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CHAPTER IX - Torts

Witkin Summary of California Law

I. INTRODUCTION

A. Nature of Torts and Tort Actions.

1. Definitions and Distinctions.

5 *Witkin Sum. Cal. Law Torts* § 1

[§ 1] Definitions and Distinctions.

A tort is "any wrong, not consisting in mere breach of contract, for which the law undertakes to give to the injured party some appropriate remedy against the wrongdoer." (*Denning v. State* (1899) 123 C. 316, 323, 55 P. 1000.) "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights." (C.C. 1708.) "Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." (C.C. 1714(a).) (See 74 *Am.Jur.2d* (2001 ed.), *Torts* §1 et seq.; on distinction between tort and crime, see 1 *Cal. Crim. Law* (3d), *Introduction to Crimes*, §4.)

Generalizations like the foregoing are obviously inadequate and of little practical value. Much of tort law "is an attempt to define what counts as a legal wrong in particular settings." (See Dobbs, *The Law of Torts* §1.) In the Restatement, tort liability is analyzed according to the "interest" involved. Certain interests arising from human relations are given legal protection: "[E]very person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations." (*Rest.2d, Torts* §1; cf. C.C. 43 [similar statement of "general personal rights"].) "Injury" is defined as the invasion of the legally protected interest; it differs from "harm," or tangible and material detriment, in that there may be injury, as by trespass on land, without any tangible harm. (*Rest.2d, Torts* §7.) The "actor" whose tort liability is in question is one who acts or fails to act, and whose conduct is in question, and is usually the defendant, but sometimes the plaintiff (as where the question is contributory negligence). (*Rest.2d, Torts* §3.)

The general language of C.C. 1714(a) has been characterized as a basic principle, and is invoked in support of many innovative decisions expanding tort liability. (See *Rowland v. Christian* (1968) 69 C.2d 108, 111, 70 C.R. 97, 443 P.2d 561, *infra*, §1086; cf. *Wilson v. Blue Cross of Southern Calif.* (1990) 222 C.A.3d 660, 666, 271 C.R. 876 [no exception should be made to fundamental principle enunciated in that provision in absence of other statute or unless clearly supported by public policy].)

West's Key Number Digest, Torts k.3

SUPPLEMENT: [This section is current through the latest supplement]

Injury: See 58 *Stanf. L. Rev.* 1251 [subcellular injury as basis for tort recovery].



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- A. Nature of Torts and Tort Actions.
- 2. Act as Tort and Breach of Contract.

5 *Witkin Sum. Cal. Law Torts* § 2

[§ 2] Act as Tort and Breach of Contract.

The distinction between tort and contract "is well grounded in common law, and divergent objectives underlie the remedies created in the two areas. Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate 'social policy'." (*Foley v. Interactive Data Corp.* (1988) 47 C.3d 654, 683, 254 C.R. 211, 765 P.2d 373, 3 Summary (10th), *Agency and Employment*, §271; *Hunter v. Up-Right* (1993) 6 C.4th 1174, 1180, 26 C.R.2d 8, 864 P.2d 88, 3 Summary (10th), *Agency and Employment*, §264.) However, the same act may be both a breach of contract and a tort. Even where there is a contractual relationship between parties, a cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed, a failure to perform the duty, or an intentional act causing injury to an interest created by the contract. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C.4th 503, 511, 28 C.R.2d 475, 869 P.2d 454, *infra*, §739.) The importance of the distinction is that, although forms of action are abolished so far as pleading is concerned, a number of substantive and procedural issues turn on the nature of the action, e.g., statute of limitations, venue, attachment, damages, and bankruptcy. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, *supra*; see *Freeman & Mills v. Belcher Oil Co.* (1995) 11 C.4th 85, 94, 44 C.R.2d 420, 900 P.2d 669, 3 Cal. Proc. (4th), *Actions*, §166 [no tort action for bad faith denial of contract]; *O'Neil v. Spillane* (1975) 45 C.A.3d 147, 158, 119 C.R. 245, 1 Summary (10th), *Contracts*, §317, citing the text [undue influence that also amounted to constructive fraud]; *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 C.A.3d 90, 100, 214 C.R. 883 [characterizing nature of action as tort in certificate of assignment accompanying complaint did not make irrevocable election to sue on tort rather than contract theory]; *Mardula v. Rancho Dominguez Bank* (1996) 43 C.A.4th 790, 798, 51 C.R.2d 63 [following *Freeman*; dismissing claim for tortious denial of contract]; 33 *San Diego L. Rev.* 137 [doctrinal classification; liability of contracting party to third person for negligent performance as distinct field of law]; 74 *Am.Jur.2d* (2001 ed.), *Torts* §19 et seq.; on recovery in tort for insurer's breach of covenant of good faith and fair dealing, see 2 Summary (10th), *Insurance*, §241.)

The classification of contract and tort actions and the election to sue in tort, contract, or quasi-contract are fully discussed in *California Procedure*. (See 3 Cal. Proc. (4th), *Actions*, §134 et seq.)

West's Key Number Digest, Torts k.1, 3, 6

SUPPLEMENT: [This section is current through the latest supplement]
Freeman & Mills case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §170.

Classification of contract and tort actions:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §139 et seq.



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3. Restatement of Torts.

5 Witkin Sum. Cal. Law Torts § 3

[§ 3] Restatement of Torts.

(1) *First and Second Restatements.* The first Torts Restatement was published from 1934 to 1939 in 4 volumes. The Torts Restatement 2d is also in 4 volumes. Volumes 1 and 2 were published in 1965, Volume 3 in 1977, and Volume 4 in 1979. (See 65 A.B.A.J. 366; 13 *Pepperdine L. Rev.* 35.)

The Torts Restatement 2d contains 14 divisions with numbered chapters, some further subdivided into topics. The Restatement rules are set forth in sections, which may be followed by comments, reporters notes, or both. The divisions are as follows:

Division One. Intentional Harms to Persons, Land and Chattels (§1 et seq.).

Division Two. Negligence (§281 et seq.).

Division Three. Strict Liability (§504 et seq.).

Division Four. Misrepresentation (§525 et seq.).

Division Five. Defamation (§558 et seq.).

Division Six. Injurious Falsehood (§623A et seq.).

Division Six-A. Privacy (§652A et seq.).

Division Seven. Unjustifiable Litigation (§653 et seq.).

Division Eight. Interference in Domestic Relations (§683 et seq.).

Division Nine. Interference With Advantageous Economic Relations (§762 et seq.).

Division Ten. Invasions of Interests in Land Other Than by Trespass (§817 et seq.).

Division Eleven. Miscellaneous Rules (§865 et seq.).

Division Twelve. Defenses Applicable to All Tort Claims (§887 et seq.).

Division Thirteen. Remedies (§901 et seq.).

(2) *Third Restatement*. In 1991, the American Law Institute determined that a Third Restatement of Torts was needed. It was decided to concentrate initially on the specific areas of tort law most immediately in need of study and to proceed by way of specific integrated projects. The new elements are in generally the same format as the earlier Restatements.

(a) The Institute approved Rest.3d, Torts: *Products Liability* in 1997, and published the official text in 1998 in a single volume. This element, which is treated in the discussion of products liability (infra, §1428 et seq.), includes these chapters:

Chapter 1. Liability of Commercial Product Sellers Based on Products Defects at Time of Sale (§1 et seq.). Topic 1 of the chapter contains the liability rules applicable to products generally. Topic 2 sets forth the liability rules applicable to special products or product markets (component parts, drugs, food products, and used products).

Chapter 2. Liability of Commercial Product Sellers Not Based on Products Defects at Time of Sale (§9 et seq.).

Chapter 3. Liability of Sellers and Apparent Manufacturers (§12 et seq.).

Chapter 4. Provisions of General Applicability (§15 et seq.). Topic 1 concerns causation, Topic 2 sets forth affirmative defenses, and Topic 3 contains definitions.

(b) The Institute approved Rest.3d, Torts: *Apportionment of Liability* in 1999, and published the official text in 2000 in a single volume. It includes these topics:

Topic 1. Basic Rules of Comparative Responsibility (§1 et seq.). (See infra, §1295 et seq.)

Topic 2. Liability of Multiple Tortfeasors for Indivisible Harm (§10 et seq.). (See infra, §44 et seq.)

Topic 3. Contribution and Indemnity (§§22, 23). (See infra, §§103 et seq., 112 et seq.)

Topic 4. Settlement (§§24, 25). (See infra, §75.)

Topic 5. Apportionment of Liability When Damages Can Be Divided by Causation (§26). (See infra, §1183.)

West's Key Number Digest, Torts k.1

SUPPLEMENT: [This section is current through the latest supplement]



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A. Nature of Torts and Tort Actions.

4. Texts, Practice Works, and Commentary.

5 Witkin Sum. Cal. Law Torts § 4

[§ 4] Texts, Practice Works, and Commentary.

National texts include:

(1) Dobbs, *The Law of Torts*, which is the successor publication to five earlier editions of Prosser on Torts and Prosser & Keeton on Torts.

(2) Harper, James & Gray, *The Law of Torts*, for which a third edition is currently being prepared.

(3) Speiser, Krause & Gans, *The American Law of Torts*.

Texts relating to particular areas of tort law, California tort law, or both include: *American Law of Products Liability* 3d; *Cal. Civil Practice*, Torts module; C.E.B., *Basic Personal Injury Anatomy*; C.E.B., *California Automobile Insurance Law Guide*; C.E.B., *California Government Tort Liability Practice* 4th; C.E.B., *California Personal Injury Proof*; C.E.B., *California Tort Damages* 2d; C.E.B., *California Tort Guide* 3d; C.E.B., *Real Property Remedies and Damages* 2d; Levy, Golden & Sachs, *California Torts*; Rutter, *California Practice Guide: California Personal Injury*; and Thomas, Kelegian & Gutierrez, *California Premises Liability: Law and Practice*.

A list of references to practice works and form books on negligence, classified under headings descriptive of the subject matter, is set forth in 4 *Cal. Proc.* (4th), *Pleading*, §539. A similar list relating to personal injury law appears in 1 *Cal. Proc.* (4th), *Attorneys*, §23.

Commentary on tort law is extensive. The following are illustrative: 102 *Harv. L. Rev.* 1037 [review of Landes & Posner, *The Economic Structure of Tort Law*, and Shavell, *Economic Analysis of Accident Law*]; 106 *Harv. L. Rev.* 1658 [review of Coleman, *Risks and Wrongs*]; 109 *Harv. L. Rev.* 715 [Property Rules Versus Liability Rules: An Economic Analysis]; 18 *J. Juvenile Law* 99 [rights of unborn children under tort law]; 19 *Pacific L. J.* 271 [Justice and the Optimal Deterrence of Accidents]; 27 *Pacific L. J.* 37 [Abuse of Rights: A Persuasive Legal Concept]; 42 *Stanf. L. Rev.* 541 [review of Huber, *Liability: The Legal Revolution and Its Consequences*]; 37 *U.C.L.A. L. Rev.* 439 [Corrective Justice and Liability for Increasing Risks]; 37 *U.C.L.A. L. Rev.* 785 [A Critique of Torts]; 38 *U.C.L.A. L. Rev.* 113 [Corrective Justice and Liability for Risk-Creation: A Comment]; 38 *U.C.L.A. L. Rev.* 143 [Corrective Justice, Liability for Risks, and Tort Law]; 42 *U.C.L.A. L. Rev.* 377 [Reality in the Economic Analysis of Tort Law: Does Tort Law

Really Deter?]; 43 *U.C.L.A. L. Rev.* 711 [The "Bundle of Rights" Picture of Property]; 50 *U.C.L.A. L. Rev.* 585 [rethinking tort doctrine]; 50 *U.C.L.A. L. Rev.* 621 [mixed theory of corrective justice and deterrence as basis of tort law].

SUPPLEMENT: [This section is current through the latest supplement]

National texts: Harper, James & Gray, *The Law of Torts* has been retitled Harper, James & Gray on Torts. The third edition is now completed.

References to works on negligence: *Cross-Reference:* 4 *Cal. Proc.* (5th), *Pleading*, §578.

References to works on personal injury law:

Cross-Reference: The discussion of practice works in 1 *Cal. Proc.* (4th), *Attorneys*, §23 was deleted in the 5th edition.

Commentary on tort law: See 58 *Hastings L.J.* 87 [The Problem of Social Cost in a Genetically Modified Age]; 38 *Loyola L.A. L. Rev.* 1121 [Is the "Crisis" in the Civil Justice System Real or Imagined?].



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A. Nature of Torts and Tort Actions.

5. Classification of Torts.

5 Witkin Sum. Cal. Law Torts § 5

[§ 5] Classification of Torts.

The California Code of Civil Procedure classifies injuries as (a) to the person and (b) to property. (*C.C.P.* 27, 28, 29.) For venue purposes, these classifications are significant in determining whether an action is local or transitory. (See *C.C.P.* 395; *Monk v. Ehret* (1923) 192 C. 186, 192, 219 P. 452; *Lucas v. Lucas Ranching Co.* (1937) 18 C.A.2d 453, 455, 64 P.2d 160; 3 *Cal. Proc.* (4th), *Actions*, §710 et seq.)

The Restatement 2d classification is with respect to the conduct of the party committing the tort. Under this analysis, liability is imposed for (a) intentional acts (see *infra*, §381 et seq.); (b) negligent acts (see *infra*, §831 et seq.); and (c) ultrahazardous or abnormally dangerous activities resulting in liability without fault (see *infra*, §1414 et seq.).

West's Key Number Digest, Torts k.1

SUPPLEMENT: [This section is current through the latest supplement]
Classification for venue:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §787 et seq.



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6. Legal Duty Toward Person Harmed.
a. General Principle.

5 *Witkin Sum. Cal. Law Torts* § 6

[§ 6] General Principle.

A tort, whether intentional or negligent, involves a violation of a *legal duty*, imposed by statute, contract, or otherwise, owed by the defendant to the person injured. Without such a duty, any injury is "damnum absque injuria"--injury without wrong. (*Biakanja v. Irving* (1958) 49 C.2d 647, 650, 320 P.2d 16, *infra*, §1179; *Johnson v. California* (1968) 69 C.2d 782, 785, 73 C.R. 240, 447 P.2d 352, *infra*, §352; *Coleman v. California Yearly Meeting of Friends Church* (1938) 27 C.A.2d 579, 582, 81 P.2d 469; *Gill v. Mission Savings & Loan Assn.* (1965) 236 C.A.2d 753, 755, 46 C.R. 456, *infra*, §1180; *Galanis v. Mercury Int. Ins. Underwriters* (1967) 247 C.A.2d 690, 695, 55 C.R. 890, *infra*, §865; *Matthias v. United Pac. Ins. Co.* (1968) 260 C.A.2d 752, 753, 67 C.R. 511, *infra*, §865; *Wynne v. Orcutt Union School Dist.* (1971) 17 C.A.3d 1108, 1110, 95 C.R. 458, *infra*, §7; *Peter W. v. San Francisco Unified School Dist.* (1976) 60 C.A.3d 814, 820, 131 C.R. 854, *infra*, §8; *San Luis Obispo v. Abalone Alliance* (1986) 178 C.A.3d 848, 865, 223 C.R. 846, citing the text; *Roman Catholic Bishop of San Diego v. Superior Court* (1996) 42 C.A.4th 1556, 1564, 50 C.R.2d 399, citing the text; *McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 C.A.4th 1011, 1016, 67 C.R.2d 516, quoting the text; see *Daniels v. McPhail* (1949) 93 C.A.2d 479, 482, 209 P.2d 19, *infra*, §1426 [maxim that "one must so use his own rights as not to infringe upon the rights of another" does not create right or interest]; *Shelton v. Westminster* (1982) 138 C.A.3d 610, 618, 188 C.R. 205, *infra*, §247; *Wilson v. Safeway Stores* (1997) 52 C.A.4th 267, 273, 60 C.R.2d 532, citing the text [tort may be imposed by statute as well as by common law; violation of FEHA is "tort"]; *Dobbs*, *The Law of Torts* §225 et seq.; 3, 4 Harper, James & Gray 2d §§18.1 et seq., 20.4 et seq.; 74 *Am.Jur.2d* (2001 ed.), *Torts* §6 et seq.)

The concept of duty is considered most frequently in the context of negligence. (Rest.2d, *Torts*, Comment b; on duty of due care, see *infra*, §867 et seq.)

It has been said that the duty concept is "a shorthand expression of a conclusion, rather than an aid to analysis in itself," constituting the result of all the policy considerations leading the law to say that a particular plaintiff is entitled to protection. (*Dillon v. Legg* (1968) 68 C.2d 728, 734, 69 C.R. 72, 441 P.2d 912, *infra*, §1008; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 C.4th 1, 8, 74 C.R.2d 248, 954 P.2d 511, citing the text.)

West's Key Number Digest, *Torts* k.3, 6

SUPPLEMENT: [This section is current through the latest supplement]
See 3, 4 Harper, James & Gray 3d §§18.1 et seq., 20.4 et seq.



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b. Illustrations of No Duty.
1. In General.

5 *Witkin Sum. Cal. Law Torts* § 7

[§ 7] In General.

The following cases illustrate circumstances in which no duty has been found to be owed by the defendant to the injured party:

Routh v. Quinn (1942) 20 C.2d 488, 491, 127 P.2d 1 [tax assessor not liable to purchaser at void tax sale for negligent computation of amount of tax; duty owed only to governmental entity].

Ahlborn v. Peters (1940) 37 C.A.2d 698, 707, 100 P.2d 542 [defendants not liable for failure to deliver will found by them after testator's death].

Roach v. Hostetter (1941) 48 C.A.2d 375, 379, 119 P.2d 749 [vendor of lots not liable to purchaser for subsequently requesting and obtaining from city a change in zoning ordinance covering tract].

Neuber v. Royal Realty Co. (1948) 86 C.A.2d 596, 611, 195 P.2d 501, 12 Summary (10th), *Real Property*, §649 [no duty owed by lessor to lessee's employee, where dangerous condition of premises was due solely to lessee's activities].

Luis v. Orcutt Town Water Co. (1962) 204 C.A.2d 433, 438, 22 C.R. 389, 1 Summary (10th), *Contracts*, §692 [no tort liability for failure to supply water to fight fires].

Duff v. Harrah South Shore Corp. (1975) 52 C.A.3d 803, 806, 125 C.R. 259 [alleged contractual duty of gambling casino to refrain from cashing gambler's checks in excess of specified limit held no basis for wrongful death action by widow when gambler cashed checks he could not cover and committed suicide].

Kinner v. World Savings & Loan Assn. (1976) 57 C.A.3d 724, 729, 129 C.R. 400 [no duty of construction lender to contractor-borrower to lend amount sufficient for contractor to complete construction project or not to lend at all].

Austero v. National Cas. Co. (1976) 62 C.A.3d 511, 516, 133 C.R. 107, 2 Summary (10th), *Insurance*, §309 [insurer's liability for bad faith failure to pay benefits under disability policy is to insured, not to wife of insured, who is not party to contract].

Zalta v. Billips (1978) 81 C.A.3d 183, 189, 144 C.R. 888, 1 Cal. Proc. (4th), Attorneys, §321 [no duty of attorney to present client in favorable public light].

In *Wynne v. Orcutt Union School Dist.* (1971) 17 C.A.3d 1108, 95 C.R. 458, plaintiffs alleged that their 10-year-old son was suffering from a progressively disabling fatal disease, that they informed his teacher and principal of it in confidence, and that the teacher, in breach of confidence, told the child, who then asked his parents about it. They alleged shock and sought \$ 200,000 damages. *Held*, judgment on the pleadings for defendant affirmed; there is no duty on the part of a person informed of sad facts not to disclose them to another. (17 C.A.3d 1110.)

SUPPLEMENT: [This section is current through the latest supplement]

Zalta case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §296.



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b. Illustrations of No Duty.

2. Schools.

5 *Witkin Sum. Cal. Law Torts* § 8

[§ 8] Schools.

In *Peter W. v. San Francisco Unified School Dist.* (1976) 60 C.A.3d 814, 131 C.R. 854, plaintiff alleged in substance that he had recently graduated from a high school of defendant district; that the district and the individual defendants (superintendent of schools, board, and board members) negligently failed to provide him with adequate instruction and supervision and misrepresented that he was performing at grade level in basic academic skills; and that as a result he suffered a loss of earning capacity because of his limited ability to read and write. *Held*, judgment for defendants on demurrer affirmed.

(a) The California Supreme Court, in cases opening new areas of tort liability, "has noted that the wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework." But this is not true of the educational malfeasance alleged here. "Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might--and commonly does--have his own emphatic views on the subject. The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified." (60 C.A.3d 824.)

(b) Other practical considerations preclude imposition of liability on agencies administering the public educational process. "To hold them to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. ... The ultimate consequences, in terms of public time and money, would burden them--and society--beyond calculation." (60 C.A.3d 825.) (See 8 *Golden Gate L. Rev.* 293 [Educational Malpractice and the Functionally Illiterate Student]; 8 *Golden Gate L. Rev.* 814 [*Peter W.*]; 10 *Pacific L.J.* 947 [same]; 18 *San Diego L. Rev.* 743 [Educational Malpractice: A Cause of Action in Search of a Theory]; 44 *U.C.L.A. L. Rev.* 865 [educational hindrance claims by university student-athletes]; 1 *A.L.R.4th* 1139 [Tort Liability of Public Schools and Institutions of Higher Learning for

Educational Malpractice]; 33 *A.L.R.4th* 1166 [Tort Liability of Public School or Government Agency for Misclassification or Wrongful Placement of Student in Special Education Program].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Wells v. One2One Learning Foundation* (2006) 39 *C.4th* 1164, 1210, 48 *C.R.3d* 108, 141 *P.3d* 225 [cause of action against charter schools under False Claims Act (see text, §767) was not barred claim for "educational malfeasance" to extent it asserted, not simply that defendants provided substandard education, but that they submitted false claims for school funds while failing to deliver promised services, materials, and supplies].



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 - b. Illustrations of No Duty.
 - 3. Social Service Agencies.

5 Witkin Sum. Cal. Law Torts § 9

[§ 9] Social Service Agencies.

In *Smith v. Alameda County Social Services Agency* (1979) 90 C.A.3d 929, 153 C.R. 712, plaintiff, 17, alleged that he had been relinquished at birth to defendant agency for adoption; that the agency placed him in a series of foster homes, but did not attempt to find a proper preadoptive home; that he was never adopted; and that, as a result, he was deprived of the advantages of homelike family environment and parental care, and suffered damage, consisting of emotional distress and interference with his psychological development. Thus, the theory of the pleading was that a county agency entrusted with the responsibility for finding an adoptive home for a child may be liable to the child for negligent failure to carry out that responsibility. *Held*, no cause of action was stated.

(a) Following the approach of *Peter W. v. San Francisco Unified School Dist.* (1976) 60 C.A.3d 814, 131 C.R. 854, *supra*, §8, "the duty sought to be imposed here does not present us with a reasonably clear or manageable standard for assessing the wrongfulness of the agency's conduct." (90 C.A.3d 936.) Placement decisions are partially subjective; the chances of adoption of children placed in foster families are low; and whether an agency could or should have acted differently calls for speculation. (90 C.A.3d 937.)

(b) The proposed liability would be likely to impede the proper functioning of adoption agencies. It is doubtful whether insurance could be obtained, and the parties involved in the placement process would not be helped by attempted reconstruction of the events and judicial inquiry into the decisions made. (90 C.A.3d 938.) The proper approach is that of decisions approving judicial review of adoption agency decisions to protect against arbitrary action (see 10 Summary (10th), *Parent and Child*, §§116, 117); a damage action is a "particularly poor" method of achieving greater institutional accountability and recognition of individual needs. (90 C.A.3d 939.)

The court also held that a separate cause of action for negligently placing plaintiff in classes for the mentally retarded was not maintainable, under the reasoning of *Peter W.* (90 C.A.3d 941.) (See *Richard P. v. Vista Del Mar Child Care Service* (1980) 106 C.A.3d 860, 863, 165 C.R. 370 [action against adoption agency for alleged failure to warn that infant's premature birth might lead to health problems; *held*, following *Smith*, public policy compels rejection of this theory of liability, which would in effect make adoption agency guarantor of infant's future health]; *Keech v. Berkeley Unified School Dist.* (1984) 162 C.A.3d 464, 468, 210 C.R. 7 [following *Peter W.* and *Smith*].)

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b. Illustrations of No Duty.

4. Public Utilities.

5 *Witkin Sum. Cal. Law Torts* § 10

[§ 10] *Public Utilities.*

In *Niehaus Bros. Co. v. Contra Costa Water Co.* (1911) 159 C. 305, 113 P. 375, it was held that a public water company under its contract to furnish water at ordinance rates for general purposes does not assume an obligation to extinguish a fire. This obligation may exist only where the company by express contract assumes the additional obligation of furnishing water in sufficient quantity to protect specific property from fire. (159 C. 309.)

In *Lowenschuss v. Southern Calif. Gas Co.* (1992) 11 C.A.4th 496, 14 C.R.2d 59, the issue and holding were stated as follows: "The gas company, a public utility, knows that a rapidly spreading fire is approaching a neighborhood. Does it have a duty to purge gas from its pipes and house meters which may be in the path of the fire? No." (11 C.A.4th 497.)

(a) The rule and reasoning of *Niehaus* are dispositive here. (11 C.A.4th 499, 500.)

(b) If plaintiffs were correct, the public gas company would assume liability practically as an insurer of millions of dollars worth of property upon which an insurance company would not think of assuming the risk. (11 C.A.4th 500.)

(c) A different case is presented when a utility company has been notified of a specific defect or damage involving one of its lines; it must then take proper precautions. (11 C.A.4th 500.)

In *White v. Southern Calif. Edison Co.* (1994) 25 C.A.4th 442, 30 C.R.2d 431, plaintiff was injured in an automobile accident and sued a public utility on the theory that its failure to maintain a streetlight in operable condition caused the accident. The trial judge granted summary judgment for defendant. *Held*, affirmed.

(a) "[L]iability may not be imposed on a public utility in these circumstances where (1) the installation of the streetlight is not necessary to obviate a dangerous condition, i.e., there is a duty to install the streetlight and a concomitant duty to maintain it; (2) the failure to maintain an installed streetlight does not create a risk greater than the risk created by the total absence of a streetlight; and (3) the injured party has not in some manner relied on the operation of the streetlight foregoing other protective actions, e.g., a pedestrian chooses a particular route home in reliance on the available streetlighting when the pedestrian would have chosen a different route or a different means of transportation in

the absence of lighting." (25 C.A.4th 451.)

(b) A municipality generally has no duty to light its streets, its failure to light them is not actionable negligence, and a public utility cannot be charged with a greater liability than the municipality itself. (25 C.A.4th 452.)

(c) *Pub.Util.C. 2106* (imposing liability on public utilities for damages caused by acts or omissions in violation of Constitution, statute, or Public Utilities Commission order) and *Sts. & H.C. 27, 941, 1806* (requiring public entities to maintain highways in a safe condition) do not create a statutory scheme imposing liability on public utilities to third parties for failure to maintain streetlights. (25 C.A.4th 452, 453.)

SUPPLEMENT: [This section is current through the latest supplement]



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aa. Violation as Giving Rise to Tort Liability.

5 Witkin Sum. Cal. Law Torts § 11

[§ 11] Violation as Giving Rise to Tort Liability.

When a legislative provision, embodying a public policy, is enacted for the protection of a particular class of persons, its violation may give rise to civil liability to an injured plaintiff who is a member of the class. (*Hudson v. Craft* (1949) 33 C.2d 654, 660, 204 P.2d 1, *infra*, §387; *Haft v. Lone Palm Hotel* (1970) 3 C.3d 756, 763, 91 C.R. 745, 478 P.2d 465, *infra*, §1195; *Wetherton v. Growers Farm Labor Assn.* (1969) 275 C.A.2d 168, 174, 79 C.R. 543; *Michael R. v. Jeffrey B.* (1984) 158 C.A.3d 1059, 1067, 205 C.R. 312, *infra*, §14; Dobbs, *The Law of Torts* §133; 3 Harper, James & Gray 2d §§17.5, 17.6.) The provision violated is ordinarily criminal, but may be civil in nature. (See *Montalvo v. Zamora* (1970) 7 C.A.3d 69, 73, 86 C.R. 401, 3 *Summary* (10th), *Agency and Employment*, §347 [agricultural workers stated cause of action for damages or injunction by alleging that employer violated their statutory right to negotiate in discharging them after they had chosen attorney representative to negotiate over minimum wage claims].)

Statutes that give protection only indirectly do not necessarily support an action for damages. (*California v. Sierra Club* (1981) 451 U.S. 287, 101 S.Ct. 1775, 1780, 68 L.Ed.2d 101, 107, *infra*, §15; see *Swickheimer v. King* (1971) 22 C.A.3d 220, 225, 99 C.R. 176 [B. & P.C. 7109, providing for discipline of contractors who depart from plans, is concerned only with licensing board; violation does not create tort right of action against contractor]; *Larez v. Oberti* (1972) 23 C.A.3d 217, 225, 100 C.R. 57 [no civil action is implied from violation of *Lab.C. 2805*, making it crime to employ illegal alien where employment would have adverse effect on resident workers; prospect of plaintiffs being employed by defendants was too remote to justify action for interference with alleged relationship].)

Situations in which a statute is alleged to create a new private cause of action must be distinguished from those in which a statute is merely employed to establish the elements of a common law cause of action, as where the breach of a statute is presumed to be a breach of the standard of due care in a negligence action. The courts in analyzing claims sometimes fail to distinguish between the two. (*Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 C.A.4th 121, 125, 62 C.R.2d 620, *infra*, §13; on statutory violation as negligence per se, see *infra*, §818 et seq.)

West's Key Number Digest, Torts k.3

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See *Animal Legal Defense Fund v. Mendes* (2008) 160 C.A.4th 136, 141, 72 C.R.3d 553, citing the text [statute requiring person who keeps confined animal to provide adequate exercise area (P.C. 597t; see 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §266) does not impliedly establish private cause of action in entities with commitment to carry out laws protecting animals]; 3 Harper, James & Gray 3d §§17.5, 17.6.



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bb. Restatement Rule.

5 Witkin Sum. Cal. Law Torts § 12

[§ 12] Restatement Rule.

Rest.2d, Torts §874A recognizes that tort liability may arise from violation of a legislative provision and describes the character of the resulting tort: "When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action."

The Comments explain the nature and scope of this principle:

(1) The term "legislative provision" includes statutes, ordinances, legislative regulations of administrative agencies, and constitutional provisions. (Comment a.)

(2) The "typical case" falling within the principle is one involving a criminal statute that proscribes certain conduct and imposes a criminal penalty but says nothing about civil responsibility. "In a case of this nature, it is obvious that the legislative body must have (1) intended that civil liability be imposed, (2) intended that there be no civil liability, or (3) not contemplated the issue at all and therefore have had no specific intent regarding it. If the court determines that the legislative body did actually intend for civil liability to be imposed or not imposed, whether the intent is express or implicit, then the court should treat the situation as if it had expressly so provided." (Comment c.)

(3) If the court concludes that the legislative body did actually have the intent either to establish a civil remedy or to limit the relief to that expressly provided in the legislative provision, the issue is settled. On the other hand, if the court does not reach either conclusion, but "recognizes instead that that body had no specific intent in fact on the issue, ... [i]t must decide this question on its own." While courts often speak of legislative intent in this situation, the expression is used in a figurative, rather than a literal, sense. "Intent" here is sometimes thought of as referring to how the legislative body would have dealt with the concrete situation if it had had the situation before it in the way in which it is now before the court. Perhaps more frequently, the figurative search for legislative intent "involves looking for the policy

behind the legislative provision, attempting to perceive the purpose for which it was enacted, and then, having ascertained that policy or purpose, determining the most appropriate way to carry it out and identifying the remedy needed to accomplish that result." (Comment d; on alternative approach declining to find civil remedy where Legislature fails to consider issue, see *infra*, §13.)

(4) If the court determines that it is appropriate to provide a civil action, that action will normally sound in tort, and will ordinarily be assimilated to the most similar common law tort. If there is no common law tort sufficiently analogous, a new tort may be created for the purpose. (Comment f.)

(5) The factors that the court may consider are the nature of the legislative provision, the adequacy of existing remedies, the extent to which the tort action will aid or supplement or interfere with existing remedies, the significance of the purpose that the legislative body is seeking to effectuate, the extent of the change in tort law, and the burden that the new cause of action will place on the judicial machinery. (Comment h, analyzing each factor.)

(6) "Whether the tort action provided by the court in furtherance of the policy of a legislative provision is to be treated as an intentional tort, as negligence or as a form of strict liability, or perhaps as involving all three (as in some existing torts such as misrepresentation), depends primarily upon construction of the statute itself. It also depends upon the nature of the established tort to which it is found to be most closely analogous and which is therefore expanded to cover it." (Comment j.)

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cc. Legislative Intent Approach.

5 *Witkin Sum. Cal. Law Torts* § 13

[§ 13] Legislative Intent Approach.

Crusader Ins. Co. v. Scottsdale Ins. Co. (1997) 54 C.A.4th 121, 62 C.R.2d 620, involved the proper approach for determining whether a private cause of action exists for the breach of a regulatory statute. The statute in question was *Ins.C. 1763*, which provides that a surplus line broker must conduct a diligent search for an admitted insurer before assigning a particular insurance risk to a nonadmitted insurer. Plaintiff, an admitted insurer, alleged that defendant brokers violated the statute by failing to make a diligent search before assigning a risk to a nonadmitted insurer. *Held*, judgment on demurrer for defendants affirmed.

(a) A first step in analysis is to distinguish those situations in which a statute is alleged to create a new private cause of action from those in which a statute is merely employed to establish the elements of a common law cause of action, as where the breach of a statute is presumed to be a breach of the standard of due care in a negligence action. Much confusion results when courts fail to distinguish these two questions. In determining whether a statute creates a private cause of action, the distinction is necessary. This issue is squarely raised in the present case, because there is no common law violation; the only wrongful act is the alleged breach of the statute. (54 C.A.4th 125.)

(b) In determining whether a statute creates a private cause of action, there are basically four situations: (1) the statute expressly created a private cause of action; (2) the Legislature actually intended for there to be civil liability, even though there was no express provision to that effect; (3) the Legislature affirmatively intended that there be no civil liability; and (4) the Legislature did not contemplate the issue, and thus had no intent one way or the other. The two approaches adopted by the decisions, the "legislative intent approach" and the "Restatement approach," are similar for the first three of these situations; both approaches attempt to ascertain the legislative intent. However, the two approaches differ with respect to analyzing the fourth situation. Under the legislative intent approach, there could be no intent to create a private cause of action in a situation where the Legislature did not even consider the question. Under the Restatement approach, the courts could create a remedy if, after an analysis of the factors listed in *Rest.2d, Torts* §874A (supra, §12), they concluded that the remedy of a private cause of action is appropriate. (54 C.A.4th 126.)

(c) Plaintiff relies on *Middlesex Ins. Co. v. Mann* (1981) 124 C.A.3d 558, 177 C.R. 495, and other cases as authority

for the Restatement approach. However, these cases are weakened by the fact that common law causes of action based on the same facts were alleged and by the fact that, under *Ev.C.* 669 (see *infra*, §873), a party who violates a statute is deemed to have failed to use due care. (54 C.A.4th 130.) Aligned against this somewhat questionable authority for adopting the Restatement approach is the leading California Supreme Court decision applying the legislative intent approach. In that case, *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 C.3d 287, 250 C.R. 116, 758 P.2d 58, 2 Summary (10th), *Insurance*, §254, the court placed the case in the fourth category and concluded that there could have been no intent to create civil liability where the question was never reached. Neither the majority nor dissenting opinion in that case or of the one that it overruled once mentioned the Restatement. Thus, although opposite results were reached, neither case indicated that any analysis other than a search for the legislative intent was proper. (54 C.A.4th 131.)

(d) The general rule of *C.C.P.* 1858, that the function of a judge is simply to ascertain what the Legislature intended, not to insert what might have been omitted, is in accord with the legislative intent approach. Moreover, although a conclusion that no private right of action was created might involve a consideration of many of the factors listed in *Rest.2d, Torts* §874A, resolution of the question involves a difficult weighing of competing policies that is best left to the *Legislature*. (54 C.A.4th 134.)

(e) An approach that declines to adopt a private right to sue except when the Legislature so intended does not abrogate common law remedies. Indeed, in both *Moradi-Shalal* and in this case, the *insured* could still pursue common law remedies if harmed either by the unlawful practices of the insurer or by the failure of the broker to conduct a proper investigation before placing surplus line insurance. (54 C.A.4th 134.)

(f) The legislative intent approach adopted in *Moradi-Shalal* is controlling in the present case even though that case did not involve the identical statute involved here. Applying this approach shows that the Legislature, in enacting *Ins.C.* 1763, was concerned about unstable and underfunded nonadmitted insurers (a condition that might prove to be harmful to California insureds), and that to deal with this problem, the Legislature chose the option of increasing regulatory procedures and creating a surplus line advisory organization, even though at least one witness argued for a private right of action. Thus, instead of showing an intent to create civil liability, the legislative history of the relevant statute indicates that the Legislature considered, but rejected, such a proposal. (54 C.A.4th 135.)

(g) Plaintiff contends that the Department of Insurance was not adequately performing its task of regulating surplus line brokers before they allocated insurance risks to nonadmitted insurers. However, instead of seeking a writ of mandamus directing the department to perform this duty, it sought *court-created* regulation of brokers and nonadmitted insurers through damage awards, injunctions, and restitution orders. The question of what type or level of regulation is adequate or appropriate involves the consideration of many policy factors, and is best left to the Legislature. Thus, plaintiff's complaint should have been directed either to the *Department of Insurance* or to the *Legislature*. (54 C.A.4th 137.)

SUPPLEMENT: [This section is current through the latest supplement]



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5 *Witkin Sum. Cal. Law Torts* § 14

[§ 14] State Statute.

(1) *Cause of Action Recognized*. In some cases, a civil cause of action has been held to arise from violation of a state statute. (See, e.g., *Wetherton v. Growers Farm Labor Assn.* (1969) 275 C.A.2d 168, 174, 79 C.R. 543 [Lab.C. 923, relating to policy to uphold freedom of employees to enter into collective bargaining contracts, enunciates public policy, and employees who are discharged from employment for union activity can obtain damages and injunctive relief for violation of their rights under statute]; *Angie M. v. Superior Court* (1995) 37 C.A.4th 1217, 1224, 44 C.R.2d 197, citing the text [minor had cause of action against physician for unlawful seduction and childhood sexual abuse, based on alleged violations of P.C. 261.5 (unlawful intercourse with minor) and P.C. 288a(b)(1) (oral copulation with minor), because minor was clearly member of class meant to be protected].)

Michael R. v. Jeffrey B. (1984) 158 C.A.3d 1059, 205 C.R. 312, arose out of an assault following a school banquet. The complaint alleged in substance that defendant B prompted defendant J to shoot a marble at plaintiff with a slingshot, and that plaintiff was blinded in one eye. The trial judge granted summary judgment for defendant B on the ground that there is no tort of "negligent encouragement," i.e., that B owed no duty to control the conduct of J. *Held*, reversed.

(a) B admitted making the statement, "Hey shoot him; go for it." This satisfied the conditions of the crime of solicitation under P.C. 653f (see 1 *Cal. Crim. Law* (3d), *Elements*, §31). (158 C.A.3d 1065.)

(b) Defendant contended that P.C. 653f was not intended to apply to "vocal bystanders," or to create tort liability. However, "an injury resulting from commission of an assault with a deadly weapon is the type of injury a statute prohibiting solicitation to commit assault with a deadly weapon was designed to prevent. Someone who encourages another to shoot a person is not a 'verbal bystander.'" (158 C.A.3d 1066.)

(c) "Violation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute itself. Any injured member of the public for whose benefit the statute was enacted may bring the action." (158 C.A.3d 1067.) "Although a statute that provides solely for a criminal penalty does not *create* a civil

liability, the significance of the statute in a civil suit for negligence involves its formulation of a standard of conduct that the court then adopts in the determination of such liability." (158 C.A.3d 1067, citing *Clinkscales v. Carver* (1943) 22 C.2d 72, 136 P.2d 777, *infra*, §875.)

(d) The seven factors set forth by the Supreme Court in *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *infra*, §1179, to be considered in determining whether a duty is owed to third persons are present here: "The harm in the instant case was clearly foreseeable; [J] had been shooting at automobiles previously. The certainty of appellant's injury was undisputed. There was a proximate connection between the verbal encouragement and the shooting. Encouragement or solicitation of an assault with a deadly or dangerous instrument was clearly wrong. Imposing a duty would promote a policy of preventing future harm; it would not impose liability which did not previously exist for mere bystanders. The burden on [B] to abstain from encouraging or soliciting a crime was minimal." (158 C.A.3d 1070.)

An implied tort remedy was also found in *Ribas v. Clark* (1985) 38 C.3d 355, 212 C.R. 143, 696 P.2d 637. The marriage of plaintiff and his wife was dissolved in a proceeding in which the wife was not represented by counsel. After entry of judgment, the wife consulted an attorney, and was informed that the court-approved property settlement had adverse implications. She advised plaintiff of this, plaintiff immediately telephoned the attorney, "and a heated exchange ensued." The wife then visited the place of business of defendant, obtained permission to use defendant's phone to call plaintiff, and asked her to listen on an extension telephone, which she did. The wife then filed an action to set aside the dissolution for fraud, and during an arbitration hearing, defendant testified that in the phone conversation, plaintiff conceded that he had prevented his wife from obtaining counsel during the dissolution proceeding. Although the arbitrator ruled in favor of plaintiff, plaintiff filed the present action against defendant for damages for violation of the Invasion of Privacy Act (P.C. 630 et seq.). *Held*, judgment for defendant on demurrer reversed. Defendant's act of monitoring plaintiff's conversation with his wife constituted a breach of the wiretapping provisions of the Act (P.C. 631), vesting in plaintiff a civil cause of action for damages. Affording a civil remedy here fosters the broad Legislative intent, stated in P.C. 630, "to protect the right of privacy of the people of this state" from what it perceived as "a serious threat to the free exercise of personal liberties." (38 C.3d 359.) P.C. 631 was aimed at one aspect of the privacy problem--the secret monitoring of conversations by third parties. Defendant contends that the Act should not be construed to prohibit eavesdropping by means of an extension telephone; i.e., that it prohibits only monitoring of communications "in transit." But this ignores the language of P.C. 631(a), covering a communication "in transit" or "being sent from, or received" at a place within the state. Defendant also argues that P.C. 631 proscribes nothing more than wiretaps. However, this construction is inconsistent with the broad wording and purpose of the statute, and would render superfluous the language proscribing attempts to learn the content of a communication "in any unauthorized manner." (38 C.3d 360.) (See 33 A.L.R.4th 506 [statutory authorization of civil action for interception of communication].)

(2) *No Cause of Action Recognized*. In some instances, the allegation of an implied tort remedy has failed. (See *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 C.3d 287, 304, 250 C.R. 116, 758 P.2d 58, 2 *Summary* (10th), *Insurance*, §254; *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 C.A.4th 121, 125, 62 C.R.2d 620, *supra*, §13.) Such was the case in *Agricultural Ins. Co. v. Superior Court* (1999) 70 C.A.4th 385, 82 C.R.2d 594, where an insurer cross-complained against the insureds on the theory of "reverse" bad faith. The ordinary action for bad faith (tortious breach of covenant of good faith and fair dealing) involves bad faith by the insurer. (See 2 *Summary* (10th), *Insurance*, §239 et seq.) The insurer contended that it must be permitted to sue on the reverse bad faith theory because P.C. 550(a)(1) makes it a criminal offense to present a fraudulent claim for the payment of a loss under an insurance contract. *Held*, the contention failed.

(a) "There is no indication that the Legislature, in enacting *Penal Code section 550*, intended to expose all insureds to suits for 'reverse bad faith' whenever they make an insurance claim. The motivations of a public prosecutor deciding whether and how to enforce a penal statute will expectably be significantly different from the motivations of a private litigant reacting to an insurance claim. One is vindicating public policy and the rule of law, the other is primarily concerned with its own private economic interests. There is no indication that the Legislature equated these two quite different situations. There is no language creating a private right of action in *Penal Code section 550*, thus any

legislative intent to create such a private right would have to be implicit at most. Yet nothing has been cited or suggested indicating such a silent legislative intent, nor why, if the Legislature did so intend, they did not simply say so." (70 C.A.4th 399.)

(b) In P.C. 550(a)(1), the Legislature attempted to criminalize fraud; it did not attempt to criminalize bad faith, and probably could not have done so constitutionally. The nebulous concept of reverse bad faith is not conterminous with the better defined concept of fraud. (70 C.A.4th 400.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Cause of Action Recognized*. See *Ramona Unified School Dist. v. Tsiknas* (2005) 135 C.A.4th 510, 522, 37 C.R.3d 381 [civil tort action may be based on violation of criminal barratry statutes (P.C. 158, 159; 2 Cal. Crim. Law (3d), *Crimes Against Governmental Authority*, §3); however, claim was unavailable where only single lawsuit was alleged, because statutes require that defendant have excited at least three groundless lawsuits]. (2) *No Cause of Action Recognized*. See *Shamsian v. Department of Conservation* (2006) 136 C.A.4th 621, 638, 39 C.R.3d 62 [private cause of action did not arise under Beverage Container Recycling and Litter Reduction Act against beverage manufacturers, Department of Conservation, and state officials for failure to provide recycling opportunities; provision imposing joint responsibility on manufacturers, distributors, dealers, recyclers, processors, and department to provide these opportunities was mere statement of legislative intent and imposed no obligation to act].



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5 *Witkin Sum. Cal. Law Torts* § 15

[§ 15] Federal Statute.

(1) *Cause of Action Recognized*. A federal statute may be the basis for an implied right of action for damages resulting from its violation. (See *Cannon v. University of Chicago* (1979) 441 U.S. 677, 99 S.Ct. 1946, 1953, 60 L.Ed.2d 560, 569 [sex discrimination in federally assisted education program under Education Amendments of 1972]; *Merrill Lynch v. Curran* (1982) 456 U.S. 353, 102 S.Ct. 1825, 1841, 72 L.Ed.2d 182, 203 [violation of Commodity Exchange Act]; 3 Harper, James & Gray 2d §17.6; 96 Harv. L. Rev. 236 [*Merrill Lynch*]; 33 *Hastings L. J.* 1294 [whether private cause of action can be implied under Rehabilitation Act of 1973]; 34 *Hastings L. J.* 969 [Implying Rights of Action for Minorities and the Poor Through Presumptions of Legislative Intent].)

In *Merrill Lynch v. Curran*, *supra*, the court said: "In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress' perception of the law that it was shaping or reshaping. When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute. When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy." (102 S.Ct. 1839, 72 L.Ed.2d 201.)

The Restatement points out that "the power to authorize damages or injunctive relief as a remedy for the vindication of a federal constitutional or statutory right is not exclusively in the hands of Congress, but exists inherently in the courts." However, "[t]here is a problem of broadening the jurisdiction of the federal courts if the court-supplied remedy of a civil action for damages is treated as arising out of a federal statute. For this reason the federal courts should give particular attention to the question of whether the state remedies can adequately take care of the situation." State courts, on the other hand, may "modify a state common law tort on the basis of a policy promoted by a federal statute," although it "would naturally be cautious in undertaking to do this." (*Rest.2d, Torts* §874A, Comment g.)

(2) *No Cause of Action Recognized*. A cause of action may be denied under particular circumstances. (See < >

Schweiker v. Chilicky (1988) 487 U.S. 412, 108 S.Ct. 2460, 2466, 101 L.Ed.2d 370, 379 [alleged due process violation in denial of Social Security disability benefits does not give rise to action for damages against officials administering program]; *Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 C.A.3d 318, 329, 227 C.R. 753, *infra*, §874 [no implied private cause of action to enforce Agricultural Credit Act of 1987]; 102 *Harv. L. Rev.* 279 [*Schweiker*].)

California v. Sierra Club (1981) 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101, declined to find such a cause of action on the facts. Plaintiffs sought to enjoin construction and operation of a state water diversion project, on the ground that the Rivers and Harbors Appropriations Act (33 U.S.C., §403) prohibits the creation of obstructions, not authorized by Congress, to the navigable capacity of waters of the United States. Both lower courts agreed that a private cause of action to enforce the Act existed. *Held*, reversed.

(a) In determining that plaintiffs were members of the class for whose benefit the statute was enacted, the Court of Appeals defined the class as all persons who would be specially harmed by an authorized obstruction. (101 S.Ct. 1779, 68 L.Ed.2d 107.) This reasoning was erroneous; it would make any victim of any crime a special beneficiary of the criminal statute's proscription. The proper question "is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." (101 S.Ct. 1779, 68 L.Ed.2d 107.)

(b) The legislative history shows that the Act was enacted in response to an earlier decision holding that in the absence of specific legislation, the federal Government had no power to take any action with respect to obstructions of navigable waters. (101 S.Ct. 1780, 68 L.Ed.2d 108.) Hence, the "silence on the remedy question serves to confirm that in enacting the Act, Congress was concerned not with private rights but with the Federal Government's ability to respond to obstructions on navigable waterways." (101 S.Ct. 1780, 68 L.Ed.2d 109.) (See 22 *Santa Clara L. Rev.* 949.)

A silent statute is even less likely to support an injunction. (See *Diaz v. Kay-Dix Ranch* (1970) 9 C.A.3d 588, 88 C.R. 443, 6 *Cal. Proc.* (4th), *Provisional Remedies*, §341 [despite federal immigration laws, injunction was unavailable to prohibit ranch owners or operators from knowingly employing illegal entrants].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Cause of Action Recognized*. See 3 Harper, James & Gray 3d §17.6.(2) *No Cause of Action Recognized*.

Diaz case:

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §340.



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c. Violation of Statute or Constitutional Provision.

2. Illustrations.

cc. Federal Constitution.

5 *Witkin Sum. Cal. Law Torts* § 16

[§ 16] Federal Constitution.

(1) *Cause of Action Recognized.* The United States Constitution may itself impliedly create a tort claim. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* (1971) 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619, recognized a civil remedy against federal officials for violation of constitutional rights. Plaintiff brought an action in the federal district court against agents of the Federal Bureau of Narcotics, to recover for emotional distress suffered as a result of a warrantless arrest without probable cause. His complaint alleged that they entered his apartment, manacled him in front of his wife and children, threatened to arrest the entire family, searched the entire premises, and then took him to the federal courthouse where he was interrogated, booked, and subjected to a visual strip search. The district court dismissed the complaint on the ground that the action was for violation of the right of privacy, and could be maintained only under state law. *Held*, reversed.

(a) The Fourth Amendment protection against unreasonable search and seizure extends to acts that might not be condemned by state law. Hence, the argument that the Amendment serves only as a limitation on defenses that can be asserted by federal officials in a state court, and not as an independent limitation on federal power, is unsound. (91 S.Ct. 2002, 29 L.Ed.2d 623.)

(b) *Bell v. Hood* (1946) 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed.2d 939, left open the question whether violation of the Amendment by a federal agent acting under color of his or her authority gives rise to a cause of action for damages. It must now be concluded that it does. A damage action is historically the ordinary remedy for invasion of personal interests in liberty. (91 S.Ct. 2001, 29 L.Ed.2d 622.) (See *Carlson v. Green* (1980) 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 [action by administrator of deceased federal prisoner recognized for violation of his due process, equal protection, and Eighth Amendment rights; survival of action under federal common law]; 67 *Cal. L. Rev.* 1242 [damages as remedy for violation of constitutional rights]; 85 *Harv. L. Rev.* 1532 [inferring constitutional remedies through analysis of *Bivens*]; 92 *Harv. L. Rev.* 745 [*Bivens* Actions for Equal Protection Violations]; 24 *Hastings L. J.* 987; 14 *Hastings Const. L. Q.* 77 [Private Remedies for Constitutional Wrongs]; 5 *Loyola L.A. L. Rev.* 126; 12 *Santa Clara Lawyer* 543; 13 *U.S.F. L. Rev.* 659 [extension of *Bivens* doctrine to First and Fifth Amendment].)

The *Bivens* doctrine was applied in *Davis v. Passman* (1979) 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846, a Fifth Amendment case. Plaintiff, a woman hired as deputy administrative assistant to defendant Congressman, was discharged a few months later on the stated ground that, though she was able, defendant had concluded that the position required a man. She brought suit in the federal district court for damages in the form of back pay, alleging that defendant's conduct discriminated against her on the basis of sex in violation of the Fifth Amendment. *Held*, a cause of action was stated.

(a) The Fifth Amendment forbids the federal government from denying equal protection of the laws; and this protection confers on plaintiff a federal constitutional right to be free from gender discrimination. (99 S.Ct. 2271, 60 L.Ed.2d 857.)

(b) The judiciary is the primary means through which these rights may be enforced. Like the plaintiffs in *Bolling v. Sharpe* (1954) 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, 8 Summary (10th), *Constitutional Law*, §750, plaintiff here claims that her rights under the Amendment have been violated and that she has no other effective means than an action for damages to vindicate them. (99 S.Ct. 2275, 2276, 60 L.Ed.2d 861, 862.) Under *Bivens*, a damage remedy is appropriate. (99 S.Ct. 2277, 60 L.Ed.2d 862.)

Four justices dissented, chiefly on the ground that the Separation of Powers doctrine precluded this intrusion into the interests of members of Congress, and that Congress could, but did not, make *Bivens* type remedies available to congressional employees. (See 92 Harv. L. Rev. 745 [5th Circuit opinion in *Davis*].)

(2) *No Cause of Action Recognized*. No *Bivens* remedy is available if there are "special factors counselling hesitation in the absence of affirmative action by Congress." (*Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, *supra*, 403 U.S. 388, 91 S.Ct. 2005, 29 L.Ed.2d 626.) This is true, for example, with respect to injuries to military personnel arising out of activity incident to military service. Special factors counseling against the remedy in those circumstances include the constitutional authorization for Congress rather than the judiciary to make rules governing the military, the unique disciplinary structure of the military establishment, and Congress' establishment of a comprehensive internal system of military justice. (*United States v. Stanley* (1987) 483 U.S. 669, 107 S.Ct. 3054, 3060, 97 L.Ed.2d 550, 563 [servicemen were secretly given doses of LSD for army experiment in study of long-term effects of drug].)

While acknowledging that *Bivens* actions are not limited to suits against government employees but may arise against private parties as well, *Stalnaker v. Boeing Co.* (1986) 186 C.A.3d 1291, 231 C.R. 323, denied that relief under the particular circumstances. Defendant company was a government contractor maintaining an Army military installation. Decedent was employed to locate unexploded ordinance on firing ranges, and was fatally injured when he stepped on an unexploded hand grenade. Plaintiffs, his widow and children, settled a workers' compensation claim and filed this action based on a "*Bivens*-type constitutional tort." *Held*, summary judgment for defendant affirmed.

(a) Defendant's contention that no *Bivens*-type action lies against a private party is unsound. Where the private defendant's action is backed by the power, property, and prestige of the Government, the harm approaches that caused by government officials. The standard is whether the defendant acted in such a way to create an "integrated alliance" so that its conduct is "imbued with the power and prestige of government officials." Here, the facts that defendant was a government contractor and its employees were supervised by the Army suggests that plaintiffs could possibly prove an "integrated alliance" at trial. (186 C.A.3d 1305, 1306.)

(b) However, the action, based on negligence, did not involve a deprivation of a constitutional right. "*Bivens* actions seek to permit recovery where there has been *no* remedy available for a violation of a particular right. In the case at bench, plaintiffs' constitutional liberty interest was protected by state law, i.e., workers' compensation." (186 C.A.3d 1307.)

The *Bivens* holding does not authorize recovery against a private entity acting under color of federal law. The threat

of suit against an individual's employer is not the kind of deterrence contemplated by that holding, the purpose of which is to deter federal officers from committing constitutional violations. (*Correctional Services Corp. v. Malesko* (2001) 534 U.S. 61, 122 S.Ct. 515, 523, 151 L.Ed.2d 456, 461) [Correctional Services Corporation operated halfway house under contract with Bureau of Prisons; although exempted from policy requiring use of stairs, rather than elevator, inmate who suffered heart attack when ordered to take stairs to go to his room had no cause of action].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Cause of Action Recognized.* *Hartman v. Moore* (2006) 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441, following *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* (1971) 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619, text, p. 64, recognized a civil suit for retaliatory action by federal officials in violation of an individual's First Amendment free speech rights. *Bivens* is the federal analogue for an action against state officials under 42 U.S.C., §1983 (see 8 Summary (10th), *Constitutional Law*, §816). (126 S.Ct. 1701, footnote 2, 164 L.Ed.2d 449.) However, a plaintiff basing a *Bivens* action on a criminal prosecution must plead and prove the absence of probable cause. (126 S.Ct. 1702, 164 L.Ed.2d 451.) (*Grassilli v. Barr* (2006) 142 C.A.4th 1260, 1280, 48 C.R.3d 715 [Hartman requirement of showing lack of probable cause did not apply in 42 U.S.C., §1983 action that was based on retaliation by California Highway Patrol officers in making repeated traffic stops of motorist who complained of officer's improper conduct; action did not involve criminal prosecution].)

See 22 A.L.R. Fed 2d 159 [*Bivens* actions--United States Supreme Court cases].(2) *No Cause of Action Recognized.*

(New) *No Bivens action for retaliation against exercise of property rights:* In *Wilkie v. Robbins* (2007) 551 U.S. 537, 127 S.Ct. 2588, 168 L.Ed.2d 389, plaintiff property owner alleged that Bureau of Land Management employees had conducted a lengthy campaign of harassment and intimidation to force him to grant an easement to the bureau. Plaintiff sought damages under *Bivens* on a theory of retaliation for the exercise of his constitutional rights to exclude the Government from his property and to refuse to grant a property interest without compensation. *Held*, *Bivens* relief is not available for retaliation against the exercise of ownership rights.

(a) "[O]n the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. ... But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.' " (127 S.Ct. 2598, 168 L.Ed.2d 401, quoting *Bush v. Lucas* (1983) 462 U.S. 367, 103 S.Ct. 2404, 2411, 76 L.Ed.2d 648.)

(b) With respect to the first step, plaintiff has an administrative and judicial process for vindicating virtually all of his complaints. (127 S.Ct. 2598, 168 L.Ed.2d 401.) The forums of defense and redress open to plaintiff are a patchwork, an assemblage of state and federal, administrative, and judicial benches applying regulations, statutes, and common law rules. "It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim." (127 S.Ct. 2600, 168 L.Ed.2d 403.)

(c) This, then, is a case for the second step in *Bivens* analysis, "for weighing reasons for and against the creation of a new cause of action, the way common law judges have always done." Here, the competing arguments boil down to that of plaintiff ("the inadequacy of discrete, incident-by-incident remedies") and that of the Government and its employees ("the difficulty of defining limits to legitimate zeal on the public's behalf in situations where hard bargaining is to be expected in the back-and-forth between public and private interests that the Government's employees engage in every day"). (127 S.Ct. 2600, 168 L.Ed.2d 404.) A *Bivens* remedy should not be recognized in these circumstances. On the one hand, a judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining "would be endlessly knotty to work out." On the other, a general provision for tort-like liability when government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of *Bivens* actions. Thus,

any remedy for conduct by government employees who push too hard for the Government's benefit should come, if at all, through legislation. (127 S.Ct. 2604, 168 L.Ed.2d 408.)



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CHAPTER IX - Torts

Witkin Summary of California Law

I. INTRODUCTION

A. Nature of Torts and Tort Actions.

6. Legal Duty Toward Person Harmed.

c. Violation of Statute or Constitutional Provision.

2. Illustrations.

dd. State Constitution.

5 *Witkin Sum. Cal. Law Torts* § 17

[§ 17] State Constitution.

(1) *Cause of Action Recognized.* A right of action may be implied, in proper circumstances, for violation of a state constitutional provision. Thus, *White v. Davis* (1975) 13 C.3d 757, 120 C.R. 94, 533 P.2d 222, 7 *Summary* (10th), *Constitutional Law*, §575, held that the California Constitution's guarantee of the right of privacy supported a cause of action, relying on the ballot argument for the constitutional amendment creating the right, which stated that the amendment would create "a legal and enforceable right of privacy for every Californian." (202 C.A.3d 1456.) (See *Porten v. University of San Francisco* (1976) 64 C.A.3d 825, 829, 134 C.R. 839 [following *White*]; 75 A.L.R.5th 619 [extension of doctrine of *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* (1971) 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619, *supra*, §16, to claims for violation of state Constitution].)

(2) *No Cause of Action Recognized.* Rights of action based on several constitutional provisions have been rejected.

In *Leger v. Stockton Unified School Dist.* (1988) 202 C.A.3d 1448, 249 C.R. 688, the court refused to imply a tort remedy from the constitutional *safe schools guarantee*. Plaintiff, a high school student, was changing clothes in a school bathroom before wrestling practice, when he was attacked and battered by a nonstudent. In his complaint against defendant school district, one cause of action was based on Cal. Const., Art. I, §28(c), which provides: "*Right to Safe Schools.* All students and staff of public, primary, elementary, junior high, and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." *Held*, no cause of action was stated.

(a) Cal. Const., Art. I, §26, states that the provisions of the Constitution are "mandatory and prohibitory"; and the courts have held that, in the absence of express language to the contrary, every constitutional provision is self-executing in the sense that agencies of government are prohibited from taking official actions that contravene these provisions. (202 C.A.3d 1454; see 7 *Summary* (10th), *Constitutional Law*, §69.)

(b) This does not mean, however, that every self-executing constitutional provision gives persons a remedy of damages for its violation, in the absence of legislation granting a remedy. Cal Const., Art. I, §28(c), declares a general right without specifying any rules for enforcement. "It imposes no express duty on anyone to make schools safe. It is

wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred." (202 C.A.3d 1455.)

(c) *White v. Davis* held that the constitutional right of privacy did support a cause of action, on the basis of a ballot argument to that effect. (202 C.A.3d 1456.) The ballot argument in support of Art. I, §28(c) contains no suggestion of a private right to sue for damages. It states the goal of public safety, extending to school students, and to be reached through reforms in the criminal laws. (202 C.A.3d 1456.)

In the companion cases of *Katzberg v. Regents of Univ. of Calif.* (2002) 29 C.4th 300, 127 C.R.2d 482, 58 P.3d 339, and *Degrassi v. Cook* (2002) 29 C.4th 333, 127 C.R.2d 508, 58 P.3d 360, the California Supreme Court examined the relevant factors in determining whether a damages action may be based on a state constitutional violation and rejected plaintiffs' claims in both instances. In *Katzberg*, a university professor who had been removed as department chairman during an investigation about misallocation of funds brought an action against university officials, seeking damages for an alleged violation of his *liberty interest under the state constitutional Due Process Clause* (Cal. Const., Art. I, §7(a)). Specifically, the complaint alleged that plaintiff had not been granted a "name clearing" hearing guaranteed by *Codd v. Velger* (1977) 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92. Finding that defendants had offered an adequate name clearing hearing to plaintiff and that this hearing was the sole remedy for the asserted liberty interest violation, the trial judge granted summary judgment in their favor. The Court of Appeal affirmed. *Held*, affirmed.

(a) *Background.*

(1) "It is clear that the due process clause of article I, section 7(a) is self-executing, and that even without any effectuating legislation, all branches of government are required to comply with its terms. Furthermore, it also is clear that, like many other constitutional provisions, this section supports an action, brought by a private plaintiff against a proper defendant, for declaratory relief or for injunction. ... The question presented here is whether, assuming the complaint states a violation of plaintiff's due process liberty interest, plaintiff may maintain an action for *monetary damages* to remedy the asserted violation of his due process liberty interests under article I, section 7(a), on the facts alleged." (29 C.4th 307.)

(2) More than 30 years ago, *Bivens* recognized the right of a party to recover damages for the violation of a constitutional right in an action against federal agents. *Bivens*, which dealt with the Fourth Amendment, did not ask whether that Amendment was *intended* to provide an action for damages, or whether this intent could be inferred from the provision. Instead, it created a cause of action for damages, i.e., a "constitutional tort" to remedy a Fourth Amendment violation, even though neither Congress nor the Fourth Amendment provided for this remedy. In so doing, *Bivens* emphasized that (a) there existed no special factors counseling hesitation; (b) there was no equally effective alternative remedy; and (c) there was no explicit congressional declaration that persons could not recover money damages in the circumstances involved. (29 C.4th 307.) However, subsequent U.S. Supreme Court decisions, and many of the recent out-of-state cases, have declined to recognize constitutional tort actions for money damages. (29 C.4th 308.)

(3) California cases have taken a different approach from the "constitutional tort" analysis of *Bivens* and its progeny. Instead of focusing on the situations in which a court should create a tort action premised upon violation of a constitutional provision, most recent California cases focus on whether the provision at issue was *intended*, either expressly or impliedly, to afford relief in damages, and conclude that there is no action for damages to remedy a violation of the state *Constitution*. (29 C.4th 309, citing *Leger v. Stockton Unified School Dist.*, *supra*, *Gates v. Superior Court* (1995) 32 C.A.4th 481, 38 C.R.2d 489, Supp., *infra*, §303, and other decisions.) (29 C.4th 313.)

(b) *Analytical framework.* "[W]e conclude it is appropriate to employ the following framework for determining the existence of a damages action to remedy an asserted constitutional violation," combining the intent-based analysis adopted by recent California Court of Appeal decisions with the policy-based factors that have been considered in the "constitutional tort" cases. (29 C.4th 317.)

(1) "First, we shall inquire whether there is evidence from which we may find or infer, within the constitutional provision at issue, an affirmative intent either to authorize or to withhold a damages action to remedy a violation. In undertaking this inquiry we shall consider the language and history of the constitutional provision at issue, including whether it contains guidelines, mechanisms, or procedures implying a monetary remedy, as well as any pertinent common law history. If we find any such intent, we shall give it effect." (29 C.4th 317.)

(2) "Second, if no affirmative intent either to authorize or to withhold a damages remedy is found, we shall undertake the 'constitutional tort' analysis adopted by *Bivens* and its progeny. Among the relevant factors in this analysis are whether an adequate remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and significance of the constitutional provision. If we find that these factors militate against recognizing the constitutional tort, our inquiry ends. If, however, we find that these factors favor recognizing a constitutional tort, we also shall consider the existence of any special factors counseling hesitation in recognizing a damages action, including deference to legislative judgment, avoidance of adverse policy consequences, considerations of government fiscal policy, practical issues of proof, and the competence of courts to assess particular types of damages." (29 C.4th 317.)

(c) *Application: Intent.*

(1) The Due Process Clause of Cal. Const., Art. I, §7(a), states: "A person may not be deprived of life, liberty, or property without due process of law." This language does not explicitly disclose an intent either to authorize or to withhold damages as a remedy for violation of the provision. (29 C.4th 318.)

(2) Cal. Const., Art. I, §7(a), which was added to the state Constitution in 1974 by the adoption of Proposition 7, was designed to make clear that the due process right applies not only in criminal prosecutions, but also affords a general civil right. There is no evidence that the drafters of the 1974 revision considered the issue of money damages as a remedy. Nor is there any discussion of this issue in the debates that preceded the adoption of the earlier version of the Due Process Clause. Moreover, there is nothing in the 1974 ballot material to suggest that the voters intended to create a damages remedy. (29 C.4th 318.)

(3) Not only does Cal. Const., Art. I, §7(a), set forth no explicit indication of a right to damages, it contains no "guidelines, mechanisms, or procedures" supporting an inference that the provision was intended to afford this remedy. (29 C.4th 320.)

(4) Because there is no indication that a damages remedy was either intended or foreclosed, it is necessary to consider whether a constitutional tort action for damages should be recognized. (29 C.4th 322.)

(d) *Application: Constitutional tort.*

(1) Other adequate remedies were available to plaintiff. For example, he could have sought mandamus under C.C.P. 1085 (see 8 Cal. Proc. (4th), *Extraordinary Writs*, §6) to compel defendants to hold a name-clearing hearing. In fact, doing so would have been more efficient than waiting and suing for money damages. Also, the delay in affording a hearing could have been remedied by filing a defamation action. Finally, plaintiff could have sought to establish a violation of his due process liberty interest by seeking injunctive or declaratory relief. (29 C.4th 325.)

(2) Plaintiff argued that a constitutional tort action for damages would not change existing tort law, because of the existence of C.C. 1708 and 3333. However, the former section, which provides in part that every person is bound to abstain from infringing on the rights of another person, merely states a general principle of law, but it hardly provides support for the novel legal proposition that a violation of Cal. Const., Art. I, §7(a), gives rise to a cause of action for damages outside the parameters of recognized tort law. And the latter provision, rather than being a substantive statute, merely prescribes the general measure of damages in tort cases. (29 C.4th 327.)

(3) The due process liberty interest of Cal. Const., Art. I, §7(a), is both important and fundamental, and this factor,

in the abstract, favors recognition of a constitutional tort action for damages. However, the availability of adequate alternative remedies weighs against recognition of such an action, and this factor deserves greater emphasis than the nature of the right violated. (29 C.4th 328.) (See *Simi Valley v. Superior Court* (2003) 111 C.A.4th 1077, 1085, 4 C.R.3d 468 [under *Katzberg*, action for damages is permitted where state Constitution violation is "tied" to common law or statutory right such as false arrest, false imprisonment, or wrongful termination based on violation of public policy; recovery denied absent that showing].)

In *Degrassi v. Cook*, a city council member sued city officials and others for damages for infringement of her *free speech rights* in violation of Cal. Const., Art. I, §2(a). Plaintiff alleged that defendants hindered her ability to fulfill her duties, by filing a defamation suit and other conduct, because of their opposition to her position on an issue. The trial judge entered judgment on demurrer for defendants, and the Court of Appeal affirmed on the ground that Cal. Const., Art. I, §2(a), does not support a cause of action for damages. *Held*, affirmed. The court followed the analytical framework enunciated in *Katzberg*, and employed the same reasoning with respect to Cal. Const., Art. I, §2(a), that it had previously used regarding Cal. Const., Art. I, §7(a). However, the following additional points were made:

(a) The Free Speech Clause of Cal. Const., Art. I, §2(a), states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." Reasoning that if the language "being responsible for the abuse of this right" implicitly recognizes the propriety of a damages suit for defamation, plaintiff argued that if the provision is to be interpreted as recognizing that actions for damages are appropriate for an *abuse* of the free speech right, then it should also be construed as allowing a cause of action for *interference* with that right. However, "[m]erely because the provision, as enacted in 1849, reenacted in 1879, and revised in 1974, implicitly contemplated the continued existence of a long-established common law action for defamation ... does not suggest or imply that it also was intended to create a new cause of action for damages to remedy a violation of the free speech right." (29 C.4th 338, 339.)

(b) Like Cal. Const., Art. I, §7(a), Cal. Const., Art. I, §2(a) was added in 1974 by the adoption of Proposition 7. There is no evidence from which to infer an intent that this provision itself permits an action for damages to remedy a violation. (29 C.4th 339.)

(c) Plaintiff had meaningful alternative remedies. She could have sought mandamus or an injunction against the challenged conduct under either C.C.P. 1085 (see 8 Cal. Proc. (4th), *Extraordinary Writs*, §6) or under the Brown Act (Govt.C. 54953 et seq.; see 9 Cal. Proc. (4th), *Administrative Proceedings*, §22). Had she done so, much of the conduct of which she now complains might have been avoided. (29 C.4th 342.)

(d) Plaintiff based her free speech claim essentially on allegations that defendants improperly frustrated her ability to exercise the duties of a local legislator (because defendants disagreed with her approach and with her views). "In circumstances such as these, there is reason for concern that a *damages* action might 'impose too heavy, or too erratic, a penalty' ... and that the threat of such damages improperly might chill the political process. These risks are increased in the absence of an objectively ascertainable measure of damages, and this also is so when 'the amount awarded depends upon the measure of the damage suffered by the particular plaintiff rather than the measure of fault on the part of the defendant. ... Accordingly, we are extremely reluctant to endorse a cause of action that would be subject to post hoc judicial scrutiny and assessment of damages the kind of political differences, squabbles, and perceived slights that are inherent in a representative government body such as a city council. ... Even assuming that the type of conduct alleged in the complaint constitutes a violation of the free speech clause by defendants, we conclude that money damages simply are not an appropriate remedy." (29 C.4th 343.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *No Cause of Action Recognized: Richards v. Department of Alcoholic Beverage Control* (2006) 139 C.A.4th 304, 42 C.R.3d 782, held that the Due Process Clause of the California Constitution (Cal. Const., Art. I, §7(a)) does not authorize a damages action by a restaurant owner challenging the suspension of an alcoholic beverage license. "Courts that have carefully considered the question have held that this provision does not authorize an action for money

damages to remedy a violation." (139 C.A.4th 317, citing *Katzberg v. Regents of Univ. of Calif.* (2002) 29 C.4th 300, 127 C.R.2d 482, 58 P.3d 339, text, p. 67.)

Right to safe schools: Cal. Const., Art. I, §28(c) was relettered Cal. Const., Art. I, §28(f)(1) at the 2008 general election.C.C.P. 1085:

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §23.

Brown Act:

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §18 et seq.



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CHAPTER IX - Torts

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I. INTRODUCTION

A. Nature of Torts and Tort Actions.

7. Causation.

5 *Witkin Sum. Cal. Law Torts* § 18

[§ 18] Causation.

Causation analysis differs depending on whether tort liability is based on intentional or negligent acts. (See 24 *Santa Clara L. Rev.* 1 [comparative fault and intentional torts]; 14 *Stanf. L. Rev.* 362; 73 *Cal. L. Rev.* 1735 [Causation in Tort Law]; on proximate cause requirement in negligence cases, see *infra*, §1181 et seq.)

In *Tate v. Canonica* (1960) 180 C.A.2d 898, 5 C.R. 28, a cause of action was upheld for wrongful death, where the death was brought about by intentional acts causing mental distress resulting in the decedent's suicide. (See *infra*, §461.) The court first observed that "[t]he law has for a long time recognized a distinction between intentional and negligent torts, and has generally recognized fewer defenses, and been more inclined to find that defendant's conduct was the legal cause of the harm complained of, where the tort is intentional. ... Indeed, it appears that many of the limitations upon liability that are subsumed under the doctrine of 'proximate cause,' as usually expounded in negligence cases do not apply to intentional torts." (180 C.A.2d 904.) It is necessary only that the conduct have been a substantial factor in bringing about an injury of the type intended; the intervention of new and independent forces, even though they may be tortious or criminal, is of no importance. "[I]t is thus made clear that the notion of independent intervening cause has no place in the law of intentional torts, so long as there is a *factual* chain of causation." (180 C.A.2d 907.) (See *United States Fidelity & Guaranty Co. v. American Employer's Ins. Co.* (1984) 159 C.A.3d 277, 285, 205 C.R. 460 [quoting *Tate* and holding that insured's act of setting fire to trash behind building was wilful act within meaning of exclusionary provision of *Ins.C.* 533].)

SUPPLEMENT: [This section is current through the latest supplement]



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I. INTRODUCTION

A. Nature of Torts and Tort Actions.

8. New Torts and Tort Reform.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 19

[§ 19] In General.

New torts are recognized continually. California, which has long recognized that "[f]or every wrong there is a remedy" (C.C. 3523), has allowed for new torts through both the legislative and judicial process. (*Smith v. Superior Court* (1984) 151 C.A.3d 491, 496, 198 C.R. 829, *infra*, §750, citing the text; see *Buxbom v. Smith* (1944) 23 C.2d 535, 546, 145 P.2d 305, *infra*, §747 [interference with prospective business relations or advantages]; *State Rubbish Collectors Assn. v. Siliznoff* (1952) 38 C.2d 330, 336, 240 P.2d 282, *infra*, §461 [intentional causing of emotional distress]; *Scott v. McPheeters* (1939) 33 C.A.2d 629, 637, 92 P.2d 678, *infra*, §728 [right of action for injury to unborn child]; *Aweeka v. Bonds* (1971) 20 C.A.3d 278, 281, 97 C.R. 650, 12 *Summary* (10th), *Real Property*, §707 [retaliatory eviction by landlord].)

A classic example is the action for violation of the right of privacy, which developed when it was recognized that an interest in privacy existed that was not adequately protected by the law of defamation. (See *infra*, §651.)

Many courts and commentators emphasize the judicial creativity in the development of tort law. Thus, in *United States v. Standard Oil Co. of Calif.* (1947) 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067, the Court, while rejecting a new basis of tort liability, made this observation: "We would not deny the Government's basic premise of the law's capacity for growth, or that it must include the creative work of judges. Soon all law would become antiquated strait jacket and then dead letter, if that power were lacking. And the judicial hand would stiffen in mortmain if it had no part in the work of creation." (67 S.Ct. 1611, 91 L.Ed. 2075.) And in *Rosefield v. Rosefield* (1963) 221 C.A.2d 431, 435, 34 C.R. 479, *infra*, §729, the court said, citing the text: "The concept that there are no causes of action except those that have been recognized by precedent, assumed at some point in the common law, was not accepted generally at early common law, nor is it accepted today."

Significant changes in the law of torts occur legislatively as well. (See C.C. 1708.7 [stalking].) An important example of this kind of legislation in California is the Medical Insurance Compensation Reform Act (MICRA). (See *infra*, §940 et seq.) Tort reform may be effected by way of initiative, such as in the case of the Fair Responsibility Act of 1986 (Proposition 51). (See *infra*, §52 et seq.)

Commentary on new torts and tort reform is extensive. (See 44 *Cal. L. Rev.* 40 [insult and outrage]; 73 *Cal. L. Rev.*

548 [symposium on alternative compensation schemes]; 75 *Harv. L. Rev.* 463 [Creative Continuity in the Law of Torts]; 66 *Harv. L. Rev.* 84, 86 [changing rules to harmonize with new conditions]; 109 *Harv. L. Rev.* 1765 [national debate on tort reform]; 35 *Hastings L. J.* 891 [proposed tort of malicious defense of civil litigation]; 22 *San Diego L. Rev.* 377 [proposed liability of media for injuries resulting from television broadcasts to immature audiences]; 23 *San Diego L. Rev.* 17 [alternatives to tort system for personal injury]; 23 *San Diego L. Rev.* 79 [Should Tort Law Protect Property Against Accidental Loss?]; 24 *San Diego L. Rev.* 795 [tort reform symposium]; 25 *San Diego L. Rev.* 13 [Some Reflections on the Process of Tort Reform]; 30 *San Diego L. Rev.* 213 [tort reform]; 19 *So. Cal. L. Rev.* 455 [child's action for alienation of father's society]; 21 *Southwestern U. L. Rev.* 1169 [Civil Remedies for the Victims of Computer Viruses]; 25 *Southwestern U. L. Rev.* 223 [Protecting Speech From Private Abridgement: Introducing the Tort of Suppression]; 14 *Stanf. L. Rev.* 901 [tort action by expectant father against abortionist]; 22 *Stanf. L. Rev.* 330 [changing frontiers in torts].)

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SUPPLEMENT: [This section is current through the latest supplement]

Legislative changes in tort law: Health & Saf.C. 1430(b) authorizes civil actions for damages and injunctive relief by or on behalf of patients in specified health facilities for violations of the Patients Bill of Rights in 22 *Cal. Code Reg.* §72527. (See *Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC* (2007) 150 C.A.4th 469, 473, 58 C.R.3d 585 [action survives death of patient].)

Commentary on new torts and tort reform: See 38 *Loyola L.A. L. Rev.* 1093 [constitutional tort reform]; 80 *So. Cal. L. Rev.* 865 [proposing wrongful conception cause of action against pharmacists who refuse to provide contraception]; 59 *Stanf. L. Rev.* 1671 [genomic revolution and resulting need for new tort remedies].



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CHAPTER IX - Torts

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I. INTRODUCTION

A. Nature of Torts and Tort Actions.

8. New Torts and Tort Reform.

b. Intentional Torts: Prima Facie Tort Doctrine.

5 *Witkin Sum. Cal. Law Torts* § 20

[§ 20] Intentional Torts: Prima Facie Tort Doctrine.

Under the "prima facie tort" doctrine, intentional harm resulting in damage may be actionable even though the harm is outside the scope of a traditional tort. (See 74 *Am.Jur.2d* (2001 ed.), *Torts* §36 et seq.; 16 *A.L.R.3d* 1191 [prima facie tort].)

The Second Restatement, §870, sets forth the doctrine as follows: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability." (See *Calvillo-Silva v. Home Grocery* (1998) 19 *C.4th* 714, 731, 80 *C.R.2d* 506, 968 *P.2d* 65, *infra*, §1099, citing the text [actor is subject to liability for intentionally injurious act *only* if conduct "is generally culpable and not justifiable under the circumstances" (*Rest.2d, Torts* §870)].)

The Comments to §870 explain its nature and scope, and the following excerpts are significant:

Comment a. The Restatement rule "is intended to supply a generalization for tortious conduct involving harm intentionally inflicted. Generalizations have long existed for negligence liability, involving conduct producing unreasonable risk of harm to others ... , and for strict liability, involving the carrying on of an activity that is abnormally dangerous. ... As for conduct intentionally causing harm, however, it has traditionally been assumed that the several established intentional torts developed separately and independently and not in accordance with any unifying principle." *Rest.2d, Torts* §870 and its comments purport to "supply that unifying principle and to explain the basis for the development of the more recently created intentional torts" and "to serve as a guide for determining when liability should be imposed for harm that was intentionally inflicted even though the conduct does not come within the requirements of one of the well established and named intentional torts."

Comment b. An intentional tort is "one in which the actor intends to produce the harm that ensues; it is not enough that he intends to perform the act. He intends to produce the harm when he desires to bring about that consequence by performing the act. ... [H]e also is treated as intending that consequence if he knows or believes that the consequence is certain, or substantially certain, to result from his act." When the claim is novel, "the court may decide to limit the liability to the situation in which the defendant acted for the purpose of producing the harm involved." The doctrine of

"transferred intent" applied to such torts as assault and battery (see *infra*, §384; *Rest.2d, Torts* §§16, 32, 43) has no application to newly developing torts arising under the *prima facie* tort doctrine.

Comment d. Some categories of intentional tort that have been recognized in the exercise of this principle "are still in the process of development. A prime example of a tort presently not fully developed is intentional infliction of emotional distress; its contours are not yet fully clear. ... Other categories of fairly recent development include injurious falsehood, interference with contractual relations and interference with prospective economic advantage."

Comment e. The determination of which intentionally caused harms deserve a tort remedy is made by resorting to a balancing process involving four factors: "(1) the nature and seriousness of the harm to the injured party, (2) the nature and significance of the interests promoted by the actor's conduct, (3) the character of the means used by the actor and (4) the actor's motive."

Comment j. "The new tort may be closely related to an established tort and thus allow tort recovery when a restrictive rule of the traditional tort would not permit it. For example, the tort of assault has traditionally required the creation of apprehension of an imminent battery. Some cases have permitted recovery when the threat is not imminent but still is a very real one of a serious battery, to take place in the near future. ... In determining whether a new tort can appropriately eliminate a restrictive feature of a traditional tort it is important to give careful consideration to the nature of the restriction. If it came about as a historical accident or for reasons that no longer have real significance, the new tort without it may serve a useful purpose. If the restriction expresses an important policy of the law against liability, however, the significance of that policy should continue regardless of the name of the tort involved or the date of its origin."

Particular applications of the general principle covered in *Rest.2d, Torts* §870 are set forth in *Rest.2d, Torts* §871 (intentional harm to a property interest of another) and *Rest.2d, Torts* §871A (intentional creation of civil or criminal liability of another).

SUPPLEMENT: [This section is current through the latest supplement]

See *Berkley v. Dowds* (2007) 152 C.A.4th 518, 526, 61 C.R.3d 304, Supp., supra, §19 ["willful misconduct" is not a separate tort, but simply an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care; pleading requirements are similar to negligence but stricter]; CACI, No. 1321 [Transferred Intent].



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A. Nature of Torts and Tort Actions.

9. Tort Recovery Precluded by Public Policy: Perjury or False Defense.

5 *Witkin Sum. Cal. Law Torts* § 21

[§ 21] Tort Recovery Precluded by Public Policy: Perjury or False Defense.

Recognition of tort recovery may be precluded by public policy. Thus, it has been held that a tort action cannot be based on the giving of false testimony (*Taylor v. Bidwell* (1884) 65 C. 489, 490, 4 P. 491) or the assertion of a fraudulent defense (*MacCharles v. Bilson* (1986) 186 C.A.3d 954, 956, 231 C.R. 155) in the course of litigation.

(1) *Action After Judgment*. In *Kachig v. Boothe* (1971) 22 C.A.3d 626, 99 C.R. 393, plaintiffs, relying on theories including intentional infliction of emotional distress (see *infra*, §449 et seq.) and malicious prosecution (see *infra*, §469 et seq.), sued to recover for damages allegedly resulting from litigation arising out of an aborted real estate exchange. The litigation had terminated in judgments adverse to plaintiffs, who had been named as defendants. Thereafter, plaintiffs acquired information tending to show that the judgments rested on a false document and perjured testimony, and brought the instant action against the plaintiffs in the first action, and against other persons purportedly involved in the alleged perjury. *Held*, judgment on the pleadings for defendants affirmed.

(a) No cause of action for malicious prosecution was stated because the element of favorable termination of the prior proceeding (see *infra*, §§477, 498) was lacking. (22 C.A.3d 638, citing the text.)

(b) Favorable termination need not be shown to recover for intentional infliction of emotional distress; and collection of a debt by perjured testimony and a false document is as outrageous as any of the means condemned in prior cases (see *infra*, §458). (22 C.A.3d 640.)

(c) Nevertheless, compelling considerations of policy preclude recovery:

(1) Recognition of a cause of action for intentional infliction of emotional distress on these facts would subvert the rule of intrinsic fraud. "In almost every case in which the prior judgment was procured by the adverse party through perjured testimony or a false document, severe emotional distress would be a substantially certain result. Thus, in virtually every such case, the doctrine of finality of judgments could be avoided merely by predicated liability in the second action on the theory of intentional infliction of emotional distress rather than malicious prosecution." (22 C.A.3d 641; on rule denying relief for intrinsic fraud, see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §242.)

(2) Liability for intentional infliction of emotional distress is subject to the defense of privilege similar to that in

defamation cases, including an absolute privilege analogous to that set forth in C.C. 47(2) (now C.C. 47(b)). (22 C.A.3d 641.) "The privilege is accorded not only to parties but to witnesses, even where their testimony is allegedly perjured and malicious." (22 C.A.3d 641.) As Prosser says, "The resulting lack of any really effective civil remedy against perjurers is simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say." (22 C.A.3d 641.)

(d) "Thus, with considerable regret and dissatisfaction, we conclude that the facts alleged and judicially noticed do not entitle plaintiffs to any relief. ... [W]e recognize that the wrong in this case is a most grievous one, and we should be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse. Reluctance on the part of witnesses to testify for fear of subsequent harassment by unfounded claims of perjury or endless litigation in which nothing was ever finally determined would be worse than occasional miscarriages of justice." (22 C.A.3d 642.)

(2) *Action After Settlement.* In *Carden v. Getzoff* (1987) 190 C.A.3d 907, 235 C.R. 698, plaintiff anesthesiologist was involved in a dissolution proceeding with his wife. For use in settlement negotiations, defendant accountants prepared a valuation of the goodwill of plaintiff's anesthesiology practice, and testified at the trial that it was based on a comparison of the valuation of goodwill of three other comparable anesthesiology medical practices. Plaintiff brought this action for abuse of process (see *infra*, §517 et seq.) and intentional infliction of emotional distress (see *infra*, §449 et seq.), alleging that he had been forced to settle the dissolution proceeding and pay his wife \$ 50,000 as her community property portion of the goodwill; that defendants' testimony was false, in that the three purported anesthesiologists with comparable practices did not exist; and that plaintiff was on a staff as part of a rotation group at a medical center, had no patients of his own, and thus had no goodwill. *Held*, judgment for defendants on demurrer affirmed. The publications (report and testimony) were made in the course of the dissolution proceeding, and were absolutely privileged. (190 C.A.3d 913, 914.) And, as held by the Supreme Court in *Taylor v. Bidwell*, *supra*, injurious perjury and suborning of perjury cannot be the basis of a civil action. "[W]hen there is a good faith intention to bring a suit, even malicious publications 'are protected as part of the price paid for affording litigants the utmost freedom of access to the courts.' ... Otherwise, adverse witnesses would always be fearful of subsequent civil suits and would be extremely hesitant or unwilling to testify. Appellant's potential remedies are to assist in the prosecution of criminal charges; to report any allegations of dereliction to the Board of Accountancy; and to attempt to litigate any claims he might have against his trial attorney." (190 C.A.3d 915.)

(3) *False Defense in Main Action.* In *MacCharles v. Bilson*, *supra*, plaintiff in a personal injury action filed an amended complaint alleging second and third causes of action for fraud and negligent misrepresentation against defendant and defendant's attorneys, claiming that they intended to offer as a false affirmative defense a settlement and release executed by plaintiff in reliance on intentional or negligent misrepresentations that defendant had no substantial assets beyond his insurance policy limit. Alleged damages were "that he will now be forced to litigate the invalidity of the release in the trial of the first cause of action, and this will cause delay in recovery of judgment, extra litigation expense and attorney's fees, and mental and emotional distress." (186 C.A.3d 956.) *Held*, judgments for defendants on demurrer to these causes of action affirmed.

(a) Plaintiff elected to disregard the settlement by continuing to pursue his first cause of action against defendant, and so far he has not suffered any limitation on his right to recover. If defendant raises the release as an affirmative defense, plaintiff will have the opportunity to prove that it is invalid. If he does not prevail, and is limited to the amount of the settlement, he may seek recourse against his own attorney for his reliance on opposing counsel's representations; and "[t]he issue of attorney liability for misrepresentations to opposing attorneys in settlement negotiations would then arise when appellant's attorney sought a remedy for the alleged misrepresentations on which he relied to his detriment." (186 C.A.3d 956, footnote 5.)

(b) No authority supports plaintiff's theory that he may, in the same action he maintains against a defendant, also sue the defendant and the defendant's attorney for raising a false defense in that action. And *Babb v. Superior Court* (1971) 3 C.3d 841, 92 C.R. 179, 479 P.2d 379, holding that a defendant may not file a cross-complaint for malicious

prosecution in the action which defendant contends is being maliciously prosecuted, supports the conclusion that "a plaintiff may not, in the very same action, assert independent causes of action against the defendant and defendant's attorneys for asserting false defenses to plaintiff's main claim." (186 C.A.3d 957.) The reasons include a danger of confusion and prejudice of the issues, the creation of conflicts of interest between attorney and client, and the risk that parties may be deterred from asserting bona fide claims. (186 C.A.3d 957.)

(c) If, during the trial of the first cause of action, defendants offer in evidence a forged settlement agreement or perjured testimony, plaintiff would be expected to meet and defeat that evidence at trial; he would have no independent cause of action against defendants for the mental distress suffered. (186 C.A.3d 957, citing *Kachig v. Boothe*, *supra*.) "By long-standing tradition he is not entitled to recover attorney's fees or for the mental stress of litigating. Appellant cannot avoid long-established procedures by labeling his opponent's conduct as 'fraud' or 'negligent misrepresentation.'" (186 C.A.3d 958.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Action After Judgment. Rule denying relief for intrinsic fraud:*

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §241.



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CHAPTER IX - Torts

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I. INTRODUCTION

A. Nature of Torts and Tort Actions.

10. Motive in Tort Law.

5 *Witkin Sum. Cal. Law Torts* § 22

[§ 22] Motive in Tort Law.

The older cases frequently declared that a malicious or improper motive alone cannot make a lawful act tortious. (See *Fisher v. Feige* (1902) 137 C. 39, 41, 69 P. 618; *Hornaday v. Hornaday* (1949) 95 C.A.2d 384, 392, 213 P.2d 91 ["a mere gesture, however vicious, is not an actionable tort"]; 26 *Cal. L. Rev.* 691.)

This statement is harmless enough but its implications are somewhat misleading. Motive is sometimes a test of the legality of the act; e.g., the *spite fence* as a nuisance (*Bar Due v. Cox* (1920) 47 C.A. 713, 715, 190 P. 1056; see 26 *Cal. L. Rev.* 691; 12 *Summary* (10th), *Real Property*, §373), the tort of malicious prosecution (see *infra*, §469 et seq.), and the tort of interference with another's business or economic advantage (*infra*, §741 et seq.). (See generally Dobbs, *The Law of Torts* §25; 74 *Am.Jur.2d* (2001 ed.), *Torts* §17.)

Malice is also relevant in connection with the defense of conditional privilege (see *infra*, §§131 et seq., 591 et seq.), where exemplary damages are sought (see *infra*, §1572 et seq.), and where a debtor relies on a discharge in bankruptcy, which does not release liabilities based on a judgment "for willful and malicious injuries to the person or property of another." (*Fitzgerald v. Herzer* (1947) 78 C.A.2d 127, 130, 177 P.2d 364 [default judgment in action against automobile driver alleged to have been grossly careless and reckless; citing 11 U.S.C., §523(a)(6)]; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §493.)

SUPPLEMENT: [This section is current through the latest supplement]
Malicious injury:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §520.



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I. INTRODUCTION

A. Nature of Torts and Tort Actions.

11. Survival of Tort Liability.

5 *Witkin Sum. Cal. Law Torts* § 23

[§ 23] Survival of Tort Liability.

(1) *Development of Law.* Traditionally, survivability was the rule, and causes of action that abated on death were the exception. (See 3 *Cal. Proc.* (4th), *Actions*, §65.) Thus, causes of action for torts to real or personal *property* were declared survivable by the original Civil Code. (C.C. 954 ["a thing in action, arising out of the violation of a right of property ... may be transferred by the owner"]; see *George v. McManus* (1915) 27 C.A. 414, 416, 150 P. 73 [damage to automobile in collision]; *Smith v. Stuthman* (1947) 79 C.A.2d 708, 709, 181 P.2d 123 [slander of title to real property]; *Sanders v. Allen* (1948) 83 C.A.2d 362, 367, 188 P.2d 760 [constructive eviction]; 22 *Cal. L. Rev.* 456; 40 *A.L.R.2d* 533 [personal property]; on survival of actions generally, see 3 *Cal. Proc.* (4th), *Actions*, §64 et seq.; Dobbs, *The Law of Torts* §295.)

California formerly followed the common law rule that actions for *personal* torts, such as personal injuries and wrongful death, abated on the death of the injured party or the tortfeasor. (See *Clark v. Goodwin* (1915) 170 C. 527, 529, 150 P. 357; *De La Torre v. Johnson* (1927) 200 C. 754, 757, 254 P. 1105; *Blodgett v. Greenfield* (1929) 101 C.A. 399, 400, 281 P. 694; *Singley v. Bigelow* (1930) 108 C.A. 436, 441, 291 P. 899; *Rideaux v. Torgrimson* (1940) 39 C.A.2d 273, 274, 102 P.2d 1104; *Rest.2d, Torts* §900(a)(1) [tort cause of action is discharged by death of either party in absence of survival statute]; 18 *Cal. L. Rev.* 44; 19 *Cal. L. Rev.* 289; 24 *Cal. L. Rev.* 716; 18 *So. Cal. L. Rev.* 254; 24 *So. Cal. L. Rev.* 417; 25 *So. Cal. L. Rev.* 343.)

A radical change in the law was made in *Hunt v. Authier* (1946) 28 C.2d 288, 169 P.2d 913, allowing an action for wrongful death against the administrator of the deceased tortfeasor on the theory that personal injury or wrongful death constitute an injury to "property," i.e., the lessening of the plaintiffs' estate and deprivation of their pecuniary interest in future support from the victim. The action was therefore expressly survivable under former Prob.C. 574, which allowed an action against a tortfeasor's personal representative for destruction of the property of the plaintiff. (28 C.2d 296.) The *Hunt* theory was followed and expanded in subsequent cases. (See *Moffat v. Smith* (1949) 33 C.2d 905, 907, 206 P.2d 353 [personal injury action against executor of tortfeasor]; *Mecum v. Ott* (1949) 92 C.A.2d 735, 739, 207 P.2d 831 [same; "regardless of the proportion of damages sought for personal injuries as compared with damage to property, in a suit founded on tort, if the complaint alleges destruction of property interests or estate, the cause does not abate at the death of a tortfeasor"]; *Nash v. Wright* (1947) 82 C.A.2d 475, 477, 186 P.2d 691 [wrongful death action by heirs of deceased victim against executor of tortfeasor]; *Los Angeles v. Howard* (1947) 80 C.A.2d 728, 730, 182 P.2d 278 [employer's right of action against third-party tortfeasor, for reimbursement for money expended on behalf of injured

employee, survives death of tortfeasor]; *Smith v. Minnesota Mut. Life Ins. Co.* (1948) 86 C.A.2d 581, 591, 195 P.2d 457 [cause of action for negligent failure to pass on insurance application until after applicant's death was probably survivable, independently of *Hunt* doctrine, as contractual or quasi-contractual]; *Smith v. Stuthman* (1947) 79 C.A.2d 708, 710, 181 P.2d 123 [cause of action for slander of title probably survivable independently as involving tort to property].)

Legislation adopted in 1949 provided for survival of personal injury and wrongful death actions. (See *Cort v. Steen* (1950) 36 C.2d 437, 440, 224 P.2d 723; *Grant v. McAuliffe* (1953) 41 C.2d 859, 862, 264 P.2d 944, *infra*, §202; *Hume v. Lacey* (1952) 112 C.A.2d 147, 150, 245 P.2d 672; *Smith v. Finley* (1952) 112 C.A.2d 599, 600, 246 P.2d 989; 25 So. Cal. L. Rev. 112; 36 Cal. L. Rev. 75, 657.) The scope of the 1949 statutes was uncertain as to other personal torts, such as false imprisonment, malicious prosecution, defamation, or invasion of privacy. On the other hand, there was no express language negating the principle of the *Hunt* case that any tort diminishing a person's estate is an injury to property, or repudiating the policy set forth in that case in favor of survivability of tort claims generally. (See *Casey v. Katz* (1952) 114 C.A.2d 391, 393, 250 P.2d 291 [malicious prosecution survives death of tortfeasor, as injury to property]; 37 Cal. L. Rev. 72, 659; 1 U.C.L.A. L. Rev. 229 [discussing superseded court of appeal decision holding false imprisonment survivable]; 1 U.C.L.A. L. Rev. 575 [remedies of person libeled in a will].)

These issues were resolved in 1961 when the Legislature abolished the classification of survivable and nonsurvivable causes of action, and made all survive. (See former Prob.C. 573.)

The current survival statutes, enacted in 1992 and set forth in C.C.P. 377.10 et seq., are discussed in detail in 14 *Summary* (10th), *Wills and Probate*, §518 et seq.

(2) *Death of Injured Party*. Death of the injured party does not abate the action. (C.C.P. 377.20(a); see C.C.P. 376(f) [parent's or guardian's right of action for personal injuries to minor child].)

(3) *Death of Wrongdoer or Other Person Liable in Damages*. Death of the wrongdoer or other liable person does not abate the action. (C.C.P. 377.20(a); see C.C.P. 376(g)(2) [action for injuries to minor child].)

(4) *Indemnity Insurance*. All policies insuring against loss or damage for personal injuries must provide for liability of the insurer on a judgment against the insured or the insured's personal representative in any action that survives. (Ins.C. 11580(b)(2).)

(5) *Filing Claim Against Estate of Deceased Tortfeasor*. Filing claims under Prob.C. 9100 et seq. is required in the case of actions brought against the estate of a deceased tortfeasor under the survival statutes. (See *Hurlimann v. Bank of America* (1956) 141 C.A.2d 801, 805, 297 P.2d 682; 14 *Summary* (10th), *Wills and Probate*, §620; on practice, see C.E.B., 1 Decedent Estate Practice, Chap. 12.)

(6) *Limitations on Recoverable Damages*. Recovery is prohibited of the following:

(a) Damages for pain, suffering, or disfigurement of a plaintiff who dies before judgment. (C.C.P. 377.34; cf. *Sullivan v. Delta Air Lines* (1997) 15 C.4th 288, 307, 63 C.R.2d 74, 935 P.2d 781, 14 *Summary* (10th), *Wills and Probate*, §519 [damages are recoverable for pain, suffering, or disfigurement where plaintiff dies pending appeal from judgment awarding them].)

(b) Punitive damages against the personal representative or successor in interest of a deceased tortfeasor. (C.C.P. 377.42.)

(7) *Imputation of Negligence*. Under Rest.3d, Torts: Apportionment of Liability, the negligence of an estate's decedent affects the estate's recovery under a survival statute "to the same extent that it would have affected the decedent's recovery had the decedent survived." (Rest.3d, Torts: Apportionment of Liability §6(b).) In a survival claim, the representative acts as the decedent's alter ego. Thus, any defenses based on the decedent's conduct are available

against the representative. (*Rest.3d, Torts: Apportionment of Liability* §6, Comment d.)

The negligence of a beneficiary of the decedent's estate is not imputed to the estate merely because of his or her status as beneficiary. (*Rest.3d, Torts: Apportionment of Liability* §6(b).)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Development of Law.*

Traditional rule:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §13.

Survival of actions generally:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §12 et seq.



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I. INTRODUCTION

B. Persons or Entities Liable for Tort.

1. In General.

5 Witkin Sum. Cal. Law Torts § 24

[§ 24] In General.

The general principle is that every person is liable for that person's own torts. (C.C. 1714(a); on liability for negligence of others, see *infra*, §1220 et seq.) The ancient common law rule that freed a wife from liability for her torts, but made the husband liable, was abolished by statute in 1913. (Former C.C. 171a; see *Family C. 1000(a)*, 11 *Summary* (10th), *Community Property*, §184 [marriage does not render married person liable for injury or damage caused by other spouse]; *Rest.2d, Torts* §895F [same].)

There are, however, certain qualifications on liability based on the capacity of the parties or on public policy. (On capacity of child, see *infra*, §25; on capacity of mentally disabled person, see *infra*, §26; on immunities of public entity, see *infra*, §226 et seq.; on immunities of public employee, see *infra*, §§348, 351 et seq.; on limitations on liability based on status of party generally, see Dobbs, *The Law of Torts* §§225 et seq., 260 et seq., 279 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]

On liability of multiple tortfeasors, see text, §44 et seq.



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CHAPTER IX - Torts

Witkin Summary of California Law

I. INTRODUCTION

B. Persons or Entities Liable for Tort.

2. Minors.

5 *Witkin Sum. Cal. Law Torts* § 25

[§ 25] Minors.

A minor child is ordinarily liable for his or her torts but not for exemplary damages unless the child is capable of knowing that the act was wrongful. (*Family C. 6600*; see *Ellis v. D'Angelo* (1953) 116 C.A.2d 310, 313, 253 P.2d 675 ["[s]tartling as this idea may be at first blush," legislative declaration is clear and this is general law]; Dobbs, *The Law of Torts* §69; 2 Harper, James & Gray 2d §8.13; 27 *So. Cal. L. Rev.* 214; 42 *Am.Jur.2d* (2000 ed.), *Infants* §127 et seq.; 27 *A.L.R.4th* 15 [modern trends as to tort liability of child of tender years]; on parental liability for torts of child, see *infra*, §1227 et seq.; on duty of care owed by child, see *infra*, §998 et seq.) The theory of liability of a minor is *compensation* rather than moral guilt; the loss is imposed on the estate of the child rather than on that of the innocent injured person. (*Ellis v. D'Angelo, supra*, 116 C.A.2d 314.) But where a young child is involved, the generalization of *Family C. 6600* is subject to qualification. The applicable rule is that a minor is liable "even though he lacks the mental development and capacity to recognize the wrongfulness of his conduct so long as he has the mental capacity to have the state of mind necessary to the commission of the particular tort with which he is charged." (*Ellis v. D'Angelo, supra*, 116 C.A.2d 315.)

In *Ellis*, plaintiff babysitter, hired by defendant parents, was attacked and knocked to the floor by defendant 4-year-old child, and suffered fractured arms and wrists. She sued for battery and negligence. *Held*, a cause of action was stated for battery but not for negligence. "[I]n the case of negligence, children have been recognized as a special group to whom a more or less subjective standard of conduct is to be applied, which will vary according to their age, intelligence and experience, so that in many cases immunity is conferred in effect by finding merely that there has been no negligence." (116 C.A.2d 314.) So a child of 4 is not liable for negligence because he does not have the mental capacity to realize that his or her conduct, not intended to harm, may nevertheless be reasonably expected to bring about that result. (116 C.A.2d 316.) However, the required mental capacity differs in a battery. "Thus as between a battery and negligent injury an infant may have the capacity to intend the violent contact which is essential to the commission of battery when the same infant would be incapable of realizing that his heedless conduct might foreseeably lead to injury to another which is the essential capacity of mind to create liability for negligence." (116 C.A.2d 315.) (See *Singer v. Marx* (1956) 144 C.A.2d 637, 641, 301 P.2d 440 [negligence and battery; following *Ellis*]; 27 *So. Cal. L. Rev.* 214 [criticizing *Ellis*].)

In *Weisbart v. Flohr* (1968) 260 C.A.2d 281, 67 C.R. 114, defendant 7-year-old boy told his 5-year-old neighbor to get off the lawn of his house or he would shoot her with his bow and arrow. He aimed it in her general direction and

pulled back the bow string, and it went off and hit her in the eye. He testified that he only intended to frighten, and to shoot at her feet, but that the arrow was deflected by his thumb. *Held*, judgment for defendant reversed. His testimony showed that he knew the use of a bow and arrow, knew it was wrong to point it at a person, and had been warned not to shoot it at anyone. Hence, a motion for judgment in favor of plaintiff should have been granted. (260 C.A.2d 290.)

West's Key Number Digest, Infants k.59 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 2 Harper, James & Gray 3d §8.13.



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I. INTRODUCTION

B. Persons or Entities Liable for Tort.

3. Mentally Disabled Persons.

5 *Witkin Sum. Cal. Law Torts* § 26

[§ 26] Mentally Disabled Persons.

(1) *In General.* Like a minor (see *supra*, §25), a person of unsound mind is ordinarily liable for torts but not for exemplary damages unless the person is capable of knowing that the act was wrongful. (C.C. 41; see Dobbs, *The Law of Torts* §69; 7 *So. Cal. L. Rev.* 480; 33 *U.C. Davis L. Rev.* 95 [denial of capacity defense as violative of Americans with Disabilities Act]; 77 *A.L.R.2d* 625 [civil liability of mentally disordered person for assault or battery]; 49 *A.L.R.3d* 189 [liability of insane person for own negligence].)

Comparable principles govern. In *Mullen v. Bruce* (1959) 168 *C.A.2d* 494, 335 *P.2d* 945, plaintiff nurse was engaged to take care of defendant, an alcoholic patient in a sanitarium. In attempting to restrain defendant from leaving, plaintiff was struck, knocked down, and seriously injured. Judgment for damages for battery was affirmed. Conceding defendant's unsoundness of mind, the court, citing *Ellis v. D'Angelo* (1953) 116 *C.A.2d* 310, 253 *P.2d* 675, *supra*, §25, held that the legislative intent to place tort liability of a child and an insane person on the same basis was clear. "Whether the defendant had sufficient capacity to intend the violent conduct essential to the commission of battery was a factual question for the trial judge." An insane or otherwise mentally disabled person, like a minor, is liable for a tort even though the person lacks the mental development and capacity to recognize the wrongfulness of the conduct so long as the person has the mental capacity to have the state of mind necessary to the commission of the particular tort charged. (168 *C.A.2d* 497.)

(2) *Sudden and Unexpected Onset of Illness.* In *Bashi v. Wodarz* (1996) 45 *C.A.4th* 1314, 53 *C.R.2d* 635, defendant was involved in an automobile accident with plaintiffs. There was evidence that the accident was due to the onset of defendant's sudden, unexpected mental illness. *Held*, summary judgment for defendant reversed.

(a) A line of appellate cases beginning with *Waters v. Pacific Coast Dairy, Ltd. Mut. Comp. Ins. Co.* (1942) 55 *C.A.2d* 789, 131 *P.2d* 588, has established the rule that a person who is suddenly stricken by an unexpected *physical* illness is not liable for negligence. However, the rule is the opposite with respect to persons stricken by a sudden, unexpected *mental* illness. This rule is codified in C.C. 41, which evidences the legislative intent to keep insane persons civilly liable for their torts. And by its terms, this statute applies regardless of the degree of fault of the insane, and thus covers negligence, as well as intentional torts. (45 *C.A.4th* 1318.)

(b) The California position is in accord with *Rest.2d, Torts* §283B, providing that mental deficiency does not relieve

an actor from liability for conduct not conforming to the standard of a reasonable man under like circumstances, although this position has been criticized by scholars and by a few other jurisdictions. (45 C.A.4th 1321.) This California and Restatement position is based on a policy rationale. "Clearly the insane or mentally disabled individual is not considered at fault in the traditional sense. However, because such individuals do create harm, the general rationale is that they should be held financially responsible to those they harm. Therefore, mental disability is not a defense. Liability is therefore predicated on an objective reasonable person standard. Unlike the rationale behind suspension of a liability for sudden physical illness which is based on fault, the fault concept is not analogous to a sudden mental disability. Thus, we do not perceive any logical rationale for barring mental illness as a defense to negligence but allowing sudden mental illness as a complete defense. We conclude sudden mental illness may not be posed as a defense to harmful conduct and that the harm caused by such individual's behavior shall be judged on the objective reasonable person standard in the context of a negligence action as expressed in" C.C. 41. (45 C.A.4th 1323.)

C.C. 41 is intended to place a mentally disabled person in the same posture as a competent person, not in a legally worse position. For example, the statute does not preclude the mentally disabled person's assertion of the primary assumption of risk doctrine. (*Herrle v. Estate of Marshall* (1996) 45 C.A.4th 1761, 1765, 53 C.R.2d 713, *infra*, §1353.)

West's Key Number Digest, Torts k.21

SUPPLEMENT: [This section is current through the latest supplement]



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B. Persons or Entities Liable for Tort.

4. Liability Between Family Members.

a. Spouses.

5 *Witkin Sum. Cal. Law Torts* § 27

[§ 27] Spouses.

(1) *Former Rule of Immunity.* The supposed policy of preserving the tranquility of the home was the principal support for the common law rule that neither spouse could sue the other for personal torts, such as assault and battery, committed during the marriage. (See *Peters v. Peters* (1909) 156 C. 32, 34, 103 P. 219 [husband against wife for assault and battery]; 11 *Cal. L. Rev.* 282; 31 *So. Cal. L. Rev.* 431; 75 *So. Cal. L. Rev.* 121 [domestic violence torts]; 3 *U.C.L.A. L. Rev.* 371.)

The archaic doctrine was followed in *Cubbison v. Cubbison* (1946) 73 C.A.2d 437, 438, 166 P.2d 387, an action by the wife against the husband for damages resulting from an automobile accident. The absurdity of the rule, as applied in this case, appeared from plaintiff's allegation that she and her husband were *separated*. (See *Watson v. Watson* (1952) 39 C.2d 305, 307, 246 P.2d 19 [same; plaintiff, after obtaining divorce, was estopped to evade the rule by asserting invalidity of marriage]; *Paulus v. Bauder* (1951) 106 C.A.2d 589, 592, 235 P.2d 422 [following *Cubbison*; tort committed after interlocutory divorce decree].)

Some relaxations, however, were recognized in this and other jurisdictions for the following situations and types of actions:

- (a) Purported marriage void. (See 3 *U.C.L.A. L. Rev.* 372.)
- (b) Action by or against estate of spouse after death had dissolved the marriage. (See 1952 A.S. 652.)
- (c) Action for premarital tort. (See 3 *U.C.L.A. L. Rev.* 373; 31 *So. Cal. L. Rev.* 438.)
- (d) Action against husband's employer. (See *Foote v. Foote* (1959) 170 C.A.2d 435, 438, 339 P.2d 188; 1 *U.C.L.A. L. Rev.* 633.)
- (e) Action for tort to property. (See *Smith v. Stuthman* (1947) 79 C.A.2d 708, 711, 181 P.2d 123 [suggesting that action for slander of title would lie by husband against wife]; 31 *So. Cal. L. Rev.* 432; 3 *U.C.L.A. L. Rev.* 371.)

(2) *Abrogation of Immunity.* Interspousal immunity has been repudiated in California, not only for intentional torts

but for negligence as well.

(a) *Intentional torts*. The abrogation of the immunity doctrine took place in *Self v. Self* (1962) 58 C.2d 683, 26 C.R. 97, 376 P.2d 65, where defendant husband beat plaintiff wife and she sued for assault and battery. The court, reversing a summary judgment for defendant, reasoned as follows:

(1) The common law rule of interspousal immunity had a logical basis in the legal identity of the husband and wife. The married women's emancipation acts, giving the wife a legal personality, the right to own property, and to sue and be sued without joinder of the husband, removed that basis. In consequence, most American jurisdictions allowed one spouse to sue the other for a tort, intentional or negligent, to property. (58 C.2d 684, 685.)

(2) The immunity from liability for personal torts persisted, with a different rationalization: the danger of disturbing domestic peace by allowing these actions. This notion has been under constant attack. It is inconsistent with the theory allowing property actions; many states have rejected it; and it is out of line with modern thinking, which recognizes tort liability as a general rule, and gives immunity only for compelling reasons of public policy. (58 C.2d 685, 686, 689, 690.)

(3) Some support for the immunity doctrine could be found in the former statutory rule that damages for personal injury to a spouse were community property. It would have been incongruous for the wife to recover these damages from the husband when they immediately came under his control. But the 1957 amendment making these damages separate property of the injured spouse (see 11 *Summary* (10th), *Community Property*, §41) "removed the last bar to the adoption of the more modern rule in this field." (58 C.2d 691.)

(4) *Peters v. Peters* and the cases following it are overruled. (58 C.2d 691.) (See *Dale v. Dale* (1998) 66 C.A.4th 1172, 1178, 78 C.R.2d 513 [res judicata, litigation privilege, and public policy do not justify departing from general rule allowing spouses to sue for intentional torts, when tortious conduct consists of concealment of community assets in dissolution proceeding, and damages sought relate to spousal support and community assets allegedly forfeited as result of that conduct]; *Kuehn v. Kuehn* (2000) 85 C.A.4th 824, 834, 102 C.R.2d 743 [no cause of action in tort for concealment of community property; disagreeing with *Dale* on ground that action is barred by litigation privilege].)

(b) *Negligent torts*. In *Klein v. Klein* (1962) 58 C.2d 692, 26 C.R. 102, 376 P.2d 70, the complaint alleged that defendant husband invited plaintiff, his newly married wife, on a fishing trip in his pleasure boat; that, knowing she was engaged in cleaning its exterior, he negligently allowed the deck to become slippery and failed to warn her of the danger. *Held*, she was entitled to recover damages for a broken leg resulting from a fall. The court, starting with the holding in the *Self* case, saw no reason to adopt a different rule for negligence actions, despite the fact that different rules were still followed in California in suits by a child against a parent (see *infra*, §28): "[B]ecause these cases have made a distinction between the two types of tort in the parent-child relationship, there is no logical basis for extending the distinction to the husband-wife relationship." (58 C.2d 696.) And the fraud and collusion argument was answered by quoting from *Emery v. Emery* (1955) 45 C.2d 421, 289 P.2d 218, *infra*, §29. (58 C.2d 695, 696.) A strong dissenting opinion (two justices) maintained that any change in the rule should have been made only by the *Legislature*. (58 C.2d 699.)

(3) *Commentary*. The *Self* and *Klein* cases received much favorable comment. (See, e.g., 36 *So. Cal. L. Rev.* 456; 51 *Cal. L. Rev.* 448.) Other commentary on interspousal liability includes the following: Dobbs, *The Law of Torts* §279; 2 Harper, James & Gray 2d §8.10; 51 *Cal. L. Rev.* 449 [problem of source of recovery]; 79 *Harv. L. Rev.* 1650 [penetrating analysis of judicial attitude toward litigation between spouses]; 25 *Loyola L.A. L. Rev.* 1025 [The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence]; 14 *Stanf. L. Rev.* 150 [liability of partnership to partner's spouse for partner's negligent tort while engaged in partnership business]; 74 *Am.Jur.2d* (2001 ed.), *Torts* §51; 92 *A.L.R.3d* 901 [interspousal tort immunity in personal injury and wrongful death actions]; 4 *A.L.R.5th* 972 [joinder of tort action between spouses with dissolution proceeding].

West's Key Number Digest, Husband and Wife k.101 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
(3) *Commentary*. See 2 Harper, James & Gray 3d §8.10.



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I. INTRODUCTION

B. Persons or Entities Liable for Tort.

4. Liability Between Family Members.

b. Parent and Child.

5 *Witkin Sum. Cal. Law Torts* § 28

[§ 28] Parent and Child.

(1) *Former Rule of Immunity.* The public policy favoring preservation of the parental right to discipline children formerly operated to prohibit a suit by an unemancipated child against its parent or one who stood *in loco parentis* to the child. It was immaterial that the action was for a motor vehicle tort and that an insurance company handled the defense. (See *Trudell v. Leatherby* (1931) 212 C. 678, 680, 300 P. 7; *Perkins v. Robertson* (1956) 140 C.A.2d 536, 539, 295 P.2d 972; 20 Cal. L. Rev. 342; 19 Hastings L. J. 201; 6 San Diego L. Rev. 286; 30 So. Cal. L. Rev. 368; 6 U.C. Davis L. Rev. 195; 3 U.C.L.A. L. Rev. 374.)

The same rule applied to an action for wrongful death based on negligence. (*Perkins v. Robertson, supra*, 140 C.A.2d 544 [defendant stepfather sued by children for wrongful death of their mother].) And the immunity was extended to an action against the parent's employer, on the theory that the employer could recoup any loss suffered through the parent employee's negligence by bringing an action against that employee. (See *Myers v. Tranquility Irr. Dist.* (1938) 26 C.A.2d 385, 386, 79 P.2d 419; 12 So. Cal. L. Rev. 218.)

The courts recognized two major exceptions:

(a) If the child had been emancipated, i.e., freed from parental control (see 10 *Summary* (10th), *Parent and Child*, §298 et seq.), the reasons for immunity were no longer valid and the action could be brought. (See *Martinez v. Southern Pac. Co.* (1955) 45 C.2d 244, 253, 288 P.2d 868.)

(b) No immunity existed for "wilful or malicious" acts. (See *Perkins v. Robertson, supra*, 140 C.A.2d 544; 43 Harv. L. Rev. 1030; 64 Harv. L. Rev. 1208; 30 So. Cal. L. Rev. 368; 3 U.C.L.A. L. Rev. 376; 118 A.L.R.5th 513 [liability of parent for wilful or malicious act against minor child].) This exception was chiefly developed for cases of excessive chastisement or brutality. (See *Gillett v. Gillett* (1959) 168 C.A.2d 102, 104, 335 P.2d 736 [stepmother brutally beat 8-year-old plaintiff necessitating removal of spleen and one kidney]; 11 Hastings L. J. 335 [Gillett]; 64 Harv. L. Rev. 1208.) But in *Emery v. Emery* (1955) 45 C.2d 421, 429, 289 P.2d 218, *infra*, §29, it was applied to an ordinary automobile tort action, where the plaintiff child alleged wilful misconduct instead of mere negligence.

(2) *Abrogation of Immunity.* In *Gibson v. Gibson* (1971) 3 C.3d 914, 92 C.R. 288, 479 P.2d 648, the complaint

alleged the following: Plaintiff, the unemancipated minor son of defendant, was riding at night in a car driven by defendant and towing a Jeep. Defendant father negligently stopped the car on a highway, and negligently instructed plaintiff to go out and correct the position of the Jeep's wheels. While following these directions plaintiff was struck by another vehicle. Judgment for defendant on demurrer was rendered on the authority of *Trudell v. Leatherby*, supra. *Held*, reversed, and *Trudell* overruled. (3 C.3d 923.)

(a) *Origin and decline of blanket immunity rule.* Interspousal immunity (see supra, §27) appears in early common law, but parental immunity is an invention of American courts, only 80 years old. It originated in Mississippi in *Hewlett v. George* (1891) 68 Miss. 703, 9 So. 885, which was followed in a number of other states. (3 C.3d 916, 917.) Courts soon began to fashion qualifications and exceptions to the rule, such as for wilful or malicious torts, actions against the estate of a deceased parent, actions against a parent in a business capacity, and actions against a parent's employer. (3 C.3d 918.) The doctrine was further weakened by *Emery v. Emery*, supra, relating to actions between siblings (see infra, §29), and by *Self v. Self* (1962) 58 C.2d 683, 26 C.R. 97, 376 P.2d 65, and *Klein v. Klein* (1962) 58 C.2d 692, 26 C.R. 102, 376 P.2d 70, abrogating interspousal immunity (see supra, §27). These decisions eliminated two of the three grounds for immunity: disruption of family harmony and fraud or collusion between family "adversaries." (3 C.3d 918 et seq.)

(b) *Approach granting immunity for exercise of parental authority or discipline.* The remaining ground was not covered in the *Emery*, *Self*, and *Klein* cases, but was carefully examined in the Wisconsin case of *Goller v. White* (1963) 20 Wis.2d 402, 122 N.W.2d 193. That case held that immunity should exist where the alleged negligent act involves an exercise of parental authority, or ordinary parental discretion in providing care. And there is merit in this approach of rejecting the blind application of traditional negligence concepts to the unique parent-child relationship. "Obviously, a parent may exercise certain authority over a minor child which would be tortious if directed toward someone else. For example, a parent may spank a child who has misbehaved without being liable for battery, or he may temporarily order the child to stay in his room as punishment, yet not be held responsible for false imprisonment." (3 C.3d 921.)

(c) *No immunity should be provided for negligent acts.* The implication in *Goller* that, within certain aspects of the relationship, a parent may freely act negligently is unsound; the *Emery* approach of *reasonable parental discipline* should be followed. "Although *Emery* involved wilful parental misconduct, we think this reasoning is applicable to a parent's negligent exercise of his familial duties and powers. In short, although a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits. The standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role. Thus, we think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent parent have done in similar circumstances." (3 C.3d 921.)

(d) *Policy reasons for abrogating immunity.* Policy reasons exists for abrogating parental immunity. *First*, the basic legal principle is that "when there is negligence, the rule is liability, immunity is the exception." This "fundamental doctrine of compensation for injury proximately caused by the act of another governs 'in the absence of statute or compelling reasons of public policy.'" (3 C.3d 922.) "*Secondly*, we feel that we cannot overlook the widespread prevalence of liability insurance and its practical effect on intra-family suits. Although it is obvious that insurance does not create liability where none otherwise exists ... , it is unrealistic to ignore this factor in making an informed policy decision on whether to abolish parental negligence immunity." (3 C.3d 922.) (See *West Shield Investigations & Sec. Consultants v. Superior Court* (2000) 82 C.A.4th 935, 955, 98 C.R.2d 612, 3 Cal. Proc. (4th), Actions, Supp., §516A [in action by child against security firm and operator of wilderness camp for troubled youths, defendants failed to show that their conduct was not actionable as within scope of assigned parental authority; citing *Gibson*].)

Law review comment was generally favorable. (See 7 Cal. Western L. Rev. 466; 23 *Hastings L. J.* 588; 11 Santa Clara Lawyer 478; 6 *U.C. Davis L. Rev.* 199.) Other commentary on parental liability includes Dobbs, *The Law of Torts* §280; 2 Harper, James & Gray 2d §8.11; 6 *A.L.R.4th* 1066 [liability of parent for injury to unemancipated child caused by parent's negligence--modern cases]; 55 *A.L.R. 4th* 778 [liability of foster parent to foster child].

Abrogation of parental immunity has made it possible for a defendant sued for negligent injury to a child to claim contribution from the parent on the ground of negligent supervision of the child. (See *infra*, §105.)

West's Key Number Digest, Torts k.21

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Abrogation of Immunity. West Shield case:*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §558.

Commentary: See 2 Harper, James & Gray 3d §8.11; 27 J. Juvenile Law 82 [liability of noncustodial parents for torts of children].



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B. Persons or Entities Liable for Tort.

4. Liability Between Family Members.

c. Siblings.

5 *Witkin Sum. Cal. Law Torts* § 29

[§ 29] Siblings.

The decisions in other jurisdictions dealing with a claimed immunity between brother and sister uniformly deny it. (See 3 *U.C.L.A. L. Rev.* 377; 81 *A.L.R.2d* 1155 [family relationship other than that of parent and child or husband and wife].)

California took the same position in *Emery v. Emery* (1955) 45 *C.2d* 421, 289 *P.2d* 218. A father allowed his son to drive a car, and his two daughters were injured. In this action by the sisters, defendant son contended that to allow the action would "(1) disrupt the family harmony, (2) encourage fraud and collusion, (3) impair the parents' exercise of their disciplinary functions, (4) result in an uneven distribution of the family resources, and (5) encourage useless litigation since there is a possibility that the minor defendant will live to inherit the money recovered from him by the minor plaintiff." (45 *C.2d* 430.) The court rejected these arguments as speculative and unpersuasive.

(a) *Family harmony*. "An uncompensated tort is no more apt to promote or preserve peace in the family than is an action between minor brother and sister to recover damages for that tort. Furthermore, the relationship between brother and sister is not complicated by reciprocal rights and obligations of the kind that characterize the relationships of husband and wife and parent and child and that lend some support to the immunities from tort liability that have been recognized" in the past in those cases. (45 *C.2d* 430.)

(b) *Collusion*. "The argument assumes that the action is not in reality directed against the minor brother or sister of the plaintiff, but is in fact directed at his liability insurer. If this assumption is correct, maintenance of such a tort action would not disturb the family peace and harmony. ... Moreover, although defendants' statement that the existence of insurance, of which there is no evidence in the present case, 'gives no cause of action where one did not exist before' is correct, by the same token the mere possibility of fraud or collusion because of the possible existence of liability insurance does not warrant immunity from liability where it would otherwise exist. ... Courts will not immunize tortfeasors from liability in a whole class of cases because of the possibility of fraud, but will depend upon the Legislature to deal with the problem as a question of public policy." (45 *C.2d* 431.)

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B. Persons or Entities Liable for Tort.

5. Agents and Employees.

5 *Witkin Sum. Cal. Law Torts* § 30

[§ 30] Agents and Employees.

An agent or employee is always liable for that person's own torts. (C.C. 2343(3).) This is so whether the principal or employer is liable or not. (*Perkins v. Blauth* (1912) 163 C. 782, 787, 127 P. 50 [agent who commits tort acting under principal's authority is liable, even though principal thus also becomes liable]; *Holt v. Booth* (1991) 1 C.A.4th 1074, 1080, footnote 5, 2 C.R.2d 727, citing the text; see *Otanez v. Blue Skies Mobile Home Park* (1991) 1 C.A.4th 1521, 1526, 3 C.R.2d 210, 12 *Summary* (10th), *Real Property*, §615 [property managers' actions in terminating utility services to mobile home were not wrongful so as to render property managers liable under C.C. 2343(3), where statute prohibiting termination of utility services to tenants only applied to landlords]; Rest.2d, Agency §343; 3 *Summary* (10th), *Agency and Employment*, §199; on liability of public officers and employees, see *infra*, §345 et seq.)

The liability of *principals* for the torts of their agents, including under the respondeat superior doctrine, is treated in another chapter. (See 3 *Summary* (10th), *Agency and Employment*, §163 et seq.)

West's Key Number Digest, Principal and Agent k.147 et seq.

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B. Persons or Entities Liable for Tort.

6. Representatives.

5 *Witkin Sum. Cal. Law Torts* § 31

[§ 31] Representatives.

(1) *Trustee, Executor, or Administrator.* A trustee of an active trust, or an executor or administrator of an estate may be personally liable for torts of persons employed on behalf of the trust or the estate, although, if free from personal fault, the representative has a right to reimbursement from the assets of the trust or estate. (See *Johnston v. Long* (1947) 30 C.2d 54, 62, 181 P.2d 645, 3 Summary (10th), *Agency and Employment*, §173; 35 Cal. L. Rev. 586; on liability of trustee holding bare legal title, see *infra*, §1084; on liability of estate for torts of trustee, executor, or administrator, see 82 A.L.R.3d 892.)

(2) *Receiver.* In *Chiesur v. Superior Court* (1946) 76 C.A.2d 198, 172 P.2d 763, plaintiff tenant alleged that defendant, receiver in charge of an apartment house, maintained the premises in a negligent manner, causing her injury. *Held*, her action was against him only in his *official capacity*, and the trial court erred in refusing to allow her to sue him as receiver. For negligent acts within the scope of his duties as receiver, such as these, the liability is of the "receivership," the judgment is payable only from receivership funds, and the receiver is not personally liable, because his legal duties are owed not personally but as a receiver. (76 C.A.2d 200.) (See 15 *Hastings L. J.* 520; 20 A.L.R.3d 967 [liability for negligence in failing to care for or maintain property in receivership where property is lost or diminished in value]; 66 *Am.Jur.2d* (2001 ed.), *Receivers* §§295, 296.) (On trustee in bankruptcy, see 15 *Hastings L. J.* 520; 9 *Am.Jur.2d* (1999 ed.), *Bankruptcy* §258 et seq.)

In *Vitug v. Griffin* (1989) 214 C.A.3d 488, 262 C.R. 588, a wrongful death action by the heirs of persons killed in a fire in an apartment building managed by defendant receiver, it was held that an order discharging defendant as receiver was void as to plaintiffs, because they were not parties to, and had no notice of, the receivership proceeding, and their claim was not accounted for in defendant's final accounting. Under *Chiesur*, defendant may incur liability for negligence in her official capacity in performing her duties that results in injury to occupants of the property, with recovery payable out of receivership funds. Plaintiffs should be permitted to maintain their action against defendant even if all receivership funds were disbursed and the receivership terminated. It is axiomatic that liability is not synonymous with ability to pay. Also, plaintiffs may be able to recover from the surety on defendant's performance bond, and defendant may have incurred personal liability for disbursing the receivership funds without notice to plaintiffs. (214 C.A.3d 497.) (For further discussion of the case, see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §§448, 449.)

West's Key Number Digest, Torts k.21

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Receiver*.

Vitug case:

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§452, 453.



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7. Corporations.

5 *Witkin Sum. Cal. Law Torts* § 32

[§ 32] Corporations.

A private corporation is ordinarily liable under the doctrine of respondeat superior (see 3 *Summary* (10th), *Agency and Employment*, §165 et seq.) for torts of its agents or employees committed while they are acting within the scope of their employment. It is immaterial that the particular act was not authorized or ratified, or that it was ultra vires. (*Maynard v. Fireman's Fund Ins. Co.* (1867) 34 C. 48, 56; *Chamberlain v. Southern Calif. Edison Co.* (1914) 167 C. 500, 506, 140 P. 25; *Hiroshima v. Pacific Gas & Elec. Co.* (1936) 18 C.A.2d 24, 31, 63 P.2d 340; *Kelly v. General Tel. Co.* (1982) 136 C.A.3d 278, 286, 186 C.R. 184, quoting the text; *Von Beltz v. Stuntman* (1989) 207 C.A.3d 1467, 1488, 255 C.R. 755, citing the text; see 69 *So. Cal. L. Rev.* 1679 [Corporate Tort Liability and the Problem of Overcompliance]; 18B *Am.Jur.2d* (2004 ed.), *Corporations* §§1831, 1832; 55 *A.L.R.2d* 828 [liability of insurance company for libel or slander by its agents or employees]; 39 *A.L.R.4th* 556 [liability of professional corporation of lawyers or its members for another member's malpractice or other tort]; BAJI, No. 13.30 [corporation acts through its officers and employees]; on effect of ultra vires acts, see 9 *Summary* (10th), *Corporations*, §120 et seq.; on liability and immunities of public corporations, see *infra*, §222 et seq.)

A private corporation may be held liable for exemplary damages where its agents, in committing a wrong, are guilty of malice or oppression. (*Lowe v. Yolo County Consol. Water Co.* (1910) 157 C. 503, 510, 108 P. 297; see 13 *So. Cal. L. Rev.* 140; on corporate liability for exemplary damages generally, see *infra*, §1583.)

West's Key Number Digest, Corporations k.488 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

Respondeat superior liability: See *Persson v. Smart Inventions* (2005) 125 C.A.4th 1141, 1167, 23 C.R.3d 335, Supp., *infra*, §830, citing the text [even if president and part owner of corporation was acting in individual capacity while negotiating buyout agreement with other owner, corporation was liable for president's fraud in concealing material facts where he was clearly acting for it by time agreement was executed].



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8. Corporate Directors and Officers.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 33

[§ 33] In General.

Directors and officers of a corporation are liable for torts committed by them on its behalf. (*O'Connell v. Union Drilling & Petroleum Co.* (1932) 121 C.A. 302, 308, 8 P.2d 867; see *Michaelis v. Benavides* (1998) 61 C.A.4th 681, 684, 71 C.R.2d 776 [where corporate president personally bid for cement work on patio job, personally made construction decisions for entire project, and personally made decision to use cheaper material, and his brother provided manual labor, he could be held personally liable because he breached duty owed to plaintiffs, not just duty owed to corporation]; *PMC v. Kadisha* (2000) 78 C.A.4th 1368, 1378, 93 C.R.2d 663 [triable issue of fact whether investors who later became corporate directors participated in or consented to wrongful conduct; corporation allegedly formed by misappropriation of plaintiffs' trade secrets by former employees]; 29 A.L.R.3d 660 [liability of corporate directors or officers for negligence in permitting conversion of property of third persons by corporation]; 90 A.L.R.3d 916 [personal liability of officer or director for negligence of subordinate corporate employee]; 72 A.L.R.4th 492 [liability of director, officer, or employee for tortious interference with corporation's contract with another]; 29 Proof of Facts 3d 53 [tort liability of corporate officer for failure to provide computer disaster recovery measures]; on liability and immunities of employees of public corporations, see *infra*, §345 et seq.)

However, directors or officers do not incur personal liability for corporate torts merely because of their official position unless they *participate* in the wrong or *authorize or direct* that it be done. (*United States Liab. Ins. Co. v. Haidinger-Hayes* (1970) 1 C.3d 586, 595, 83 C.R. 418, 463 P.2d 770; *Wyatt v. Union Mortg. Co.* (1979) 24 C.3d 773, 785, 157 C.R. 392, 598 P.2d 45; on liabilities of directors and officers generally, see 9 *Summary* (10th), *Corporations*, §90 et seq.)

West's Key Number Digest, Corporations k.342

SUPPLEMENT: [This section is current through the latest supplement]

Necessity that directors or officers direct or participate in tort: In *Reynolds v. Bement* (2005) 36 C.4th 1075, 32 C.R.3d 483, 116 P.3d 1162, a former corporate employee sued its directors and officers, as well as the corporation itself, to recover overtime wages that were unpaid in violation of wage laws. *Held*, the directors and officers were not individually liable in tort.

(a) *Frances T. v. Village Green Owners Assn.* (1986) 42 C.3d 490, 229 C.R. 456, 723 P.2d 573, text, §39, recognized that corporate directors may be jointly liable with the corporation and may be joined as defendants, provided that they personally directed or participated in the tortious conduct. Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise. Director status therefore neither immunizes a person from individual liability nor subjects him or her to vicarious liability. (36 C.4th 1089.)

(b) Plaintiff cannot state a cause of action under *Frances T.* The simple failure to comply with statutory overtime requirements does not qualify as tortious conduct. (36 C.4th 1090.)

(c) Plaintiff's boilerplate allegations of conspiracy do not alter the situation. Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage. Moreover, there can be no liability if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was only acting as the agent or employee of the party who did have that duty. (36 C.4th 1090.)

(d) Nor has plaintiff alleged that the individual defendants here misappropriated to themselves, as individuals for their individual advantage, the unpaid wages allegedly owed. (36 C.4th 1090.)

See *Jones v. Gregory* (2006) 137 C.A.4th 798, 803, 40 C.R.3d 581 [CEO was not liable for unpaid wages of corporate employees merely because of his operational control of corporation; Labor Code did not alter common law rule against personal liability by corporate agents]; *Bradstreet v. Wong* (2008) 161 C.A.4th 1440, 1449, 75 C.R.3d 253 [corporate shareholders, officers, and managing agents were not liable as "employers" for unpaid wages and accrued vacation in Labor Commissioner's enforcement action under *Lab.C. 1193.6*; citing *Reynolds* and *Jones*].



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8. Corporate Directors and Officers.

b. Limitation of Liability in Articles.

5 *Witkin Sum. Cal. Law Torts* § 34

[§ 34] Limitation of Liability in Articles.

(1) *Director's Liability.* Articles of incorporation may include "[p]rovisions eliminating or limiting the personal liability of a director for monetary damages in an action brought by or in the right of the corporation for breach of a director's duties to the corporation and its shareholders," as set forth in *Corp.C. 309* (obligation to perform duties in good faith and with due care). (*Corp.C. 204(a)(10)*; see *19 Pacific L. J. 497*.) (On director's right to indemnification, see *9 Summary* (10th), *Corporations*, §81 et seq.)

This authorization is subject to specified exceptions. The provisions may not eliminate or limit a director's liability for any of the following (*Corp.C. 204(a)(10)*):

- (a) Acts or omissions that involve intentional misconduct or a knowing and culpable violation of the law.
- (b) Acts or omissions that the director believes to be contrary to the best interests of the corporation or its shareholders or that involve the absence of good faith.
- (c) Transactions from which the director derived an improper personal benefit.
- (d) Acts or omissions that show a reckless disregard for the director's duty in circumstances where the director was or should have been aware of a risk of serious injury to the corporation or shareholders.
- (e) Acts or omissions that constitute an unexcused pattern of inattention amounting to an abdication of duty.
- (f) Liability under *Corp.C. 310* (corporate contracts or transactions in which director has material financial interest).
- (g) Liability under *Corp.C. 316* (improper distributions, loans, and guarantees).

(2) *Officer's Liability.* No provision may eliminate or limit an officer's liability for any act or omission as an officer, notwithstanding that the officer is a director or that the officer's actions, if negligent or improper, were ratified by the directors. (*Corp.C. 204(a)(10)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Volunteer Directors or Officers of Nonprofit Corporations.

5 *Witkin Sum. Cal. Law Torts* § 35

[§ 35] Volunteer Directors or Officers of Nonprofit Corporations.

(1) *In General.* Under specified circumstances, volunteer directors and volunteer executive officers of public benefit corporations (*Corp.C.* 5239), mutual benefit corporations (*Corp.C.* 7231.5), and religious corporations (*Corp.C.* 9247) are exempt from tort liability. (See *19 Pacific L. J.* 499; on immunity of uncompensated directors and officers of nonprofit medical associations, see *infra*, §36; on immunity of uncompensated directors and officers of nonprofit corporations or associations managing common interest developments, see *infra*, §41.)

A pleading may not include a negligence cause of action against an uncompensated officer or director of a nonprofit corporation in the absence of a court order based on a finding that the party filing the pleading has "established evidence that substantiates the claim." (*C.C.P.* 425.15, 9 *Summary* (10th), *Corporations*, §299.)

(2) *Public Benefit and Religious Corporations.* A volunteer director or officer of a public benefit or religious corporation is not personally liable to third parties for monetary damages caused by the director's or officer's negligent acts or omissions in the performance of his or her duties, if (a) the act or omission was within the scope of those duties, performed in good faith, and not reckless, wanton, intentional, or grossly negligent, and (b) the resulting damages are covered by liability insurance issued to either the corporation or the director or officer. If there is no insurance, there is still no liability if the board of directors and the director or officer made reasonable efforts in good faith to obtain it. (*Corp.C.* 5239(a), 9247(a); see *Corp.C.* 5239(h) [public benefit corporation with annual budget of less than \$ 25,000 and exempt from federal taxation satisfies condition of making reasonable efforts in good faith to obtain liability insurance if (a) it makes at least one inquiry per year to purchase a general liability policy with coverage of at least \$ 500,000; and (b) insurance was not available at a cost of less than 5% of corporation's annual budget for previous year]; on public benefit corporations generally, see 9 *Summary* (10th), *Corporations*, §251 et seq.; on religious corporations generally, see 9 *Summary* (10th), *Corporations*, §382 et seq.)

Liability is not eliminated or limited in actions or proceedings brought by the Attorney General, or as provided by statutes governing self-dealing transactions (see *Corp.C.* 5233, 9243) or actions for which a director is liable to the corporation (see *Corp.C.* 5237, 9245). (*Corp.C.* 5239(e), 9247(e).)

Nothing in *Corp.C.* 5239 or 9247 creates a duty of care or basis of liability. (*Corp.C.* 5239(f), 9247(f).) On the other

hand, neither statute limits the corporation's liability for damages caused by the acts or omissions of a volunteer director or officer. (*Corp.C. 5239(d), 9247(d).*)

(3) *Mutual Benefit Corporations.* Except as provided in *Corp.C. 7233* (contracts between corporation and director) and *Corp.C. 7236* (acts making directors liable to corporation), a volunteer director or officer of a mutual benefit corporation is not subject to monetary damages or a damages action based on an alleged failure to discharge his or her duties, if the duties are performed in good faith, in a manner believed to be in the corporation's best interests, and with such care as an ordinarily prudent person would use under similar circumstances. (*Corp.C. 7231.5(a)*; on mutual benefit corporations generally, see 9 *Summary* (10th), *Corporations*, §358 et seq.)

Corp.C. 7231.5 is applicable only to trade, professional, and labor organizations that operate exclusively for fraternal, educational, and other nonprofit purposes, and under Section 501(c) of the United States Internal Revenue Code. (*Corp.C. 7231.5(d).*)

The statute does not limit a director's duty, under *Corp.C. 7231*, to act in good faith in the corporation's best interests. (*Corp.C. 7231.5(e).*)

(4) *Definitions.*

(a) To "volunteer" means to render services without compensation. And "compensation" refers to remuneration by salary, fee, or other consideration for services rendered, but does not include payment of per diem, mileage, or other reimbursement expenses. (*Corp.C. 5239(b), 7231.5(b), 9247(b).*)

(b) "Executive officer" refers to the president, vice president, secretary, treasurer, or other individual serving in like capacity who assists in establishing corporate policy. (*Corp.C. 5239(c), 7231.5(c), 9247(c).*)

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9. Unincorporated Associations.

a. Judicial Recognition of Liability.

5 *Witkin Sum. Cal. Law Torts* § 36

[§ 36] Judicial Recognition of Liability.

The tort liability of labor unions was established in California by two Supreme Court decisions.

In *Marshall v. International Longshoremen's & Warehousemen's Union, Local 6, Dist. 1* (1962) 57 C.2d 781, 22 C.R. 211, 371 P.2d 987, defendant union's employee negligently maintained a parking lot for its members, adjacent to its meeting hall. Plaintiff union member was injured in a fall over an obstruction there. In this action for damages against the union and the officers, summary judgment was granted on the basis of two traditional theories: (a) that the union, like a partnership, is not a legal entity but an aggregate of individuals; (b) that each member is both a principal and an agent as to all other members, and, under the doctrine of respondeat superior, the negligence of the common agent is imputed to the coprincipal and bars recovery against the other principals. *Held*, reversed.

(a) The modern law has recognized the separate entity of the union for various substantive and procedural purposes; e.g., a member may sue the union for damages for breach of contract. (57 C.2d 784.)

(b) The doctrine of respondeat superior is not applied to make one union member liable as a principal for the wrongful acts of others where the defendant member does not personally participate in or authorize the acts. (57 C.2d 785.)

(c) The decision of the court was that (1) "a member of a labor union is entitled to sue the union for negligent acts which he neither participated in nor authorized," and (2) "any judgment that he may recover against the union can be satisfied from the funds and property of the union alone." (57 C.2d 787.) But an important caution was added: "We limit our holding to labor unions only, leaving to future development the rules to be applied in the case of other types of unincorporated associations." (57 C.2d 787, footnote 1.)

In *Inglis v. Operating Engineers Local Union No. 12* (1962) 58 C.2d 269, 23 C.R. 403, 373 P.2d 467, plaintiff member sued the union for damages for assault and battery inflicted on him by officers and members during a union meeting. *Held*, the *Marshall* case was controlling and plaintiff was entitled to maintain the action; i.e., the same rule governs liability for negligent and intentional torts. (58 C.2d 270.) (See *Coats v. Construction & General Laborers Local No. 185* (1971) 15 C.A.3d 908, 914, 915, 93 C.R. 639 [union's liability is similar to that of corporation]; 50 Cal. L.

Rev. 909; 76 Harv. L. Rev. 1087, 1092; 36 So. Cal. L. Rev. 445; 34 A.L.R.3d 884 [union's liability for refusal or failure to process employee grievance]; *100 A.L.R.3d 546* [union's liability to member for defamation]; *14 A.L.R.4th 1161* [union's liability for injury or death allegedly resulting from unsafe working conditions]; *85 A.L.R.4th 979* [liability, under statute, of labor union or its membership for torts committed in connection with primary labor activities].)

Until 1967, apart from the labor union cases, there was little California law on the tort liability of unincorporated associations. (See *42 Cal. L. Rev. 825*.)

SUPPLEMENT: [This section is current through the latest supplement]



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9. Unincorporated Associations.

b. Statutory Liability.

5 *Witkin Sum. Cal. Law Torts* § 37

[§ 37] Statutory Liability.

(1) *In General.* In 1967, legislation proposed by the California Law Revision Commission was enacted to give unincorporated associations entity status and make them liable, whether in contract or tort, to the same extent as natural persons. (See former Corp.C. 24000 et seq.) These provisions were substantially revised and reorganized in 2004. (See Corp.C. 18000 et seq., 18605 et seq.)

(a) *Broad definition.* An "unincorporated association" is defined as "an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not." (Corp.C. 18035(a).)

(b) *Liability of association.* "Except as otherwise provided by law, an unincorporated association is liable for its act or omission," or that of a director, officer, agent, or employee acting within the scope of the office, agency or employment, "to the same extent as if the association were a natural person." (Corp.C. 18250.) The Law Revision Commission's Comment to former Corp.C. 24001 states that these principles are "probably declarative of the prior California law insofar as the tort liability of unincorporated associations is concerned," citing *Marshall v. International Longshoremen's & Warehousemen's Union, Local 6, Dist. 1* (1962) 57 C.2d 781, 22 C.R. 211, 371 P.2d 987, and *Inglis v. Operating Engineers Local Union* (1962) 58 C.2d 269, 23 C.R. 403, 373 P.2d 467, supra, §36. (On liability of unincorporated associations generally, see 6 Am.Jur.2d (1999 ed.), *Associations and Clubs* §47 et seq.; 74 Am.Jur.2d (2001 ed.), *Torts* §50; 15 A.L.R.3d 1013 [liability of social club]; 40 A.L.R.4th 106 [liability of religious association]; 268 A.L.R.4th 228 [liability of college, university, fraternity, or sorority for injury or death caused by hazing]; on liability of condominium associations and directors, see infra, §§38, 39; on capacity of unincorporated associations to sue and be sued, see 4 Cal. Proc. (4th), *Pleading*, §81 et seq.)

It has been held that, because unincorporated associations are now generally recognized as separate legal entities, a member of an association may maintain a tort action against it. (*White v. Cox* (1971) 17 C.A.3d 824, 828, 95 C.R. 259, infra, §38.)

(2) *Liability of Members, Directors, Officers, or Employees.* An unincorporated association member is liable for torts where the member personally participates in, authorizes, or ratifies the wrongful act. Liability for the acts of other

members or third parties is based on the agency doctrine of respondeat superior. (See *Steuer v. Phelps* (1974) 41 C.A.3d 468, 472, 116 C.R. 61 [vehicle entrusted to one member who drove it negligently, causing injury to plaintiffs]; 6 *Am.Jur.2d* (1999 ed.), *Associations and Clubs* §49; 62 A.L.R.3d 1165 [liability of member for tort of nonmember agent or employee]; on respondeat superior, see 3 *Summary* (10th), *Agency and Employment*, §165 et seq.)

Generally, officers, committees, agents, or others who act for an association are liable, like members, for torts that they personally participate in, authorize, or ratify, or for which they are liable on the basis of respondeat superior. (See *Florence v. Helms* (1902) 136 C. 613, 615, 69 P. 429 [unlawful conversion of association property]; *Frances T. v. Village Green Owners Assn.* (1986) 42 C.3d 490, 503, 229 C.R. 456, 723 P.2d 573, *infra*, §39 [negligence]; 6 *Am.Jur.2d* (1999 ed.), *Associations and Clubs* §49; cf. *Cody F. v. Falletti* (2001) 92 C.A.4th 1232, 1244, 112 C.R.2d 593 [directors of subdivision or other property owners association have no vicarious liability for torts of association].) Tort liability of uncompensated officers and directors of nonprofit medical associations (see *Corp.C.* 24001.5) and of nonprofit common interest developments (C.C. 1365.7; *infra*, §41) is limited in prescribed circumstances. (On liability of directors and officers of nonprofit corporations, see *supra*, §35.)

A member, director, officer, or agent of a nonprofit association is not liable for a liability of the association solely by reason of being a member, director, officer, or agent. (*Corp.C.* 18605.) However, a member or person in control of the association may be subject to liability "under common law principles governing alter ego liability of shareholders of a corporation, taking into account the differences between a nonprofit association and a corporation." (*Corp.C.* 18630.)

(3) *Enforcement of Judgment.* A money judgment against an unincorporated association may be enforced only against its property. (*Corp.C.* 18260.)

A judgment creditor of a member, director, officer, or agent of an unincorporated association may not levy execution against his or her assets to satisfy a judgment based on a claim against the association unless a judgment based on the same claim has been obtained against the association and any of the following conditions is satisfied:

(a) A writ of execution on the judgment against the association has been returned unsatisfied in whole or in part. (*Corp.C.* 18270(a)(1).)

(b) The association is a debtor in bankruptcy. (*Corp.C.* 18270(a)(2).)

(c) The member, director, officer, or agent has agreed that the creditor need not exhaust the assets of the association. (*Corp.C.* 18270(a)(3).)

(d) A court grants permission to the judgment creditor to levy execution against the assets of a member, director, officer, or agent based on a finding that the association's assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of the assets of the unincorporated association is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers. (*Corp.C.* 18270(a)(3).)

West's Key Number Digest, Associations k.16; Labor Relations k.751 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

(b) *Liability of association.* See 6 *Am.Jur.2d* (2008 ed.), *Associations and Clubs* §45 et seq. *Capacity of unincorporated associations:*

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §93 et seq.

(2) *Liability of Members, Directors, Officers, or Employees.* See 6 *Am.Jur.2d* (2008 ed.), *Associations and Clubs* §47.



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c. Condominiums and Other Common Interest Developments.

1. In General.

5 Witkin Sum. Cal. Law Torts § 38

[§ 38] In General.

In *White v. Cox* (1971) 17 C.A.3d 824, 95 C.R. 259, plaintiff was a unit owner in a condominium project and a member of defendant condominium association that maintained its common areas. He sued the association for damages for personal injuries allegedly suffered when he tripped and fell over a negligently maintained water sprinkler in the common areas. Judgment for defendant was based on the traditional theory of negligence of one member imputed to every other (see *supra*, §36). *Held*, reversed.

(a) Under the modern decisions and California statutes, an unincorporated association is an entity subject to tort liability. (17 C.A.3d 828; see *supra*, §36.)

(b) Under the tests set forth in *Marshall v. International Longshoremen's & Warehousemen's Union, Local 6, Dist. 1* (1962) 57 C.2d 781, 22 C.R. 211, 371 P.2d 987, *supra*, §36, this rule applies to a condominium association:

(1) It has an existence separate from its members; otherwise the unit owners would be tenants in common of an estate in real property and exposed to the consequences of that status. "We think the concept of separateness in the condominium project carries over to any management body or association formed to handle the common affairs of the project, and that both the condominium project and the condominium association must be considered separate legal entities from its unit owners and association members." (17 C.A.3d 829.)

(2) The members do not retain direct control over the operations of the association. Under the statutory scheme, an administrator conducts the common affairs and maintains the common area; that administrator is appointed by and responsible to a board of governors elected by unit owners, each with one vote. Plaintiff was one of 60, and had no more control over the operations than a stockholder in a corporation operating such a project. (17 C.A.3d 830.)

(3) There is no substantial distinction between a condominium and any other unincorporated association. The condominium is therefore liable in tort to its members; it may be sued in its condominium name under former C.C.P. 388 (now C.C.P. 369.5; see 4 Cal. Proc. (4th), *Pleading*, §84) and served in the manner of an unincorporated association (see 3 Cal. Proc. (4th), *Actions*, §971); and individual unit owners need not be named or served as parties in

a negligence action against the condominium and the condominium association. (17 C.A.3d 830.) (See 8 Cal. Western L. Rev. 536; 10 Cal. Western L. Rev. 361; 15A Am.Jur.2d (2000 ed.), *Condominiums and Cooperative Apartments* §57; 45 A.L.R.3d 1171 [liability of condominium association for injury allegedly caused by condition of premises].)

SUPPLEMENT: [This section is current through the latest supplement]
C.C.P. 369.5:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §98.

Service on unincorporated associations:

Cross-References: 3 Cal. Proc. (5th), *Actions*, §1054.



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CHAPTER IX - Torts

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I. INTRODUCTION

B. Persons or Entities Liable for Tort.

9. Unincorporated Associations.

c. Condominiums and Other Common Interest Developments.

2. Liability for Third-Party Criminal Conduct.

5 *Witkin Sum. Cal. Law Torts* § 39

[§ 39] Liability for Third-Party Criminal Conduct.

In *Frances T. v. Village Green Owners Assn.* (1986) 42 C.3d 490, 229 C.R. 456, 723 P.2d 573, the question was "whether a condominium owners association and the individual members of its board of directors may be held liable for injuries to a unit owner caused by third-party criminal conduct." (42 C.3d 495.) Defendant association was a nonprofit corporation composed of owners of individual condominium units. It was managed by a board of directors operating under the project's declaration of covenants, conditions, and restrictions (CC&Rs). After plaintiff's unit was burglarized as part of a wave of similar crimes in the project, she and other owners requested the board to install more exterior lighting. When the board failed to act, she installed her own additional lighting. The board informed her that her action violated the CC&Rs and ordered removal of the lights, leaving the exterior of her unit in darkness. Some months later, plaintiff was raped and robbed, and brought suit against the association and individual members of the board for negligence. *Held*, judgment of dismissal reversed.

(a) *Association's liability.* A condominium association should be held to the same standard of care as a landlord.

(1) Defendants point out that the association is governed by its self-imposed restrictions (the CC&Rs), and is not a landlord in the traditional sense but a nonprofit association of homeowners. Nevertheless it is, for all practical purposes, the project's "landlord." "And traditional tort principles impose on landlords, no less than on homeowner associations that function as a landlord in maintaining the common areas of a large condominium complex, a duty to exercise due care for the residents' safety in those areas under their control." (42 C.3d 499.)

(2) *White v. Cox* (1971) 17 C.A.3d 824, 95 C.R. 259, *supra*, §38, supports the conclusion that a condominium association may properly be held to a landlord's standard of care as to the common areas under its control. (42 C.3d 500.) And judicial notice may be taken of the growth of condominiums and their management. "While in some projects the maintenance of common areas is truly cooperative, in most of the large projects control of the common areas is delegated or controlled by ruling bodies that do not exercise the members' collective will on a one-person, one-vote basis." (42 C.3d 500, footnote 9.)

(3) Landlord-tenant cases involving facts similar to those of this case (i.e., criminal acts of strangers) have reached

different results on liability. (See *infra*, §§1142, 1143.) However, in *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, *infra*, §1134, the court rejected the "rigidified foreseeability concept" and adopted the view that foreseeability does not require prior identical or even similar events. "The facts alleged here, if proven, demonstrate defendant's awareness of the need for additional lighting and of the fact that lighting could aid in deterring criminal conduct, especially break-ins. ... [T]he Association was on notice that crimes were being committed against the Project's residents. ... It is not necessary, as defendant appears to imply, that the prior crimes be *identical* to the ones perpetrated against the plaintiff. ... Defendant need not have foreseen the *precise* injury to plaintiff so long as the possibility of this type of harm was foreseeable." (42 C.3d 503.)

(b) *Directors' liability.* The complaint also alleged that the individual directors on the association's board breached a duty of care they owed by ordering plaintiff to remove the additional lighting and by failing to repair the hazardous lighting condition within a reasonable period of time.

(1) Corporate directors cannot be held vicariously liable for the corporation's torts in which they do not participate; their liability, if any, stems from their own tortious conduct, not from their status as directors or officers. (42 C.3d 503.) However, directors are liable if they personally directed or participated in the tortious conduct, regardless of whether they acted on behalf of the corporation and regardless of whether the corporation is also liable. (42 C.3d 504.) "[L]ike any other employee, directors individually owe a duty of care, independent of the corporate entity's own duty, to refrain from acting in a manner that creates an unreasonable risk of personal injury to third parties. The reason for this rule is that otherwise, a director could inflict injuries upon others and then escape liability behind the shield of his or her representative character, even though the corporation might be insolvent or irresponsible." (42 C.3d 505.)

(2) In order to maintain a tort claim against a director in his or her personal capacity, the plaintiff must first show that the director specifically authorized, directed or participated in the tortious conduct, or that although the director knew or reasonably should have known that some hazardous condition or activity under his or her control could injure the plaintiff, he or she negligently failed to take or order appropriate action to avoid the harm. (42 C.3d 508.) The plaintiff must also allege and prove that an ordinarily prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances. (42 C.3d 509.) Plaintiff pleaded facts to support two theories of negligence under the standard stated above:

(a) Plaintiff alleged that the directors took affirmative action that made the break-in more likely when they ordered her to immediately disconnect the additional lighting. (42 C.3d 510.)

(b) Plaintiff alleged that the individual directors, with actual knowledge of the risk of recurring criminal activity, failed to take action to repair the hazardous condition within a reasonable period of time. Directors and officers have frequently been held liable for negligent nonfeasance where they knew that a condition or instrumentality under their control posed an unreasonable risk of injury, and failed to take action to prevent it. (42 C.3d 510.)

(3) Plaintiff's allegation that each of the directors participated in the tortious activity was sufficient to withstand a demurrer. But she will have to prove that each director acted negligently as an individual, and a director may present evidence showing that he opposed or did not participate in the alleged tortious conduct. (42 C.3d 511.)

One justice concurred and two dissented. (42 C.3d 519.) (See *Cody F. v. Falletti* (2001) 92 C.A.4th 1232, 1244, 112 C.R.2d 593 [directors of property owners association have no vicarious liability for torts of association; citing *Francis T.*; 19 *Pacific L. J.* 377; 5 Proof of Facts 3d 715 [association's liability for failure to protect residents and guests from criminal attack]; 59 A.L.R.4th 489 [condominium association's liability to unit owner for injuries caused by third person's criminal conduct]; on immunity of volunteer directors and officers of nonprofit common interest developments, see *infra*, §41.)

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5 *Witkin Sum. Cal. Law Torts* § 40

[§ 40] Liability of Individual Owners.

In *Davert v. Larson* (1985) 163 C.A.3d 407, 209 C.R. 445, plaintiff passengers were injured when their automobile collided with a horse, which had escaped from the common areas of a condominium project. They sued defendant owner of an individual unit. The trial court granted defendant's motion for summary judgment on the ground that exclusive control of the property had been delegated to the owners' association. *Held*, reversed.

(a) The owner or occupier of land owes a duty to third persons of ordinary care in the management of his or her property, and the owners of individual units in a condominium development are tenants in common of the common areas. (163 C.A.3d 411.) As such, they may not be immunized from liability to third parties for tortious conduct by delegating management and control of the property to a separate legal entity. (163 C.A.3d 412.)

(b) "It is clear that considerations of public policy require that any departure from the common law of liability of individual owners of property in common cannot operate to the substantial detriment of third parties Since California law does not require insurance to protect third parties in the case of common area torts, relieving individual owners in common of liability would eliminate any motivation on the part of *any* party to exercise due care in the management and control of commonly owned property and could leave third parties with no remedy at law." (163 C.A.3d 412.) (See *Kaye v. Mount La Jolla Homeowners Assn.* (1988) 204 C.A.3d 1476, 1491, 252 C.R. 67, 4 Cal. Proc. (4th), *Pleading*, §250 [unnecessary to determine whether, as general rule, individual owners can be vicariously liable for torts of association's board of directors, where association's insurance was sufficient to satisfy all claims]; *Ruoff v. Harbor Creek Community Assn.* (1992) 10 C.A.4th 1624, 1629, 13 C.R. 2d 755, *infra*, §41 [following *Davert*]; 10 Cal. Western L. Rev. 359; 39 A.L.R.4th 98 [personal liability of owner of condominium unit for injuries resulting from condition of common areas]; on ownership rights and liabilities respecting condominium common areas, see 12 *Summary* (10th), *Real Property*, §117.)

SUPPLEMENT: [This section is current through the latest supplement]
Kaye case:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §271.



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5 *Witkin Sum. Cal. Law Torts* § 41

[§ 41] Volunteer Directors or Officers of Nonprofit Developments.

(1) *Governing Statute.* Volunteer officers and directors of nonprofit associations or corporations managing common interest developments have a limited immunity. (C.C. 1365.7; see 24 *Pacific L. J.* 1053; on common interest developments, see 12 *Summary* (10th), *Real Property*, §85 et seq.; on immunity of volunteer directors and officers of nonprofit corporations generally, see *supra*, §35.)

An officer or director is immune from liability for any tortious act or omission if both of the following conditions apply:

(a) The act or omission was performed in good faith within the scope of the officer's or director's association duties and was not wilful, wanton, or grossly negligent. (C.C. 1365.7(a)(1)-(a)(3).) For these purposes, the scope of the officer's or director's association duties includes, but is not limited to, any decision on whether (1) to conduct an investigation of the common interest development for latent deficiencies prior to the expiration of the applicable statute of limitations or (2) to commence a civil action against the builder for defects in design or construction. (C.C. 1365.7(f).)

(b) The association had insurance covering the general liability of the association and the individual liability of the officers and directors of at least \$ 500,000 (if the development consists of 100 or fewer separate interests) or \$ 1 million (if the development consists of more than 100 separate interests). (C.C. 1365.7(a)(4).)

The immunity extends only to an officer or director who is a volunteer and who resides in a common interest development that is exclusively residential. (C.C. 1365.7(a); on what constitutes volunteer status, see C.C. 1365.7(b), (c).) Also, the officer or director must reside in the development either as a tenant or an owner of no more than two separate interests. (C.C. 1365.7(e).)

(2) *Unit Owners Not Immune.* In *Ruoff v. Harbor Creek Community Assn.* (1992) 10 C.A.4th 1624, 13 C.R.2d 755, plaintiff was seriously injured when she slipped and fell on a stairway in the common area of a condominium complex. Defendants, who were individual owners of condominium units, were the tenants in common of the common areas and

had delegated control and management of these areas to their homeowners association. Defendants argued that under these circumstances they were immune under C.C. 1365.7. *Held*, summary judgment for defendants reversed.

(a) Defendants' argument that C.C. 1365.7 was intended to immunize *them* from liability for tortious acts or omissions in the management and control of the commonly held property is without merit. This construction would, in effect, delete the language of the statute limiting its applicability to specified volunteer *officers or directors* of the association. (10 C.A.4th 1629.)

(b) Defendants argued that *Davert v. Larson* (1985) 163 C.A.3d 407, 209 C.R. 445, supra, §40, by noting that California law did not require insurance covering common area torts, held that the reason for imposing liability on the individual owners evaporates if control of the common areas is delegated to a separate legal entity with sufficient liability insurance to protect injured parties. Defendants reasoned that because C.C. 1365.7 was enacted after *Davert* and requires homeowners associations to maintain a certain minimum level of liability insurance, the Legislature was reacting to *Davert* by eliminating common law rules regarding individual owner liability. This convoluted argument fails for two reasons:

(1) It should not be presumed that a statute was intended to overthrow long-established principles of law unless that intention clearly appears either by express declaration or necessary implication. No such declaration or implication is present here. (10 C.A.4th 1630.)

(2) Defendants' reliance on *Davert* for negative inferences is off the mark. "The clear holding of *Davert* is that tenants in common who delegate control and management of the property remain jointly and severally liable for tortious acts or omissions causing injury to third persons. We do not deem the court's observation about the wisdom of retaining landowners' liability where ownership is shared to be judicial advice that a tenant in common can buy his or her way out of liability by purchasing insurance for the property manager." (10 C.A.4th 1630.)

(c) Defendants further argued that granting immunity to them would not constitute a hardship on plaintiff because the homeowners association had liability insurance of \$ 1 million and was authorized to assess its members for pro rata contribution if a judgment exceeded policy limits. However, in view of unanswered questions concerning the effect of sales by individual owners and the extent of coverage under their individual insurance policies, this power to assess might prove to be a wholly illusory remedy. (10 C.A.4th 1631, footnote 9.)

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10. Charities.

a. Liability to Persons Other Than Beneficiaries.

5 *Witkin Sum. Cal. Law Torts* § 42

[§ 42] Liability to Persons Other Than Beneficiaries.

In some states, charitable institutions operated primarily for the public benefit are normally exempt from liability for torts of their agents or servants. Various theories are relied on, the principal one being that the property of the charity is a trust fund for certain purposes, and that the charitable objects should not be hampered by the wrongful acts of those chosen to carry them out. (See Dobbs, *The Law of Torts* §282; 5 Harper, James & Gray 2d §29.17; 100 *Harv. L. Rev.* 1382 [criticism of new forms of indirect immunity]; 15 *Am.Jur.2d* (2000 ed.), *Charities* §183; 5B *Am.Jur.* P.P. Forms (2004 ed.), *Charities*, §26 et seq.; 125 *A.L.R.4th* 517 [tort immunity of nongovernmental charities].)

This view is rejected in California, and charitable organizations are liable to third persons under the usual rules of agency. (*Phoenix Assur. Co. of London v. Salvation Army* (1927) 83 *C.A.* 455, 461, 256 *P.* 1106; see *Edwards v. Hollywood Canteen* (1946) 27 *C.2d* 802, 812, 167 *P.2d* 729 ["by the great weight of authority, and clearly the rule in California, persons who are not recipients of the charity, such as employees and strangers, may maintain an action based on negligence"]; *Rest.2d, Torts* §895E; Dobbs, *The Law of Torts* §282; 5 Harper, James & Gray 2d §29.17; 15 *Am.Jur.2d* (2000 ed.), *Charities* §184.)

It is, of course, a necessary basis of recovery to plead and prove that the agent acted within the scope of employment. (*O'Moore v. Driscoll* (1933) 135 *C.A.* 770, 775, 28 *P.2d* 438; see 5 *Cal. Proc.* (4th), *Pleading*, §873 et seq. [pleading tort liability for acts of others].)

West's Key Number Digest, *Charities* k.45(2)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §29.17.

Pleading liability for torts of others:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §919 et seq.



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b. Liability to Beneficiaries.

5 *Witkin Sum. Cal. Law Torts* § 43

[§ 43] Liability to Beneficiaries.

(1) *Former Law.* Under the so-called American majority rule, formerly followed in California, where a person accepts the benefits of a charity, e.g., becomes a patient in a charitable hospital, that person exempts the benefactor from liability for the acts of its agents, provided those agents have been selected with due care. (See *Thomas v. German General Benevolent Soc.* (1914) 168 C. 183, 188, 141 P. 1186; *Stonaker v. Big Sisters Hosp.* (1931) 116 C.A. 375, 379, 2 P.2d 520; *Hallinan v. Prindle* (1936) 17 C.A.2d 656, 668, 62 P.2d 1075; 6 Cal. L. Rev. 307; 2 So. Cal. L. Rev. 490; 8 So. Cal. L. Rev. 360; 15 Am.Jur.2d (2000 ed.), *Charities* §183.) This immunity is sometimes said to rest on "implied contract," but other theories are also advanced in its support. (See *Shane v. Hospital of the Good Samaritan* (1934) 2 C.A.2d 334, 336, 37 P.2d 1066.)

The doctrine made it necessary to draw peculiar distinctions; e.g., a corporation that deducted money from salaries of employees to maintain a hospital was held not a charity (*Bowman v. Southern Pac. Co.* (1921) 55 C.A. 734, 737, 204 P. 403; 10 Cal. L. Rev. 343), but a charitable hospital that operated without profit was held exempt even though the particular patient injured paid the regular rate charged for paying patients. (*Burdell v. St. Luke's Hosp.* (1918) 37 C.A. 310, 312, 173 P. 1008; *Stonaker v. Big Sisters Hosp.*, *supra*; *Hallinan v. Prindle*, *supra*; cf. *England v. Hospital of the Good Samaritan* (1936) 16 C.A.2d 640, 643, 61 P.2d 48 [paying patient without knowledge of claim of charitable exemption might recover].)

(2) *Present Rule of Liability.* In *Silva v. Providence Hosp. of Oakland* (1939) 14 C.2d 762, 776, 97 P.2d 798, the theories supporting the exemption doctrine were reexamined and rejected, and the court adopted what it termed the "modern view" that the charity is liable for injuries suffered by a paying patient. (See *England v. Hospital of the Good Samaritan* (1939) 14 C.2d 791, 795, 97 P.2d 813 [following *Silva*]; 28 Cal. L. Rev. 530.)

The remaining question, whether liability would also be imposed in favor of a *nonpaying* beneficiary, was decided in the affirmative in *Malloy v. Fong* (1951) 37 C.2d 356, 232 P.2d 241, where plaintiff, a 13-year-old boy, was injured while attending a Bible school. The court declared that there was no logical justification for immunity in the one case and not in the other, and quoted from a leading federal decision as follows: "Retention for the nonpaying patient is the least defensible and most unfortunate of the distinction's refinements. He, least of all, is able to bear the burden. More than all others, he has no choice. He is the last person the donor would wish to go without indemnity. With everyone

else protected, the additional burden of protecting him cannot break the trust." (37 C.2d 365.) (See *Rest.2d, Trusts* §402(2) [abandoning immunity rule]; 39 *Cal. L. Rev.* 455; 74 *Harv. L. Rev.* 614 [abrogation of immunity as extending to religious organizations]; 3 *Hastings L. J.* 81; for discussions of the weakening of the immunity rule in other jurisdictions, see Dobbs, *The Law of Torts* §282; 5 Harper, James & Gray 2d §29.17; 5 *U.C.L.A. L. Rev.* 128.)

(3) *Effect of Legislation.* The issue may be affected by statute. Thus, a food facility that donates food fit for human consumption at the time of donation to a nonprofit charitable organization or food bank is not liable for injury due to the food, unless the injury results from negligence or a wilful act in preparing or handling the food. (C.C. 1714.25(a).) Similarly, a nonprofit charitable organization or food bank that, in good faith and without charge, receives and distributes food fit for consumption when distributed is not liable for injury due to the food, unless the injury is the direct result of the organization's negligence, recklessness, or intentional misconduct. (C.C. 1714.25(b).)

West's Key Number Digest, Charities k.45(2)

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C. Liability of Multiple Tortfeasors.

1. Types of Joint Torts.

a. Acts in Concert: Joint Tortfeasors.

1. Who Are Joint Tortfeasors.

5 *Witkin Sum. Cal. Law Torts* § 44

[§ 44] Who Are Joint Tortfeasors.

The term "joint tortfeasors" has been narrowly defined to apply only to those who act *in concert* to accomplish some common purpose or plan, and whose concerted acts cause the harm. (See *Key v. Caldwell* (1940) 39 C.A.2d 698, 701, 104 P.2d 87; *Gray v. Sutherland* (1954) 124 C.A.2d 280, 289, 268 P.2d 754.) However, the term has also been used more expansively to include those who order, direct, or permit others to do the act and those who give assistance or encouragement. (*Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 605, 163 C.R. 132, 607 P.2d 924, *infra*, §1486.) (See generally 3 Harper, James & Gray 2d §10.1; 25 Cal. L. Rev. 413, 429; 24 So. Cal. L. Rev. 466; 74 Am.Jur.2d (2001 ed.), *Torts* §57 et seq.; 68 Am.Jur. Trials 503 [hidden and multiple defendant tort litigation].)

In *Orser v. George* (1967) 252 C.A.2d 660, 60 C.R. 708, defendant hunters were practicing by shooting with pistols and rifles at cans, frogs, and mudhens. Decedent, working on a farm machine in the line of fire, was killed by a pistol bullet. *Held*, summary judgment in favor of some defendants reversed.

(a) Mere knowledge of another person's acts does not amount to "concerted action," for one normally owes no affirmative duty to interfere. To establish liability, it must be shown that the defendant is proceeding tortiously--with intent or negligence. (252 C.A.2d 667.)

(b) On this theory, a triable issue of fact arose as to two of the hunters, Vierra and Jacobson, who were firing the pistol which, investigation showed, contained the fatal bullet. An issue also arose as to a third hunter, James, who had a rifle, and with both of the others, was firing at a mudhen. As to James, the evidence might show that he knew Vierra's conduct was a breach of duty to decedent, and that he was giving Vierra substantial assistance or encouragement by his own tortious conduct of a similar nature. (252 C.A.2d 668.)

(c) None of the other defendants could be held liable. They were not shooting, and there was no evidence that they knew the other three were shooting in the direction of decedent's work. (252 C.A.2d 669.)

West's Key Number Digest, Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Harper, James & Gray 3d §10.1.

Assistance or encouragement: In *Cadlo v. Owens-Illinois (2004)* 125 C.A.4th 513, 23 C.R.3d 1, plaintiff, injured by asbestos exposure, sued a company that had sold its asbestos business to another company. The successor company made the product to which the plaintiff was first exposed. Plaintiff alleged misrepresentations about the product's safety. The trial court sustained demurrers to various tort causes of action against the predecessor company, including one for "concert of action." *Held*, affirmed. "Concert of action" is a theory of group liability that may be used to impose liability on a person who did not personally cause the harm to the plaintiff, "but whose 'advice or encouragement to act operates as a moral support to a tortfeasor[,] and if the act encouraged is known to be tortious[,] it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.'" (125 C.A.4th 521, quoting *Rest.2d, Torts §486, Comment d.*) Here, however, plaintiff did not allege that defendant continued to encourage and advise the successor company to make false representations about the product after the sale. (125 C.A.4th 522.)

In *Casey v. United States Bank Nat. Assn. (2005)* 127 C.A.4th 1138, 26 C.R.3d 401, the trustee of a bankrupt corporation sued defendant banks for aiding and abetting corporate fiduciaries in looting the corporation. The trial court sustained defendants' demurrers. *Held*, affirmed.

(a) California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. Liability may be imposed on one who aids and abets the commission of an intentional tort if the person (1) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act, or (2) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. (127 C.A.4th 1144.)

(b) Even ordinary business transactions that a bank performs for a customer can satisfy the substantial assistance element of an aiding and abetting claim. However, knowledge is the crucial element. Liability for aiding and abetting requires proof that the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. (127 C.A.4th 1145.)

(c) Here, though the complaint provides ample details of defendants' improper *conduct* in their business dealings with the fiduciaries, it fails to establish that they had *actual knowledge* of the primary violation in which they purportedly participated, i.e., the fiduciaries' misappropriation of the bankrupt's funds. (127 C.A.4th 1148, 1152.)

In *Austin B. v. Escondido Union School Dist. (2007)* 149 C.A.4th 860, 57 C.R.3d 454, Supp., *infra*, §425, plaintiffs sued their special education instructor for battery and joined various supervisory employees, alleging that the supervisory employees aided and abetted the instructor in the alleged tort. The evidence against them amounted at most to a showing that they had knowledge of the instructor's allegedly tortious conduct and failed to take action against it. The trial court granted these other employees a nonsuit. *Held*, affirmed. Under the common law rule, adopted in California, liability may be imposed on one who aids and abets the commission of an intentional tort only if he or she either (a) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act, or (b) gives substantial assistance to the other in accomplishing a tortious result and his or her own conduct, separately considered, constitutes a breach of duty to the person acted upon. (149 C.A.4th 879, citing *Casey*.) However, mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. As a general rule, one owes no duty to control the conduct of another. More specifically, a supervisor is not liable to third parties for the acts of his or her subordinates. (149 C.A.4th 879.)



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a. Acts in Concert: Joint Tortfeasors.

2. Civil Conspiracy.

aa. Significance of Charge.

5 Witkin Sum. Cal. Law Torts § 45

[§ 45] Significance of Charge.

(1) *In General.* Occasionally, in actions against joint tortfeasors, the defendants are charged with "conspiracy," and the cause of action is sometimes described as one for "civil conspiracy." (See, e.g., *Neblett v. Elliott* (1941) 46 C.A.2d 294, 302, 115 P.2d 872.) Strictly speaking, however, there is no separate tort of civil conspiracy. (*Kidron v. Movie Acquisition Corp.* (1995) 40 C.A.4th 1571, 1581, 47 C.R.2d 752, *infra*, §47; *Kesmodel v. Rand* (2004) 119 C.A.4th 1128, 1140, 15 C.R.3d 118.) Thus, there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results from that act (see *infra*, §146).

Hence, where the complaint charges a conspiracy and the commission of a wrongful act, the only significance of the conspiracy charge is that each member may be held responsible as a joint tortfeasor, regardless of whether that member directly participated in the act. (*Revert v. Hesse* (1920) 184 C. 295, 301, 193 P. 943; *Bowman v. Wohlke* (1913) 166 C. 121, 124, 135 P. 37; *Orloff v. Metropolitan Trust Co.* (1941) 17 C.2d 484, 488, 110 P.2d 396; *Kinney v. Postal Tel.-Cable Co.* (1932) 123 C.A. 70, 74, 10 P.2d 1043; *Burckhardt v. Woods* (1932) 124 C.A. 345, 351, 12 P.2d 482; *Schwartz v. Schwartz* (1938) 25 C.A.2d 303, 304, 77 P.2d 260; *Wallace v. Kerr* (1940) 42 C.A.2d 182, 185, 108 P.2d 754; *California v. Day* (1946) 76 C.A.2d 536, 550, 173 P.2d 399; *Abbot Kinney Co. v. Harrah* (1948) 84 C.A.2d 728, 733, 191 P.2d 761; *Lynch v. Rheinschild* (1948) 86 C.A.2d 672, 676, 195 P.2d 448; *Biggs v. Tourtas* (1949) 92 C.A.2d 316, 322, 206 P.2d 871; *Clark v. Leshner* (1951) 106 C.A.2d 403, 409, 235 P.2d 71; *Vargas v. Giacosa* (1953) 121 C.A.2d 521, 524, 263 P.2d 840; *Greenwood v. Mooradian* (1955) 137 C.A.2d 532, 538, 290 P.2d 955; *Prince v. Harting* (1960) 177 C.A.2d 720, 728, 2 C.R. 545; *Wetherston v. Growers Farm Labor Assn.* (1969) 275 C.A.2d 168, 175, 79 C.R. 543, citing the text; *Mayes v. Sturdy Northern Sales* (1979) 91 C.A.3d 69, 76, 154 C.R. 43; *Barney v. Aetna Cas. & Surety Co.* (1986) 185 C.A.3d 966, 983, 230 C.R. 215; *Saunders v. Superior Court* (1994) 27 C.A.4th 832, 845, 33 C.R.2d 438, *infra*, §742; see *Younan v. Equifax* (1980) 111 C.A.3d 498, 508, 511, 169 C.R. 478 [action lies against agents and employees of insurers who join insurer in conspiracy to defraud insured, even though agents and employees are not parties to insurance contract]; *Sprague v. Equifax* (1985) 166 C.A.3d 1012, 1044, 213 C.R. 69 [analyzing and answering criticisms of instructions]; *Sheppard v. Freeman* (1998) 67 C.A.4th 339, 349, 79 C.R.2d 13, 3 Summary (10th), *Agency and Employment*, §199 [airline pilot terminated for failing captain upgrade test did not have to show that

coworkers each published libelous statements, because liability for libel can be based on conspiracy theory]; 8 *Loyola L.A. L. Rev.* 302 [Civil Conspiracy and Interference With Contractual Relations]; 12 *Stanf. L. Rev.* 476; 16 *Am. Jur.2d* (1998 ed.), *Conspiracy* §50 et seq.; BAJI, No. 13.85 et seq. [conspirators]; CACI, No. 3600 et seq. [same]; 5 *Cal. Proc.* (4th), *Pleading*, §875 et seq.)

(2) *Conspirators*. An alleged coconspirator must be legally capable of committing the tort charged. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C.4th 503, 511, 28 C.R.2d 475, 869 P.2d 454, *infra*, §739; *Kasparian v. Los Angeles* (1995) 38 C.A.4th 242, 45 C.R.2d 90, *infra*, §746.) He or she must owe a duty to the plaintiff recognized by law and be potentially subject to liability for breach of that duty. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, *supra*.) For example, a person who is not an employer, and hence cannot commit the tort of wrongful discharge in violation of public policy, cannot be liable for conspiracy to wrongfully discharge. (*Khajavi v. Feather River Anesthesia Med. Group* (2000) 84 C.A.4th 32, 54, 100 C.R.2d 627.)

Under the "agent's immunity rule," agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage. (*Black v. Bank of America* (1994) 30 C.A.4th 1, 4, 35 C.R.2d 725.)

In *Everest Investors 8 v. Whitehall Real Estate Ltd. Partnership XI* (2002) 100 C.A.4th 1102, 123 C.R.2d 297, the question on appeal was whether "a nonfiduciary defendant can be liable for conspiring with a fiduciary defendant to breach the fiduciary duty to the plaintiff." Plaintiffs, limited partners in an investment group, brought an action against defendant, a company that purchased partnerships in the group from the general partners at a price allegedly below fair market value. Plaintiffs based their action on a theory of civil conspiracy among the general partners and defendant, and alleged as the underlying torts breach of fiduciary duty, unfair business practices, and constructive fraud. *Held*, judgment for defendant on demurrer affirmed. Defendant cannot be liable for the general partners' breach of their fiduciary duty, because defendant, which was neither an agent nor an employee of the general partners and which owed no fiduciary duty to plaintiffs, is legally incapable of committing the tort underlying the claim of conspiracy (breach of fiduciary duty). Conspiracy presupposes that the conspirator is legally capable of committing the underlying tort or, in other words, that he or she owes a duty to the plaintiff recognized by law and is potentially subject to liability for breach of that duty. Because the only duty allegedly breached was a fiduciary duty owed by the general partners but not by defendant, defendant cannot be held accountable to plaintiffs for breach of a fiduciary duty on a conspiracy theory. Because only a fiduciary can be liable for constructive fraud, plaintiffs' constructive fraud claim cannot be pursued against defendant. And because plaintiffs' unfair business practices cause of action is based entirely on the breach of fiduciary duty allegations and an unfair business practices claim requires proof that another law has been violated, the unfair business practices claim cannot be pursued. (100 C.A.4th 1107.)

(3) *Inference of Unlawful Purpose*. The requisite concurrence in the tortious scheme with knowledge of its unlawful purpose may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances. (*Wyatt v. Union Mortg. Co.* (1979) 24 C.3d 773, 784, 785, 157 C.R. 392, 598 P.2d 45, 3 *Cal. Proc.* (4th), *Actions*, §516.)

(4) *Statute of Limitations*. In *Wyatt*, an action based on fraud and breach of fiduciary duty, the statute of limitations had run on each of the wrongful acts of misrepresentation and concealment. However, the allegation and proof of a civil conspiracy brought in the "last overt act" doctrine--that the statute does not begin to run until the culminating act in the conspiracy. In this case, the last overt act was collection of the final payment on a loan shortly before the trial. (24 C.3d 787, following *Schessler v. Keck* (1954) 125 C.A.2d 827, 271 P.2d 588, 3 *Cal. Proc.* (4th), *Actions*, §516.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. In *Richard B. LeVine v. Higashi* (2005) 131 C.A.4th 566, 32 C.R.3d 244, citing the text, an arbitration ruling had been entered finding in favor of continuing partners on a former partner's torts claims involving the allocation of partnership profits. *Held*, the ruling barred the former partner's subsequent conspiracy cause of action against the partnership's accountants. Liability on a conspiracy theory is derivative, like that under the doctrine of respondeat

superior. Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing the tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. Here, because no tort was committed by the continuing partners, there could be no conspiracy liability of the accountants. (131 C.A.4th 575.)

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §921 et seq.(2) *Conspirators*. See *Reynolds v. Bement* (2005) 36 C.4th 1075, 1090, 32 C.R.3d 483, 116 P.3d 1162, Supp., supra, §33 [no conspiracy liability results where alleged conspirators, though participants in agreement underlying injury, are not personally bound by duty violated by wrongdoing but only act as agents or employees of party with that duty]; *Brown v. Professional Community Management* (2005) 127 C.A.4th 532, 540, 25 C.R.3d 617 [because property management company owed no independent duty to homeowner under statute limiting fees homeowners association could assess, it could not be liable for conspiring with association to charge excessive fees; conspiracy is not independent tort, and allegations of conspiracy do not create duty where none exists].

Agent's immunity rule: See 2 A.L.R.6th 387 [construction and application of doctrine that corporation acting through its agents cannot conspire with itself].(3) *Inference of Unlawful Purpose*.

Wyatt case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §557.

(4) *Statute of Limitations*.

Schessler case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §557.



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2. Civil Conspiracy.

bb. Wrongful Act.

5 Witkin Sum. Cal. Law Torts § 46

[§ 46] Wrongful Act.

(1) *Nature of Requirement.* A conspiracy is not actionable unless a *wrongful act* was committed with resulting damage. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C.4th 503, 511, 28 C.R.2d 475, 869 P.2d 454, *infra*, §739; *Wise v. Southern Pac. Co.* (1963) 223 C.A.2d 50, 64, 35 C.R. 652, *infra*, §739; *Rosefield v. Rosefield* (1963) 221 C.A.2d 431, 435, 34 C.R. 479, *infra*, §729; *Widdows v. Koch* (1968) 263 C.A.2d 228, 234, 69 C.R. 464, *infra*, §354; *Kerr v. Rose* (1990) 216 C.A.3d 1551, 1564, 265 C.R. 597, quoting the text; see BAJI, No. 13.85 [definition of conspiracy].)

(2) *Illustrations.* The requirement that a wrongful act be shown has been an issue in a number of cases. (See *Gensburg v. Miller* (1994) 31 C.A.4th 512, 525, 37 C.R.2d 97, *infra*, §181 [no liability for conspiracy where underlying wrongs are subject to privilege]; *Lyons v. Security Pac. Nat. Bank* (1995) 40 C.A.4th 1001, 1018, 48 C.R.2d 174 [no liability for conspiracy where object in view is lawful and lawful means are employed, even though damage results and defendant acts with malicious motives]; *Monastra v. Konica Business Machines, U.S.A.* (1996) 43 C.A.4th 1628, 1644, 51 C.R.2d 528 [defendants were jointly liable for conspiracy to hinder and delay plaintiff's efforts to satisfy judgment against judgment debtor by making fraudulent transfer of debtor's assets]; *Weinbaum v. Goldfarb, Whitman & Cohen* (1996) 46 C.A.4th 1310, 1314, 54 C.R.2d 462 [same].)

In *Agnew v. Parks* (1959) 172 C.A.2d 756, 343 P.2d 118, plaintiff brought a malpractice suit against Dr. L. It was tried three times, the third ending in a judgment for plaintiff. In her present suit for conspiracy to obstruct the original action, she alleged that certain defendants, Los Angeles County Medical Association and doctors, conspired to prevent her from getting an impartial medical witness to testify for her; that at the request of the court the association's malpractice committee recommended defendant Dr. P; that Dr. P represented himself to be impartial and denied knowing Dr. L, but in fact knew him and had worked with him; and that Dr. P testified against plaintiff. *Held*, judgment of nonsuit affirmed.

(a) Allegations that defendant medical association threatened to expel doctors from membership and cause their malpractice insurance policies to be cancelled by their carriers if they testified for plaintiff did not give rise to a cause of

action. A doctor who was not previously engaged by a patient has no legal obligation to accept employment to render services as a medical expert; and because the doctors asked by her had a legal right to refuse to testify for her, it was not an actionable wrong for the association to seek to control them in this regard. (172 C.A.2d 764.)

(b) Allegations of a conspiracy to obstruct the orderly prosecution of her malpractice action by false representations causing the court to appoint Dr. P as a disinterested expert and causing him to testify falsely, and concealment of certain X-ray evidence, did not state a cause of action. If this was a charge of perjury, subornation of perjury, or concealment of evidence, no civil right could be predicated on the mere violation of a criminal statute (except defamation and malicious prosecution from false testimony). (172 C.A.2d 765.)

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cc. Knowledge and Intent.

5 Witkin Sum. Cal. Law Torts § 47

[§ 47] Knowledge and Intent.

Conspiracy is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C.4th 503, 510, 28 C.R.2d 475, 869 P.2d 454, *infra*, §739.) Thus, there must be a showing of knowledge of the planned tort and intent to aid in its commission. (*Wyatt v. Union Mortg. Co.* (1979) 24 C.3d 773, 784, 785, 157 C.R. 392, 598 P.2d 45, 3 Cal. Proc. (4th), *Actions*, §516.)

In *Kidron v. Movie Acquisition Corp.* (1995) 40 C.A.4th 1571, 47 C.R.2d 752, plaintiff, the originator of a television series, sued his former partners for conspiring to oust him from the project and the distributor who, after plaintiff's ouster, had entered into a distribution contract with the partners. *Held*, nonsuit in favor of the distributor affirmed.

(a) Conspiring defendants must have actual knowledge of the planned tort and concur in the tortious scheme with knowledge of its unlawful purpose. In other words, knowledge of the planned tort must be combined with intent to aid in its commission. (40 C.A.4th 1582.) There is no evidence here that defendant distributor satisfied either element at the time that the unlawful action was completed (5 months before it joined the project). Indeed, the evidence established that defendant distributor was deliberately kept uninformed of the dispute between plaintiff and the former partners in order to induce it to sign the contract. (40 C.A.4th 1583.)

(b) Similarly, there is a lack of evidence establishing that defendant distributor, after it had entered into the distribution contract, had knowledge of the plan to defraud plaintiff. And, even if it had knowledge of the partners' scheme to defraud plaintiff, there is no evidence suggesting that defendant distributor, who had no motive for harming plaintiff, intentionally joined them in this plan. Instead, the evidence showed that defendant distributor had no plan other than to distribute the television series according to its contract, the performance of which is no evidence that it was a coconspirator. (40 C.A.4th 1585.)

(c) Defendant distributor could not join in a conspiracy that had already been completed. *De Vries v. Brumback*

(1960) 53 C.2d 643, 2 C.R. 764, 349 P.2d 532, *infra*, §48, in which the conspiracy was still ongoing when defendant joined the scheme, does not suggest otherwise. (40 C.A.4th 1595.)

SUPPLEMENT: [This section is current through the latest supplement]

Wyatt case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §557.



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5 Witkin Sum. Cal. Law Torts § 48

[§ 48] Joining Existing Conspiracy.

In *De Vries v. Brumback* (1960) 53 C.2d 643, 2 C.R. 764, 349 P.2d 532, M and B conspired to and did rob a jewelry store of plaintiff's assignor. Then they met with defendant, who joined the conspiracy to dispose of the property. Some of the stolen property was recovered; in this action for conversion defendant was held liable for the value of the unrecovered part--\$ 21,947.13. On appeal, he contended that, because he was not a member of the prero robbery conspiracy, his tort was a new conversion when the stolen goods were delivered to him, and, because all that he had was recovered from him, he could not be liable in damages. His contention, based on the rule governing criminal conspiracy (see *People v. Weiss* (1958) 50 C.2d 535, 327 P.2d 527, 1 Cal. Crim. Law (3d), *Elements*, §96), was rejected.

"There is a clear distinction in the law of conspiracy as applied to criminal as differentiated from civil cases. ... The gist of the *crime* of conspiracy is the *agreement* to commit the unlawful act ... , while the gist of the *tort* is the *damage* resulting to the plaintiff from an overt act or acts done pursuant to the common design." (53 C.2d 649.) Hence, in tort a conspirator is a joint tortfeasor liable for all damages irrespective of whether he or she was a direct actor. (53 C.2d 650.) (See BAJI, No. 13.93 [joining conspiracy after formation]; CACI, No. 3601 [same].)

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b. Independent Acts: Concurrent and Successive Tortfeasors.

5 Witkin Sum. Cal. Law Torts § 49

[§ 49] Independent Acts: Concurrent and Successive Tortfeasors.

Where the *independent* acts of several persons contribute to the injury, the wrongdoers are not joint tortfeasors, and are more properly characterized as "concurrent" tortfeasors or "successive" tortfeasors. (See *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 586, 146 C.R. 182, 578 P.2d 899, *infra*, §1357 [summary of law on multiple tortfeasors]; *Rest.3d, Torts: Apportionment of Liability* §17; Dobbs, *The Law of Torts* §385; 3 Harper, James & Gray 2d §10.1; 74 *Am.Jur.2d* (2001 ed.), *Torts* §58 et seq.)

(1) *Concurrent Acts*. The wrongful acts may actually be simultaneous or concurrent, as where two negligent automobile drivers collide, injuring a third person. (See *infra*, §1193; 19 *Cal. L. Rev.* 630; 25 *Cal. L. Rev.* 413, 432; 68 *Harv. L. Rev.* 697; 23 *So. Cal. L. Rev.* 412; cf. *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1, *infra*, §§67, 1194 [identification of culpable defendant].)

(2) *Successive Acts*. The acts may, however, be successive in point of time, one occurring before the other. (See *Shea v. San Bernardino* (1936) 7 C.2d 688, 693, 62 P.2d 365 [defendant railway company negligently paved right of way; defendant city accepted work and negligently failed to remedy or to warn of defects]; *Ash v. Mortensen* (1944) 24 C.2d 654, 657, 150 P.2d 876 [negligent motorist injured plaintiff; doctor aggravated injuries by negligent treatment]; *Holahan v. McGrew* (1931) 111 C.A. 443, 446, 295 P. 1059 [property owner and contractor negligently constructed canopy with protruding timbers; bus driver negligently struck it]; *Alexander v. Hammarberg* (1951) 103 C.A.2d 872, 879, 230 P.2d 399 [building contractor negligently placed house foundations on loose fill; architect negligently failed to supervise construction]; 19 *Cal. L. Rev.* 630; 25 *Cal. L. Rev.* 413, 434; 9 *A.L.R.5th* 746 [joint and several liability of physicians whose independent negligence in treatment of patient causes indivisible injury].)

SUPPLEMENT: [This section is current through the latest supplement]

See 3 Harper, James & Gray 3d §10.1.(2) *Successive Acts*. See *Henry v. Superior Court* (2008) 160 C.A.4th 440, 450, 454, 72 C.R.3d 808 [original tortfeasor is jointly liable to injured party for aggravation of injury caused by negligent medical treatment; concept is one of legal causation, not precise nature of resulting damages].



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2. Apportionment of Damages.

a. Common Law Background: Joint and Several Liability.

5 Witkin Sum. Cal. Law Torts § 50

[§ 50] Common Law Background: Joint and Several Liability.

(1) *General Rule of Joint and Several Liability.* Before the adoption of Proposition 51 (*infra*, §52), contributory wrongdoers, whether joint tortfeasors or concurrent or successive tortfeasors, were ordinarily jointly and severally liable for the entire damage. (*Shea v. San Bernardino* (1936) 7 C.2d 688, 693, 62 P.2d 365; *Holahan v. McGrew* (1931) 111 C.A. 443, 446, 295 P. 1059; *Gray v. Sutherland* (1954) 124 C.A.2d 280, 289, 268 P.2d 754; see *Rest.2d, Torts* §§875, 879; *Dobbs, The Law of Torts* §385; 74 *Am.Jur.2d* (2001 ed.), *Torts* §66 et seq.)

Hence, when they were joined in an action, it was improper to apportion compensatory damages among them; judgment for the full amount would be rendered against each. (*Hallinan v. Prindle* (1934) 220 C. 46, 55, 29 P.2d 202; *Puckett v. Sullivan* (1961) 190 C.A.2d 489, 496, 12 C.R. 55; *Apodaca v. Haworth* (1962) 206 C.A.2d 209, 213, 23 C.R. 461, citing the text; *Dauenhauer v. Sullivan* (1963) 215 C.A.2d 231, 235, 30 C.R. 71; see *Oldham v. Aetna Ins. Co.* (1936) 17 C.A.2d 144, 146, 61 P.2d 503 [verdict of \$ 6,282 against one joint tortfeasor and \$ 4,282 against another was invalid for attempted apportionment]; *Aitken v. White* (1949) 93 C.A.2d 134, 142, 208 P.2d 788 [stating rule, but holding that improper verdict can be corrected by trial court in ruling on motion for new trial]; 41 *So. Cal. L. Rev.* 728; 100 *A.L.R.2d* 16 [damages following successive impacts by motor vehicles]; 46 *A.L.R.3d* 801 [propriety and effect of jury's apportionment of damages as between tortfeasors jointly and severally liable].) (On statutory right to contribution, see *infra*, §105.)

Application of the common law joint and several liability doctrine prior to Proposition 51 "produced some situations in which defendants who bore only a small share of fault for an accident could be left with the obligation to pay all or a large share of the plaintiff's damages if other more culpable tortfeasors were insolvent." (*Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 1198, 246 C.R. 629, 753 P.2d 585, *infra*, §§52, 65.)

(2) *Exceptions.* In a few situations, apportionment was permitted before adoption of Proposition 51 (and still is). The most common is where independent acts of different defendants create a *nuisance*. The damages will be assessed against each tortfeasor according to the tortfeasor's contribution to them. (*Conner v. Grosso* (1953) 41 C.2d 229, 232, 259 P.2d 435; see *California Orange Co. v. Riverside Portland Cement Co.* (1920) 50 C.A. 522, 524, 195 P. 694 [dust from cement mills of two different companies formed deposits in plaintiff's orchard]; *Griffith v. Kerrigan* (1952) 109 C.A.2d 637, 639, 241 P.2d 296 [water seepage from defendants' land and other sources raised water table and injured

plaintiff's orchard]; *Carlotto Ltd. v. Ventura* (1975) 47 C.A.3d 931, 937, 938, 121 C.R. 171 [recognizing right to apportionment, but holding that trial judge's apportionment formula was incorrect]; 3 Harper, James & Gray 2d §10.1; 19 Cal. L. Rev. 630; 25 Cal. L. Rev. 413, 434; 38 Cal. L. Rev. 383; on remedies for nuisance generally, see 13 *Summary* (10th), *Equity*, §153 et seq.)

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(2) *Exceptions*. See 3 Harper, James & Gray 3d §10.1.



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b. Restatement.

5 *Witkin Sum. Cal. Law Torts* § 51

[§ 51] Restatement.

Rest.3d, Torts: Apportionment of Liability states the following propositions:

(1) When some persons are jointly and severally liable to an injured person, the injured person "may sue for and recover the full amount of recoverable damages from any jointly and severally liable person." (*Rest.3d, Torts: Apportionment of Liability* §10.)

(2) When, on the other hand, a person is severally liable to an injured person for an indivisible injury, the injured person "may recover only the severally liable person's comparative-responsibility share of the injured person's damages." (*Rest.3d, Torts: Apportionment of Liability* §11; on Restatement rule of comparative responsibility generally, see *infra*, §1328.)

(3) Joint and several liability is imposed on intentional tortfeasors (*Rest.3d, Torts: Apportionment of Liability* §12) and on tortfeasors acting in concert (*Rest.3d, Torts: Apportionment of Liability* §15).

(4) A person who negligently fails to protect the plaintiff from the specific risk of an intentional tort is liable for both the person's share of comparative responsibility and the intentional tortfeasor's share. (See *Rest.3d, Torts: Apportionment of Liability* §14, *infra*, §§1129, 1146.)

(5) Liability similar to joint and several liability is imposed on vicariously liable parties. (See *Rest.3d, Torts: Apportionment of Liability* §13, *infra*, §63.)

However, the Restatement leaves to local law when other tortfeasors should be held jointly and severally liable. It expressly takes no position on whether, or in what form, joint and several liability, several liability, or some combination of the two should be employed, noting that there is no majority rule on this question. (See *Rest.3d, Torts: Apportionment of Liability* §17 and Comment a.) The Restatement provides five different alternative systems of joint and several, several, and hybrid liability.

Track A reflects a pure joint and several liability system. (See *Rest.3d, Torts: Apportionment of Liability* §A18 et seq.)

Track B sets forth a pure several liability system. (See Rest.3d, Torts: Apportionment of Liability §B18 et seq.)

Track C sets forth a hybrid system in which insolvent parties' shares are reallocated to solvent parties.(See Rest.3d, Torts: Apportionment of Liability §C18 et seq.)

Track D sets forth a hybrid system in which defendants whose comparative responsibility exceeds a threshold are jointly and severally liable, while those below the threshold are severally liable. (See Rest.3d, Torts: Apportionment of Liability §D18 et seq.)

Track E sets forth a hybrid system in which defendants may be jointly and severally liable for economic damages and severally liable for noneconomic damages. (See Rest.3d, Torts: Apportionment of Liability §E18 et seq.)

Track E is similar, with respect to these tortfeasors, to the California statute (*infra*, §52 et seq.). When the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, each defendant is jointly and severally liable for the economic damages portion of the recoverable damages and, generally, is severally liable for that defendant's comparative share of the noneconomic damages. (Rest.3d, Torts: Apportionment of Damages §E18.) However, there is joint and several liability for both types of damages in the case of intentional tortfeasors and tortfeasors acting in concert. (Rest.3d, Torts: Apportionment of Damages §§12, 15, E18.) When the only damages recoverable are economic damages, responsibility is assigned only to the parties and any settling tortfeasors, but when the plaintiff seeks recovery of both economic and noneconomic damages, other identified persons may be assigned a percentage of comparative responsibility. (Rest.3d, Torts: Apportionment of Damages §E19.)

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c. Modification of Joint and Several Liability (Proposition 51).

1. Nature, Purpose, and Validity.

5 *Witkin Sum. Cal. Law Torts* § 52

[§ 52] Nature, Purpose, and Validity.

(1) *Adoption and General Effect.* The Fair Responsibility Act of 1986 (C.C. 1431 et seq.), popularly known as Proposition 51 or the Deep Pocket Initiative, was adopted by the voters on June 3, 1986, to modify the long-established rule of joint and several liability of multiple tortfeasors (see *supra*, §50). (See Dobbs, *The Law of Torts* §§389, 390; 39 Cal. Western L. Rev. 69 [misapplication of Fair Responsibility Act]; 21 U.C. Davis L. Rev. 1141 [defense of traditional joint and several liability rule]; 22 U.C. Davis L. Rev. 1125, 1147, 1161 [criticism and defense of recent legislative changes in traditional joint and several liability rule]; 44 U.C.L.A. L. Rev. 213 [judicial apportionment of liability under Proposition 51].)

The statute retains joint and several liability for *economic damages*, but makes liability for *noneconomic damages* several. (C.C. 1431, 1431.2; on several liability for noneconomic damages, see *infra*, §53.) It does not alter the law of immunity. (C.C. 1431.3.)

The statute may be amended or repealed only by a vote of the electors or a two-thirds vote of the Legislature. (C.C. 1431.4.)

Similar statutes have been implemented in other states. (See *Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 1199, 246 C.R. 629, 753 P.2d 585, *infra*, §65.)

(2) *Findings and Declaration of Purpose.* C.C. 1431.1 states:

"The legal doctrine of joint and several liability, also known as 'the deep pocket rule,' has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers." (C.C. 1431.1(a).)

"Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault.

Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People--taxpayers and consumers alike--ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums." (C.C. 1431.1(b).)

"Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums." (C.C. 1431.1(c).)

"Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable." (C.C. 1431.1.)

"The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses." (C.C. 1431.1.)

(3) *Validity*. In *Evangelatos v. Superior Court*, *supra*, the court rejected two constitutional challenges to the Act: (a) that it is too vague to satisfy the due process requirements of either the state or federal Constitutions, and (b) that it violates the Equal Protection Clauses of both Constitutions by establishing classifications that are not rationally related to a legitimate state interest. (44 C.3d 1200.) The opinion notes that similar contentions were raised in cases challenging the validity of the Medical Injury Compensation Reform Act (MICRA) (*infra*, §779), and that the decisions in the MICRA cases clearly showed the lack of merit in plaintiff's current constitutional challenges. (44 C.3d 1200 et seq.) (See *Weidenfeller v. Star & Garter* (1991) 1 C.A.4th 1, 7, 2 C.R.2d 14, *infra*, §62 [following *Evangelatos*].)

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2. Several Liability for Noneconomic Damages.

5 Witkin Sum. Cal. Law Torts § 53

[§ 53] Several Liability for Noneconomic Damages.

(1) *Statement of Rule.* "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint." (C.C. 1431.2(a).) (See *Aetna Health Plans of Calif. v. Yucaipa-Calimesa Joint Unified School Dist.* (1999) 72 C.A.4th 1175, 1190, 85 C.R.2d 672 [no indemnity claim lies for noneconomic damages; liability for them is several under Proposition 51].)

(2) *"Economic" and "Noneconomic" Damages.* The basic terms are defined as follows:

(a) "[T]he term '*economic damages*' means *objectively verifiable monetary losses* including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities." (C.C. 1431.2(b)(1).)

(b) "[T]he term '*non-economic damages*' means *subjective, non-monetary losses* including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." (C.C. 1431.2(b)(2).) (See BAJI, No. 14.76 [defining economic and non-economic damages], CACI, Nos. 3902, 3903, 3905 [same].)

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aa. Basic Rule.

5 *Witkin Sum. Cal. Law Torts* § 54

[§ 54] Basic Rule.

"Each defendant shall be liable only for the amount of *non-economic damages* allocated to that defendant in direct proportion to that defendant's *percentage of fault*, and a separate judgment shall be rendered against that defendant for that amount." (C.C. 1431.2(a).) (See *Kellogg v. Asbestos Corp. Ltd.* (1996) 41 C.A.4th 1397, 1408, 49 C.R.2d 256 [where defendant failed to contest trial court finding that it was 100% responsible for pain and suffering, it was bound by that allocation]; BAJI, No. 16.90 [judgment on special verdict]; on amount of settlement to be offset from judgment against nonsettling defendant, see *infra*, §99.)

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bb. Between Negligent and Intentional Tortfeasors.

5 Witkin Sum. Cal. Law Torts § 55

[§ 55] Between Negligent and Intentional Tortfeasors.

In *Rosh v. Cave Imaging Systems* (1994) 26 C.A.4th 1225, 32 C.R.2d 136, plaintiff manager, who was shot by an employee whom he had fired, brought a negligence action against the security company that had contracted with plaintiff's employer to provide security services. The jury apportioned the fault as follows: defendant security company, 75%; the assailant, 25%. Defendant argued that no reasonable person could conclude that a negligent tortfeasor was more responsible for an injury than an intentional tortfeasor. *Held*, the apportionment was proper.

(a) Comparative fault is a flexible concept that does not lend itself to exact measurement. A jury is competent to apply comparative fault principles, and its determination will not be set aside if it is supported by substantial evidence. (26 C.A.4th 1233.)

(b) The liability theory presented by plaintiff, i.e., that defendant negligently permitted the assailant to repeatedly enter the employer's premises, does not lend itself to an apportionment of substantial fault to the assailant and minimal fault to defendant. And the evidence supports this theory: Defendant was hired to protect the employer's property and personnel. Defendant's employees were aware that terminated employees posed a security risk, that the assailant had been terminated, and that he was no longer allowed on the premises. Nevertheless, they allowed the assailant to remain on the premises on three occasions within 26 hours of his termination, and when informed of the assailant's presence on the premises, they promised to take care of the matter, but did nothing. Under these circumstances, there is substantial evidence to support the jury's apportionment of fault. (26 C.A.4th 1234.)

(c) Defendant's reliance on *Weidenfeller v. Star & Garter* (1991) 1 C.A.4th 1, 2 C.R.2d 14, *infra*, §62, is misplaced. In that case the plaintiff was the victim of an assault in a bar parking lot, and the jury assessed 75% fault to the assailant, 20% to the bar, and 5% to the plaintiff. However, *Weidenfeller* does not stand for the proposition that a jury must make this type of apportionment in every case involving both intentional and negligent tortfeasors. Moreover, *Weidenfeller* is readily distinguishable from the present case in that there was no evidence that the bar had notice that its parking lot was inadequately guarded, that a would-be assailant had returned several times to the premises, that a particular patron would be at risk, or that security procedures were being violated. (26 C.A.4th 1235.)

In *Scott v. Los Angeles* (1994) 27 C.A.4th 125, 147, 32 C.R.2d 643, however, a verdict setting the combined fault of defendant county and its social worker at 99% and the fault of a person who placed a child in boiling water at only 1% was held not supported by evidence.

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(New) *Intentional tortfeasor is not entitled to reduction or apportionment of noneconomic damages: Thomas v. Duggins Const. Co.* (2006) 139 C.A.4th 1105, 44 C.R.3d 66, a case of first impression, held that an intentional tortfeasor is not entitled to a reduction or apportionment of noneconomic damages under Proposition 51. Plaintiffs, who were injured when a scissor lift collapsed at a construction site, sued the seller of the lift and certain of its employees for breach of implied warranty, negligence, and intentional misrepresentation. The jury found in plaintiffs' favor on these claims, found that the seller and plaintiffs' employer were each 40% responsible for the injuries and that the two of the seller's employees each were 10% responsible, and further found that one of the seller's employees, while acting within the scope of his employment, made intentional misrepresentations about the lift. The trial court rejected the seller's claim that its liability for plaintiffs' noneconomic damages was subject to apportionment in accordance with Proposition 51, and entered judgment against the seller for the entirety of the plaintiffs' damages. *Held*, affirmed.

(a) At the time Proposition 51 was adopted, the law was well established that a tortfeasor who intentionally injured another was not entitled to contribution from any other tortfeasors. A defendant who committed an intentional tort was not entitled to a reduction of the judgment against it because the plaintiff's injuries also resulted either from plaintiff's own negligence or the negligence of a third party. Proposition 51 did not alter these principles. (139 C.A.4th 1111.)

(b) In *Heiner v. Kmart Corp.* (2000) 84 C.A.4th 335, 347, 100 C.R.2d 854, text, §1371, the court noted (although in dicta) that an intentional tortfeasor's liability is not subject to apportionment where the plaintiff's injuries result in part from the plaintiff's own contributory negligence, observing that it would be contrary to sound policy to reduce a plaintiff's damages, based on comparative fault, for his or her negligence in encountering the defendant's deliberately inflicted harm. The same policy considerations of deterrence and punishment that bar a reduction of an intentional tortfeasor's liability to reflect the plaintiff's contributory negligence also support the conclusion that an intentional tortfeasor's liability to the plaintiff is not subject to apportionment (i.e., reduction) where the negligence of one or more third-party tortfeasors contribute to the injuries. An intentional actor cannot rely on someone else's negligence to shift responsibility for his or her own conduct. (139 C.A.4th 1112.)

(c) Applying the foregoing principles, the seller's vicarious liability for the intentional misrepresentation of its employee is not subject to reduction under Proposition 51 based on the jury's finding that the negligence of plaintiffs' employer also contributed to their injuries. Thus, although the seller's liability in negligence would have otherwise entitled it to an apportionment of the plaintiffs' noneconomic damages, its vicarious liability for the intentional tort is not subject to reduction. This is so even though the jury concluded that the employee's intentional misconduct constituted only a 10% contributing factor to the plaintiffs' injuries. (139 C.A.4th 1113.)



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cc. Between Original and Successive Tortfeasors.

5 Witkin Sum. Cal. Law Torts § 56

[§ 56] Between Original and Successive Tortfeasors.

In *Kitzig v. Nordquist* (2000) 81 C.A.4th 1384, 97 C.R.2d 762, the malpractice of plaintiff's prior dentist caused her to seek treatment from defendant, who negligently aggravated her original injuries. *Held*, the trial judge did not err in failing to require the jury to allocate fault to the prior dentist.

(a) Under the circumstances, it would have been inconsistent with the statutory language and the policies underlying C.C. 1431.2(a) to permit the second tortfeasor, who was directly at fault for the aggravation of the plaintiff's injuries, to reduce his liability for the noneconomic damages connected to those injuries because of the conduct of the original tortfeasor. The prior dentist played no part in creating the actual injuries caused by defendant for which plaintiff sought compensation in this action. The prior dentist's conduct was passive with respect to those injuries. He did not participate with defendant in causing those injuries, and he had no control or opportunity to protect himself against the subsequent negligence. (81 C.A.4th 1396.)

(b) While the prior dentist was a "proximate cause" of the damages suffered by the plaintiff and therefore could be jointly and severally liable for all economic damages, this form of proximate cause is not necessarily equivalent to "fault" analysis under Proposition 51. "Fault" connotes some form of active participation in creating the injuries for which the plaintiff seeks to recover. There was no evidence that the prior dentist was at fault with respect to the noneconomic damages suffered in connection with defendant's negligence. The fact that the prior dentist may have placed plaintiff in the situation where she needed more complicated dental care is not the same as saying that the prior dentist should bear financial responsibility under Proposition 51 for defendant's conduct alone. (81 C.A.4th 1401.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Henry v. Superior Court* (2008) 160 C.A.4th 440, 455, 72 C.R.3d 808 [to limit their liability for noneconomic damages to their proportionate fault under C.C. 1431.2, defendants were entitled to present evidence of negligent treatment by nonparty medical providers that aggravated plaintiff's injuries from fall on defendant's property].



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dd. Between Tortfeasors Subject and Not Subject to Liability.

5 Witkin Sum. Cal. Law Torts § 57

[§ 57] Between Tortfeasors Subject and Not Subject to Liability.

Liability for noneconomic damages under Proposition 51 cannot exceed the defendant's proportionate share of fault as compared with all fault for the plaintiff's injury, not merely that of parties subject to liability. In *DaFonte v. Up-Right* (1992) 2 C.4th 593, 7 C.R.2d 238, 828 P.2d 140, plaintiff was employed by defendant rancher. In attempting to clean a moving conveyor belt of a grape harvester, plaintiff was injured when his arm was drawn into the belt. The employer's insurance carrier paid plaintiff workers' compensation benefits. Plaintiff, his parents, and his sister then sued defendant manufacturer of the harvester, alleging negligence and strict products liability. There was evidence that the harvester lacked both a belt guard and an accessible emergency "off" switch; that the manufacturer gave no instruction on safe methods of cleaning the belt; and that plaintiff had worked on an overlong shift without adequate supervision. The jury allocated 15% of the fault for the injury to the employee, 45% to the employer, who was not a defendant, and 40% to the manufacturer. After the parties agreed to reduce the award by 15%, the amount attributable to the employee's fault, the trial court further reduced the judgment against the manufacturer, pursuant to C.C.P. 1431.2 by an amount equal to 45% of the employee's noneconomic damages, which were attributable to the fault of the employer. The Court of Appeal concluded that the trial court had erroneously invoked C.C.P. 1431.2 to preclude a full joint and several award of noneconomic damages against the manufacturer, and recomputed the judgment against the manufacturer. *Held*, reversed.

(a) *Law prior to Proposition 51.* Under the law prior to Proposition 51, an employee's damage judgment against third parties was required to be reduced by an amount attributable to the employer's proportionate share of fault, up to the amount of workers' compensation benefits paid. If the employer's share of fault exceeded the benefits paid or owed, its claim for reimbursement, lien, or credit was denied. If the benefits paid or owed exceeded the employer's share of fault, the employer could recoup the excess only. But third-party defendants remained jointly and severally liable to the injured employee for all damages attributable to the employer's fault that were not covered by workers' compensation benefits. And "deep pocket" defendants whose fault was slight could still be saddled with large damage awards mainly attributable to the greater fault of others who were able to escape their full proportionate contribution. (2 C.4th 599.)

(b) *Purpose and effect of Proposition 51.* Joint and several liability was modified by Proposition 51. C.C. 1431

establishes a presumption that an obligation is presumed to be joint and not several, except as provided in C.C. 1431.2, which states that the liability of each defendant for noneconomic damages shall be several only, and that each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault. (2 C.4th 599.) "Proposition 51 thus retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively probable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damage were limited by Proposition 51 to a rule of strict proportionate liability. With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (2 C.4th 600.)

(c) *No exception for damages attributable to fault of persons not subject to liability.*

(1) Even though the employer, who was also determined to have fault for the injury, could not be a tort or indemnity defendant, due to the workers' compensation system, Proposition 51 does not have an exception for damages attributable to the fault of persons who are immune from liability or have no mutual joint obligation to pay missing shares. In every case, the statute limits the joint liability of every defendant to economic damages, and it shields every defendant from any share of noneconomic damages beyond that attributable to his or her own comparative fault. Thus, a defendant's liability for noneconomic damages cannot exceed his or her proportionate share of fault as compared with all fault responsible for plaintiff's injuries, not merely that of the defendants present in the lawsuit. (2 C.4th 601.)

(2) *Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 246 C.R. 629, 753 P.2d 585, supra, §52 and infra, §65, addressed and rejected a claim that Proposition 51 denies equal protection because it discriminates irrationally against persons injured by insolvent tortfeasors. But the court did not imply that Proposition 51 applies only when insolvency prevents some tortfeasors from contributing their fair share of damages. (2 C.4th 603.)

(3) Plaintiff and his amici curiae argued that failure to infer an exception to Proposition 51 for third-party suits by injured workers would create a host of practical litigation problems and destroy the "delicate" preexisting balance among the rights of employee, employer, and third party tortfeasor. But the principal effect is precisely that intended by the initiative: defendants no longer have to pay an injured employee's noneconomic damages caused by the fault of another, and the employee, like any other tort victim, bears the resulting risk of loss. (2 C.4th 603.)

(d) *Conclusion.* "In sum, section 1431.2 plainly limits a defendant's share of noneconomic damages to his or her own proportionate share of comparative fault. The statute states or implies no exception for third party suits by injured employees. No compelling reason appears to infer such an exception in derogation of the measure's literal words." (2 C.4th 604.) (See *Richards v. Owens-Illinois* (1997) 14 C.4th 985, 993, 60 C.R.2d 103, 928 P.2d 1181 [tobacco manufacturers, whose immunity from direct suit under former language of C.C. 1714.45, infra, §1534, was based on no tort having been committed, were not "tortfeasors" whose fault could be used to reduce comparative liability of asbestos manufacturer for noneconomic damages; distinguishing *DaFonte*]; *Rutherford v. Owens-Illinois* (1997) 16 C.4th 953, 985, 67 C.R.2d 16, 941 P.2d 1203, infra, §1490 [same]; *Hernandez v. Badger Const. Equipment Co.* (1994) 28 C.A.4th 1791, 1804, 34 C.R.2d 732 [citing *DaFonte* and applying C.C. 1431.2 where workers' compensation benefits were paid by immune employer under Longshore and Harbor Workers' Compensation Act; C.C. 1431.2 not preempted by federal law]; *Taylor v. John Crane* (2003) 113 C.A.4th 1063, 1068, 6 C.R.3d 695 [proportionate fault was properly allocated to nondefendant U.S. Navy in Navy machinist's negligence action against defendant manufacturer of asbestos-containing products, even if Navy was immune from liability]; 20 *Pepperdine L. Rev.* 350; 33 *U.S.F. L. Rev.* 459 [*Richards v. Owens-Illinois*].)

A defendant may seek to reduce his or her share of liability for noneconomic damages by adding nonparty joint tortfeasors in the apportionment. However, the defendant must produce substantial evidence that the alleged nonparty tortfeasor is in fact at fault. (*Wilson v. Ritto* (2003) 105 C.A.4th 361, 366, 129 C.R.2d 336 [defendant was required to show that nonparty doctor was at fault as measured by medical standard of care, not that doctor merely contributed to plaintiff's injury].)

SUPPLEMENT: [This section is current through the latest supplement]

Munoz v. Union City (2007) 148 C.A.4th 173, 55 C.R.3d 393, was a wrongful death action against a police officer and city arising from a shooting incident and based in part on the city's direct negligence in selecting and supervising the officer. The trial court reduced recovery by the percent of fault allocated to the city on the ground that sovereign immunity barred liability for the city's direct negligence. *Held*, reversed, with directions to enter a new judgment apportioning liability between the parties legally at fault (officer and victim). Sovereign immunity does not mean simply that plaintiffs cannot collect damages from a public entity. Under *Govt.C. 815*, direct tort *liability* of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care. In the absence of duty, there can be no tort liability, and no fault can be allocated to a party that is not a tortfeasor. It necessarily follows that no portion of the fault in this case may be allocated to the city. (148 C.A.4th 182, following *Richards v. Owens-Illinois* (1997) 14 C.4th 985, 60 C.R.2d 103, 928 P.2d 1181, text, p. 126, and distinguishing *DaFonte v. Up-Right* (1992) 2 C.4th 593, 7 C.R.2d 238, 828 P.2d 140, text, p. 124.)

See *Ford v. Polaris Industries* (2006) 139 C.A.4th 755, 778, 43 C.R.3d 215, Supp., *infra*, §1344 [watercraft operator who had no duty to injured passenger under primary assumption of the risk doctrine was not subject to allocation of fault in passenger's products liability action against watercraft manufacturer; operator committed no tort and thus there was no fault to apportion to her]; *Ovando v. Los Angeles* (2008) 159 C.A.4th 42, 71, 71 C.R.3d 415 [in legal malpractice action predicated on plaintiff's false criminal conviction, apportionment of fault was required among defendant and nonparty police officers who planted evidence and testified falsely against plaintiff, even if officers were immune under *Govt.C. 821.6* (prosecution of judicial or administrative proceeding; see text, §180 et seq.); immunity is not based on legislative finding that public employee bears no fault; citing *DaFonte*].



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ee. Between Settling and Nonsettling Tortfeasors.

5 Witkin Sum. Cal. Law Torts § 58

[§ 58] Between Settling and Nonsettling Tortfeasors.

In *Roslan v. Permea* (1993) 17 C.A.4th 110, 21 C.R.2d 66, an action for injuries sustained from a defective shipping carton, plaintiff recovered damages against defendant Z that included \$ 268,481 for noneconomic damages. While that amount was reduced by the 30% comparative fault of plaintiff, it was not reduced by the comparative fault of two other defendants which had settled prior to trial. Also, defendant Z was not allowed to introduce deposition testimony showing that one of the settling defendants had contributed to the design of the packaging system. *Held*, reversed.

(a) Under C.C. 1431.2, liability for noneconomic damages must be apportioned among the "universe of tortfeasors," including nonjoined defendants. (17 C.A.4th 113, citing *DaFonte v. Up-Right* (1992) 2 C.4th 593, 7 C.R.2d 238, 828 P.2d 140, *supra*, §57.) Here, liability was not so apportioned, because the relevant "universe" included the settling defendants. (17 C.A.4th 113.)

(b) Because the trial judge refused to allow defendant Z to present evidence concerning the alleged culpability of one of the settling defendants, the settling defendants were not included in the special verdict form, and the jury had no evidence from which to assess their comparative fault. Hence, the matter must be remanded so that the jury can make these determinations. (17 C.A.4th 113.)

(c) On remand, a modified version of BAJI, No. 16.00 [form of special verdict--negligence] or BAJI, No. 16.73 [form of special verdict--comparative implied indemnity--multiple defendants--contributory negligence an issue] should be used because these are special verdict forms that contemplate allocation of fault among defendants not present at trial. (17 C.A.4th 113.)

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ff. Credit for Workers' Compensation Benefits.

5 *Witkin Sum. Cal. Law Torts* § 59

[§ 59] Credit for Workers' Compensation Benefits.

In *Torres v. Xomox Corp.* (1996) 49 C.A.4th 1, 56 C.R.2d 455, a worker was killed on the job by being doused with sulfuric acid that escaped from a defective valve. His family sued both the manufacturer and the distributor of the valve, and a verdict was rendered in the family's favor. Plaintiffs also received workers' compensation benefits. *Held*, workers' compensation benefits should be allocated in the same proportion that damages are awarded. In this case, 55.3% of the damages were economic, so 55.3% of the benefits must be subtracted from the amount awarded for economic damages. (49 C.A.4th 21.) ((See *Scalice v. Performance Cleaning Systems* (1996) 50 C.A.4th 221, 237, 57 C.R.2d 711 [adopting same approach in allocating workers' compensation benefits]; *Rosales v. Thermex-Thermatron* (1998) 67 C.A.4th 187, 197, 78 C.R.2d 861 [workers' compensation benefits cannot be equated with tort losses for economic damages]; 29 *McGeorge L. Rev.* 141 [*Torres*]; 39 *Santa Clara L. Rev.* 545 [Proposition 51 and workers' compensation].)

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gg. Applicability of Comparative Equitable Indemnity.

5 Witkin Sum. Cal. Law Torts § 60

[§ 60] Applicability of Comparative Equitable Indemnity.

In *Union Pac. Corp. v. Wengert* (2000) 79 C.A.4th 1444, 95 C.R.2d 68, three of four defendants settled with plaintiffs for \$ 3 million, and then cross-complained against the nonsettling defendant for comparative equitable indemnity (see *infra*, §116). The nonsettling defendant argued that, under Proposition 51, equitable indemnification could only be based on a joint obligation and that, therefore, the jury should have been required to assess only the reasonable amount of plaintiffs' economic damages. However, the trial court rejected this argument and awarded judgment against cross-defendant based on the total settlement. (Because cross-defendant was found to be 20% at fault, judgment was entered against him for \$ 600,000.) *Held*, reversed.

(a) One acting in good faith in making a payment under a reasonable belief that it is necessary to his or her protection is entitled to equitable indemnity, even though it develops that the settlor has no interest to protect. Here, as a result of Proposition 51, the settling defendants could never be held liable for plaintiffs' noneconomic damages insofar as they were caused by the nonsettling defendant's negligence. Thus, they could not have reasonably believed that they were protecting their own interests when they settled all of plaintiffs' claims. (79 C.A.4th 1448.)

(b) "It is well established that the right to indemnity flows from payment of a joint legal obligation on another's behalf. ... Before the enactment of Proposition 51, a defendant who settled the plaintiff's entire claim was entitled to seek indemnification from concurrent tortfeasors for its payment of their joint obligation to the plaintiff. ... Now, however, joint liability is restricted to economic damages, and the right to seek indemnity after settlement is correspondingly limited." Here, the jury should have been instructed to determine the amount of the settlement attributable to economic losses, and the nonsettling defendant should only have been charged with his proportionate share of that amount. (79 C.A.4th 1448.)

(c) The settling defendants argued that Proposition 51 applies only to liability that has been apportioned by a trier of fact and thus has no applicability to a *settlement* that dismisses the plaintiff's principal action but preserves comparative indemnity rights. This argument has no merit. "If liability is firm enough to induce a defendant to settle, it is subject to the unequivocal terms of Proposition 51." (79 C.A.4th 1449.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Claims Subject to Proposition 51.

aa. In General.

5 Witkin Sum. Cal. Law Torts § 61

[§ 61] In General.

The rule of several liability for noneconomic damages applies in "any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault." (C.C. 1431.2(a), *supra*, §53.)

In *Hernandez v. Badger Const. Equipment Co.* (1994) 28 C.A.4th 1791, 34 C.R.2d 732, plaintiff wife was awarded \$ 250,000 noneconomic damages for loss of consortium in her husband's action against the manufacturer and the lessor of a crane for injuries suffered in a work-related injury. Plaintiff argued that C.C. 1431.2 did not apply to her loss of consortium cause of action because such claim was not "based upon principles of comparative fault" within the meaning of the statute. *Held*, this argument is without merit. The quoted provision does not require comparison of the plaintiff's negligence to that of other parties. Instead, it focuses on the comparative fault of multiple tortfeasors. Hence, plaintiff's cause of action for loss of consortium was "based upon principles of comparative fault" because it involved independently acting tortfeasors who have some fault to compare. (28 C.A.4th 1811.) (See *Craddock v. Kmart Corp.* (2001) 89 C.A.4th 1300, 1309, 107 C.R.2d 881 [husband's claim for loss of consortium was subject to reduction for plaintiff wife's comparative fault; following *Hernandez*]; *Brandon G. v. Gray* (2003) 111 C.A.4th 29, 39, 3 C.R.3d 330 [legal malpractice action to recover for value of claim lost as result of failure to press meritorious claim was not transformed into one for "personal injury, property damage, or wrongful death" within meaning of C.C. 1431.2(a) by fact that underlying action was for personal injury].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Ovando v. Los Angeles* (2008) 159 C.A.4th 42, 73, 71 C.R.3d 415 [legal malpractice action predicated on plaintiff's false criminal conviction, in which plaintiff sought only noneconomic damages for emotional distress and physical pain, was "action for personal injury" subject to requirement of apportionment of fault under C.C. 1431.2(a)].



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bb. Claims Involving Both Negligent and Intentional Torts.

5 *Witkin Sum. Cal. Law Torts* § 62

[§ 62] Claims Involving Both Negligent and Intentional Torts.

Weidenfeller v. Star & Garter (1991) 1 C.A.4th 1, 2 C.R.2d 14, involved intentional as well as negligent torts. Plaintiff was assaulted in a bar's parking lot, and sued the bar and its owners for failing to provide adequate lighting and security. Finding that defendants' negligence was a proximate cause of plaintiff's injuries, the jury attributed 75% fault to the assailant, 20% to defendants, and 5% to plaintiff. Applying C.C. 1431.2, the trial judge reduced the economic damage award from \$ 122,500 to \$ 116,375 (95% of \$ 122,500) and the noneconomic damage award from \$ 250,000 to \$ 50,000 (20% of \$ 250,000), and entered judgment for \$ 166,375. *Held*, affirmed.

(a) Plaintiff contended that he was also entitled to 95% of the noneconomic damage award because C.C. 1431.2, applicable by its terms only to actions "based upon principles of *comparative fault*," was necessarily inapplicable whenever one party, as here, acted *intentionally*. However, accepting this argument would defeat the purpose of the statute and produce an absurd result. "It is inconceivable that the voters intended that a negligent tortfeasor's obligation to pay only its proportionate share of the noneconomic loss, here 20 percent, would become disproportionate increasing to 95 percent solely because the only other responsible tortfeasor acted intentionally. To penalize the negligent tortfeasor in such circumstances not only frustrates the purpose of the statute but violates the commonsense notion that a more culpable party should bear the financial burden caused by its intentional act." (1 C.A.4th 6.)

(b) The cases relied on by plaintiff, *Allen v. Sundean* (1982) 137 C.A.3d 216, 186 C.R. 863, and *Godfrey v. Steinpress* (1982) 128 C.A.3d 154, 180 C.R. 95, stand for the proposition that an intentional actor cannot rely on someone else's negligence to shift responsibility for his or her own conduct. In that context the statement in *Allen* that intentional torts appear to be excluded from the comparative fault system does not mean that C.C. 1431.2 never applies to both intentional and negligent tortfeasors. There is no basis for not applying the statute in the converse situation where, as in the present case, the injured party is attempting to transfer the intentional actor's responsibility to the negligent tortfeasor. (1 C.A.4th 7.) (See 54 A.L.R.5th 379 [apportionment of liability between landowners and assailants for injuries to crime victims].)

SUPPLEMENT: [This section is current through the latest supplement]



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cc. Claims Involving Vicarious Liability.

5 *Witkin Sum. Cal. Law Torts* § 63

[§ 63] Claims Involving Vicarious Liability.

Proposition 51 does not abrogate vicarious liability; the parties remain jointly and severally liable for both economic and noneconomic damages.

(1) *Liability Based on Respondeat Superior.* In *Miller v. Stouffer* (1992) 9 C.A.4th 70, 11 C.R.2d 454, plaintiff was struck by an automobile driven by Barrientos, who at the time was acting within the scope of her employment as a housekeeper for Stouffer. The jury returned a verdict awarding plaintiff \$ 174,000 in economic damages, and \$ 260,000 in noneconomic damages and allocating fault between Barrientos and Stouffer. The trial judge granted a motion to modify the verdict so as to allocate 100% of the fault to Barrientos, and to find Stouffer vicariously liable for Barrientos' entire liability. Because she was only vicariously liable, and hence without fault, Stouffer argued that under Proposition 51 she could not be held liable for any portion of the noneconomic damages. *Held*, Proposition 51 does not shield vicariously liable employers from liability for noneconomic damages.

(a) Proposition 51 requires an apportionment of noneconomic damages based on each tortfeasor's *comparative fault*. "By its terms, Proposition 51 is unavailing to Stouffer because it is directed at the doctrine of joint and several liability, while Stouffer's liability arises as a consequence of her *status* as Barrientos's employer pursuant to the doctrine of respondeat superior. Nothing in Proposition 51 altered the vicarious liability of an employer under that long-standing doctrine." (9 C.A.4th 83.)

(b) Proposition 51 benefits employers by shielding them from liability for noneconomic damages beyond those attributable to their employees. However, it does not require the injured party to recover noneconomic damages *only* from the negligent employee, who may have little in the way of assets. Such a result would mean that victims would often go uncompensated while employers would be allowed to avoid much of the risk incident to their enterprise. (9 C.A.4th 84.)

(2) *Liability Imposed by Statute.* *Rashtian v. BRAC-BH* (1992) 9 C.A.4th 1847, 12 C.R.2d 411, addressed the question whether Proposition 51 is applicable to the vicarious liability imposed on the owner of a motor vehicle, under

Veh.C. 17150 (infra, §1260), when an operator using that vehicle with the owner's implied or express permission injures another person, and the owner is without fault. *Held*, Proposition 51 does not reduce the liability of vehicle owners imposed by *Veh.C. 17150*.

(a) The reasoning of *Miller v. Stouffer*, *supra*, is applicable here. "However, the critical factor in our analysis is not the presence of imputed negligence under the respondeat superior doctrine, but rather the imposition of *vicarious* liability, whatever the basis. In *Miller*, that liability rested upon imputed negligence. In this case, it rests upon statutory fiat. In either case, liability for the negligent acts of another is imposed not because of independent culpability which can be measured and evaluated but because of status or relationship. To read Proposition 51 so as to shield *every* defendant from liability for noneconomic damages beyond that attributable to his or her own fault, 'largely would abrogate the vicarious tort liability of persons for the acts of others. Nothing in the language or intent of Proposition 51 conveyed to the voters in June 1986 dictates such a drastic change in California tort law.' " (9 C.A.4th 1854.)

(b) Furthermore, the liability of the operator and the owner are, to the extent of the financial limitations of Proposition 51, coextensive; i.e., for the purposes of Proposition 51, they are a *single* tortfeasor. Hence, the noneconomic damages properly chargeable to the operator are likewise chargeable to the owner; and nothing in Proposition 51 can reasonably be construed to abrogate that fundamental principle. (9 C.A.4th 1854.)

(3) *Liability Based on Nondelegable Duty*. In *Srithong v. Total Inv. Co.* (1994) 23 C.A.4th 721, 28 C.R.2d 672, T leased a portion of a mini-mall to plaintiff restaurant operator and contracted with M to do repair work on the roof. While this was being done, tar seeped through the ceiling and injured plaintiff. In plaintiff's action against T and M, the jury returned a verdict finding that (a) M was 95% at fault and T was 5% at fault; and (b) plaintiff sustained \$ 2,735 in economic damages and \$ 83,000 in noneconomic damages, for a total of \$ 85,735. The trial judge granted T's motion for entry of a separate judgment under Proposition 51, making it obligated to pay 100% of the economic damages, but only 5% of the noneconomic damages, for a total of \$ 6,885. *Held*, this was error, Proposition 51 was inapplicable; T was jointly and severally liable for the entire damages. As a lessor, T had a nondelegable duty to maintain the leased premises in a safe condition (see *infra*, §1250). The nondelegable duty rule is a form of vicarious liability. (23 C.A.4th 726.) Hence, the reasoning of *Miller* and *Rashtian* applies, and Proposition 51 is inapplicable. (23 C.A.4th 728.)

(4) *Liability Based on Civil Conspiracy*. By extension from the principles generally governing vicarious liability, where the substantive law makes each joint actor liable for the act of each other joint actor in causing a plaintiff's indivisible injury, as in the case of a civil conspiracy, the rule of joint and several liability is not abrogated by Proposition 51. The policy of allocating losses among defendants for harm caused by the defendants' joint enterprise justifies dispensing with the requirement that plaintiffs prove the degree of fault of each individual defendant. (*Kesmodel v. Rand* (2004) 119 C.A.4th 1128, 1142, 15 C.R.3d 118.)

(5) *Restatement 3d*. The Restatement is in accord. A person "whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other." (*Rest.3d, Torts: Apportionment of Liability* §13.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Bayer-Bel v. Litovsky* (2008) 159 C.A.4th 396, 399, 71 C.R.3d 518 [negligent unlicensed driver was only severally liable for injured plaintiff's noneconomic damages, where other defendant was primarily liable for negligent entrustment rather than merely vicariously liable].



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dd. Claims Involving Strict Liability.

5 *Witkin Sum. Cal. Law Torts* § 64

[§ 64] Claims Involving Strict Liability.

(1) *Single Product*. In *Wimberly v. Derby Cycle Corp.* (1997) 56 C.A.4th 618, 65 C.R.2d 532, defendant was the producer and distributor of a brand of bicycle. It was sued in strict liability when plaintiff suffered an injury due to faulty welding on the fork assembly. Under Proposition 51, defendant attempted to have the liability for the noneconomic damages apportioned on the basis of fault among the manufacturer, designer, and retailer, as well as itself, because the manufacturer, from a negligence standpoint, was 100% at fault. However, the trial judge refused to apply Proposition 51 in this situation, and entered judgment for plaintiff. *Held*, affirmed. Drawing an analogy to vicarious liability (see *supra*, §63), the court said:

"[T]he retention of 'joint and several liability' of parties in a defective product's chain of distribution for the plaintiff's full damages without a showing of negligence is essential to the theory of strict product liability. Nothing in Proposition 51 compels dilution of the strict liability doctrine. To the contrary, the measure disapproves of joint and several liability for plaintiff's noneconomic damages only where there are 'independently acting tortfeasors who have some fault to compare.' ... The parties in a defective product's chain of distribution are not joint tortfeasors in the traditional sense; rather, as a matter of law their liability to plaintiff is coextensive with others who may have greater 'fault,' as in other instances of statutorily or judicially imposed vicarious, imputed or derivative liability." (56 C.A.4th 633.)

"Accordingly, we hold Proposition 51 has no application in a strict product liability case where, as here, the plaintiff's injuries are caused solely by a defective product. A strictly liable defendant cannot reduce or eliminate its responsibility to the plaintiff for all injuries caused by a defective product by shifting blame to other parties in the product's chain of distribution who are ostensibly more at 'fault,' and therefore may be negligent as well as strictly liable. The defendant's recourse, if not precluded by good faith settlement principles, lies in an indemnity action." (56 C.A.4th 633.) (See *Springmeyer v. Ford Motor Co.* (1998) 60 C.A.4th 1541, 1574, 71 C.R.2d 190 [following *Wimberly*].)

(2) *Multiple Products*. The rule is different where multiple products are involved. *Wimberly* requires joint and

several liability only when the defendants are in the same chain of distribution of a specific defective product. Proposition 51 is thus applicable to a strict liability case where multiple products cause the plaintiff's injuries and the evidence provides a basis to allocate liability for noneconomic injury. (*Arena v. Owens Corning Fiberglas Corp.* (1998) 63 C.A.4th 1178, 1193, 74 C.R.2d 580 [asbestosis exposure]; *Wilson v. John Crane* (2000) 81 C.A.4th 847, 851, 97 C.R.2d 240 [following *Arena*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Single Product.* *Wimberly v. Derby Cycle Corp.* (1997) 56 C.A.4th 618, 65 C.R.2d 532, text, p. 133, was followed in *Bostick v. Flex Equipment Co.* (2007) 147 C.A.4th 80, 54 C.R.3d 28, holding that Proposition 51 did not apply to a products liability action against a manufacturer of weight-lifting equipment and a gym brought by a plaintiff injured while using the equipment. Defendants in a strict liability action are jointly and severally liable to the plaintiff for noneconomic damages because liability is imposed as a matter of public policy and is not based on fault. (147 C.A.4th 93.) However, a long, concurring opinion, agreeing with the majority on different grounds, argued that *Wimberly* was wrongly decided. Strict products liability "is not liability without fault. ... [A] defendant liable for strict products liability based on participation in the chain of distribution of a defective product is an actor whose relative culpability can be measured and assessed." (147 C.A.4th 109.) (2) *Multiple Products.* See *Garcia v. Duro Dyne Corp.* (2007) 156 C.A.4th 92, 102, 67 C.R.3d 100 [manufacturer of asbestos products, found to be 3% at fault for plaintiff's injuries, was not entitled to offset against award of noneconomic damages for plaintiff's settlement with another defendant in same chain of distribution of one defective product; jury found that manufacturer was both negligent and strictly liable without allocating amounts between theories of recovery or among different products manufacturer produced; distinguishing *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 C.A.4th 1178, 1193, 74 C.R.2d 580, text, p. 134].



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5. Proposition 51 Nonretroactive.

5 Witkin Sum. Cal. Law Torts § 65

[§ 65] Proposition 51 Nonretroactive.

(1) *Rule of Nonretroactivity.* In *Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 246 C.R. 629, 753 P.2d 585, Proposition 51 was held nonretroactive, in an elaborate opinion in which the majority and dissenting opinions reviewed all of the case law on the presumption of prospectivity in the absence of an express statement of legislative intent to the contrary. (For a full discussion of the holding on this point, see 7 *Summary* (10th), *Constitutional Law*, §634.)

(2) *Accrual of Action for Purposes of Rule.* Under *Evangelatos*, Proposition 51 applies only to actions accruing after its passage. *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 C.4th 520, 66 C.R.2d 438, 941 P.2d 71, held that, with respect to latent diseases, an action "accrues" for purposes of Proposition 51 only when the plaintiff becomes aware of the disease. Plaintiff employee contracted a form of asbestos-related lung cancer after being exposed to defendant's asbestos-containing products. In the ensuing products liability case, plaintiff obtained a judgment that included \$ 450,000 for noneconomic damages, for which defendant was determined to be jointly and severally liable. Because defendant was only 28% at fault, it argued that, under Proposition 51, it was liable for only 28% of the noneconomic damages. However, plaintiff relied on the *Evangelatos* holding that Proposition 51 applies only to causes of action accruing *after* the Proposition's effective date of June 4, 1986. Plaintiff contended that the date of accrual was 1984, the date established by his medical testimony as the time when subclinical, i.e., undiscovered, cancer cells began forming. Defendant contended that the accrual date was not until 1991, when the cancer was discovered, or 1992, when suit was brought. *Held*, the cause of action accrued in 1991 or 1992, after the effective date of Proposition 51. Thus, defendant was only severally liable for the noneconomic damages.

(a) In *Evangelatos*, both the breach of duty and the injury occurred at the same time, which was well before the effective date of Proposition 51. However, in latent disease cases such as this, it is very difficult to pinpoint the date of injury, because the disease might not be discovered until many years after it began. In addition to this difficulty, the accrual date may vary depending on the purpose for which the determination is sought. (16 C.4th 529.) For example, insurance coverage for third-party liability is said to exist from the time when subclinical injury occurs. (16 C.4th 530, citing *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 C.4th 645, 42 C.R.2d 324, 913 P.2d 878, 2 *Summary* (10th), *Insurance*, §139.) In contrast, for statute of limitations purposes, a cause of action does not accrue until plaintiff *discovers*, or reasonably should have discovered, that plaintiff has suffered a compensable injury. (16 C.4th 530, citing

Velasquez v. Fibreboard Paper Products Corp. (1979) 97 C.A.3d 881, 159 C.R. 113, 3 Cal. Proc. (4th), Actions, §525.) Here, however, the inquiry is confined to ascertaining the accrual date for the limited purpose of determining the applicability of Proposition 51. (16 C.4th 531.)

(b) The holding in *Evangelatos* that Proposition 51 merits prospective application only was based on two primary grounds: first, with regard to causes of action accruing before the effective date of Proposition 51, parties would have planned their actions according to the "rules of the game" then in existence, i.e., joint and several liability; and second, the drafters of the initiative said nothing to indicate that it was to have retroactive application. Retroactive application of Proposition 51 could prevent both plaintiffs and settling defendants from obtaining full recovery for noneconomic damages, because they would have made decisions on the basis of the existent joint and several liability rules, only to discover that those decisions were unwise under Proposition 51 provisions. Whether a plaintiff or a settling defendant were involved, the difficulty in applying Proposition 51 retroactively would stem from the fact that some other defendant, instead of being theoretically liable for all of the noneconomic damages, would only be responsible for that defendant's proportionate share. (16 C.4th 532.)

(c) Once it has been determined that Proposition 51 applies prospectively, i.e., to causes of action that accrue after its effective date, it becomes necessary to ascertain what is meant by "accrual," especially in latent injury cases. In making this determination, the crucial date occurs when the plaintiff becomes *aware* of the injury, because it is only then that the plaintiff contemplates a lawsuit and experiences a need to know the rules that will govern. Moreover, until there has been an awareness of the injury, there can be no noneconomic damages, such as pain and suffering, the category of damages to which Proposition 51 is addressed. (16 C.4th 533, 534.) "In short, none of the considerations that militated against declaring Proposition 51 retroactive in *Evangelatos* ... would be undermined by a rule that looks to diagnosis or discovery of actual injury as the date on which a cause of action should be deemed to accrue for the limited purpose of determining" the applicability of Proposition 51. (16 C.4th 535.) On the other hand, tying the date of accrual to when any appreciable harm resulted would mean (1) choosing a date that is proved only in retrospect by medical testimony as to the *probability* that such harm existed on that date, and (2) using a date that would often result in a situation where the statute of limitations would have expired on the plaintiff's cause of action before the plaintiff even discovered the harm and planned to bring suit. (16 C.4th 536.) (See *Arena v. Owens Corning Fiberglas Corp.* (1998) 63 C.A.4th 1178, 1191, 74 C.R.2d 580 [under *Buttram*, Proposition 51 applied where cancer from exposure to asbestosis was diagnosed after Proposition's effective date, even though exposure occurred prior to that date]; 32 U.S.F. L. Rev. 459 [*Buttram*].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Accrual of Action for Purposes of Rule. Velasquez case:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §568.



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3. Action and Judgment.

a. Suit and Judgment Against One or More.

5 *Witkin Sum. Cal. Law Torts* § 66

[§ 66] Suit and Judgment Against One or More.

The injured party may sue *all or any* of the joint tortfeasors or concurrent wrongdoers, either by separate actions or by joining them as defendants in a single action. Even where all are sued, a judgment against one and not against another may be entirely proper, and it is possible on appeal to reverse it as to one and not as to those who fail to appeal. (*Fowden v. Pacific Coast Steamship Co.* (1906) 149 C. 151, 155, 86 P. 178; *Cole v. Roebeling Const. Co.* (1909) 156 C. 443, 447, 105 P. 255; *Frazzini v. Cable* (1931) 114 C.A. 444, 453, 300 P. 121; *Hedlund v. Sutter Med. Service Co.* (1942) 51 C.A.2d 327, 335, 124 P.2d 878; see *Rest.3d, Torts: Apportionment of Liability* §10, Comment f [plaintiff "may choose to sue only one or less than all jointly and severally liable persons and obtain a full recovery of damages"]; 74 *Am.Jur.2d* (2001 ed.), *Torts* §64 et seq.; 20 *Cal. L. Rev.* 215; 25 *Cal. L. Rev.* 413, 414; 15 *A.L.R.2d* 1293 [tort action based on condition of sidewalk or highway; joinder of municipal corporation and abutting property owner or occupant as defendants]; on joinder of joint, concurrent, and successive tortfeasors, see 4 *Cal. Proc.* (4th), *Pleading*, §181; on joint and several judgments, see 7 *Cal. Proc.* (4th), *Judgment*, §38 et seq.)

If an action is brought or judgment rendered against less than all, the entry of judgment alone is not res judicata with respect to the liability of the others. (*Knowles v. Tehachapi Valley Hosp. Dist.* (1996) 49 C.A.4th 1083, 1090, 57 C.R.2d 192, quoting the text; see *Rest.2d, Torts* §884; *Rest.2d, Judgments* §49; 6 *Cal. L. Rev.* 230; 74 *Am.Jur.2d* (2001 ed.), *Torts* §64 et seq.; on effect of judgment on strangers to action, see 7 *Cal. Proc.* (4th), *Judgment*, §405 et seq.)

West's Key Number Digest, Torts k.22, 29

SUPPLEMENT: [This section is current through the latest supplement]

Joinder of joint, concurrent, and successive tortfeasors:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §200.

Joint and several judgments:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §38 et seq.

Judgment against fewer than all tortfeasors is not res judicata against others: See *Gottlieb v. Kest* (2006) 141 C.A.4th 110, 154, 46 C.R.3d 7, quoting the text [where liability is joint and several, civil action against one obligor poses no risk to others].

Effect of judgment on strangers to action:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §468 et seq.



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b. Burden of Proof on Defendants.

5 *Witkin Sum. Cal. Law Torts* § 67

[§ 67] Burden of Proof on Defendants.

The difficulty of ascertaining the amount of damage caused by each tortfeasor has occasionally resulted in decisions denying any recovery. (See *Slater v. Pacific Amer. Oil Co.* (1931) 212 C. 648, 654, 300 P. 31; *Thome v. Honcut Dredging Co.* (1941) 43 C.A.2d 737, 742, 111 P.2d 368.) But the better view is to place the burden of proof on the defendants to show their limited responsibility for a specified proportion of the damage, or be liable for the whole. (See *Oakland v. Pacific Gas & Elec. Co.* (1941) 47 C.A.2d 444, 449, 118 P.2d 328; *Katenkamp v. Union Realty Co.* (1940) 36 C.A.2d 602, 618, 98 P.2d 239; *DeCorsey v. Purex Corp.* (1949) 92 C.A.2d 669, 676, 207 P.2d 616; *Brown v. Guy* (1956) 144 C.A.2d 659, 666, 301 P.2d 413; *Rest.3d, Torts: Apportionment of Liability* §26, Comment h; 19 *Cal. L. Rev.* 630; 25 *Cal. L. Rev.* 413, 438; 33 *Cal. L. Rev.* 331; 38 *Cal. L. Rev.* 388.)

The policy underlying this shifting of the burden of proof was approved and given an extended application in *Summers v. Tice* (1948) 33 C.2d 80, 85, 199 P.2d 1, *infra*, §1194. In the usual case, each defendant is responsible for some damage, and the difficulty is only in apportioning damages among them. In *Summers*, although two defendants were negligent, only one act could have been the cause of the major injury, and the problem was of *identification of the culpable defendant*. The court held, nevertheless, that the same reasons of policy justify shifting the burden to each defendant to absolve himself of liability, and that it is immaterial whether the defendants acted in concert (as joint tortfeasors) or, as here, independently (as concurrent wrongdoers). (See *Finnegan v. Royal Realty Co.* (1950) 35 C.2d 409, 433, 218 P.2d 17 [discussing *Summers v. Tice*]; 38 *Cal. L. Rev.* 389; 23 *So. Cal. L. Rev.* 412; 5 *A.L.R.2d* 98 [liability of several persons guilty of acts one of which alone caused injury, in absence of showing as to whose act was the cause].)

SUPPLEMENT: [This section is current through the latest supplement]



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I. INTRODUCTION

C. Liability of Multiple Tortfeasors.

3. Action and Judgment.

c. Instructions.

5 Witkin Sum. Cal. Law Torts § 68

[§ 68] Instructions.

The BAJI Committee made numerous changes after adoption of Proposition 51 to reflect its effect. BAJI includes the following approved instructions and special verdict forms referring to apportionment of responsibility:

- (1) No. 12.69. Implied Indemnity--Comparative Fault Among Defendants.
- (2) No. 12.88. Damages--Emotional Distress.
- (3) No. 14.00. Compensatory Damages--Personal Injury and Property Damage--Introductory for General Verdict.
- (4) No. 14.01. Compensatory Damages--Personal Injury and Property Damage--Introductory for General Verdict (Admitted Liability).
- (5) No. 14.02. Compensatory Damages--Personal Injury and Property Damage--Introductory for Special Verdict.
- (6) No. 14.10. Measure of Damages--Personal Injury--Expenses Incurred.
- (7) No. 14.11. Measure of Damages--Personal Injury--Loss of Earnings.
- (8) No. 14.12. Measure of Damages--Personal Injury--Loss of Earning Capacity.
- (9) No. 14.13. Measure of Damages--Personal Injury--Pain and Suffering.
- (10) No. 14.20. Measure of Damages--Personal Property--Property Damaged.
- (11) No. 14.21. Measure of Damages--Personal Property--Lost or Destroyed.
- (12) No. 14.22. Measure of Damages--Personal Property--Loss of Use.
- (13) No. 14.30. Damages--Injury to Minor--Suit by Parents and Minor.

- (14) No. 14.31. Measure of Damages--Injury to Minor--Minor's Damages.
- (15) No. 14.32. Measure of Damages--Injury to Minor--Parent's Damages.
- (16) No. 14.40. Measure of Damages--Loss of Consortium.
- (17) No. 14.50. Measure of Damages--Death of Adult.
- (18) No. 14.51. Death of Adult--Damages Not to Be Allocated.
- (19) No. 14.52. Measure of Damages--Death of Child.
- (20) No. 14.76. Definition of Economic and Non-Economic Damages.
- (21) No. 14.90. Reduction of Damages Because of Contributory Negligence--General Verdict.
- (22) No. 16.00. Form of Special Verdict--Negligence.
- (23) No. 16.01. Form of Special Verdict--Medical Malpractice.
- (24) No. 16.02. Form of Special Verdict--Owner's, Occupant's or Lessor's Liability.
- (25) No. 16.10. Form of Special Verdict--Products Liability--Comparative Fault.
- (26) No. 16.11. Form of Special Verdict--Negligence and Products Liability--Comparative Fault.
- (27) No. 16.12. Form of Special Verdict--Products Liability--Comparative Fault and Comparative Implied Indemnity Between Defendants.
- (28) No. 16.25. Form of Special Verdict--Elder/Dependent Adult Abuse.
- (29) No. 16.72. Form of Special Verdict--Comparative Implied Indemnity--Multiple Defendants--Negligence By Plaintiff's Employer.
- (30) No. 16.73. Form of Special Verdict--Comparative Implied Indemnity--Multiple Defendants--Contributory Negligence an Issue.
- (31) No. 16.75. Form of Special Verdict--Employee Receives Workers' Compensation and Sues One Defendant Third Party for Same Injury--Third Party Claims Employer's Concurrent Negligence.
- (32) No. 16.90. Judgment on Special Verdict.

The Judicial Council of California has approved plain language civil jury instructions and special verdict forms, which are set forth in *California Civil Jury Instructions* (CACI). The following instructions and special verdict forms refer to apportionment of responsibility:

(1) *Instructions:*

- (a) No. 3800. Comparative Fault Between and Among Tortfeasors.
- (b) No. 3902. Economic and Noneconomic Damages.
- (c) No. 3903. Items of Economic Damage.
- (d) No. 3903A. Medical Expenses--Past and Future (Economic Damage).

- (e) No. 3903B. Medical Monitoring--Toxic Exposure (Economic Damage).
- (f) No. 3903C. Past and Future Lost Earnings (Economic Damage).
- (g) No. 3903D. Lost Earning Capacity (Economic Damage).
- (h) No. 3903E. Loss of Ability to Provide Household Services (Economic Damage).
- (i) No. 3903F. Damage to Real Property (Economic Damage).
- (j) No. 3903G. Loss of Use of Real Property (Economic Damage).
- (k) No. 3903H. Damage to Annual Crop (Economic Damage).
- (l) No. 3903I. Damage to Perennial Crop (Economic Damage).
- (m) No. 3903J. Damage to Personal Property (Economic Damage).
- (n) No. 3903K. Loss or Destruction of Personal Property (Economic Damage).
- (o) No. 3903L. Damage to Personal Property Having Special Value (*Civ. Code*, § 3355) (Economic Damage).
- (p) No. 3903M. Loss of Use of Personal Property (Economic Damage).
- (q) No. 3903N. Lost Profits (Economic Damage).
- (r) No. 3904. Present Cash Value.
- (s) No. 3905. Items of Noneconomic Damage.
- (t) No. 3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage).
- (u) No. 3920. Loss of Consortium (Noneconomic Damage).
- (v) No. 3921. Wrongful Death (Death of an Adult).
- (w) No. 3922. Wrongful Death (Parents' Recovery for Death of a Minor Child).
- (x) No. 3960. Contributory Negligence--General Verdict.
- (2) *Special verdict forms*:
 - (a) No. VF-400 et seq. Negligence.
 - (b) No. VF-500 et seq. Medical Negligence.
 - (c) No. VF-700 et seq. Motor Vehicles and Highway Safety.
 - (d) No. VF-1000, VF-1001. Premises Liability.
 - (e) No. VF-1100 et seq. Dangerous Condition of Public Property.
 - (f) No. VF-1200 et seq. Products Liability.

SUPPLEMENT: [This section is current through the latest supplement]

CACI instructions and special verdict forms:(2) Special verdict forms:

(d) *Premises liability*: See CACI, No. VF-1002 [Premises Liability--Contributory Negligence of Plaintiff at Issue], adopted in 2007.



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d. Satisfaction of Judgment.

5 *Witkin Sum. Cal. Law Torts* § 69

[§ 69] Satisfaction of Judgment.

(1) *Single Satisfaction Rule*. There can be only one satisfaction for any injury; hence, satisfaction of the judgment by execution sale, or payment by one or more of the joint or concurrent tortfeasors extinguishes the obligation and discharges the liability of all the others. (*Laurenzi v. Vranizan* (1945) 25 C.2d 806, 813, 155 P.2d 633; *Heves v. Kershaw* (1961) 198 C.A.2d 340, 345, 17 C.R. 837, citing the text; *Steele v. Hash* (1963) 212 C.A.2d 1, 3, 27 C.R. 853; *Fletcher v. California Portland Cement Co.* (1979) 99 C.A.3d 97, 99, 159 C.R. 915; see *Rest.3d, Torts: Apportionment of Liability* §25(a) ["payment of the full amount of recoverable damages constitutes a satisfaction of the plaintiff's rights against all tortfeasors legally responsible" for the injury]; 40 A.L.R.3d 1181 [voluntary payment into court of judgment as release of others].)

Watson v. McEwen (1964) 225 C.A.2d 771, 774, 37 C.R. 677, quoting the text, is illustrative. Plaintiff was injured while swimming in a recreational area owned by defendant S and operated by defendant lessee M. Verdict was for plaintiff against both, for \$ 12,137. Defendant S moved for judgment notwithstanding the verdict and for a new trial; defendant M moved for a new trial. The judge granted both motions unless plaintiff consented to a reduction to \$ 7,647. Plaintiff filed a written consent, M paid in full, and satisfaction was entered. *Held*, plaintiff's appeal from the judgment notwithstanding the verdict dismissed. (225 C.A.2d 775.)

A judgment creditor and judgment debtor may have a satisfaction vacated for mutual mistake when no rights of third parties have intervened. (*Southern Calif. Edison Co. v. Harnischfeger Corp.* (1979) 99 C.A.3d 9, 15, 160 C.R. 23.)

(2) *Distinction: Pro Tanto Discharge by Partial Satisfaction*. Partial satisfaction has the effect of a discharge pro tanto. (*Winzler & Kelly v. Superior Court* (1975) 48 C.A.3d 385, 392, 122 C.R. 259, quoting the text; *Kemp v. Barnett* (1976) 62 C.A.3d 245, 250, 132 C.R. 823, *infra*, §1263; see *Rest.3d, Torts: Apportionment of Liability* §25(b) ["payment by one or more judgment defendants of less than the full amount of the recoverable damages constitutes a reduction of the plaintiff's right to recover from the judgment defendants in the amount of the value of the payment"].)

Thus, where fewer than all the joint tortfeasors by compromise satisfy less than the entire judgment, the satisfaction does not relieve the remaining tortfeasors of their obligation under the judgment. (*Milicevich v. Sacramento Med. Center* (1984) 155 C.A.3d 997, 1063, 202 C.R. 484, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §89; see *McCall v.*

Four Star Music Co. (1996) 51 C.A.4th 1394, 1398, 59 C.R.2d 829, quoting the text [where release clearly indicated that purpose of satisfaction was to cover only two of three defendants, action on judgment could be maintained against excluded defendant; terms of release are controlling].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Distinction: Pro Tanto Discharge by Partial Satisfaction.*

Milicevich case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §99.



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4. Settlement With Fewer Than All Tortfeasors.

a. In General.

1. Common Law Release Rule.

5 *Witkin Sum. Cal. Law Torts* § 70

[§ 70] Common Law Release Rule.

Prior to 1957, California followed the common law and general rule that a release or dismissal of one *joint* tortfeasor for consideration released all the others, even though an express reservation was made of the right to sue the others. The theory of the common law rule is that there can be but one compensation for the joint wrong; each joint tortfeasor is responsible for the whole damage; and once the injured party has been paid by any of them for the injury suffered, the cause of action is satisfied. Under this theory, the amount of payment received is immaterial; the claim is unliquidated, and *any payment* in consideration of a release or dismissal operates as full compensation. (See *Bee v. Cooper* (1932) 217 C. 96, 99, 17 P.2d 740; *Bogardus v. O'Dea* (1930) 105 C.A. 189, 193, 287 P. 149 [dismissal for consideration is a *retraxit* or renunciation of cause of action]; *Markwell v. Swift & Co.* (1954) 126 C.A.2d 245, 252, 272 P.2d 47.)

A few decisions, making no distinction between strict joint tortfeasors and others jointly and severally liable, held that the release or dismissal for consideration of one of two or more *concurrent* wrongdoers discharged the liability of the others. (See *Hawber v. Raley* (1928) 92 C.A. 701, 705, 268 P. 943 [automobile collision; release of one negligent driver]; *Hadden v. Moran* (1951) 104 C.A.2d 777, 778, 232 P.2d 594 [similar, though court confusingly refers to joint tortfeasors].) The Supreme Court subsequently held that the release doctrine did not apply to *successive* tortfeasors, leaving open the question as to concurrent tortfeasors. (See *Ash v. Mortensen* (1944) 24 C.2d 654, 657, 150 P.2d 876 [plaintiff released negligent motorist, then sued doctor for negligent treatment of injury]; *Lamoreux v. San Diego & Arizona Eastern Ry. Co.* (1957) 48 C.2d 617, 624, 311 P.2d 1 [following *Ash*]; *Alexander v. Hammarberg* (1951) 103 C.A.2d 872, 881, 230 P.2d 399 [same].)

A release of one joint tortfeasor may be made in writing without consideration. (*Weddle v. Heath* (1931) 211 C. 445, 454, 295 P. 832; on written release as not requiring consideration, see 1 *Summary* (10th), *Contracts*, §946.) The later California decisions held that where no consideration has been received, the release or voluntary dismissal of one does not satisfy the cause of action and therefore did not discharge the liabilities of the others. (See *Shea v. San Bernardino* (1936) 7 C.2d 688, 694, 62 P.2d 365; *Key v. Caldwell* (1940) 39 C.A.2d 698, 701, 104 P.2d 87; *Commercial Transfer v. Daigh & Stewart* (1939) 33 C.A.2d 370, 373, 91 P.2d 951.)

The effect of the release doctrine could be avoided by the purely formal step of using different language. If, instead

of a release, the claimant made a *covenant not to sue*, and this agreement affected only the parties to it, the other joint tortfeasors were not released. (*Kincheloe v. Retail Credit Co.* (1935) 4 C.2d 21, 23, 46 P.2d 971; *Holtz v. United Plumbing & Heating Co.* (1957) 49 C.2d 501, 504, 319 P.2d 617; *Abbott v. Goodyear Tire & Rubber Co.* (1931) 116 C.A. 665, 669, 3 P.2d 56; *Burke v. W.R. Chamberlin & Co.* (1942) 51 C.A.2d 419, 428, 125 P.2d 120; cf. *Pellett v. Sonotone Corp.* (1945) 26 C.2d 705, 711, 160 P.2d 783 [covenant not to execute]; *Ivy v. Pacific Auto. Ins. Co.* (1958) 156 C.A.2d 652, 661, 320 P.2d 140 [same]; 24 A.L.R.4th 547 [covenant not to sue one primarily liable for tort, expressly reserving rights against one secondarily liable, as bar to recovery against latter].)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Statutory Abrogation of Rule.

aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 71

[§ 71] In General.

The release rule (*supra*, §70) was widely criticized as a common law conceptual doctrine without any justification in modern practice. (See 31 *Cal. L. Rev.* 451; 9 *Hastings L. J.* 182; 24 *So. Cal. L. Rev.* 470; 12 *Stanf. L. Rev.* 483.) In 1957, a State Bar-sponsored bill abolished the rule by the enactment of *C.C.P.* 877. "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in *good faith* before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, ... [i]t shall not discharge any other such party from liability unless its terms so provide, but it shall *reduce the claims* against the others in the *amount stipulated* by the release, the dismissal or the covenant, or in the *amount of the consideration* paid for it, whichever is the greater." (*C.C.P.* 877(a).) (On determination of good faith, see *C.C.P.* 877.6, *infra*, §83 et seq.)

Also, the good faith release, dismissal, or covenant "shall discharge the party to whom it is given from all liability for any *contribution* to any other parties." (*C.C.P.* 877(b).) (On effect of good faith settlement generally, see *infra*, §88 et seq.)

The statute "shall not apply to co-obligors who have *expressly agreed* in writing to an apportionment of liability for losses or claims among themselves." (*C.C.P.* 877(c).)

C.C.P. 877 and similar legislation have been the subject of extensive discussion by courts and commentators. (See *Wouldridge v. Zimmerman* (1971) 21 *C.A.3d* 656, 658, 98 *C.R.* 778; *River Garden Farms v. Superior Court* (1972) 26 *C.A.3d* 986, 993, 103 *C.R.* 498, *infra*, §78; *Sambaugh v. Superior Court* (1976) 62 *C.A.3d* 231, 235, 132 *C.R.* 843; *Turcon Const. v. Norton-Villiers, Ltd.* (1983) 139 *C.A.3d* 280, 283, 188 *C.R.* 580; Dobbs, *The Law of Torts* §388; 3 Harper, James & Gray 2d §10.1; 2 California Affirmative Defenses, §42:1 et seq.; 24 *A.L.R.4th* 547 [release of one primarily liable for tort, expressly reserving rights against one secondarily liable, as bar to recovery against latter]; 6 *A.L.R.5th* 883 [release of one joint tortfeasor as discharging liability of others under Uniform Contribution Among Tortfeasors Act and other statutes expressly governing effect of release]; Uniform Contribution Among Tortfeasors Act §4, 12 *U.L.A.* (Master Ed.), p. 63.)

West's Key Number Digest, Release k.2, 7, 37; Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]

Commentary: See 3 Harper, James & Gray 3d §10.1; Uniform Contribution Among Tortfeasors Act §4, 12 U.L.A. (Master Ed.), p. 284.



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2. Statutory Abrogation of Rule.

bb. Scope.

5 *Witkin Sum. Cal. Law Torts* § 72

[§ 72] Scope.

The following matters should be noted in connection with *C.C.P. 877* (supra, §71):

(1) *Application to all tortfeasors claimed liable for same tort.* The statute applies to any "tortfeasors claimed to be liable for the same tort," thus eliminating the distinction between joint tortfeasors and concurrent or successive tortfeasors (see supra, §70). (See *Kemp v. Barnett* (1976) 62 C.A.3d 245, 248, 132 C.R. 823, infra, §1263 [vehicle owner and driver are considered joint tortfeasors]; *Kohn v. Superior Court* (1983) 142 C.A.3d 323, 328, 191 C.R. 78 [tortious activities by contractor, pest control inspector, and seller combined to create one indivisible injury that took place when sale was consummated]; *Lopez v. Blecher* (1983) 143 C.A.3d 736, 739, 740, 741, 192 C.R. 190 [C.C.P. 877 et seq. apply to persons properly joined as defendants even though they are not technically "joint tortfeasors"]; *Turcon Const. v. Norton-Villiers, Ltd.* (1983) 139 C.A.3d 280, 283, 188 C.R. 580 [same]; cf. *Bailey v. Reliance Ins. Co.* (2000) 79 C.A.4th 449, 453, 94 C.R.2d 149 [employee and his wife, injured in car accident, reached settlement with other driver whereby wife received \$ 200,000 and employee nothing; employer's workers' compensation insurance carrier could not successfully challenge good faith of settlement, because no joint tortfeasor or coobligor was involved].) And the requirement of the "same tort" makes the statute inapplicable to tortfeasors charged in a single action with *separate* torts. (See *Carr v. Cove* (1973) 33 C.A.3d 851, 854, 109 C.R. 449 [plaintiff, injured in two separate vehicle accidents, settled with first defendant and obtained verdict against second; motion to reduce verdict by amount of settlement was properly denied].)

(2) *Respondeat superior liability.* Under the broad term "tortfeasors," the statute applies to vicarious liability of a principal under the respondeat superior doctrine. Hence, release of an agent does not discharge the principal. (*Ritter v. Technicolor Corp.* (1972) 27 C.A.3d 152, 154, 155, 103 C.R. 686 [noting, however, that principal may seek indemnity against settling agent]; *Mayhugh v. Orange* (1983) 141 C.A.3d 763, 766, 190 C.R. 537 [enactment of C.C.P. 877.6 (infra, §83 et seq.) did not overturn or modify *Ritter*].)

(3) *Liability of parent corporation for acts of subsidiary.* The statute applies to liability of a parent corporation for wrongful acts of its subsidiary. (See *Mesler v. Bragg Management Co.* (1985) 39 C.3d 290, 216 C.R. 443, 702 P.2d 601,

infra, §74.)

(4) *No double recovery.* The statute states the case law rule against double recovery (see infra, §1550) and makes clear its effect on the statutory rule of contribution (infra, §105).

(5) *No necessity for covenant form.* The statute covers "release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment," thus making unnecessary the use of the covenant form (see supra, §70).

(6) *Comparative equitable indemnity.* The policy underlying *C.C.P. 877(b)* (supra, §71) makes it applicable not only to contribution but to *comparative equitable indemnity*; i.e., each settling tortfeasor is protected from contribution or equitable indemnity to the other. (*Mill Valley Refuse Co. v. Superior Court* (1980) 108 C.A.3d 707, 710, 166 C.R. 687, quoting *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, infra, §1357.)

(7) *Good faith requirement.* The statute's application is restricted to releases, etc., "given in good faith." (See infra, §77.)

(8) *Time of release.* "[B]efore verdict or judgment" means before liability is established by jury verdict or judgment. (See *Halpin v. Superior Court* (1971) 14 C.A.3d 530, 543, 92 C.R. 329, infra, §76; *Southern Calif. White Trucks v. Teresinski* (1987) 190 C.A.3d 1393, 1407, 236 C.R. 159, infra, §76; *Be v. Western Truck Exchange* (1997) 55 C.A.4th 1139, 1142, 64 C.R.2d 527.)

(9) *Right to offset.* It is proper for the nonsettling tortfeasor to defer assertion of the right to offset until establishment of his or her liability at the completion of the trial. (*Knox v. Los Angeles* (1980) 109 C.A.3d 825, 834, 167 C.R. 463, citing *River Garden Farms v. Superior Court* (1972) 26 C.A.3d 986, 993, 103 C.R. 498, infra, §78.)

(10) *Discharge of other parties.* The release does not, under the statute, discharge other parties "unless its terms so provide." (See *Brinton v. Bankers Pension Services* (1999) 76 C.A.4th 550, 558, 90 C.R.2d 469 [further action against defendant was barred by settlement of earlier action where plaintiff participated in earlier action and defendant was third-party beneficiary of the release of claims clause contained in settlement of earlier action]; on effect of general release, see infra, §73.)

(11) *Reduction of other claims.* The "claims" against a nonsettling defendant are reduced by the amount of a settlement. Because "claim" refers to a cause of action with respect to liability and because "costs" are recoverable from the losing party after liability has been established, costs are not reduced by the amount of a settlement, unless they are part of the settlement consideration. (*Reed v. Wilson* (1999) 73 C.A.4th 439, 443, 86 C.R.2d 510.)

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2. Statutory Abrogation of Rule.

cc. Effect of General Release.

5 *Witkin Sum. Cal. Law Torts* § 73

[§ 73] Effect of General Release.

A release, dismissal, or covenant not to sue given to tortfeasors claimed to be liable for a tort "shall not discharge any other such party from liability unless the terms so provide." (*C.C.P.* 877(a).) The courts have differed regarding the effect of a general release. (See *General Motors Corp. v. Superior Court* (1993) 12 C.A.4th 435, 440, 15 C.R.2d 622 [no requirement of specific identification; release of driver of other vehicle and "any and all other persons, firms and corporations" covered automobile manufacturer]; *Lama v. Comcast Cablevision* (1993) 14 C.A.4th 59, 64, 17 C.R.2d 224 [accident victim's release of driver and owner of other vehicle, as well as any other person or corporation allegedly responsible for the accident, covered driver's employer]; cf. *Appleton v. Waessil* (1994) 27 C.A.4th 551, 556, 32 C.R.2d 676 [distinguishing *General Motors Corp.* and *Lama*; whether party causing automobile accident was included within victim's release of automobile manufacturer and dealer and "all other persons" was triable question of fact]; *Vahle v. Barwick* (2001) 93 C.A.4th 1323, 113 C.R.2d 793 [release between client and country club that referred to "all other persons" did not apply to client's attorney when he was later sued for malpractice].)

A broadly worded general release was again involved in *Neverkovec v. Fredericks* (1999) 74 C.A.4th 337, 87 C.R.2d 856, and the related issues were discussed. Plaintiff was a passenger in a car that collided with another vehicle. The insurer of the car in which plaintiff was riding agreed to pay its policy limit, but required plaintiff and other claimants to sign a broadly worded release by which they purported to release anyone chargeable with liability for injuries arising from the accident. Nevertheless, a few months later, plaintiff instituted the present action against defendant, who was the driver of the other vehicle involved in the accident. Defendant successfully moved for summary judgment on the basis of the release. *Held*, reversed; even if the release was sufficient to shift the burden of proof to plaintiff, the extrinsic evidence raised a triable issue regarding plaintiff's intent to release defendant.

(a) This case is best suited to resolution under well-settled contract principles governing third-party beneficiaries (see 1 *Summary* (10th), *Contracts*, §685 et seq.). Thus, it is necessary to prove that the contracting parties intended to benefit the third-party beneficiary, and the fact that a literal interpretation of the release would be to his or her benefit is insufficient proof of that intent. In determining the intent of the contracting parties, the court must consider the circumstances surrounding their negotiations. And the parol evidence rule (see 2 *Cal. Evidence* (4th), *Documentary*

Evidence, §59 et seq.) does not preclude this consideration. Moreover, some authority supports the proposition that the rule does not apply if the term to be interpreted is ambiguous. (74 C.A.4th 344.)

(b) *C.C.P. 877* provides that a release does not discharge other parties unless its terms so provide. (Defendant was arguably discharged by the terms of the release.) This statute has led to the development of three approaches regarding the effect of a general release: (1) a minority view holding that the release absolutely bars the settling party from proceeding against other tortfeasors; (2) a view presuming that parties not named or specifically identified are not released; (3) a view that the court must determine whether the parties intended to release the unnamed third party. Some of the courts following this third approach hold that extrinsic evidence is always admissible for this purpose and some hold that it is admissible only if there is an ambiguity. (74 C.A.4th 354.)

(c) Here, the agreement purported to release "anyone" chargeable with liability for plaintiff's injuries. However, the release also required plaintiff's mother (on his behalf) to "repay" any additional amounts that anyone chargeable with plaintiff's injuries might be compelled to pay in the future. The release is thus ambiguous, because if it were operative against "anyone" liable for plaintiff's injuries, plaintiff could not be expected to recover further amounts from which to make repayments. (74 C.A.4th 352.)

(d) The evidence also showed that the release in question was provided by the insurer to implement a settlement agreement negotiated among various claimants, including defendant, who had agreed to release only the driver of the vehicle in which plaintiff was riding. Several of the parties then sought a determination that the settlement was in good faith under *C.C.P. 877.6* (see *infra*, §83 et seq.). However, the only purpose of this determination is to bar any other claim by a joint tortfeasor, and if the release had already accomplished that purpose, there was no reason to seek the protection of that statute. Moreover, the evidence indicated that none of the parties responsible intended to release defendant. The totality of the evidence was sufficient to create a triable issue of fact as to the release's applicability to defendant. (74 C.A.4th 352, distinguishing *General Motors Corp.* and *Lama* and following *Appleton*.)

(e) "In closing, we urge counsel on both sides to avoid overly broad, loose terms in release agreements. We suggest to counsel for insurers that the benefits of sweeping release terms are questionable in view of the high volume of litigation such terms have engendered. In California, consideration should be given to the statutory protection provided to parties settling in good faith under sections 877 and 877.6, which ought to reduce the temptation to release not just the insured but also the population at large. Counsel for claimants should advise their clients not to sign releases that appear to bar claims the client does not intend to give up. ... [A]ttorneys' energies are better spent making sure that release agreements accurately reflect their clients' intentions than in litigating what their clients *really* intended when they signed agreements including terms that counsel failed to analyze in the circumstances of the specific case." (74 C.A.4th 354.)

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4. Settlement With Fewer Than All Tortfeasors.

a. In General.

2. Statutory Abrogation of Rule.

dd. Application to Alter Ego Liability.

5 *Witkin Sum. Cal. Law Torts* § 74

[§ 74] Application to Alter Ego Liability.

In *Mesler v. Bragg Management Co.* (1985) 39 C.3d 290, 216 C.R. 443, 702 P.2d 601, plaintiff, operating a Caterpillar dozer at night, stumbled into the vehicle while the engine was running, and his arm was partially amputated by the engine fan. His complaint, based on strict products liability and negligence, named a number of defendants, including the prior owner of the dozer and Does. After discovery revealed that the prior owner was a wholly owned subsidiary of another corporation, plaintiff substituted that corporation as Doe I. The parent corporation moved for summary judgment on the ground that it had no connection with the dozer, workplace, or plaintiff, and the trial judge granted the motion. Plaintiff appealed from the resulting judgment but, pending appeal, plaintiff settled with the subsidiary and dismissed his action against that defendant. The parent corporation, then the sole remaining defendant, contended that dismissal of the suit against its subsidiary precluded continuance of the action against it. The issue on appeal, therefore, was whether C.C.P. 877, abrogating the common law release rule (see *supra*, §71), applied to the parent-subsidary situation. *Held*, summary judgment reversed; C.C.P. 877 did apply.

(a) Defendant's contention, based on two federal decisions, is that C.C.P. 877 applies only to joint tortfeasors and that the alter ego claim rests on the theory that the two distinct entities are really one. This is a misinterpretation of the alter ego doctrine (see 9 *Summary* (10th), *Corporations*, §9 et seq.). When a court disregards the corporate entity, it does not dissolve the corporation; the corporate entity is real, not a fiction, and the doctrine merely limits the exercise of the corporate privilege to prevent its abuse. (39 C.3d 300.)

(b) The alter ego doctrine, properly applied, has this effect: "When it is claimed that a parent corporation should be liable because it is the alter ego of its subsidiary, equity commands that the corporate wall be breached. Yet the wall remains: the parent is liable through the acts of the subsidiary, but as a separate entity. A judgment obtained against a corporation and its alter ego is enforceable against both separately. Thus, when the plaintiff settles with only the subsidiary, the parent's liability continues." (39 C.3d 301.)

(c) Application of C.C.P. 877 to alter ego situations is supported by the analogy of tort liability of a principal for acts of its agent. "The principal is held vicariously liable not because it was necessarily at fault, but because justice

requires that the enterprise be responsible for the risks of conducting its business. ... Similarly, the parent corporation is liable for the acts of its subsidiary under the alter ego doctrine because justice requires that the corporate wall be breached." (39 C.3d 302.) California cases have made it clear that C.C.P. 877 applies to principal-agent liability. (39 C.3d 303, citing *Ritter v. Technicolor Corp.* (1972) 27 C.A.3d 152, 155, 103 C.R. 686, and *Mayhugh v. Orange* (1983) 141 C.A.3d 763, 190 C.R. 537.)

(d) It has been argued that, because liability of the principal is wholly dependent on liability of the agent, dismissal of the agent removes the basis of the principal's responsibility. "However, it does not follow that because *judgment* in favor of the agent exonerates the principal ... , *release* of the agent has the same effect. A judgment ... means that under our system of law the plaintiff should not recover under the circumstances presented. A settlement has no such implication; it means simply that the parties have agreed to resolve their problems outside the courtroom. Thus liability of the principal--or parent corporation in the alter ego situation--has not been disproved. The liability of the principal (or parent) is not affected by the route the agent (or subsidiary) chooses to take in disposing of the action." (39 C.3d 303.)

(e) Policies underlying the contribution legislation (see *infra*, §105) further support the rule that release of the subsidiary does not release its alter ego.

(1) One goal is to allow the plaintiff full recovery to the extent that others are responsible for plaintiff's injuries. "This policy would be violated if a corporation alleged to be liable as the alter ego of its subsidiary were to be dismissed because the subsidiary has settled with the plaintiff, especially if the plaintiff has accepted a modest settlement because the subsidiary is undercapitalized." (39 C.3d 304.)

(2) A second goal of the contribution legislation is the early and final settlement of claims, and a problem arises because of the right of full indemnity; i.e., the threat of an indemnity claim by the secondarily liable defendant could keep a primarily liable defendant from settling. This court has not yet addressed the question whether an employer-judgment debtor has a right to obtain indemnification from an employee who has settled with the plaintiff, but it must be assumed that the Legislature, in preserving full indemnity by C.C.P. 875(f) (*infra*, §106), foresaw this contingency. "Moreover, in the alter ego arena, where the corporations involved have comparable control, it is unlikely that the parent will sue the subsidiary for indemnity unless to do so would be in the best interests of both corporations. Finally, it should be noted that in many cases the parent and subsidiary will be represented by the same counsel, as is the situation in the case at bar, or by separate counsel working in close collaboration. Thus the easiest method for avoiding indemnity problems is to include both corporations in the settlement." (39 C.3d 305.)

(3) A third policy is equity among defendants. C.C.P. 877(a) provides that the plaintiff's recovery will be reduced by the amount of consideration *paid* by the settling defendant, not by the proportion of that defendant's liability. "If the subsidiary is allowed to settle for a modest share of the plaintiff's liability and this settlement covers the parent as well, the remaining defendants will have a proportionately greater sum to pay. The low settlement, not made in bad faith because, for example, the subsidiary is undercapitalized, may indeed be unfair if the more affluent parent corporation is included in its terms. Since the remaining defendants cannot attack a settlement unless it was made in bad faith, the rule would be inequitable to the nonsettlers." (39 C.3d 305.)

(f) Allowing the plaintiff to proceed against the nonsettling parent would also reflect the parties' intent. "When, as here alleged, the terms of settlement and release expressly include only the subsidiary and no other party, the parent should not magically benefit from the agreement. If it could do so, results unfair to plaintiffs might follow: not realizing that the parent would also be part of the agreement, the plaintiff would base his settlement on the financial capabilities of the only other party to the agreement, the subsidiary. The amount the plaintiff would receive would likely be disproportionately low if the settlement discharged the parent as well as the subsidiary. And as for the protection of the corporations, the solution is simple: both parties could and should participate in the negotiations. In this way, with every party's identity fully disclosed, an agreement fair to all can be reached." (39 C.3d 305.)

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4. Settlement With Fewer Than All Tortfeasors.

a. In General.

3. Restatement.

5 *Witkin Sum. Cal. Law Torts* § 75

[§ 75] Restatement.

Rest.3d, Torts: Apportionment of Liability, departs from common law principles. A plaintiff's recoverable damages from a jointly and severally liable tortfeasor "are reduced by the comparative share of damages attributable to a settling tortfeasor who otherwise would have been liable for contribution to jointly and severally liable defendants who do not settle." (*Rest.3d, Torts: Apportionment of Liability* §16.) Nonsettling tortfeasors thus receive a credit against the judgment for the settling tortfeasor's share of responsibility. (*Rest.3d, Torts: Apportionment of Liability* §16, Comment c.)

The settling tortfeasor's comparative share of damages is "the percentage of comparative responsibility assigned to the settling tortfeasor multiplied by the total damages of the plaintiff." (*Rest.3d, Torts: Apportionment of Liability* §16.) A "comparative-share" credit is adopted rather than its primary alternative, a credit in the amount of the settlement (a so-called pro tanto credit). The comparative share credit, among other advantages, obviates the need for courts to review the bona fides of partial settlements. (*Rest.3d, Torts: Apportionment of Liability* §16, Comment c; on good faith requirement, see *infra*, §77 et seq.)

Under the Restatement rule, a plaintiff may recover more than the damages determined by the factfinder, i.e., where the plaintiff settles with one defendant for an amount greater than that of defendant's comparative share of the plaintiff's damages. This result is deemed appropriate on the ground that, because the plaintiff bears the risk of an inadequate settlement, the plaintiff should also obtain the benefit of a favorable settlement. Also, a nonsettling defendant would otherwise receive an unjustified windfall. (*Rest.3d, Torts: Apportionment of Liability* §16, Comment e.)

Persons "released from liability by the terms of a settlement are relieved of further liability to the claimant for the injuries or claims covered by the agreement." (*Rest.3d, Torts: Apportionment of Liability* §24(b).) When a settlement releases only the settling tortfeasor, the settling tortfeasor ordinarily should be dismissed from the lawsuit or, if no suit has been initiated, not joined in any subsequent action. Nevertheless, the conduct of the settling tortfeasor may be submitted to the factfinder for assignment of responsibility. (*Rest.3d, Torts: Apportionment of Liability* §24, Comment e.)

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b. Time of Settlement.

5 *Witkin Sum. Cal. Law Torts* § 76

[§ 76] Time of Settlement.

With respect to the time of settlement, the only requirement is that it be made "before verdict or judgment." (*C.C.P.* 877, *supra*, §71; see *Be v. Western Truck Exchange* (1997) 55 *C.A.4th* 1139, 1142, 64 *C.R.2d* 527 [postjudgment settlement between cross-defendant and plaintiff was not subject to *C.C.P.* 877 and 877.6].)

(1) *Release Prior to Litigation.* A prelawsuit settlement, even if remote from the commencement of litigation, is binding on other tortfeasors if arrived at in good faith. (*Mid-Century Ins. Exchange v. Daimler-Chrysler Corp.* (2001) 93 *C.A.4th* 310, 314, 112 *C.R.2d* 880, *infra*, §93.)

(2) *Release Before Establishment of Liability.* *C.C.P.* 877 and nearly all of the cases deal with a single trial. But where there are separate trials on liability and damages (see 7 *Cal. Proc.* (4th), *Trial*, §168 et seq.), a question is presented that the statute does not directly answer: What is the effect of a release given after liability has been determined in the first trial, but before verdict and judgment in the second trial on damages?

In *Halpin v. Superior Court* (1971) 14 *C.A.3d* 530, 92 *C.R.* 329, the court held that the contribution statute (*infra*, §105) was intended to provide a comprehensive scheme of contribution between joint tortfeasors after they have been judicially declared to be such. This takes place in the first trial on liability. Thereafter, there is no mere "claim of liability," for it has been determined. Accordingly, the statutory phrase "before verdict or judgment" must be construed to mean "before establishment of liability." "[W]ere the rule to be established otherwise, there would unquestionably occur concurrently with the determination of joint liability a mad rush by one or more of the joint tortfeasors in an effort to settle and to obtain a release, thus thwarting the provisions of the contribution statute and the right of the other joint tortfeasors to obtain contribution from the settlors. A complete breakdown of (1) bifurcation of trials and (2) the operation of the contribution statute's provisions would follow. Both of these modern processes are notably progressive advances towards the more efficient disposition of litigation." (14 *C.A.3d* 543.)

The *Halpin* approach was followed in *Southern Calif. White Trucks v. Teresinski* (1987) 190 *C.A.3d* 1393, 236 *C.R.* 159, a multiple defendant action involving a vehicle collision. Plaintiff, after settling with the other defendants, obtained a jury verdict against defendant V. A "partial" judgment provided for credit for the previous settlements, the amount of which was then unknown. Plaintiff and V then entered into a settlement on the stipulation that judgment be vacated. The

trial judge vacated the judgment and, after determining pursuant to *C.C.P.* 877.6 (infra, §83 et seq.) that the settlement was made in good faith, dismissed the other defendants' cross-complaints for contribution and indemnification. *Held*, the dismissals were erroneous; the settlement was not made "before verdict or judgment," as required by *C.C.P.* 877.

(a) *Halpin* correctly determined that the phrase "before verdict or judgment" means before establishment of liability by either a jury verdict or a judgment in a court trial. (190 C.A.3d 1405.) And because one purpose of *C.C.P.* 877.6 is to implement *C.C.P.* 877, the requirement of a settlement "before verdict or judgment" applies to it as well, even though the phrase itself does not appear in it. (190 C.A.3d 1407.)

(b) The fact that the judgment was vacated does not change the result. First, the settlement was entered into before the vacating occurred. (190 C.A.3d 1407.) Second, because the trial judge was not correcting a clerical error, vacating a void judgment, or acting on one of the statutory grounds set forth in *C.C.P.* 473 and 663, the vacating order was invalid. (190 C.A.3d 1408; see 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §147 et seq.)

The *Halpin* approach was not followed in *Price Pfister v. William Lyon Co.* (1993) 14 C.A.4th 1643, 18 C.R.2d 437. Plaintiff filed an action against the developer of a housing tract and the plumbing contractor to recover damages sustained when her bathroom ceiling collapsed on her. The developer and the contractor filed a cross-complaint against a manufacturer of plumbing products. The trial was bifurcated and the jury found the developer to be 100% liable. Before completion of the damage phase, both the developer and the contractor entered into a settlement with plaintiff which, following a *C.C.P.* 877.6 hearing, was found to be in good faith. Plaintiff then instituted the present action against the manufacturer, which cross-complained against both settling tortfeasors for indemnity and contribution. Contending that the good faith settlement in the first action barred all of the manufacturer's claims against them, settling tortfeasors moved to strike the cross-complaint, and the trial judge granted the motions. *Held*, affirmed.

(a) *Halpin* held that the phrase "before verdict or judgment" in *C.C.P.* 877 means before establishment of liability by either a jury verdict or a judgment in a court trial. The manufacturer relied on *Halpin* in contending that the trial judge exceeded his jurisdiction by granting the motions for a finding of good faith because the settlement was entered into *after* the finding of liability. However, for the following reasons, *Halpin* is not controlling here:

(1) *Halpin* is distinguishable from this case. There, the defendants were found jointly and severally liable. Here, by contrast, only the developer was found liable. (14 C.A.4th 1647.)

(2) Given that the facts in *Halpin* were complex and convoluted (there was some question whether a settlement was even reached) and that the Court of Appeal was sharply critical of the attorneys for defendants, its result, i.e., that settlement after liability did not deprive the remaining tortfeasor of the right of contribution, can best be justified on the basis that the settlement, if any, was not made in good faith. (14 C.A.4th 1648.)

(3) When *Halpin* was decided, there was no established procedure for determining whether a settlement was in good faith. With the subsequent enactment of *C.C.P.* 877.6 to provide an expeditious procedure for a speedy determination of good faith after notice to all concerned, *Halpin's* concern that a settlement after a verdict of liability would lead to a "mad rush" to settle should vanish. (14 C.A.4th 1648.)

(b) The manufacturer's reliance on *Southern Calif. White Trucks v. Teresinski* is also unavailing. "To the extent it relies on *Halpin*, we disagree with *Teresinski*. Moreover, it is distinguishable because it was not a bifurcated trial. The verdict indeed was final, i.e., there was nothing more for the jury to decide." (14 C.A.4th 1649.)

(c) Although in enacting *C.C.P.* 877 and 877.6, the Legislature was not contemplating bifurcated trials where settlement is reached "before verdict or judgment," it was contemplating that this phrase would signify some kind of finality. However, a verdict on only one portion of a case in a bifurcated trial lacks finality. So long as a jury still must decide issues essential to the rendering of a judgment, there can be no finality. (14 C.A.4th 1649.)

(d) Extending the benefits and protection of *C.C.P.* 877 and 877.6 to a settling defendant in the situation presented

here will have multiple benefits to the parties and the legal system in general. Bifurcation will provide an opportunity to settle once liability is found, because the settling defendant will no longer be subjected to indemnity cross-complaints, and the settling tortfeasor and the plaintiff will save the time and expense of litigating the issue of damages. Court time will also be saved. On the other hand, adopting the manufacturer's position would force all defendants in multiparty tort cases to litigate to the bitter end, thereby thwarting the legislative policy of encouraging settlements. (14 C.A.4th 1649.)

(3) *Release Given Before Judgment Is Final*. Under C.C.P. 877, a covenant *before* verdict or judgment no longer discharges other tortfeasors. In *Thomas v. General Motors Corp.* (1970) 13 C.A.3d 81, 91 C.R. 301, the covenant was given *after* judgment, and this would ordinarily have operated as a discharge, because the old law still governs except as modified by the statute. (13 C.A.3d 86.) Here, however, though given *after judgment*, it was given before the judgment became *final* (an appeal was pending). *Held*, in view of the policy favoring settlement and the harshness of the discharge doctrine, the covenant did not discharge. (13 C.A.3d 86.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Release Before Establishment of Liability*.

Separate trials:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §154. *Vacating judgment:*

Cross-Reference: 8 Cal. Proc. (5th), Attack on Judgment in Trial Court, §139 et seq.



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c. Requirement of Good Faith.

1. Nature and Scope of Requirement.

aa. In General.

5 Witkin Sum. Cal. Law Torts § 77

[§ 77] In General.

C.C.P. 877 refers to a release, dismissal, or covenant "given in good faith." This limiting condition has given rise to extensive litigation. (See *infra*, §78 et seq.) It has also resulted in a statutory provision for a hearing on the issue. (See *C.C.P. 877.6*, *infra*, §83 et seq.) (On effect of determination, see *infra*, §88 et seq.; on application of condition to sliding scale (Mary Carter) agreement, see *infra*, §102.)

West's Key Number Digest, Release k.1; Torts k.22

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1. Nature and Scope of Requirement.

bb. Early Cases.

5 *Witkin Sum. Cal. Law Torts* § 78

[§ 78] Early Cases.

(1) *River Garden Farms Case*. In *River Garden Farms v. Superior Court* (1972) 26 C.A.3d 986, 103 C.R. 498, all but one of several joint tortfeasors obtained releases for injuries and deaths resulting from a fire in which parents died and their children were injured. The nonsettling tortfeasor sought mandamus in the Court of Appeal to compel dismissal of one victim's action, contending that, in executing the releases, the victims had not complied with the good faith requirement of C.C.P. 877 in that the allocation as between the death and injury claims was such as to subject the nonsettling defendant to about two-thirds of the liability it had originally shared with three other defendants. *Held*, the nonsettling tortfeasor was entitled to assert the invalidity of the releases.

(a) *Good faith requirement extends beyond settling parties.*

(1) The claimants correctly argued that, because a plaintiff may choose to sue one of several joint tortfeasors and collect solely from that tortfeasor, there is no obligation to engage in collective negotiations. But this does not mean that they may negotiate and settle in disregard of a tortfeasor reserved for later negotiation or suit. Every contract contains an implied obligation of good faith and fair dealing, and, if the good faith requirement were limited to the settling parties, there would be no need for the provision in C.C.P. 877. (26 C.A.3d 993.)

(2) "The California legislation empowers a plaintiff, armed with a strong and lucrative claim, to settle with his antagonists one by one, preserving for the jury the opponent with the most money and least sympathy. The power is great and vulnerable to abuse. In a multi-party case the threat of an unshared judgment against the last remaining defendant--diminished only by meager settlements with his eager fellows--permits a plaintiff to create acute financial pressures bordering on extortion. Viewed as a demand for settlements which have a reasonable relation to the value of the plaintiff's case, to the strengths and weaknesses of the parties and the financial ability of the settlor, the good faith clause aids the statutory goal of equitable sharing. It also aids the goal of settlement, by preventing a plaintiff from selecting one defendant as the target for enlarged demands after unreasonably low settlements with others." (26 C.A.3d 994.)

(3) "Construed in the light of the legislation's objectives, the good faith release clause extends the obligation of good faith beyond the parties to the negotiations, embracing an absent tortfeasor. The latter has a financial stake in the amount of the settlement and thus a justiciable interest in the question of good faith. Petitioners are properly before the court." (26 C.A.3d 996.)

(b) *Test of good faith.* The standard that the good faith clause incorporates--the general equitable principle of contribution that frowns on unfair settlements--is nebulous, but no more so than the good faith test of an insurer's failure to settle. (26 C.A.3d 997.) The policies of equitable sharing and finality of settlement compete. If the clause demanded equitable sharing as determined by a future jury verdict, parties could not settle with assurance of finality. On the other hand, if the policy of encouraging settlements is permitted to overwhelm equitable financial sharing, the possibilities of unfair tactics are multiplied. (26 C.A.3d 997, 998.) To strike a balance between the two objectives is possible, for generalized valuation criteria are recognized by the personal injury bar, insurance claims departments, and pretrial settlement courts. "The danger that a low settlement violates the good faith clause will not impart uncertainty so long as the parties behave fairly and the courts maintain a realistic awareness of settlement imponderables." (26 C.A.3d 998.)

(c) *Good faith is question of fact.* The issue cannot be determined on this appeal. The question is one of fact, and only a trial court, on evidence, may reach a decision. (26 C.A.3d 998.)

(d) *Effect of bad faith settlement.* Assuming that the settlement was in bad faith, what is its effect?

(1) The contention that the release is taken outside the statute, and that the common law rule of release of the others applies, is unsound. The common law rule, criticized and evaded by language of covenant not to sue, was opposed to the statutory objective of encouraging settlement. "Section 877 implicitly but firmly dispatched it." (26 C.A.3d 1000.)

(2) Although the statute does not state the effect of a bad faith release, its consequences can be discerned by implication and nonstatutory principles: A release in bad faith is contrary to the policy of the law and is therefore an illegal contract. If it is the product of collusion between the plaintiff and the settlors, they are in *pari delicto* and barred from judicial aid. Where, however, as here, only the plaintiff has breached the duty, the settlors may insist on the validity of their releases, and their discharge from liability for their pro rata contributions. (26 C.A.3d 1000, 1001.)

(3) Although ordinarily only a party to a contract may invoke its illegality, a third person whose interests are affected may do so. "As a nonparticipant whose ultimate liability is affected, the nonsettling tortfeasor may invoke the settlement's illegality. Through appropriate procedures, he may have it set aside. Conceivably--although we do not so decide--he might seek the offending settlor's joinder to the lawsuit as a party defendant, thus preserving his own contribution claim against the possibility of a joint judgment." (26 C.A.3d 1000.)

(4) Although the contribution statute (*infra*, §105) provides no express remedy for the claimant's breach of duty, its violation supports a right of action. "The nonsettling tortfeasor has a civil claim for damages against the claimant who exercised bad faith. He may set off this claim against the latter's tort recovery and receive credit against any judgment recovered in the tort suit. In money terms, he receives pro rata rather than *pro tanto* credit against the judgment." (26 C.A.3d 1001.) (See *Lareau v. Southern Pac. Trans. Co.* (1975) 44 C.A.3d 783, 797, 118 C.R. 837 [evidence showing allocation to be arguably disproportionate was sufficient to raise good faith issue; following *River Garden Farms*].)

(2) *Dompeling Case.* In *Dompeling v. Superior Court* (1981) 117 C.A.3d 798, 173 C.R. 38, plaintiff was injured in an automobile collision when defendant D's truck swerved to avoid defendant C's parked school bus and struck plaintiff's car. Plaintiff sued and demanded \$ 325,000 for settlement. He made an agreement with defendant D calling for payment of \$ 100,000 (the insurance policy limits) with a possible \$ 10,000 in addition on a sliding scale dependent on recovery from C. Plaintiff then served C with an offer to compromise for \$ 150,000. C, having cross-complained against D for partial indemnity, took D's deposition and asked numerous questions as to his personal and business assets, on the theory that a defendant's financial status is relevant on the issue of good faith in settlement; i.e., that D could have paid more. The trial judge ordered D to answer. *Held*, mandamus granted to compel the trial court to vacate

the order.

(a) C's theory was that D was more culpable than C, that the damages were substantial, and that therefore the settlement was suspect. While some cases have intimated that a disproportionately low settlement may be in bad faith, most were decided before *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, *infra*, §1357, which declared that "a plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury." (117 C.A.3d 804.) Hence, while the court in *River Garden Farms* spoke of collusion resulting in an "unreasonably cheap settlement" (117 C.A.3d 807), the \$ 100,000 settlement in the present case was not unreasonably cheap, and the sliding scale agreement has statutory recognition (*infra*, §§100, 101). (117 C.A.3d 807.)

(b) "Bad faith is not established by a showing that a settling defendant paid less than his theoretical proportionate or fair share of the value of plaintiff's case. A settlement always removes the settling defendant from the action; this necessarily results in a possibility that the remaining defendants will suffer judgment greater in amount than if there had been no settlement." (117 C.A.3d 809.)

(c) "Where plaintiff settles with fewer than all defendants, the defendants are clearly adverse parties. A settling defendant does not owe a legal duty to adverse parties, the nonsettling defendants, to pay the plaintiff more so that the adverse parties may pay the plaintiff less. Plaintiff and defendants are also adverse parties; the plaintiff does not owe a legal duty to the nonsettling defendants to seek more from a settling defendant so that the nonsettling defendants may pay less." (117 C.A.3d 809.)

(d) "The settling parties owe the nonsettling defendants a legal duty to refrain from tortious or other wrongful conduct; absent conduct violative of such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants." (117 C.A.3d 809.)

A number of decisions followed *Dompeling*. (See *Cardio Systems v. Superior Court* (1981) 122 C.A.3d 880, 890, 176 C.R. 254 [settling defendant owes no duty to nonsettling codefendant except to refrain from tortious or other wrongful conduct; citing *Dompeling*]; *Burlington Northern R. Co. v. Superior Court* (1982) 137 C.A.3d 942, 945, 187 C.R. 376 [following *Dompeling*]; *Kohn v. Superior Court* (1983) 142 C.A.3d 323, 327, 191 C.R. 78 [same]; *Wysong & Miles Co. v. Western Industrial Movers* (1983) 143 C.A.3d 278, 286, 289, 191 C.R. 671 [settlement does not lack good faith simply because of disparity in amount of settlement compared to damages claimed in complaint]; *Ford Motor Co. v. Schultz* (1983) 147 C.A.3d 941, 950, 195 C.R. 470 [good faith is deemed established where no showing of collusion to injure interests of absent tortfeasor]; 17 *Loyola L.A. L. Rev.* 851 [exhaustive review of early cases].) However, *Dompeling* "and its progeny" were disapproved in *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 C.3d 488, 500, footnote 7, 213 C.R. 256, 698 P.2d 159, *infra*, §79.

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1. Nature and Scope of Requirement.

cc. Tech-Bilt Test.

5 *Witkin Sum. Cal. Law Torts* § 79

[§ 79] Tech-Bilt Test.

In *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 C.3d 488, 213 C.R. 256, 698 P.2d 159, plaintiff owners of residential property sued the developer and soils engineers, and others, to recover damages for structural defects in the property. When it appeared that plaintiffs' action against the soils engineering firm was barred by limitations, plaintiffs accepted defendant's offer to waive any claim against plaintiffs for costs incurred in defending the action if plaintiffs agreed to dismiss their claim against it. Defendant developer, who had not settled with plaintiffs, thereafter filed an amended cross-complaint for equitable indemnity against the engineers. The engineers then moved for an order under C.C.P. 877.6 (infra, §83 et seq.) to confirm the agreement with plaintiffs as a good faith settlement and for summary judgment as to all cross-complaints against it. The trial judge found the settlement to be in good faith and entered summary judgment dismissing the developer's cross-complaint against the engineers. *Held*, the settlement was not in good faith, and thus did not immunize the settling defendant from liability to the other defendants.

(a) *Prior common law and statutes.* The common law discouraged settlements in multiple tortfeasor cases because a release of one joint tortfeasor released all. C.C.P. 877 provides that a release in good faith reduces the claims against the others in the amount stipulated or paid as consideration, but does not discharge the other tortfeasors; and C.C.P. 877.6 provides that a settlement in good faith bars any other joint tortfeasor from further claims against the settling tortfeasors for equitable comparative contribution or partial or comparative indemnity. (38 C.3d 493.)

(b) *River Garden Farms case approved.* *River Garden Farms v. Superior Court* (1972) 26 C.A.3d 986, 103 C.R. 498, supra, §78, pointed out that the 1957 legislation had dual objectives: equitable sharing of costs among parties at fault and encouragement of settlements. Although these goals are not necessarily harmonious, neither should be applied to defeat the other, and the courts should review agreements to insure appropriate balance. (38 C.3d 495.) *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, infra, §1357, in articulating a theory of partial indemnity applicable to all multiple tortfeasors, cited *River Garden Farms* on the meaning of "good faith" settlement. (38 C.3d 495.) Thereafter, the 1980 Legislature enacted C.C.P. 877.6, codifying the *American Motorcycle* result that a C.C.P. 877 settlement bars claims for partial or comparative indemnity as well as for contribution. This background suggests that the Legislature intended the "good faith" in C.C.P. 877.6 to have the

meaning ascribed in *River Garden Farms* and *American Motorcycle*; and the United States Court of Appeals for the Ninth Circuit, applying California law, reached the same conclusion. (38 C.3d 496.)

(c) *Dompeling case disapproved. Dompeling v. Superior Court* (1981) 117 C.A.3d 798, 173 C.R. 38, supra, §66, held that bad faith is not established by showing that a settling defendant paid less than his or her theoretical proportionate or fair share of the value of plaintiff's case; i.e., the settling defendant and the nonsettling defendants are adverse parties and each may act to further his or her own interests. (38 C.3d 497, 498.) But the *Dompeling* every-person-for-himself approach has harsh results, and it is improbable that the Legislature intended to have the good faith requirement in C.C.P. 877.6 interpreted so narrowly. *Dompeling* and its progeny are disapproved "to the extent that those cases are inconsistent with this opinion." (38 C.3d 500, footnote 7.)

(d) *Test of good faith.*

(1) The court may inquire, among other things, "whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries." (38 C.3d 499.) This is not to say that bad faith is established by showing that a settling defendant paid less than his or her theoretical proportionate share; damages are often speculative, and settlement for a disproportionately low figure is often reasonable where liability is uncertain or remote, or the tortfeasor is insolvent, uninsured, or underinsured. However, the amount of the settlement is not irrelevant. (38 C.3d 499.)

(2) The policies underlying the good faith requirement "require that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants." (38 C.3d 499.)

(3) Practical considerations require that the evaluation be made "on the basis of information available at the time of settlement." (38 C.3d 499.)

(4) The party asserting lack of good faith--who has the burden of proof--should be permitted to demonstrate that "the settlement is so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute," and hence was not in good faith. (38 C.3d 499.)

(e) *Policy considerations favor this approach.*

(1) The plaintiff will have the same incentive to settle; "indeed, to the extent that the settling defendant is induced to offer more in order to bring the settlement within the bounds of fairness, the plaintiff's incentive to settle may be greater." (38 C.3d 500.)

(2) Because the "reasonable range" test leaves substantial latitude to the parties and to the discretion of the trial court, "defendants will still have an incentive to get out of the litigation for a reduced amount." (38 C.3d 500.)

(3) The public interest is advanced by settling all claims and removing the case from the judicial system. (38 C.3d 500.)

(4) There will not be an undue burden on the parties or the trial court. "Despite the uncertainties, generalized valuation criteria are recognized by the personal injury bar, insurance claims departments and pretrial settlement courts. When testing the good faith of a settlement figure, a court may enlist the guidance of the judge's personal experience and of experts in the field. Represented by knowledgeable counsel, settlement negotiators can predict with some assurance whether a settlement is within the reasonable range permitted by the criterion of good faith." (38 C.3d 500, quoting *River Garden Farms*.)

(f) *Settlement in this case not in good faith.* Plaintiffs received nothing in return for the dismissal except relief from having to pay costs of the settlor because it was wrongfully sued; the same net situation would have existed if, knowing that the statute of limitations had run, plaintiffs had not sued. Hence, the trial court's discretion, exercised on the basis of the criteria recited, could lead only to the conclusion that the settlement was not in good faith. (38 C.3d 501.) (See 22 Cal. Western L. Rev. 362; 20 Loyola L.A. L. Rev. 247; 26 Santa Clara L. Rev. 63.)

A number of cases, applying the *Tech-Bilt* test in various factual situations, uphold the trial court's determination of good faith. (See *Barth-Wittmore Ins. v. H.R. Murphy Enterprises* (1985) 169 C.A.3d 124, 132, 214 C.R. 894; *Ex-Cell-O Corp. v. Holdener* (1986) 181 C.A.3d 25, 32, 226 C.R. 57; *Horton v. Superior Court* (1987) 194 C.A.3d 727, 734, 238 C.R. 467; *Schuler v. Hernandez* (1988) 202 C.A.3d 1302, 1307, 249 C.R. 550; *Schmid v. Superior Court* (1988) 205 C.A.3d 1244, 1248, 253 C.R. 137; *Los Angeles v. Guerrero* (1989) 209 C.A.3d 1149, 1156, 257 C.R. 787; *Cal-Jones Properties v. Evans Pac. Corp.* (1989) 216 C.A.3d 324, 329, 264 C.R. 737; *Everman v. Superior Court* (1992) 8 C.A.4th 466, 472, 10 C.R.2d 176, *infra*, §82; *Aero-Crete v. Superior Court* (1993) 21 C.A.4th 203, 208, 25 C.R.2d 804; *North County Contractor's Assn. v. Touchstone Ins. Services* (1994) 27 C.A.4th 1085, 1092, 33 C.R.2d 166; *Regan Roofing Co. v. Superior Court* (1994) 21 C.A.4th 1685, 1701, 1705, 1708, 27 C.R.2d 62.)

Other cases find the settlement lacking in good faith. (See *Gehl Bros. Mfg. Co. v. Superior Court* (1986) 183 C.A.3d 178, 184, 185, 228 C.R. 19 [mandamus to trial court to vacate its order determining that settlement was in good faith]; *Southern Calif. Gas Co. v. Superior Court* (1986) 187 C.A.3d 1030, 1035, 1036, 232 C.R. 320 [same]; *Grand Terrace v. Superior Court* (1987) 192 C.A.3d 1251, 1263, 1264, 238 C.R. 119, *infra*, §85 [same]; *Greshko v. Los Angeles* (1987) 194 C.A.3d 822, 835, 836, 239 C.R. 846 [settlement "out of the ballpark" and part of plan for later bad faith suit against insurer]; *Standard Pac. of San Diego v. A.A. Baxter Corp.* (1986) 176 C.A.3d 577, 585, 222 C.R. 106 [reversal of judgment finding good faith; judge failed to conform to *Tech-Bilt* standards]; *Minnesota Mining & Mfg. Co. v. Superior Court* (1988) 206 C.A.3d 1025, 1029, 253 C.R. 908 [mandamus to trial judge to vacate its order determining that settlement was in good faith]; *Toyota Motor Sales U.S.A. v. Superior Court* (1990) 220 C.A.3d 864, 878, 269 C.R. 647 [same]; *Alcal Roofing & Insulation v. Superior Court* (1992) 8 C.A.4th 1121, 1129, 10 C.R.2d 844 [same]; *West v. Superior Court* (1994) 27 C.A.4th 1625, 1635, 34 C.R.2d 409 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

Cases finding settlement lacking in good faith: See *TSI Seismic Tenant Space v. Superior Court* (2007) 149 C.A.4th 159, 165, 56 C.R.3d 751 [good faith determination in construction defects action was abuse of discretion where approved settlement was based solely on limitation of liability clause in plaintiff's contract with settling party and was grossly disproportionate to that party's culpability in relation to other defendants; trial court failed to consider *Tech-Bilt* factor whether amount paid bears reasonable relationship to settling party's proportionate share of liability].



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dd. Nonmonetary Consideration for Settlement.

5 Witkin Sum. Cal. Law Torts § 80

[§ 80] Nonmonetary Consideration for Settlement.

In *Armstrong World Industries v. Superior Court* (1989) 215 C.A.3d 951, 264 C.R. 39, plaintiffs, occupants of a new office building, brought an action against various entities responsible for its construction, claiming personal injuries from toxic chemicals generated within the building. One defendant, which had installed ceiling tiles, obtained summary judgment against plaintiffs on the ground that their action was barred by the statute of limitations. Plaintiffs then entered into a settlement with that defendant under which plaintiffs would not appeal from the summary judgment in consideration of that defendant's forbearance from seeking an award of costs incurred in its defense of the action. The settling defendant then sought an order confirming the settlement, supported by counsel's declaration that its litigation costs were \$ 15,000. The trial judge denied the motion on the ground that the settling defendant's waiver of costs could not effect any economic benefit to the nonsettling defendants, because there was no express agreement that it would reduce their liability. *Held*, mandamus issued directing the trial judge to reconsider the motion.

(a) *C.C.P. 877(a)* provides that a good faith settlement reduces the claims against nonsettling defendants "in the amount of the consideration paid for it" (see *supra*, §71). The statute does not impose requirements as to how or when consideration is to be paid, and the case law does not require direct payment of money. (215 C.A.3d 956.) Thus, the operation of the setoff does not depend on either an express "offset" provision or an actual transfer of money. (215 C.A.3d 957.)

(b) Noncash consideration will effect a proportionate reduction under *C.C.P. 877(a)* in the liability of nonsettling defendants to the extent of the value of the noncash consideration. Forbearance from seeking an award of litigation costs is legal consideration for a contract. (215 C.A.3d 957, 958.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Franklin Mint Co. v. Superior Court* (2005) 130 C.A.4th 1550, 1557, 31 C.R.3d 319, Supp., *infra*, §96 [where proper amount of offset is unclear because of inclusion of nonmonetary consideration in settlement, parties must include allocation or valuation in agreement; court should not be burdened with obligation to determine value]; *Garcia v. Duro Dyne Corp.* (2007) 156 C.A.4th 92, 105, 67 C.R.3d 100 [economic damages award against asbestos manufacturer was

properly offset in amount of cost waivers in plaintiff's releases of other defendants, where it was undisputed that released defendants would have prevailed at trial].



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ee. Settlement With Cross-Defendant.

5 Witkin Sum. Cal. Law Torts § 81

[§ 81] Settlement With Cross-Defendant.

In *Mattco Forge v. Arthur Young & Co.* (1995) 38 C.A.4th 1337, 45 C.R.2d 581, plaintiff subcontractor sued defendant accounting firm for damages allegedly caused by defendant's improper calculation of damages for plaintiff in a prior federal action. Defendant then cross-complained for indemnity and fraud against the attorneys plaintiff had retained in the federal action. The cross-defendant attorneys and plaintiff entered into a sliding scale settlement agreement (see *infra*, §100 et seq.), which was valued at \$ 250,000 and guaranteed a recovery for plaintiff of at least \$ 750,000, even though plaintiff had not sued them, and any claims against them were time-barred. Plaintiff's damages were estimated at \$ 39 million, the figure used in cross-defendants' moving papers, which meant that they settled with plaintiff for less than one percent of plaintiff's damages. The trial judge approved the settlement, finding that it was in good faith, and dismissed defendant's cross-complaint. *Held*, reversed and remanded with directions to deny cross-defendants' motion for good faith settlement and to reinstate defendant's cross-complaint.

(a) Cross-defendants were authorized to bring a motion to determine the good faith of their settlement with plaintiff even though plaintiff did not sue them and they were solely cross-defendants on defendant's cross-complaint. *C.C.P. 877.6(a)(1)* (*infra*, §83) states that any party to an action "wherein it is alleged that two or more parties are joint tortfeasors" is entitled to a hearing on the issue of the good faith of a settlement. Although plaintiff did not sue cross-defendants, and its complaint against defendant did not allege that cross-defendants and defendant were joint tortfeasors, defendant's cross-complaint, by alleging that any damage to plaintiff was caused, in whole or in part, by cross-defendants' negligence or other fault, alleged that they were joint tortfeasors. (38 C.A.4th 1347.)

(b) One of the most important factors in determining the good faith of a settlement is the settling party's proportionate liability. Cross-defendants did not present any evidence regarding their proportionate liability for plaintiff's alleged injury; they merely presented a series of questionable assumptions in their memorandum of points and authorities to show the settlement amount was reasonable. Both *C.C.P. 877.6(b)* (*infra*, §85) and *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 C.3d 488, 213 C.R. 256, 698 P.2d 159, *supra*, §79, require an evidentiary showing that the proposed settlement is within the reasonable range permitted by the criterion of good faith. Thus, absent that evidence, defendant met its burden under *C.C.P. 877.6(d)* (*infra*, §85) in attacking the settlement as lacking

in good faith. (38 C.A.4th 1350.)

(c) The trial judge based the good faith ruling entirely on defendant's unwillingness to settle. This was error, as a matter of law. Under *Abbott Ford v. Superior Court* (1987) 43 C.3d 858, 239 C.R. 626, 741 P.2d 124, *infra*, §102, although a trial court may consider the conduct of the nonsettling defendant in determining whether a sliding scale agreement is a good faith settlement, there are limits on the consequences for being unreasonably recalcitrant in settlement negotiations. The mere fact of defendant's denial of liability and its refusal to settle did not establish that cross-defendants' settlement was anywhere within the reasonable range of their liability. (38 C.A.4th 1351.)

(d) Under *Tech-Bilt*, one of the factors in determining good faith is the settling party's financial condition and insurance policy limits. Cross-defendants had malpractice insurance with a \$ 2 million limit of liability. Attorneys' fees, costs, and expert witness fees had reduced the available limits to something less than \$ 1.8 million. Thus, the guarantee, with a present value of \$ 250,000, represented a mere 14% of the available policy limits. Given the substantial insurance policy limits, the settlement was not justified by cross-defendants' financial condition. (38 C.A.4th 1352.)

(e) Another relevant consideration under *Tech-Bilt* is the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. Given that cross-defendants settled for less than one percent of plaintiff's claimed damages, despite the availability of substantial insurance policy limits, that the "settlement" was made even though plaintiff no longer had a viable claim against cross-defendants, and that cross-defendants admitted their reason for settling was to cut off defendant's cross-complaint, the settlement was not in good faith and was aimed at injuring defendant's interests. A plaintiff and a cross-defendant may enter into a good faith settlement, even if the plaintiff's claims against the cross-defendant are time-barred, but the proffered good faith settlement must be subjected to particular scrutiny to ensure the settlement amount is reasonable and that there is no collusion aimed at injuring the interests of the nonsettling cross-complainant. (38 C.A.4th 1353.)

(f) The settlement was also invalid because it improperly encouraged continued litigation. Under C.C.P. 877.5(b) (*infra*, §100), a sliding scale agreement "limits the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the nonagreeing defendant or defendants." Here, however, the sliding scale agreement went so far as to compel plaintiff to continue litigating the action against defendant in order to receive any compensation whatsoever from cross-defendants. (38 C.A.4th 1354.)

(g) Because the settlement failed to comply with good faith standards, the trial judge erred in dismissing defendant's cross-complaint for indemnity. It necessarily followed that the trial judge also erred in dismissing the fraud claim. (38 C.A.4th 1355.)

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ff. Condition That Settling Tortfeasor Participate in Trial.

5 Witkin Sum. Cal. Law Torts § 82

[§ 82] Condition That Settling Tortfeasor Participate in Trial.

In *Everman v. Superior Court* (1992) 8 C.A.4th 466, 10 C.R.2d 176, a personal injury action arising from a motor vehicle collision, plaintiff sued the driver of the colliding vehicle, the driver's employer, the sanitation company whose truck allegedly caused the accident by swerving across the center line, and the city. The driver of the colliding vehicle and his employer agreed to settlements, one of the conditions of which was that the driver would remain in the lawsuit and participate at trial as a defendant. On the basis of this condition, the trial judge refused to grant the settling defendants' motion for a determination of good faith settlement under C.C.P. 877.6 (*infra*, §83 et seq.), and they sought mandamus. *Held*, mandamus granted; a settlement is not subject to disapproval solely because it provides for the continuing participation by a settling defendant.

(a) The purpose of a condition requiring a settling defendant to participate in the trial is to counteract the "empty chair" tactic, whereby the remaining defendants can ascribe fault to an actor who is not there to defend himself or herself. The condition is not collusive as a matter of law, so long as the jury is informed of the settling defendant's true status as a defendant facing no monetary liability. (8 C.A.4th 471.) Because the disclosure, which the settling defendants have agreed is appropriate, will remove any potential unfairness in the proceedings, the trial judge abused his discretion in denying the motion for determination of good faith settlement. (8 C.A.4th 473.)

(b) The nonsettling defendants' concern that defendant driver, having no involvement in the controversy, will merely "perform" for the jury is unwarranted. Defendant driver has a genuine interest in the litigation. By participating in the trial, he avoids a breach of contract and loss of the benefits of the settlement. Moreover, his participation, as the immediate actor, tends to facilitate the requirement of C.C. 1431.2 (*supra*, §53) that the comparative several liability of each defendant for noneconomic damages be allocated. (8 C.A.4th 472.)

(c) Defendant driver's participation in the trial after entering into the settlement does not defeat or seriously impair the goal of using settlements to finalize one's involvement in the litigation; this settlement is final, subject only to the condition of his participation. Certainly that participation involves no less finality than participation under a sliding scale agreement by a settling defendant who continues to participate in the case, a practice that has been approved

subject to determination of whether there is a good faith settlement (see *infra*, §102). Furthermore, the settlement here clearly confers advantages on the settling parties, and hence tends to further the objective of C.C.P. 877.6 of encouraging settlements. (8 C.A.4th 472.) (See *Alcala Co. v. Superior Court* (1996) 49 C.A.4th 1308, 1312, 57 C.R.2d 349 [following *Everman*].)

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aa. Statutory Requirement.

5 *Witkin Sum. Cal. Law Torts* § 83

[§ 83] Statutory Requirement.

River Garden Farms v. Superior Court (1972) 26 C.A.3d 986, 103 C.R. 498, supra, §78, observed that a judicial determination of the issue of good faith should be made at the earliest possible time. (26 C.A.3d 1002.) *Fisher v. Superior Court* (1980) 103 C.A.3d 434, 163 C.R. 47, approved the *River Garden* theory and held that there should be a hearing on noticed motion prior to trial of the liability issues. (103 C.A.3d 442.)

The 1980 Legislature accepted this view by the enactment of C.C.P. 877.6, entitling "[a]ny party to an action in which it is alleged that two or more parties are joint tortfeasors ... to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors." (C.C.P. 877.6(a)(1); see *Regal Recovery Agency v. Superior Court* (1989) 207 C.A.3d 693, 695, 255 C.R. 34 [defendant whose settlement was not confirmed had right, in action against it by codefendant for indemnity, for hearing on issue of good faith]; *Los Angeles v. Guerrero* (1989) 209 C.A.3d 1149, 1154, 257 C.R. 787 [C.C.P. 877.6 applies to both proposed and executed settlements; hence, fact that settlement was executed 8 months before action was filed did not preclude finding of good faith]; *Mattco Forge v. Arthur Young & Co.* (1995) 38 C.A.4th 1337, 45 C.R.2d 581, supra, §81 [cross-defendant alleged by defendant to be joint tortfeasor was entitled to good faith determination under C.C.P. 877.6 even though not sued by plaintiff]; *Nutrition Now v. Superior Court* (2003) 105 C.A.4th 209, 212, 129 C.R.2d 266 [California court erred in refusing to determine good faith of Connecticut settlement; place of settlement is not relevant for purposes of C.C.P. 877.6]; 12 *Pacific L. J.* 290; on application of C.C.P. 877.6 to actions involving coobligors on contract, see 1 *Summary* (10th), *Contracts*, §111.)

This is the procedure required where good faith is questioned. In *Northrop Corp. v. Stinson Sales Corp.* (1984) 151 C.A.3d 653, 199 C.R. 16, the settling defendant did not move for a hearing, but simply moved for summary judgment, which the trial judge granted without any determination of the issue of good faith of the settlement. *Held*, judgment reversed. The proper procedure where good faith is questioned is a motion under C.C.P. 877.6; if it is determined at the hearing that the settlement was made in good faith, a motion for summary judgment discharging the settling defendant from further liability is appropriate. (151 C.A.3d 658.) (See *Andruss v. Superior Court* (1996) 46 C.A.4th 1276, 1279, 54 C.R.2d 466 [trial judge erred in granting summary judgment motion after settlement and dismissing motion to

determine good faith as moot].)

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bb. Notice or Application.

5 Witkin Sum. Cal. Law Torts § 84

[§ 84] Notice or Application.

C.C.P. 877.6 sets forth alternative procedures:

(1) *Notice of Motion for Hearing.* Any party is entitled to a hearing on the good faith of the settlement after giving notice of motion pursuant to *C.C.P. 1005(b)* (see 6 *Cal. Proc. (4th)*, *Proceedings Without Trial*, §11 et seq.). On a showing of good cause, the court may shorten the time for giving the required notice to permit determination of the issue before commencement of the trial, or before verdict or judgment if settlement is made after the trial has commenced. (*C.C.P. 877.6(a)(1).*)

(2) *Application for Settlement.* A settling party may give, by certified mail return receipt requested, notice of settlement to all parties and the court, together with a proposed order and an application for determination of good faith settlement indicating the settling parties and the basis, terms, and amount of the settlement. Proof of service must be filed with the court. However, this procedure does not apply to settlements in which a confidentiality agreement has been entered into regarding either the case or the settlement's terms. (*C.C.P. 877.6(a)(2)*; on disclosure of terms of settlement agreement, see *infra*, §85.)

A nonsettling party may, within 25 days of the mailing of the notice, application, and proposed order, or within 20 days of personal service, file a notice of motion under *C.C.P. 1005(b)* contesting the good faith of the settlement. If no nonsettling party files such a motion, the court may approve the settlement. (*C.C.P. 877.6(a)(2).*)

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(1) *Notice of Motion for Hearing.*

Cross-Reference: 6 *Cal. Proc. (5th)*, *Proceedings Without Trial*, §12 et seq.



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cc. Conduct of Hearing.

5 *Witkin Sum. Cal. Law Torts* § 85

[§ 85] Conduct of Hearing.

(1) *In General.* The good faith issue may be determined on the basis of affidavits and counteraffidavits, or the court in its discretion may receive other evidence. (*C.C.P. 877.6(b)*.) The party asserting lack of good faith has the burden of proof on the issue. (*C.C.P. 877.6(d)*.) (See *Erreca's v. Superior Court* (1993) 19 *C.A.4th* 1475, 1492, 24 *C.R.2d* 156, *infra*, §96 [criticizing procedure where judge presided over 4-hour preliminary ex parte settlement conference before delegating matter to special master and then presiding over good faith hearing, but concluding that there was no prejudicial error]; *Brehm Communities v. Superior Court* (2001) 88 *C.A.4th* 730, 734, 105 *C.R.2d* 918 [good faith of settlement consisting entirely of unvalued assets and intangibles could not be established by hearsay declaration that retired judge had determined that settlement was fair; good faith determination must be based on competent evidence].)

(2) *Scope of Affidavits.* In *Grand Terrace v. Superior Court* (1987) 192 *C.A.3d* 1251, 238 *C.R.* 119, nonsettling parties contended that the trial court abused its discretion in granting a good faith motion because there were no declarations or affidavits describing the basic facts concerning the litigation, and that these are necessary for an intelligent assessment of good faith. The court rejected the contention.

(a) The overwhelming majority of such motions are unopposed and granted summarily; and in many cases, at the time of filing, the moving party does not know if a contest will develop, and a full factual response to all of the factors set forth in *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 *C.3d* 488, 213 *C.R.* 256, 698 *P.2d* 159, *supra*, §79, would be a waste of valuable judicial and legal time and clients' resources. (192 *C.A.3d* 1261.)

(b) Only when good faith is disputed must the trial court consider the *Tech-Bilt* factors; when no one objects, "the barebones motion which sets forth the ground of good faith, accompanied by a declaration which sets forth a brief background of the case is sufficient." (192 *C.A.3d* 1261.)

(c) When there is a contest, *C.C.P. 877.6(d)* states a workable ground rule for the hearing by placing the burden of proving lack of good faith on the contesting nonsettlor, who should file declarations. These could require the moving party to file responsive counterdeclarations to negate the lack of good faith asserted by the contesting party. (192 *C.A.3d*

1261.) (See *Alcal Roofing & Insulation v. Superior Court* (1992) 8 C.A.4th 1121, 1127, 10 C.R.2d 844 [rule in *Grand Terrace* does not excuse settlor in contested case from disclosing details of settlement to nonsettlers and court].)

(3) *Disclosure of Terms of Settlement Agreement.* In *J. Allen Radford Co. v. Superior Court* (1989) 216 C.A.3d 1418, 265 C.R. 535, the settling defendant moved to confirm the good faith of a sliding scale recovery agreement, and the nonsettling defendant, in opposing the motion, requested permission to see the agreement. The trial judge denied the request and made an order determining good faith. *Held*, mandamus issued, directing the judge to vacate the order determining that the settlement was made in good faith and either allow the nonsettling defendant permission to review the relevant terms of the agreement, or permit the settling defendant to withdraw its motion. Sliding scale agreements may contain many provisions that require secrecy (see *Abbott Ford v. Superior Court* (1987) 43 C.3d 858, 239 C.R. 626, 741 P.2d 124, *infra*, §102) and the parties are free to maintain the confidentiality of their agreement, but "they may not claim a privilege of nondisclosure when they move to confirm the good faith of their settlement." (216 C.A.3d 1423.) Because the nonsettling defendant has the burden of proof on the issue of good faith, it must be allowed to see the settlement agreement in order to attempt to meet that burden. (216 C.A.3d 1423.) (See *Mediplex of Calif. v. Superior Court* (1995) 34 C.A.4th 748, 749, 40 C.R.2d 397 [settling defendant could not withhold confidential terms of settlement agreement even though it had revealed important terms; nonsettling defendant must be given opportunity to determine independently whether undisclosed terms could have effect on reducing offset].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Scope of Affidavits.* See *Franklin Mint Co. v. Superior Court* (2005) 130 C.A.4th 1550, 1558, 31 C.R.3d 319, *Supp.*, *infra*, §96 [moving party must set forth value of consideration paid and evidentiary basis for that valuation, and must demonstrate that valuation was reached in sufficiently adversarial manner to justify presumption that reasonable valuation was reached].



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dd. Review.

5 *Witkin Sum. Cal. Law Torts* § 86

[§ 86] Review.

(1) *By Mandamus.* Within 20 days after service of written notice of the determination, or such additional time as the trial judge may allow, the aggrieved party may petition for review by mandamus. Within 30 days of the receipt of all filed materials, the court must determine whether it will hear the writ, and so inform the parties. Any hearing granted must be given special precedence over all civil matters on the calendar, except those matters having equal or greater precedence by law. (*C.C.P. 877.6(e).*)

During review, the running on any period of time after which an action would be subject to dismissal under *C.C.P. 583.110* et seq. (see 6 *Cal. Proc. (4th), Proceedings Without Trial*, §330 et seq.) is tolled. (*C.C.P. 877.6(e).*)

(2) *On Appeal of Final Judgment.* Whether a good faith determination may only be reviewed by mandamus is unsettled. In *Main Fiber Products v. Morgan & Franz Ins. Agency* (1999) 73 *C.A.4th* 1130, 87 *C.R.2d* 108, plaintiffs brought an action against two defendants. One defendant settled, and the settlement was determined to have been in good faith. The nonsettling defendant moved successfully for judgment on the pleadings, and plaintiffs appealed. The nonsettling defendant cross-appealed in order to challenge the good faith determination. Noting that *C.C.P. 877.6(e)* provides that the aggrieved party "may" petition for mandamus to review a good faith determination, defendant argued that because this statute did not expressly preclude review of the ruling on appeal from the final judgment, the good faith determination, as with other interlocutory orders, could be reviewed at that time. *Held*, appeal dismissed.

(a) Several courts have stated generally in dicta that the determination of good faith may only be reviewed by mandamus (see, e.g., *Housing Group v. Superior Court* (1994) 24 *C.A.4th* 549, 29 *C.R.2d* 460, and *Rohr Industries v. First State Ins. Co.* (1997) 59 *C.A.4th* 1480, 69 *C.R.2d* 872). "But neither those cases nor any others of which we are aware actually address the specific issue before us, i.e., whether subdivision (e) of section 877.6 precludes, not only a direct appeal from the interlocutory good faith determination, but also any review of that ruling upon an appeal from the final judgment. We conclude that it does." (73 *C.A.4th* 1135.)

(b) This interpretation of *C.C.P. 877.6(e)* is supported by the need for finality regarding good faith determinations.

"A contrary construction, permitting an aggrieved party to postpone review of the good faith determination until after the balance of the claims were tried and a final judgment issued months or years later, would prevent the very finality and certainty that writ review was intended to promote. Years after the settlement, the settling tortfeasor could be dragged back into the action, necessitating a retrial of the plaintiff's claims." (73 C.A.4th 1135.)

(c) This construction is supported by the legislative history, and the language of the statute itself confirms that the Legislature planned for the expeditious resolution of the good faith issue. "By providing a speedy remedy and ensuring that the remaining litigants would not be prejudiced while that remedy was being pursued, the Legislature clearly indicated its intention that the trial be postponed until after the trial court's good faith determination was reviewed. The Legislature would not have gone to such lengths to enable effective writ review if the aggrieved party was equally free to wait for a final judgment." (73 C.A.4th 1136.) (See *O'Hearn v. Hillcrest Gym & Fitness Center* (2004) 115 C.A.4th 491, 494, 499, 9 C.R.3d 342 [party wishing to challenge merits of good faith determination must do so by way of mandamus petition, and may not forgo writ review and seek to have determination reviewed for first time on appeal from final judgment; following *Main Fiber*].)

However, *Maryland Cas. Co. v. Andreini & Co. of Southern Calif.* (2000) 81 C.A.4th 1413, 97 C.R.2d 752, held that a party who had unsuccessfully sought review of a good faith determination by petitioning for mandamus *could* again raise the good faith point on appeal from a final judgment. Examination of the legislative history of C.C.P. 877.6(e) reveals that while the Legislature "viewed a writ petition *before* trial as a *preferable* means of reviewing good faith settlement determinations," it did not intend by the statute's permissive language to foreclose postjudgment review. (81 C.A.4th 1423.) With respect to the apparent conflict with *Main Fiber*, and the cases cited, the court said: "In *Main Fiber*, the court expressly declined to address the question before us, i.e., whether a nonsettling party, having previously sought but failed to obtain a writ, can challenge a determination of good faith on a postjudgment appeal. ... Nevertheless, *Main Fiber* did note that other courts had stated in dicta that the sole means of challenging a determination of good faith was by writ petition. ... Because the cases cited in *Main Fiber* did not consider the legislative history of section 877.6(e), we decline to follow them." (81 C.A.4th 1425, footnote 13.)

Maryland Cas. Co. v. Andreini & Co. of Southern Calif. was followed in *Wilshire Ins. Co. v. Tuff Boy Holding* (2001) 86 C.A.4th 627, 103 C.R.2d 480, *infra*, §87. Appellant had previously petitioned the court for writ review and been denied. Noting that the statute, by using the word "may," is not designed to make a writ petition the exclusive mode of review, the court referred to other instances where the Legislature clearly accomplishes this result. (86 C.A.4th 636.) (See *O'Hearn v. Hillcrest Gym & Fitness Center*, *supra*, 115 C.A.4th 499, footnote 8 [noting that *Wilshire Ins. Co.* sets forth "possible exception" to rule denying appellate review of good faith settlement determination, but distinguishing instant action in which appellant did not seek writ review in first instance].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *By Mandamus.* See *Franklin Mint Co. v. Superior Court* (2005) 130 C.A.4th 1550, 1558, 31 C.R.3d 319, *Supp.*, *infra*, §96 [trial court's determination of value of consideration paid in settlement will be upheld on review if, but only if, it is supported by substantial evidence].

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §358 et seq.



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ee. Scope of Statute.

5 *Witkin Sum. Cal. Law Torts* § 87

[§ 87] Scope of Statute.

(1) *Settlement Among Joint Tortfeasors.* The Courts of Appeal are split on whether *C.C.P.* 877.6 applies to settlements among joint tortfeasors.

In *Arizona Pipeline Co. v. Superior Court* (1994) 22 *C.A.4th* 33, 27 *C.R.2d* 118, the court held that, because *C.C.P.* 877.6 applies to settlements between "the plaintiff or other claimant and one or more alleged tortfeasors," the statute does not apply to settlements among joint tortfeasors. Thus, a determination that a settlement among joint tortfeasors was made in good faith does not bar a nonsettling tortfeasor from prosecuting a claim for comparative indemnity against a settling tortfeasor. (22 *C.A.4th* 42.)

However, in *KAOM v. Superior Court* (1995) 35 *C.A.4th* 549, 41 *C.R.2d* 310, the court held that, because the phrase "plaintiff or other claimant" logically includes a cross-complainant seeking express or implied indemnity against a cross-defendant, a cross-defendant who settles with a cross-complainant, but not the plaintiff, is entitled to a good faith determination under *C.C.P.* 877.6. "We recognize ... that cross-defendants routinely settle indemnity cross-complaints without concurrently settling with the plaintiff. ... It creates an artificial and unsustainable distinction to say, as *Arizona Pipeline* does, that a cross-defendant who settles with the plaintiff is entitled to a good faith determination under section 877.6 ... , but that a cross-defendant who settles with a cross-complainant cannot." (35 *C.A.4th* 555.)

(2) *Two or More Parties Must Be Tortfeasors.* Although *C.C.P.* 877.6 applies when "it is alleged that two or more parties are joint tortfeasors or coobligors," the use of the word "alleged" does not mean that proceedings under the statute are appropriate whenever a complaint names joint tortfeasors, even when only one tortfeasor is made a party. *C.C.P.* 877.6(c) (*infra*, §88) applies only to actions involving both settling and nonsettling tortfeasors or coobligors. Read in context, the word "alleged" merely acknowledges that the party need not be found liable in tort; allegations are sufficient. It is essential, however that the action involve two or more parties who are at least alleged to be joint tortfeasors or coobligors and that some, but not all, of the parties have settled. (*Hartford Acc. & Indem. Co. v. Superior Court* (1995) 37 *C.A.4th* 1174, 1178, 44 *C.R.2d* 126.)

(3) *No Requirement of Nonsettling Party.* *Wilshire Ins. Co. v. Tuff Boy Holding* (2001) 86 C.A.4th 627, 103 C.R.2d 480, which arose out of a traffic accident in which one driver was killed, initially produced two actions. In one action, the insurer for the driver causing the accident filed a complaint in indemnity against the manufacturer of a defective weld, seeking to recover the amount it had paid to settle the case with the heirs of the decedent. In the other case, the heirs filed a negligence and products liability action against the same manufacturer. The two actions were then consolidated, and the action involving the manufacturer and heirs was settled. After the settlement was found to have been made in good faith under C.C.P. 877.6 and judgment was entered, the insurer, whose indemnity action was effectively barred by the settlement under C.C.P. 877.6(c) (infra, §88), appealed on the ground that, because C.C.P. 877.6(a)(2) (supra, §84) refers to a "nonsettling" party, the presence of such a party is required before a settlement can be determined to be made in good faith. *Held*, C.C.P. 877.6 applied.

(a) Although most of the cases relied on by the insurer involved nonsettling defendants, those cases do not hold that the *presence* of a defendant who had not yet settled with the plaintiff is necessary. (86 C.A.4th 627.)

(b) C.C.P.877.6(a)(1) (supra, §83) entitles any party to a hearing to determine the good faith of a settlement, if it is alleged that there are at least two joint tortfeasors. Here, the two joint tortfeasors were the driver causing the accident, in whose shoes the insurer stood, and the manufacturer. (86 C.A.4th 641.)

(c) The only reference to "nonsettling party" occurs in C.C.P. 877.6(a)(2). This phrase "merely refers to a defendant who is not a party to the particular settlement for which a good faith determination is being sought. Subdivision (a)(2) does not require that there be defendants who have not settled with the plaintiff at the time of a good faith determination. Construed in its entirety, the language of section 877.6 envisions that a later-added defendant or the last defendant to settle can use section 877.6 to extinguish indemnity claims by joint tortfeasors or co-obligors who have already settled." (86 C.A.4th 641.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Where Tortfeasors Settle Separately.* In *Bob Parrett Const. v. Superior Court* (2006) 140 C.A.4th 1180, 45 C.R.3d 250, two corporations separately settled claims against them by the United States. One corporation then sued the other for indemnity, and the defendant corporation moved under C.C.P. 877.6 for a determination that its own settlement was made in good faith and thus barred the plaintiff corporation's claims. *Held*, the trial court's denial of the motion was error; C.C.P. 877.6 applied. The motion is proper under the terms of the statute. A good faith determination need not be made in a tort action in which settlement is reached, but may be made in a separate indemnity action. Also, there is no requirement of a single action in which the joint tortfeasors are sued by the injured party. Because C.C.P. 877.6 was adopted to encourage settlements and to permit the equitable allocation of damages, it applies whenever the fundamental requirements of the statute are met. (140 C.A.4th 1187.)



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1. General Rule: Bar to Further Claims Against Settling Tortfeasor.

5 *Witkin Sum. Cal. Law Torts* § 88

[§ 88] General Rule: Bar to Further Claims Against Settling Tortfeasor.

"A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (*C.C.P. 877.6(c)*.) (See *C.C.P. 877(b)*, supra, §85 [good faith release of tortfeasor "shall discharge the party to whom it is given from all liability for any contribution to any other parties"]; *John Hancock Mut. Life Ins. Co. v. Setser* (1996) 42 *C.A.4th* 1524, 1528, 50 *C.R.2d* 413 [*C.C.P. 877.6(c)* did not preclude defendant insurer from recovering attorneys' fees under *C.C.P. 1021.6* (7 *Cal. Proc.* (4th), *Judgment*, §201); claim to fees, perfected before determination of good faith, was not "further claim," and defendant was not "joint tortfeasor," within meaning of *C.C.P. 877.6(c)*]; *Dillingham Const., N.A. v. Nadel Partnership* (1998) 64 *C.A.4th* 264, 276, 75 *C.R.2d* 207 [reasonable settlement amount could be used to establish damages in equitable indemnity action, but only where parties to settlement agreement specifically allocated settlement proceeds between claims and, in proceeding in which nonsettling parties were allowed to be heard, trial court found that allocation was made in good faith]; *Norco Delivery Service v. Owens-Corning Fiberglas* (1998) 64 *C.A.4th* 955, 962, 75 *C.R.2d* 456 [trial court making good faith settlement determination did not err by barring "direct" or "independent" causes of action by nonsettling defendant who failed to adduce evidence of other than derivative damages].)

In *Shane v. Superior Court* (1984) 160 *C.A.3d* 1237, 207 *C.R. 210*, infra, §90, the court made the following observations on the nature and effect of this provision:

(a) Unlike the other subdivisions of *C.C.P. 877.6*, which enunciate rules of procedure, subdivision (c) states a substantive right of discharge from liability. (160 *C.A.3d* 1245.) It does not provide a procedure by which this right may be implemented, but other provisions of the Code provide mechanisms by which the party settling in good faith may obtain dismissal of actions or cross-complaints: motion for summary judgment, motion for judgment on the pleadings, general demurrer, or motion to dismiss cross-complaint. (160 *C.A.3d* 1245.)

(b) "Regardless of which mechanism is chosen, employment of a distinct procedure to adjudicate the effect of a judicially determined good faith settlement upon a pending action or claim not only is procedurally necessary but also

serves an important salutary function: it focuses the court's attention distinctly upon two completely different substantive questions--whether the settlement was in good faith and whether the claim sought to be dismissed is of such a nature as to be barred by a good faith settlement. Each of these questions is becoming increasingly controversial and complex with the development of the law in this area." (160 C.A.3d 1246.)

Application of C.C.P. 877.6(c) is not limited to parties to the action at the time the good faith settlement determination is made. The statute prescribes a substantive right of discharge from liability, and nothing in its language requires that the trial court have jurisdiction over any other joint tortfeasor in order for the good faith determination to bar that tortfeasor's claim for indemnity. (*Britz v. Dow Chemical Co.* (1999) 73 C.A.4th 177, 180, 86 C.R.2d 188; *Mid-Century Ins. Exchange v. Daimler-Chrysler Corp.* (2001) 93 C.A.4th 310, 314, 112 C.R.2d 880, *infra*, §93.)

SUPPLEMENT: [This section is current through the latest supplement]
Attorneys' fees:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §226.



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aa. Claims Against Others.

5 *Witkin Sum. Cal. Law Torts* § 89

[§ 89] Claims Against Others.

The provisions governing good faith settlements have no effect on claims other than those against a settling tortfeasor.

(1) *Claim Against Settling Plaintiff.* C.C. 877.6 does not apply to indemnity claims against a settling *plaintiff*. In *Doose Landscape v. Superior Court* (1991) 234 C.A.3d 1698, 1700, 286 C.R. 321, the court said: "In this action we are confronted with the novel situation where a settling plaintiff seeks the protection of a good faith settlement to protect itself from cross-claims by a cross-defendant for equitable indemnity. ... The subdivision only acts to bar claims against a *settling tortfeasor*. The court was without jurisdiction under the statutory provision to bar cross-claims for equitable indemnity against the *settling plaintiff*."

(2) *Claim Against Nonsettling Tortfeasor.* C.C. 877.6 does not apply to a *settling tortfeasor's* indemnity claims against a *nonsettling* tortfeasor. Thus, any valuation or allocation determinations made by the parties to the settlement are not binding in an action on those claims. In *Gouvis Engineering v. Superior Court* (1995) 37 C.A.4th 642, 43 C.R.2d 785, plaintiff sued developers for construction defects, and the developers cross-complained against numerous subcontractors for indemnification. Plaintiff settled with the developers and all but three of the subcontractors. The agreement called for the developers to pay a specified sum to plaintiff and to continue the indemnity action against the three nonsettling subcontractors, with any recovery to be allocated between themselves and plaintiff. Plaintiff moved for a determination of good faith settlement, which included an analysis of the value of the settlement, and the trial judge granted the motion. One of the nonsettling subcontractors, G, then petitioned for mandamus to review the good faith determination. The developers' cross-complaint against the subcontractors was based on the amount they had paid in settlement, and G contended that the total valuation of the settlement as well as the presumptive estimate of his share of damage was excessive. *Held*, petition denied; G was not prejudiced by the good faith determination.

(a) Because G was not a party to the settlement agreement, he could not be bound or affected by its terms, other than as provided by C.C.P. 877 (see *supra*, §71) and 877.6. Under these provisions, the legal effect of the determination of good faith could be no more than nondischarge of joint liability of nonsettling parties and the creation of a credit to offset the claims against nonsettling parties. (37 C.A.4th 649.)

(b) In the developers' action against G for indemnity, the terms of settlement will be admissible. However, the allocation and valuation approved at the good faith hearing have no binding or res judicata effect as to G in that action. Res judicata principles should not apply where the scope of substantive inquiry and the potential for development of evidence are much more restricted than the corresponding opportunity afforded in a court of general jurisdiction, as they were here:

(1) Although G was a party and participated in the good faith hearing, the procedures used were those of motion practice instead of the ordinary rules of evidence. The hearing is abbreviated and its objective is not a precise or accurate determination of fact. The inquiry at the good faith settlement stage is not the same as the inquiry at trial, where complete precision of allocation could presumably be achieved. (37 C.A.4th 650.)

(2) The burdens of proof in the hearings are different. At the good faith hearing, G, as the party opposing the finding of good faith, had the burden under C.C.P. 877.6(d) (see supra, §85) to show lack of good faith. At the trial of the indemnity action, the developers will have the burden to prove the amount that has been paid by virtue of injury caused by G's fault. (37 C.A.4th 650.)

A settlement with one joint tortfeasor does not, of course, bar the *plaintiff* from pursuing damages claims against the other joint tortfeasors. (*Neubauer v. Goldfarb* (2003) 108 C.A.4th 47, 53, 133 C.R.2d 218 [judgment in action by minority shareholder against closely held corporation and majority shareholders in favor of two majority shareholders was appealable, notwithstanding that plaintiff settled with corporation and other majority shareholder; two majority shareholders were still potentially liable, although any money judgment plaintiff might obtain against them would have to be reduced by amount paid in settlement].)

SUPPLEMENT: [This section is current through the latest supplement]



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bb. Claims Asserted in Independent Action.

5 Witkin Sum. Cal. Law Torts § 90

[§ 90] Claims Asserted in Independent Action.

In *Shane v. Superior Court* (1984) 160 C.A.3d 1237, 207 C.R. 210, two lawsuits between K and S, arising out of the same transaction, were pending in different branches of the Los Angeles Superior Court. K entered into a settlement in the Los Angeles branch and moved for a determination of good faith. The Los Angeles court granted the motion, and made an order that S's claims in the Van Nuys branch were barred. *Held*, the order purporting to adjudicate the Van Nuys claims was in excess of the court's jurisdiction. (160 C.A.3d 1246, 1248.) Adjudication of the reach of the "bar" effected by a good faith settlement "requires care and discrimination. When, as here, *two* or more cases are involved, the underlying issues concerning the extent of the 'bar' may be highly complex. Such cases may also involve courts of different jurisdiction, and/or different stages of proceeding, and/or diverse parties asserting diverse claims. Subject of course to the convenient statutory mechanisms of transfer, severance, consolidation, and coordination, each such case must be decided on its own." (160 C.A.3d 1251.) (See *Housing Group v. Superior Court* (1994) 24 C.A.4th 549, 552, 29 C.R.2d 460 [following *Shane*].) (For full treatment of priority of jurisdiction, see 2 *Cal. Proc.* (4th), *Courts*, §232 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

Priority of jurisdiction:

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §229 et seq.



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cc. Claims for Contractual or Statutory Indemnity.

5 *Witkin Sum. Cal. Law Torts* § 91

[§ 91] Claims for Contractual or Statutory Indemnity.

(1) *Claim Under Express Indemnity Clause.* In *C.L. Peck Contractors v. Superior Court* (1984) 159 C.A.3d 828, 205 C.R. 754, plaintiff worker, injured on a construction site, sued the general contractor, the owner, and a subcontractor. Plaintiff settled with the subcontractor, who moved for a hearing and dismissal of all cross-claims for indemnification. The other defendants opposed dismissal on the ground that their cross-claims for indemnity were provided for in the contract between them and the subcontractor. The lower court found good faith and granted the motion. *Held*, mandamus granted to compel the court to vacate its order and deny dismissal.

(a) The issue whether a good faith settlement under C.C.P. 877.6 bars the remaining codefendants from seeking indemnity based on an express contract has been discussed in several cases in which no definitive holding was made. (159 C.A.3d 832.) The difficulty lies in the somewhat inconsistent language of C.C.P. 877 (settlement discharges tortfeasor "from *all* liability for *any* contribution to *any* other tortfeasors"; see *supra*, §73) and C.C.P. 877.6(c) (settlement discharges tortfeasor from claims "for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence of comparative fault"; see *supra*, §88). The possible conflict is resolved by holding that the more general language of C.C.P. 877(b) is subordinated to C.C.P. 877(c), "the more recent and more specific expression of the legislative will." (159 C.A.3d 833.)

(b) The rules governing express indemnity reflect its contractual nature (see *infra*, §119), and, within the limitations of the language used, an express indemnity clause is accorded a preemptive effect; i.e., when contractual indemnity is applicable, the doctrine of equitable indemnity does not come into play. (159 C.A.3d 833, 834.) (See *Borrow/Thomas & Associates v. Superior Court* (1996) 50 C.A.4th 1654, 1660, 58 C.R.2d 626 [in construction defect case, determination that settlement between two of defendants and plaintiff was made in good faith was improper, where it was uncertain whether settlement satisfied nonsettling defendant's contractual indemnity rights or improperly sought to thwart them].)

(2) *Claim Based on Statutory Indemnity.* In *Kantor v. Housing Authority* (1992) 8 C.A.4th 424, 10 C.R.2d 695, defendant county housing authority settled a personal injury action involving a broken window in a building owned by it and used as a church. The other defendants (two ministers and a church), claiming to be "special employees" of

defendant housing authority, filed a cross-complaint for statutory indemnity under *Govt.C. 825* (infra, §375) to require defendant to pay any amount that they might have to pay plaintiff by way of judgment or settlement. Finding that the settlement was made in good faith, the trial judge granted defendant's motion to dismiss the cross-complaint. *Held*, judgment reversed; claims for statutory indemnity are not barred by *C.C.P. 877.6(c)*.

(a) *C. L. Peck Contractors v. Superior Court* held that a claim against a codefendant based on express contract survives a good faith settlement under *C.C.P. 877.6* because, by specifying equitable comparative indemnity, the Legislature evidenced its intention to exclude contractual indemnity. This rationale is equally applicable to statutory indemnity. (*8 C.A.4th 431.*)

(b) Defendant's argument that only a claim for *express* contractual indemnity survives a good faith settlement is not supported by statute or decision. Equally unpersuasive is the argument that the cross-complaint was clearly a claim for *implied* contractual indemnity. "Apples are not oranges, and a claim for statutory indemnity is not a claim for implied contractual indemnity. If a public entity could avoid its obligation under *Government Code section 825* by simply settling with a claimant, the very purpose of the statute would be thwarted." (*8 C.A.4th 431.*)

SUPPLEMENT: [This section is current through the latest supplement]



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dd. Claims of Nonparties.

5 *Witkin Sum. Cal. Law Torts* § 92

[§ 92] Claims of Nonparties.

In *Singer Co. v. Superior Court* (1986) 179 C.A.3d 875, 225 C.R. 159, wrongful death actions were brought for the death of two children in a fire caused when a gas leak was ignited by a spark from the relay in an air conditioning unit. The named defendants were the homeowners and Cool-Temp, the servicer of their air conditioner. The homeowners cross-complained against the servicer for indemnity. In deposition proceedings, evidence indicated that a defective gas regulator could have caused the leakage. The servicer settled each action, involving claims of \$ 252,000 and \$ 500,000, for \$ 5,000, and its motion for determination of good faith was granted. Thereafter, the manufacturer of the gas regulator was named as cross-defendant in a cross-complaint filed by the homeowners, and the manufacturer filed a cross-complaint for indemnity, contribution, and declaratory relief against the servicer and the homeowners. The manufacturer then sought discovery from the servicer on the extent and nature of its involvement with the servicing, its insurance coverage, and the financial condition of the servicer at the time of settlement. The servicer, relying on the determination of good faith, moved to dismiss the cross-complaint. Despite the fact that the manufacturer's discovery was not yet completed, the trial judge granted the motion. *Held*, mandamus granted to compel vacating of the order. The court stated the issue as follows: "whether a joint tortfeasor not a party to the lawsuit, either by complaint or cross-complaint, at the time another joint tortfeasor settles with the plaintiff is bound by an ensuing determination ... that the settlement is in good faith." (179 C.A.3d 881.)

(a) The court's inquiry must focus on "seeking to accommodate (1) the policy favoring settlement of litigation as well as that favoring equitable sharing of tort liability, (2) the reasonable expectation of a settling tortfeasor that he will escape the burden and expense of prolonged litigation, and (3) the fundamental constitutional principle that no one shall be deprived of a substantial property right without due process of law." (179 C.A.3d 884.)

(b) For a trial court to make a binding judicial determination of good faith, the tortfeasors known to have an interest in the outcome of the lawsuit must be brought before the court, and the obvious vehicle is a cross-complaint for contribution or partial indemnity. (179 C.A.3d 888.) C.C.P. 877.6 does not provide for a separate hearing in this situation, but to deny it is a violation of constitutional due process. "The financial stake an absent tortfeasor has in the fairness of a settlement between the plaintiff and a joint tortfeasor equates to the deprivation of a property interest, to

wit: a nonsettling tortfeasor may be forced to bear a share of the liability greater than that proportionate to his fault when the plaintiff's recovery is reduced only by the monetary amount of a prior settlement. Since a nonsettling tortfeasor loses his right to seek contribution or partial indemnity from a joint tortfeasor who settled *if* that settlement is adjudged to be in good faith, the nonsettling tortfeasor stands to be deprived of his property right to contribution or partial indemnity. When the parties to a settlement know, or reasonably should know, that a nonsettling tortfeasor is exposed to substantial potential liability, such that his joinder as a defendant or cross-defendant is likely, the property right of that nonsettling tortfeasor must be regarded as significant." (179 C.A.3d 890.)

(c) "Assuming for this discussion that a settling tortfeasor is named a cross-defendant in a subsequent action for contribution or partial indemnity, how then can the cross-complaint be addressed to maximize the expectations of the parties? The cross-complainant must allege, initially or by amendment, (1) that he is exposed to substantial liability on the plaintiff's claim, (2) that his relationship to the subject matter of plaintiff's claim was known or reasonably should have been known to the settling parties, and (3) that he is therefore a necessary party who was not given notice of the prior good faith adjudication. A settlor who objects to the cross-complaint need only move to dismiss on the basis of the prior good faith determination; the cross-complainant must then prove to the satisfaction of the court his status as a necessary party, i.e., a likely defendant, at the time of settlement or face a judgment of dismissal." (179 C.A.3d 892.) The cross-complainant also has the burden of proof of absence of good faith. (179 C.A.3d 893.)

(d) In view of the constitutional right of the likely defendant to a new hearing on the good faith issue, there is a concurrent right to engage in discovery against the settling defendant to elicit evidence relevant to the factors set forth in *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 C.3d 488, 213 C.R. 256, 698 P.2d 159, supra, §79. (179 C.A.3d 895.) The burden placed on the settlor to respond to this limited discovery is slight, and is outweighed by the settlor's failure to join the challenging tortfeasor prior to the good faith determination. (179 C.A.3d 896.) Thus, the abuse of discretion was not the trial court's finding of good faith on the evidence before it, but rather its refusal to postpone the hearing until the manufacturer could complete discovery. (179 C.A.3d 897.) Hence, in further proceedings, the manufacturer should be given the right to pursue this discovery. (179 C.A.3d 898.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Unnamed party with notice and opportunity to be heard may be bound:* A settling tortfeasor's good faith settlement determination discharges indemnity claims by other tortfeasors, whether or not they are named as parties, so long as the other tortfeasors are given notice and an opportunity to be heard. Although C.C.P. 877.6 applies to "an action in which it is alleged that two or more parties are joint tortfeasors," there is no reason why a *doe* allegation does not satisfy this requirement. (*Gackstetter v. Frawley* (2006) 135 C.A.4th 1257, 1273, 38 C.R.3d 333 [notice of application for good faith settlement given to unnamed party by settling party].)



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5 *Witkin Sum. Cal. Law Torts* § 93

[§ 93] Claims of Insurers.

A good faith determination under *C.C.P. 877.6* is generally not binding on an insurer who does not participate in the settlement. (*Pacific Estates v. Superior Court* (1993) 13 *C.A.4th* 1561, 1573, 17 *C.R.2d* 434 [insurer not bound by settlement between developer and homeowners association]; *Hartford Acc. & Indem. Co. v. Superior Court* (1994) 29 *C.A.4th* 435, 441, 34 *C.R.2d* 520 [in action by insured against multiple insurers allegedly covering same loss, *C.C.P. 877.6(c)* did not bar cross-claims by nonsettling insurers against settling insurer for contribution and indemnity; statute is inapplicable to equitable apportionment of contractual undertakings]; *Hartford Acc. & Indem. Co. v. Superior Court* (1995) 37 *C.A.4th* 1174, 1181, 1184, 44 *C.R.2d* 126 [insurer was not bound by settlement between developer and builder; following *Pacific Estates*]; see 24 *Southwestern U. L. Rev.* 1157 [settlement of complex environmental insurance coverage cases].)

Topa Ins. Co. v. Fireman's Fund Ins. Cos. (1995) 39 *C.A.4th* 1331, 46 *C.R.2d* 516, is illustrative. An insured brought a declaratory relief action against two insurers. One of the insurers cross-complained for indemnity against another insurer, whose policy assertedly covered the same occurrence and who had previously entered into a good faith settlement with the insured. This insurer raised *C.C.P. 877* and *877.6* as a defense, and was successful. *Held*, reversed.

(a) Both *C.C.P. 877* and *877.6* refer to "joint tortfeasors." Although an insurer stands in the shoes of the insured, it is not a joint wrongdoer, either with the insured or with another insurer, because it does not commit the tort for which the claimant seeks to hold the insured liable. (39 *C.A.4th* 1338.)

(b) Both statutes also refer to "co-obligors." However, multiple insurers are not "co-obligors," as that term is used in the statutes, because their respective obligations arise out of separate contracts. (39 *C.A.4th* 1339.)

(c) Finally, *C.C.P. 877.6* is limited to claims that are "based on comparative negligence or comparative fault." Because an action by an insurer against another for indemnity does not depend on "fault" concepts, the statute is inapplicable. These actions are based on an equitable apportionment of the contractual undertakings. (39 *C.A.3d* 1343.) (See *Rohr Industries v. First State Ins. Co.* (1997) 59 *C.A.4th* 1480, 1490, 69 *C.R.2d* 872 [because action for

contribution by one insurer against another does not depend on "fault" concepts, *C.C.P. 877.6* is inapplicable].)

These cases were distinguished in *Mid-Century Ins. Exchange v. Daimler-Chrysler Corp.* (2001) 93 C.A.4th 310, 112 C.R.2d 880. An individual was injured when a car's battery exploded in his face. Plaintiff, the car owner's insurer, paid its policy limits in return for a release of all claims. The injured individual then sued the car manufacturer and other defendants. That action was settled and, based on a finding that the settlement was made in good faith, the trial judge dismissed plaintiff insurer's claim for equitable indemnity. *Held*, affirmed. Under *C.C.P. 877.6*, a good faith settlement bars "any other tortfeasor" from asserting a claim against a settling tortfeasor. It is true that plaintiff, *in its role as insurer*, was not a tortfeasor or joint tortfeasor for purposes of *C.C.P. 877.6*. However, plaintiff was the insurer of an alleged tortfeasor, and under equitable subrogation principles, the insurer on its own settlement *stepped into the shoes of its insured*. Thus, plaintiff was entitled to no greater rights than the car owner and was subject to the same defenses that were assertable against that party. (93 C.A.4th 315.)

SUPPLEMENT: [This section is current through the latest supplement]



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5 Witkin Sum. Cal. Law Torts § 94

[§ 94] Claims Not Involving Contribution or Indemnity.

In *Knowles v. Tehachapi Valley Hosp. Dist.* (1996) 49 C.A.4th 1083, 57 C.R.2d 192, plaintiffs brought a medical malpractice action against a doctor and a hospital district. After plaintiffs and the doctor stipulated to the entry of judgment against him, finding that he was negligent, plaintiffs argued that the matter of the doctor's negligence could not be relitigated in their suit against defendant hospital district, which resulted in a jury verdict in favor of the district. Specifically, plaintiffs argued that defendant could have requested a hearing, under C.C.P. 877.6, as to the good faith of the settlement, and that its failure to do so waived its right to a redetermination of this issue. The trial court rejected this argument, and entered judgment for defendant. *Held*, affirmed. "[T]he ultimate issue in a good faith hearing is the discharge of the right to indemnity or contribution. ... Such a hearing deals with likelihoods of liability and probabilities of outcomes, and is not a fair substitute for a jury determination focusing on the presence or absence of negligent acts or omissions." (49 C.A.4th 1090.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Gackstetter v. Frawley* (2006) 135 C.A.4th 1257, 1274, 38 C.R.3d 333 [nonsettling tortfeasor may not avoid C.C.P. 877.6 motion by providing different labels for what are in reality indemnity or contribution claims; judge may dismiss causes of action that purport to state direct claims but, in fact, seek to recover derivative damages].



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aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 95

[§ 95] In General.

A good faith settlement with a joint tortfeasor "shall reduce the claims against the others in the amount stipulated ... or in the amount of the consideration paid for it whichever is the greater." (*C.C.P. 877(a)*, *supra*, §71.)

The reduction of an award pursuant to *C.C.P. 877(a)* is normally applied in one of two ways: (1) by the jury after evidence is submitted to it of the settlement with instructions to reduce the award by the amount paid in settlement; (2) by the court when the settlement is not presented to the jury. (*Syverson v. Heitmann* (1985) 171 C.A.3d 106, 111, 214 C.R. 581 [citing cases]; see *May v. Miller* (1991) 228 C.A.3d 404, 407, 409, 410, 411, 278 C.R. 341 [where jury was informed of settlement but not instructed to reduce award, trial judge had discretion to order setoff].)

A nonsettling defendant is entitled to a setoff for the settlement even where the trier of fact determines that the settling defendant was not at fault for the plaintiff's injuries. *C.C.P. 877* does not require the settling defendant to prove that settling codefendants were, in fact, liable; it only requires proof that they were *claimed* to be liable for the same tort (see *supra*, §88). (*Poire v. C.L. Peck/Jones Bros. Const. Corp.* (1995) 39 C.A.4th 1832, 1839, 46 C.R.2d 631; see *McComber v. Wells* (1999) 72 C.A.4th 512, 516, 85 C.R.2d 376 [following *Poire*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Garcia v. Duro Dyne Corp.* (2007) 156 C.A.4th 92, 99, 67 C.R.3d 100 [under *C.C.P. 877(a)*, nonsettling tortfeasor is not entitled to offset against award of economic damages for amount of settlement not yet paid to plaintiff; but trial court reserves jurisdiction to award offset credits for future settlement payments by settling defendants].



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5 *Witkin Sum. Cal. Law Torts* § 96

[§ 96] Valuation of Settlement.

The consideration involved in the settlement must be valued in order to be offset against any judgment subsequently recovered against nonsettling tortfeasors. The burden of establishing the value of the settlement and, where necessary, of allocating that amount to particular types of damages rests on the settling parties. (*Southern Calif. Gas Co. v. Superior Court* (1986) 187 C.A.3d 1030, 232 C.R. 320; *Arbuthnot v. Relocation Realty Service Corp.* (1991) 227 C.A.3d 682, 690, 278 C.R. 135; *Alcal Roofing & Insulation v. Superior Court* (1992) 8 C.A.4th 1121, 10 C.R.2d 844 [value of noncash consideration].)

Difficult questions of valuation and allocation may arise, as where there are multiple claims with different damages or where noncash consideration is included in the settlement. In *Erreca's v. Superior Court* (1993) 19 C.A.4th 1475, 24 C.R.2d 156, plaintiffs brought an action against the developers of a residential subdivision for defective construction. The complaint was amended to add as defendants the parties responsible for the negligent grading and filling of the developed lots, i.e., the original owner of the property and the grader and soils engineer he hired to perform the work (the soils defendants). Plaintiffs then settled with the developers and various subcontractors, design professionals, and material suppliers for \$ 6.5 million: \$ 5,403,500 to be paid by the developers and \$ 1,096,500 by the other contributors. In addition, the developers assigned to plaintiffs their claims for indemnity and contribution against the nonsettling soils defendants, and the settling parties agreed that the value of the assigned claims was \$ 300,000. For purposes of allocation, the settlement severed the case into two parts, the soils claims and the nonsoils claims, and allocated \$ 1.5 million of the settlement payment, plus the value of the assigned claims (\$ 300,000), to the soils issues and the remainder of the settlement payment (\$ 5 million) to the nonsoils issues, including construction and landscaping defect allegations.

After an ex parte hearing and referral of the matter to a special master, the trial judge ruled that the settlement was made in good faith. Specifically, the judge ruled that \$ 300,000 was the correct valuation of the assigned claims and that \$ 1.5 million should be allocated to the soils issues. However, based on a belief that the developers had contributed more to the settlement than their probable ultimate liability, the judge ruled that the credit to be given to the nonsettling soils defendants should be limited to \$ 500,000. *Held*, this allocation was erroneous; the good faith order must be

vacated unless modified to allow a \$ 1.8 million credit to the nonsettling defendants.

(a) *Allocation of settlement funds between damages issues.*

(1) By allocating only \$ 1.5 million out of the total settlement to the soils issues, the settling parties effectively reduced the credit to be accorded to the nonsettling soils defendants against any judgment in favor of plaintiffs that they might ultimately suffer. An evidentiary showing is required to justify such an allocation. (19 C.A.4th 1491.) Specifically, "[a] party seeking confirmation of a settlement must explain to the court and to all other parties, by declaration or other written form, the evidentiary basis for any allocations and valuations made, and must demonstrate that the allocation was reached in a sufficiently adversarial manner to justify the presumption that a reasonable valuation was reached." (19 C.A.4th 1495.)

(2) Here, there was evidence of a wide range of soils damages estimates and plaintiffs' settlement demands, thereby showing that the parties had an actual dispute to negotiate and giving rise to a presumption that their allocation was reached at arm's length and was reasonable. (19 C.A.4th 1495.) In concluding that the allocation was made in good faith, the trial judge correctly utilized his own experience, the evaluations of the attorneys, and expert opinion testimony. (19 C.A.4th 1495.)

(b) *Valuation of assignment of indemnity rights.*

(1) In addition to the \$ 1.5 million cash consideration allocated for settlement of the soils claims, the settling parties set a value of \$ 300,000 on the developers' assignment to plaintiffs of their indemnity and contribution rights as against the nonsettling defendants. An assignment of indemnity rights may constitute a valuable noncash consideration for settlement, but the value of the assignment must be supported by the evidence. (19 C.A.4th 1496.)

(2) Here, a declaration by the developers' attorney explained that (a) it was likely that the plaintiffs, as assignees, could prevail against the former owner of the property on a strict liability theory, but that because negligence would have to be proved as to the other soils defendants, prevailing on those claims would be more difficult; (b) the likelihood of collecting on a judgment on the assigned claims against any of the soils defendants was negligible because all were insolvent and had limited insurance, and the insurers were asserting coverage defenses; and (c) based on these considerations, the \$ 300,000 evaluation represented a reasonable discount from the maximum \$ 1.5 million entitlement to indemnity. This evidence supplied a factual basis for the valuation, based on estimated cost to prosecute the claims, probability of prevailing on them, and collection prospects for any judgment, and was sufficient to support a valuation of assignment rights that amounted to only 20% of the potential recovery. (19 C.A.4th 1497, 1499.)

(3) The valuation of the assignment rights was correctly made at the time of settlement, instead of after a trial took place. "If the time of setting a credit for an assignment of rights were delayed until after a trial took place, the credit to the nonsettling defendants would then be fixed at the amount the plaintiffs as assignees recovered at trial. Such a delayed valuation would serve to render the indemnity rights valueless, since they would be wiped out by a full award of credit. ... This would remove any incentive for the plaintiffs to accept or the settling defendants to offer such an assignment as settlement consideration." (19 C.A.4th 1498.)

(c) *Credit to accorded nonsettling soils defendants for cash consideration.* In this case, the settlement included an allocation to soils issues of \$ 1.5 million cash consideration. The soils defendants argued that, under C.C.P. 877(a), the entire amount should be credited toward any future judgment that plaintiffs might obtain against them. However, the trial judge, reasoning that the developers' settlement payment represented an amount greater than their likely actual liability, allowed the soils defendants a credit of only \$ 500,000. This was error. As stated in *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, *infra*, §1357: " '[T]o preserve the incentive to settle which section 877 provides to injured plaintiffs, ... a plaintiff's recovery from nonsettling tortfeasors should be diminished. ... by the amount that the plaintiff has actually recovered in a good faith settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury.' " (19 C.A.4th 1501.)

(d) *Credit from settlement to be accorded nonsettling soils defendants for assignment of indemnity rights.*

(1) The settlement consideration of \$ 300,000 for assignment of indemnity rights is a little more problematic as far as credit is concerned. For example, once plaintiffs receive the settlement payment of \$ 1.5 million from the developers, they may, as assignees of the developers' right to indemnity, seek to recover the same amount from the soils defendants. Also, it is difficult to determine whether the assignment represents the transfer of valuable consideration or whether the assigned right merely duplicates the plaintiff's existing rights against the nonsettling defendants. (19 C.A.4th 1503.)

(2) No confusion need arise if the assignment of indemnity rights is viewed as the transfer of a valuable asset in consideration of settlement, which should be treated like any other valuable asset for purposes of setting a credit. Here, in the parties' allocation of settlement consideration, the assignment of indemnity rights was placed in the soils issues category. Hence, the credit for the \$ 300,000 value of those rights goes toward any future judgment plaintiffs may obtain on their direct soils claims against the soils defendants. If plaintiffs are able to successfully pursue their assignment of rights through litigation and judgment, they will have reaped a return on the valuable asset that they "bought"; at settlement. (19 C.A.4th 1503.)

(3) Any profit that plaintiffs obtain from the assignment should not be viewed as a double recovery. Because the nonsettling soils defendants must be accorded a credit in plaintiffs' direct action against them for the fair valuation of the assignment, later developments (such as any indemnity recovery) cannot affect the good faith of the settlement at the time it was approved. (19 C.A.4th 1504, footnote 9.) (See *Aero-Crete v. Superior Court* (1993) 21 C.A.4th 203, 209, 25 C.R.2d 804 [distinguishing *Erreca* and holding that valuation of assigned rights could wait until trial, where settling defendant's insolvency made valuation unnecessary to determination whether settlement was in good faith]; *Regan Roofing Co. v. Superior Court* (1994) 21 C.A.4th 1685, 1714, 27 C.R.2d 62 [applying *Erreca* standards to determine value of assigned indemnity rights, but holding that evidence was insufficient to support valuation representing only .0025% of potential indemnity recovery]; *L. C. Rudd & Sons v. Superior Court* (1997) 52 C.A.4th 742, 750, 60 C.R.2d 703 [in construction defect case, nonsettling defendant, which was potentially liable for damages relating to "soils and foundation issues," was entitled to setoff of entire amount of settlement that related to these issues, without reduction for those "soils and foundation" damages attributable to design, for which nonsettling defendant was found not to be potentially liable].)

SUPPLEMENT: [This section is current through the latest supplement]

In *Franklin Mint Co. v. Superior Court* (2005) 130 C.A.4th 1550, 31 C.R.3d 319, plaintiffs in a malicious prosecution action entered into a settlement agreement with fewer than all defendants. The agreement provided for the payment of a stated sum into escrow to be distributed in charitable grants, and also ensured attendance of one of the settling defendants' officers as a witness at trial against the remaining defendants. The settling defendants moved for a good faith settlement determination under C.C.P. 877.6 but failed to assign a specific value to the consideration paid. The trial court, on declaring the settlement to be in good faith, fixed the value of the setoff for the nonsettling defendants as the amount paid into escrow. *Held*, reversed. Determination of the value of the consideration paid clearly required more than a mere presentation of the settlement terms. The settling parties failed in their obligation to set a value for the consideration, supported by admissible evidence. Similarly, the nonsettling defendants were required to do more than simply assert that the value was the full amount deposited in the escrow account. Therefore, in light of the noncash elements, the trial court had no evidence on which it could base a reasoned decision on the credit to which the nonsettling defendants were entitled. (130 C.A.4th 1559.)

In *Garcia v. Duro Dyne Corp.* (2007) 156 C.A.4th 92, 67 C.R.3d 100, plaintiff sued multiple defendants for asbestos-related injuries, but released 16 defendants for mutual cost waivers. After plaintiff obtained a judgment against a remaining manufacturer, the trial court offset the economic damages award by \$ 4,000 for each cost waiver. *Held*, affirmed. Plaintiff had the burden of establishing the value of the cost waivers. After plaintiff declared that the waivers had no value and the manufacturer offered evidence that \$ 6,000 was the approximate amount that each defendant incurred in costs, the trial court did not abuse its discretion in determining the amounts to be \$ 4,000 each. (156 C.A.4th 106.)



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5 *Witkin Sum. Cal. Law Torts* § 97

[§ 97] Structured Settlement With Periodic Payments.

In *Franck v. Polaris E-Z Go Div. of Textron* (1984) 157 C.A.3d 1107, 204 C.R. 321, plaintiff was injured while riding in a snowmobile. She sued the driver of the machine, the driver's father, the seller, and the manufacturer. Damages were assessed by the judge at \$ 300,000. Prior to trial, plaintiff settled with the driver and driver's father for a total of \$ 215,000, embodied in a structured settlement calling for \$ 25,000 down and \$ 190,000 in future periodic payments over 17 years. The insurer of the driver's father made a \$ 25,000 downpayment and bought an annuity contract for \$ 75,000 to finance the future payments of \$ 190,000. Plaintiff also settled with the seller for a lump sum payment of \$ 2,500. Defendant manufacturer, which did not settle, contended that the \$ 300,000 damage award should be reduced by the total amount to be paid under the settlement agreement--\$ 217,500, consisting of \$ 2,500 cash from the seller, \$ 25,000 cash from the driver and the driver's father, and \$ 190,000 in future payments. Plaintiff's position was that the award should be reduced only by the amount of cash paid and the *present cash value* or cost of future payments--\$ 102,500, consisting of \$ 2,500 cash from the seller, \$ 25,000 cash from the driver's father, and the \$ 75,000 premium for the annuity. The trial judge decided in favor of defendant manufacturer. *Held*, reversed.

(a) A policy consideration favored in the law--maximization of recovery to the plaintiff to the extent that the fault of others has contributed to his or her injury--supports plaintiff's position.

(1) She received judgment for \$ 300,000; if the award is discounted by the total amount of future payments, she will have received at the end of the annuity period a total amount of money worth less than the amount to which she is now entitled. Under defendant's approach, if a plaintiff obtains a structured settlement for future payments in an amount equal to the judgment award, a nonsettling tortfeasor would be completely relieved of liability and the plaintiff would have only a settlement worth much less than the amount to which the plaintiff was entitled at the time of judgment. (157 C.A.3d 1117.)

(2) Defendant argues that plaintiff will receive a tax "windfall" because the future payments will not be subject to federal income taxation, while investment of a lump sum award would produce taxable income. This consideration is irrelevant. Tax benefits are a matter of legislative policy, and a plaintiff is entitled to negotiate a settlement that takes

advantage of tax benefits legally available. Moreover, no one can predict the course of legislation in this area over the next 17 years. (157 C.A.3d 1118.)

(b) A second policy consideration supported in the law--encouragement of settlement--also supports plaintiff's position.

(1) Structured settlements have advantages for both plaintiffs and defendants. "Plaintiffs receive tax-free periodic income over a period of time, thereby preventing recoveries from being squandered and ensuring that money is received in the future at times when it is actually needed. Defendants, on the other hand, are able to offer plaintiffs large settlements at a relatively small up-front cost by spreading payments out over a period of years through an annuity." (157 C.A.3d 1119.)

(2) Defendant's position would discourage structured settlements in multiple defendant cases. "Few plaintiffs would be willing to enter into structured settlements unless they could obtain future payments large enough to cover the possibility of a nonsettling defendant being relieved of paying damages. The large amounts demanded by plaintiffs would in turn discourage defendants from settling. Using tax considerations to reduce a nonsettling defendant's liability would further discourage structured settlements by nullifying their tax advantage. Moreover, [defendant's] interpretation of the law would considerably lessen the incentive for nonsettling defendants to settle. If a plaintiff settles with other defendants for large future payments, a nonsettling defendant will be more willing to go to trial on the chance that the court will find damages in an amount equal to or less than the amount of future payments under the settlement." (157 C.A.3d 1119.)

(c) Evenhandedness in treatment of damages is also an important consideration. A plaintiff who recovers for future pecuniary loss must take an award reduced to its present cash value. But under defendant's theory, the nonsettling defendant would immediately receive the benefit of the full amount of future payments rather than the present cash value. (157 C.A.3d 1120.)

(d) Defendant's contention that its position is mandated by the language of C.C.P. 877 is not persuasive. The statute calls for a reduction of the award by "the amount stipulated by the release" or "the amount of the consideration paid for it," whichever is greater; and defendant asserts that structured settlements would actually be "paid for" by annuity premiums. But the statute was enacted 16 years before the first known structured settlement in California, and there is no indication that the Legislature foresaw that innovation. "We are persuaded that when enacted this provision was intended to prevent fraud and double recovery by plaintiffs. A plaintiff and a settling defendant might agree to state an amount in the settlement agreement less than that actually paid by the defendant. If an award against a nonsettling defendant is only reduced by the amount stated in the agreement, plaintiff would receive a double recovery. The language of Section 877 protects a nonsettling defendant from having the award reduced by an amount less than that stipulated in the agreement when, for whatever reason, a settling defendant pays less than the amount stipulated." (157 C.A.3d 1120.) (On requirements for contracts for transfer of structured settlement payment rights, see *Ins.C. 10134* et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See 27 A.L.R.6th 323 [construction and application of state statutes regulating transfer of structured settlement payment rights].



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I. INTRODUCTION

C. Liability of Multiple Tortfeasors.

4. Settlement With Fewer Than All Tortfeasors.

d. Effect of Good Faith Settlement.

3. Offset to Judgment Against Nonsettling Tortfeasor.

dd. Settlement Offsetting Entire Judgment.

5 *Witkin Sum. Cal. Law Torts* § 98

[§ 98] Settlement Offsetting Entire Judgment.

In *Syverson v. Heitmann* (1985) 171 C.A.3d 106, 214 C.R. 581, plaintiff sued defendant H for personal injuries and received a verdict and judgment for \$ 100,000. Prior to trial, plaintiff had settled with other codefendants for \$ 100,000. On appeal, defendant contended that, in view of the offset, plaintiff was not entitled to receive any of the damages awarded, and was therefore not a prevailing party entitled to costs. *Held*, the judgment should be modified, but plaintiff was entitled to costs.

(a) Plaintiff contended that the proper method of applying the offset was (1) entry of the judgment in the full amount, and (2) making an acknowledgment of partial satisfaction of judgment under *C.C.P.* 724.110, 724.120 (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §385). Authorities from other jurisdictions support this procedure, but in each of the cases, the fact of settlement was not raised prior to judgment. (171 C.A.3d 111, 112.)

(b) In the present case, the parties stipulated to the fact and amount of the settlement before the entry of judgment. And *C.C.P.* 877 requires that the judgment be reduced by amounts paid by settling tortfeasors. Thus, "[w]here a plaintiff's settlement completely offsets the damages assessed against a nonsettling joint tortfeasor, it reduces the judgment to zero by operation of law." (171 C.A.3d 110.)

(c) Despite the reduction of the judgment to zero, plaintiff obtained a favorable verdict and judgment on liability, and was therefore the prevailing party entitled to costs. (171 C.A.3d 112; on recovery of costs by prevailing party, see 7 *Cal. Proc.* (4th), *Judgment*, §89 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Partial satisfaction of judgment:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §393. *Recovery of costs by prevailing party:*

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §88 et seq.

(New) *Where both parties breach contract:* In *Brawley v. J.C. Interiors* (2008) 161 C.A.4th 1126, 74 C.R.3d 832, four building owners and a contractor sued each other for breach of a construction contract, and three of the four owners settled for \$ 100,000, which was paid to the contractor. After trial, the jury found that the owner and the contractor each breached the contract and awarded \$ 32,551 to the contractor and \$ 19,800 to the nonsettling owner. The trial court offset the settlement amount against the contractor's award, yielding zero, and entered judgment of \$ 19,800 for the owner. *Held*, reversed. The proper procedure was to offset the awards, yielding \$ 12,751 owed to the contractor, and then apply the settlement credit, yielding a judgment of nothing for each party. (161 C.A.4th 1132, distinguishing *Syverson v. Heitmann* (1985) 171 C.A.3d 106, 214 C.R. 581, text, p. 189.)



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 - ee. Noneconomic Damages Under Proposition 51.

5 Witkin Sum. Cal. Law Torts § 99

[§ 99] Noneconomic Damages Under Proposition 51.

Under Proposition 51, a tort defendant has no joint liability for noneconomic damages. (C.C. 1431.2, *supra*, §53.) As held in *Espinoza v. Machonga* (1992) 9 C.A.4th 268, 11 C.R.2d 498, this means that where such a defendant makes a settlement with the plaintiff, a nonsettling codefendant who sustains a money judgment is entitled to a setoff only for the portion of the settlement attributable to economic damages, and is solely responsible for his or her share of the noneconomic damages. To subject the portion of the settlement attributable to noneconomic damages to setoff would, in effect, cause settlement money to be treated as if it were paid as a joint liability. (9 C.A.4th 276.) It is thus necessary to determine the amount of the settlement attributable to economic damages. The method for doing so is to calculate the percentage of the judgment attributable to economic damages in relationship to the entire award, apply that percentage to the settlement amount to determine the portion of the settlement attributable to economic damages, and then reduce the amount of the judgment by the economic damages portion of the settlement. (12 C.A.4th 277.)

The *Espinoza* rule and formula have been frequently applied. (See *Regan Roofing Co. v. Superior Court* (1994) 21 C.A.4th 1685, 1706, 27 C.R.2d 62 [implied approval of *Espinoza* calculation]; *Hoch v. Allied-Signal* (1994) 24 C.A.4th 48, 62, 29 C.R.2d 615 [in automobile accident case, one defendant settled for \$ 382,500 and jury awarded noneconomic damages of \$ 500,000; nonsettling defendant was not entitled to setoff]; *Greathouse v. Amcord* (1995) 35 C.A.4th 831, 837, 41 C.R.2d 561 [calculation of setoff must be based on percentages of economic and noneconomic damages reflected in jury verdict against nonsettling defendant, not on terms of settlement agreements with other defendants]; *Poire v. C.L. Peck/Jones Bros. Const. Corp.* (1995) 39 C.A.4th 1832, 1841, 46 C.R.2d 631, *supra*, §95 [defendant was entitled to setoff of 70.88% of the \$ 45,000 settlement proceeds (\$ 31,896) where percentage of jury's award of total damages (\$ 285,000) attributable to economic damages (\$ 202,000) was 70.88%]; *Ehret v. Congoleum Corp.* (1999) 73 C.A.4th 1308, 1316, 87 C.R.2d 363 [undifferentiated settlement must be apportioned between economic and noneconomic damages (so that setoff applies only to economic damages), and under *Espinoza* formula, percentage of economic damages in jury verdict must be applied to determined percentage of settlement to be offset; burden of proving different allocation is on plaintiff]; *Wilson v. John Crane* (2000) 81 C.A.4th 847, 859, 97 C.R.2d 240 [*Espinoza* formula applied to determine allowable amount to be credited against judgment, based on plaintiffs' settlements with

other defendants].)

The right to this reduction in the setoff may be waived. In *Conrad v. Ball Corp.* (1994) 24 C.A.4th 439, 29 C.R.2d 441, plaintiff, who was injured when a bottle containing apple juice collapsed in her hand, brought an action against the manufacturer of the bottle, the bottler, and the seller. Plaintiff settled with the bottler and seller for \$ 50,000 and obtained a special verdict against defendant manufacturer for \$ 275,000. The trial judge reduced the judgment by the \$ 50,000 settlement. *Held*, this was error; generally, only the amount of the settlement attributable to economic damages can be offset, but under the circumstances here, defendant waived the right to any offset.

(a) Although the *Espinoza* method is correct, it cannot be applied here because the special verdict did not specify economic and noneconomic damages. Plaintiff suggested that this problem be resolved by assuming that the jury awarded the full amount of economic damages that she claimed at trial, i.e., \$ 48,446, and use this amount in an *Espinoza* calculation. However, this is not a satisfactory solution because it requires wholly unsupported speculation as to the jury's decision-making process. (24 C.A.4th 444.)

(b) The correct solution in this case is to hold that defendant waived any right to an offset. As the party seeking an offset, defendant had the burden of establishing the facts essential to it. And it could have established such facts by proposing a special verdict that differentiated between economic and noneconomic damages. Its failure to do so constitutes a wavier. (24 C.A.4th 444.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Settlement With Fewer Than All Tortfeasors.

e. Sliding Scale Agreements.

1. Nature and Types.

5 *Witkin Sum. Cal. Law Torts* § 100

[§ 100] Nature and Types.

A "sliding scale recovery agreement" is "an agreement or covenant between a plaintiff or plaintiffs and one or more, but not all, alleged tortfeasor defendants, which limits the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the nonagreeing defendant or defendants." This definition includes, but is not limited to, agreements within the *C.C.P.* 877 and "agreements in the form of a loan from the agreeing tortfeasor defendant or defendants to the plaintiff or plaintiffs which is repayable in whole or in part from the recovery against the nonagreeing tortfeasor defendant or defendants." (*C.C.P.* 877.5(b).) Liability is "usually in some inverse ratio to the amount of recovery which the plaintiff is able to make against the nonagreeing defendant or defendants." (*Abbott Ford v. Superior Court* (1987) 43 *C.3d* 858, 869, footnote 9, 239 *C.R.* 626, 741 *P.2d* 124, *infra*, §102; see *Hackett v. John Crane* (2002) 98 *C.A.4th* 1233, 1238, 120 *C.R.2d* 662 [in calculating credit to nonsettling defendant against liability for economic damages after plaintiff settled with other defendants, court did not err in attributing 34% of settlement to potential wrongful death claims, considering nature of relationship and decedent's life expectancy].) Sliding scale agreements are sometimes termed "Mary Carter" agreements, a term derived from one of the earliest cases involving such an agreement. (*Abbott Ford v. Superior Court*, *supra*.)

These agreements have been the subject of considerable commentary. (See *Abbott Ford v. Superior Court*, *supra*, 43 *C.3d* 869, footnote 10, listing law review articles; 19 *Loyola L.A. L. Rev.* 995; 9 *Pacific L. J.* 362; 12 *Pacific L. J.* 121, 135, 137; 23 *San Diego L. Rev.* 227; 47 *So. Cal. L. Rev.* 1393; 62 *A.L.R.3d* 1111 [validity and effect of "loan receipt" agreement between injured party and one tortfeasor, for loan repayable to extent of injured party's recovery from cotortfeasor]; 22 *A.L.R.5th* 483 [validity and effect of "Mary Carter" or similar agreement].)

West's Key Number Digest, Release k.2, 7, 37; Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]
See CACI, No. 222 [Evidence of Sliding-Scale Settlement], adopted in 2007.



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2. Notice and Disclosure.

5 *Witkin Sum. Cal. Law Torts* § 101

[§ 101] Notice and Disclosure.

(1) *Notice of Intent To Make Agreement.* No sliding scale recovery agreement is effective "unless a notice of intent to enter into an agreement has been served on all nonsignatory alleged defendant tortfeasors." The notice must be given at least 72 hours prior to entering into the agreement unless, on a showing of good cause, the court allows a shorter time. (*C.C.P. 877.5(c)*) [further providing that failure to comply with notice requirement does not constitute good cause to delay commencement of trial.]

(2) *Disclosure to Court.* The parties to a sliding scale agreement or covenant must "promptly inform the court in which the action is pending" of the existence of the agreement or covenant and its terms and provisions. (*C.C.P. 877.5(a)(1).*)

(3) *Disclosure to Jury.* If the action is tried before a jury, and a defendant party to a sliding scale agreement or covenant is called as a witness at trial, the court must, on motion of a party, disclose to the jury the existence and content of the agreement or covenant, "unless the court finds that such disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*C.C.P. 877.5(a)(2).*) However, the disclosure required "shall be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness." (*C.C.P. 877.5(a)(2).*) (See *BAJI*, No. 15.03.1; *Cal. Civil Practice*, 4 Procedure §27:44; *Cal. Civil Practice*, 1 Torts, Indemnity, Contribution, and Setoff, §4:22.)

(4) *Disclosure to Other Parties.* A nonsettling defendant who disputes the good faith of a confidential sliding scale agreement is entitled to disclosure of its terms. (See *J. Allen Radford Co. v. Superior Court* (1989) 216 C.A.3d 1418, 1423, 265 C.R. 535, *supra*, §85.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Good Faith Requirement.

5 *Witkin Sum. Cal. Law Torts* § 102

[§ 102] Good Faith Requirement.

In *Abbott Ford v. Superior Court* (1987) 43 C.3d 858, 239 C.R. 626, 741 P.2d 124, the court held that a sliding scale agreement is valid if it meets the test of good faith under the standards set forth in *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 C.3d 488, 213 C.R. 256, 698 P.2d 159, supra, §79. One of several defendants in a personal injury action entered a sliding scale agreement with plaintiffs. Under the terms of the agreement, the settling defendant's insurer guaranteed specified minimum recoveries from the nonsettling defendants and agreed to pay any balance short of those amounts, agreed to make no-interest loans to plaintiffs and their attorneys during the litigation, and agreed to pay a specified sum outright if the agreement was found invalid, and plaintiffs agreed not to settle with the other defendants without that insurer's consent. The settling defendant made a motion under C.C.P. 877.6 for an order declaring the agreement to be in good faith and dismissing all claims for contribution or comparative indemnity. The trial judge denied the motion, but the Court of Appeal, on an application for mandamus, concluded that the agreement was a good faith settlement as a matter of law. The Supreme Court granted a hearing and remanded the matter to the Court of Appeal to consider whether the *Tech-Bilt* standards should be applied. The Court of Appeal then concluded that the *Tech-Bilt* standards did apply to sliding scale agreements, and that the agreement here satisfied those standards as a matter of law. The Supreme Court granted review, but while the matter was pending, the case was fully settled. Nevertheless, because of the importance of the issue, the Supreme Court retained and decided the technically moot case. (43 C.3d 868.) Thus, the opinion of the Supreme Court does not determine the rights of the plaintiffs and defendants in the litigation, but sets forth the principles under which a sliding scale settlement agreement may meet the good faith requirement.

(a) *Nature of problem.* The majority of out-of-state decisions have declined to condemn or condone these agreements categorically, and this cautious approach is appropriate for a number of reasons:

(1) *The variety of contractual arrangements is enormous.* "Although in all such agreements the settling defendant's ultimate liability to the plaintiff is dependent, at least in part, on the amount of money which the plaintiff recovers from the nonsettling defendants, there are a virtually unlimited number of additional provisions that may be included in such agreements--for example, provisions which mandate secrecy, restrict settlement with the remaining defendants, or provide various forms of financing for the plaintiff's action--that will often substantially affect the operation and validity

of the agreements." (43 C.3d 870.)

(2) The *content and effect of the sliding scale clause itself and the factual background* frequently vary from case to case. (a) In some cases, the clause may be structured so that the settling party may ultimately bear no liability to the plaintiff. (b) In other cases, the settling party may make a substantial noncontingent payment to the plaintiff, and the sliding scale element may simply provide a supplemental guaranty of some additional recovery. (c) In some cases, the guaranty figure may be for an amount equal or close to the plaintiff's total damages; in others, the guaranty figure may represent only a relatively small share of the plaintiff's damages. (d) In some cases, the settling defendant who may potentially be relieved of all liability may be clearly the most culpable of all the defendants; in others, the sliding scale agreement may be entered into by only peripherally involved defendants in order to avoid a potentially lengthy and costly suit. (e) In some cases, the agreement may be made in the early stages of negotiation without regard to the willingness of other defendants to engage in settlement negotiations, while in others, it may be only a last resort after one or more defendants unreasonably refuse to make a settlement offer commensurate with their fair share of responsibility. (43 C.3d 870.)

(3) The agreements may have a *variety of effects at different stages of the litigation process* (discovery, settlement, trial or appeal). The potential problems may call for one remedy in one context (e.g., disclosure of the agreement to the nonagreeing parties or to the jury), and another remedy in another context (e.g., invalidation of a specific provision or the entire agreement). (43 C.3d 871.)

Thus, "analysis requires close attention to the specific provisions of the agreement itself, the factual setting in which the agreement is entered into, and the agreement's effect on the particular aspect of the judicial process at issue." (43 C.3d 871.)

(b) *Tech-Bilt standards.*

(1) The two major goals of C.C.P. 877 and 877.6 are equitable sharing of costs among the parties at fault and encouragement of settlements. There is no priority to these objectives; they must be harmonized. (43 C.3d 872, and footnote 15.) *Tech-Bilt* recognized that the "good faith" requirement is the key to harmonization (43 C.3d 873), and set forth the factors to be taken into account (43 C.3d 874).

(2) "As *Tech-Bilt* emphasizes, of course, a 'good faith' settlement does not call for perfect or even nearly perfect apportionment of liability. In order to encourage settlement, it is quite proper for a settling defendant to pay less than his proportionate share of the anticipated damages. What is required is simply that the settlement not be grossly disproportionate to the settlor's fair share." (43 C.3d 874.)

(c) *Tech-Bilt standards apply to sliding scale agreements.* "Neither section 877 nor section 877.6 exempts sliding scale agreements from its 'good faith' requirement, and nothing in section 877.5 ...--a provision which was enacted to protect against the unfair consequences that may flow from undisclosed sliding scale agreements--indicates that these agreements need not meet the generally applicable good faith standard." (43 C.3d 875.)

(d) *Contention that loss unfairly apportioned.*

(1) The nonsettling defendants argue that sliding scale agreements invariably thwart the goal of fair apportionment because, by definition, the agreement is one in which the settling defendant's final out-of-pocket payment to the plaintiff is dependent on the amount the plaintiff recovers from the remaining defendants, and that in a case such as this, the nonsettling defendants could be required to bear all of the damages, while the settling defendant--who may be the most culpable tortfeasor--would pay nothing. (43 C.3d 876.) But some sliding scale agreements do require the settling defendant to make an outright payment, and the diverse situations call for analysis of the particular agreement. (43 C.3d 877.)

(2) A settlement found to be in good faith has two interrelated consequences: (a) It discharges the settling tortfeasor

from liability for contribution or indemnity, and (b) it reduces the plaintiff's claims against the other defendants by "the amount of consideration paid for it." "Although past cases have often overlooked the interrelationship of these two features ... , in our view the ultimate analysis of the effect of the sliding scale agreement resolves itself to a consideration of fairness to the nonsettling defendants. If a court finds that a settling defendant, by entering into a sliding scale agreement, has realistically paid a 'consideration' that is within its *Tech-Bilt* 'ballpark,' and if the nonsettling defendants obtain a reduction in the plaintiff's claims against them in an amount equal to that consideration, the statutory fair apportionment objective should be satisfied." (43 C.3d 877.)

(3) "Accordingly, the analysis of whether a sliding scale agreement conflicts with the fair apportionment objective lies in 'the amount of consideration' which is attributed to the settling defendant as the 'payment' for his release from liability by entering into the sliding scale agreement. Since the sliding scale agreement is given by the settling defendant in exchange for the plaintiff's release and the immunity from contribution or indemnity from the claims of the nonsettling cotortfeasors, we should assume the exchange is of equivalents. If we focus, then, not on what the settling defendant gave up, but rather what he received, then we have a simple application of the *Tech-Bilt* rules. This is so because one of the principal difficulties in this area has been the attempt to arrive at an accurate evaluation of the 'price' or 'consideration' which has been paid by a settling defendant who enters into a sliding scale arrangement." (43 C.3d 878.)

(4) The nonsettling defendants contend that the "consideration paid" should be calculated solely by reference to the amount of any *noncontingent* payment; the settling defendant, pointing to its guaranty, contends that the consideration paid should be fixed at the *maximum possible* payment (\$ 3 million). The "economic reality" lies between these two extreme positions. A guaranty agreement, even if totally contingent, is not completely cost-free, and the cost or price of such an agreement is not equal to the maximum possible payment. (43 C.3d 878.)

(5) The court should not be required to determine the actual value of the agreement by the use of actuarial or other valuation methods; the parties are in the best position to place a monetary figure on its value, and should have the burden of establishing it. (43 C.3d 879.) In many cases, negotiations will have included a traditional "straight" settlement, and this background will give the settling parties a vantage point in declaring the agreement's value. And in view of the conflicting interests of the plaintiff and settling defendant, "requiring a joint valuation by the plaintiff and the settling defendant should generally produce a reasonable valuation." (43 C.3d 879.) Once the parties to the agreement have declared its value, a nonsettling defendant may either (a) accept that value and attempt to show lack of good faith "because the assigned value is not within the settling defendant's *Tech-Bilt* ballpark," or (b) attempt to prove that the assigned value is too low and that a greater reduction in the plaintiff's claims against the remaining defendants is actually warranted. (43 C.3d 879.) Because the settling parties in the present case placed no value on the agreement, the ordinary result on review (if the case had not been settled) would be to remand the matter to the trial court for further consideration of this issue. (43 C.3d 880.)

(e) *Contention that subsequent settlements are discouraged.*

(1) The nonsettling defendants contend that the typical "veto power" provision in the present agreement, preventing settlement with other defendants except with consent of the settling defendant, interferes with the ability of the nonsettling defendants to settle. This contention has some merit. "An open-ended veto provision conflicts with the public policy which favors the full settlement of litigation and may frequently result in unnecessary trials. Accordingly, we conclude that to be valid and enforceable, such a veto provision must, by its terms, be confined only to those subsequent settlements that will require the earlier settling defendant to bear more than its fair 'ballpark' share of damages." (43 C.3d 883.)

(2) The nonsettling defendants further contend that, even in the absence of an express veto provision, sliding scale agreements impair subsequent settlements and should be found not in good faith for that reason. It is true that some sliding scale agreements--by establishing a high guaranty figure and by mandating that the proceeds of a subsequent settlement up to the figure be credited in toto to the earlier settling defendant--may eliminate any incentive a plaintiff

has to settle with the remaining defendants within a range commensurate with their fair share of responsibility. "We do not decide at this time whether the potential antisettlement effect of such an agreement is sufficient, in itself, to warrant a finding that the agreement is not a good faith settlement. ... We do note, however, that settling parties may be able to obviate such a challenge in the future by providing some mechanism for the sharing of subsequent settlement proceeds between the earlier settling defendant and the plaintiff, thereby assuring that the plaintiff retains at least some incentive to entertain reasonable settlement offers from the remaining defendants." (43 C.3d 884.)

(f) *Effect of provision for no-interest loan.* This provision has the beneficial effect of providing injured victims with a speedy source of revenue, and the value of such a loan will realistically be considered by the parties in arriving at the agreement's value. (43 C.3d 885.)

(g) *Conclusion.* "In sum, we conclude: (1) that *Tech-Bilt's* good faith standard applies to sliding scale agreements; (2) that to satisfy the statutory objective of a fair apportionment of loss, (i) the 'consideration' paid by a defendant who enters into a sliding scale agreement must fall within the *Tech-Bilt* 'ballpark,' and (ii) the plaintiffs' claims against the remaining defendants must be reduced by the amount of the 'consideration paid' by the settling defendant; (3) that any unreasonable or bad faith conduct of the nonsettling defendants which impeded the settlement process and led to the sliding scale agreement may be taken into account in determining whether the agreement satisfies the 'ballpark' standard; and (4) that any provision which purports to give a settling defendant a 'veto' over subsequent settlements is valid only if it is limited to settlements which would leave the earlier settling defendant to bear more than its fair share of liability for the plaintiff's damages." (43 C.3d 887.)

In *United Services Auto. Assn. v. Superior Court* (2001) 93 C.A.4th 633, 113 C.R.2d 328, the consideration paid for a sliding scale settlement agreement consisted of a noncontingent \$ 1 million and an interest-free loan of \$ 3.5 million repayable only upon the contingency of its recovery from the nonsettling tortfeasor. Nevertheless, the settlement agreement provided that the value to be placed on all the payments of \$ 4.5 million, for the purpose of establishing the credit to which the nonsettling defendant would be entitled, was only \$ 1 million. In effect the settling parties agreed that the \$ 3.5 million loan had no value to the settling plaintiffs. *Held*, the trial court erred in finding the settlement was made in good faith. The valuation placed on the loan by the settling parties failed to comply with the equitable principles governing good faith settlements under *Abbot Ford*. (93 C.A.4th 640.) (See *Mattco Forge v. Arthur Young & Co.* (1995) 38 C.A.4th 1337, 45 C.R.2d 581, *supra*, §81 [applying principles derived from *Abbot Ford* in determining good faith of sliding scale settlement between plaintiff and party against whom plaintiff had no viable claim]; *Alcala Co. v. Superior Court* (1996) 49 C.A.4th 1308, 1312, 57 C.R.2d 349 [sliding scale settlement otherwise within *Tech-Bilt* standards is not invalidated solely because it provides for continued participation in trial by settling defendants]; 16 *Pepperdine L. Rev.* 795 [The Changing Face of Mary Carter Agreements in California: The Aftermath of *Abbot Ford* and Proposition 51]; 22 *U.C. Davis L. Rev.* 239 [proposal for liberal interpretation of *Abbot Ford*]; 22 *A.L.R.5th* 483 [validity and effect of sliding scale agreements].)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Liability of Multiple Tortfeasors.

5. Contribution.

a. Development of Law.

5 *Witkin Sum. Cal. Law Torts* § 103

[§ 103] Development of Law.

At common law, there is no right of contribution between persons jointly or severally liable in tort, i.e., among joint, concurrent, or successive tortfeasors. Hence, one who is sued may be forced to pay the entire claim, with the others wholly absolved. (See Dobbs, *The Law of Torts* §386; *Rest.*, *Restitution* §102 [no contribution among jointly or severally liable tortfeasors]; 60 *A.L.R.2d* 1366 [contribution between negligent tortfeasors at common law].) This was formerly the California law. (See *Adams v. White Bus Line* (1921) 184 C. 710, 712, 195 P. 389; *Smith v. Fall River Joint Union High School Dist.* (1934) 1 C.2d 331, 334, 34 P.2d 994; *Salter v. Lombardi* (1931) 116 C.A. 602, 604, 3 P.2d 38; 18 *Cal. L. Rev.* 522; 24 *Cal. L. Rev.* 546, 612, 702; 25 *Cal. L. Rev.* 413, 425; 9 *Hastings L. J.* 180.)

This rule was severely criticized. (See 54 *Harv. L. Rev.* 1170; 23 *Hastings L. J.* 1612 [Nevada legislation]; 41 *So. Cal. L. Rev.* 728 [suggested ways to allocate loss].) The Uniform Contribution Among Tortfeasors Act was adopted in 1939. (See 12 U.L.A. (Master Ed.), p. 185 [1955 revision of Act]; 34 *A.L.R.2d* 1107 [cases under uniform act].) The principal objections to the common law rule were stated in the Commissioner's Prefatory Note to the 1939 Uniform Act: "Most joint and several tort liability results from inadvertently caused damage, although it is almost impossible to draw a practical line between torts of inadvertence and others. It is, then, somewhat ironic to note that at common law contribution is denied among all tortfeasors and is allowed as a matter of course to one who has deliberately chosen to violate a contractual obligation undertaken with others. And this situation is aggravated by the common-law view that the injured person is 'lord of his action' and, when injured by the joint and several tort of two or more, may place the loss where and how he sees fit." (12 U.L.A. (Master Ed.), p. 188.)

Contribution has been permitted in admiralty (see 45 *Cal. L. Rev.* 304) and under the Federal Tort Claims Act (see *United States v. Yellow Cab Co.* (1951) 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523).

Either by statute or judicial decision, a considerable number of states came to recognize the principle of contribution. (See 9 *Hastings L. J.* 181; 3 Harper, James & Gray 2d §10.2; 12 *Stanf. L. Rev.* 865 [measure of contribution where judgments in different amounts have been rendered]; 72 *A.L.R.2d* 1298 [same]; 34 *A.L.R.3d* 1374 [effect of release on right to contribution]; 100 *A.L.R.5th* 409 [right to contribution of owner, operator, maintainer, repairer, or installer of automatic passenger elevator in action by elevator user].) In 1957, a right to contribution was statutorily granted in California. (See *C.C.P.* 875 et seq., *infra*, §105.)

SUPPLEMENT: [This section is current through the latest supplement]

Criticism of rule: See 12 U.L.A. (Master Ed.), p. 193; the language quoted in the text appears at 12 U.L.A. (Master Ed.), p. 196.

Recognition of principle: See 3 Harper, James & Gray 3d §10.2.

(New) Municipal contribution to state liability for flood damage: *Water C. 8307*, added in 2007, provides that, where property damage is caused by a flood, a city or county may be required to contribute its fair and reasonable share to the extent that the city or county has increased the state's exposure to liability for that damage by unreasonably approving new development in a previously undeveloped area that is protected by a state flood control project. Contribution is not required if the city or county meets specified requirements. (*Water C. 8307(a)*.) Also, the city or county is not required to contribute unless an action has been filed against the state asserting liability for the damage. There is no contribution requirement if the state settles the claims against it without providing the city or county with an opportunity to participate in settlement negotiations. (*Water C. 8307(b)*.)



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5. Contribution.

b. Restatement.

5 Witkin Sum. Cal. Law Torts § 104

[§ 104] Restatement.

Under Rest.3d, Torts: Apportionment of Liability, when two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other, unless the other previously had a valid settlement and release from the plaintiff. (*Rest.3d, Torts: Apportionment of Liability §23(a).*)

A person entitled to recover contribution may recover no more than the amount paid to the plaintiff in excess of the person's comparative share of responsibility. (*Rest.3d, Torts: Apportionment of Liability §23(b)*; on comparative responsibility under Restatement generally, see *infra*, §1328.)

A person who has a right of indemnity against another does not have a right of contribution against the other person and is not subject to liability for contribution to that person. (*Rest.3d, Torts: Apportionment of Liability §23(c)*; on indemnity under Restatement, see *infra*, §113.) A person may seek both indemnity and contribution as alternative theories of recovery, but may not recover under both theories. (*Rest.3d, Torts: Apportionment of Liability §23, Comment d.*)

A person otherwise entitled to contribution is not precluded from receiving contribution by the fact that he or she is liable for an intentional tort. (*Rest.3d, Torts: Apportionment of Liability §23, Comment l.*)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Contribution.

c. Contribution Statute.

5 Witkin Sum. Cal. Law Torts § 105

[§ 105] Contribution Statute.

(1) *Enactment.* In 1957, a State Bar-sponsored measure, differing substantially from the Uniform Act (supra, §103), was adopted. The statute is entitled "Releases From and Contribution Among Joint Tortfeasors." (C.C.P. 875 et seq.) (See *Augustus v. Bean* (1961) 56 C.2d 270, 272, 14 C.R. 641, 363 P.2d 873 [statute was applicable where judgment was recovered after effective date, though plaintiff's injury occurred before that date]; Dobbs, *The Law of Torts* §§386, 387; Cal. Civil Practice, 1 Torts, Indemnity, Contribution and Setoff, Chap. 4; 9 *Hastings L. J.* 180; 72 A.L.R.4th 231 [right of initial tortfeasor to contribution from medical attendant aggravating injury or causing new injury]; for contribution among joint debtors *other than tortfeasors*, see C.C.P. 881 et seq., 8 Cal. Proc. (4th), *Enforcement of Judgment*, §479 et seq.)

(2) *Tortfeasor Judgment Debtor's Right of Contribution.* A right of contribution exists among two or more defendants to a tort action "[w]here a *money judgment* has been rendered jointly" against them. (C.C.P. 875(a); on amount of contribution, see infra, §§109, 110.) The statute applies to a judgment obtained in an action brought in another state. (*Caterpillar Tractor Co. v. Teledyne Industries* (1975) 53 C.A.3d 693, 699, 126 C.R. 455.)

(3) *Subrogation of Insurer.* A liability insurer "who by payment has discharged the liability of a tortfeasor judgment debtor" is subrogated to that tortfeasor's right of contribution. (C.C.P. 875(e).) (On whether this requires payment of the entire amount of the judgment and not merely one tortfeasor's pro rata share, see 9 *Hastings L. J.* 189; cf. Uniform Contribution Among Tortfeasors Act, §1(e) (12 U.L.A. (Master Ed.), p. 195) [insurer subrogated if it "has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer"].) C.C.P. 875(e) is limited to an insurer that pays under its policy. An *insurance agent* who is held liable for breach of a contract to procure insurance is not entitled to contribution. (*Delta Mfg. Co. v. Jones* (1977) 69 C.A.3d 428, 432, 138 C.R. 40.)

(4) *Discharge of Contribution Obligation by Good Faith Settlement.* To encourage settlement, the statute provides that a good faith release, dismissal, or covenant not to sue or enforce judgment (see supra, §70 et seq.) "shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors." (C.C.P. 877(b), supra, §71; see Uniform Contribution Among Tortfeasors Act, §4(b) (12 U.L.A. (Master Ed.), p. 264) [similar]; 6 A.L.R.5th 883 [release of one joint tortfeasor as discharging liability of others under Uniform Contribution Among Tortfeasors Act and similar statutes].) But the consideration received will reduce the injured person's claims against the others. (

C.C.P. 877(a), supra, §71; see *18 Stanf. L. Rev. 486*; *94 A.L.R.2d 352* [manner of crediting one tortfeasor with amount paid by another for release or covenant not to sue].)

(5) *Limitations on Contribution Right*. The contribution right is subject to the following limitations:

(a) The *plaintiff* still has the right "to satisfy a judgment in full as against any tortfeasor judgment debtor." (*C.C.P. 875(g)*.)

(b) A *wilful wrongdoer* has no right of contribution. (*C.C.P. 875(d)*, infra, §107.)

(c) There is no right of contribution where one tortfeasor judgment debtor is entitled to *indemnity* from another. (*C.C.P. 875(f)*, infra, §106.)

(d) There is no right of contribution where the liability of the person from whom contribution is sought is merely *imputed by statute*. (*Southern Pac. Trans. Co. v. Dolan* (1972) 27 C.A.3d 534, 540, 104 C.R. 131, infra, §1258.)

(6) *Significance of Contribution Remedy*. Typically, the loss sharing claims of multiple tortfeasors are resolved by a *comparative indemnification* cross-complaint in the underlying action, instead of by a postjudgment claim for contribution under the statute. (*Coca-Cola Bottling Co. v. Lucky Stores* (1992) 11 C.A.4th 1372, 1379, 14 C.R.2d 673, infra, §106; on comparative indemnity generally, see infra, §116.)

West's Key Number Digest, Contribution k.1 et seq.; Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Enactment*.

Contribution among joint debtors:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §508 et seq.(3) *Subrogation of Insurer*. See Uniform Contribution Among Tortfeasors Act, §1(e) (12 U.L.A. (Master Ed.), p. 202).

(4) *Discharge of Contribution Obligation by Good Faith Settlement*. See Uniform Contribution Among Tortfeasors Act, §4(b) (12 U.L.A. (Master Ed.), p. 284); *17 A.L.R.6th 1* [contribution between joint tortfeasors as affected by settlement with injured party by one or more of them].



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d. No Contribution Where Entitlement to Indemnity.

5 Witkin Sum. Cal. Law Torts § 106

[§ 106] No Contribution Where Entitlement to Indemnity.

There is no right of contribution where one tortfeasor judgment debtor is entitled to indemnity from another. (*C.C.P.* 875(f); see Uniform Contribution Among Tortfeasors Act, §1(f) (12 U.L.A. (Master Ed.), p. 195) [similar]; *Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co.* (2004) 123 C.A.4th 278, 288, 20 C.R.3d 128 [indemnity provision in subcontractor's contract with general contractor precluded subcontractor's insurer from recovering contribution from general contractor's insurer respecting defense and settlement expenses that were incurred in defending suit against general contractor by subcontractor's injured employee]; on indemnity generally, see *infra*, §112 et seq.)

Where an attempt to obtain indemnification proves unsuccessful, however, contribution may still be available. In *Coca-Cola Bottling Co. v. Lucky Stores* (1992) 11 C.A.4th 1372, 14 C.R.2d 673, a motorcyclist filed an action against a grocery store chain that owned a market and a bottling company alleging that the market directed the bottling company to park its delivery truck in an illegal zone, thereby preventing an approaching driver from seeing the motorcycle, with which the driver collided. The bottling company cross-complained against grocery store chain for partial equitable indemnity for any sum it was required to pay in excess of its proportionate share of liability. The trial judge granted the grocery store chain's motion for summary judgment on this cross-complaint on the ground that the bottling company's liability arising from illegally parking its truck could not be placed on the grocery store chain. In the motorcyclist's action, the jury returned a verdict against both defendants, and the bottling company paid the entire judgment. The bottling company then commenced this action seeking contribution from the grocery store chain. *Held*, summary judgment for the bottling company affirmed.

(a) The bottling company's cross-complaint was an assertion of a claim for partial equitable indemnity under *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, *infra*, §1357. On the other hand, its action for contribution seeks to enforce an entirely different right, i.e., a statutory right that distributes the loss equally among all tortfeasor judgment debtors, instead of on the basis of comparative fault. And *American Motorcycle* recognized that the statutory contribution remedy was separate and distinct from the judicially created doctrine of comparative indemnification. (11 C.A.4th 1378.)

(b) The loss sharing claims of multiple tortfeasors are typically resolved by a comparative indemnification cross-complaint in the underlying action, rather than by a postjudgment claim for contribution. "However, it does not

follow that a defendant is limited to such procedure against its codefendant; nor do we see any reason to conclude that one defendant who *unsuccessfully* seeks indemnification is prohibited from thereafter seeking contribution if the statutory preconditions are met. The statute prohibits contribution *only* if a right to indemnity has been established. (*Code Civ. Proc.* §875, subd. (f).) In other words, a defendant cannot recover under both procedures, but there is no reason to deny a right to at least one of them." (11 C.A.4th 1379.)

(c) The grocery store chain argued that the finality of the judgment denying the bottling company's right to indemnity precludes it from now asserting a claim for contribution. This argument misapprehends the doctrine of res judicata. That doctrine does not apply when new rights have accrued since the rendition of the former judgment, and that is the situation here. When the bottling company prosecuted and lost its claim for partial indemnity on the basis of comparative fault, a claim for contribution could not have been brought. That right did not accrue until a money judgment had been rendered jointly against both the grocery store chain and the bottling company, and the bottling company had discharged more than its pro rata share of that judgment. Thus, the bottling company's "postjudgment statutory claim for contribution was an entirely new and different claim which was unaffected by the unsuccessful attempt to establish a right to comparative or equitable indemnification." (11 C.A.4th 1380.)

A similar result was reached in *Huntington Beach v. Westminster* (1997) 57 C.A.4th 220, 66 C.R.2d 826. City H responded to a report of a robbery in progress at a local restaurant. In accordance with a mutual assistance pact, officers from city W were also sent to the restaurant. At the crime scene, an officer from city H assumed control, and requested a canine unit. An officer from city W responded, but when the police dog was released, it ran through the area believed to be a possible hiding place of the suspects and bit one of the robbery victims. Without admitting fault, the cities settled the victim's suit, and the court entered judgment in accordance with the stipulated settlement, finding both cities jointly and severally liable. When the cities tried their indemnity cross-complaints, the judge found no fault on the part of either city, but nevertheless assigned 100% of the responsibility to city H, reasoning that the requesting party should bear the fiscal burden for unforeseen consequences that are not due to either party's fault. *Held*, reversed.

(a) In California, there is but a single comparative indemnity doctrine that permits partial indemnification on a comparative fault basis in appropriate cases. Comparative equitable indemnity includes the entire range of possible apportionments from no indemnity to total indemnity. However, it still depends on an allocation of fault. There is no authority for imposing an all-or-nothing indemnity judgment in favor of one fault-free party against another fault-free party. (57 C.A.4th 224.)

(b) Despite the failed attempt to obtain indemnity, however, contribution is still available. In fact, the contribution statute and common sense compels the result that each city be responsible for 50% of the settlement. (57 C.A.4th 237, citing *Coca-Cola Bottling Co.*)

SUPPLEMENT: [This section is current through the latest supplement]

See Uniform Contribution Among Tortfeasors Act, §1(f) (12 U.L.A. (Master Ed.), p. 202).



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e. No Contribution to Wilful Wrongdoer.

5 *Witkin Sum. Cal. Law Torts* § 107

[§ 107] No Contribution to Wilful Wrongdoer.

There is no right of contribution "in favor of any tortfeasor who has intentionally injured the injured person." (*C.C.P.* 875(d); see *Martinez v. De Los Rios* (1960) 187 C.A.2d 28, 33, 9 C.R. 326, 7 Cal. Proc. (4th), Judgment, §361 [right of contribution only exists between negligent tortfeasors]; Uniform Contribution Among Tortfeasors Act, §1(c) (12 U.L.A. (Master Ed.), p. 194 [similar]; 9 *Hastings L. J.* 187; cf. Uniform Contribution Among Tortfeasors Act, §1(g) (12 U.L.A. (Master Ed.)), p. 195 [no right of contribution for breach of trust or other fiduciary obligation].)

In *Bartneck v. Dunkin* (1969) 1 C.A.3d 58, 81 C.R. 428, plaintiff received a replevin judgment against D and M for return of property or payment of \$ 9,000. M paid \$ 4,500 (half). Several years later, he paid an additional \$ 3,587 and received an assignment of the judgment. He then sought to execute on the judgment against D for the balance due. *Held*, he was not entitled to contribution. The judgment determined that there had been *intentional* detention of the property, and no contrary contention could be made in a subsequent proceeding. (1 C.A.3d 61.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference:

Martinez case:

7 Cal. Proc. (5th), Judgment, §421.

See Uniform Contribution Among Tortfeasors Act, §1(c), (g) (12 U.L.A. (Master Ed.), p. 202).



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f. Necessity of Joint Judgment.

5 *Witkin Sum. Cal. Law Torts* § 108

[§ 108] Necessity of Joint Judgment.

(1) *Right Enforceable Only After Judgment.* The right of contribution "may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share" of that judgment. (*C.C.P.* 875(c).) Thus the California statute is limited to contribution after judgment. It leaves the plaintiff free, as before, to select defendants, and avoids the controversial procedure of third-party impleader and litigation of the contribution issue in the main action. (See 9 *Hastings L. J.* 186, 189 [criticism of California provision]; cf. Uniform Contribution Among Tortfeasors Act, §1 (12 U.L.A. (Master Ed.)), p. 194 [contribution right applies where persons "liable in tort," i.e., remedy provided is broader than in California].)

(2) *Judgment Must Be Joint.* The contribution statute applies only where a judgment has been rendered *jointly* against two or more defendants. (*C.C.P.* 875(a), (c).) Thus, in *Guy F. Atkinson Co. v. Consani* (1963) 223 *C.A.2d* 342, 35 *C.R.* 750, plaintiff was injured by the negligence of C, an independent contractor under control of A. Plaintiff sued both but received judgment against A alone, and A satisfied the judgment. A then appealed from the judgment in favor of C on the ground that an admittedly erroneous instruction may have cost it the right to contribution. *Held*, appeal dismissed. The general rule that a party is not aggrieved by an erroneous judgment in favor of a codefendant (see 9 *Cal. Proc.* (4th), *Appeal*, §181 et seq.) is unaffected by *C.C.P.* 875. (223 *C.A.2d* 344.) (See *Winzler & Kelly v. Superior Court* (1975) 48 *C.A.3d* 385, 395, 122 *C.R.* 259 [judgment against four defendants affirmed as to first two, and satisfied by them, but reversed and remanded as to others; hence, no "joint judgment," permitting former to seek contribution from latter, existed].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Right Enforceable Only After Judgment.* See Uniform Contribution Among Tortfeasors Act, §1 (12 U.L.A. (Master Ed.)), p. 201. (2) *Judgment Must Be Joint.*

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §33 et seq.



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5. Contribution.

g. Amount of Contribution.

1. Pro Rata Share.

5 Witkin Sum. Cal. Law Torts § 109

[§ 109] Pro Rata Share.

Contribution is "limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment." (*C.C.P.* 875(c); see *Mizirawi v. Holl* (1982) 135 C.A.3d 322, 325, 185 C.R. 328 [contribution was properly limited to pro rata share of judgment].)

The pro rata share is determined by "dividing the entire judgment equally among all of them." (*C.C.P.* 876(a); see *Rollins v. California* (1971) 14 C.A.3d 160, 165, footnote 8, 92 C.R. 251 [contributing parties are said to be in *pari delicto*, and damages are divided equally between them].) But "[w]here one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share, as to which there may be indemnity between them." (*C.C.P.* 876(b).)

The pro rata share limitation was applied in *Lamberton v. Rhodes-Jamieson* (1988) 199 C.A.3d 748, 245 C.R. 162. Applying comparative fault principles (see *infra*, §1327 et seq.), a jury found three defendants 25%, 25% and 10% liable, respectively, for a \$ 350,000 damages award. (Plaintiff's employer, who was found 40% at fault, was not a party to the action.) The defendants who were 25% liable settled with plaintiff for \$ 125,000 each, but the defendant who was 10% liable refused to settle, pursued an appeal, and then, after abandoning the appeal, finally settled for \$ 100,000, an amount in excess of its original 10% share. It then brought a motion for contribution. *Held*, order denying motion affirmed.

(a) The 10% liable defendant argued that, under *C.C.P.* 875(c), it had a right to contribution for the amount it paid in excess of its *fault-proportioned* share. However, that statute conditions the right to contribution on a payment in excess of a defendant's *pro rata* share, and *C.C.P.* 876(a) provides that each defendant's *pro rata* share "*shall be determined*" by dividing the judgment equally. (199 C.A.3d 751.) Here, dividing the total judgment (\$ 350,000) by the number of defendants (3) results in a *pro rata* share for each defendant of \$ 116,661, an amount which is more than that paid by the 10% liable defendant (\$ 100,000) and less than that paid by the 25% liable defendants (\$ 125,000 each). Hence, because the 10% liable defendant's settlement did not exceed its *pro rata* share, as defined in *C.C.P.* 876, it was not entitled to contribution. (199 C.A.3d 751, 755.)

(b) *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, *infra*, §1357, suggested, without deciding, that C.C.P. 875(b), allowing the trial judge to apply contribution "in accordance with the principles of equity" (see *infra*, §110), might allow the contribution statute to be interpreted to permit fault-proportioned, instead of pro rata, contribution. "In our view, there is nothing to 'interpret.' Section 876 states that the pro rata share *shall be determined* by dividing the judgment equally among the number of defendants. The Legislature has the power to prescribe legal definitions of its own language, and when the meaning to be given to particular terms is prescribed by the Legislature, it is binding on the court." (199 C.A.3d 754.)

West's Key Number Digest, Contribution k.7; Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]



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g. Amount of Contribution.

2. Equitable Principles.

5 *Witkin Sum. Cal. Law Torts* § 110

[§ 110] Equitable Principles.

The right of contribution "shall be administered in accordance with the principles of equity." (*C.C.P.* 875(b); cf. Uniform Contribution Among Tortfeasors Act, §2 (12 U.L.A. (Master Ed.)), p. 246 [more detailed provision]; on equitable right of joint obligors to contribution, see 13 *Summary* (10th), *Equity*, §179 et seq.)

This provision was applied in *Ramirez v. Redevelopment Agency of San Francisco* (1970) 4 C.A.3d 397, 84 C.R. 356. Plaintiff was injured in a fall from a hotel elevator as a result of alleged negligence in maintenance. He sued the maintenance company, and the building owner, and the lessee of the building. After judgment for plaintiff, the maintenance company paid half, the owner and the lessee paid the other half, and satisfaction of judgment was executed. Then the maintenance company sought contribution from the owner and the lessee on the theory that each defendant should have paid one-third. *Held*, the contention was unsound. The maintenance company was, in the light of the verdict, guilty of active and primary negligence. The owner and the lessee, on the other hand, were held under the legal principle of nondelegable duty of care; there was nothing in the record to show active negligence on the part of either. Under these circumstances, it was proper to treat the owner and the lessee as a unit. (4 C.A.3d 401.) (See *Mizirawi v. Holl* (1982) 135 C.A.3d 322, 325, 185 C.R. 328 [stating, in case involving vicarious liability, that it is proper under *C.C.P.* 875(b) to "inquire into the relative delinquency of the parties"].)

West's Key Number Digest, Contribution k.7; Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]

See Uniform Contribution Among Tortfeasors Act, §2 (12 U.L.A. (Master Ed.), p. 263).



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h. Judgment on Notice.

5 *Witkin Sum. Cal. Law Torts* § 111

[§ 111] Judgment on Notice.

Judgment for contribution may be entered by one tortfeasor against other tortfeasor judgment debtors by noticed motion. Notice of motion must be given to all parties in the action, including the plaintiff, at least 10 days before the hearing on the motion. The notice must be accompanied by an affidavit setting forth any information that the moving party may have concerning the assets of defendants available for satisfaction of the judgment or claim for contribution. (*C.C.P.* 878; see 2 *C.E.B.*, *Civ. Proc. During Trial* 3d §23.2; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §482; cf. Uniform Contribution Among Tortfeasors Act, §3 (12 U.L.A. (Master Ed.)), p. 250 [separate action for contribution].)

West's Key Number Digest, Contribution k.9(8); Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]

See Uniform Contribution Among Tortfeasors Act, §3 (12 U.L.A. (Master Ed.)), p. 268.

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §510.



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6. Indemnity.

a. In General.

1. Definition and Nature.

5 Witkin Sum. Cal. Law Torts § 112

[§ 112] Definition and Nature.

Indemnity "may be defined as the obligation resting on one party to make good a loss or damage another party has incurred." (*Rossmoor Sanitation v. Pylon* (1975) 13 C.3d 622, 628, 119 C.R. 449, 532 P.2d 97.) The right of indemnity is either express or implied (equitable). (*Bay Dev., Ltd. v. Superior Court* (1990) 50 C.3d 1012, 1030, 269 C.R. 720, 791 P.2d 290, *infra*, §118.) It may arise "from either of two general sources: First, it may arise by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances. Second, it may find its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular case." (*E.L. White v. Huntington Beach* (1978) 21 C.3d 497, 506, 146 C.R. 614, 579 P.2d 505, *infra*, §123; see *Miller v. Ellis* (2002) 103 C.A.4th 373, 832, 126 C.R.2d 667 [indemnity may not result in unjust enrichment]; on equitable indemnity, see *infra*, §115 et seq.; on express indemnity, see *infra*, §119 et seq.; on indemnity from successor attorney, see 1 Cal. Proc. (4th), Attorneys, §349 et seq.)

Indemnity, which either imposes the entire loss on one of two or more tortfeasors or apportions it on the basis of comparative fault, is distinct from contribution, which distributes the loss pro rata. (See *Herrero v. Atkinson* (1964) 227 C.A.2d 69, 73, 38 C.R. 490; *Rollins v. California* (1971) 14 C.A.3d 160, 164, 92 C.R. 251; *Sanders v. Atchison, Topeka & Santa Fe Ry. Co.* (1977) 65 C.A.3d 630, 647, 135 C.R. 555.)

Commentary on indemnity has been extensive. (See *Rest.3d, Torts: Apportionment of Liability* §22; Dobbs, The Law of Torts §386; 3 Harper, James & Gray 2d §10.2; 74 Cal. L. Rev. 1057, 1064; 13 Hastings L. J. 214; 22 Hastings L. J. 1201; 20 Loyola L.A. L. Rev. 99, 102; 20 Pepperdine L. Rev. 1407 [An End Run Around the U.C.C.: The Use (or Abuse?) of Indemnity]; 4 Santa Clara Lawyer 136; 41 So. Cal. L. Rev. 728, 737; 8 Santa Clara Lawyer 159; 26 Stanf. L. Rev. 577; Cal. Civil Practice, 1 Torts, Indemnity, Contribution, and Setoff, Chap. 4; 41 Am.Jur.2d (1995 ed.), Indemnity §1 et seq.; 28 A.L.R.3d 943 [right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa]; 31 A.L.R.3d 438 [indemnity obligations of suppliers and users of intoxicating liquors]; 59 A.L.R.5th 733 [indemnitor's liability to indemnitee for attorney's fees and expenses arising from defense of action alleging indemnitee's negligence]; 100 A.L.R.5th 409 [right to indemnity of owner, operator, maintainer, repairer, or installer of automatic passenger elevator in action by elevator user]; on indemnity in products

liability cases, see *infra*, §1432; on pleading indemnity, see 5 *Cal. Proc.* (4th), *Pleading*, §§879, 880; on judgment as collateral estoppel when indemnity sought, see 7 *Cal. Proc.* (4th), *Judgment*, §362.)

West's Key Number Digest, Indemnity k.1, 8(4); Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]

General sources of right of indemnity: See *McCrary Const. Co. v. Metal Deck Specialists* (2005) 133 C.A.4th 1528, 1536, 35 C.R.3d 624 [where parties expressly contract with respect to duty to indemnify, extent of that duty must be determined from contract and not by reliance on independent doctrine of equitable indemnity].

Commentary on indemnity: See 3 Harper, James & Gray 3d §10.2; 41 *Am.Jur.2d* (2005 ed.), *Indemnity* §1 et seq.

Indemnity from successor attorney:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §333 et seq.

Pleading indemnity:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §§925, 926.

Judgment as collateral estoppel:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §422.



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C. Liability of Multiple Tortfeasors.

6. Indemnity.

a. In General.

2. Restatement.

5 Witkin Sum. Cal. Law Torts § 113

[§ 113] Restatement.

Rest.3d, Torts: Apportionment of Liability §22 provides as follows:

(1) "When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses" in the following circumstances:

(a) The indemnitor has agreed by contract to indemnify the indemnitee. (*Rest.3d, Torts: Apportionment of Liability* §22(a)(1).)

(b) The indemnitee was not liable except vicariously for the tort of the indemnitor, or "was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable." (*Rest.3d, Torts: Apportionment of Liability* §22(a)(2).)

(2) "A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought would not be liable to the plaintiff." (*Rest.3d, Torts: Apportionment of Liability* §22(b).)

Unlike *Rest.2d, Torts* §886B, which it replaced, this section addresses all types of indemnity, including contractual indemnity. The right to recover contractual indemnity is determined by the terms of the contract. An indemnitee may recover contractual indemnity for the indemnitee's own legally culpable conduct only if the contract is clear on that point. If otherwise clear, the contract need not contain specific words, such as "negligence" or "fault." (*Rest.3d, Torts: Apportionment of Liability* §22, Comment f; on construction of indemnity provisions generally, see *infra*, §120.)

Also, while *Rest.2d, Torts* §886B sometimes provided for indemnity when the indemnitee was negligent (i.e., a negligent retailer who was liable for a manufacturer's defective product), comparative responsibility undermines the need for indemnity in these situations, and the Third Restatement thus does not provide for indemnity to a person who is independently responsible. (See *Rest.3d, Torts: Apportionment of Liability* §22, Reporter's Note, p. 276; on comparative

responsibility generally, see *infra*, §1327 et seq.)

West's Key Number Digest, Indemnity k.1; Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]



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a. In General.

3. Instructions.

5 Witkin Sum. Cal. Law Torts § 114

[§ 114] Instructions.

(1) *BAJI Instructions.*

(a) *In general.* BAJI classifies implied indemnity on the basis of whether, as between the indemnitee and the indemnitor, the right to indemnification arises from a contractual relationship (BAJI, No. 12.61 et seq.) or comparative fault (BAJI, No. 12.69). For purposes of either contractual or noncontractual indemnity, BAJI, No. 12.60 defines "indemnity" as "the right of one person to be compensated for a loss sustained or which will be sustained for the legal consequences of the conduct of another person."

(b) *Implied contractual indemnity.* BAJI, No. 12.61 states that the right to implied contractual indemnity is conferred on a party "who is liable to pay damages for injury to the person or property of another caused by the breach of a contractual duty owed to that party." (See BAJI, No. 12.62 [contractual relationship in issue], BAJI, No. 12.63 [contractual relationship admitted], BAJI, No. 12.64 [breach of duty to use reasonable care in performance of contract]; on implied contractual indemnity generally, see *infra*, §§118, 123.)

(c) *Implied indemnity for comparative fault.* BAJI, No. 12.69 relates to claims for "comparative indemnity," which is defined as "the right of a person, whose fault concurrently with the fault of [another][others] contributes as a cause of economic damages, to recover from the other person(s) any amount [he][she] [has paid] [has become liable to pay] in excess of [his][her] proportionate fault."

In these cases, the jury must determine "the percentage of fault of all persons which contributed as a cause of such damages" and award to the indemnitee "any amount of such damages in excess of the proportionate fault" of the indemnitee. (BAJI, No. 12.69; on comparative equitable indemnity generally, see §116 et seq.; for forms of special verdicts when comparative implied indemnity is in issue, see BAJI, Nos. 16.72 and 16.73.)

(2) *CACI Instructions.* The Judicial Council of California has approved plain language civil jury instructions. The following two instructions were adopted under the heading "Equitable Indemnity":

(a) *Implied indemnity for comparative fault*. CACI, No. 3800 [comparative fault between and among tortfeasors] provides as follows:

(b) *Implied contractual indemnity*. CACI, No. 3801 [implied contractual indemnity] provides:

"[Name of indemnitee] claims that [he/she] [is/was] required to pay [describe liability, e.g., "a court judgment in favor of [name of plaintiff]]" because of [name of indemnitor]'s failure to use reasonable care in performing work under an agreement with [name of indemnitee]. In order for [name of indemnitee] to recover from [name of indemnitor], [name of indemnitee] must prove both of the following:"

"1. That [name of indemnitor] failed to use reasonable care in [performing the work/[describe work or services]] under an agreement with [name of indemnitee]; and"

"2. That [name of indemnitor]'s failure contributed as a substantial factor in causing [name of plaintiff]'s harm."

"[Name of indemnitor] claims that [name of indemnitee] [and] [insert identification of others] contributed as [a] substantial factor[s] in causing [name of plaintiff]'s harm."

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

"1. That [name of indemnitee] [and] [insert identification of others] [was/were] [negligent/[other basis of responsibility]]; and"

"2. That [name of indemnitee] [and] [insert identification of others] contributed as [a] substantial factor[s] in causing [name of plaintiff]'s harm."

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

West's Key Number Digest, Indemnity k.15(8); Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]

(2) CACI Instructions.(b) *Implied contractual indemnity*. CACI, No. 3801, as revised in 2007, provides:

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

"1. That [name of indemnitor] [failed to use reasonable care in [performing the work/[describe work or services]] under an agreement with [name of indemnitee]/ [specify other basis of responsibility]]; and"

"2. That [name of indemnitor]'s conduct was a substantial factor in causing [name of plaintiff]'s harm."

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

"1. That [[name of indemnitee] [and] [insert identification of others]] [was/were] [negligent/[specify other basis of responsibility]]; and"

"2. That [[name of indemnitee] [and] [insert identification of others]] contributed as [a] substantial factor[s] in causing [name of plaintiff]'s harm."

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



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C. Liability of Multiple Tortfeasors.

6. Indemnity.

b. Equitable Indemnity.

1. In General.

5 *Witkin Sum. Cal. Law Torts* § 115

[§ 115] In General.

(1) *Basis*. "The duty to indemnify may arise, and indemnity may be allowed in those fact situations where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought. The right depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him. Thus the determination of whether or not indemnity should be allowed must of necessity depend upon the facts of each case." (*Herrero v. Atkinson* (1964) 227 C.A.2d 69, 74, 38 C.R. 490; see *Lassen v. California* (1992) 4 C.A.4th 1151, 1155, 6 C.R.2d 359 [county may not use equitable indemnity doctrine to recover from state costs of defending lawsuits involving operation of county jails; these costs are part of costs of operating these jails, which counties are required by statute to bear]; *Fireman's Fund Ins. Co. v. Haslam* (1994) 29 C.A.4th 1347, 1354, 35 C.R.2d 135, 3 Summary (10th), *Agency and Employment*, §116, citing the text; *Children's Hosp. of Los Angeles v. Sedgwick* (1996) 45 C.A.4th 1780, 1786, 53 C.R.2d 725 [plaintiff hospital, subsequent tortfeasor that settled malpractice action brought by patient, could not recover in equitable indemnity action against defendant anesthesiologist, prior tortfeasor who was exonerated in earlier action brought by patient]; *Major Clients Agency v. Diemer* (1998) 67 C.A.4th 1116, 1130, 79 C.R.2d 613 [plaintiff representative, who settled suit by his client for alleged negligence in negotiating contract, was not entitled to indemnity from client's attorney, who allegedly also acted negligently in negotiating same contract, where there was no allegation that plaintiff had become liable to pay economic damages to client and where there was no relationship between plaintiff and attorney]; 97 A.L.R.2d 616 [equitable duty of construction contractor to indemnify contractee held liable for injury to third person]; on discharge of settling tortfeasor from partial or comparative indemnity, see *supra*, §72; on application of MICRA limitations to equitable indemnity rights, see *infra*, §962.)

(2) *Applications*. The doctrine applies only among defendants who are jointly and severally liable to the plaintiff. Joint and several liability in the context of equitable indemnity is fairly expansive; it can apply to acts that are concurrent or successive or are joint or several, as long as they create a detriment caused by several actors. Generally, there must be some basis for tort liability against the proposed indemnitor. It is usually based on a duty owed to the underlying plaintiff, although vicarious liability and strict liability also may sustain application of equitable indemnity. (

BFGC Architects Planners v. Forcum/Mackey Const. (2004) 119 C.A.4th 848, 852, 14 C.R.3d 721 [contractual claim was insufficient].) However, implied contractual indemnity between the indemnitor and the indemnitee may also provide a basis for equitable indemnity. (See *infra*, §118.)

(3) *Shifting of Liability*. Equitable indemnity originally was based "upon a difference between the *primary and secondary liability* of two persons each of whom is made responsible by the law to an injured party." (*Alisal Sanitary Dist. v. Kennedy* (1960) 180 C.A.2d 69, 75, 4 C.R. 379, 5 Cal. Proc. (4th), *Pleading*, §880.) The rule traditionally applied where one person's negligence was active while the other's was either passive or constructive. (See *San Francisco v. Ho Sing* (1958) 51 C.2d 127, 130, 330 P.2d 802; *Alameda v. Southern Pac. Co.* (1961) 55 C.2d 479, 484, 11 C.R. 751, 360 P.2d 327; *De La Forest v. Yandle* (1959) 171 C.A.2d 59, 60, 340 P.2d 52; *Los Angeles v. Cox Bros. Const. Co.* (1961) 195 C.A.2d 836, 842, 16 C.R. 250; *Montgomery Ward & Co. v. KPIX Westinghouse Broadcasting Co.* (1962) 198 C.A.2d 759, 762, 18 C.R. 341; *B.F.G. Builders v. Weisner & Coover Co.* (1962) 206 C.A.2d 752, 762, 23 C.R. 815; *Gardner v. Murphy* (1975) 54 C.A.3d 164, 168, 126 C.R. 302.) It has been invoked in such situations as vicarious liability of the indemnitee (see *Herrero v. Atkinson*, *supra*, 227 C.A.2d 77), the indemnitor's creation of a dangerous condition (see *Alameda v. Southern Pac. Co.* (1961) 55 C.2d 479, 484, 11 C.R. 751, 360 P.2d 327), negligent aggravation of injury by the indemnitor (see *Herrero v. Atkinson* (1964) 227 C.A.2d 69, 75, 38 C.R. 490), and reliance on misrepresentations by the indemnitor (see *Gardner v. Murphy* (1975) 54 C.A.3d 164, 169, 126 C.R. 302).

The rule resulted in a total shifting of liability from the indemnitee to the indemnitor. (See *Cahill Bros. v. Clementina Co.* (1962) 208 C.A.2d 367, 376, 25 C.R. 301, *infra*, §116; *Horn & Barker v. Macco Corp.* (1964) 228 C.A.2d 96, 101, 39 C.R. 320; *Ralke Co. v. Esquire Bldg. Maintenance Co.* (1966) 246 C.A.2d 141, 143, 54 C.R. 556; *Ferrel v. Vegetable Oil Products Co.* (1966) 247 C.A.2d 117, 120, 55 C.R. 589; *Aerojet General Corp. v. D. Zelinsky & Sons* (1967) 249 C.A.2d 604, 611, 57 C.R. 701; *Ford Motor Co. v. Robert J. Poeschl* (1971) 21 C.A.3d 694, 696, 98 C.R. 702, *infra*, §116; *Mabie & Mintz v. B & E Installers* (1972) 25 C.A.3d 491, 496, 101 C.R. 919.)

After adoption of the comparative negligence doctrine (see *infra*, §1327 et seq.), the equitable indemnity rule was significantly modified. (See *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 599, 146 C.R. 182, 578 P.2d 899, *infra*, §1357.) A concurrent tortfeasor may now obtain *partial* indemnity on a *comparative fault* basis. (See *infra*, §116.)

West's Key Number Digest, Indemnity k.1, 8(4); Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Applications*. See *Weseloh Family Ltd. Partnership v. K.L. Wessel Const. Co.* (2004) 125 C.A.4th 152, 174, 22 C.R.3d 660 [general contractor, who settled with property owner for damages arising from defective construction, had no equitable indemnity claim against design engineers where no basis existed for tort liability by engineers to owner and case did not involve any form of contractual indemnity]; *Stop Loss Ins. Brokers v. Brown & Toland Med. Group* (2006) 143 C.A.4th 1036, 1043, 49 C.R.3d 609 [mere negligent performance of contract will not support claim for equitable indemnity; omission to perform contractual obligation only constitutes tort when omission violates duty that is independent of contract and arises from principles of tort law]; *Stonegate Homeowners Assn. v. Staben* (2006) 144 C.A.4th 740, 751, 50 C.R.3d 709 [trial court erred in granting subcontractor's motion for summary judgment on contractor's cross-complaint for equitable indemnity where there were triable issues of fact whether subcontractor was negligent]; *Willdan v. Sialic Contractors Corp.* (2007) 158 C.A.4th 47, 57, 69 C.R.3d 633 [consulting firm's liability to city for increased cost of construction project was not based solely on breach of contract, and thus firm could seek comparative equitable indemnity from general contractor; city alleged both contract and negligence and jury reached general verdict, and although firm had contractual relationship with city, it had duty to perform competently].

(3) *Shifting of Liability*.

Alisal Sanitary case:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §926.



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b. Equitable Indemnity.

2. Recognition of Comparative Indemnity.

5 Witkin Sum. Cal. Law Torts § 116

[§ 116] Recognition of Comparative Indemnity.

(1) *Former Law: No Indemnity Where Claimant Is at Fault.* Under the doctrine of primary and secondary liability (see *supra*, §115), indemnity was originally denied to a party who actively participated in the wrongful act. (See *American Can Co. v. San Francisco* (1962) 202 C.A.2d 520, 524, 21 C.R. 33; *Baldwin Contracting Co. v. Winston Steel Works* (1965) 236 C.A.2d 565, 573, 46 C.R. 421; *King v. Timber Structures* (1966) 240 C.A.2d 178, 182, 49 C.R. 414; *O'Melia v. California Production Service* (1968) 261 C.A.2d 618, 623, 68 C.R. 125; *Atchison, Topeka & Santa Fe Ry. Co. v. Lan Franco* (1968) 267 C.A.2d 881, 888, 73 C.R. 660; *People v. Daly City Scavenger Co.* (1971) 19 C.A.3d 277, 281, 282, 96 C.R. 669, citing the text; *Kerr Chemical v. Crown Cork & Seal Co.* (1971) 21 C.A.3d 1010, 1016, 99 C.R. 162; *Standard Oil Co. v. Oil, Chemical & Atomic Workers Int. Union* (1972) 23 C.A.3d 585, 100 C.R. 354.)

Cahill Bros. v. Clementina Co. (1962) 208 C.A.2d 367, 25 C.R. 301, is illustrative. Contractor Cahill engaged Clementina as an independent contractor to do demolition work for an excavation. During this work a pedestrian was injured through the negligence of Cahill's employee L, acting in a dual capacity for both parties. The injured party recovered judgment against both, each paid half, and Cahill sought indemnity against Clementina. *Held*, there was no right of indemnity. In the original suit by the injured party, the judgment established the liability of Clementina for L's negligence, which was a breach of Clementina's contractual duty to Cahill. But, since L, the actual wrongdoer, was also Cahill's employee, his active negligence was imputed to Cahill; hence, as a matter of law, Cahill actively participated in the wrongful act and was not entitled to indemnity. The court said: "The thrust of these cases is that if the person seeking indemnity participates in an affirmative act of negligence, or is physically connected with an act or omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement, he is deprived of the right of indemnity. In other words, the person seeking indemnity cannot recover if his negligence is active or affirmative as distinguished from negligence which is passive." (208 C.A.2d 382.)

The denial of indemnity was criticized in *Ford Motor Co. v. Robert J. Poeschl* (1971) 21 C.A.3d 694, 98 C.R. 702. When an automobile manufacturer determined that one of its models had a rear brake light defect, it sent its dealers a recall notice. A dealer and a leasing agency allegedly allowed a defective car to be used without correcting the defect, and an accident occurred by reason of that defect. The injured parties sued the manufacturer, the dealer, and the leasing

agency. The manufacturer paid \$ 72,000 in a settlement and then brought this action for indemnity against the dealer and the leasing agency. *Held*, judgment for defendants on demurrer affirmed. Whether, at the time of the recall notice, the car was in the dealer's hands or had reached the customer, the manufacturer could have located the car and the customer and notified the customer of the defect. By notifying the dealer alone, the manufacturer could not shift to the dealer the direct obligation of safety it owed the customer. The manufacturer's "production of the defective car, coupled with its failure to attempt direct notice to the customer, breached a direct obligation it owed the customer. It "had a 'last clear chance' to avert injury and failed to use it. Its fault is primary, not secondary, and not imputed to it as a consequence of the dealer's or leasing agency's fault. Under the pleaded circumstances, the latter are not liable for indemnification of the manufacturer." (21 C.A.3d 699.) The court was, however, unhappy about the result. The manufacturer bore the entire loss, while the dealer and leasing agency, both of whom knew of the danger and did nothing, escaped liability. "A wise rule of law--one designed to stimulate responsibility throughout the merchandising chain--would require both parties to share the loss. A rule of contribution or partial indemnification would permit that result." (21 C.A.3d 699, adding that California's contribution law applies only after a *joint judgment*; see *supra*, §109.)

(2) *Partial Indemnity for Comparative Fault: American Motorcycle Case*. Following the adoption of the comparative negligence doctrine in *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, *infra*, §1329, the court in *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, *infra*, §1357, held that "the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (20 C.3d 598.)

American Motorcycle "did not establish a new cause of action separate and distinct from the traditional equitable indemnity action, but simply modified the all-or-nothing aspect of the doctrine to permit partial indemnification in appropriate cases." (*People ex rel. Dept. of Transportation v. Superior Court* (1980) 26 C.3d 744, 756, 163 C.R. 585, 608 P.2d 673.) This revised rule is variously referred to as "comparative equitable indemnity," "comparative" indemnity, and "partial" indemnity. (See C.C.P. 877.6(c), *supra*, §88; *Far West Financial Corp. v. D & S Co.* (1988) 46 C.3d 796, 809, 251 C.R. 202, 760 P.2d 399, *infra*, §117.)

The scope and application of comparative indemnity are treated in detail later in this chapter. (See *infra*, §1357 et seq.)

West's Key Number Digest, Indemnity k.13.2; Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]



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b. Equitable Indemnity.

3. Total Indemnity.

5 Witkin Sum. Cal. Law Torts § 117

[§ 117] Total Indemnity.

Comparative equitable indemnity includes the entire spectrum of possible apportionments--from no right to any indemnity at all to a right to total indemnity, as in the case of vicarious or derivative liability. A claim for total equitable indemnity is treated like any other claim for comparative equitable indemnity. (*Far West Financial Corp. v. D & S Co.* (1988) 46 C.3d 796, 807, 251 C.R. 202, 760 P.2d 399.)

C.C.P. 877.6(c), regarding good faith settlements, bars claims of a nonsettling defendant for "comparative indemnity, based on comparative negligence or comparative fault." (See *supra*, §88.) Does this provision preclude the right of nonsettling defendants whose liability is *vicarious* to obtain *total* equitable indemnity from actively negligent defendants? (See 74 Cal. L. Rev. 1057; 20 Loyola L.A. L. Rev. 99.) The Courts of Appeal were divided on this issue. (See *Sacramento v. Gemsch Inv. Co.* (1981) 115 C.A.3d 869, 877, 171 C.R. 764 [right denied]; *E.L. White v. Huntington Beach* (1982) 138 C.A.3d 366, 376, 187 C.R. 879 [right upheld]; *Huizar v. Abex Corp.* (1984) 156 C.A.3d 534, 542, 203 C.R. 47 [right upheld]; *Angelus Associates Corp. v. Neonex Leisure Products* (1985) 167 C.A.3d 532, 542, 213 C.R. 403 [right upheld]; *IRM Corp. v. Carlson* (1986) 179 C.A.3d 94, 108, 224 C.R. 438 [right denied]; *Horton v. Superior Court* (1987) 194 C.A.3d 727, 739, 238 C.R. 467 [right denied; listing cases].)

The Supreme Court in *Far West* resolved the conflict, holding that a good faith settlement under C.C.P. 877.6(c) bars a claim of a nonsettling defendant for total equitable indemnity. Here, a homeowners association sued a developer and others on causes of action arising out of latent construction defects. The developer cross-complained against other defendants for total equitable indemnity following its settlement with plaintiff. However, the trial judge granted cross-defendants' motion for dismissal after finding that their own settlement with plaintiff was made in good faith, and that the settlement barred the developer's claim for indemnity. *Held*, affirmed.

(a) *Construction of C.C.P. 877.6(c)*. Cross-complainant contended that because the statute does not expressly refer to claims for "total indemnity," it should not prohibit a nonsettling party who may be only vicariously or derivatively liable from pursuing a claim against a directly or primarily responsible tortfeasor even if that tortfeasor's settlement with the plaintiff has satisfied the good faith requirement. Cross-defendants contended that the language of the section was intended to refer to the entire spectrum of claims pursued under California's common law equitable indemnity doctrine.

The language is, on its face, reasonably susceptible to either interpretation; hence the issue must be resolved by considering the legislative history and legislative purpose. (46 C.3d 804.)

(b) *Development of case law.*

(1) *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 C.3d 488, 213 C.R. 256, 698 P.2d 159, supra, §79, explained that C.C.P. 877.6(c) in large part was a codification of the principles established in *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, infra, §1357. (46 C.3d 805.) In *American Motorcycle*, the court concluded that "the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (46 C.3d 805, quoting 20 C.3d 578.) The court also held that a tortfeasor who entered into a good faith settlement with plaintiff would be free from any claim for partial recovery or comparative indemnity. (46 C.3d 806.)

(2) In *Safeway Stores v. Nest-Kart* (1978) 21 C.3d 322, 146 C.R. 550, 579 P.2d 441, infra, §1360, the court observed that it did not determine whether the comparative indemnity doctrine should be applied in a situation in which a party's liability is entirely derivative or vicarious; and the court likewise did not address the question at issue in the present case, whether an action for total equitable indemnity is impervious to the effect of a good faith settlement. (46 C.3d 807.)

(3) *People v. Superior Court (Frost)* (1980) 26 C.3d 744, 163 C.R. 585, 608 P.2d 673, made it clear that there are not two separate equitable indemnity doctrines in California, but a single "comparative indemnity" doctrine that permits partial indemnification on a comparative fault basis in appropriate cases. (46 C.3d 808.) And *Standard Pac. of San Diego v. A. A. Baxter Corp.* (1986) 176 C.A.3d 577, 222 C.R. 106, properly concluded that under *People v. Superior Court (Frost)*, comparative equitable indemnity includes the entire range of possible apportionments--from no right to a right of complete indemnity. (46 C.3d 808.)

(c) *Enactment of C.C.P. 877.6.* The statute was enacted in 1980, a few months after the decision in *People v. Superior Court (Frost)*. And in light of the explanation in that case, "it appears reasonable to interpret the reference to claims for 'equitable comparative contribution, or partial or comparative indemnity' ... as embodying the entire spectrum of potential equitable indemnity claims." (46 C.3d 809.)

(d) *Statutory objectives.* The two objectives pointed out in *Tech-Bilt* and *Abbott Ford v. Superior Court* (1987) 43 C.3d 858, 239 C.R. 626, 741 P.2d 124, supra, §102, can be harmonized only by including claims for total equitable indemnity.

(1) *Objective of promoting settlement agreements.* This would be impaired by an interpretation leaving a settling tortfeasor vulnerable to further liability:

First, "claims for total indemnity have been made, and undoubtedly will continue to be made, by nonsettling tortfeasors in a wide variety of contexts, with nonsettling tortfeasors frequently characterizing their potential liability as merely 'derivative' or 'vicarious' in relation to the allegedly more direct malfeasance of the settling tortfeasor. Although if such total indemnity claims were permitted to proceed to trial the settling defendant might well ultimately succeed in defeating the claim for total indemnity in most instances by demonstrating that the nonsettling tortfeasor's liability was not merely vicarious or derivative, such success would be by a Pyrrhic victory as far as the settlement process is concerned. As explained above, the very fact that the total indemnity claim remained to be litigated despite a good faith settlement would have already taken its toll in discouraging the potential indemnitor from entering into a settlement agreement with the plaintiff in the first place." (46 C.3d 812.)

Second, the fact that the nonsettling defendant is vicariously or derivatively liable does not mean that a total shifting of loss is warranted under equitable indemnity principles; in many instances the vicariously liable defendant may also bear some direct responsibility for an accident (e.g., by negligent hiring of an agent, or failing to supervise his work). Cross-complainant's proposed interpretation "would reintroduce the intractable problem of attempting to define,

through a general formula, the appropriate occasions for total equitable indemnity, one of the key problems which the adoption of comparative indemnity was intended to overcome." (46 C.3d 813.)

(2) *Objective of fair apportionment of loss.* Under *Tech-Bilt* and *Abbott Ford*, a vicariously or derivatively liable tortfeasor, like any other minimally culpable tortfeasor, is afforded substantial protection against harm from an unfair settlement between a more culpable tortfeasor and the plaintiff:

First, "[i]f the more culpable tortfeasor settles with the plaintiff before the vicariously liable tortfeasor, and if the settlement does not require the more culpable tortfeasor to bear its fair share of the loss, the trial court can find that the settlement is not in good faith and, as a consequence, the settlement will not bar the less culpable tortfeasor from pursuing its equitable indemnity claim against the more culpable tortfeasor." (46 C.3d 815.)

Second, if, as in this case, an allegedly vicariously liable tortfeasor has already settled with the plaintiff and has continued to pursue its indemnity claim, the allegedly culpable tortfeasor retains the right to challenge the good faith of any subsequent settlement by the allegedly more culpable tortfeasor. (46 C.3d 815.)

Third, under *Tech-Bilt*, a nonsettling tortfeasor may be left to bear some portion of the plaintiff's loss because a settlement may be found in good faith even though the sum is not precisely commensurate with its proportionate share of liability. This minor departure from a theoretical precise allocation of loss is the price that nonsettling defendants uniformly bear to promote the settlement of litigation. (46 C.3d 816, 817.) (See *Pioneer Equipment Co. v. R.M. Wade & Co.* (1989) 212 C.A.3d 824, 838, 260 C.R. 815 [following *Far West*]; 21 *Pacific L. J.* 147; 16 *Pepperdine L. Rev.* 874.)

West's Key Number Digest, Indemnity k.13.2; Torts k.22-

SUPPLEMENT: [This section is current through the latest supplement]



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b. Equitable Indemnity.

4. Implied Contractual Indemnity.

5 Witkin Sum. Cal. Law Torts § 118

[§ 118] Implied Contractual Indemnity.

Implied contractual indemnity is a type of equitable indemnity in which equitable considerations are brought into effect by contractual language not specifically dealing with indemnification. (*E.L. White v. Huntington Beach* (1978) 21 C.3d 497, 507, 146 C.R. 614, 579 P.2d 505, *infra*, §123; on preclusive effect of express indemnity provision on implied indemnity, see *infra*, §123.) This type of indemnity is based on the premise that a contractual obligation to perform carries with it an implied agreement to indemnify against liability to a third party arising from failure to perform. (*Bay Dev., Ltd. v. Superior Court* (1990) 50 C.3d 1012, 1032, 269 C.R. 720, 791 P.2d 290.)

A claim for implied contractual indemnity is treated like any other claim for equitable indemnity. Thus, in *Bay Dev.*, the court held that a claim based on implied contractual indemnity is barred by a good faith settlement under C.C.P. 877.6(c), which bars claims of a nonsettling defendant for "comparative indemnity, based on comparative negligence or comparative fault" (*supra*, §88). (50 C.3d 1020.) "Our conclusion that a good faith settlement bars a claim for implied contractual indemnity is not at all inconsistent with the principle that such a settlement would not preclude an indemnity action based on an express indemnity agreement. ... Such agreements often provide an efficient means of allocating responsibility. When an indemnitee under such an agreement reasonably relies on express terms in the agreement in conducting its affairs, it would be unfair to permit a party that has agreed to indemnify to escape its express contractual obligations by entering into a partial settlement." (50 C.3d 1032, citing *C.L. Peck Contractors v. Superior Court* (1984) 159 C.A.3d 828, 205 C.R. 754, *supra*, §73; see 22 *Loyola L.A. L. Rev.* 1227 [Implied Contractual Indemnity: An Infirm Doctrine Whose Time Has Passed].)

West's Key Number Digest, Indemnity k.13; Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Implied contractual indemnity need not be based on finding of negligence:* In *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 C.A.4th 937, 56 C.R.3d 177, the trial court denied an implied contractual indemnity claim on the ground that the indemnitee failed to prove that the indemnitor failed to use reasonable care in performing its contractual duties. *Held*, this was error; the doctrine of implied contractual indemnity is not limited to negligent breaches of contract.

(a) An action for implied contractual indemnity is not a claim for contribution from a joint tortfeasor. It is not founded on a tort or on any duty that the indemnitor owes to the injured third party. Instead, it is grounded on the indemnitor's breach of duty owing to the *indemnitee* to properly perform its contractual duties. (148 C.A.4th 971.)

(b) Review of the cases demonstrates that a duty to indemnify has been implied from the obligation of the contracting parties to perform their promises, the reasoning being that a promise to perform includes an implied promise to perform properly. Where the cases have factually involved a negligent failure to perform, it is not surprising that the opinions contain language regarding the contracting party's implied obligation to "carefully" perform or to perform with "reasonable care" or "reasonable safety." A negligent breach of contract is clearly sufficient to trigger implied contractual indemnity. However, no California court has been squarely presented with the issue whether implied contractual indemnity requires a negligent breach of the contract. (148 C.A.4th 972.)

(c) Many of the cases recognize that implied contractual indemnity is not based on principles of tort law, but on the contractual relationship between the parties and a breach of the contract between them. Implied contractual indemnity cases may involve joint tortfeasors, but it is not necessary that an indemnitor be jointly liable with the indemnitee for the third party's injuries in order for the indemnitee to recover against the indemnitor. The court is concerned only with the obligations flowing between the indemnitor and the indemnitee, and whether the indemnitor breached an obligation that foreseeably resulted in the indemnitee being made liable for damages to the third party. Implied contractual indemnity rests on a balancing of the equities of the contractual situation between the parties, with contracting parties sharing a loss relative to their breach. (148 C.A.4th 973.) There is no discernible reason why this would not include responsibility for a breach of contract where the breach, even if not negligent, foreseeably causes damages to a third party for which another contracting party is held liable. (148 C.A.4th 974.)

(d) Moreover, because implied contractual indemnity is a form of equitable indemnity, it is inconsistent to limit it to situations involving a negligent breach of contract. Thus, the comparative equitable indemnity doctrine has been applied not only to require indemnification by a defendant whose negligence causes the plaintiff's loss, but to allow apportionment in situations of strict liability and of vicarious liability. (148 C.A.4th 974.)



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c. Express Indemnity.

1. In General.

5 *Witkin Sum. Cal. Law Torts* § 119

[§ 119] In General.

The court in *MacDonald & Kruse v. San Jose Steel Co.* (1972) 29 C.A.3d 413, 105 C.R. 725, on an elaborate review of the California decisions (see *infra*, §125), classified indemnity clauses as follows:

(a) A clause that provides "expressly and unequivocally" that the indemnitor is to indemnify the indemnitee for the indemnitee's negligence. Under this provision, the indemnitee is indemnified whether liability has arisen as the result of the indemnitee's negligence alone or of the indemnitee's co-negligence with the indemnitor. (29 C.A.3d 419.)

(b) A general clause providing that the indemnitor is to indemnify the indemnitee for the indemnitee's liability "howsoever same may be caused," "regardless of responsibility for negligence," "arising from the use of the premises, facilities or services" of the indemnitee, "which might arise in connection with the agreed work," "caused by or happening in connection with the equipment or the condition, maintenance, possession, operation or use thereof," or "from any and all claims for damages to any person or property by reason of the use of said leased property." Under any of these provisions, "the indemnitee is indemnified from his own acts of passive negligence that solely or contributorily cause his liability, but is not indemnified for his own acts of active negligence that solely or contributorily cause his liability." (29 C.A.3d 419.)

(c) A clause providing that the indemnitor is to indemnify the indemnitee for the indemnitee's liabilities caused by the indemnitor, but not for liabilities otherwise caused. Under this provision, "any negligence on the part of the indemnitee, either active or passive, will bar indemnification against the indemnitor irrespective of whether the indemnitor may also have been a cause of the indemnitee's liability." (29 C.A.3d 420.)

A dissent, rejecting this tripartite classification, argues that the proper unifying premise of the indemnity cases is that "the intention of the parties must be enforced by limiting the indemnity to what the parties expected it to cover. The cases require no more." (29 C.A.3d 427.) (See *Western Contracting Corp. v. Southwest Steel Rolling Mills* (1976) 58 C.A.3d 532, 538, 541, 129 C.R. 782 [third class]; *Hollywood Turf Club v. Montgomery Elevator Co.* (1976) 58 C.A.3d 580, 587, 130 C.R. 81 [second class]; *C.I. Engineers & Constructors v. Johnson & Turner* (1983) 140 C.A.3d 1011, 1018, 189 C.R. 824 [first class; clause granting indemnity for all liability arising from indemnitor's obligations, except

that arising from indemnitee's sole negligence, covered subject of indemnitee's negligence and required indemnification even for active negligence (unless it was sole cause of liability)); *Ralph M. Parsons Co. v. Combustion Equipment Associates* (1985) 172 C.A.3d 211, 219, 218 C.R. 170 [same]; *Girard v. Delta Towers Joint Venture* (1993) 20 C.A.4th 1741, 1749, 26 C.R.2d 102 [second class]; 16 *Pacific L. J.* 767; for statutory limitations on indemnification in construction contracts, see *infra*, §121.)

In *Herman Christensen & Sons v. Paris Plastering Co.* (1976) 61 C.A.3d 237, 132 C.R. 86, the court rejected application to the agreement in issue of the third *MacDonald* classification on the ground that to deny indemnity when the indemnitee is passively negligent would render the agreement largely illusory, i.e., "in the absence of some negligence, active or passive, on the part of the indemnitee there would be nothing for which it could seek indemnity other than costs of suit." (61 C.A.3d 248.) (See *Marathon Steel Co. v. Tilley Steel* (1977) 66 C.A.3d 413, 417, 136 C.R. 73 [following *Herman Christensen & Sons*].)

West's Key Number Digest, Indemnity k.1, 6; Torts k.22

SUPPLEMENT: [This section is current through the latest supplement]

See *Edmondson Property Management v. Kwock* (2007) 156 C.A.4th 197, 208 67 C.R.3d 243 [indemnity agreement imposing liability on indemnitor for indemnitee's negligence must be express and unequivocal; agreement is strictly construed against indemnitee].



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2. Interpretation of Clauses.

5 Witkin Sum. Cal. Law Torts § 120

[§ 120] Interpretation of Clauses.

The following rules apply in interpreting indemnity agreements "unless a contrary intention appears" (C.C. 2778):

(1) *Recovery on liability.* On an indemnity against liability, expressly or in other equivalent terms, the indemnitee is entitled to recover on becoming liable. (C.C. 2778(1).) (See *CC-Calif. Plaza Associates v. Paller & Goldstein* (1996) 51 C.A.4th 1042, 1054, 59 C.R.2d 382 [clause providing indemnification against both liabilities and claims fell under C.C. 2778(1), not C.C. 2778(2)].)

(2) *Recovery on payment.* On an indemnity against claims, demands, damages, or costs, expressly or in other equivalent terms, the indemnitee is not entitled to recover without payment of them. (C.C. 2778(2).)

(3) *Costs of defense.* An indemnity against claims, demands, or liability, expressly or in other equivalent terms, embraces costs of defense incurred in good faith and in the exercise of a reasonable discretion. (C.C. 2778(3); see *FMC Corp. v. Plaisted & Cos.* (1998) 61 C.A.4th 1132, 1199, 72 C.R.2d 467 [policies' explicit disavowal of duty to defend rendered C.C. 2778(3) inapplicable].)

(4) *Duty to defend.* The indemnitor is bound, on request of the indemnitee, to defend actions or proceedings against the indemnitee in respect to the matters embraced by the indemnity, but the indemnitee has the right to conduct these defenses, if the indemnitee chooses to do so. (C.C. 2778(4); see *FMC Corp. v. Plaisted & Cos.*, *supra* [policies' explicit disavowal of duty to defend rendered C.C. 2778(4) inapplicable].)

(5) *Conclusiveness of judgment.* If, after request, the indemnitor neglects to defend the indemnitee, a recovery against the indemnitee, suffered by the indemnitee in good faith, is conclusive in the indemnitee's favor against the indemnitor. (C.C. 2778(5); see *Peter Culley & Associates v. Superior Court* (1992) 10 C.A.4th 1484, 1495, 1498, 13 C.R.2d 624, *infra*, §124 [C.C. 2778(5) is limited to recovery by judgment; settlement negotiated by indemnitee is merely presumptive evidence of liability and its amount].)

(6) *Judgment as presumptive evidence.* If the indemnitor, whether a principal or a surety in the agreement, has not

had reasonable notice of the action or proceeding against the indemnitee, or is not allowed to control the indemnitee's defense, judgment against the indemnitee is only presumptive evidence against the indemnitor. (C.C. 2778(6).)

(7) *Effect of stipulation.* A stipulation that a judgment against the indemnitee is conclusive on the indemnitor is inapplicable if the indemnitee had a good defense on the merits, which by want of ordinary care the indemnitee failed to establish in the action. (C.C. 2778(7).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Costs of defense.*

(*New*) *Recovery of costs is not conditioned on requesting defense:* In *Watsonville v. Corrigan* (2007) 149 C.A.4th 1542, 58 C.R.3d 458, plaintiffs sued a city and developers for negligence related to soil instability and landslides. The city cross-complained against the developers for contractual indemnity. The trial court ruled that the developers had no duty to reimburse the city for costs and fees incurred by it in defending the actions, because the city failed to tender the defense to them. *Held*, reversed.

(a) C.C. 2778 sets forth rules that guide the construction of contracts of indemnity "unless a contrary intention appears." However, no contrary intention appears in the indemnity agreements here; the agreements are silent with respect to the costs of defense. (149 C.A.4th 1547.)

(b) The developers contend that general principles applicable in insurance contexts require that C.C. 2778 be construed to allow defense costs to an indemnitee only after he or she first requests a defense. This contention must be rejected; indemnity agreements are not construed like liability insurance policies. The insurer owes a broad duty to defend its insured after tender, even when there is only a potential for indemnity, and even where no damages are ultimately awarded in the underlying action. Also, unlike insurance policies, which are adhesion contracts, there is normally no reason to construe indemnity agreements against the drafter. (149 C.A.4th 1548.)

(c) C.C. 2778(3) states that an indemnity against claims includes the costs of defense against those claims where they are incurred in good faith and in the exercise of reasonable discretion. This rule of interpretation applies to the contractual relationship between the developers and the city because no contrary intention appears from the language of their indemnity agreements. (149 C.A.4th 1549.)

(d) The developers maintain that C.C. 2778(4), regarding an indemnitor's duty to defend on request of the indemnitee, requires the indemnitee to first request that the indemnitor provide a defense before recovering reimbursement. The developers read too much into that subdivision. It describes the indemnitor's duty to defend, not the duty of indemnification, and makes it clear that the indemnitee has the right to conduct its own defense if it so chooses. Nothing in the provision obligates the indemnitee to tender the defense to the indemnitor; and the election to conduct its own defense does not supplant the interpretive rule in C.C. 2778(3) that indemnification includes the costs of the indemnitee's defense. (149 C.A.4th 1549.)

(4) *Duty to defend.* See *Watsonville v. Corrigan*, *supra*, 149 C.A.4th 1549 [C.C. 2778(4) does not obligate indemnitee to tender defense to indemnitor before choosing to conduct defense itself and be reimbursed by indemnitor for defense costs].

Crawford v. Weather Shield Mfg. (2008) 44 C.4th 541, 79 C.R.3d 721, 187 P.3d 424, involved the scope of the duty to defend in an indemnity provision between a contractor and subcontractor. Homeowners sued the contractor and subcontractor for construction defects, and the contractor cross-complained against the subcontractor for indemnity and defense under the indemnity provision, requiring the subcontractor to indemnify the contractor for damages arising from the execution of the subcontractor's work and to defend "any suit or action" brought against the contractor "founded upon" a claim of such damages. The jury found that the subcontractor was not negligent, but in a separate proceeding on the cross-complaint, the trial court ordered the subcontractor to pay attorneys' fees the contractor had incurred. *Held*,

affirmed.

(a) Parties to a construction contract may define their duties toward one another, may require one party to indemnify the other, and may assign one party the responsibility for the other's legal defense against third-party claims. These agreements are construed under the same rules as other contracts, but C.C. 2782 imposes some absolute limits on the enforceability of noninsurance indemnity agreements in the construction industry. C.C. 2778 (text, p. 222) sets forth general rules for the interpretation of indemnity contracts, including the defense obligations of indemnitors. (44 C.4th 551.)

(b) Here, the parties' agreement expressly obligated the subcontractor to defend, from the outset, any action against the contractor founded on the subcontractor's negligent role in the construction, even if it was later determined in the same litigation that the subcontractor was not negligent. (44 C.4th 553.) Under C.C. 2778(3) and 2778(4), the indemnitor's duty to defend is different from an obligation, after the fact, to pay defense costs another has incurred. (44 C.4th 554.) By specifying a duty to defend, C.C. 2778(4) places in every indemnity contract, unless the agreement provides otherwise, a duty to assume the indemnitee's defense, if tendered, against all claims embraced by the indemnity. (44 C.4th 557.) The agreement here did not limit the subcontractor's duty to defend only to those claims to which the subcontractor ultimately owed indemnity. (44 C.4th 558.)



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3. Void Clauses.

5 Witkin Sum. Cal. Law Torts § 121

[§ 121] Void Clauses.

(1) *Indemnification for Illegal Acts.* An agreement to indemnify against an act to be done later is void, if the indemnitee knows the act is unlawful at the time of doing it. (C.C. 2773; see *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 C.A.4th 464, 486, 54 C.R.2d 888 [indemnification of surety's settlement costs was properly denied where costs were attributable to obligee's direct action against surety for wilful malfeasance in managing property, and malfeasance was unrelated to any wrongdoing by principal].) However, an agreement to indemnify against an act already done is valid, even though the act was known to be unlawful, unless it was a felony. (C.C. 2774.)

(2) *Indemnification for Negligence in Construction Contracts.* Subject to specified exceptions (see C.C. 2782.1 et seq., 1 Summary (10th), *Contracts*, §667), a provision in a construction contract is void and unenforceable if it purports to indemnify against liability for injuries arising from the sole negligence or wilful misconduct of the promisee, or for defects in design furnished by the promisee. (C.C. 2782(a).) Also void are provisions in construction contracts with public agencies that purport to relieve the agency from liability for its active negligence. (C.C. 2782(b).) (See *B. & P.C. 7034(a)* [prohibiting licensed contractor from inserting in contract a provision violative of C.C. 2782]; *Ins.C. 11580.04* [invalidating additional insured indorsement for benefit of public agency that purports to provide indemnity coverage for agency's active negligence where an indemnity agreement would be invalid under C.C. 2782(b)]; C.E.B., 1 Construction Contracts and Disputes 3d, §2.54; 32 *McGeorge L. Rev.* 1019 [interpretation of express contractual indemnity provisions in construction contracts]; 8 *Pacific L. J.* 209; 68 *A.L.R.3d* 7 [liability of subcontractor on agreement indemnifying general contractor against liability for damage to person or property].)

(3) *Indemnification for Negligence in Hauling, Trucking, or Cartage Contracts.* A provision in a hauling, trucking, or cartage contract is void and unenforceable if it purports to indemnify the promisee against liability for damages arising out of bodily injury or death or property damage caused by the sole negligence or wilful misconduct of the promisee. (C.C. 2784.5.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Indemnification for Negligence in Construction Contracts.*

See C.E.B., 1 Construction Contracts, Defects, and Litigation, §2.52 (replacing C.E.B., Construction Contracts and Disputes 3d); 39 *McGeorge L. Rev.* 407 [type I indemnity agreements in construction contracts].

(New) Residential construction contracts: Agreements affecting residential construction contracts that purport to require a subcontractor to insure or indemnify the builder, or a general or other contractor not affiliated with the builder, against liability for claims of construction defects or other injury to property are unenforceable where the claims (a) arise from the negligence of the builder or contractor or its other agents, servants, or independent contractors who are directly responsible to the builder or contractor, (b) are for defects in design furnished by those persons, or (c) are unrelated to the scope of work in the agreement. These requirements may not be waived or modified. (C.C. 2782(c), added in 2005 and amended in 2008.) However, a subcontractor and the builder or contractor may mutually agree to the timing or immediacy of the defense and the reimbursement of defense fees and costs so long as the agreement does not constitute a waiver or modification. (C.C. 2782(d), added in 2005.)

A subcontractor does not owe a defense or indemnity obligation to a builder or contractor for a construction defect claim unless a written tender is provided. If a claim is tendered, the subcontractor may (a) defend the claim with counsel of its choice, or (b) pay a reasonable allocated share of the defense costs and fees within 30 days. (C.C. 2782(d), as amended in 2008.) If the subcontractor fails to perform, the contractor or builder may pursue a claim against it. (C.C. 2782(e), as amended in 2008.) For this purpose, "construction defect" is a violation of the standards set forth in C.C. 896, 897 (see text, §§1163, 1164). (C.C. 2782(h), added in 2008.)

A builder, contractor, or subcontractor may seek equitable indemnity for claims involving residential construction contracts. (C.C. 2782(f), added in 2008.)

Agreements affecting residential construction contracts to which wrap-up insurance policies (covering the risks associated with construction projects) are applicable are unenforceable to the extent they require a subcontractor to indemnify or defend another for a covered claim or action arising out of the project. However, if the contract is deemed unenforceable, the parties may pursue an equitable indemnity claim. (C.C. 2782.9, added in 2008). (On requirements for a wrap-up insurance policy covering a residential construction project, see C.C. 2782.95, added in 2008.)(4) *(New) Indemnification of Public Agency by Design Professional.* A provision in a contract with a public agency for design professional services that requires indemnification of the agency by the design professional for claims against the agency is unenforceable, except for claims concerning negligence, recklessness, or wilful misconduct of the design professional. This prohibition may not be waived or modified. Design professionals include, for these purposes, licensed architects, licensed landscape architects, registered professional engineers, licensed professional land surveyors, and related business entities. (C.C. 2782.8, added in 2006.)



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4. Distinction Between Active and Passive Negligence.

5 Witkin Sum. Cal. Law Torts § 122

[§ 122] Distinction Between Active and Passive Negligence.

Even if a claim rests on express contract, the claimant's active participation in the wrongful act may preclude recovery. (*Rossmoor Sanitation v. Pylon* (1975) 13 C.3d 622, 628, 629, 119 C.R. 449, 532 P.2d 97.) On the other hand, an express indemnity clause, although in general terms, will furnish additional support for a claim by an indemnitee only passively negligent. Thus, in *Markley v. Beagle* (1967) 66 C.2d 951, 59 C.R. 809, 429 P.2d 129, contractors negligently installed a defective guardrail and the owners negligently failed to inspect and discover the dangerous condition. Both were liable to the plaintiff injured by a fall, but the mere "nonfeasance" of the owners was not a bar to their claim against the contractors on the agreement to "hold Owner harmless ... in any suit at law for damages which might arise in connection with the agreed work." (66 C.2d 961.)

Despite criticism of its uncertainty (see 22 *Hastings L. J.* 1207), the distinction between active and passive negligence, and its consequences, were retained in *Rossmoor Sanitation v. Pylon*, *supra*, with the important qualification that the parties' intent expressed in the contract controls. An owner of real property employed a contractor to construct a sewage pump station and sewer lines in conformity with plans furnished by the owner. In the contract, the contractor agreed to indemnify the owner against all claims for damages arising out of the work, and to name the owner as an additional insured in its insurance policy. Two employees of the contractor were working in an unshored trench when it caved in, killing one and injuring the other. A personal injury and wrongful death action was brought against the owner and the judgment was paid by the owner and its insurer. The owner then brought this action against the contractor and its insurer, seeking indemnity on the theory that its negligence was only passive (failing to discover that the contractor's employees intended to enter an unshored trench). The trial judge agreed and gave judgment for the owner. *Held*, affirmed.

(a) The indemnity clause was a general one under *MacDonald & Kruse v. San Jose Steel Co.* (1972) 29 C.A.3d 413, 419, 105 C.R. 725, *supra*, §119, and plaintiff indemnitee can therefore recover if it was only passively negligent. (13 C.3d 629.)

(b) The contractor contended that the owner was actively negligent because it had plans prepared and supervision performed by an engineering firm, and also conducted other activities in the area causing earth vibrations. But the trial

judge, on conflicting evidence, concluded that the owner had no supervisory personnel at the site when the accident occurred, and had no knowledge of the employees' intention to enter the unshored trench, and that the cave-in was not caused by defective plans or earth vibrations. This determination, that the owner's negligence was passive, must be sustained. (13 C.3d 631.)

(c) However, "we do not employ the active-passive dichotomy as wholly dispositive of this or any other case." (13 C.3d 632.) The pragmatic approach of *Harvey Machine Co. v. Hatzel & Buehler* (1960) 54 C.2d 445, 6 C.R. 284, 353 P.2d 924, gives full effect to the intent of the parties: "Thus, while adhering to the underlying distinction between active and passive negligence which has long been accepted by the bench, the bar, and the insurance industry, we hold that, as declared in *Harvey*, the question whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts." (13 C.3d 633.) (See *Jimenez v. Pacific Western Const. Co.* (1986) 185 C.A.3d 102, 113, 229 C.R. 575 [criticizing *Rossmoor* dictum that finding of active negligence on part of indemnitee may be based solely on its knowledge of indemnitor's negligent act or omission]; *Morton Thiokol v. Metal Bldg. Alteration Co.* (1987) 193 C.A.3d 1025, 1029, 1030, 238 C.R. 722 [following *Rossmoor* qualification and holding indemnity proper notwithstanding jury's finding of indemnitee's "active" negligence]; *Rooz v. Kimmel* (1997) 55 C.A.4th 573, 581, 64 C.R.2d 177 [following *Rossmoor* qualification and holding that indemnity agreement applied to both active and passive negligence]; 16 *Pacific L. J.* 767.)

SUPPLEMENT: [This section is current through the latest supplement]

See *McCrary Const. Co. v. Metal Deck Specialists* (2005) 133 C.A.4th 1528, 1537, 35 C.R.3d 624 [provision calling for indemnification for liabilities "on account of, or related to, any act or omission" of indemnitor was general indemnity clause, not addressing issue of indemnitee's negligence, and would not be interpreted to provide indemnity if indemnitee was actively negligent unless circumstances of case or language of contract evinced different intent; following *Rossmoor Sanitation v. Pylon* (1975) 13 C.3d 622, 119 C.R. 449, 532 P.2d 97, text, p. 224].



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C. Liability of Multiple Tortfeasors.

6. Indemnity.

c. Express Indemnity.

5. Implied Indemnity Despite Express Clause.

5 *Witkin Sum. Cal. Law Torts* § 123

[§ 123] Implied Indemnity Despite Express Clause.

An express indemnity clause, rather than the equitable principles behind comparative indemnity, governs the scope of any duty to indemnify. Thus, the indemnitee under an express contract is precluded from obtaining comparative equitable indemnity from the indemnitor. In *Regional Steel Corp. v. Superior Court* (1994) 25 C.A.4th 525, 32 C.R.2d 417, McCarthy was the general contractor on a project to erect a college science building, and Regional was a subcontractor. The subcontract contained a provision requiring Regional to indemnify others only to the extent that damage was "cause in whole" by the negligence of someone employed by or under the control of Regional. An employee of Regional who was injured after being knocked from a truck by McCarthy's crane, brought an action against McCarthy, and McCarthy cross-complained against Regional for equitable indemnity. *Held*, Regional was not subject to the claim. "The 'caused in whole' indemnity clause precludes joint tortfeasor liability. By contract, McCarthy bargained away its right to pursue Regional on equitable indemnity grounds. Because Regional's duty is limited by contract and McCarthy did not sue on the contract, Regional was entitled to summary judgment." (25 C.A.4th 529.)

However, the *indemnitor* under a contract is not necessarily precluded from obtaining comparative equitable indemnity from the indemnitee if the duties established by that contract are inapplicable to the particular facts giving rise to the liability. In *E.L. White v. Huntington Beach* (1978) 21 C.3d 497, 146 C.R. 614, 579 P.2d 505, defendant city contracted with White to construct public improvements including a storm drain. White engaged subcontractor B & T to do the storm drain. B & T dug a trench, negligently failing to comply with safety orders, and city's inspectors observed the violation but took no action. A trench wall collapsed, killing one worker and injuring another, and personal injury and wrongful death judgments were recovered against city and White, and affirmed on appeal. Before the trial, city and its carriers sued White, its carrier, and B & T, seeking declaratory and other relief based on its contract with White under which White agreed to indemnify the city from claims arising out of performance. Judgment was in favor of White on the ground that city's negligence was active and that indemnity under the contract provision was precluded. This judgment was affirmed on appeal. Then White and its carrier filed the present action for implied indemnity against city for the sums paid on the personal injury and wrongful death judgments. City's general demurrer was sustained. *Held*, judgment of dismissal on demurrer reversed.

(a) The rules governing express indemnity reflect its contractual nature, permitting great freedom of action to the

parties, subject to established rules of construction and limitations of public policy. (21 C.3d 507.) (1) The parties may, by sufficiently specific language, establish a duty to indemnify the indemnitee from the results of even active negligence (see supra, §122). But in the absence of that language the provision will be construed to provide indemnity only if the indemnitee has been no more than *passively* negligent. (21 C.3d 507.) (2) Even where an indemnitee has been only passively negligent the indemnitee may be precluded if the contract provides indemnity only from acts of the indemnitor and not from those of others (see supra, §119). (3) A provision that specifically excepts from its scope any negligence on the part of the indemnitee will be construed only to preclude indemnity to the indemnitee but may give rise to an implied right of indemnity in the indemnitor. (21 C.3d 507.) (4) An express indemnity clause is accorded a certain preemptive effect, displacing implied indemnity that might otherwise arise. (21 C.3d 508.) However, where the express contractual indemnity is in terms inapplicable to the factual setting, implied indemnity may come into play. (21 C.3d 508, 509.)

(b) These principles are applicable here. The decision in the prior action by city against White was that the express provision did not create an obligation of White to hold city harmless, in view of its active negligence; and city is collaterally estopped to challenge this determination. Hence, the preemptive effect of the express clause--which might have been applicable if city had been only passively negligent--did not apply. Accordingly, it was error to sustain the demurrer, and the trial judge must determine the issue under the facts presented at trial, in the light of *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, infra, §1357. (21 C.3d 510.) (See *Maryland Cas. Co. v. Bailey & Sons* (1995) 35 C.A.4th 856, 874, 41 C.R.2d 519 [where indemnity agreement specified circumstances under which subcontractor was entitled to indemnity from general contractor, but was silent as to whether general contractor was entitled to indemnification from subcontractor, general contractor could state cause of action for equitable indemnity; following *E.L. White*].)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Effect of Indemnatee's Settlement of Underlying Claim.

5 *Witkin Sum. Cal. Law Torts* § 124

[§ 124] Effect of Indemnatee's Settlement of Underlying Claim.

In *Peter Culley & Associates v. Superior Court* (1992) 10 C.A.4th 1484, 13 C.R.2d 624, the developer of a condominium project retained an architect, which in turn hired a structural engineer as a consultant on foundation design. By contract, the engineer agreed to defend, indemnify, and hold blameless the architect for and against all loss, damage, injury or liability, real or alleged, resulting from the engineer's negligent performance of services. When the architect sued the developer to collect fees owed on the project, the developer cross-complained, alleging that design flaws had caused delay and increased construction costs. The engineer was not a party to the action between the developer and the architect, having declined the architect's tender of defense of the cross-complaint. The developer and the architect settled the cross-complaint for \$ 225,000-\$ 200,000 of which was to cover the risk of liability associated with the engineer's foundation design work. After the architect assigned to the developer its indemnity rights against the engineer, the developer instituted the present action against the engineer to enforce the indemnity agreement. On the issue whether the architect had properly tendered the defense of the cross-complaint to the engineer, the jury found that the tender was proper. On the issue whether the architect's alleged active negligence barred indemnity, the trial judge granted nonsuit against the engineer because it had failed to present any expert testimony on standard of care. On the issue whether the settlement was made in good faith, the trial judge, citing *C.C.P. 877.6* (supra, §83), found that the settlement, including the allocation of \$ 200,000 to the foundation issue, was in good faith and was *conclusive* against the engineer. Citing *C.C.P. 877.6(e)* (supra, §86), the engineer sought mandamus. *Held*, writ granted, directing the trial judge to vacate the good faith settlement order and to conduct further proceedings consistent with this opinion.

(a) *Mandamus is proper remedy.* *C.C.P. 877.6(e)*, which allows a party aggrieved by a good faith determination to seek review by mandamus, does not apply where, as here, the good faith determination was made to enforce a contractual indemnity right. *C.C.P. 877.6* is designed to deal with equitable indemnity claims among multiple defendants in the same case where expedited review facilitates continuation of the action against nonsettling defendants. However, mandamus is a proper remedy under the general writ authority stated in *C.C.P. 1086* (8 *Cal. Proc.* (4th), *Extraordinary Writs*, §6), because appeal is not an adequate remedy under the peculiar facts of this case. The proceedings below, as well as the channels for review, have become confused by a blurring of the distinctions between *C.C.P. 877.6* proceedings and proceedings to enforce contractual indemnity rights. Without intervention at this stage,

reversal on appeal seems inevitable. (10 C.A.4th 1490.)

(b) *Nature of C.C.P. 877.6 procedure.*

(1) *C.C.P. 877.6* provides a *defensive* procedure by which a settling joint tortfeasor may extricate himself from a lawsuit and bar actions for equitable indemnity by the remaining joint tortfeasors. (10 C.A.4th 1488.) Hence, had the developer named the engineer as a defendant on its cross-complaint against the architect, the architect, as a settling defendant, could have used *C.C.P. 877.6* procedures defensively against the engineer. However, because the original action was a two-party action involving only the developer and the architect, *C.C.P. 877.6* procedures did not come into play, i.e., neither party could have contested its own settlement. Consequently, the parties' focus shifted to the role that the settlement would play in any subsequent indemnity action against the engineer. (10 C.A.4th 1491.)

(2) The record does not reveal why the trial judge used *C.C.P. 877.6* to decide the issue of good faith, but it does demonstrate at least one problem. During the proceedings, the judge correctly stated that the burden of proof in the indemnity action was on the developer. However, in his written order determining that the settlement was made in good faith, he incorrectly assigned the burden of proof to the engineer, apparently because the engineer was the party that would have the burden, under *C.C.P. 877.6(d)*, of proving lack of good faith. (10 C.A.4th 1498.)

(c) *Meaning of C.C. 2778(5).* C.C. 2778(5) (supra, §120) provides that if the indemnitor refuses a request to defend the indemnitee, a *recovery* against the indemnitee suffered in good faith is conclusive in the indemnitee's action against the indemnitor. Based on the juxtaposition of the term "good faith" with the words "is conclusive," the developer argues that a good faith determination in a contractual indemnity action has the same conclusive effect as a good faith determination in a *C.C.P. 877.6* proceeding. However, insofar as C.C. 2778(5) makes a "recovery" suffered in good faith conclusive, "the statute refers only to a recovery by judgment against the indemnitee." (10 C.A.4th 1495.) This construction is based on the following grounds:

(1) C.C. 2778(5) neither defines "recovery" nor mentions how a settlement would affect enforcement of an indemnity agreement. And the wording of the statute does not, in itself, support the developer's construction, i.e., a negotiated settlement is not normally thought to have been "suffered" by an indemnitee. (10 C.A.4th 1495.)

(2) More importantly, the developer's construction is inconsistent with the following principle enunciated in *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 C.3d 775, 244 C.R. 655, 750 P.2d 297, and *Lamb v. Belt Cas. Co.* (1935) 3 C.A.2d 624, 40 P.2d 311: " '[I]f an insurer wrongfully fails to provide coverage or a defense, and the insured then settles the claim, the insured is given the benefit of an evidentiary presumption. In a later action against the insurer for reimbursement based on a breach of its contractual duty to defend the action, a reasonable settlement made by the insured to terminate the underlying claim against him ... may be used as presumptive evidence of the insured's liability on the underlying claim, and the amount of such liability.' " (10 C.A.4th 1493, quoting *Isaacson*.)

(3) None of the decisions addressing C.C. 2778(5) conflicts with the construction adopted here. Although no case has discussed the effect of a settlement on an action for indemnity, the decisions have consistently equated "recovery" with judgment after trial. (10 C.A.4th 1496, citing *Parra v. Traeger* (1931) 214 C. 535, 6 P. 941, and numerous other decisions.)

(d) *Lamb and Isaacson controlling.* The developer cites several cases as establishing that a settlement in good faith is conclusive on all issues. However, none of these cases enforced the indemnity contract merely because the indemnitee had settled. Hence, none conflicts with the interpretation of C.C. 2778(5) adopted here, i.e., that only a *judgment* against the indemnitee is entitled to conclusive effect in a subsequent action against the indemnitor. When the indemnitee settles without trial, the principles of *Lamb* and *Isaacson* apply. "Pursuant to those principles, the indemnitee must show that liability is covered by the contract, that liability existed, and the extent thereof. The settlement is presumptive evidence of liability of the indemnitee and of the amount of liability, but it may be overcome by proof from the indemnitor that the settlement was unreasonable." (10 C.A.4th 1497.)

(e) *Construction of indemnity contract.*

(1) Actions to enforce indemnity agreements are governed by rules developed primarily in insurance and construction cases, the paramount of which is that the extent of the duty to indemnify must be determined from the contract, instead of by reliance on the doctrine of equitable indemnity. (10 C.A.4th 1492, citing *Rossmoor Sanitation v. Pylon* (1975) 13 C.3d 622, 119 C.R. 449, 532 P.2d 97.)

(2) Here, the indemnity clause requires the engineer to defend and indemnify the architect for all loss, etc., resulting from the engineer's negligence, and the parties differ in their interpretation of it. The developer argues that it requires the engineer to defend and indemnify whenever there is an *allegation* of negligence, whereas the engineer argues that *actual negligence* is required. If the developer is correct, the architect's settlement with the developer would be presumptive evidence that the architect was liable to the developer in the amount of the settlement. But if the engineer is correct, the effect of the settlement would be a factor only if the engineer's actual negligence were proven. (10 C.A.4th 1494.)

(3) Hence, the trial judge should have determined whether the architect's "liability," as established by the settlement, was of the *type* covered by the indemnity clause before considering whether the settlement showed the architect's liability *in fact*. However, perhaps because of preoccupation with the questions of good faith and the possible application of C.C.P. 877.6, the trial judge evidently never decided which party's interpretation was correct. (10 C.A.4th 1494.)

(f) *Effect of allocation in settlement.*

(1) In this case, the allocation of the settlement is at least as important as the total amount of the settlement, because it is undisputed that the engineer's obligation as the indemnitor extends only to damages arising out of its design work on the building's foundation. However, neither the developer nor the architect had a motivation to allocate other than a high amount to this work. The developer, as possessor of the indemnification rights, would benefit from a high allocation, and a high allocation would not in any way be detrimental to the architect, which would pay the full settlement amount of \$ 225,000 regardless of how the settlement was allocated. (10 C.A.4th 1497.)

(2) "We have found no case addressing the situation presented here. We find, however, no justification for giving presumptive effect to an allocation that is not the product of adverse negotiation. A presumption that the parties have reasonably allocated a settlement amount between issues in the action should be reserved for a settlement by parties with truly adverse interests in the allocation. ... Where the parties have purported to settle an imaginary dispute over allocation, that allocation should be given no special treatment in an indemnity action. Plaintiff should be required to prove the reasonableness of its proposed allocation by ordinary means." (10 C.A.4th 1498.)

(g) *Role of good faith.*

(1) To summarize, in a contractual indemnity action the indemnitee must prove that liability is covered by the contract, that liability existed, and the extent of that liability. A settlement in a prior action is merely presumptive evidence of liability and the amount thereof, and this evidence may be overcome by the indemnitor's proof that the settlement was unreasonable. (10 C.A.4th 1498.)

(2) "All these matters are determined at trial. The court holds no separate good faith hearing to confirm the settlement. In fact, in an indemnity action, the critical issue is not good faith, but *reasonableness*. ... In ruling on the reasonableness of a settlement, the court may consider any relevant evidence, including evidence tending to show the presence or absence of good faith as that term is applied" in *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 C.3d 488, 213 C.R. 256, 698 P.2d 159, supra, §79. (10 C.A.4th 1498.) (See *Mel Clayton Ford v. Ford Motor Co.* (2002) 104 C.A.4th 46, 54, 127 C.R.2d 759 [where agreement provides for indemnification only where indemnitee is not negligent, indemnitee must prove absence of negligence and cannot use, offensively, good faith settlement in underlying action to establish amount owed by indemnitor; relying on *Peter Culley*]; *Hartford Cas. Ins. Co. v. Travelers Indem. Co.* (2003)

110 C.A.4th 710, 720, 2 C.R.3d 18 [settlement of underlying action against landlord did not establish that landlord was not covered as additional insured under tenant's policy].)

SUPPLEMENT: [This section is current through the latest supplement]

General writ authority:

Cross-Reference: 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §116.



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7. Illustrations.

5 Witkin Sum. Cal. Law Torts § 125

[§ 125] Illustrations.

(1) *Clause Sufficient*. Express indemnity clauses have often been enforced. The following cases are illustrative:

Herman Christensen & Sons v. Paris Plastering Co. (1976) 61 C.A.3d 237, 249, 132 C.R. 86 [passive negligence of indemnitee does not bar indemnity]; *Gonzales v. R.J. Novick Co.* (1978) 20 C.3d 798, 809, 144 C.R. 408, 575 P.2d 1190 [same].

Continental Heller Corp. v. Amtech Mechanical Services (1997) 53 C.A.4th 500, 504, 508, 61 C.R.2d 668 [subcontractor's promise to indemnify contractor for loss arising out of or connected with subcontractor's acts or omissions did not require that loss be caused by subcontractor's fault or that its performance be substantial factor in loss; clause also allowed contractor to recover attorneys' fees it expended in fighting claims against it, while another clause allowed it to be indemnified for attorneys' fees it expended in enforcing indemnity contract].

Centex Golden Const. Co. v. Dale Tile Co. (2000) 78 C.A.4th 992, 997, 93 C.R.2d 259 [subcontractor's promise to indemnify contractor "with respect to all work which is covered by or incidental to this subcontract" did not require negligence on subcontractor's part; citing *Continental Heller Corp. v. Amtech Mechanical Services*].

In *Hernandez v. Badger Const. Equipment Co.* (1994) 28 C.A.4th 1791, 34 C.R.2d 732, plaintiff was injured in an accident involving a crane that was manufactured by one defendant and leased to plaintiff's employer by another. Plaintiff recovered workers' compensation benefits from his employer (thereby rendering the employer immune from suit) and obtained judgment against the lessee and the manufacturer. Fault was apportioned as follows: plaintiff, 5%; the employer, 55%; the manufacturer, 20%; the lessee, 20%. The rental agreement between the employer and the lessee contained a provision under which the employer agreed to indemnify the lessee against any liability resulting from injury to plaintiff that was in any way caused by the employer and occasioned by use of the crane. Because the lessee was actively negligent, the judgment declared that the employer was not required to indemnify the lessee for the lessee's liability to plaintiff. *Held*, this portion of the judgment must be reversed; the lessee's active negligence did not preclude enforcement of the indemnity agreement.

(a) Although an indemnitee's active negligence may ordinarily preclude its recovery under a general indemnity agreement, *Rossmoor Sanitation v. Pylon* (1975) 13 C.3d 622, 119 C.R. 449, 532 P.2d 97, expressly held that the applicability of an indemnity agreement turns on contractual interpretation, instead of on a mechanical application of the active-passive dichotomy. (28 C.A.4th 1820.) Moreover, this more flexible approach is more in accord with the evolving and presumably more equitable trend toward allocating liability in proportion to comparative fault. (28 C.A.4th 1823.)

(b) Reasonably read, the contractual indemnity language here did not obligate the employer to indemnify the lessee for the lessee's own negligence. However, reasonably construed, the language did obligate the employer to indemnify the lessee for the portion of the lessee's liability attributable to the employer's fault. That interpretation is consistent with the lessee's reasonable expectation that it would be indemnified for liability arising from the negligence of the employer. Thus, despite its 20% active negligence, the lessee was contractually entitled to indemnification from the employer for the portion of plaintiffs' joint and several economic damage award attributable to the employer's 55% negligence that is ultimately paid by C. (28 C.A.4th 1822.)

In *United Services Auto. Assn. v. Snappy Car Rental* (1999) 74 C.A.4th 461, 87 C.R.2d 742, two insureds were injured while driving a rental car, and their insurer paid their claims. The insurer then filed a subrogation claim against the rental car company, and the company sought indemnification against the insureds for the costs and attorneys' fees expended in defense of that claim. Held, indemnification was required. The insureds had signed a clause stating that they would indemnify the rental car company "from all claims, liabilities and expenses for bodily injury, death or property damage, arising out of the use, operation, or possession" of the rental car during the rental period. The insurer's claims fell directly into the category of expenses for bodily injury or property damage arising from the use or operation of the rental vehicle. (74 C.A.4th 464.)

(2) *Clause Insufficient*. The following cases illustrate circumstances in which express indemnity provisions may be invalid or inapplicable:

Goldman v. Ecco-Phoenix Elec. Corp. (1964) 62 C.2d 40, 41 C.R. 73, 46, 396 P.2d 377 [indemnity against promisee's own negligence cannot rest on vague and ambiguous language].

MacDonald & Kruse v. San Jose Steel Co. (1972) 29 C.A.3d 413, 423, 105 C.R. 725, supra, §119 [promise to indemnify "from any cause whatsoever" does not constitute express and unequivocal reference to indemnitee's own negligence].

Los Angeles v. Japan Air Lines Co. (1974) 41 C.A.3d 416, 428, 116 C.R. 69 [promise to indemnify city for all liability arising from airlines' operations did not include liability based on inverse condemnation].

Guy F. Atkinson Co. v. Schatz (1980) 102 C.A.3d 351, 357, 359, 161 C.R. 436 [promise to indemnify for all liability arising from indemnitor's performance of its duties, unless due solely to indemnitee's negligence, did not apply to liability based on indemnitee's active negligence, even though indemnitor was itself passively negligent].

Armco Steel Corp. v. Roy H. Cox Co. (1980) 103 C.A.3d 929, 934, 936, 163 C.R. 330 [promise to indemnify for all claims for injury or death, however caused and even though due to indemnitee's negligence, was general clause not covering indemnitee's active negligence].

Widson v. International Harvester Co. (1984) 153 C.A.3d 45, 58, 200 C.R. 136 [general clause inapplicable where indemnitee, in addition to being guilty of passive negligence, was also liable on strict liability grounds].

Building Maintenance Service Co. v. AIL Systems (1997) 55 C.A.4th 1014, 1021, 64 C.R.2d 353 [indemnitee was not entitled to indemnity for attorneys' fees that it expended in defending indemnitor's cross-complaint].

Heppler v. J.M. Peters Co. (1999) 73 C.A.4th 1265, 1275, 87 C.R.2d 497 [no obligation to indemnify where

language contained in preprinted subcontracts did not evidence mutual understanding that subcontractors would indemnify general contractor even if their work was not negligent].

St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co. (2002) 101 C.A.4th 1038, 1049, 124 C.R.2d 818 [subcontractor was not required to indemnify contractor, where indemnity clause expressly referred to injury from work arising out of subcontract, and injury was caused by unrelated work; injured employee's mere presence at site where subcontract was to be performed was insufficient to trigger indemnity clause].

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 232, fifth line of section, "*Gonzales v. R.J. Novick Co.*" should be "*Gonzales v. R.J. Novick Const. Co.*"



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I. INTRODUCTION

D. Defenses to Tort Action.

1. Consent.

a. In General.

5 Witkin Sum. Cal. Law Torts § 126

[§ 126] In General.

The maxim "*volenti non fit injuria*" is expressed in C.C. 3515: "He who consents to an act is not wronged by it." Consent is generally a complete defense to tort liability. (See *Churchill v. Baumann* (1892) 95 C. 541, 544, 30 P. 770 [plaintiff participated with defendants in alleged tortious diversion of water]; *Rest.2d, Torts* §892A; Dobbs, *The Law of Torts* §95 et seq.; 1 Harper, James & Gray 3d §1.11; 2 California Affirmative Defenses, §32:1 et seq.; 47 *Hastings L. J.* 635 [contracting against liability]; 19 *U.C. Davis L. Rev.* 949 [applicability of consent doctrine to actions based on religiously motivated conduct]; 74 *Am.Jur.2d* (2001 ed.), *Torts* §46.) But it must be free, and not, e.g., rendered under duress or incapacity. (*Rest.2d, Torts* §§58, 59.)

Consent may take a number of forms, including the following:

(1) Express advance contractual release or waiver of liability for ordinary negligence. (See 1 *Summary* (10th), *Contracts*, §660.)

(2) Voluntary assumption of risk of injury from certain dangers inherent in the defendant's activity. (See *infra*, §1281 et seq.)

(3) Voluntary participation or acquiescence in acts otherwise amounting to an intentional tort such as battery. (See *infra*, §386 et seq.)

(4) Prevention of defendant's precautionary acts. Thus, in *Edward Brown & Sons v. San Francisco* (1950) 36 C.2d 272, 223 P.2d 231, water in a defective side sewer backed up and flooded plaintiff's basement offices. But defendant city's agent had been told at the time of the first seepage that plaintiff did not want repairs made in wintertime. *Held*, C.C. 3515 applied, and the damage that resulted from plaintiff's own inaction could not be charged to the city. (36 C.2d 279.)

(5) Patient's consent to withholding or withdrawal of life-sustaining procedures. (See *infra*, §127 et seq.)

West's Key Number Digest, Torts k.17

SUPPLEMENT: [This section is current through the latest supplement]



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1. Consent.

b. Withholding of Life-Sustaining Treatment.

1. In General.

5 *Witkin Sum. Cal. Law Torts* § 127

[§ 127] In General.

(1) *Under Advance Statutory Directive.* The Natural Death Act (former Health & Saf.C. 7185 et seq.), enacted in 1976 and substantially revised in 1991, addressed the right to make advance decisions regarding the withholding or withdrawal of life-sustaining treatment. The Natural Death Act, together with the statutes regarding durable powers of attorney for health care in the Power of Attorney Law (see 14 *Summary* (10th), *Wills and Probate*, §873 et seq.), were repealed in 1999 (effective July 1, 2000) and replaced by the Health Care Decisions Law (*Prob.C. 4600* et seq.). The Health Care Decisions Law, prescribing the requisites and effect of "advance health care directives," is treated in detail in 14 *Summary* (10th), *Wills and Probate*, §876 et seq. (For the Uniform Determination of Death Act (*Health & Saf.C. 7180* et seq.), see 14 *Summary* (10th), *Wills and Probate*, §§11, 12.)

(2) *Independent of Statutory Directive.* Even in the absence of an advance directive under the prescribed statutory procedure (see *supra*, §126), a "competent, informed adult, in the exercise of self-determination and control of bodily integrity, has the right to direct the withholding or withdrawal of life-sustaining medical treatment, even at the risk of death, which ordinarily outweighs any countervailing state interest. The right does not depend upon the nature of the treatment refused or withdrawn; nor is it reserved to those suffering from terminal conditions. Once a patient has declined further medical intervention, the physician's duty to provide such care ceases." (*Thor v. Superior Court* (1993) 5 C.4th 725, 744, 21 C.R.2d 357, 855 P.2d 375, *infra*, §129; see *Barber v. Superior Court* (1983) 147 C.A.3d 1006, 1015, 195 C.R. 484 [doctors who complied with family requests to remove life-sustaining equipment could not be found guilty of murder]; *In re Christopher I.* (2003) 106 C.A.4th 533, 548, 131 C.R.2d 122 [Juvenile Court's authority under Welf.C. 362(a) (10 *Summary* (10th), *Parent and Child*, §633) to make decisions regarding medical treatment for dependent children within its jurisdiction includes decisions to refuse or withdraw life-sustaining medical treatment]; 17 *Southwestern L. Rev.* 109 [*Barber*].)

The right is a corollary of the common law doctrine of informed consent to medical treatment (see *infra*, §388 et seq.). It has also been based on the liberty interest in the Due Process Clause of the Fourteenth Amendment and on the state constitutional right of privacy, i.e., the freedom to choose to reject intrusions on bodily integrity. (See *Bartling v. Superior Court* (1984) 163 C.A.3d 186, 193, 209 C.R. 220; *Bouvia v. Superior Court* (1986) 179 C.A.3d 1127, 1137, 225 C.R. 297; *Donaldson v. Lungren* (1992) 2 C.A.4th 1614, 1617, 1620, 4 C.R.2d 59, *infra*, §128.) However, the right

to die may be legislatively restricted in proper circumstances. (See *Cruzan v. Director, Missouri Dept. of Health* (1990) 497 U.S. 261, 110 S.Ct. 2841, 2847, 111 L.Ed.2d 224, 237, 7 Summary (10th), *Constitutional Law*, §571.)

A patient may assert this right over the objections of the caregiver. "[I]f the right of the patient to self-determination as to his own medical treatment is to have any meaning at all, it must be paramount to the interests of the patient's hospital and doctors." (*Bartling v. Superior Court*, *supra*, 163 C.A.3d 195; see 13 *Pepperdine L. Rev.* 100 [*Bartling*].)

The patient's motive, such as to commit suicide, is irrelevant. "If a right exists, it matters not what 'motivates' its exercise. We find nothing in the law to suggest the right to refuse medical treatment may be exercised only if the patient's *motives* meet someone else's approval. It certainly is not illegal or immoral to prefer a natural, albeit sooner, death than a drugged life attached to a mechanical device." (*Bouvia v. Superior Court* 179 C.A.3d 1145; see 18 *Pacific L. J.* 1029 [*Bouvia*].)

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1. Consent.

b. Withholding of Life-Sustaining Treatment.

2. Assisted Suicide.

5 *Witkin Sum. Cal. Law Torts* § 128

[§ 128] Assisted Suicide.

In *Donaldson v. Lungren* (1992) 2 C.A.4th 1614, 1617, 4 C.R.2d 59, D suffered from an incurable tumor that would result in a persistent vegetative state and probable death within 5 years. D and M brought an action for declaratory and injunctive relief against the Attorney General, the district attorney, and the county coroner, seeking (1) a declaration that D had a constitutional right to premortem cryogenic suspension and the assistance of others in achieving that state; (2) an injunction against criminal prosecution of M and others for participating in the act; and (3) an injunction against the coroner from performing an autopsy on D's body. *Held*, judgment for defendants on demurrer affirmed.

(a) A person has a constitutionally protected interest in refusing unwanted medical treatment or procedures. To determine whether D has suffered a violation of his constitutional rights, the court "must balance his interests against any relevant state interests. ... Pertinent state interests include preserving human life, preventing suicide, protecting innocent third parties such as children, and maintaining the ethical integrity of the medical profession. ... The state may also decline to assess the quality of a particular human life and assert an unqualified general interest in the preservation of human life to be balanced against the individual's constitutional rights." (2 C.A.4th 1620.)

(b) "Decisions regarding the right to refuse life-sustaining treatment, including hydration and nourishment, distinguish between artificial life support in the face of inevitable death and self-infliction of deadly harm (suicide). ... The rationale of these decisions is that natural death from underlying illness is merely forestalled by life support measures." (2 C.A.4th 1621.) There is a significant difference between the patient and doctor and D and M. The patient who is being kept alive by a life-support system has prolonged life and prevented death from taking place; D is asking sanction for something quite different: "Here there are no life-prolonging measures to be discontinued. Instead, a third person will simply kill [D] and hasten the encounter with death. No statute or judicial opinion countenances [D's] decision to consent to be murdered or to commit suicide with the assistance of others." (2 C.A.4th 1622.)

(c) D may take his own life; "[n]o state interest is compromised by allowing [D] to experience a dignified death rather than an excruciatingly painful life." (2 C.A.4th 1622.) But it does not follow that he may implement that right by allowing a third person assisting in the suicide to be immune from investigation by the coroner or law enforcement agencies: "In such a case, the state has a legitimate competing interest in protecting society against abuses. This interest

is more significant than merely the abstract interest in preserving life no matter what the quality of that life is. Instead, it is the interest of the state to maintain social order through enforcement of the criminal law and to protect the lives of those who wish to live no matter what their circumstances. This interest overrides any interest [D] possesses in ending his life through the assistance of a third person in violation of the state's penal laws. We cannot expand the nature of [D's] right of privacy to provide a protective shield for third persons who end his life." (2 C.A.4th 1622.)

(d) D argues that constitutional rights do not depend on there being a fail-safe scheme, nor may they be deferred because of the difficulty in devising a procedure to implement them; and it is conceivable to devise a judicial procedure to supervise D's assisted death. But D has no constitutional right to a state-assisted death, and the court may not enjoin public officers from performing official acts that they are required by law to perform. (2 C.A.4th 1623.) "We realize that time is critical to [D], but the legal and philosophical problems posed by his predicament are a legislative matter rather than a judicial one." (2 C.A.4th 1623.)

(e) D also argues that he has a constitutional right to receive advice and encouragement concerning his suicide, and that P.C. 401 (making it a felony to aid, advise, or encourage suicide; see 1 Cal. Crim. Law (3d), *Crimes Against the Person*, §101) is unconstitutional. Suicide or attempted suicide is not a crime, but a majority of states impose criminal penalties on one who assists another to commit suicide. One reason is to discourage those who might encourage a suicide to advance personal motives; another is the belief that the sanctity of life is threatened by one who is willing to participate in taking the life of another, even at the victim's request; and a third justification is that, although the suicide victim may be mentally ill, the aider is not necessarily mentally ill. (2 C.A.4th 1624.) "The state's interest in such a situation involves more than just a general commitment to the preservation of human life ... Third parties, even family members, do not always act to protect the person whose life will end." (2 C.A.4th 1624.)

(f) M contends that, because suicide is not illegal, the state may not prohibit speech that encourages it. But regulation of conduct bearing no necessary relation to the freedom to disseminate information or opinion is not constitutionally protected. Hence, "[M] enjoys no constitutional protection for his planned participation in [D's] suicide." (2 C.A.4th 1625.)

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3. Particular Types of Patients.

5 Witkin Sum. Cal. Law Torts § 129

[§ 129] Particular Types of Patients.

(1) *Incompetent Patient*. Where an incurable patient has the right to die (see supra, §127) but is incompetent, the patient's conservator, considering medical advice and the conservatee's best interest, may authorize the withholding or withdrawal of life-sustaining treatment. (*Conservatorship of Drabick* (1988) 200 C.A.3d 185, 209, 245 C.R. 840, 14 Summary (10th), *Wills and Probate*, §996.) However, the conservator may not authorize the withholding or withdrawal from a conscious conservatee who is not terminally ill, comatose, or in a persistent vegetative state, and who has not left formal instructions for health care or appointed an agent or surrogate for health care decisions without clear and convincing evidence that the conservator's decision is in accordance with either the conservatee's own wishes or best interest. (*Conservatorship of Wendland* (2001) 26 C.4th 519, 530, 110 C.R.2d 412, 28 P.3d 151, 14 Summary (10th), *Wills and Probate*, §909.) (On authority of conservator respecting removal of life support generally, see 14 Summary (10th), *Wills and Probate*, §996.)

(2) *Victim of Crime*. In *People v. Adams* (1990) 216 C.A.3d 1431, 265 C.R. 568, 1 Cal. Evidence (4th), Hearsay, §192, a prosecution for murder, defendant shot the victim, inflicting wounds so serious that he died 5 days later. At the trial, the prosecution introduced statements made by the victim 2 days before his death, to the effect that defendant intended to kill him. On the issue of belief in impending death (a condition of admission of a dying declaration), the prosecution introduced evidence that the victim had been advised that, if placed in a respirator, he could have lived "for days or weeks," and that the victim had refused life support. On appeal, defendant contended that his constitutional right of confrontation had been violated by admission of the dying declaration after the victim chose not to prolong his life through artificial life support. *Held*, the evidence was admissible; a competent adult has a constitutional right to die, and the state had no power, and consequently no duty, to keep him alive to ensure his presence at the preliminary examination. (216 C.A.3d 1439.)

(3) *Prisoner*. In *Thor v. Superior Court* (1993) 5 C.4th 725, 21 C.R.2d 357, 855 P.2d 375, a state prisoner serving a life term jumped or fell from a wall, fracturing a cervical vertebrae and rendering himself a quadriplegic. He lacked any physical sensation or control of his body below the shoulders, and medical personnel had to assist in the performance of all bodily functions; this condition was irreversible. Petitioner, a licensed physician, attending the prisoner as a staff member of the medical facility, instituted an ex parte proceeding in the superior court seeking an order allowing him to

perform a gastrojejunostomy--a surgical operation to permit feeding and medication--notwithstanding the prisoner's refusal to consent to the procedure. Petitioner alleged that unless this procedure was done, the prisoner, who had intermittently rejected both food and necessary medication, would be at substantial risk of death due to possible pulmonary emboli, starvation, infection, and renal failure. Petitioner argued that he had a duty to force-feed and provide other nonconsensual medical treatment because the prisoner, although competent, was in petitioner's custodial care, and unless permitted to provide such care, petitioner could be subject to possible civil and criminal liability. *Held*, the prisoner had the right to refuse.

(a) *Ex parte and summary procedure criticized and limited.* The ex parte and summary nature of the hearing below, which does not appear to have been precipitated by any actual emergency, has somewhat constrained the court's analysis for lack of a thorough exposition of the facts. "The informality of the procedures did more than potentially compromise the record for review, however: it denied fundamental due process. The unnecessary exclusion of *the* critical party from meaningful participation in a determination of his right to direct the course of medical treatment contravenes the basic tenets of our judicial system and affronts the principles of individual integrity that sustain it." Accordingly, "except in cases of imminent danger to the life or health of the patient or a similar exigency," any procedure is disapproved "that denies or limits any relevant party access to the proceedings and the opportunity to be heard. In the event such denial or limitation has occurred and thereby impaired review, an appellate court may remand the matter for amplification of the record to safeguard the interests of all concerned." (5 C.4th 733, footnote 2.)

(b) *Patient's right to refuse life-sustaining treatment.* While the physician has the professional and ethical responsibility to provide the medical evaluation on which informed consent is predicated, the patient still retains the sole prerogative to make the subjective treatment decision based on an understanding of the circumstances. (5 C.4th 735.) "[W]e find no countervailing state interest in the preservation of life sufficient to sustain a duty on the part of petitioner superseding the right to refuse unwanted medical treatment." The proposed treatment involves a substantial surgical procedure, with the potential not only to cause discomfort and pain but also to create additional risks. And, while it may serve to extend his life, it offers no hope of reversing the affliction, and "remains palliative at best." (5 C.4th 740.) A competent, informed adult has the right to direct the withholding or withdrawal of life-sustaining medical treatment, even at the risk of death, which ordinarily outweighs any countervailing state interest. (5 C.4th 744.)

(c) *Extent to which state prison inmate may make medical decisions.*

(1) The need to ensure institutional security may place substantial limitations on a prisoner's ability to exercise the rights of association, expression, privacy and some others. But prison administrative authority is not unqualified: P.C. 2600 (3 Cal. Crim. Law (3d), *Punishment*, §45) provides that a prisoner may be deprived of these rights only to the extent necessary for the reasonable protection of the public. And petitioner has offered no evidence that allowing exercise of the right of self-determination in medical decisions undermines prison integrity or endangers the public. (5 C.4th 745.)

(2) However, "our holding does not imply any attenuation of the deference accorded the experience and expertise of administrative officials in such matters. ... In another case, or in this case if a change of circumstances warrant, we do not preclude prison authorities from establishing the need to override an inmate's choice to decline medical intervention." (5 C.4th 745.) But measures to forestall the untoward consequences of disruptive conduct "must be demonstrably 'reasonable' and 'necessary,' not a matter of conjecture." (5 C.4th 746.)

(3) "Under the facts of this case, we have no occasion to address, and therefore do not decide, any related issues that might arise in the event an otherwise healthy inmate with no underlying affliction engages in a course of conduct for nonmedical reasons, such as a hunger strike, that subsequently necessitates therapeutic intervention to prevent death." (5 C.4th 747, footnote 16.) (See 21 *Pepperdine L. Rev.* 637 [Thor].)

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4. Commentary.

5 Witkin Sum. Cal. Law Torts § 130

[§ 130] Commentary.

The right to refuse, or consent to the withholding of, life-sustaining treatment is the subject of considerable commentary. (See 75 *Cal. L. Rev.* 707 [Suicidal Competence and the Patient's Right to Refuse Lifesaving Treatment]; 76 *Cal. L. Rev.* 897 [Decision Making for Incompetent Patients]; 79 *Cal. L. Rev.* 1121 [The Due Process of Dying]; 80 *Cal. L. Rev.* 857 [Letting Patients Die: Legal and Moral Reflections]; 35 *Cal. Western L. Rev.* 333 [physician-assisted suicide]; 102 *Harv. L. Rev.* 375 [Litigating Life and Death]; 103 *Harv. L. Rev.* 1519, 1623 [right to refuse medical treatment]; 105 *Harv. L. Rev.* 1414 [termination of treatment for never-competent patient in persistent vegetative state]; 105 *Harv. L. Rev.* 2021 [Physician-Assisted Suicide and the Right To Die With Assistance]; 40 *Hastings L. J.* 119 [Individualism, Community, and the Right to Die]; 42 *Hastings L. J.* 779 [The Sirens' Lure of Invented Consent: A Critique of Autonomy-Based Surrogate Decisionmaking for Legally-Incapacitated Older Persons]; 42 *Hastings L. J.* 817 [Coming to Terms with Death: The *Cruzan* Case]; 44 *Hastings L. J.* 1241 [A Clash at the Bedside: Patient Autonomy v. A Physician's Professional Conscience]; 44 *Hastings L. J.* 1291 [Don't Ask--Don't Tell: The Secret Practice of Physician-Assisted Suicide]; 15 *Hastings Const. L. Q.* 479 [The Judicial Role in Protecting the Privacy Right of Dying Incompetents]; 19 *Loyola L.A. L. Rev.* 61 [Discontinuing Treatment of Comatose Patients Who Have Not Executed Living Wills]; 23 *Loyola L.A. L. Rev.* 791 [Death and Life Decisions: Who Is in Control?]; 16 *Pacific L. J.* 877 [Withholding Food and Water from a Patient--Should It Be Condoned in California?]; 17 *Pepperdine L. Rev.* 461 [The Right to Refuse Life Sustaining Medical Treatment and the Noncompetent Nonterminally Ill Patient]; 20 *Pepperdine L. Rev.* 689 [Assisted Suicide: A Tough Pill to Swallow]; 2 *Pepperdine Dispute Resolution L. J.* 285 [The Right To Die: Definitional Inquiry and Search for Truth]; 28 *San Diego L. Rev.* 387 [Dignified Death and the Law of Torts]; 36 *San Diego L. Rev.* 997 [recovery for undertaking of life-extending medical procedures against patient's wishes]; 22 *Southwestern U. L. Rev.* 105 [The Search for a Constitutional Permit To Die]; 23 *Southwestern U. L. Rev.* 1 [Withdrawal of Life-Support in the Newborn: Whose Baby Is It?]; 23 *Southwestern U. L. Rev.* 103 [Just Whose Life Is It?: Establishing a Constitutional Right for Physician-Assisted Euthanasia]; 31 *Stanf. L. Rev.* 913 [empirical study of physicians' practices]; 48 *Stanf. L. Rev.* 937 [The Right to Choose How to Die: A Constitutional Analysis of State Laws Prohibiting Physician-Assisted Suicide]; 40 *U.C.L.A. L. Rev.* 1545 [*Artes Moriendi*: Active Euthanasia and the Art of Dying]; 93 *A.L.R.3d* 67 [patient's right to refuse treatment allegedly necessary to sustain life]; 48 *A.L.R.4th* 67 [judicial power to order discontinuance of life-sustaining treatment]; 58 *A.L.R.4th* 222 [maintenance or removal of life support

systems]; 87 *A.L.R.5th* 277 [construction and application of patient bill of rights statutes]; 40 Proof of Facts 3d 287 [grounds to refuse or discontinue life-sustaining treatment on behalf of incapacitated person]; 63 Am.Jur. Trials 1 [decisionmaking at the end of life].)

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2. Privilege.

a. In General.

5 Witkin Sum. Cal. Law Torts § 131

[§ 131] In General.

(1) *Nature of Privilege Defense.* Conduct that ordinarily would be tortious is not if it is privileged, i.e., if *justified or excused* for reasons of policy. (*Rest.2d, Torts §10*, Comment a; see Dobbs, *The Law of Torts* §68 et seq.; 1 Harper, James & Gray 3d §2.39 et seq., 3.10 et seq.; 2 California Affirmative Defenses, §41:1 et seq.; 74 *Am.Jur.2d* (2001 ed.), *Torts* §§42, 45.) The difference between a "privilege" limiting liability and an "immunity"[] is largely one of semantics, i.e., a person entitled to claim a privilege as a defense is immune from liability. (*Moore v. Conliffe* (1994) 7 C.4th 634, 639, footnote 1, 29 C.R.2d 152, 871 P.2d 204; on *evidentiary* privileges, see 2 *Cal. Evidence* (4th), *Witnesses*, §59 et seq.; on *privileged communications in defamation actions*, see *infra*, §561 et seq.; on *immunities under Tort Claims Act*, see *supra*, §§222 et seq., 345 et seq.)

(2) *Restatement Analysis.* The Torts Restatement classifies consent (*supra*, §126 et seq.) as one of the forms of privilege. (*Rest.2d, Torts §10(2)(a).*) It is defined as denoting "willingness in fact that an act or an invasion of an interest shall take place." (*Rest.2d, Torts §10A.*)

Apart from consent, the Restatement groups the various types of privilege into two classes, *conditional* and *absolute*:

(a) *Conditional privilege.* Some interest of the actor or of the public may be important enough to justify the harm, e.g., force used or personal injury inflicted in self-defense or defense of property (see *infra*, §417 et seq.), and confinement of the person or force used in a lawful arrest by a police officer or private person (see *infra*, §§424, 434 et seq.). The privilege exists in these cases because of the value of the interest (possession of land, personal security, etc.) to be protected, and it is available only where the person acts in good faith for the protection of the interest. An improper motive or purpose defeats the privilege. Hence, it is characterized as a "defeasible" or "conditional" privilege. (*Rest.2d, Torts §10*, Comment d; see *Gilmore v. Superior Court* (1991) 230 C.A.3d 416, 420, 421, 281 C.R. 343, *infra*, §*420, citing the text [defense of property is conditional privilege].) A conditional privilege is frequently referred to as a "qualified" privilege. (See *Butz v. Economou* (1978) 438 U.S. 478, 98 S.Ct. 2894, 2900, 57 L.Ed.2d 895, 906, *infra*, §178.)

(b) *Absolute privilege.* Certain persons performing public functions require a greater freedom from the annoyance

of litigation, and their acts are privileged, regardless of malice or other improper motive. Any inquiry into motive in these cases would unduly hamper their activities. This defense is known as "absolute privilege." (*Rest.2d, Torts* §10; see *infra*, §304 et seq.; *Easton v. Sutter Coast Hosp. (2000) 80 C.A.4th 485, 492, 95 C.R.2d 316*, *infra*, §150 [privilege for health practitioners' reports of elder abuse required by Elder Abuse and Dependent Adult Civil Protection Act is absolute]; *31 Pepperdine L. Rev. 915* [Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers].) (On particular privileges, see *Rest.2d, Torts* §§888 et seq., 895A et seq. [immunities].)

West's Key Number Digest, Torts k.16, 21

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(1) *Nature of Privilege Defense.* See *Delfino v. Agilent Technologies (2006) 145 C.A.4th 790, 806, 52 C.R.3d 376*, Supp., *infra*, §455 [immunity from tort liability provided by federal Communications Decency Act to computer service providers or users for communications of others (see *47 U.S.C., §230(c)(1)*) may apply to variety of causes of action]; *11 A.L.R. Fed 2d 779* [liability of Coast Guard for injury to persons or property while engaged in rescue activities].



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2. Privilege.

b. Emergency Medical Aid.

1. In General.

5 Witkin Sum. Cal. Law Torts § 132

[§ 132] In General.

At common law, a person not under an affirmative duty to aid another, who nevertheless undertook to do so for humanitarian motives, was subject to liability for failure to act with reasonable care. Thus, a physician who rendered emergency medical care could be sued for malpractice, and this possibility operated as a serious deterrent to rendering needed medical aid in emergency situations. "In response, California, in 1959, became the first state to enact Good Samaritan legislation altering the common law rights and obligations in the medical malpractice area." (*Colby v. Schwartz* (1978) 78 C.A.3d 885, 890, footnote 3, 144 C.R. 624 ["Currently, all 50 states and the District of Columbia have enacted some type of Good Samaritan legislation"]; on immunity of physicians rendering emergency medical care generally, see *infra*, §133 et seq.) (See Dobbs, *The Law of Torts* §252; 51 Cal. L. Rev. 816; 75 Harv. L. Rev. 641; 4 Pacific L. J. 665; 54 So. Cal. L. Rev. 417; 68 A.L.R.4th 294 [construction and application of Good Samaritan statutes].) A number of other statutes also relate to emergency medical care. (see *infra*, §§136, 137.)

"No person who in good faith, and not for compensation, renders emergency care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission." However, the "scene of an emergency," for purposes of this provision, "shall not include emergency departments and other places where medical care is usually offered." (*Health & Saf.C. 1799.102.*)

SUPPLEMENT: [This section is current through the latest supplement]

(6)(New) *Scope of Statutory Immunity.* In *Van Horn v. Watson* (2008) 45 C.4th 322, 86 C.R.3d 350, 197 P.3d 164, plaintiff, involved in a traffic accident, sued a friend who removed her from the car, alleging that defendant's actions caused permanent injury and rendered her a paraplegic. The trial court granted summary judgment for defendant on the ground of statutory immunity under *Health & Saf.C. 1799.102*. The Court of Appeal reversed. *Held*, judgment of Court of Appeal affirmed. Defendant was not immune.

(a) *Parties' contentions.* *Health & Saf.C. 1799.102* provides immunity for uncompensated emergency care at the scene of an emergency. Defendant argues that the statute applies broadly to both medical and nonmedical care rendered at the scene of any emergency, while plaintiff argues that the statute applies narrowly to those who render medical care at the scene of a medical emergency. (45 C.4th 327.)

(b) *Statutory analysis.* Under principles of statutory construction, *Health & Saf.C. 1799.102* immunizes only those who, in good faith, render medical care at the scene of a medical emergency. (45 C.4th 327.) A statute providing broad immunity would likely appear in the Civil Code. Instead, *Health & Saf.C. 1799.102* appears in the division of the Code entitled "Emergency Medical Services." Other statutes in this division expressly refer to emergency medical attention or care. This indicates that the Legislature intended this entire division to apply to medical emergencies. (45 C.4th 327.) Under *Health & Saf.C. 1797.70*, an "emergency" is a situation "in which an individual has a need for immediate medical care." This implies that "the scene of an emergency" under *Health & Saf.C. 1799.102* involves a medical emergency. This conclusion is further supported by the portion of *Health & Saf.C. 1799.102* that excludes from "the scene of an emergency" places where medical care is usually offered. Further, *Health & Saf.C. 1799.107*, intended to encourage public entities and emergency rescue personnel to give emergency assistance, broadly defines "emergency services" to include nonmedical situations, but expressly limits this definition to this particular section. (45 C.4th 329.)

(c) *Common law principles.* Defendant's broad interpretation of the statute would undermine established common law regarding liability for assisting others. Although there is no general common law duty to give assistance, a person who undertakes to help others has a duty to exercise due care. Nothing in the statute overcomes the judicial presumption that the Legislature does not intend to overrule established common law principles when it enacts legislation. (45 C.4th 332.)

(d) *Other "Good Samaritan" statutes.* A broad interpretation would also render superfluous other "Good Samaritan" statutes, such as *Govt.C. 50086* (immunity for person trained in first aid who is summoned by authorities and renders emergency services) and *Harb. & Nav.C. 656(b)* (immunity for person who assists at scene of vessel collision). (45 C.4th 333.)

A concurring and dissenting opinion, in which two justices concur, disagrees with the majority's limitation of the statute to medical care given in medical emergencies. "There is no reason why one kind of lay volunteer aid should be immune, while another is not." (45 C.4th 335.)



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b. Emergency Medical Aid.

2. Immunity of Physicians.

aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 133

[§ 133] In General.

(1) *Emergency Care at Scene of Accident.* No licensed doctor "who in good faith renders emergency care at the scene of an emergency, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care." Excepted from the immunity are wilful acts and omissions. (*B. & P.C.* 2395; see *Kearns v. Superior Court* (1988) 204 C.A.3d 1325, 1328, 252 C.R. 4 [surgeon responding to request for intraoperative assistance during critical stage of operation was protected by *B. & P.C.* 2395].)

"The scene of an emergency" includes, but is not limited to, hospital emergency rooms during medical disasters, i.e., duly proclaimed states of emergency. Immunity is granted for acts or omissions that occur either after the declaration of a medical disaster or prior to the declaration but after commencement of the disaster. (*B. & P.C.* 2395.)

(2) *Emergency Care for Complication From Prior Care.* Similar immunity is granted to a doctor who, at the request of another doctor, renders emergency care "for medical complication arising from prior care" by another doctor. (*B. & P.C.* 2396; see *Burciaga v. St. John's Hosp.* (1986) 187 C.A.3d 710, 716, 717, 232 C.R. 75, *infra*, §134 [pediatrician rendering emergency care at request of obstetrician]; *Perkins v. Howard* (1991) 232 C.A.3d 708, 717, 283 C.R. 764 [*B. & P.C.* 2396 protects physician responding in good faith regardless of whether physician calling for assistance could or should have anticipated the emergency requiring assistance].)

(3) *Emergency Care for Participant in Athletic Event.* Immunity is also granted to a doctor "who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event or contest, at the site of the event or contest, or during transportation to a health care facility," unless the doctor's conduct constitutes gross negligence. (*B. & P.C.* 2398.)

(4) *Determination That Emergency Exists.* In *Bryant v. Bakshandeh* (1991) 226 C.A.3d 1241, 277 C.R. 379, the trial judge held that the Good Samaritan immunity applied and granted summary judgment for defendant doctor, on the ground that whether an emergency exists and an unforeseen complexity creates the necessity to obtain assistance to complete surgery is determined by the operating surgeon. *Held*, reversed. It is for the trier of fact to determine whether

the surgeon had a reasonable, good faith belief that he was responding to an emergency situation, or whether, under the circumstances, a doctor acting in good faith would have reasonably concluded that no emergency existed. (226 C.A.3d 1247.)

The issue whether an emergency that initially triggered Good Samaritan immunity continues to exist at any given juncture is likewise "an issue of fact, which must be determined in the same manner as the issue of whether an emergency existed in the first instance." (*Breazeal v. Henry Mayo Newhall Memorial Hosp.* (1991) 234 C.A.3d 1329, 1337, 286 C.R. 207.)

(5) *Effect of Election Not To Transfer Patient.* In *Breazeal*, *supra*, plaintiff contended that the immunity was not available because the patient's condition was sufficiently stable to permit transfer to another hospital with better facilities, and that in electing to retain the patient defendant doctors established an ordinary doctor-patient relationship with him. In rejecting this theory the court said: "There is no support in the language of the Good Samaritan statutes for such a limitation. Nor would such a limitation produce results consistent with the statutory purpose. The encouragement ... to provide emergency care will be inevitably and greatly diminished if physicians know that, however urgently *some* care might be needed in any given situation, the availability of Good Samaritan immunity will depend upon whether the responding physician guesses correctly as to whether he or she is the best person reasonably available to provide that care. The statutory purpose would be seriously undermined if immunity were denied to physicians who provided care where care was plainly and urgently needed, merely because a jury could conclude with the benefit of hindsight that another physician would have provided superior care."; (234 C.A.3d 1340.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Determination That Emergency Exists.* See *Reynoso v. Newman* (2005) 126 C.A.4th 494, 500, 24 C.R.3d 5 [where it was undisputed that emergency did in fact exist, doctor's subjective belief whether he was responding to actual emergency was irrelevant; objective test applies in determining whether emergency exists].



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2. Privilege.

b. Emergency Medical Aid.

2. Immunity of Physicians.

bb. Distinction: Physician Assigned to Emergency Duties.

5 *Witkin Sum. Cal. Law Torts* § 134

[§ 134] Distinction: Physician Assigned to Emergency Duties.

(1) *Doctor Liable Where Treatment Is Part of Normal Practice.* In *Colby v. Schwartz* (1978) 78 C.A.3d 885, 889, 144 C.R. 624, decedent was seriously injured in an automobile accident in the early morning hours. He was taken to the emergency room of defendant hospital, given emergency treatment, and later prepared for surgery by defendant doctors. The surgery began at 3 p.m. and decedent died at 4:30 p.m. In this action, defendants were granted summary judgment on the basis of former B. & P.C. 2144 and 2144.5 (now B. & P.C. 2395 and 2396, *supra*, §133). *Held*, reversed. The declarations showed that defendants operated on decedent in the normal course of their practice as members of the hospital emergency call panel, and this did not constitute "emergency" medical care as the term is used in the statute. The statutory immunity is given to physicians who, by chance and on an irregular basis, render emergency care; often the physician would not have the skills of a specialist and the facilities available could be severely limited. Defendants, by contrast, were practicing within the area of their expertise and with the benefits of full hospital facilities; they did not need the added inducement that immunity from civil liability would provide. "Moreover, excusing such physicians of their negligence could have the adverse effect of lowering the quality of their medical care without justification. And further, to extend immunity to such physicians would deny an overly broad spectrum of malpractice victims of their legal remedies." (78 C.A.3d 892.) (See 54 So. Cal. L. Rev. 417 [Colby].)

(2) *Doctor Not Liable When Responding to Emergency Call.* In *McKenna v. Cedars of Lebanon Hosp.* (1979) 93 C.A.3d 282, 155 C.R. 631, the doctor was a "volunteer" rather than a member of a regular emergency staff. The court said: "While dicta in *Colby* may lead to an interpretation that the statute is not applicable to emergency medical treatment in a hospital, the holding of the case does not compel that result." (93 C.A.3d 286.) (See 54 So. Cal. L. Rev. 417 [Colby and McKenna].)

McKenna was followed in *Burciaga v. St. John's Hosp.* (1986) 187 C.A.3d 710, 232 C.R. 75. Dr. T, the obstetrician delivering plaintiff at 9:30 a.m., observed that the umbilical cord was entangled about plaintiff's neck and feet and that he suffered from severe intrauterine anoxia. Dr. T requested the services of a pediatrician, and defendant Dr. G, a pediatrician visiting his patients in the hospital, responded to the call within a minute. He discovered that the infant was cyanotic, gave him emergency treatment, and made several efforts to place him in a hospital with a neonatal intensive

care unit, which efforts finally were successful at 5 p.m. Plaintiff, now 6 years old and suffering cerebral palsy and permanent neurological damage, brought this malpractice action, contending that the Good Samaritan statutes did not shield Dr. G because he was an active member of the hospital staff with a duty to treat infants born there. *Held*, summary judgment for Dr. G affirmed.

(a) Plaintiff contended that because Dr. G was in the hospital when he was summoned for aid, he had a duty to treat plaintiff. "Under such reasoning, the Good Samaritan laws would grant immunity only to physicians who, without specialized expertise, respond by chance to medical emergencies that occur outside the hospital such as a roadside injury." (187 C.A.3d 715.) But B. & P.C. 2395 and 2396 contain no provision restricting the site of an emergency, and therefore apply to emergencies both within and without a hospital. (187 C.A.3d 715, 716.)

(b) Plaintiff also contended that *McKenna* was not controlling because the defendant in that case was a chief resident without specialized expertise, while Dr. G was a specialist. But the statutes do not limit immunity to only those physicians treating patients outside the physicians' specialties. "Such a restriction would deny victims the benefit of knowledgeable and experienced care and would not promote the legislative purpose of inducing physicians to provide medical care to those in need." (187 C.A.3d 716.)

(c) "The heart of the application of the Good Samaritan statutes is the inquiry whether a duty of professional care pre-existed the emergency." (187 C.A.3d 716.) Plaintiff was not Dr. G's patient, and Dr. T. did not customarily refer patients to him. Dr. G was present in the hospital only because he was treating his own hospitalized patients. He cancelled his office appointments for the day in order to treat plaintiff. That a medical emergency fortuitously occurred while he was in the hospital creates no duty to plaintiff. There was no evidence that Dr. G was employed by the hospital, and it is not a reasonable inference that because he was an active staff member, the hospital had designated him to treat newborns in the event of an emergency. (187 C.A.3d 716.)

In *Perkins v. Howard* (1991) 232 C.A.3d 708, 719, 283 C.R. 764, a responding physician who had no business relationship with the treating physician and no medical relationship with the patient was deemed a "volunteer," immune from liability under the Good Samaritan statutes, even though he had treated the patient for an earlier, unrelated problem.

(3) *Emergency Obstetrical Services*. Doctors rendering *emergency obstetrical services* on an on-call basis are not liable for negligent acts or omissions in the good faith rendering of these services to a hospital emergency room. (B. & P.C. 2395.5(a).) The immunity does not apply in the following circumstances:

(a) The doctor's acts or omissions constitute gross negligence, recklessness, or wilful misconduct. (B. & P.C. 2395.5(a).)

(b) The doctor received consideration for serving on an on-call basis, or was required to so serve, unless the hospital expressly, in writing, accepts liability for the doctor's negligence. (B. & P.C. 2395.5(b)(1); see B. & P.C. 2395.5(c) [B. & P.C. 2395.5 does not otherwise affect hospital's liability for negligence].)

(c) The doctor had provided prior services to the same patient for a condition relating to the obstetrical condition requiring emergency services. (B. & P.C. 2395.5(b)(2).)

(d) Before rendering the emergency services, the doctor had either a reasonable expectation of payment for the services or a contractual obligation with the patient, another doctor, or a third-party payer on the patient's behalf to provide obstetrical care for the patient. (B. & P.C. 2395.5(b)(3).)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Immunity of Physicians.

cc. Distinction: Services Rendered to Scheduled Patient.

5 *Witkin Sum. Cal. Law Torts* § 135

[§ 135] Distinction: Services Rendered to Scheduled Patient.

In *Street v. Superior Court* (1990) 224 C.A.3d 1397, 274 C.R. 595, defendant Dr. C and his brother owned and operated a medical group. Decedent came to the clinic for a diagnostic test, which was negligently performed by Dr. D. Defendant Dr. C. then took control of the emergency treatment, but the patient died. *Held*, the immunity of the Good Samaritan statutes was unavailable.

(a) The immunity has been upheld in a number of cases in which the physicians were rendering emergency treatment inside hospitals. (225 C.A.3d 1402, citing *Kearns v. Superior Court* (1988) 204 C.A.3d 1325, 252 C.R. 4, *McKenna v. Cedars of Lebanon Hosp.* (1979) 93 C.A.3d 282, 155 C.R. 631, *supra*, §134, and *Burciaga v. St. John's Hosp.* (1986) 187 C.A.3d 710, 232 C.R. 75, *supra*, §134.) But none involved the situation presented here, of an owner of a medical facility who renders emergency aid to a scheduled patient. (224 C.A.3d 1403.)

(b) The correct rule is stated in a Georgia case: "If the doctor had a particular employment duty to aid the patient at the hospital or had a pre-existing doctor-patient relationship to the patient he aided, then he had a duty to the patient to begin with; and in such a case he does not need a special inducement to offer aid, the aid he offers is not 'voluntary' in the sense of a Good Samaritan, and public policy would be ill-served if he were relieved of the usual physician's duty of care and given immunity in such a case." (224 C.A.3d 1403, quoting *Clayton v. Kelly* (1987) 183 Ga.App. 45, 47, 357 S.E.2d 865, 868.)

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aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 136

[§ 136] In General.

In addition to the Good Samaritan laws primarily directed to physicians (*supra*, §133 *et seq.*), many other statutes grant immunity from civil liability to specified persons or agencies for acts or omissions occurring during good faith emergency treatment. The following are among those given immunity:

(1) *Dentist*. A licensed dentist has immunity for emergencies occurring and treated outside the dentist's place of practice, and for emergency care given on request of another licensed dentist as the result of complications from prior care. (*B. & P.C. 1627.5*.)

(2) *Nurse*. Immunity extends to a licensed nurse who renders emergency care "outside both the place and the course of that person's employment." The immunity is lost, however, if the nurse is grossly negligent. (*B. & P.C. 2727.5*.) (On similar immunity for vocational nurse, see *B. & P.C. 2861.5*; 6 *Pacific L. J.* 423 [discussing *B. & P.C. 2861.5*].)

(3) *Veterinarian*. "A veterinarian who on his or her own initiative, at the request of an owner, or at the request of someone other than the owner, renders emergency treatment to a *sick or injured animal* at the scene of an accident shall not be liable in damages to the owner of that animal in the absence of gross negligence." (*B. & P.C. 4826.1*.)

(4) *School District or Officer, etc., Treating Student*. A school district or officer, school principal, physician, or hospital is not liable for administering "reasonable treatment" to a child without the consent of the child's parent or guardian when the child is ill or injured during school hours, needs reasonable medical treatment, and the parent or guardian cannot be reached. The immunity is inapplicable if the parent or guardian previously filed written objection to any treatment other than first aid. (*Educ.C. 49407*.) (On similar immunity for treatment of community college students, see *Educ.C. 76407*.)

School districts are authorized, in the absence of a licensed nurse, to provide emergency medical training to school personnel to administer emergency medical assistance to diabetic pupils suffering from severe hypoglycemia. (*Educ.C. 49414.5*.) It is the intent of the Legislature that *Health & Saf.C. 1799.102* (*supra*, §132) apply in this situation. (Stats.

2003, Chap. 684, §2.)

(5) *Operator of Vessel*. A vessel operator is not liable for providing or arranging for medical treatment "where the assisting person has acted as an ordinary, reasonably prudent person would have acted under the same or similar circumstances." (*Harb. & Nav.C. 656(b)*.)

(6) *Agency or Person Providing Emergency Medical Care Training*. To encourage the training of people in emergency medical care, a public or private agency providing that training is not liable for any resulting damages. (*Health & Saf.C. 1799.100*; see *McAlexander v. Siskiyou Joint Community College* (1990) 222 C.A.3d 768, 774, 272 C.R. 70 [immunity applied where injuries were sustained by student taking part in belay rope training exercise during training]; *Duckett v. Pistoiresi Ambulance Service* (1993) 19 C.A.4th 1525, 1533, 24 C.R.2d 304 [injury sustained during ambulance attendant module of training; immunity barred relief].)

Similarly, neither a physician or nurse providing emergency instruction to paramedics, nor any paramedic following that instruction is liable for resulting damages. (*Health & Saf.C. 1799.104*.)

(7) *Trained Volunteer*. Immunity is extended to a person who has had first aid training and is summoned by authorities to voluntarily assist in a search or rescue operation. (*Govt.C. 50086*.)

(8) *Firefighter, Law Enforcement Officer, or Emergency Medical Technician*. Firefighters, law enforcement officers, and emergency medical technicians, and the agencies hiring them, are not liable for damages resulting from emergency treatment rendered at the scene of an emergency, unless they acted in a grossly negligent manner or without good faith. (*Health & Saf.C. 1799.106*; see *Wright v. Los Angeles* (1990) 219 C.A.3d 318, 347, 268 C.R. 309 [paramedic was guilty of gross negligence in examining fight victim who later died of sickle cell shock]; 16 A.L.R.5th 605 [liability of ambulance attendants, emergency medical technicians, etc., rendering emergency medical care outside hospital].) Emergency rescue personnel, defined as members of a federal, state, local, or private firefighting agency, are not liable unless they act in bad faith or in a grossly negligent manner. (*Health & Saf.C. 1799.107*; see *Eastburn v. Regional Fire Protection Authority* (2003) 31 C.4th 1175, 1185, 7 C.R.3d 552, 80 P.3d 656, *infra*, §343 [immunity of *Health & Saf.C. 1799.107* extends to 911 dispatchers].)

(9) *Person Helping Another Person Choking on Food*. Neither the proprietor of a restaurant nor any other person who, in accordance with instructions promulgated by the state Department of Health Services, assists a person choking on food is liable for resulting damages. (*Health & Saf.C. 114180(d)*.)

(10) *Poison Control Centers*. A poison information specialist or provider that provides emergency information or advice in accordance with protocols approved by a poison control center's medical director is liable only for acts or omissions performed in a grossly negligent manner or in bad faith. (*Health & Saf.C. 1799.105(b)*.) And the medical director is liable only for acts or omissions performed in a grossly negligent manner or in bad faith when providing emergency information not covered by an approved protocol. (*Health & Saf.C. 1799.105(c)*.) Immunity is granted the poison control center with respect to the acts or omissions for which its medical director, poison information specialist, or poison information provider are thus immune. (*Health & Saf.C. 1799.105(a)*.) (See 20 *Pacific L. J.* 737.)

(11) *Hospital or Physician Detaining Mentally Disordered or Gravely Disabled Person*. A general acute care hospital, its licensed professional staff, and any physician or surgeon providing emergency medical services to a mentally disordered or gravely disabled person at the hospital are not liable for detaining the person, or for the actions of the person following release from the hospital, if prescribed conditions exist. (*Health & Saf.C. 1799.111*.) Also, no person authorized to detain another under the Lanterman-Petris-Short Act (*Welf.C. 5000 et seq.*, 3 *Cal. Proc.* (4th), *Actions*, §29 *et seq.*) may be held liable for exercising that authority "in accordance with the law." (*Welf.C. 5278*.)

(12) *Persons or Teams Attempting Resuscitation*. (See *infra*, §137.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Dentist. B. & P.C. 1627.5* was amended in 2008 to provide immunity to a licensed dentist who voluntarily and without compensation provides emergency medical care, consistent with his or her dental education and emergency training, and negligently causes injury, death, or property damage during a declared state of emergency.(9) *Person Helping Another Person Choking on Food. Health & Saf.C. 114180(d)* was repealed in 2006.

(11) *Hospital or Physician Detaining Mentally Disordered or Gravely Disabled Person.*

Lanterman-Petris-Short Act:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §80 et seq.



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bb. Persons or Teams Attempting Resuscitation.

5 *Witkin Sum. Cal. Law Torts* § 137

[§ 137] Persons or Teams Attempting Resuscitation.

(1) *Hospital Rescue Team*. Immunity is granted for an act or omission by a rescue team in attempted resuscitation in good faith of a person in immediate danger of loss of life. The immunity is given to the health facility, public or private, its officers, staff, and employees, and the federal or state government or a county. (*Health & Saf. C. 1317(f)*.) "Rescue team" is defined as "a special group of physicians and surgeons, nurses, and employees of a health facility who have been trained in cardiopulmonary resuscitation and have been designated by the health facility to attempt, in cases of emergency, to resuscitate persons who are in immediate danger of loss of life." (*Health & Saf.C. 1317(g)*.) However, the health facility is not relieved of any legal duty involved in designation and training of members of the team, or for providing or maintaining its equipment. (*Health & Saf.C. 1317(h)*.) (See *Lowry v. Henry Mayo Newhall Memorial Hosp.* (1986) 185 C.A.3d 188, 192, 229 C.R. 620 [language of *Health & Saf.C. 1317* clearly refers to designated members of hospital rescue team; hence, it cannot be construed as Good Samaritan statute designed to apply only to volunteers]; 64 A.L.R.4th 1200 [liability for injury or death allegedly caused by activities of hospital "rescue team"].)

(2) *Trained Person Administering CPR*. A person who has completed a basic cardiopulmonary resuscitation course that complies with specified standards, and who in good faith renders that resuscitation at the scene of an emergency, is generally immune from liability for resulting damages. (C.C. 1714.2(a).) Immunity, however, does not extend to conduct constituting gross negligence. (C.C. 1714.2(b).) Also, no immunity exists where the person renders emergency care to an individual "with the expectation of receiving compensation from the individual." (C.C. 1714.2(e).)

Local agencies, entities of the state or local government, and other public or private organizations that sponsor, authorize, support, finance, or supervise cardiopulmonary resuscitation training are immune from liability for damages resulting from the training programs. (C.C. 1714.2(c).) A certified instructor is immune from liability for the acts or omissions of a person who received instruction from the instructor. (C.C. 1714.2(d).) (See 9 *Pacific L. J.* 678.)

(3) *Trained Person Using AED*. A person who in good faith and not for compensation, renders emergency care or treatment by the use of an automatic external defibrillator (AED) at the scene of an emergency is not liable for resulting damages. (C.C. 1714.21(b).) Also, a person or entity who provides CPR and AED training to the person rendering AED

emergency care is immune from liability for damages resulting from acts or omissions of the person rendering the emergency care. (C.C. 1714.21(c).) And a person or entity that acquires an AED for emergency use is not liable for damages resulting from acts or omissions in rendering emergency care if that person or entity has complied with specified requirements regarding training for and use of AEDs. (C.C. 1714.21(d).) A physician involved with the placement of an AED and a person or entity responsible for the site where an AED is located are not liable for damages resulting from acts or omissions of the person rendering the care, if that physician, person, or entity has complied with applicable requirements for training and use of AEDs. (C.C. 1714.21(e).) (See *Health & Saf.C. 1797.196* [requirements for AED training and use].)

These immunities do not apply where personal injury or wrongful death results from the gross negligence or wilful or wanton misconduct of the person who renders AED emergency care or treatment. (C.C. 1714.21(f).) Also, nothing in these provisions relieves a manufacturer, designer, developer, distributor, installer, or supplier of an AED of liability under any applicable statute or rule of law. (C.C. 1714.21(g).)

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4. Refusal To Render Emergency Services.

5 Witkin Sum. Cal. Law Torts § 138

[§ 138] Refusal To Render Emergency Services.

Neither a health facility and its employees, nor a physician, surgeon, dentist, clinical psychologist, or podiatrist is liable for refusing to render emergency services if the refusal is based on a reasonable determination of either of the following:

- (1) There is no emergency. (*Health & Saf. C. 1317(c).*)
- (2) The facility lacks appropriate equipment or qualified personnel. (*Health & Saf. C. 1317(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Immunization Programs.

5 Witkin Sum. Cal. Law Torts § 139

[§ 139] Immunization Programs.

(1) *Elderly and Other High-Risk Groups*. The Department of Health Services is required to provide flu and pneumonia vaccines without cost to local governmental or private nonprofit agencies, in order that these agencies may provide the vaccine at minimal cost to older persons and other high-risk groups. (*Health & Saf.C. 104900(a), (b).*) The program is designed to utilize voluntary assistance from public or private sectors. (*Health & Saf.C. 104900(c).*)

Immunity is provided, as follows, from liability for injury (including residual effects) caused by an act or omission in administering the vaccine or other immunizing agent:

(a) *Scope of immunity*. The immunity extends to a "private, nonprofit volunteer agency" whose involvement in the program is limited to providing a "clinic site or promotional and logistical support"; and to the agency's employees or members. (*Health & Saf.C. 104900(f).*)

(b) *Conditions of immunity*. The immunity exists if (1) the immunization is performed pursuant to the statute in conformity with applicable federal, state, or local governmental standards, and (2) the act or omission does not constitute wilful misconduct or gross negligence. (*Health & Saf.C. 104900(f).*)

(2) *Minors*. Immunity is provided for "any injury caused by an act or omission in the administration of a vaccine or other immunizing agent to a minor," including residual effects, if (a) the immunization is required by state law or given as part of an outreach program established by the Department of Health Services (see *Health & Saf.C. 120400 et seq.*), and (b) the act or omission does not constitute wilful misconduct or gross negligence. (*Health & Saf.C. 120455.*) (See *Flood v. Wyeth Laboratories* (1986) 183 C.A.3d 1272, 1278, 1279, 228 C.R. 700 [plaintiff child, suffering brain damage as result of immunization on admission to school, was not barred from recovery against defendant manufacturer of drug; word "administration" in immunity provision is not intended to include manufacturing activities]; *Salasguevara v. Frye* (1995) 31 C.A.4th 330, 336, 37 C.R.2d 40 [physician who administered DPT vaccine to infant was not liable for infant's resulting injuries, notwithstanding that administration of vaccine was contraindicated and therefore below standard of care, where administration of vaccine was required by statute].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Elderly and Other High-Risk Groups*. See 59 *Stanf. L. Rev.* 1753 [immunity for immunizations].



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d. Report of Child Abuse or Neglect.

1. In General.

5 *Witkin Sum. Cal. Law Torts* § 140

[§ 140] In General.

(1) *Reporting Requirements and Authorization.* The Child Abuse and Neglect Reporting Act (P.C. 11164 et seq.) requires specified persons to report known or reasonably suspected instances of child abuse or neglect. (P.C. 11166(a); see P.C. 11165.6 [defining "child abuse and neglect"]; P.C. 11166(a) [mandated reporter who knows or reasonably suspects that home or institution in which child resides is unsuitable because of abuse or neglect must report that condition].) The report must be made immediately or as soon as practicably possible (P.C. 11166(a)) to a police or sheriff's department, the county probation department if designated to receive the reports, or the county welfare department (P.C. 11165.9; see P.C. 11166(i), 11166(j), 11166.1 et seq., 11169 et seq. [action on reports by public agencies]; *Burt v. Orange* (2004) 120 C.A.4th 273, 279, 15 C.R.3d 373 [parent was entitled to hearing on agency's decision to file report with Child Abuse Central Index finding that allegation of suspected child abuse was either substantiated or inconclusive; due process, based on right to privacy, mandates procedure to challenge child abuse reports, and Act's reporting limitations, notification requirement, and expungement remedy impliedly recognize that right].) "Mandated reporters" include, among others, childcare custodians, health practitioners, child protective agency employees, teachers, social workers, peace officers, and clergy members. (P.C. 11165.7; see P.C. 11166.5 [statements by mandated reporters on employment promising compliance with reporting requirements].) Any other person *may* report known or suspected child abuse or neglect. (P.C. 11166(f).) The form and content of the reports is prescribed by the Act (see P.C. 11166(a), 11167, 11168) and the reports are generally privileged (*infra*, §141 et seq.). (For detailed treatment of reporting requirements, see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §156.)

(2) *Confidentiality and Disclosure.* The *identity* of all persons who report is confidential. Disclosure is permitted only (a) between agencies receiving or investigating mandated reports; (b) to counsel in designated criminal, juvenile, or administrative proceedings involving child abuse or neglect; (c) to a licensing agency where abuse in out-of-home care is involved; (d) when the person waives confidentiality; (e) by court order. (P.C. 11167(d)(1).) No disclosure may be made to the person's employer except with the person's consent or by court order. (P.C. 11167(d)(2).)

Both mandatory and optional *reports* are confidential. (P.C. 11167.5(a).) Reports may be disclosed only to the persons or agencies to whom disclosure of the reporting party's identity is permitted or to designated persons or agencies involved in investigation, treatment, or licensing. (P.C. 11167.5(b), (c).) Disclosure is not required if

prohibited by other state or federal law. (P.C. 11167.5(e).)

However, neither the physician-patient (see 2 *Cal. Evidence* (4th), *Witnesses*, §196 et seq.) nor the psychotherapist-patient (see 2 *Cal. Evidence* (4th), §211 et seq.) privilege applies in any court proceeding or administrative hearing to information reported pursuant to the Act. (P.C. 11171.2(b), 2 *Cal. Evidence* (4th), *Witnesses*, §234.)

West's Key Number Digest, Infants k.256, Torts k.16

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Reporting Requirements and Authorization*. P.C. 11165.9, as amended in 2005, prohibits agencies receiving reports of child abuse or neglect from refusing to accept them, and requires the agencies to keep records of all reports received.

P.C. 11166(f), (i), and (j) were relettered in 2005 as P.C. 11166(g), (j), and (k), respectively.

As amended in 2006, P.C. 11165.9 and 11166(a) not only require reports of suspected child abuse or neglect, but also authorize reports of instances where a child suffers or is at substantial risk of suffering serious emotional damage.



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2. Nature and Scope of Immunity.

5 Witkin Sum. Cal. Law Torts § 141

[§ 141] Nature and Scope of Immunity.

(1) *Immunity Provisions.* A mandated reporter (supra, §140) is immune from civil or criminal liability for the submission of any required or authorized report of child abuse or neglect. Similar immunity is granted to *any other person* submitting a report, unless he or she knew that the report was false or made with reckless disregard for the truth. (P.C. 11172(a).) (See *McMartin v. Children's Institute Int.* (1989) 212 C.A.3d 1393, 1401, 261 C.R. 437 [childcare custodian's immunity under P.C. 11172 was not affected by allegations that its employee was unlicensed and used unorthodox methods in interviewing children].)

(2) *Immunity of Mandated Reporter Is Absolute.* In *Storch v. Silverman* (1986) 186 C.A.3d 671, 231 C.R. 27, plaintiffs brought an action against defendant doctors and hospital for malpractice and negligent infliction of emotional distress. Both causes of action were based on allegations of defendants' negligence in reporting that plaintiff's daughter was a suspected child abuse victim. Despite plaintiff's contention that P.C. 11172 was inapplicable to negligent or knowingly false reports, the trial judge gave a judgment for defendants on demurrer. *Held*, affirmed; the immunity granted by P.C. 11172 is *absolute*.

(a) Plaintiffs' argument for qualified immunity was based on the following reasoning: (1) P.C. 11166 requires a report only where the practitioner "knows or reasonably suspects" child abuse; (2) P.C. 11172 grants immunity only to reports "required or authorized"; (3) hence, a report must meet the standards of P.C. 11166 to qualify for immunity. (186 C.A.3d 678.) But, this interpretation would render P.C. 11172 virtually meaningless. "There is no need for immunity when there can be no liability, as in the case of reports that are true or based upon objectively reasonable suspicion." (186 C.A.3d 678.)

(b) The legislative history is also contrary to plaintiffs' position. Under former P.C. 11161.5, all reporters, whether required to report or not, were immune unless they "knew or should have known" that the report was false. With the enactment of P.C. 11172, the Legislature made the "known or should have known" qualification applicable only to persons voluntarily reporting, thereby evidencing an intention to eliminate this limitation on immunity for persons required to report. (186 C.A.3d 679.) (See *Thomas v. Chadwick* (1990) 224 C.A.3d 813, 820, 274 C.R. 128, *infra*, §144 [even intentionally false reports by mandated reporter are immunized; following *Storch v. Silverman*].)

(3) *Matters Subject to Immunity.* The immunity from liability granted by P.C. 11172 extends not only to making an initial report, but also to conduct giving rise to the obligation to report, such as the collection of data, or the observation, examination, or treatment of the suspected victim performed in a professional capacity, and to subsequent communications between the reporter and the public authorities responsible for investigating or prosecuting child abuse. (*Robbins v. Hamburger Home for Girls* (1995) 32 C.A.4th 671, 679, 38 C.R.2d 534, *infra*, §143; on application of immunity to postreporting activities, see *infra*, §§142, 143.) The immunity extends to the entire report, including even potentially irrelevant statements. (*Stecks v. Young* (1995) 38 C.A.4th 365, 374, 45 C.R.2d 475.)

(4) *Persons Immune.* The immunity applies not only to those who actually make the reports, but also to all those who participate in the process. Limitation of immunity to the person making the telephone call or signing the report would defeat the legislative purpose of promoting the reporting of child abuse. Thus, in *Storch v. Silverman, supra*, where the complaint alleged that all defendants "supported and/or submitted" a report, each physician who either actually submitted a report or supported the submission was immune. And because the liability of defendant hospital was, under respondeat superior, necessarily based on the negligence of one of the other defendants, it too was immune. (186 C.A.3d 681.)

However, the immunity extends only to persons involved in reporting the child abuse or neglect, and not to actions taken by officials who receive the reports. (*Newton v. Napa* (1990) 217 C.A.3d 1551, 1557, 1558, 266 C.R. 682.)

(5) *Reimbursement for Legal Fees and Costs.* In the event that, despite immunity, an action based on a required or authorized report is initiated against a mandated reporter, the mandated reporter may, on obtaining a dismissal of the action or a favorable judgment, obtain reimbursement for reasonable attorneys' fees and costs from the state Board of Control. However, the right to reimbursement does not exist if a public entity has provided for the defense of the action. (P.C. 11172(c).) Also, the fees recovered may not exceed either the hourly rate charged by the Attorney General or an aggregate amount of \$ 50,000. (P.C. 11172(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Immunity Provisions. Qualified immunity of voluntary reporters:* See *Siam v. Kizilbash* (2005) 130 C.A.4th 1563, 1574, 1578, 31 C.R.3d 368 [P.C. 11172(a), imposing liability on voluntary reporters for knowingly false child abuse reports, does not violate First Amendment; also, liability is not limited to reports made to listed agencies but extends to reports made to persons legally required to transmit those reports to listed agencies]; *Chabak v. Monroy* (2007) 154 C.A.4th 1502, 1512, 65 C.R.3d 641 [liability of voluntary reporters for false reports does not apply to reports by alleged victims; P.C. 11172(a) is limited to reports by third parties about suspected instances of child abuse]. (5) *Reimbursement for Legal Fees and Costs.* P.C. 11172(c) was amended in 2006 to refer to the California Victim Compensation and Government Claims Board, rather than the state Board of Control.



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aa. Subsequent Statements.

5 *Witkin Sum. Cal. Law Torts* § 142

[§ 142] Subsequent Statements.

(1) *By Reporters.* In *Ferraro v. Chadwick* (1990) 221 C.A.3d 86, 270 C.R. 379, plaintiffs' son fell down some stairs and died after being treated by defendants doctor and hospital. After making a report of suspected child abuse as required by P.C. 11166(a) (*supra*, §140), defendants made statements to law enforcement agencies that led to a dependency proceeding involving plaintiffs' daughter and a criminal prosecution for the death of their son. Both proceedings were resolved in plaintiffs' favor, and plaintiffs then brought this action for negligent and intentional infliction of emotional distress and malicious prosecution. *Held*, judgment for defendants on demurrer affirmed.

(a) *Immunity for authorized reports.*

(1) P.C. 11172(a) provides reporters with immunity for all reports required *or authorized*. To avoid treating the words "or authorized" as mere surplusage, it must be assumed that the Legislature foresaw that reporters would have occasion to make reports other than those required by the Act, and intended that these authorized reports be protected by the same immunity that protects the required reports. (221 C.A.3d 92.) This construction is in accord with the goal of rectifying the problem of inadequate child abuse reporting, particularly by professionals. (221 C.A.3d 94.)

(2) Numerous provisions in the Act involve reporting other than that required by P.C. 11166(a). It is reasonable to infer that the Legislature anticipated that the reporter would be contacted and interviewed by the agency conducting the investigation, and sanctioned any communication between reporter and agency. (221 C.A.3d 94.) Hence, regardless of which party initiated the contact, communications by a reporter to child protective or law enforcement agencies that are statutorily entitled to receive and investigate reports of child abuse are "authorized" reports under the Act, and are, therefore, within the protection of P.C. 11172(a). (221 C.A.3d 95.)

(3) *Storch v. Silverman* (1986) 186 C.A.3d 671, 231 C.R. 27, *supra*, §141, held that the immunity provided for required reports is absolute. There is nothing in the language of P.C. 11172(a) suggesting that less immunity should be provided for authorized reports. (221 C.A.3d 95.)

(b) *Effect of dismissal of dependency proceeding.* Plaintiffs argued that after the dismissal of the dependency proceeding concerning their daughter, defendants lost their immunity for communications with law enforcement agencies concerning the death of their son. This position is untenable:

(1) Plaintiffs' position blurs the distinction between a dependency proceeding to protect the welfare of the child and a proceeding to determine the defendant's criminal liability. These are litigated separately. (221 C.A.3d 96.) And, although *Lockwood v. Superior Court* (1984) 160 C.A.3d 667, 206 C.R. 785, 7 Cal. Proc. (4th), Judgment, §336, held that a finding of no abuse in a dependency proceeding collaterally estops a subsequent criminal prosecution on the same evidence, it did not hold that the finding automatically stops all criminal investigatory activity. (221 C.A.3d 96.)

(2) Ending the reporter's immunity after dismissal of a dependency proceeding would reduce the desired cooperation between the district attorney investigating suspected child abuse and the reporter, who in many cases would hesitate to supply additional information out of fear of exposure to liability. (221 C.A.3d 97.) (See *Thomas v. Chadwick* (1990) 224 C.A.3d 813, 222, 274 C.R. 128, infra, §144 [Child Abuse and Neglect Reporting Act contemplates that mandated reporters may be involved in communications beyond initial "required" report; following *Ferraro*].)

(2) *By Others.* *Ferraro v. Chadwick* was distinguished in *James W. v. Superior Court* (1993) 17 C.A.4th 246, 21 C.R.2d 169. A hospital, after determining that plaintiffs' 8-year-old daughter had been raped and sodomized, filed a report under the Child Abuse and Neglect Reporting Act. Although the daughter claimed that the assailant was a man who had climbed through her bedroom window, a hospital worker and a detective accused plaintiff father. Soon thereafter, the county department of social services referred plaintiffs to defendant family counselor and placed the daughter in defendant foster home. Over the next 21/2 years, defendants allegedly campaigned incessantly to force the daughter to identify her father as her assailant despite possessing knowledge indicating that another man, who was a registered sex offender, was the guilty party. Finally, allegedly in order to return to her home, the daughter named her father as the assailant. Plaintiff father was charged with the crime, but all charges were dropped when newly discovered extrinsic evidence established that he could not have been the assailant. In the present action, the trial judge sustained demurrers to most of the causes of action on the ground that defendants were immune under P.C. 11172. *Held*, this was error; the statute does not apply to acts performed, after the report of abuse, by parties not acting as reporters.

(a) The focus of the Child Abuse and Neglect Reporting Act is directed toward discovering suspected child abuse and, to that end, encouraging reporters to spread the word as quickly as possible without fear of suit so that independent governmental agencies may remove the child from immediate danger and investigate. Here, the Act was satisfied when the hospital determined that plaintiff's daughter had been abused, filed a report, and enabled the county to file a petition and remove the daughter from her home. The activities of defendants for the next 21/2 years went far beyond anything contemplated by statute. (17 C.A.4th 254.)

(b) Both *Ferraro v. Chadwick* and *Thomas v. Chadwick*, supra, involved postreporting activities that were simply republications of the initial report of suspected child abuse. They are, therefore, distinguishable from the present situation, and are not authority for extending the Act, beyond its purpose of reporting suspected child abuse, to include investigations seeking to identify the perpetrator. (17 C.A.4th 255.) Here, neither of the defendants identified or reported child abuse; that was done by the hospital staff. Nor did they merely republish an initial report. To the contrary, defendants voluntarily assumed the role of those who seek to identify the perpetrator and obtain a conviction. As such, they are not entitled to immunity under the Act. (17 C.A.4th 256.)

(c) *Krikorian v. Barry* (1987) 196 C.A.3d 1211, 242 C.R. 312, and *McMartin v. Children's Institute Int.* (1989) 212 C.A.3d 1393, 261 C.R. 437, carved out an expanded immunity concept that immunizes forensic experts not only for the report of the abuse, but also for the activities leading up to the report. This concept is not available here. First, there is no authority or reason for applying expanded immunity to a nonprofessional, such as defendant foster parent, who was not treating a suspected victim preliminary to a determination of child abuse. (17 C.A.4th 257.) Second, with respect to defendant family counselor, she was, in contrast to the forensic experts in *Krikorian* and *McMartin*, a treating therapist who, long after the abuse had been reported, rendered psychotherapeutic services not only to plaintiff's daughter, but

also to the daughter's mother and brother. And, under *Marlene F. v. Affiliated Psychiatric Med. Clinic* (1989) 48 C.3d 583, 257 C.R. 98, 770 P.2d 278, *infra*, §1024, defendant may be held liable for breaching the duty of care imposed by the therapeutic relationship. To allow her to escape that liability would be to penalize families who, however, reluctantly, enter the juvenile justice system. (17 C.A.4th 258.)

(d) "[R]ecognition of a dichotomy between reporter and reportee, i.e., differentiating between those who make the initial report and the officials who come later, is a healthy distinction. It discourages family counselors and foster parents from taking on roles they are not adequately prepared to perform. When private citizens become deeply enmeshed in investigatory or prosecutorial activities and take on functions of the police, the DSS, county counsel or district attorney, the system suffers a loss of objectivity, independence, balance and accountability. The combination of private players and public officials all on one side performing the same roles, albeit for different reasons, has a momentum of its own which can, in its own way, overwhelm any family. Such an imbalance leading to grievous injury is precisely the problem alleged in this complaint." (17 C.A.4th 257.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *By Reporters.Lockwood case:*

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §394.



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bb. Subsequent Concealment of Victim.

5 *Witkin Sum. Cal. Law Torts* § 143

[§ 143] Subsequent Concealment of Victim.

In *Robbins v. Hamburger Home for Girls* (1995) 32 C.A.4th 671, 38 C.R.2d 534, plaintiffs' 15-year-old daughter voluntarily sought assistance from defendants, a private, nonprofit girls' shelter and its counselors, and stayed at the shelter for 3 days after complaining of abuse at home. A counselor reported the claimed abuse to the county department of children's services under the Child Abuse and Neglect Reporting Act, but the authorities took no action and plaintiffs took their daughter home. In their action, plaintiffs alleged federal civil rights violations and various state law causes of action, asserting that defendants interfered with parental rights of custody and inflicted emotional distress on them. The trial judge granted summary judgment to defendants. *Held*, affirmed.

(a) *Reporting*. To the extent the action was based on the report of suspected child abuse and communications with the department of children's services, defendants were immune from liability under the Act. (32 C.A.4th 679.)

(b) *Concealment*. Here, the gist of the action was not *reporting* child abuse, but the subsequent concealment of the girl while the authorities investigated. Because the absolute immunity under P.C. 11172 for reporting suspected child abuse follows from the mandate that persons do so under criminal penalty, and because there was no statute requiring defendants to avoid disclosing the girl's whereabouts, the absolute immunity was inapplicable to their refusal to disclose her whereabouts. Nevertheless, summary judgment was proper for the following reasons:

(1) There was no violation of C.C. 49(a) (abduction or enticement of child; see *infra*, §729) because the girl voluntarily went to the shelter, seeking a safe place to stay; there was no evidence of force, coercion, or inducement. Under *Rest.2d, Torts* §700 (interference with parental custody rights), there is a privilege to rescue a child from physical violence inflicted by a parent. Defendants' conduct was privileged because it was based on a reasonable apprehension that the girl could suffer immediate physical harm if she returned home or her whereabouts were disclosed. (32 C.A.4th 680.)

(2) Defendants did not have a duty under Welf.C. 305 et seq. (temporary custody of minors by peace officers, probation officers, and social workers; see 10 *Summary* (10th), *Parent and Child*, §552 et seq.) to notify plaintiffs of the

girl's whereabouts. She was at the shelter voluntarily and she had not been taken into custody by any public authority. (32 C.A.4th 682.)

(3) Plaintiffs failed to state a civil rights action under 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 *Summary* (10th), *Constitutional Law*, §§816, 818 et seq.). The shelter was private and defendants were not acting under color of law in allowing the girl to remain there voluntarily and in following the advice of the department of children's services not to disclose the shelter's address. The brief nondisclosure of the address, while counseling the girl and while the authorities investigated, did not constitute a violation of a fundamental interest of plaintiffs protected by the Fourteenth Amendment. Further, a federal civil rights action is subject to defenses of immunity and privilege. To the extent plaintiffs' action was based on conduct immunized by P.C. 11172, defendants had absolute immunity on the federal civil rights action as well. To the extent their conduct was not within that immunity, they could assert a defense of good faith or probable cause. (32 C.A.4th 683.) (On immunity of reporters of child abuse or neglect from federal civil rights liability generally, see *infra*, §144.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Federal Civil Rights Liability.

5 *Witkin Sum. Cal. Law Torts* § 144

[§ 144] Federal Civil Rights Liability.

In *Thomas v. Chadwick* (1990) 224 C.A.3d 813, 274 C.R. 128, the complaint alleged that plaintiff's 2-month-old child was sent to defendant hospital, suffering from a congenital defect (subdural hematoma). Defendant doctor misdiagnosed the ailment as indicating child abuse, and defendants filed an initial report under the Child Abuse and Neglect Reporting Act. The child died 4 days later, and defendants sent a letter (the subsequent report) to the district attorney, urging action to remove plaintiffs' other child from her parents' home. The district attorney then recommended dependency proceedings. Plaintiffs prevailed on the issue of the true cause of death, and were cleared of all charges. They then filed this complaint under 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 *Summary* (10th), *Constitutional Law*, §§816, 818 et seq.). Defendants' motion for judgment on the pleadings was granted, mainly on the theory that their acts were protected by absolute immunity under state and federal law. *Held*, affirmed.

(a) The immunities provided by P.C. 11172(a) to mandated reporters are absolute, and protect negligent, reckless, or even intentionally false reports. (224 C.A.3d 819, citing and discussing *Storch v. Silverman* (1986) 186 C.A.3d 671, 231 C.R. 27, *supra*, §141.) (224 C.A.3d 820.) This absolute immunity extends to both the initial and subsequent reports by defendants. The statute protects reports "required or authorized," and it contemplates that mandated reporters may be involved in communications beyond the initial "required" report. (224 C.A.3d 821, citing *Ferraro v. Chadwick* (1990) 221 C.A.3d 86, 270 C.R. 379, *supra*, §142.)

(b) California's immunity statute bars a claim under 42 U.S.C., §1983. Ordinarily state statutory immunities cannot protect a defendant against federal civil rights litigation because of federal preemption; but state defenses may be asserted against a 42 U.S.C., §1983 claim if not inconsistent with the intent and purpose of federal law. (224 C.A.3d 824, citing *Robertson v. Wegmann* (1978) 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554, 8 *Summary* (10th), *Constitutional Law*, §841.) Here, Congress impliedly authorized the creation of an immunity by its enactment of the Child Abuse and Neglect Reporting Act in 1974. "Because fear of civil liability was the impediment to reporting Congress sought to remove, it would be incongruous to construe the federal act as permitting avoidance of immunity (thus resurrecting the impediment to reporting) merely because the injured party pleads federal rather than state causes of action premised on the same operative conduct. ... [W]e believe the congressional intent behind the immunity

provisions requires that immunity protect against all damage claims arising from the act of reporting, including claims artfully pled under" 42 U.S.C., §1983. (224 C.A.3d 826.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Related Immunities.

5 *Witkin Sum. Cal. Law Torts* § 145

[§ 145] Related Immunities.

Several other immunities relate to the investigation or prosecution of child abuse or neglect.

(1) *Taking Photographs*. Persons required to report instances of child abuse or neglect, or persons acting under their direction, may not be held liable for taking photographs, without parental consent, of a suspected victim or for disseminating the photographs with the required reports. (P.C. 11172(a).)

(2) *Allowing Access to Victim*. A person who, pursuant to a request from a government agency investigating a report of suspected child abuse or neglect, allows access to the victim is immune from liability for doing so. (P.C. 11172(b).)

(3) *Statements Made While Criminal Charges Are Pending*. A person charged with child abuse is prohibited from suing the child, the child's parent, or any witness for defamation arising from statements made while criminal charges are pending. (C.C. 48.7(a), 2 *Cal. Proc.* (4th), *Actions*, §655.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Statements Made While Criminal Charges Are Pending*.

C.C. 48.7(a):

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §721.



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6. Liability for Failure To Report.

5 *Witkin Sum. Cal. Law Torts* § 146

[§ 146] Liability for Failure To Report.

The Child Abuse and Neglect Reporting Act's enacting statute (Stats. 1980, Chap. 1071, §5) states that "it is not the intent of the Legislature to alter the holding in" *Landeros v Flood* (1976) 17 C.3d 399, 131 C.R. 69, 551 P.2d 389, *infra*, §972 which imposed civil liability for a failure to report child abuse. (See 19 J. Juvenile Law 236 [civil liability of mandated reporters of suspected child abuse]; 12 *San Diego L. Rev.* 743 [pre-*Landeros* argument for holding physician civilly liable for failing to report]; 38 Am.Jur. Trials 1 [Failure To Report Child Abuse].) In addition, a mandated reporter failing to report child abuse or neglect is guilty of a misdemeanor. (P.C. 11166(b), 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §156.)

In *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 C.4th 1066, 60 C.R.2d 263, 929 P.2d 582, *infra*, §822, plaintiff was molested by G, who was hired as vice-principal of plaintiff's school as a result of favorable recommendations given by defendants, his former employers, despite the fact that they knew he had committed sexual misconduct. Plaintiff alleged that, in breaching their statutory duty to report past instances of G's sexual misconduct, defendants were guilty of negligence per se. *Held*, defendants' demurrers were properly sustained. It is not necessary to determine whether defendants had sufficient knowledge of the "child abuse" to trigger the requirements of the Child Abuse and Neglect Reporting Act because plaintiff was not a member of the class for whose protection that Act was enacted. The reporting statute makes the duty to report applicable to children the reporter observes in his or her professional capacity or within the scope of his or her employment, and it is clear that the Act was designed to protect only those in the custodial care of the person charged with reporting the abuse, not all children who may be abused by the same offender in the future. Plaintiff failed to allege that she was ever in the custodial care of defendants. Furthermore, to adopt plaintiff's contrary argument would mean that a childcare custodian who failed to report the suspected abuse of a child in his or her custodial care could be held liable, perhaps years later, to other children abused by the same person, whether or not those children were within custodial protection. Neither legislative intent nor public policy supports such a broad extension of liability. (14 C.4th 1087.) (See 32 U.S.F. L. Rev. 405 [*Randi W.*]; on negligence per se generally, see *infra*, §871 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

P.C. 11166(b): P.C. 11166(b) was relettered P.C. 11166(c) in 2005.



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e. Report of Abuse of Elder or Dependent Adults.

1. In General.

5 *Witkin Sum. Cal. Law Torts* § 147

[§ 147] In General.

(1) *Nature and Purpose of Governing Legislation.* The Elder Abuse and Dependent Adult Civil Protection Act (Welf.C. 15600 et seq.), covering abuse of the elderly and other dependent adults, was added in 1982 and has since been extensively amended. The Act is basically the same in format as the child abuse reporting statute (*supra*, §140 et seq.). (See 21 California Lawyer 55 (November 2001) [Elder Abuse Law]; 40 Cal. Western L. Rev. [banks' effectiveness at reporting financial abuse of elders]; 42 *Hastings L. J.* 859 [Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California]; 36 *Loyola L.A. L. Rev.* 565 [symposium on elder abuse]; 34 *McGeorge L. Rev.* 267 [protection of elderly against financial abuse]; 31 *McGeorge L. Rev.* 801 [reporting requirements and remedies under Welf.C. 15600 et seq.]; 15 *Pepperdine L. Rev.* 653 [The Not-So-Golden Years: The Legal Response to Elder Abuse]; 41 *San Diego L. Rev.* 505 [same]; 53 Proof of Facts 3d 1 [abuse, neglect, or exploitation of older persons]; on recovery in civil actions for abuse of elder or dependent adults, see *infra*, §1686 et seq.; BAJI, Nos. 7.40 et seq., 16.25; CACI, Nos. 3100 et seq., VF-3100 et seq.)

In adopting the Act, the Legislature intended that adult protective services agencies, local law enforcement agencies, and long-term care ombudsman coordinators should receive relevant information concerning the endangered welfare of elders and dependent adults, and should take appropriate corrective action. (Welf.C. 15600(i).) The purposes of the Act are to (a) encourage the reporting of suspected cases of abuse, (b) collect data to aid the state in establishing adequate aid to the victims, and (c) grant protection to persons reporting abuse, unless done with malicious intent. (Welf.C. 15601.)

Reports pursuant to the Act are generally privileged. (See *infra*, §150.)

(2) *Definitions.* "Elder," within the scope of the Act, is defined as "any person residing in this state, 65 years of age or older." (Welf.C. 15610.27.) "Dependent adult" means any resident between 18 and 64 with physical or mental limitations restricting his or her ability to carry out normal activities or protect his or her rights, or any person of that age admitted as an inpatient to a 24-hour health facility. (Welf.C. 15610.23.) "Abuse of an elder or a dependent adult" is defined as "physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering," or "deprivation by a care custodian of goods or services that are necessary to

avoid physical harm or mental suffering." (Welf.C. 15610.07.) The definitions of terms used in defining "abuse of an elder or a dependent adult" are set forth in the following statutes: Welf.C. 15610.05 [abandonment]; Welf.C. 15610.06, [abduction]; Welf.C. 15610.17 [care custodian]; Welf.C. 15610.30 [financial abuse]; Welf.C. 15610.35 [goods and services necessary to avoid physical harm or mental suffering]; Welf.C. 15610.43 [isolation]; Welf.C. 15610.53 [mental suffering]; Welf.C. 15610.57 [neglect]; Welf.C. 15610.63 [physical abuse]. (See *Conservatorship of Gregory (2000) 80 C.A.4th 514, 520, 95 C.R.2d 336* [instruction based on definition of "abuse of an elder or a dependent adult" in Welf.C. 15610.07, but omitting definitions of "neglect" and "physical abuse" in Welf.C. 15610.57 and Welf.C. 15610.63 was proper, where jury was not misled]; *Mack v. Soung (2000) 80 C.A.4th 966, 971, 95 C.R.2d 830* [allegations that doctor concealed existence of serious bed sore, opposed patient's hospitalization where circumstances indicated that it was medically necessary, and then abandoned patient in her dying hour pleaded elder abuse in form of "neglect" under Act]; *Marron v. Superior Court (2003) 108 C.A.4th 1049, 1066, 134 C.R.2d 358, infra, §230* [decendent was "dependent adult" within definition of Welf.C. 15610.23(b); she did not have to have physical or developmental disability as required by alternative definition in Welf.C. 15610.23(a)].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature and Purpose of Governing Legislation.* See C.E.B., Elder Law Litigation, §§1.2, 6.1 et seq.; C.E.B., Elder Law Resources, §5.40.



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2. Required or Authorized Reporting.

5 Witkin Sum. Cal. Law Torts § 148

[§ 148] Required or Authorized Reporting.

(1) *Report Required.* A mandated reporter, "who, in his or her professional capacity, or within the scope of his or her employment, has observed or has knowledge of an incident that reasonably appears to be physical abuse, abandonment, abduction, isolation, financial abuse, or neglect," is "told by an elder or dependent adult that he or she has experienced" that abuse, or "reasonably suspects" that abuse must report the known or suspected instance of abuse by telephone immediately or as soon as practically possible, and by written report sent within 2 working days. (Welf.C. 15630(b)(1).) "Mandated reporters" include elder or dependent adult care custodians, health practitioners, clergy members, employees of a county adult protective services agency or a local law enforcement agency, and persons who have assumed responsibility, with or without compensation, for care or custody of an elder or dependent adult, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults. (Welf.C. 15630(a).) (See Welf.C. 15640 et seq., 15650 et seq., 15653 et seq., 15656, 15657 et seq. [action on reports by public agencies]; on recovery in civil actions for abuse of elder or dependent adults, see *infra*, §1686 et seq.)

When the abuse has occurred in a long-term care facility, except a state mental health hospital or a state developmental center, the report is made to either the local ombudsperson or the local law enforcement agency. When it has occurred in a state mental hospital or a state developmental center, the report is made to designated investigators of the State Department of Mental Health or the State Department of Developmental Services or to the local law enforcement agency. If it has occurred anywhere else, the report is made to the adult protective services agency or the local law enforcement agency. On receiving reports of abuse in a long-term care facility, the local ombudsperson or local law enforcement agency must in turn make reports to designated state agencies in specified cases. (Welf.C. 15630(b)(1).)

When two or more mandated reporters are required to report a single instance of abuse, they may select a member of their team to act for them. However, any other member who knows that the designated member has failed to submit the report must then do so. (Welf.C. 15630(d).)

(2) *Report Optional.* A mandated reporter who has knowledge of, or reasonably suspects that, "types of elder or

dependent adult abuse for which reports are not mandated" have occurred or that "his or her emotional well-being is endangered in any other way" may report the abuse. (Welf.C. 15630(c).)

Any other person with knowledge or a reasonable suspicion that any type of abuse has occurred may also report it. (Welf.C. 15631.)

(3) *Report Excused.* A mandated reporter who is a physician and surgeon, a registered nurse, or a psychotherapist is not required to report an incident where (a) the mandated reporter has been told by an elder or dependent adult that he or she has experienced behavior constituting abuse, (b) the mandated reporter is unaware of any independent corroborative evidence, (c) the elder or dependent adult has been diagnosed with a mental illness or dementia or is the subject of a court-ordered conservatorship for that reason, and (d) the mandated reporter, in the exercise of clinical judgment, reasonably believes that the abuse did not occur. (Welf.C. 15630(b)(3).)

A clergy member who acquires knowledge or reasonable suspicion of elder or dependent adult abuse during a penitential communication is likewise excused from making a report. "Penitential communication" means a communication that is intended to be in confidence, including, but not limited to, a sacramental confession made to a clergy member. However, this provision may not be construed to modify or limit a clergy member's duty to report known or suspected elder and dependent adult abuse when the clergy member is acting in the capacity of a care custodian, health practitioner, or employee of an adult protective agency. (Welf.C. 15630(b)(2).)

In a long-term care facility, a mandated reporter is not required to report an incident where the reporter is aware that there is a proper plan of care and that the plan was properly provided or executed, injury resulted as a result of that care, and the reporter reasonably believes that the injury was not the result of abuse. (Welf.C. 15630(b)(3).)

(4) *Form and Content of Reports.* The form and content of reports are prescribed by the Act. (See Welf.C. 15630(e) [telephone reports]; Welf.C. 15658(a) [written reports].)

(5) *Statements Promising Compliance.* A person who becomes employed as a care custodian, clergy member, health practitioner, or with an adult protective services agency or a local law enforcement agency must, as a prerequisite to employment, sign a statement that the person has knowledge of the provisions of Welf.C. 15630, and will comply with them and that informs the person that the person is a mandated reporter and of his or her reporting obligations under Welf.C. 15630. In addition, the employer must provide a copy of Welf.C. 15630 to the person. (Welf.C. 15659(a).) Similar requirements apply to persons issued a state license or certificate to engage in a profession or occupation the members of which are required to make reports pursuant to Welf.C. 15630. (Welf.C. 15659(d), (e).)

(6) *Criminal Liability for Failure To Report.* Failure to make a required report of elder or dependent adult abuse is a misdemeanor. (Welf.C. 15630(h); see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §168.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Report Required.* See C.E.B., *Elder Law Litigation*, §8.6; C.E.B., *Elder Law Resources*, §5.40.

Financial abuse: On reporting by financial institutions, see Supp., *infra*, §148A.(6) *Criminal Liability for Failure To Report.* Welf.C. 15630(h), as amended in 2005, provides that "impeding or inhibiting" a required report is likewise a misdemeanor.



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2a. (New) Reporting by Financial Institutions.

5 Witkin Sum. Cal. Law Torts § 148A

[§ 148A] (New) Reporting by Financial Institutions.

(1) *In General.* The Financial Elder Abuse Reporting Act of 2005 (Stats. 2005, Chap. 140) prescribes reporting requirements for a mandated reporter of suspected financial abuse of elder or dependent adults. (See Welf.C. 15630.) The following definitions apply:

(a) "Mandated reporter" means "all officers and employees of financial institutions." (Welf.C. 15630.1(a).)

(b) "Financial institution" means a depository institution as defined in the Federal Deposit Insurance Act (see 12 U.S.C., §1813(c)), an institution-affiliated party as defined in that Act (see 12 U.S.C., §1813(u)), or a federal or state credit union as defined in the Federal Credit Union Act (see 12 U.S.C., §1752), including an institution-affiliated party of a credit union as defined in that Act (see 12 U.S.C., §1786(r)). (Welf.C. 15630.1(b).)

(c) "Financial abuse" is defined in Welf.C. 15610.30. (Welf.C. 15630.1(c) [adopting that definition for purposes of Financial Elder Abuse Reporting Act of 2005].)

(2) *When Report Is Required.* A mandated reporter who (a) has direct contact with an elder or dependent adult, or reviews or approves his or her financial documents, records, or transactions in connection with providing financial services, and (b) within the scope of the reporter's employment or professional practice, observes, knows of, or reasonably suspects an incident that reasonably appears to be financial abuse, must report the abuse. (Welf.C. 15630.1(d)(1).)

Suspected financial abuse is deemed to occur when a mandated reporter observes or has knowledge of behavior or unusual circumstances or transactions, or a pattern of behavior or unusual circumstances or transactions, that would lead an individual with like training or experience, based on the same facts, to form a reasonable belief that an elder or dependent adult is the victim of financial abuse. (Welf.C. 15630.1(h).)

(3) *When Report Is Not Required.* An allegation by the elder or dependent adult, or any other person, that financial abuse has occurred is not sufficient to trigger the reporting requirement if both of the following conditions are met:

(a) The mandated reporter is aware of no other corroborating or independent evidence of the alleged financial abuse. The mandated reporter is not required to investigate any accusations. (Welf.C. 15630.1(e)(1).)

(b) In the exercise of his or her professional judgment, the mandated reporter reasonably believes that financial abuse did not occur. (Welf.C. 15630.1(e)(2).)

(4) *Manner of Reporting.* The abuse must be reported by telephone immediately or as soon as practicably possible, and by written report sent within 2 working days, generally to the local adult protective services agency or the local law enforcement agency. (Welf.C. 15630.1(d)(1); see Welf.C. 15630.1(d)(3) [report must be made to local ombudsman or local law enforcement agency if mandated reporter knows that elder or dependent adult resides in long-term care facility].) When two or more mandated reporters jointly have knowledge or reasonably suspect financial abuse, the telephone report may be made by a member of the reporting team who is selected by mutual agreement. (Welf.C. 15630.1(d)(2).)

(5) *Civil Penalty.* Failure to report financial abuse under these provisions is subject to a civil penalty not exceeding \$ 1,000 or, if the failure to report is wilful, a civil penalty not exceeding \$ 5,000. The penalty is paid by the financial institution employing the mandated reporter. (Welf.C. 15630.1(f).) The penalty may be recovered only in a civil action brought against the financial institution by the Attorney General, district attorney, or county counsel. Multiple actions for the penalty may not be brought for the same violation. However, nothing in the Financial Elder Abuse Reporting Act may be construed to limit, expand, or otherwise modify any civil liability or remedy that may exist under other law. (Welf.C. 15630.1(g).)

(6) *Reports Are Privileged.* Reports of suspected financial abuse made by an employee or officer of a financial institution pursuant to these provisions are absolutely privileged under C.C. 47(b) (text, §562). (Welf.C. 15630.1(i).)

(7) *Effective Dates.* Unless extended, these provisions are effective from January 1, 2007, through January 1, 2013. (Welf.C. 15630.1(j); Stats. 2005, Chap. 140, §13.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Confidentiality and Disclosure.

5 *Witkin Sum. Cal. Law Torts* § 149

[§ 149] Confidentiality and Disclosure.

(1) *Identity of Reporter.* The identity of all persons who report is confidential. Disclosure is permitted only (a) among adult protective services agencies, long-term care ombudsman coordinators, licensing agencies, local law enforcement agencies, the district attorney, the public guardian, the probate court, the Bureau of Medi-Cal Fraud, and the Division of Investigation of the Department of Consumer Affairs; (b) to counsel representing adult protective services agencies; (c) to the district attorney in a criminal prosecution; (d) when the person waives confidentiality; and (e) by court order. (Welf.C. 15633.5(b), (c).)

(2) *Content of Report.* Both mandatory and optional reports are confidential. (Welf.C. 15633(a).) They may be disclosed only to persons or agencies to whom disclosure of the reporting party's identity is permitted, and among members of teams charged with the prevention, identification, or treatment of abuse. (Welf.C. 15633(b).) Disclosure is not required if prohibited by other state or federal law. (Welf.C. 15633(c).)

However, neither the physician-patient (see 2 *Cal. Evidence* (4th), *Witnesses*, §196 et seq.) nor the psychotherapist-patient (see 2 *Cal. Evidence* (4th), *Witnesses*, §211 et seq.) privilege applies to information reported. (Welf.C. 15632(a).)

(3) *Disclosure in Civil Actions.* *C.C.P.* 2017.310 and 2017.320 relate to confidentiality and disclosure in civil actions, the foundation of which establishes a cause of action for violation of Welf.C. 15600 et seq. (see *supra*, §147, and *infra*, §1686 et seq.).

(a) *Confidential settlement agreements.* Confidential settlement agreements are disfavored in these actions. (*C.C.P.* 2017.310(a).) An agreement may not be recognized or enforced without a showing that (1) the information is privileged under existing law, (2) the information is not evidence of abuse of an elder or dependent adult as described in Welf.C. 15610.30, 15610.57, and 15610.63 (see *supra*, §147), or (3) the party seeking to uphold the confidentiality of the information has demonstrated that there is a substantial probability that prejudice will result from the disclosure and that the party's interest in the information cannot be adequately protected through redaction. (*C.C.P.* 2017.310(b).)

Nothing in these provisions (1) permits sealing or redacting a defendant's name in information made available to the public (*C.C.P. 2017.310(c)*); (2) is intended to alter, modify, or amend existing law (*C.C.P. 2017.310(d)*); (3) may be deemed to prohibit the entry or enforcement of that part of a confidentiality agreement, settlement agreement, or stipulated agreement between the parties that requires the nondisclosure of the amount of any money paid in the settlement of a claim (*C.C.P. 2017.310(e)*); or (4) applies to or affects an action for professional negligence against a health care provider (*C.C.P. 2017.310(f)*).

(b) *Protective orders.* Information acquired through discovery in these actions that is protected from disclosure by a stipulated protective order remains subject to the protective order, except for information that is evidence of abuse of an elder or dependent adult as described Welf.C. 15610.30, 15610.57, and 15610.63 (see *supra*, §147). (*C.C.P. 2017.320(a)*.) In that instance, after redacting information in the document that is not evidence of abuse of an elder or dependent adult, a party may file that particularized information with the court. (*C.C.P. 2017.320(b)*.) The party proposing to file the information must offer to meet and confer with the party from whom the information was obtained at least 1 week prior to filing the information, giving concurrent notice of filing and its basis to the party from whom the information was obtained. (*C.C.P. 2017.320(b)*, (c).)

The filed information submitted to the court remains confidential under the protective order for 30 days after filing and becomes part of the public court record thereafter, unless an affected party petitions the court and shows good cause for a court protective order. (*C.C.P. 2017.320(d)*.) The burden of showing good cause is on the party seeking the court protective order. (*C.C.P. 2017.320(e)*.) A stipulated protective order may not be recognized or enforced by the court to prevent disclosure of information filed with the court pursuant to these provisions without a showing that (a) the information is privileged under existing law, (b) the information is not evidence of abuse of an elder or dependent adult as described in Welf.C. 15610.30, 15610.57, and 15610.63, or (c) the party seeking to uphold the confidentiality of the information has demonstrated that there is a substantial probability that prejudice will result from the disclosure and that the party's interest in the information cannot be adequately protected through redaction. (*C.C.P. 2017.320(f)*.)

If the court denies the petition for a court protective order, it must redact any part of the filed information that is not evidence of abuse of an elder or dependent adult. (*C.C.P. 2017.320(g)*.)

Nothing in these provisions permits sealing or redacting a defendant's name in information made available to the public or applies to or affects an action for professional negligence against a health care provider. (*C.C.P. 2017.320(g)*, (h).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Content of Report.* Welf.C. 15633(c) further provides that a financial institution's disclosure of reports or records relevant to a report of elder or dependent adult abuse is not prohibited if the disclosure would be required by an otherwise applicable state or federal law or court order. This provision is effective from January 1, 2007, until January 1, 2013. (Welf.C. 15633(d); Stats. 2005, Chap. 140, §13.) (On reporting by financial institutions, see *Supp.*, *supra*, §148A.)



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4. Immunity for Reporting.

5 Witkin Sum. Cal. Law Torts § 150

[§ 150] Immunity for Reporting.

(1) *Immunity Provisions.* A "care custodian, clergy member, health practitioner, or employee of an adult protective services agency or a local law enforcement agency" is immune from civil or criminal liability for the submission of any required or authorized report, or for providing, on request, an adult protective services agency or a local law enforcement agency with access to the victim. (Welf.C. 15634(a), (b).)

"Any other person" submitting a report is immune unless it is proven that the report was knowingly false. (Welf.C. 15634(a).)

No person required to make a report, nor any person taking photographs at his or her direction, is civilly or criminally liable for taking the photographs or disseminating them with the report. However, there is no immunity for any other use of the photographs. (Welf.C. 15634(a).)

(2) *Immunity as Absolute or Conditional.* In *Easton v. Sutter Coast Hosp.* (2000) 80 C.A.4th 485, 95 C.R.2d 316, the mother of one of the plaintiffs was removed from his home by defendant paramedics who had been escorted there by sheriff's deputies. The deputies had received a report of elder abuse from defendant doctor, who was acting on information from defendant visiting nurse's actual observation. After the mother died, plaintiffs sued all parties for various causes of action, and defendants demurred. *Held*, judgment sustaining demurrer affirmed; the privilege granted by Welf.C. 15634 is absolute as to these defendants.

(a) *Immunity of doctor and nurse.* Both the nurse and the doctor were "health practitioners" required to make reports of elder abuse. As to whether persons making these reports receive a conditional or absolute privilege, Welf.C. 15634 *distinguishes between required and voluntary reports*. Persons making voluntary reports do not merit a privilege if the report is knowingly false. The omission of this requirement with respect to persons submitting mandatory reports implies that the truth or falsity of the report is of no moment, and that the resulting privilege is thus absolute. (80 C.A.4th 492.)

(b) *Immunity of paramedics.* Welf.C. 15634 also grants immunity to health practitioners who, pursuant to request,

provide the requesting agency with access to a victim of elder abuse. Defendant paramedics, who were charged with trespass and false imprisonment, are "health practitioners" for this purpose. The goal of the Act, which is not only for agencies to receive reports of elder abuse, but also to allow the agencies to intervene to protect the elderly, would not be served by withholding the absolute privilege from defendant paramedics, who at all times were acting under the directions of defendant doctor or the deputies to whom the report was submitted. Thus, defendant paramedics were absolutely privileged with respect to the alleged trespass. Because plaintiffs failed to allege that the patient's removal to a hospital was not privileged, they failed to plead a cause of action for false imprisonment. (80 C.A.4th 495.)

(3) *Reimbursement for Legal Fees*. In the event that, despite immunity, an action is initiated against a care custodian, a health practitioner, or an employee of an adult protective services agency or a local law enforcement agency, that person may, on obtaining a dismissal or favorable judgment, obtain reimbursement for reasonable attorneys' fees from the state Board of Control. However, the right to reimbursement does not exist if a public entity has provided for the defense of the action. Also, the fees recovered may not exceed either the hourly rate charged by the Attorney General or an aggregate amount of \$ 50,000. (Welf.C. 15634(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Immunity Provisions*. Welf.C. 15634(a) and (b) also provide immunity to "a mandated reporter of suspected financial abuse of an elder or dependent adult." These provisions are effective from January 1, 2007, until January 1, 2013. (Welf.C. 15634(d); Stats. 2005, Chap. 140, §13.) (On reporting by financial institutions, see Supp., supra, §148A.)(3) *Reimbursement for Legal Fees*. Welf.C. 15634(c) was amended in 2006 to refer to the California Victim Compensation and Government Claims Board, rather than the state Board of Control.



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f. Report of Student's Use of Alcohol or Drugs.

5 *Witkin Sum. Cal. Law Torts* § 151

[§ 151] Report of Student's Use of Alcohol or Drugs.

(1) *Right To Report.* Generally, a principal or person designated by the principal may report a pupil's consumption of alcohol or abuse of a controlled substance to the pupil's parents or legal custodian if, in so doing, the principal or designee is acting in his or her professional capacity or within the scope of employment and knows or reasonably suspects, based on the pupil's apparent intoxication, that the pupil has used alcohol or drugs. (*Educ.C. 44049(a).*) No report may be made if it would require disclosure of confidential information given to a school counselor by a pupil over 12 years of age receiving counseling, or by a parent or guardian of that pupil. (*Educ.C. 44049(c), 49602, 72621.*)

(2) *Immunity From Liability.* There is no civil or criminal liability for making a report unless it can be proved that the report was false and that the principal or principal's designee knew of the falsity or made it with reckless disregard for its truth or falsity. If this proof is established, the reporting party is liable for any damages caused. (*Educ.C. 44049(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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g. Reports Respecting Health Care Plans and Facilities.

5 Witkin Sum. Cal. Law Torts § 152

[§ 152] Reports Respecting Health Care Plans and Facilities.

(1) *Report by Consultant Regarding Health Care Service Plan.* No cause of action arises against a consultant on account of any communication by the consultant to the Director of the Department of Managed Health Care, or any other officer, employee, agent, contractor, or consultant of the Department of Managed Health Care, made for the purpose of determining whether health care services have been or are being arranged or provided in accordance with the Knox-Keene Health Care Service Plan Act of 1975 (*Health & Saf.C. 1340 et seq.*). The consultant must (a) act without malice, (b) make a reasonable effort to obtain the facts of the matter communicated, (c) act with a reasonable belief that the communication is warranted by the facts actually known to the consultant after a reasonable effort to obtain the facts, and (d) act pursuant to a contract, as prescribed, with the director or the Commissioner of Corporations or between the director or commissioner and a state licensing board or committee. (C.C. 43.98.)

(2) *Report of Assault Against Hospital Personnel.* Assaults against on-duty hospital personnel that result in injury or involve the use of a firearm or other dangerous weapon must be reported to the local law enforcement agency. Reports of other types of assault against on-duty hospital personnel are optional. Absolute immunity is given to a health facility or employee making a mandatory report and conditional immunity for making an optional report, i.e., there is no immunity if the report was false and the facility or employee knew that the report was false or was made with reckless disregard of its truth or falsity. (*Health & Saf.C. 1257.7(d).*)

SUPPLEMENT: [This section is current through the latest supplement]



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h. Disclosure of AIDS Test.

5 Witkin Sum. Cal. Law Torts § 153

[§ 153] Disclosure of AIDS Test.

Disclosure of the identity of a person who was the subject of an AIDS blood test may result in liability (2 Cal. Evidence (4th), Witnesses, §522), subject to certain exceptions. Circumstances in which the disclosing party is immune from liability include the following:

(1) Reporting of a diagnosed case of AIDS by the state Department of Health Services or the Centers for Disease Control under the United States Public Health Service. (*Health & Saf.C. 120980(i).*)

(2) Reporting by physicians, hospitals, and health care providers to local health officers of AIDS cases, HIV infections, and viral hepatitis infections. (*Health & Saf.C. 1603.1(c), (d).*)

(3) Distribution by a local health officer to a blood bank or plasma center, on a confidential basis, whether blood or blood components previously transfused may have been donated by a person infected with HIV. (*Health & Saf.C. 1603.1(k).*)

(4) Disclosure to a person believed to be a patient's spouse, sexual partner, or needle sharer that the patient tested positive. (*Health & Saf.C. 121015.*)

(5) Disclosure to public health authorities or tissue banks of results of tests performed on cadavers. (*Health & Saf.C. 120980(h).*)

(6) Disclosure of test results to a public health officer when necessary to locate and notify a blood donor of a positive result. (*Health & Saf.C. 1603.3(f).*) (For full discussion of exceptions to AIDS confidentiality requirements, see 2 Cal. Evidence (4th), Witnesses, §523 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Required reporting:* *Health & Saf.C. 120980(i)*, as amended in 2006, provides immunity for disclosing HIV tests in accordance with reporting requirements for cases of HIV infection by the state Department of Health Services or the Centers for Disease Control and Prevention under the United States Public Health Service.

(7) *(New) Reporting to local health officer and state Department of Health Services:* To ensure knowledge of current trends in the HIV epidemic and to assure that California remains competitive for federal HIV and AIDS funding, health care providers and laboratories must report cases of HIV infection to the local health officer using patient names. Local health officers must, in turn, report unduplicated HIV cases by name to the state Department of Health Services. (*Health & Saf.C. 121022*, added in 2006.)



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i. Insurer's Report of Suspected Arson.

5 Witkin Sum. Cal. Law Torts § 154

[§ 154] Insurer's Report of Suspected Arson.

An insurer that investigates a fire must provide authorized public agencies (fire protection officers, law enforcement officers, etc.) with "all relevant information acquired," and must cooperate with the agency's investigation. (*Ins.C. 1875, 1875.2.*) In the absence of fraud or malice, neither an insurer that furnishes this information nor an agency that releases it will be liable for damages in a civil action. (*Ins.C. 1875.4.*) (See *10 Pacific L. J. 512.*)

SUPPLEMENT: [This section is current through the latest supplement]



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j. Proceedings of Professional Society or Committee.

5 *Witkin Sum. Cal. Law Torts* § 155

[§ 155] Proceedings of Professional Society or Committee.

(1) *Organizations and Persons Protected.* The following organizations and persons are immune from monetary liability and actions for damages in prescribed circumstances:

(a) Members of a quality assurance committee formed to evaluate the care provided to mental health patients. (C.C. 43.7(a).)

(b) Professional societies and members of a committee of a medical specialty society, state or local professional society, or licensed hospital's professional staff that are formed to maintain professional standards. A "professional society" includes "legal, medical, psychological, dental, dental hygiene, dietetic, accounting, optometric, acupuncture, podiatric, pharmaceutical, chiropractic, physical therapist, veterinary, licensed marriage and family therapy, licensed clinical social work, and engineering organizations" with at least 25% of the eligible persons in the geographic area served, or at least a majority if the organization has less than 100 members. A "medical specialty society" is one having as members at least 25% of the eligible physicians within a recognized medical specialty in the geographic area served by the society. (C.C. 43.7(b).) (On liability of hospital ethics committee, see 60 *So. Cal. L. Rev.* 1239.)

(c) Members of a peer review committee formed to evaluate "medical, dental, dietetic, chiropractic, optometric, acupuncture, or veterinary services," and composed chiefly of members of the covered professions. (C.C. 43.7(b).) (On antitrust implications of medical peer review, see 15 *Pepperdine L. Rev.* 111.)

(d) Members of a hospital's governing board when reviewing the quality of medical services. (C.C. 43.7(b).)

(e) Physicians and surgeons, podiatrists, or chiropractors serving on "an underwriting committee of an interindemnity or reciprocal or interinsurance exchange or mutual company" when evaluating such professionals for liability insurance or an interindemnity, reciprocal, or interinsurance contract. (C.C. 43.7(d).)

(f) Members of a committee of a professional society composed of a substantial percentage of licensed realtors in the geographic area served and formed to maintain professional standards. (C.C. 43.91(a).)

(g) Persons giving information to hospitals and professional schools, societies, committees, and licensing boards

relating to professional evaluation. (*B. & P.C. 802.5, 2318; C.C. 43.8; C.C. 43.91(b); C.C. 43.96(b).*)

(2) *Scope of Immunity.* The privileges accorded are generally stated as conditional. (See C.C. 43.7(a), (b), (d), 43.91(a), providing that immunity extends to acts or proceedings within scope of designated functions, if organization or person "acts without malice, has made a reasonable effort to obtain the facts of the matter ... , and acts in reasonable belief that the action taken ... is warranted by the [known] facts ... after such reasonable effort to obtain facts.")

Hassan v. Mercy Amer. River Hosp. (2003) 31 C.4th 709, 3 C.R.3d 623, 74 P.3d 726, held to the same effect in examining the scope of C.C. 43.8. Plaintiff doctor, a member of defendant hospital's medical staff, applied for medical staff privileges at another hospital. In response to the other hospital's request for information regarding plaintiff, defendant forwarded a copy of a memorandum summarizing a 20-year-old telephone conversation in which plaintiff was described as militant with respect to authority, too personally involved with the problems of the unfortunate, and a manipulator of coworkers. After the other hospital rejected plaintiff's application, he sued defendant on several causes of action, all of which were based on the telephone conversation. The trial court granted defendant's summary judgment motion on the ground that its correspondence with the other hospital was *absolutely* privileged under C.C. 43.8. The Court of Appeal affirmed, but concluded that the privilege was *conditional*. *Held*, affirmed.

(a) *Word "person" is not limited to humans.*

(1) C.C. 43.8 confers a privilege on any "person" but does not define that term. C.C. 14, which defines certain words used in the Civil Code, states that "the word person includes a corporation as well as a natural person," and that definition was adopted by the Supreme Court long ago in *Pasadena v. Stimson* (1891) 91 C. 238, 27 P. 604. (31 C.4th 716.)

(2) Noting that health care providers are often organized as *noncorporate* entities, plaintiff argued that applying the C.C. 14 definition of "person" would lead to an absurd result in this context, because a corporation could claim the C.C. 43.8 privilege, but a medical provider organized in another way could not. This contention is without merit. C.C. 14 states that the word "person" "includes" corporations, and "includes" is ordinarily a term of enlargement, rather than limitation. (31 C.4th 717.)

(3) Referring to the bill that enacted C.C. 43.8, a legislative staff analysis stated that "it is the intent of the legislation that 'person's include natural and unnatural individuals." Additionally, the Legislature could have expressly excluded all hospitals from the privilege, as it has done in other provisions granting immunity from tort liability, e.g., C.C. 43.7, but it did not do so. Thus, neither the language nor history of this provision supports the narrow definition of "person" advanced by plaintiff. (31 C.4th 717.)

(b) *Privilege as conditional.*

(1) A 1990 amendment to C.C. 43.8 deleted the phrase that made the privilege expressly conditioned on the communicator's reasonable belief in the truth of the information conveyed. But the elimination of this language does not mean that the privilege was changed to an absolute one, because the statute continues to require that the communication be "intended to aid," in the evaluation of a medical practitioner. By so providing, the Legislature manifested an intent to require a form of subjective good faith inconsistent with the communication of information known to be false. Had the Legislature meant to refer merely to the context of the communication, it could have provided that the privilege applied only to a communication "used" or "submitted for use." (31 C.4th 718.)

(2) The concluding sentence of C.C. 43.8 provides that the immunity does not affect the availability of any absolute privilege afforded by C.C. 47 (*infra*, §561 et seq.) If C.C. 43.8 itself conferred an absolute privilege, there would be no reason for the legislative concern that the C.C. 43.8 privilege not affect the absolute privilege of C.C. 47. "This legislative concern necessarily implies that the section 43.8 privilege is more limited than the section 47 privilege, or, in other words, that the section 43.8 privilege is qualified rather than absolute." (31 C.4th 721.)

(3) Although the words "intended to aid" "do not require that the communication actually assist the receiving party in evaluating the doctor's 'qualifications, fitness, character, or insurability,' they do require that the communicator make the communication with a particular subjective intent. Because false information of any sort has no value in evaluating a medical practitioner, the communication of information known to be false cannot be intended to help or assist in that evaluation, or, in other words, an intent to deceive is inconsistent with an intent to aid. Thus, proof that the communicator knew the information to be false when it was conveyed establishes malice sufficient to defeat the qualified section 43.8. privilege." (31 C.4th 723.) (See *Axline v. St. John's Hosp. & Health Center* (1998) 63 C.A.4th 907, 912, 74 C.R.2d 385 [C.C. 43.8 does not apply unless alleged misconduct relates to "communication" to hospital or peer review committee]; *N.N.V. v. American Assn. of Blood Banks* (1999) 75 C.A.4th 1358, 1398, 89 C.R.2d 885 [immunity of C.C. 43.7 applies to professional society's failure to comply with standards, not with failure to adopt standards]; 27 *Loyola L.A. L. Rev.* 357 [Medical Staff Peer Review: Qualifying the Qualified Privilege Provision].) (On immunity for persons serving on committees reviewing health care service plans, see *Health & Saf.C.* 1370, 1370.1.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Scope of Immunity.*

Scope of C.C. 43.8: C.C. 43.8 was subdivided in 2007. The provision that the immunity set forth in the section does not affect the absolute immunity afforded by C.C. 47 was lettered as subdivision (b), and other provisions were lettered as subdivision (a). Subdivision (c) was added: "Nothing in this section is intended to in any way affect the California Supreme Court's decision in" *Hassan v. Mercy Amer. River Hosp.* (2003) 31 C.4th 709, 3 C.R.3d 623, 74 P.3d 726, text, p. 274, "holding that subdivision (a) provides a qualified privilege."



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k. Referrals of Patients or Clients.

5 Witkin Sum. Cal. Law Torts § 156

[§ 156] Referrals of Patients or Clients.

(1) *Immunity of Professional Society or Referral Service.* Immunity from civil liability is provided to "any professional society or any nonprofit corporation authorized by a professional society to operate a referral service, or their agents, employees, or members, for referring any member of the public to any professional member of such society or service, or for acts of negligence or conduct constituting unprofessional conduct committed by a professional to whom a member of the public was referred." (C.C. 43.95(a).) The referral must have been made without malice and at no cost above an initial fee made as part of a public service referral system. (C.C. 43.95(a).)

Immunity is also given to these societies and nonprofit corporations for providing a telephone information library that is available to the general public without charge. (C.C. 43.95(a).)

"Professional society" is defined broadly to include (a) "psychological, architectural, medical, dental, dietetic, accounting, optometric, podiatric, pharmaceutical, chiropractic, veterinary, licensed marriage and family therapy, licensed clinical social work, and engineering organizations" with at least a majority of the eligible persons or licentiates in the geographic area served if the society has less than 100 members, and at least 25% otherwise, (b) organizations with nonprofit lawyer referral services registered with the State Bar and in conformance with the minimum standards approved by the Supreme Court, and (c) organizations established to provide free assistance or representation to the needy. (C.C. 43.95(a).) (On standards and requirements for lawyer referral services, see *B. & P.C. 6155*.)

The immunity is lost if the society fails to disclose the nature of a disciplinary action, of which it has actual knowledge, taken against a member by a state licensing agency. However, there is no duty to disclose where (a) a disciplinary proceeding results in no action being taken, or (b) except for attorneys, for whom there is no time limit on the duty to disclose, 3 years have elapsed since the professional satisfied the conditions imposed. (C.C. 43.95(b).)

(2) *Immunity of Health Care Provider Receiving Unsolicited Referral From Diagnostic Testing Facility.* A health care provider is given immunity from liability for professional negligence "on account of the receipt by such provider of an unsolicited referral, arising from a test performed by a multiphasic screening unit," i.e., a facility performing diagnostic testing only. (C.C. 43.9(a), 43.9(d)(4).) However, the immunity does not apply if there is a provider-patient relationship or a contract for health care services. (C.C. 43.9(b).)

In order to receive immunity, the provider must notify the screening unit, or return the test results within 21 days, if it does not evaluate the results, or does so but takes no further action. If a review of the results indicates a substantial risk of serious illness or death, the provider must make a reasonable effort to notify the testee within 14 days. (C.C. 43.9(c).)

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5 Witkin Sum. Cal. Law Torts § 157

[§ 157] (l) Protection of Property Against Dog.

Generally, "any dog entering any enclosed or unenclosed property upon which livestock or poultry are confined may be seized or killed by the owner or tenant of the property or by any employee of the owner or tenant," and no action, civil or criminal, "shall be maintained against the owner, tenant, or employee." (*Food & Ag.C. 31103*; see C.C. 3341(2) [granting immunity for killing dog or other animal, not on its owner's property, engaged in "worrying, wounding, or killing any bovine animals, swine, horses, mules, burros, sheep, angora or cashmere goats"].)

Food & Ag.C. 31103 was construed in *Katsaris v. Cook* (1986) 180 C.A.3d 256, 225 C.R. 531. Plaintiff, living alone on land adjacent to the ranch of defendants Mr. and Mrs. H, had two sheep dogs. While plaintiff was absent on business, the dogs, left in the care of two neighbor boys, wandered away and were shot on the H ranch by defendant C, the Hs' employee. The facts of the killing and dumping of the bodies in a ditch were not disclosed to plaintiff for 10 days, during which period he made sustained and expensive efforts to find them. He brought this action for negligence and intentional infliction of emotional distress. The trial judge granted defendants' motion for judgment on the ground that *Food & Ag.C. 31103* precluded all claims. *Held*, affirmed as to all but the emotional distress count.

(a) By enacting the statute, the Legislature found that the public interest in protecting farm animals outweighed the dog owners' right to permit their animals to roam freely on land occupied by livestock, and gave livestock owners a privilege to kill or seize trespassing dogs. (180 C.A.3d 263.) The privilege is qualified, because it protects nonofficial actors and is based on the value of the interest protected. (180 C.A.3d 265.) However, because the privileged killing deprives the owner of his property rights in the animal, the statute should be strictly construed. (180 C.A.3d 266.)

(b) The claim for damages arising from the killing is clearly barred by the statute; and the claim that defendants negligently failed to tell plaintiff what happened could not be maintained, for defendants were under no duty to speak. (180 C.A.3d 266, 267.)

(c) The claim for intentional infliction of emotional distress would be barred by the privilege if it were based solely on the manner of killing of the dogs and disposition of their bodies. (180 C.A.3d 267.) But an additional basis was Mrs. H's statements after the shooting that she knew nothing about the dogs. If plaintiff can prove that this conduct was, under the circumstances, extreme and outrageous, and that it met the other tests of intent or reckless disregard and

proximate cause (see *infra*, §451 et seq.), recovery may be possible. (180 C.A.3d 267, 268.) Proof merely of failure to notify the dog's owner of its death, or failure to answer truthfully to an inquiry about the dog, will not be sufficient. "Livestock owners, insulated by section 31103 from often negligible liability for the value of the destroyed dog, would instead be exposed to potentially substantial liability for the dog owner's emotional suffering." (180 C.A.3d 268.)

The *Katsaris* approach and reasoning were applied in *Scozzafava v. Lieb* (1987) 190 C.A.3d 1575, 236 C.R. 129, involving different facts. Defendant, owner of a poultry farm, instructed his employee M to shoot trespassing dogs. M shot and wounded a dog that was chasing the chickens. The dog's owner took it to C, a veterinarian, and while it was being prepared for surgery, the dog bit plaintiff, C's assistant. *Held*, plaintiff had no cause of action against defendant for negligence. "With the sole distinction that *Katsaris* dealt with the killing of dogs and this case involves only the wounding of a marauding dog, plaintiff's negligence claim is virtually identical to that in *Katsaris*." (190 C.A.3d 1581.) The statutory privilege to kill necessarily reaches shooting intended to kill. (190 C.A.3d 1581.)

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m. Structural Inspection After Declared Emergency.

5 *Witkin Sum. Cal. Law Torts* § 158

[§ 158] Structural Inspection After Declared Emergency.

An *architect* is immune from liability for personal injury, wrongful death, or property damage caused by good faith but negligent inspection, for structural integrity or nonstructural elements affecting life and safety, of a structure used for human habitation or owned by a public entity, where the inspection is (1) conducted at the scene of a declared emergency caused by a major earthquake, flood, riot, or fire and (2) performed voluntarily and without compensation at the request of a public official, public safety officer, or building inspector acting in an official capacity. (*B. & P.C. 5536.27(a)*; see *B. & P.C. 5536.27(b)* [defining terms].)

Similar immunity is granted to *engineers* after any declared emergency. (*B. & P.C. 6706.*)

The immunities apply only to inspections occurring within 30 days of the declared emergency, and does not cover gross negligence or wilful misconduct. (*B. & P.C. 5536.27(a), 6706(a).*)

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n. Donated Fire Protection Equipment.

5 Witkin Sum. Cal. Law Torts § 159

[§ 159] Donated Fire Protection Equipment.

No public employee or public entity, including a fire department, a fire protection district, or the Department of Forestry and Fire Protection, that donates fire protection apparatus or equipment to a volunteer fire department, volunteer fire protection district, or volunteer fire company is liable for damage or injury that results from its use by the recipient, except for damage or injury proximately caused by a grossly negligent act or omission or wilful or wanton misconduct of the donor. (C.C. 1714.11(a).) However, this immunity only applies if the donor discloses in writing to the recipient known damage to, or deficiencies in, the apparatus and equipment. (C.C. 1714.11(b)(1).)

The recipient is required to inspect and repair the apparatus and equipment prior to its use for public safety purposes. (C.C. 1714.11(b)(2).)

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o. Independent Quality Review for Residential Construction.

5 Witkin Sum. Cal. Law Torts § 160

[§ 160] Independent Quality Review for Residential Construction.

There is no monetary liability by, and no cause of action for damages against, a qualified person under contract with an applicant for a residential building permit (1) to provide independent quality review of the plans and specifications provided with the application in order to determine compliance with the State Housing Law (*Health & Saf.C. 17910 et seq.*) or related rules or regulations, or (2) to provide independent quality review of the work of improvement to determine compliance with these plans and specifications. The person must be a building inspector, combination inspector, combination dwelling inspector, registered professional engineer, licensed general contractor, or licensed architect meeting specified standards and holding a valid certification. The immunity extends to the entity employing the qualified person. (C.C. 43.99(a).) However, the qualifying person may not engage in other construction, design, planning, supervision, or activities on the work of improvement, or provide quality review services for any other party on the work of improvement. (C.C. 43.99(e).) Also, the qualifying person or employing entity must maintain professional errors and omissions insurance coverage in an amount not less than \$ 2 million. (C.C. 43.99(f).) (On liability for construction defects generally, see *infra*, §1162 et seq.)

The immunity does not apply to an action initiated by the applicant who retained the qualified person. (C.C. 43.99(a).) Also, the immunity does not inure to the benefit of the qualified person for damages caused to the applicant solely by the negligence or wilful misconduct of the qualified person resulting from providing services under the contract with the applicant. (C.C. 43.99(g).)

The fact that an inspection by a qualified person has taken place may not be introduced as evidence in a construction defect action, other than an action initiated by the applicant, including any reports or other items generated by the qualified person. (C.C. 43.99(b).)

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p. Reliance on Court Process or Order.

5 *Witkin Sum. Cal. Law Torts* § 161

[§ 161] Reliance on Court Process or Order.

(1) *Reliance on Court Process.* A sheriff or other ministerial officer is required to execute all orders "regular on their face and issued by competent authority," whatever may be the defect in the proceedings on which they were issued. (C.C.P. 262.1.) A peace officer is not liable for an arrest on a warrant regular on its face if the officer acts without malice and in the reasonable belief that the person arrested is the one referred to. (C.C. 43.55.) These statutes state the established common law rule that an officer acting under an apparently valid process or order is immune from civil liability. (See *Vallindras v. Massachusetts Bonding & Ins. Co.* (1954) 42 C.2d 149, 151, 265 P.2d 907; *Hayward Lumber & Inv. Co. v. Biscailuz* (1957) 47 C.2d 716, 721, 306 P.2d 6; *Rest.2d, Torts* §122 et seq.) And "[a]ll that is required to make process fair on its face is that it must proceed from a court having jurisdiction of the subject matter and that it contain nothing which ought reasonably to apprise the officer that it was issued without authority." (*Vallindras v. Massachusetts Bonding & Ins. Co.*, *supra*, 42 C.2d 154.)

In *Vallindras*, the superior court held plaintiff in contempt for wilful failure to pay attorneys' fees and support money to his wife in a divorce action. He was imprisoned, but obtained a discharge on habeas corpus by showing that the contempt order was defective (failure to state the sum due in the adjudicating and committing portion of the order) and therefore void. Plaintiff's theory was that if the process was void, the sheriff, chargeable with knowledge of what constitutes a valid order, was liable for false imprisonment. *Held*, despite its technical invalidity, the order was regular on its face and no cause of action was stated. (42 C.2d 154.)

The rule was given an extended application in *Biscailuz*, where the sheriff was sued for wrongfully releasing the attachment of a bank account. The defense, upheld by the court, was the sheriff's reliance on the superior court clerk's certificate reciting that no undertaking to continue the lien had been timely filed. (47 C.2d 722.)

In *George v. San Luis Obispo* (2000) 78 C.A.4th 1048, 1051, 93 C.R.2d 595, a bankruptcy court writ of possession omitting plaintiffs' names was nevertheless held regular on its face, where it was executed with an order from the same court that contained plaintiffs' names.

The rule was indirectly involved in *People v. Vargas* (1960) 179 C.A.2d Supp. 863, 3 C.R. 925, where defendant, while being served with a writ of possession in a civil action, struck and bit deputy sheriffs. In this prosecution for

battery, she asserted the right to resist service of the writ on the ground that it was based on a void judgment. *Held*, conviction affirmed. The same principle that protects the officer executing process valid on its face from civil liability protects the officer from physical violence, and makes it criminal to resist the service. (179 C.A.2d Supp. 865.)

(2) *Obedience to Law or Lawful Order*. In *Sokol v. Public Util. Com.* (1966) 65 C.2d 247, 257, 53 C.R. 673, 418 P.2d 265, the telephone company discontinued service to a suspected bookmaker, on request of the chief of police, pursuant to a Public Utilities Commission order. The order, though invalid; was valid on its face. *Held*, the utility was not liable in tort for compliance with it. It would be manifestly unfair to impose civil liability on a private entity for doing what the law requires. (65 C.2d 258, citing *Peterson v. Robison* (1954) 43 C.2d 690, 277 P.2d 19, *infra*, §439.) (See *Brian T. v. Pacific Bell* (1989) 210 C.A.3d 894, 908, 258 C.R. 707 [following *Sokol*; telephone utility was absolved from liability where it acted under compulsion of Public Utilities Commission order, even if order was based on mistaken interpretation of commission's duties and powers].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Reliance on Court Process*. C.C. 43.55 was subdivided in 2005, with the material treated in the text designated as C.C. 43.55(a). C.C. 43.55(b) defines a "warrant of arrest regular upon its face" to include either (a) a paper arrest warrant issued pursuant to a judicial order or (b) a judicial order entered into an automated warrant system by law enforcement or court personnel authorized to make those entries at or near the time the judicial order is made.



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q. Failure of Court To Give Notice of Protective Order.

5 *Witkin Sum. Cal. Law Torts* § 162

[§ 162] Failure of Court To Give Notice of Protective Order.

Employees of local law enforcement agencies, courts, and the Department of Justice acting within the scope of their employment have immunity in the event that, as a result of a court's failure to give notice of a protective order as required by *Family C. 6380* et seq. of the Domestic Violence Prevention Act (see 11 *Summary* (10th), *Husband and Wife*, §373 et seq.), either (1) a person restrained by the order unlawfully obtains or attempts to obtain a firearm with which a person is injured, or (2) a person otherwise entitled to a firearm is denied one. (*Family C. 6385(c)*.)

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r. Disclosure by Anonymous Witness Program.

5 *Witkin Sum. Cal. Law Torts* § 163

[§ 163] Disclosure by Anonymous Witness Program.

C.C. 48.9 provides a qualified immunity for an "anonymous witness program," defined as "a program whereby information relating to alleged criminal activity is received from persons, whose names are not released without their authorization unless required by law, and disseminated to law enforcement agencies." (C.C. 48.9(d).)

(1) *Persons Protected*. The immunity covers an organization that "sponsors or conducts" such a program, and its employees and agents. (C.C. 48.9(a).)

(2) *Nature of Immunity*. These organizations and persons are not liable in a civil action for damages resulting from their receipt of information or dissemination of it to a law enforcement agency. "Civil action for damages" includes, but is not limited to, "a defamation action or an action for damages resulting from retaliation against a person who provided information." (C.C. 48.9(a), (b).)

(3) *Where Immunity Is Inapplicable*. The immunity does not apply where (a) the information was disseminated with actual knowledge of its falsity; (b) the name of the provider of the information was disseminated without his or her authorization, and the dissemination was not required by law; (c) the name of the provider was obtained and he or she was not informed that the disclosure may be required by law. (C.C. 48.9(c).) (See 15 *Pacific L. J.* 695.)

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s. Report Regarding Threat of Violence on School Grounds.

5 Witkin Sum. Cal. Law Torts § 164

[§ 164] Report Regarding Threat of Violence on School Grounds.

C.C. 48.8 recognizes a qualified privilege for communications or reports about threats of armed violence on school grounds. The communication may be made by any person to a school principal. It may also be made by a student attending the school to the student's teacher, a school counselor, or a school nurse, and a report of that communication to the school principal is also protected. The communication or report must state that a specific student or other specified person has made a threat to commit violence or potential violence on the school grounds involving the use of a firearm or other deadly or dangerous weapon. (C.C. 48.8(a).) "School" is defined as "a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive." (C.C. 48.8(b).) (See 33 *McGeorge L. Rev.* 195 [protecting those who report threats of potential violence from defamation liability].)

The communication or report "is a communication on a matter of public concern" and is subject to liability in defamation only on a showing by clear and convincing evidence that the communication or report was made with knowledge of its falsity or with reckless disregard for the truth or falsity of the communication. Where punitive damages are alleged, C.C. 3294 (see *infra*, §1559) applies. (C.C. 48.8(a).)

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t. Privilege of Public Officers.

1. Legislators.

5 Witkin Sum. Cal. Law Torts § 165

[§ 165] Legislators.

Federal, state, and local legislators have an absolute privilege and therefore a complete immunity from tort liability for acts (e.g., defamatory statements) in the exercise of their legislative functions (e.g., speeches and publications). (*Lake Country Estates v. Tahoe Regional Planning Agency* (1979) 440 U.S. 391, 99 S.Ct. 1171, 1178, 59 L.Ed.2d 401, 411; see *Rest.2d, Torts* §590; Dobbs, *The Law of Torts* §273; 5 Harper, James & Gray 2d §29.10; 44 Cal. L. Rev. 888; 47 Cal. L. Rev. 318; 68 Harv. L. Rev. 1229; 3 Stanf. L. Rev. 486; 4 U.C.L.A. L. Rev. 466; 28 U.C.L.A. L. Rev. 1087.) (On immunity under Speech or Debate Clause, see 7 Summary (10th), *Constitutional Law*, §§150, 151.)

In *Tenney v. Brandhove* (1951) 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019, plaintiff, who had petitioned the Legislature to refuse funds to a committee, was summoned to a hearing. On his refusal to testify, his prior statements and criminal record were disclosed and he was prosecuted for contempt. He brought a civil rights suit in the federal district court under 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 Summary (10th), *Constitutional Law*, §§816, 818 et seq.), alleging conspiracy to prevent him from exercising his rights of free speech, etc. Held, legislators are protected by common law immunity from tort liability. To find that an investigation exceeded the bounds of legislative power there must be an obvious usurpation of judicial or executive functions, not shown here. And as to the allegations of motive, the Court said: "The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." (71 S.Ct. 788, 95 L.Ed. 1027.) (See 44 Cal. L. Rev. 890; 68 Harv. L. Rev. 1229.)

Dawson v. Martin (1957) 150 C.A.2d 379, 309 P.2d 915, involved the effect of Govt.C. 25042, which provides that a county supervisor who performs any duty "fraudulently or corruptly" is liable on his official bond to a person so injured. Plaintiff alleged that defendants, members of the county board, had him falsely charged with violations of the building code, for which he was arrested and imprisoned. Thus, plaintiff sought an interpretation of the statute which would remove the ordinary immunity of these officers from liability for malicious prosecution. Held, the Legislature did not intend to single out boards of supervisors for special liability, and the statutory language, strictly interpreted, was

not satisfied with these general charges of fraud. (150 C.A.2d 382.)

In *Hancock v. Burns* (1958) 158 C.A.2d 785, 323 P.2d 456, plaintiffs, employees of a public utility, alleged that they were summoned before the committee and claimed privilege; that thereafter the committee maliciously communicated with their employer recommending their discharge for their lack of cooperation and as poor security risks; that they were discharged on the basis of this recommendation; and that they were loyal citizens. *Held*, no cause of action for inducing breach of contract was stated; the acts were within the legislative authority of the committee to report its recommendations to the people.

(a) The underlying policy may be stated as follows: "If government, operating through the individuals who form it, is afforded immunity from private suit only when its actions are beyond any question, and loses that immunity upon mere allegation of improper motives or unlawful acts in a complaint seeking damages, then those persons who form government are subject to the threat of personal liability in any matter in which their discretion is exercised." (158 C.A.2d 792.)

(b) However, the privilege is not wholly unlimited: "Were the committee or its members charged with the commission of some bodily injury inflicted on another in the course of conducting their hearings, such act could not reasonably be urged to come within the immunity here stated, as the mere recitation of the infliction of bodily harm is a statement of an act which by no reasonable means could be encompassed by the immunity." (158 C.A.2d 793.) (See *Allen v. Superior Court* (1959) 171 C.A.2d 444, 448, 340 P.2d 1030, 4 Cal. Proc. (4th), *Pleading*, §402 [chairman of legislative committee was immune from tort liability for acts in conduct of hearing]; *Martelli v. Pollock* (1958) 162 C.A.2d 655, 659, 328 P.2d 795 [city legislators have same immunity]; 11 *Stanf. L. Rev.* 194 [criticizing *Hancock*].)

West's Key Number Digest, States k.28(2)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §29.10. *Allen case*:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §441.



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aa. In General.

5 Witkin Sum. Cal. Law Torts § 166

[§ 166] In General.

(1) *Rule of Absolute Privilege.* A judge has the same absolute privilege as a legislator (*supra*, §165), and is consequently immune from liability for such torts as malicious prosecution or false imprisonment. (*Oppenheimer v. Ashburn* (1959) 173 C.A.2d 624, 629, 343 P.2d 931; *Lewis v. Linn* (1962) 209 C.A.2d 394, 397, 26 C.R. 6; *Paddleford v. Biscay* (1971) 22 C.A.3d 139, 143, 99 C.R. 220, *infra*, §169; *Stump v. Sparkman* (1978) 435 U.S. 349, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331, 341, *infra*, §169; *Butz v. Economou* (1978) 438 U.S. 478, 98 S.Ct. 2894, 2912, 57 L.Ed.2d 895, 918, *infra*, §178; *Pulliam v. Allen* (1984) 466 U.S. 522, 104 S.Ct. 1970, 1975, 80 L.Ed.2d 565, 572, *infra*, §170.) "An unbroken line of authorities including many English cases as well as authorities in our own country from the beginning of our judicial history sustains the principle that judicial officers are not liable for the erroneous exercise of *judicial* powers vested in them." (*Frazier v. Moffatt* (1951) 108 C.A.2d 379, 384, 239 P.2d 123.) (See *Rest.2d, Torts* §585; 47 *Cal. L. Rev.* 309; 27 *San Diego L. Rev.* 1; 46 *Am.Jur.2d* (1994 ed.), *Judges* §74 et seq.; 42 *A.L.R.2d* 825 [findings, report, or the like of judge or person acting in judicial capacity as privileged in defamation action]; 64 *A.L.R.3d* 1251 [civil liability of judicial officer for malicious prosecution or abuse of process].)

(2) *Illustrations.* The judicial privilege defense has been frequently applied. (See *Ceinar v. Johnston* (1933) 134 C.A. 166, 170, 25 P.2d 28 [justice court judge who incarcerated plaintiff was not liable for false imprisonment]; *Malone v. Carey* (1936) 17 C.A.2d 505, 507, 62 P.2d 166 [city judge]; *Perry v. Meikle* (1951) 102 C.A.2d 602, 605, 228 P.2d 17 [superior court judge committed plaintiff for contempt for disobedience of order to produce a child; no liability for false imprisonment]; *Reverend Mother Pauline v. Bray* (1959) 168 C.A.2d 384, 385, 335 P.2d 1018 [appellate justice]; *Taliaferro v. Contra Costa* (1960) 182 C.A.2d 587, 592, 6 C.R. 231, *infra*, §169 [immunity of judge of inferior court is same as that of judge of any other court].)

In *Frazier v. Moffatt*, *supra*, plaintiff and his party were engaged in a noisy lunch at a cafe. Defendant justice court judge, acting under P.C. 838 (authorizing magistrate to order arrest committed in presence), called the police, ordered plaintiff arrested for disturbing the peace, and filed a criminal complaint. After trial and acquittal, plaintiff sued for false arrest and imprisonment. *Held*, judgment for plaintiff reversed. The question was whether a magistrate is civilly liable for an arrest made maliciously and on insufficient evidence; in other words, whether the act carried with it the complete

immunity of a judicial officer. The court concluded that in making the arrest pursuant to P.C. 838, the magistrate "is acting within his jurisdiction and in the performance of a judicial act, done in the execution of his office and within the purview of his general authority." (108 C.A.2d 387.)

In *Pierson v. Ray* (1967) 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288, blacks, arrested and convicted for peacefully attempting to use public facilities in Mississippi, brought a civil rights action in federal district court under 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 Summary (10th), *Constitutional Law*, §§816, 818 et seq.) against the police judge who tried them. *Held*, the principle of judicial immunity was applicable to such actions, and the judge had a complete defense. (87 S.Ct. 1218, 18 L.Ed.2d 296.)

In *Frost v. Geernaert* (1988) 200 C.A.3d 1104, 246 C.R. 440, involving allegations that defendant superior court judges were guilty of fraud in making rulings against plaintiff in other actions, plaintiff argued that judicial immunity was abrogated by Govt.C. 822.2, which immunizes public employees from liability for misrepresentation, *unless* they are guilty of "actual fraud, corruption or actual malice" (see *infra*, §348). Plaintiff's argument was based on a 1977 amendment to Govt.C. 810.2, which expanded the definition of "employee" to include a "judicial officer." *Held*, judicial immunity was not abrogated.

(a) The 1977 Chapter amending Govt.C. 810.2 also added Govt.C. 27648, which provides that any judge who, like other public employees, is entitled to representation under Govt.C. 825, 995, or 27647, but who is required to retain the judge's own counsel because of a conflict of interest, is entitled to recover attorneys' fees from the public entity. In the light of the limited nature of the 1977 legislation, there is no indication that the Legislature intended to expand judicial liability through Govt.C. 822.2 by amending Govt.C. 810.2. (200 C.A.3d 1109.)

(b) Although a literal construction of the language of Govt.C. 810.2 and 822.2 would lead to alteration of the common law doctrine of judicial immunity, nothing in the language or history of these statutes suggests that the Legislature intended to achieve so significant a result by indirection. Rather, it is far more likely that had the Legislature intended such a result it would have addressed the issue directly. (200 C.A.3d 1109.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Rule of Absolute Privilege*. See *Regan v. Price* (2005) 131 C.A.4th 1491, 1495, 33 C.R.3d 130, Supp., *infra*, §168 [judicial immunity applies even to acts that are malicious or corrupt, so long as acts are judicial in nature]; 46 *Am.Jur.2d* (2006 ed.), *Judges* §67 et seq.



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5 *Witkin Sum. Cal. Law Torts* § 167

[§ 167] Quasi-Judicial Immunity.

Under the concept of "quasi-judicial immunity," California courts have extended absolute judicial immunity to persons other than judges if those persons act in a judicial capacity. In determining whether a person is acting in a quasi-judicial fashion, the courts look at the nature of the duty performed to determine whether it is a judicial act--not the name or classification of the officer who performs it; many who are properly classified as executive officers are invested with limited judicial powers. (*Howard v. Drapkin* (1990) 222 C.A.3d 843, 852, 271 C.R. 893, *infra*, §174; see *Fisher v. Pickens* (1990) 225 C.A.3d 708, 713, 275 C.R. 487, 14 *Summary* (10th), *Wills and Probate*, §941 [in gathering evidence on proposed conservatee, court investigator was acting as quasi-judicial officer]; 29 *Hastings L. Rev.* 613 [immunity of police officers enforcing court orders as quasi-judicial or as qualified].) Thus, a court commissioner acting either as a temporary judge or in performance of subordinate judicial duties under Cal. Const., Art. VI, §22, may raise the defense. (*Tagliavia v. Los Angeles* (1980) 112 C.A.3d 759, 761, 169 C.R. 467; see *Branson v. Martin* (1997) 56 C.A.4th 300, 304, 65 C.R.2d 401 [court commissioner, substituting for magistrate in traffic infraction case, was immune from liability for incarcerating plaintiff, who refused to enter plea or sign promise to appear].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Regan v. Price* (2005) 131 C.A.4th 1491, 1495, 33 C.R.3d 130, *Supp.*, *infra*, §168 [privilege of judicial immunity extends not only to judges, but to all persons who act in judicial capacity, including court-appointed referees performing subordinate judicial duties].



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5 *Witkin Sum. Cal. Law Torts* § 168

[§ 168] Nonjudicial Acts.

(1) *Inapplicability of Immunity.* The concept of judicial immunity does not extend to conduct that, though by a judicial or quasi-judicial officer or employee, is not performed in a judicial capacity. Courts look at the nature of the challenged act to determine if it is truly in the exercise of a judicial function and therefore deserving of judicial immunity. (*Soliz v. Williams* (1999) 74 C.A.4th 577, 595, 88 C.R.2d 184.)

Soliz involved both judicial and nonjudicial acts. Plaintiff was a party to a previous action before defendant, a superior court judge, that involved a settlement conference. During that conference, defendant in very profane terms criticized plaintiff's position. Three days later, defendant made comments to a reporter in which he denied his earlier conduct, thus indicating that plaintiff was a liar. Plaintiff then filed the present complaint, alleging several causes of action, some of which involved the statements during the settlement conference and some of which related to defendant's remarks to the reporter. Pursuant to stipulation, the trial judge entered judgment dismissing the complaint with the understanding that plaintiff could appeal the order sustaining the demurrer. *Held*, affirmed with respect to the causes of action involving the settlement conference; reversed as to the causes based on the remarks to the reporter.

(a) Conducting settlement conferences is a judicial function and, under C.R.C., Rule 222, is within the jurisdiction of an acting judge. Plaintiff argued that defendant's conduct was so serious that absolute judicial immunity was inapplicable. This contention is erroneous. "The seriousness of the misconduct identified in the complaint in the present case does not alter the fact that judicial immunity bars the damage claims ... premised on the statements made and the conduct engaged in at the ... settlement conference." (74 C.A.4th 589.)

(b) A judge is not immune from liability for torts involving *nonjudicial* action, however, and federal law makes it clear that defamatory comments to reporters fall into this category. Speaking to a reporter about a pending lawsuit is not a normal judicial function. While the judicial function can be furthered by statements to journalists, the present case involves a verified complaint alleging that defendant made false statements about the incident that thereby made plaintiff appear to be a liar. "Under these narrow circumstances," the absolute judicial privilege against a suit for damages is not applicable. (74 C.A.4th 595.)

(2) *Ministerial Acts*. Nonjudicial conduct, unprotected by judicial immunity, includes the performance of duties that are ministerial, rather than discretionary. In *Antoine v. Byers & Anderson* (1993) 508 U.S. 429, 113 S.Ct. 2167, 124 L.Ed.2d 391, plaintiff, who had been convicted of robbery, brought a civil action against defendant court reporter whose delay in producing a transcript of the robbery trial delayed the appeal process for 4 years. Defendant claimed absolute judicial immunity as a defense. *Held*, a court reporter is not absolutely immune for damages liability for failure to produce a transcript of a federal criminal trial.

(a) The "functional approach" to immunity does not require that absolute immunity be extended to court reporters on the ground that they are part of the judicial process. (113 S.Ct. 2171, 124 L.Ed.2d 399, citing *Burns v. Reed* (1991) 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547, *infra*, §181.) "When judicial immunity is extended to officials other than judges, it is because their judgments are 'functional[ly] comparab[le]' to those of judges--that is, because they, too, 'exercise a discretionary judgment' as part of their function." (113 S.Ct. 2171, 124 L.Ed.2d 399, citing *Imbler v. Pachtman* (1976) 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128, *infra*, §181.)

(b) The function performed by court reporters does not meet this test. Court reporters are afforded no discretion in performing their statutory duty (28 U.S.C., §753(b)) to record verbatim court proceedings in their entirety; they must record, as accurately as possible, what transpires in court. And neither the skill required to perform this task nor the importance of it is sufficient to make it functionally comparable to that of a judge. "In short, court reporters do not exercise the kind of judgment that is protected by the doctrine of judicial immunity." (113 S.Ct. 2172, 124 L.Ed.2d 400.)

(3) *Executive, Legislative, or Administrative Acts*. In *Forrester v. White* (1988) 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555, defendant, an Illinois trial judge, had authority to hire probation officers, and hired plaintiff. Later he discharged her, and, in this civil rights action under 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 *Summary* (10th), *Constitutional Law*, §§816, 818 et seq.), a jury found that he had discriminated against her on account of her sex, and awarded compensatory damages. The federal district court set aside the verdict and granted summary judgment for defendant on the ground of absolute judicial immunity. *Held*, the judge's decision to dismiss a subordinate court employee was not a judicial act, and the defense of absolute immunity was not available.

(a) "[T]his Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court. Running through our cases, with fair consistency, is a 'functional' approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." (108 S.Ct. 542, 98 L.Ed.2d 563.)

(b) "Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." Although the Court has never articulated a precise and general definition of acts entitled to immunity, the cases "suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." (108 S.Ct. 544, 98 L.Ed.2d 565.)

(c) In this case, it is clear that defendant was acting in an administrative capacity when he demoted and discharged plaintiff. Those acts--like many others involved in supervising court employees and overseeing the efficient operation of a court--may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative. A judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other executive branch official who is responsible for making these employment decisions. (108 S.Ct. 545, 98 L.Ed.2d 566.)

(d) "This does not imply that qualified immunity, like that available to Executive Branch officials who make similar discretionary decisions, is unavailable to judges for their employment decisions." (108 S.Ct. 545, 98 L.Ed.2d 567.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Inapplicability of Immunity.* Former C.R.C., Rule 222 was renumbered C.R.C., Rule 3.1380 in 2006.

In *Regan v. Price* (2005) 131 C.A.4th 1491, 33 C.R.3d 130, a discovery referee slammed a door against a litigant's body when he tried to leave the deposition room, and the litigant subsequently sued the referee for false imprisonment, assault, battery, negligence, and infliction of emotional distress. The trial court sustained the referee's demurrer to the complaint on the ground of judicial immunity. *Held*, reversed.

(a) Physically assaulting a litigant cannot be a judicial function, except in extraordinary cases. (131 C.A.4th 1496.) That situation might occur, for example, where a litigant assaults court staff, and the judge physically intervenes because court security personnel are absent. However, this is not the case here. (131 C.A.4th 1497.)

(b) The referee claims that the assault is privileged because the referee was exercising his power to compel the parties to proceed with a scheduled deposition. Under the same rule, however, a judge could, without incurring civil liability, step down from the bench and choke an unruly litigant under the "judicial" auspices of restoring order to the courtroom. The test for whether an act is a judicial one, to which judicial immunity attaches, must be determined by whether it is a function normally performed by a judge. The use of physical force on a litigant is not an act normally performed by a judge. "A judge's robe is not a king's crown. [Judicial immunity] was never intended to protect acts of thuggery against litigants merely because the assailant happens to be a judge." (131 C.A.4th 1499.)



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5 *Witkin Sum. Cal. Law Torts* § 169

[§ 169] Acts Without or in Excess of Jurisdiction.

(1) *Limited Scope of Exception.* It is often asserted (usually as dictum) that a judicial officer has complete immunity only when the officer acts within his or her jurisdiction, and that liability may be imposed for acts in excess of jurisdiction. (See *Franklin v. Municipal Court* (1972) 26 C.A.3d 884, 898, 103 C.R. 354; 47 Cal. L. Rev. 314.) Use of the ambiguous term "jurisdiction" in this connection is misleading, and the actual rule as applied by California cases can be stated as follows:

(a) In the rare situation in which a judge totally lacks jurisdiction of the subject matter, so that the judge is not acting within the general scope of his or her judicial powers, the judge may be subject to liability. Thus, in *De Courcey v. Cox* (1892) 94 C. 665, 30 P. 95, the allegation was that plaintiff, having refused to return an alleged overpayment of \$ 20 made by another, was arrested, tried by defendant justice of the peace, ordered to restore the sum or be committed to jail, and thereafter imprisoned. The facts alleged showed that the judge of an inferior court conducted a criminal trial and had a sentence of imprisonment executed where it was obvious that no crime of any kind was charged. The court held that a cause of action for false imprisonment was stated, and quoted several broad declarations to the effect that a magistrate or inferior tribunal with limited authority is liable as a private individual for acts beyond jurisdiction. (94 C. 669.)

(b) Where a judge determines a debatable jurisdictional issue, even though erroneously, the judge is not civilly liable even though it develops that the issue was incorrectly decided. Usually, the court has subject matter jurisdiction, and the departure is merely an erroneous exercise of that jurisdiction (i.e., an "act in excess of jurisdiction"; see 2 Cal. Proc. (4th), *Jurisdiction*, §276). Thus, in *Singer v. Bogen* (1957) 147 C.A.2d 515, 305 P.2d 893, plaintiffs alleged that defendant superior court judges, sitting in the juvenile court, improperly detained plaintiff as a material witness in a criminal case. The jurisdictional defect was lack of timely filing of the petition and citation. "In other words, the judges ... acted within the scope of the general subject matter over which they were given power, even though there might have been some procedural error." (147 C.A.2d 525.) Held, no cause of action was stated for false imprisonment. The court in *Singer* also pointed out that a prior determination of the jurisdictional issue in favor of the plaintiff (on habeas corpus) did not affect the immunity: "One standard will be recognized for obtaining relief from imprisonment on habeas corpus,

and another standard for obtaining damages from public officials in a civil suit." (147 C.A.2d 525.)

(2) *Illustrations.* In *Taliaferro v. Contra Costa* (1960) 182 C.A.2d 587, 6 C.R. 231, plaintiff was arrested for wilfully ignoring a subpoena duces tecum requiring his appearance before the Labor Commissioner at a hearing in Alameda County. The warrant of arrest was issued by the judge of the San Pablo Justice Court in Contra Costa County, the proceeding was tried by the Martinez Justice Court in that county, and a verdict of guilty was reversed by the Appellate Department on the ground that neither the San Pablo nor Martinez court had jurisdiction because the crime charged was wholly committed in Alameda County. In this action, plaintiff sought damages in tort against the San Pablo judge. *Held*, judgment for defendant on demurrer affirmed. The allegation of plaintiff's residence in San Pablo and judicial notice of its geographical proximity to Oakland furnished reasonable grounds for the judge to believe that the criminal act had occurred in Contra Costa County. The court said: "The meaning of the phrase 'within the general scope of judicial powers' or 'within the judicial competency of the magistrate's as applied to judges of courts of inferior jurisdiction in California must include all of those cases wherein any reasonable ground for assumption of jurisdiction arises under the facts disclosed by a criminal complaint and the law applicable thereto. Otherwise, the administration of justice in a most important sphere would be seriously hampered by depriving such judges of the immunity from civil suit that society recognizes as essential to the maintenance of an efficient and independent judiciary." (182 C.A.2d 593.)

In *Paddleford v. Biscay* (1971) 22 C.A.3d 139, 99 C.R. 220, defendant municipal judge provided printed warrants for traffic violations, with his prestamped signature, authorizing service day or night. This was contrary to P.C. 840, which at that time permitted service at night of a misdemeanor warrant only on direction of the magistrate indorsed on the warrant in the particular case. Plaintiff, arrested on such a warrant for a standing parking violation, sued defendant judge in the federal court for violation of his civil rights, and then sued in the California court for conspiracy to violate the governing Penal Code sections. *Held*, summary judgment for defendant affirmed. The judge had jurisdiction over the offense and the issuance of a warrant (subject matter jurisdiction); his violation of the statute was at most an act in excess of jurisdiction. This long-recognized distinction was not abrogated by the *Civil Rights Act*. (22 C.A.3d 144.)

In *Stump v. Sparkman* (1978) 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331, plaintiff brought a civil rights action alleging the following: When she was 15 years old, her mother had an attorney prepare a petition to have a tubal ligation performed on her, and presented it to defendant judge of the Indiana Circuit Court. The petition stated that plaintiff was "somewhat retarded," that she had been associating with "older youth or young men," and that in view of this behavior and her mental capabilities, it would be in her best interest to be sterilized. Defendant approved the petition, and, after being told she was to have her appendix removed, plaintiff entered the hospital and the tubal ligation was performed. Two years later, she married, discovered that she had been sterilized, and brought this suit in the federal district court. The court ruled that defendant was entitled to judicial immunity. *Held*, affirmed.

(a) *Judge liable only when "clear absence of all jurisdiction."* The doctrine of judicial immunity was recognized as early as 1872 (*Bradley v. Fisher* (1872) 13 Wall 335, 20 L.Ed. 646), and was later held applicable to civil rights actions under 42 U.S.C., §1983 (*Pierson v. Ray* (1967) 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288, *supra*, §166). The immunity depends on subject matter jurisdiction, and the scope of jurisdiction is construed broadly: A judge will not be liable because he acted in error, or maliciously, or in excess of authority. A judge "will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" (98 S.Ct. 1105, 55 L.Ed.2d 339, quoting *Bradley*.)

(b) *Principle inapplicable on facts.* The Indiana statutes expressly provide for sterilization of institutionalized persons under certain circumstances, and contain no express authority for judicial approval of tubal ligation. But no statute or case law prohibits a court of general jurisdiction from considering a petition of the type presented here. (98 S.Ct. 1105, 55 L.Ed.2d 340.) An Indiana decision holds that a parent does not have a common law right to have a minor child sterilized; but this decision deals only with the rights of the parents and does not question the jurisdiction of a judge to act, even though the judge would err as a matter of law. The implication of the decision is that a judge presented with such a petition should deny it on the merits rather than dismiss it for lack of jurisdiction. (98 S.Ct. 1106, 55 L.Ed.2d 340.) The contention that the judge's act was an illegitimate exercise of common law power because it failed to comply with elementary principles of procedural due process misconceives the immunity doctrine: The judge is

absolutely immune "even if his exercise of authority is flawed by the commission of grave procedural errors." (98 S.Ct. 1106, 55 L.Ed.2d 341.)

(c) *Approval of petition was judicial act.* A judge is immune only for acts performed in his "judicial" capacity, and it was argued that the informality of this ex parte proceeding, with no docket number, no filing, no notice, and no appointment of a guardian ad litem, took it out of that classification. But the determinative factors relate to the nature of the act, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his or her judicial capacity. Both factors appear here. (98 S.Ct. 1107, 1108, 55 L.Ed.2d 342.)

(d) *Fundamental unfairness does not nullify jurisdiction.* The suggestion that defendant's action was so devoid of concern for the interests of a young girl as to disqualify it as a judicial act is unacceptable: Disagreement with the action taken does not warrant deprivation of the immunity. (98 S.Ct. 1108, 55 L.Ed.2d 343.) (See *Mireles v. Waco* (1991) 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9, 8 Summary (10th), *Constitutional Law*, §835 [per curiam opinion discussing *Stump*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Limited Scope of Exception.*

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §285.



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Witkin Summary of California Law

I. INTRODUCTION

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t. Privilege of Public Officers.

2. Judges and Quasi-Judicial Officers.

ee. Proceedings or Relief Not Barred.

5 *Witkin Sum. Cal. Law Torts* § 170

[§ 170] Proceedings or Relief Not Barred.

Judicial or quasi-judicial immunity provides a defense against civil liability for damages. It has been held inapplicable in certain other types of proceedings, however, even though brought against a judge or other person performing a judicial function. The immunity does not, for example, preclude a private, voluntary professional association from disciplining one of its members for false representations or wrongful conduct made or carried out in a judicial proceeding. (*Budwin v. American Psychological Assn.* (1994) 24 C.A.4th 875, 884, 29 C.R.2d 453, *infra*, §572.)

The right to injunctive relief and attorneys' fees in a civil rights action against a judge was declared in *Pulliam v. Allen* (1984) 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565. Defendant, a state magistrate in Virginia, followed the practice of imposing bail on persons arrested for nonjailable misdemeanors and of incarcerating those who could not meet the bail. Plaintiffs were arrested for nonjailable misdemeanors and incarcerated. They brought this civil rights action under 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 *Summary* (10th), *Constitutional Law*, §§816, 818 et seq.) in the federal district court, seeking an injunction and declaratory relief. The district court declared the practice to be a violation of due process and equal protection, and granted an injunction. The court also awarded attorneys' fees of \$ 7,038 under the Civil Rights Attorney's Fees Awards Act (42 U.S.C., §1988; see 7 *Cal. Proc.* (4th), *Judgment*, §206 et seq.). The Court of Appeals affirmed. *Held*, affirmed.

(a) *Judicial immunity no bar to injunctive relief.* "We never have had a rule of absolute judicial immunity from prospective relief and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence." (104 S.Ct. 1978, 80 L.Ed.2d 576.)

(1) The limitations on equitable relief--a showing of inadequate remedy at law and a serious risk of irreparable harm--"severely curtail the risk that judges will be harassed and their independence compromised by the threat of having to defend themselves against suits by disgruntled litigants." (104 S.Ct. 1978, 80 L.Ed.2d 576.)

(2) The other concern is that federal judges should not sit in constant supervision of state judicial officers. But this does not raise a question of judicial independence properly addressed by a doctrine of judicial immunity. The intrusion

would result whether the action enjoined were that of a state judge or of another state official, and the concern has been addressed as a matter of comity and federalism. "We reaffirm the validity of those principles and the need for restraint by federal courts called on to enjoin the actions of state judicial officers. We simply see no need to reinterpret the principles now as stemming from the doctrine of judicial immunity." (104 S.Ct. 1979, 80 L.Ed.2d 577.)

(3) In enacting the Civil Rights Act, Congress intended to reach unconstitutional actions by all state actors, including judges. And, although it is no longer proper to assume that a state court will not act to prevent a federal constitutional deprivation, "[w]e remain steadfast in our conclusion ... that Congress intended §1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review." (104 S.Ct. 1981, 80 L.Ed.2d 579.)

(b) *Attorneys' fee award not prohibited by judicial immunity.* Defendant contends that judicial immunity bars a fee award because attorneys' fees are the functional equivalent of monetary damages, which are prohibited by judicial immunity, and that the chilling effect of a damages award is no less chilling when it is denominated attorneys' fees. Although there is some logic in this reasoning, it is for Congress to determine whether and to what extent to abrogate the judiciary's common law immunity. And the legislative history of the statute "confirms Congress' intent that an attorney's fee award be available even when damages would be barred or limited by 'immunity doctrines and special defenses, available only to public officials.'" (104 S.Ct. 1981, 80 L.Ed.2d 580.) (See 17 Pacific L. J. 461.)

SUPPLEMENT: [This section is current through the latest supplement]
Civil Rights Attorney's Fees Award Act:

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §242 et seq.



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ff. Administrative Judges and Hearing Officers.

5 *Witkin Sum. Cal. Law Torts* § 171

[§ 171] Administrative Judges and Hearing Officers.

In *Butz v. Economou* (1978) 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895, *infra*, §178, the absolute immunity of judicial officers was extended to persons performing adjudicatory functions in federal administrative proceedings. "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge ... is 'functionally comparable' to that of a judge." (98 S.Ct. 2914, 57 L.Ed.2d 920.) "We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review." (98 S.Ct. 2915, 57 L.Ed.2d 921.)

The *Butz* holding on this point was applied to state hearing officers in *Taylor v. Mitzel* (1978) 82 C.A.3d 665, 671, 147 C.R. 323.

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gg. State Bar and Bar Associations.

5 *Witkin Sum. Cal. Law Torts* § 172

[§ 172] State Bar and Bar Associations.

(1) *State Bar and Committee of Bar Examiners.* In *Greene v. Zank* (1984) 158 C.A.3d 497, 204 C.R. 770, plaintiff, who had passed the bar examination, was informed that his certificate for admission would be delayed pending a moral fitness investigation by the Committee of Bar Examiners (see 1 *Cal. Proc.* (4th), *Attorneys*, §380 et seq.). After a year had passed without a hearing, he brought a civil rights action under 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 *Summary* (10th), *Constitutional Law*, §§816, 818 et seq.) against the State Bar, the committee, and two of its employees, alleging a conspiracy to deny his certification for reasons other than moral fitness. *Held*, judgment for defendants on demurrer affirmed.

(a) The absolute immunity of judges extends to those performing "judge-like" functions. (158 C.A.3d 508, citing *Butz v. Economou* (1978) 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895, *infra*, §178.) And bar associations and their officials charged with duties involving attorney *discipline* have historically enjoyed absolute immunity from damage claims. The immunity attaches because they function as an integral part of the judicial process. (158 C.A.3d 508.)

(b) Supreme Court justices deciding matters pertaining to *admission to the bar* are likewise performing judicial acts, and the performance of those acts by bar officials are similarly protected by absolute immunity. (158 C.A.3d 510.) In California, the State Bar and Committee of Bar Examiners are regarded as arms of the California Supreme Court in conducting investigations of applicants for admission, and they and their officials have similar immunity. (158 C.A.3d 511, 512, 513.)

(2) *State Bar and Local Bar Association.* In *Lebbos v. State Bar* (1985) 165 C.A.3d 656, 211 C.R. 847, defendant county bar association received complaints from clients and former clients of plaintiff attorney, and forwarded them to the State Bar. The State Bar, after an investigation and informal hearing, dismissed the complaints without issuing an order to show cause. Plaintiff then brought this suit against the State Bar and the county bar association on various causes of action, including violation of 42 U.S.C., §1983. *Held*, judgment for defendants on demurrer affirmed.

(a) The county bar association, a private nonprofit corporation, is not "clothed with the authority of state law," and

therefore cannot be held liable under the *Civil Rights Act*. (165 C.A.3d 656.)

(b) The State Bar, an arm of the California Supreme Court, is entitled to the same quasi-judicial immunity in conducting disciplinary proceedings as other prosecutors acting within their prosecutorial authority. (165 C.A.3d 666.) *Imbler v. Pachtman* (1976) 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128, *infra*, §181, and similar cases make it clear that the quasi-judicial immunity extends beyond conducting a trial or hearing to include actions that must be taken prior to the initiation of a prosecution. Hence, the investigation of the complaints by the State Bar and its officers was within the prosecutorial authority of the State Bar and entitled to immunity. (165 C.A.3d 666.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *State Bar and Committee of Bar Examiners*.

Cross-Reference: 1 Cal. Proc. (5th), *Attorneys*, §364 et seq.



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hh. Grand Jurors.

5 *Witkin Sum. Cal. Law Torts* § 173

[§ 173] Grand Jurors.

Members of a grand jury perform functions of a quasi-judicial character and are legally invested with discretion. Accordingly, they cannot be held civilly responsible for their official acts. (*Turpen v. Booth* (1880) 56 C. 65, 69; *Irwin v. Murphy* (1933) 129 C.A. 713, 716, 19 P.2d 292; see 48 A.L.R.2d 716 [proceedings, presentments, investigations, and reports of grand jury as privileged].)

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5 *Witkin Sum. Cal. Law Torts* § 174

[§ 174] Persons Engaged in Alternative Dispute Resolution.

Judicial immunity may arise in the context of alternative dispute resolution (ADR). (On ADR generally, see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §468 et seq.)

(1) *Arbitrators or Mediators.* In *Baar v. Tigerman* (1983) 140 C.A.3d 979, 189 C.R. 834, plaintiffs engaged defendant arbitrator to administer arbitration proceedings pursuant to the arbitration clause of their limited partnership agreement. Defendant failed to make an award within the deadline fixed, and as a result, lost all contractual and statutory authority to act. In this action by plaintiffs for breach of contract and negligence, the court held: (a) An arbitrator acts in a quasi-judicial capacity and is immune from liability for alleged misconduct in arriving at a decision. (140 C.A.3d 982, 983.) (b) However, the absolute immunity that protects a judge who fails to rule does not apply in arbitration proceedings; the contractual obligations of an arbitrator, including the duty to rule within the time period set forth in the agreement, must be upheld. (140 C.A.3d 984, 985.) (See 44 *Hastings L. J.* 421 [Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators]; 27 *U.S.F. L. Rev.* 873 [Reassessing the Architect's Role as Arbiter]; on privilege of witnesses in contractual arbitration proceeding, see *infra*, §573.)

The liability holding of *Baar* was nullified by the enactment of former C.C.P. 1280.1 in 1985, providing that "[a]n arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract." (See *Coopers & Lybrand v. Superior Court* (1989) 212 C.A.3d 524, 527, 535, 260 C.R. 713 [immunity under former C.C.P. 1280.1 extended to arbitrators in appraisals, valuations, and similar proceedings, such as audits]; *Thiele v. RML Realty Partners* (1993) 14 C.A.4th 1526, 1529, 18 C.R.2d 416 [immunity created for arbitrator extended to sponsoring arbitration association]; 17 *Pacific L. J.* 627.)

Former C.C.P. 1280.1 was repealed by its own terms in 1997. However, *Stasz v. Schwab* (2004) 121 C.A.4th 420, 17 C.R.3d 116, 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, Supp., §509, reaffirmed that the protection of judicial immunity extends to arbitrators and sponsoring arbitration organizations. (121 C.A.4th 430, 433.) The court reasoned that former C.C.P. 1280.1 never purported to affect arbitral immunity under the common law but was intended only to respond to *Baar*, which held merely that arbitrators are liable for complete nonperformance of their contract with the

parties. (121 C.A.4th 434.)

An arbitrator or mediator of an *attorneys' fee dispute* conducted by the State Bar or a local bar association pursuant to B. & P.C. 6200 et seq. (see 1 Cal. Proc. (4th), *Attorneys*, §248 et seq.), as well as the arbitrating association and its officers and employees, "have the same immunity which attaches in judicial proceedings." (B. & P.C. 6200(f).) This statute was construed in *Olney v. Sacramento County Bar Assn.* (1989) 212 C.A.3d 807, 813, 260 C.R. 842. Plaintiff client sued defendant arbitrator and the county bar association, alleging that statements in the arbitration findings were fraudulent. He contended that the statutory immunity did not apply because the arbitrator made a mistake of law and therefore did not conduct the arbitration "pursuant to" B. & P.C. 6200 et seq., as required by the statute. In rejecting this contention, the court said: "Under plaintiff's reasoning, any arbitrator who makes an error of law would be subject to liability because the arbitration would not have been conducted 'pursuant to' the authorizing legislation. Of course the only time an arbitrator faces potential liability and thus the only time the statutory immunity is called into play is when one party to the arbitration asserts the arbitrator erred. We cannot adopt an interpretation of the statute which allows the statute to have effect only in those situations where it serves no function. Rather, an arbitrator is entitled to the immunity when the arbitration's structure and procedure are fashioned in accordance with the rules established under section 6200 et seq. and the arbitration results from a request made 'pursuant to' the statute's authority." (212 C.A.3d 813.)

(2) *Neutral Third Parties.* In *Howard v. Drapkin* (1990) 222 C.A.3d 843, 271 C.R. 893, plaintiff initiated family law proceedings against her former husband to terminate his custody and visitation rights with respect to their 9-year-old son, on the ground that the former husband had physically and sexually abused the child. Plaintiff and the former husband then entered into a stipulation providing that defendant, a licensed psychologist, would evaluate the facts and render nonbinding findings and recommendations. The stipulation was ultimately signed by the court and converted into an order, but the judge did not supervise defendant's work. In this action for intentional and negligent infliction of emotional distress, plaintiff alleged that (a) defendant in a 6-hour session ridiculed her, and made false charges and threats, in order to induce her to abandon her belief in the former husband's abuse of the child; (b) that defendant failed to divulge her own lack of expertise in the area of child and sexual abuse; and (c) defendant failed to disclose a prior professional relationship with the former husband and her close personal friendship with the wife of one of the former husband's law partners. The trial judge sustained defendant's demurrer. *Held*, judgment for defendant on demurrer affirmed. Absolute quasi-judicial immunity is properly extended to neutral third parties who attempt to resolve disputes. (222 C.A.3d 860.) (On neutral fact-finding or evaluation, see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §478; on ADR generally, see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §468 et seq.)

The *Howard* case was distinguished in *Susan A. v. Sonoma* (1991) 2 C.A.4th 88, 3 C.R.2d 27, *infra*, §578. A public defender representing a minor charged with attempted murder retained defendant psychologist on the minor's behalf to assist the defense. In an action based on statements that defendant made to the press concerning his evaluation of the minor, defendant raised the immunity defense. *Held*, *Howard* was inapplicable. In speaking to the press, defendant intended to relate facts that would be helpful to the defense case by rebutting certain press allegations about premeditation. In this role as the minor's advocate, defendant was not entitled to quasi-judicial immunity. (2 C.A.4th 98.)

SUPPLEMENT: [This section is current through the latest supplement]
ADR generally:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §481 et seq.

(1) *Arbitrators or Mediators.* See 5 Pepperdine Dispute Resolution L. J. 325 [Immunizing Arbitrators From Claims for Equitable Relief].

In *Morgan Phillips v. JAMS/Endispute, L.L.C.* (2006) 140 C.A.4th 795, 44 C.R.3d 782, a party to an arbitration proceeding sued the arbitrator for breach of contract and negligent breach of the duty to provide binding arbitration

services. The complaint alleged that the arbitrator improperly withdrew from the proceeding, without cause, following evidence and argument in order to coerce a settlement, and refused to render an arbitration award. The arbitrator's demurrer on the ground of arbitral immunity was sustained. *Held*, reversed.

(a) California common law arbitral immunity protects arbitrators from civil liability for conduct in their quasi-judicial capacity. The purpose of arbitral immunity is to encourage fair and independent decisionmaking by immunizing arbitrators from lawsuits arising from conduct in their decisionmaking role. Generally speaking, arbitral immunity shields all functions that are integrally related to the arbitral process. (140 C.A.4th 800.)

(b) *Baar v. Tigerman* (1983) 140 C.A.3d 979, 211 C.R. 426, text, p. 297, recognizes a narrow exception to arbitral immunity: the immunity generally does not apply to an arbitrator's failure to make any decision at all. This exception is supported by common sense. Failure to render an arbitration award is not integral to the arbitration process; it is, rather, a breakdown of that process. (140 C.A.4th 801.) The *Baar* exception is applicable here. Thus, the arbitrator's conduct was not sufficiently associated with the adjudicative phase of the arbitration to justify immunity. (140 C.A.4th 802.)

(c) The scope of the *Baar* exception is not unlimited. Certainly, a decision to withdraw because of ethical considerations, i.e., because of substantial doubt about the ability to be fair and impartial or because of a conflict of interest, is entitled to immunity. An arbitrator's decision to withdraw based on ethical standards is integral to the arbitral function and is therefore covered by arbitral immunity. Here, however, the complaint alleges that the arbitrator withdrew without justification. If these facts are true, and in the absence of any other showing, the arbitrator's withdrawal is not immunized as a decision necessitated by ethical strictures. (140 C.A.4th 803.) *Stasz case*:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §555.

Attorneys' fees dispute:

Cross-Reference: 1 Cal. Proc. (5th), *Attorneys*, §220 et seq.(2) *Neutral Third Parties*.

Neutral fact-finding:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §493.

ADR generally:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §481 et seq. *Correction*: Page 297, fourth line from bottom of page, parallel citation for *Baar v. Tigerman* should be "211 C.R. 426".



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5 *Witkin Sum. Cal. Law Torts* § 175

[§ 175] Private Persons Conspiring With Judge.

In *Dennis v. Sparks* (1980) 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185, plaintiffs filed a civil rights action in federal district court under 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 *Summary* (10th), *Constitutional Law*, §§816, 818 et seq.) alleging that a state court judge had issued an injunction as a result of a corrupt conspiracy involving bribery of the judge. Defendants were the judge and the alleged coconspirators. *Held*, the judge was immune but the private conspirators were not.

(a) The private parties conspiring with the judge were acting under color of state law. The judge's immunity did not change the character of his action or theirs; indeed, his immunity was dependent on the challenged conduct being an official judicial act within his statutory jurisdiction. (101 S.Ct. 186, 187, 66 L.Ed.2d 190.)

(b) The contention that denial of immunity to the coconspirators will seriously erode the judge's immunity is not persuasive. Even though the judge may be forced to testify about and defend his judicial conduct, there is no constitutional privilege that precludes such compulsory testimony in third-party litigation. (101 S.Ct. 188, 66 L.Ed.2d 191.) And the concern that his conduct will be examined in a collateral proceeding against those with whom he allegedly conspired is not as great as that which would arise if he were held liable for damages. "[T]he potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons." (101 S.Ct. 188, 66 L.Ed.2d 192.)

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aa. General Rule and Policy.

5 *Witkin Sum. Cal. Law Torts* § 176

[§ 176] General Rule and Policy.

(1) *Rule of Absolute Immunity.* The absolute immunity developed in the judge cases (*supra*, §166 et seq.), and then applied to legislators (*supra*, §165), also generally exists in favor of "executive public officers when performing within the scope of their power acts which require the exercise of discretion or judgment." (*Hardy v. Vial* (1957) 48 C.2d 577, 582, 311 P.2d 494 [rule applied "notwithstanding malice or other sinister motive"]; see *Martelli v. Pollock* (1958) 162 C.A.2d 655, 659, 328 P.2d 795 [quoting *Hardy*; absolute immunity applied to city attorney giving legal advice]; *Cross v. Tustin* (1958) 165 C.A.2d 146, 149, 331 P.2d 785 [members of State Personnel Board were protected by absolute immunity for acts within scope of power]; *Rest.2d, Torts* §591; Dobbs, *The Law of Torts* §273; 5 Harper, James & Gray 2d §29.10; 44 Cal. L. Rev. 887; 47 Cal. L. Rev. 303; 73 Harv. L. Rev. 237; 74 Harv. L. Rev. 44; 12 So. Cal. L. Rev. 127, 216; 13 So. Cal. L. Rev. 49; 10 Stanf. L. Rev. 589; 17 Stanf. L. Rev. 1169; 66 A.L.R.2d 749 [civil liability of school officials for malicious prosecution]; for immunities under Tort Claims Act, see *infra*, §§226 et seq., 348.)

(2) *Underlying Policy.* The underlying policy is quoted at length from a leading federal case in *Hardy v. Vial*, *supra*: "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." (48 C.2d 582, quoting Judge

Learned Hand in *Gregoire v. Biddle* (2d Cir. 1949) 177 F.2d 579, 581.) (See *Barr v. Matteo* (1959) 360 U.S. 564, 79 S.Ct. 1335, 1434, 3 L.Ed.2d 1434, 1441 [quoting same opinion].)

(3) *Discretionary Function Requirement*. In *Westfall v. Erwin* (1988) 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619, plaintiff, employed as a civilian warehouseman at an army depot, sued defendants, his supervisors, alleging injuries resulting from inhaling soda ash dust stored in the warehouse without warning of the presence and danger of the ash. The federal district court found that defendants were acting within the scope of their employment, hence were absolutely immune from liability for ordinary torts. *Held*, the immunity is available only if the conduct is also discretionary in nature.

(a) Defendants contended that the requirement is satisfied so long as the official exercises "minimal discretion." "We reject such a wooden interpretation of the discretionary function requirement. Because virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless. Furthermore, by focusing entirely on the question whether a federal official's precise conduct is controlled by law or regulation, petitioners' approach ignores the balance of potential benefits and costs of absolute immunity under the circumstances and thus loses sight of the underlying purpose of official immunity doctrine." (108 S.Ct. 585, 98 L.Ed.2d 627.)

(b) "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." (108 S.Ct. 585, 98 L.Ed.2d 628.)

(4) *Officer Conspiring With Private Persons*. In *Hardy v. Vial*, *supra*, plaintiff state college professor brought an action for malicious institution of an administrative proceeding (*infra*, §513). He alleged that defendants (college officials and officers of the State Department of Education) conspired with outsiders to make false charges of immorality and unprofessional conduct against him which resulted in his dismissal, and that, after a hearing, the State Personnel Board cleared him and he was reinstated. His theory was that in acting with *outsiders* the school defendants went outside the scope of their official duties. The court held, however, that their positions embraced duties relating to investigation of charges against teachers. This being so, "the fact that the school defendants sought to attain their objective by acting in concert with other persons cannot properly be treated as destroying the immunity which they would have if each of them had acted individually and independently of any other person to secure the same result. The underlying theory of absolute immunity is equally applicable whether the employee acts by himself or with others who are not immune." (48 C.2d 583.) (See criticism, 9 *Hastings L. J.* 81; 5 *U.C.L.A. L. Rev.* 164.)

West's Key Number Digest, States k.55-

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Rule of Absolute Immunity*. See 5 Harper, James & Gray 3d §29.10.



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5 *Witkin Sum. Cal. Law Torts* § 177

[§ 177] State Officers in Civil Rights Suits.

In *Scheuer v. Rhodes* (1974) 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90, the United States Supreme Court reaffirmed the immunity but characterized it under the circumstances as qualified, not absolute. The case arose out of the killing of students by members of the Ohio National Guard at the Kent State University campus civil disorder in May 1970. The present action was by personal representatives of student decedents against the governor and other executive officers of the state, the National Guard, and the state university, seeking damages under 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 *Summary* (10th), *Constitutional Law*, §§816, 818 et seq.). The federal district court dismissed the suit before answer, and the Court of Appeals affirmed, on the dual grounds of Eleventh Amendment and common law executive immunity. *Held*, the dismissal was inappropriate at this stage of the litigation, for the complaints alleged, in substance, that the defendants acted either outside the scope of their offices or in an arbitrary manner, grossly abusing the lawful powers of the office.

(a) An absolute immunity is given to Congress by the Speech and Debate Clause (see 7 *Summary* (10th), *Constitutional Law*, §150); the other two branches of government have immunity under the common law. And "one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public." (94 S.Ct. 1689, 40 L.Ed.2d 99.)

(b) The Court of Appeals held that the immunity here was absolute; but this was not the common law rule for peace officers (94 S.Ct. 1691, 40 L.Ed.2d 102), and the Civil Rights Act would have no meaning if high executive officers were wholly immune from liability (94 S.Ct. 1692, 40 L.Ed.2d 103).

(c) "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct." (94 S.Ct. 1692, 40 L.Ed.2d 103.)

This approach has been followed in later decisions. (See *Wood v. Strickland* (1975) 420 U.S. 308, 95 S.Ct. 992, 995, 43 L.Ed.2d 214, 218 [liability of school board member under Civil Rights Act: no immunity if he knew or should have known that act would violate constitutional rights of student]; *O'Connor v. Donaldson* (1975) 422 U.S. 563, 95 S.Ct. 2486, 2494, 45 L.Ed.2d 396, 408, 7 Summary (10th), *Constitutional Law*, §222 [following *Scheuer* and *Wood*]; *Zisk v. Roseville* (1976) 56 C.A.3d 41, 50, 127 C.R. 896 [adoption of rezoning plan; immune in action under federal Civil Rights Act, under test laid down in *Scheuer*]; *Procunier v. Navarette* (1978) 434 U.S. 555, 98 S.Ct. 855, 862, 55 L.Ed.2d 24, 33 [following *Scheuer* and *Wood*; no cause of action under federal Civil Rights Act for negligent interference with mailing rights of state prison inmate]; *Wilson v. Layne* (1999) 526 U.S. 603, 119 S.Ct. 1692, 1696, 143 L.Ed.2d 818, 825 ["media ride along" during police action to enforce arrest warrants violates Fourth Amendment, but because state of law was not clearly established at time protective sweep took place, state officers were entitled to defense of qualified immunity]; 13 Cal. Western L. Rev. 153 [*Wood*]; 89 Harv. L. Rev. 219 [same]; 10 Loyola L.A. L. Rev. 149 [same]; 30 Cal. Western L. Rev. 201 [Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact]; 49 So. Cal. L. Rev. 1322 [Liability for Constitutional Torts and the Risk-Averse Public School Official]; 28 Pepperdine L. Rev. 163 [*Wilson*].)

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5 *Witkin Sum. Cal. Law Torts* § 178

[§ 178] Federal Officers in Constitutional Tort Actions.

In *Butz v. Economou* (1978) 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895, plaintiff, a commodity futures commission merchant, filed an action for damages against defendant, the Secretary of Agriculture, and several administrative officers of the Department of Agriculture. The complaint alleged that defendants had brought administrative proceedings against plaintiff to revoke his registration, and that the proceedings were wrongfully instituted with improper motives and without due process of law. Damages were sought on the theory that defendants' acts were in violation of plaintiff's rights under the federal Constitution. The United States contended that all of the federal officials were absolutely immune even if they knowingly and deliberately infringed plaintiff's constitutional rights. *Held*, this contention is unsound.

(a) *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* (1971) 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619, *supra*, §16, held that federal officers' violation of a constitutionally protected interest gives rise to a cause of action for damages, but reserved the question whether the officers were immune from liability. On remand, the Court of Appeals held that the officers were not absolutely immune but had qualified immunity. Other Courts of Appeals reached the same result. (98 S.Ct. 2900, 57 L.Ed.2d 906.) The plurality opinion in *Barr v. Matteo* (1959) 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434, is not controlling; it did not purport to depart from the general rule that a federal official may not ignore limitations on his or her powers. (98 S.Ct. 2902, 57 L.Ed.2d 908.) And a review of all of the United States Supreme Court decisions from early times demonstrates that a federal official was protected from liability for a tort committed under state law only if the official's acts were authorized by federal law. (98 S.Ct. 2902 *et seq.*, 57 L.Ed.2d 909 *et seq.*)

(b) The cases on immunity of state officers (see *Scheuer v. Rhodes* (1974) 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90, *supra*, §177; *Wood v. Strickland* (1975) 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214, *supra*, §177; *Procunier v. Navarette* (1978) 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24, *supra*, §177) are instructive. None furnishes support for the view that federal officials are absolutely immune, and the federal Courts of Appeals have unanimously concluded that federal officials should receive no greater degree of protection from constitutional claims than their counterparts in state government. (98 S.Ct. 2907, 57 L.Ed.2d 912.)

(c) These decisions are sound: "We see no sense in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation." (98 S.Ct. 2908, 57 L.Ed.2d 912.) Accordingly, without congressional directions to the contrary, no distinction should be drawn between suits against state officials under federal civil rights legislation (see *supra*, §177) and suits against federal officers under the *Constitution*. (98 S.Ct. 2909, 57 L.Ed.2d 914.)

(d) Extending absolute immunity to all federal executive officials "would seriously erode the protection provided by basic constitutional guarantees. ... It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority." (98 S.Ct. 2910, 57 L.Ed.2d 915.)

(e) Public policy, however, does require some protection of public officials required to exercise discretion. "We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." (98 S.Ct. 2911, 57 L.Ed.2d 916.) (See *Wilson v. Layne* (1999) 526 U.S. 603, 119 S.Ct. 1692, 1696, 143 L.Ed.2d 818, 825 ["media ride along" during police action to enforce arrest warrants violates Fourth Amendment, but because state of law was not clearly established at time protective sweep took place, federal officers were entitled to defense of qualified immunity]; 8 *Hastings Const. L. Q.* 671; 92 *Harv. L. Rev.* 265; 28 *Pepperdine L. Rev.* 163 [Wilson]; 20 *Santa Clara L. Rev.* 453.)

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5 *Witkin Sum. Cal. Law Torts* § 179

[§ 179] President and Aides.

(1) *Absolute Immunity of President.* In *Nixon v. Fitzgerald* (1982) 457 U.S. 731, 102 S.Ct. 2690, 2701, 73 L.Ed.2d 349, 363, the Court said: "[W]e hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." (See 96 Harv. L. Rev. 226; 108 Harv. L. Rev. 701 [Executive Privileges and Immunities: The Nixon and Clinton Cases"]; 25 Western State L. Rev. 211 [suits against President].)

(2) *Qualified Immunity of Presidential Aides.* In *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396, the Court, after reviewing its reasoning and decision in *Butz v. Economou* (1978) 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895, supra, §178, said: "Having decided in *Butz* that Members of the Cabinet ordinarily enjoy only qualified immunity from suit, we conclude today that it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House. Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff. The considerations that supported our decision in *Butz* apply with equal force to this case. It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity." (102 S.Ct. 2733, 73 L.Ed.2d 404.) (See 96 Harv. L. Rev. 226.)

(3) *Qualified Immunity of Attorney General Acting in Furtherance of National Security.* *Mitchell v. Forsyth* (1985) 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411, involving the Attorney General's authorization of an unconstitutional warrantless domestic security wiretap, held that the absolute immunity applicable to a Cabinet officer generally (see supra, §176) or applicable to a prosecutor (see infra, §180) does not apply where the Attorney General is exercising national security functions. The bases of this holding are explained as follows:

(a) The performance of national security functions does not subject an official to the same risks of entanglement in vexatious litigation as does the carrying out of judicial or quasi-judicial tasks, for the judicial process is an area of open conflict, while national security tasks are carried out in secret. (105 S.Ct. 2813, 86 L.Ed.2d 422.)

(b) Most officials entitled to absolute immunity are subject to other checks that help to prevent abuses of authority; e.g., legislators are accountable to their constituents, and the judicial process is largely self-correcting. No such built-in restraints on the Attorney General's activities in the name of national security exist. (105 S.Ct. 2814, 86 L.Ed.2d 423.)

(c) The denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints. Under the standard of *Harlow v. Fitzgerald*, *supra*, the Attorney General will be entitled to immunity "so long as his actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " (105 S.Ct. 2814, 86 L.Ed.2d 423.)

(4) *Distinction: Unofficial Conduct Before Assuming Office.* In *Clinton v. Jones* (1997) 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945, plaintiff, a private citizen, filed various state and federal charges in federal district court against defendant President stemming from alleged sexual misconduct that occurred before he assumed office. Defendant, claiming presidential immunity, moved to dismiss the charges. The trial judge denied the motion and ruled that discovery could continue, but that any trial was stayed until defendant left office. The Court of Appeals, finding that the stay amounted to an improper grant of temporary immunity, reversed this condition. *Held*, affirmed.

(a) Defendant claimed that, in all but the most exceptional cases, the Constitution affords a President temporary immunity from civil damages litigation arising from events that occurred before taking office. This contention is without merit. The rationale for affording government officials immunity for their *official* acts has no application when *unofficial* conduct is involved, as in the present case. Moreover, in defining the scope of the immunity granted for clearly official acts, a functional approach has been used that considers the function performed, rather than the title of the person performing it. Thus, defendant's attempt to construct an immunity from being sued for unofficial conduct that is based purely on the identity of the Presidential office is unsupported by precedent. (117 S.Ct. 1643, 137 L.Ed.2d 959.)

(b) Relying on a separation of powers argument, defendant contended that, while he is not "above the law," he is at least entitled to a stay. Specifically, defendant argued that the powers and duties of his office are so awesome that the public interest demands that he not be called on to use his valuable time in defending civil suits. However, this position fails to recognize that the separation of powers doctrine is mostly concerned with allocating power between the three branches of Government, and with ensuring that the power granted to each branch is not encroached upon. Suing a President for unofficial conduct poses no risk of misallocation of either judicial or executive power. (117 S.Ct. 1645, 137 L.Ed.2d 962.) Moreover, with respect to the contention that subjecting the President to civil suit will impair the executive branch by rendering him unable to perform his functions, history has shown that only three sitting Presidents have been subjected to suits for their private actions. It thus appears that a deluge of litigation is unlikely to engulf the Presidency. (117 S.Ct. 1648, 137 L.Ed.2d 966.)

(c) Most importantly, the separation of powers doctrine does not preclude all interaction between the three branches of government. For example, it has long been established that the judiciary has the power to determine whether the President's actions comply with the law. Also settled is the principle that the President is subject to judicial process. Thus, "[i]f the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the power of his unofficial conduct. The burden on the President's time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions. We, therefore, hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office." (117 S.Ct. 1650, 137 L.Ed.2d 967.)

(d) The Court of Appeals concluded that the stay was the equivalent of constitutional immunity. This is not so, because discovery was allowed to continue and because the trial court, apart from constitutional considerations, has power to order stays to control its dockets. Indeed, the trial court may consider such factors as any burden on the Presidency in determining whether a stay is appropriate in a particular case. However, ordering a stay in this case was an abuse of discretion, because the trial judge failed to consider the interests of plaintiff in bringing the matter to a

speedy trial. The complaint was filed a mere 3 days before expiration of the statute of limitations, and further delay would have increased the chance of loss of evidence, including the inability of witnesses to remember the facts. Moreover, the stay was premature because, having been imposed prior to discovery, there was no way, at that time, to assess whether a stay was called for. (117 S.Ct. 1651, 137 L.Ed.2d 969.) (See 28 Southwestern U. L. Rev. 71 [*Clinton*]; 31 U.C. Davis L. Rev. 123 [same].)

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5 *Witkin Sum. Cal. Law Torts* § 180

[§ 180] In General.

(1) *Rule of Immunity.* The policy reasons that give immunity to judges (see *supra*, §166) are equally applicable (though perhaps not as strongly) to other kinds of officers connected with the judicial process in the field of law administration and enforcement. And the courts have favored this policy as against that of protecting individuals from oppressive official action. (See *White v. Towers* (1951) 37 C.2d 727, 729, 235 P.2d 209; *Imbler v. Pachtman* (1976) 424 U.S. 409, 96 S.Ct. 984, 991, 47 L.Ed.2d 128, 139, *infra*, §181 [proceeding under federal Civil Rights Act]; *Falls v. Superior Court* (1996) 42 C.A.4th 1031, 1042, 49 C.R.2d 908 [prosecutor acts within official, judicial capacity and enjoys absolute immunity when subpoenaing witness, preparing for preliminary hearing, or interviewing witness and encouraging that witness to testify]; 47 Cal. L. Rev. 317.) The Tort Claims Act now expressly immunizes a public employee for injury caused by instituting or prosecuting a judicial or administrative proceeding within the scope of his or her employment, even if the employee acts maliciously and without probable cause. (*Govt.C.* 821.6; *infra*, §368.)

The cases uniformly hold district attorneys and other prosecuting officers immune from liability for false arrest and malicious prosecution, despite allegations or findings of malice and lack of probable cause. (See *Pearson v. Reed* (1935) 6 C.A.2d 277, 278, 44 P.2d 592 [city prosecuting officer]; *Norton v. Hoffmann* (1939) 34 C.A.2d 189, 194, 93 P.2d 250 [city attorney prosecuting misdemeanors]; *Imbler v. Pachtman*, *supra*, 96 S.Ct. 991, 47 L.Ed.2d 139; *Rest.2d, Torts* §586; 12 So. Cal. L. Rev. 216; 79 A.L.R.3d 882 [immunity of prosecuting attorney or similar officer].) The immunity also exists where the officer is charged with an omission rather than with affirmative action. (*Wilson v. Sharp* (1954) 42 C.2d 675, 679, 268 P.2d 1062 [county counsel, with functions of district attorney, exercised discretion to refrain from suit to recover allegedly illegal payments].)

In *Harmston v. Kirk* (1989) 216 C.A.3d 1410, 265 C.R. 548, the court held that a deputy attorney general assigned to assist a grand jury in its investigation is immune from liability to any person wrongfully indicted or accused after the investigation. (a) On the state law causes of action, recovery was precluded by the *Govt.C.* 821.6 (*infra*, §368). (216 C.A.3d 1413.) (b) On the cause of action for violation of federal civil rights under 42 U.S.C., §1983, the court relied on *Imbler v. Pachtman*, *supra*, and federal cases following it. (216 C.A.3d 1415, 1416.)

(2) *Distinction: Public Defenders.* A distinction was made in *Ferri v. Ackerman* (1979) 444 U.S. 193, 100 S.Ct. 402, 408, 409, 62 L.Ed.2d 355, 362, 363: Although a lawyer appointed to represent an indigent defendant in a federal judicial proceeding is also a federal officer, the policy reasons for granting immunity to prosecutors do not apply to defense counsel sued for malpractice by his or her own client. (See 6 A.L.R.4th 774 [public defender not immune from malpractice liability].)

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5 Witkin Sum. Cal. Law Torts § 181

[§ 181] Immunity in Civil Rights Suits.

(1) *Imbler v. Pachtman*. The common law absolute immunity of prosecuting officers from tort liability was reaffirmed in *Imbler v. Pachtman* (1976) 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128, and was held equally applicable to civil rights suits for damages under 42 U.S.C., §1983 (deprivation of federal constitutional or statutory rights under color of state law; see 8 Summary (10th), *Constitutional Law*, §§816, 818 et seq.) respecting prosecutor's functions that are an integral part of the judicial process. Petitioner was convicted of murder in California. His conviction was affirmed and he commenced service of a life sentence. Some years later, he sought habeas corpus in the federal district court, alleging suppression of evidence and knowing use of false testimony by the prosecution. The district court found the allegations true and ordered his retrial. The Court of Appeals affirmed, California elected not to retry petitioner, and he was released. He then filed a civil rights action against several law enforcement officers, including respondent, the deputy district attorney who had prosecuted him at the trial. The district court dismissed the complaint as to respondent. *Held*, affirmed.

(a) *Absolute common law immunity*. The common law absolute immunity of a prosecutor "is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." (96 S.Ct. 991, 47 L.Ed.2d 139.)

(b) *Absolute immunity under 42 U.S.C., §1983*. The same considerations of public policy apply to civil rights suits:

(1) If the prosecutor had only a qualified immunity, the threat of a 42 U.S.C., §1983 suit would undermine performance of his duties in the same way as a suit for malicious prosecution. He would have to make decisions in terms of his own potential liability, and his energy and attention would be diverted from the duty of enforcing the criminal law. (96 S.Ct. 992, 47 L.Ed.2d 140.)

(2) A qualified immunity rule could also have an adverse effect on the criminal justice system. The veracity of

witnesses is frequently subject to doubt before and after they testify; and if prosecutors were hampered in exercising their judgment as to the use of witnesses, the triers of fact often would be denied relevant evidence. Also, in postconviction collateral proceedings, the focus of the reviewing court could be blurred by the knowledge that a decision for the accused might result in the prosecutor being called to respond in damages for his error or mistaken judgment. (96 S.Ct. 993, 47 L.Ed.2d 141.)

(3) The absolute immunity does not leave the public powerless to deter or punish misconduct. (1) Criminal proceedings against judges as well as prosecutors may be brought under 18 U.S.C., §242 (see 8 *Summary* (10th), *Constitutional Law*, §815) for wilful deprivation of constitutional rights. (2) A prosecutor is also amenable to professional discipline. (96 S.Ct. 994, 47 L.Ed.2d 142.)

(c) *Distinction: where other functions of prosecutor involved.* The holding here is limited to activities that are an "integral part of the judicial process"; i.e., the prosecutor, in initiating a prosecution and in presenting the state's case, is absolutely immune from a civil suit for damages under 42 U.S.C., §1983. "We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." (96 S.Ct. 995, 47 L.Ed.2d 143.) As to these, the Courts of Appeals of some circuits have held that only a qualified immunity, similar to that of other law enforcement officers, exists. (96 S.Ct. 995, 47 L.Ed.2d 143.) (See 10 *Southwestern L. Rev.* 305; 34 *Stanf. L. Rev.* 487 [Supplementing the Functional Test of Prosecutorial Immunity].)

(2) *Later Cases.* Subsequent cases have applied the *Imbler* analysis. (See *Jenkins v. Orange* (1989) 212 C.A.3d 278, 286, 260 C.R. 645 [social worker held entitled to absolute prosecutorial immunity from 42 U.S.C., §1983 claims based on investigating child abuse charges and weighing and presenting evidence]; *Harmston v. Kirk* (1989) 216 C.A.3d 1410, 1415, 265 C.R. 548, supra, §180 [deputy attorney general assigned to assist grand jury]; *Bradley v. Medical Bd. of Calif.* (1997) 56 C.A.4th 445, 454, 65 C.R.2d 483 [deputy attorney general was entitled to absolute immunity, when charged under 42 U.S.C., §1983 for evaluative action she had taken in preparing charges against plaintiff doctor]; *Pitts v. Kern* (1998) 17 C.4th 340, 345, 70 C.R.2d 823, 949 P.2d 920, 8 *Summary* (10th), *Constitutional Law*, §819 [in prosecuting criminal violations of state law, district attorney acts for the state and has absolute immunity under 42 U.S.C., §1983].)

Jenkins v. Orange was followed in *Alicia T. v. Los Angeles* (1990) 222 C.A.3d 869, 881, 271 C.R. 513. The opinion points out that the lower federal courts are split on the issue whether social workers are entitled to absolute or only qualified immunity in 42 U.S.C., §1983 cases, and that in the absence of a controlling United States Supreme Court decision, California reviewing courts are free to adopt one of the divergent lines of authority. (222 C.A.3d 879.)

In *Burns v. Reed* (1991) 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547, the issue was whether a state prosecuting attorney was absolutely immune for participating in a probable cause hearing and for giving legal advice to the police. *Held:*

(a) Under the functional approach of *Imbler v. Pachtman*, the prosecutor's appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing were protected by absolute immunity. (111 S.Ct. 1942, 114 L.Ed.2d 562.)

(b) There is no common law basis for extending absolute immunity for giving legal advice to the police in the investigative phase of a case, and the prosecutor did not meet his burden of showing relevant factors to justify such an extension. Thus, the prosecutor was entitled only to qualified immunity for giving the advice. An improper motive or purpose defeats the immunity. (111 S.Ct. 1942, 1944, 114 L.Ed.2d 562, 564.)

In *Gensburg v. Miller* (1994) 31 C.A.4th 512, 37 C.R.2d 97, plaintiff foster home operators brought an action under 42 U.S.C., §1983 against employees of the state Department of Social Services (state DSS), a county, and the county social services department (county DSS), alleging wrongful acts in connection with the suspension of plaintiffs' foster home license. The trial judge ruled that defendants were absolutely immune from civil liability, and dismissed the

action. *Held*, affirmed.

(a) *Federal law determines immunity*. Because 42 U.S.C., §1983 was intended by Congress as a remedy to prevent unconstitutional acts by state and local officials, state courts must look to federal law to determine the scope of immunity of governmental officials from a suit under that statute. *Imbler v. Pachtman, supra*, and following cases delineate the scope of liability, and *Imbler*-type immunity has been extended by most federal courts to social workers performing statutorily authorized quasi-prosecutorial functions. (31 C.A.4th 519.)

(b) *State employees immune*.

(1) The conduct of the state DSS defendants in temporarily suspending plaintiffs' license was entitled to absolute immunity. In implementing disciplinary action to protect the welfare of foster children under plaintiffs' care, defendants were acting in a prosecutorial role. State officials performing the functions of prosecutors in administrative proceedings are acting in a quasi-judicial capacity and are entitled to absolute immunity within the meaning of *Imbler*. (31 C.A.4th 521.)

(2) Although one of the defendants was acting as a staff attorney in an investigative role, his conduct in interviewing witnesses and evaluating reports and complaints in preparation for filing an accusation fell within the scope of the prosecutorial role. The label "investigative" is not determinative of the boundaries of the prosecutor's immunity. The prosecutor's role may include investigatory activities in preparing for judicial or quasi-judicial proceedings. When it does, the shield of prosecutorial immunity follows. (31 C.A.4th 522.)

(c) *County employees immune*. Under the functional test of *Imbler*, the county DSS defendants also had absolute immunity. Although they had no power to institute or prosecute license revocation proceedings, in reporting to the prosecutorial arm of the state DSS on matters affecting the state's decision on commencing disciplinary action against plaintiffs' foster care license, they were operating in a role functionally equivalent to that of the prosecutors whom they served. The same immunity that protects prosecutors and social workers investigating child abuse should apply to county defendants when performing their duties to monitor and report on the activities of foster licensees to state prosecutorial officials. (31 C.A.4th 524.)

(d) *County immune*. Defendant county was immune because its employees were immune. When 42 U.S.C., §1983 liability of a municipality is predicated on privileged conduct of its employee acting within the scope of employment, the municipality is protected by the same immunity. (31 C.A.4th 525.) (On immunity of administrative agency officers performing prosecutorial functions generally, see *infra*, §182.)

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5 *Witkin Sum. Cal. Law Torts* § 182

[§ 182] Administrative Agency Officers.

In *Butz v. Economou* (1978) 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (supra, §178), the absolute immunity of a prosecutor in judicial proceedings was extended to officers of a federal administrative agency performing similar functions.

(a) *Agency official initiating administrative proceeding applying sanctions.* The decision is very much like the prosecutor's decision to initiate a criminal prosecution; and an agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. (98 S.Ct. 2915, 57 L.Ed.2d 921.) The agency officer must make his or her decision free from intimidation or harassment. "Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision." (98 S.Ct. 2915, 57 L.Ed.2d 922.)

(b) *Agency attorney who conducts trial.* There is no substantial difference between the function of an agency attorney in presenting evidence in an agency hearing and that of a prosecutor who brings evidence before a court. "We therefore hold that an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence." (98 S.Ct. 2916, 57 L.Ed.2d 923.)

With respect to state officers, the Tort Claims Act expressly immunizes public employees for injury caused by instituting or prosecuting an administrative proceeding with the scope of employment, even if malicious and without probable cause. (*Govt.C.* 821.6; *infra*, §368.)

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5 *Witkin Sum. Cal. Law Torts* § 183

[§ 183] In General.

(1) *State and Local Officers.* In *White v. Towers* (1951) 37 C.2d 727, 235 P.2d 209, defendant, an investigator for the State Fish and Game Commission, was charged with having maliciously and without probable cause procured the institution of criminal proceedings against plaintiff for pollution of waters. *Held*, no action for malicious prosecution could be maintained. The court relied in part on cases from other jurisdictions upholding the privilege of building inspectors, fire marshals, city engineers, and F.B.I. agents, and disapproved *Prentice v. Bertken* (1942) 50 C.A.2d 344, 349, 123 P.2d 96, which had denied immunity to a police officer. (37 C.2d 730.) (See *White v. Brinkman* (1937) 23 C.A.2d 307, 317, 73 P.2d 254 [chief building inspector; city manager]; *Oppenheimer v. Arnold* (1950) 99 C.A.2d 872, 874, 222 P.2d 940 [county engineer who discharged plaintiff, a probationary employee]; *Dawson v. Martin* (1957) 150 C.A.2d 379, 382, 309 P.2d 915 [county building inspector]; *Dawson v. Rash* (1958) 160 C.A.2d 154, 159, 324 P.2d 959 [deputy county building inspector]; *Keylon v. Kelley* (1961) 188 C.A.2d 490, 493, 10 C.R. 549 [marshal of municipal court who, on advice of district attorney, filed criminal complaint against plaintiff]; *Johnson v. Pacifica* (1970) 4 C.A.3d 82, 87, 84 C.R. 246 [police officers]; 47 Cal. L. Rev. 342; 4 U.S.F. L. Rev. 452; 28 A.L.R.2d 646 [civil liability of law enforcement officers for malicious prosecution]; for immunities under Tort Claims Act, see *infra*, §§290 et seq., 362.)

In civil rights action under 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 *Summary* (10th), *Constitutional Law*, §§816, 818 et seq.), investigators for the Medical Board of California, and private persons assisting them, enjoyed qualified immunity for undercover investigation of a doctor accused of writing false prescriptions, where the investigators clearly had authority to conduct the investigation and where their actions were reasonable. (*Bradley v. Medical Bd. of Calif.* (1997) 56 C.A.4th 445, 456, 460, 65 C.R.2d 483; on qualified immunity of executive and prosecuting officers in civil rights suits, see *supra*, §§177, 178, 181.)

(2) *Federal Officers.* In *Anderson v. Creighton* (1987) 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523, the Court held that a federal law enforcement officer who participated in an unreasonable search could claim immunity on the basis of a reasonable belief that the search was lawful. (107 S.Ct. 3040, 97 L.Ed.2d 532.) (See *Hunter v. Bryant* (1991) 502 U.S. 224, 112 S.Ct. 534, 537, 116 L.Ed.2d 589, 596 [citing *Anderson v. Creighton*; secret service agents entitled to immunity where they had reasonable, though mistaken, belief that they had probable cause to arrest plaintiff]; 101 Harv.

L. Rev. 220.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Privilege.

t. Privilege of Public Officers.

5. Law Enforcement Officers.

bb. Police Officer Witness.

5 *Witkin Sum. Cal. Law Torts* § 184

[§ 184] Police Officer Witness.

In *Briscoe v. LaHue* (1983) 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96, the Court held (6-3) that 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law; see 8 *Summary* (10th), *Constitutional Law*, §§816, 818 et seq.) does not authorize a convicted person to recover damages from a police official for giving perjured testimony at his criminal trial. In three cases arising in Indiana, the convicted defendants sued under the Act against police officer witnesses alleging that they gave false testimony. The Court of Appeals held that absolute immunity of any witness was a complete defense. The Supreme Court, in an extensive review of the history, came to the same conclusion.

(a) *Immunity of lay witness.* 42 U.S.C., §1983 does not create a remedy for all conduct that may result in a violation of rights, privileges, or immunities protected by the Constitution or laws. Its reach is limited to actions taken under "color of law," and a private party giving testimony in a criminal trial is not performing such an action. Common law principles, including defenses previously recognized in ordinary tort litigation, apply, and the immunity of parties and witnesses from subsequent damages liability for their testimony was well established at common law. (103 S.Ct. 1112, 1113, 75 L.Ed.2d 104, 105.)

(b) *Immunity of persons who perform official functions in the judicial process.* State judges and prosecutors have absolute immunity under common law principles because they are integral parts of the judicial process. (103 S.Ct. 1115, 1116, 75 L.Ed.2d 107, citing *Stump v. Sparkman* (1978) 435 U.S. 349, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331, 341, *supra*, §169, and *Imbler v. Pachtman* (1976) 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128, *supra*, §181.)

(c) *Immunity of police officer.* "When a police officer appears as a witness, the officer may reasonably be viewed as acting like any other witness sworn to tell the truth--in which event he or she can make a strong claim to witness immunity; alternatively, he may be regarded as an official performing a critical role in the judicial process, in which event he may seek the benefit afforded to other governmental participants in the same proceeding." (103 S.Ct. 1116, 75 L.Ed.2d 108.)

(d) *Conspiracy section distinguished.* The civil and criminal conspiracy section of the civil rights statutes (42 U.S.C., §1985(3); 18 U.S.C., §241) was designed to provide remedies in the federal court for conspiratorial activities of the Ku Klux Klan, and was aimed at *acquittals* obtained by perjury, not unjust convictions. "We are asked to extrapolate from pro-defendant perjury to pro-prosecution perjury, and if willing to make that step, we are further invited to apply legislative history relating to ... a section specifically directed toward private conspiracies ... to ... a section designed to provide remedies for abuses under color of law. We decline the invitation." (103 S.Ct. 1118, 75 L.Ed.2d 110, 111.)

(e) *No exception for police officer witnesses.* Although there is force in the argument that common law immunity for police officers has less justification than such immunity for lay witnesses, the decisions show that immunity rests on function, not on status. "A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions on direct examination, and may be prosecuted subsequently for perjury." (103 S.Ct. 1119, 75 L.Ed.2d 112.) Moreover, other considerations of public policy support the immunity "more emphatically for such persons than for ordinary witnesses": Subjecting officers to damages liability "might undermine not only their contribution to the judicial process but also the effective performance of their other public duties." (103 S.Ct. 1119, 75 L.Ed.2d 112.) As Judge Learned Hand said: "[I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant threat of retaliation." (103 S.Ct. 1120, 75 L.Ed.2d 114.) (On immunity of witnesses in defamation actions, see *infra*, §568.)

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2. Privilege.

s. Privilege of Member of Military.

5 *Witkin Sum. Cal. Law Torts* § 185

[§ 185] Privilege of Member of Military.

A member of the armed forces is *not liable to a civilian* for injuries in carrying out an order of a superior unless the order is so palpably illegal as to be obvious to the subordinate. (*Curnutt v. Holk* (1964) 230 C.A.2d 580, 583, 41 C.R. 174.) In the *Curnutt* case, the issue was *liability between members of the military*. Plaintiff and defendant were Air Force officers on active duty at Vandenberg Air Force Base, a military reservation ceded by California to the United States. The commander ordered six officers, including these parties, to kill deer that were a hazard to aircraft at the runway. Defendant, according to the complaint, injured plaintiff by the negligent discharge of his shotgun. *Held*, judgment for defendant on demurrer sustained. In the absence of any authority on point, the policy is one for Congress to determine. There is no right of action of one member of the military against another for negligent injury while acting under orders in the line of duty in the absence of a federal statute giving an officer or enlisted man a right of action. (230 C.A.2d 583.)

Members of the National Guard on active service are immune from liability for any act done in the performance of their duty. (*Mil. & Vet.C.* 392, *infra*, §349.) Also, a public entity is not liable for injuries arising out of an activity conducted by a National Guard member that are compensated under the Federal Tort Claims Act. (*Govt.C.* 816, *infra*, §344.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: In section title, "(s)" should be "(u)".



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2. Privilege.

t. Statutory Privileged Communications.

5 *Witkin Sum. Cal. Law Torts* § 186

[§ 186] Statutory Privileged Communications.

C.C. 47 provides a privilege for a publication or broadcast in the proper discharge of an official duty, in a legislative or judicial proceeding, in a communication without malice between interested persons, and for reports of judicial, legislative, or other public official proceedings or public meetings. (See *infra*, §562.)

The usual application of the statute is in defamation actions. (See *infra*, §561 et seq.) But it has been invoked in other proceedings. (See, e.g., *Bernstein v. Alameda-Contra Costa Med. Assn.* (1956) 139 C.A.2d 241, 245, 293 P.2d 862 [privilege applied to protect doctor against unwarranted discipline by medical association]; *Portman v. George McDonald Law Corp.* (1979) 99 C.A.3d 988, 991, 160 C.R. 505 [privilege applied in action for negligent misrepresentation based on statement of defendant attorneys to avoid filing undertaking to stay enforcement of money judgment].)

In *Pettitt v. Levy* (1972) 28 C.A.3d 484, 104 C.R. 650, plaintiffs alleged that defendants conspired to submit to a city a forged building permit that omitted a particular street address contained in the original, in order to deny plaintiffs the use of that address for business purposes as a nonconforming use in a residential area. The complaint alleged causes of action for fraud, negligent misrepresentation, negligence, and intentional infliction of mental distress. *Held*, judgment for defendants on demurrer affirmed.

(a) The C.C. 47 privilege accorded to publications made in judicial, legislative, or other official proceedings applies to this publication made in a city planning commission or city council proceeding. (28 C.A.3d 488.)

(b) The contention that the criminal act of forging the permit destroyed the privilege is untenable. *Perjury* in a *complaint* does not, and preparing and presenting false documents is equivalent to preparation and presentation of false testimony. (28 C.A.3d 489.)

(c) The contention that the conspiracy to forge and the forgery took place prior to and outside of the meeting of the planning commission or city council, and therefore did not occur "in any proceeding," is unsound. "To accomplish the purpose of judicial or quasi-judicial proceedings, it is obvious that the parties or persons interested must confer and must marshal their evidence for presentation at the hearing. The right of private parties to combine and make

presentations to an official meeting and, as a necessary incident thereto, to prepare materials to be presented is a fundamental adjunct to the right of access to judicial and quasi-judicial proceedings. To make such preparations and presentations effective, there must be an open channel of communication between the persons interested and the forum, unchilled by the thought of subsequent judicial action against such participants; provided always, of course, that such preliminary meetings, conduct and activities are directed toward the achievement of the objects of the litigation or other proceedings." (28 C.A.3d 490.)

(d) "It is not gratifying to reach a result which insulates those guilty of alleged heinous conduct from answering therefor. However, we are satisfied that the purpose and philosophy of the privilege compels this result and that any narrowing of the privilege to redress this grievance would produce mischiefs far worse." (28 C.A.3d 492.) (See *Kachig v. Boothe* (1971) 22 C.A.3d 626, 641, 99 C.R. 393, supra, §21 [privilege applied in action for intentional infliction of emotional distress based on false documents and perjured testimony introduced in litigation].)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: In section title, "(t)" should be "(v)".



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2. Privilege.

w. (New) Prescription of Controlled Substance Pursuant to Drug Overdose Program.

5 Witkin Sum. Cal. Law Torts § 186A

[§ 186A] (New) Prescription of Controlled Substance Pursuant to Drug Overdose Program.

A licensed health care provider who is permitted by law to prescribe an opioid antagonist may, if acting with reasonable care, prescribe and subsequently dispense or distribute the drug in conjunction with an opioid overdose prevention and treatment training program without being subject to civil liability or criminal prosecution. (C.C. 1714.22(b), added in 2007.) "Opioid antagonist" means naloxone hydrochloride that is approved by the federal Food and Drug Administration for the treatment of a drug overdose, and "opioid overdose prevention and treatment training program" means a program operated by or registered with a local health jurisdiction to train individuals to prevent, recognize, and respond to an opiate overdose. (C.C. 1714.22(a), added in 2007.)

This immunity applies even when the drug is administered by and to someone other than the person to whom it is prescribed. (C.C. 1714.22(b), added in 2007.)

These provisions apply only to seven designated counties, and they remain in effect only until January 1, 2011, unless extended. (C.C. 1714.22(d) and (e), added in 2007.)

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3. Discharge of Liability.

5 *Witkin Sum. Cal. Law Torts* § 187

[§ 187] Discharge of Liability.

Tort liability may be discharged by the following:

- (1) *Release*. (See 1 *Summary* (10th), *Contracts*, §**old893; *Rest.2d*, *Torts* §952.)
- (2) *Merger in judgment*. (See 7 *Cal. Proc.* (4th), *Judgment*, §342 et seq.)
- (3) *Bar by judgment*. (See 7 *Cal. Proc.* (4th), *Judgment*, §348 et seq.)
- (4) *Statute of limitations*. (See 3 *Cal. Proc.* (4th), *Actions*, §405 et seq.; *Rest.2d*, *Torts* §899.)
- (5) *Discharge in bankruptcy*. (See 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §486 et seq.)

West's Key Number Digest, *Torts* k.16

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Release*.

Cross-Reference: 1 *Summary* (10th), *Contracts*, §946 et seq.

(2) *Merger in judgment*.

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §401 et seq.

(3) *Bar by judgment*.

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §407 et seq.

(4) *Statute of limitations*.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §430 et seq.

(5) *Discharge in bankruptcy.*

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §514 et seq.



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4. What Are Not Defenses.

5 Witkin Sum. Cal. Law Torts § 188

[§ 188] What Are Not Defenses.

Among the excuses for tortious conduct that are usually rejected by the courts are the following:

(1) *Mistake or Innocent Motive*. This is seldom a defense. Thus, in actions for defamation, trespass, or conversion, the innocent motive or belief of the defendant is immaterial where the action is intentional. (See *Poggi v. Scott* (1914) 167 C. 372, 375, 139 P. 815; *Shahood v. Cavin* (1957) 154 C.A.2d 745, 751, 316 P.2d 700; *Rest.2d, Torts* §164; *infra*, §§626, 693, 713; on privileged mistake as defense, see Dobbs, *The Law of Torts* §69; 1 Harper, James & Gray 3d, §2.5.)

(2) *Coercion*. In accordance with the common law conception that all persons are free and equal, "[o]ne whose conduct is otherwise tortious is not relieved from liability merely by the fact that his conduct is pursuant to the command of or is on account of another." (*Rest.2d, Torts* §888.)

(3) *"Jus Tertii" (Rights of Third Persons)*. A defendant liable for interference with land or a chattel does not escape liability because a third person has an interest superior to that of the plaintiff, unless the third person either adopts the tortious act or discharges the defendant. (*Rest.2d, Torts* §895; see 1 Harper, James & Gray 3d, §2.8.)

(4) *Plaintiff's Violation of Law*. The fact that the injured person is committing a tort or crime, or is illegally in possession of land or a chattel does not absolve the defendant. (See *Rest.2d, Torts* §889.) However, if the injured person violated a statute, he or she cannot recover if the harm caused by the violation resulted from a risk against which the statute was intended to afford protection. (*Rest.2d, Torts* §889, Comment b.)

(5) *Contractual Delegation of Duty*. Contracting parties may, as between themselves, agree to an exemption from liability for ordinary negligence where the public interest is not involved. (See 1 *Summary* (10th), *Contracts*, §671 et seq.) But the agreement does not absolve a contracting party of his or her ordinary legal duty to strangers. (*Gall v. Union Ice Co.* (1951) 108 C.A.2d 303, 314, 239 P.2d 48.)

(6) *Public Franchise or License*. Official permission to locate power poles along a highway does not absolve a public service company from liability for placing them in such a manner as to constitute a danger to traffic. (*Gerberich v. Southern Calif. Edison Co.* (1935) 5 C.2d 46, 51, 53 P.2d 948.)

(7) *Performance of Government Contract.* In *Smith v. Lockheed Propulsion Co.* (1967) 247 C.A.2d 774, 56 C.R. 128, liability was imposed for the ultrahazardous activity of testing a rocket motor. (See *infra*, §1421.) The defense that defendant was a government contractor was rejected, the court pointing out that the Government itself is not liable without fault under the Federal Tort Claims Act (*infra*, §205), and that to extend the immunity to an independent contractor would leave plaintiff remediless. (247 C.A.2d 791.)

West's Key Number Digest, Torts k.16

SUPPLEMENT: [This section is current through the latest supplement]



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E. Conflict of Laws.

1. Traditional Rule: Place of Wrong.

5 Witkin Sum. Cal. Law Torts § 189

[§ 189] Traditional Rule: Place of Wrong.

(1) *Traditional Rule and Underlying Theory.* Under the former general rule, set forth in the first Restatement of Conflict of Laws, the "lex loci delicti" or law of *the place where the tort occurred* governed substantive tort liability. If a cause of action arose there, suit could be brought on it in another state, although under the law of that state no liability would have been recognized. And conversely, if the tort was not recognized in the place where the act was done, no action could be maintained in a state that did recognize the tort. (See *Loranger v. Nadeau* (1932) 215 C. 362, 366, 10 P.2d 63; *Zinn v. Ex-Cell-O Corp.* (1957) 148 C.A.2d 56, 78, 306 P.2d 1017; American Conflicts Law 4th, §132; Scoles & Hay 2d, §17.2; 28 Cal. L. Rev. 211; 16 Hastings L. J. 21; 38 Hastings L. J. 1041; 13 So. Cal. L. Rev. 503; 1 U.C.L.A. L. Rev. 367; 16 Am.Jur.2d (2002 ed.), *Conflict of Laws* §125 et seq.)

The rule and its underlying theory are described in the second Restatement (Introductory Note, p. 412) as follows: "The original Restatement stated that, with minor exceptions, all substantive questions relating to the existence of a tort claim are governed by the local law of the 'place of wrong.' This was described ... as 'the state where the last event necessary to make an actor liable for an alleged tort takes place.' Since a tort is the product of wrongful conduct and of resulting injury and since the injury follows the conduct, the state of the 'last event' is the state where the injury occurred. This rule of the original Restatement was derived from the vested rights doctrine which called for the enforcement everywhere of rights that had been lawfully created under the local law of a state. In effect, the doctrine provided for the application of the local law of the state in which had occurred the last act necessary to bring a legal obligation into existence. In the case of torts, the state of the last act, for reasons stated above, was the state where the injury had occurred."

(2) *Departures From Rule.* The rule embodied in the first Restatement was subjected to continual attack by commentators and courts, and was generally felt to be unsuited to modern conditions. (See *Reich v. Purcell* (1967) 67 C.2d 551, 553, 63 C.R. 31, 432 P.2d 727, *infra*, §191; *Kasel v. Remington Arms Co.* (1972) 24 C.A.3d 711, 729, 101 C.R. 314, *infra*, §198; 51 Cal. L. Rev. 762; 71 Harv. L. Rev. 1351; 77 Harv. L. Rev. 355; 80 Harv. L. Rev. 377; 88 Harv. L. Rev. 347 [special substantive rules for multistate problems]; 54 Cal. L. Rev. 1301, 1584; 55 Cal. L. Rev. 74; 16 Hastings L. J. 21, 42; 22 Hastings L. J. 1173; 44 So. Cal. L. Rev. 877; 1 Stanf. L. Rev. 759; 18 Stanf. L. Rev. 699; American Conflicts Law 4th, §131; Scoles & Hay 2d, §17.7; 16 Am.Jur.2d (2002 ed.), *Conflict of Laws* §127; 29 A.L.R.3d 622 [modern status of rule that substantive rights of parties to tort action are governed by law of place of wrong].)

The second Restatement (Introductory Note, p. 413) makes this observation: "Experience has shown that the last event rule does not always work well. Situations arise where the state of the last event (place of injury) bears only a slight relationship to the occurrence and the parties with respect to the particular issue. Also, in the case of such torts as fraud, defamation, invasion of the right of privacy, unfair competition and interference with a marital relationship, there is often no one clearly demonstrable place of injury and at times injury will have occurred in two or more states."

West's Key Number Digest, Actions k.17; Torts k.2-

SUPPLEMENT: [This section is current through the latest supplement]



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E. Conflict of Laws.

2. Modern Approach.

a. Restatement: State of Most Significant Relationship.

5 *Witkin Sum. Cal. Law Torts* § 190

[§ 190] Restatement: State of Most Significant Relationship.

(1) *General Principles.* The basic modern conflicts rule for torts is set forth in *Section 145 of the Restatement 2d of Conflict of Laws* in conformity with the general principles stated in Section 6 : "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6," which governs choice of law generally. (*Rest.2d, Conflict of Laws* §145(1); see 3 *Cal. Proc.* (4th), *Actions*, §93; 38 *Hastings L. J.* 1041 [Choice of Law in the United States]; 16 *Am.Jur.2d* (2002 ed.), *Conflict of Laws* §128; on choice of law generally, see 1 *Summary* (10th), *Contracts*, §61.)

Applying the Section 6 principles, the identity of the state of most significant relationship depends on the nature of the tort and the particular issue. Accordingly, the basic rule of Section 145 is supplemented by a number of specific rules applying its underlying principle to particular torts and to particular issues in tort (see *infra*, §§193 et seq., 199 et seq.). (*Rest.2d, Conflict of Laws*, Introductory Note to Chapter 7 (Wrongs), Topic 1 (Torts), p. 413.)

The protection of "the justified expectations of the parties" (*Rest.2d, Conflict of Laws* §6), of extreme importance in contracts, property, wills, and trusts, is of lesser importance in torts; the tortfeasor usually acts without giving thought to the law determining the legal consequences of the conduct. Also, the values of "certainty, predictability and uniformity of result" (*Rest.2d, Conflict of Laws* §6) are of lesser importance in torts than in areas where the parties and their lawyers plan their transactions. Finally, certain specific policies underlie the tort field, e.g., deterrence of tortious conduct and compensation for the injured victim. Hence, the remaining factors of Section 6 assume greater importance: needs of the interstate and international systems, relevant policies of the forum, relevant policies of other interested states (and particularly of the state with the dominant interest in the determination of the particular issue), and ease in determination and application of the law. (*Rest.2d, Conflict of Laws* §145, Comment b.)

(2) *Important Contacts.* Under *Rest.2d, Conflict of Laws* §145(2), the contacts to be taken into account in applying these principles include the following:

- (a) The place where the injury occurred.

(b) The place where the conduct causing the injury occurred.

(c) The domicile, residence, nationality, place of incorporation, and place of business of the parties.

(d) The place where the relationship, if any, between the parties is centered.

The *place where the injury occurred* is usually the important contact. But this is not always true, as in fraud (infra, §195) or multistate defamation (infra, §196). (*Rest.2d, Conflict of Laws §145, Comment e.*)

The *place where the conduct occurred* may be given weight where the injury occurs in two or more states; where the place of injury cannot be ascertained, is fortuitous, or bears little relation to the occurrence and parties with respect to a particular issue, e.g., in unfair competition (where there is often no clearly demonstrable place of injury); where the primary purpose is to deter or punish misconduct; or where the conduct is required or privileged by the law of the state where it occurred. (*Rest.2d, Conflict of Laws §145, Comment e.*)

Domicile, residence, nationality, place of incorporation, and place of business ordinarily carry little weight alone, but in two situations have independent significance: (a) Where the interest affected is a personal one (e.g., in reputation or privacy), domicile, residence, and nationality are important; and where the interest is financial (e.g., unfair competition, interference with contract, or trade disparagement), the place of business is important. (b) Where the injury occurs in two or more states, the domicile or principal place of business is important. (*Rest.2d, Conflict of Laws §145, Comment e.*)

The *place where the relationship is centered* may be significant when the plaintiff is riding as a guest in an automobile. (*Rest.2d, Conflict of Laws §145, Comment e.*)

(3) *Purpose of Substantive Torts Rules.* This is an important factor. If the primary purpose sought to be achieved by a state in having its tort rule applied is to deter or punish misconduct, the state where the conduct took place may be the one of dominant interest; but if it is primarily to compensate the victim for injuries, the state where the injury occurred (often the state of the plaintiff's residence) may have the greater interest. (*Rest.2d, Conflict of Laws §145, Comment c.*)

(4) *Issue Involved.* Certain recurring issues have a significant relation to certain states. Thus, the law of the state where the conduct and injury occurred will, with rare exceptions, be applied to determine whether the actor satisfied minimum standards of acceptable conduct, and whether the interest affected was entitled to legal protection (see infra, §199). But the law of the state of domicile may be applied to determine immunity, liability only for intentional conduct or aggravated negligence, or the requirement of a higher standard of care (see infra, §201). (*Rest.2d, Conflict of Laws §145, Comment d.*)

(5) *Tort Involved.* The importance of the contacts may vary somewhat with the nature of the tort. Thus, the place of injury is of particular importance in cases of personal injury, injury to property, false imprisonment, malicious prosecution, and abuse of process (see infra, §193 et seq.). It is less significant in cases of fraud and of unfair competition by false advertising or misappropriation of trade values, for the injury suffered will frequently be in two or more states and the effect will normally be felt at the principal place of business. (*Rest.2d, Conflict of Laws §145, Comment f.*)

West's Key Number Digest, Torts k.2

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Principles.*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §43.



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2. Modern Approach.

b. Repudiation of Traditional Rule and Adoption of Governmental Interest Approach.

5 Witkin Sum. Cal. Law Torts § 191

[§ 191] Repudiation of Traditional Rule and Adoption of Governmental Interest Approach.

The modern approach to choice of law in tort cases in California was ushered in by *Reich v. Purcell* (1967) 67 C.2d 551, 63 C.R. 31, 432 P.2d 727. Mrs. R and her child Jay were killed in an automobile collision caused by negligence of defendant, and plaintiffs Mr. R and child Jeffry sued in California for wrongful death. Defendant was domiciled in California. The R family, domiciled in Ohio, were on their way to California; Mr. R and the remaining child later became California residents, but the estates of Mrs. R and the deceased child were administered in Ohio. It was stipulated that judgment be entered for plaintiffs, and that the damages for death of Mrs. R be fixed at \$ 55,000, if Ohio or California law--with no limitation of damages--applied. But the accident occurred in Missouri, which had a maximum of \$ 25,000 for wrongful death. The trial judge, following the traditional rule, gave effect to this limitation imposed by the law of the place of wrong. *Held*, reversed.

(a) *Criticism of traditional rule.* The established rule assumes that the law of the place of wrong creates the cause of action and necessarily determines the extent of liability. This theory worked well enough when all the relevant events took place in one jurisdiction. But in a complex situation involving multistate contacts, no single state alone can be deemed to create exclusively governing rights. These complex cases make it clear that the forum can only apply its own law, and that when it purports to do otherwise it is not enforcing foreign rights but is choosing a foreign rule of decision as the appropriate one to apply to the case before it. (67 C.2d 553.) And the hopeless search for a governing foreign law to create a foreign vested right may defeat the legitimate interests of the litigants and the states involved. (67 C.2d 554.)

(b) *Departures from traditional rule.* When application of the law of the place of wrong would defeat the interests of the litigants and states concerned, California and other states have refused to apply it. (67 C.2d 554, 555, discussing *Grant v. McAuliffe* (1953) 41 C.2d 859, 264 P.2d 944, *infra*, §202, and *Emery v. Emery* (1955) 45 C.2d 421, 289 P.2d 218, *infra*, §201, and listing cases from other jurisdictions.)

(c) *Traditional rule repudiated.* "[A]s jurisdiction after jurisdiction has departed from the law of the place of the wrong as the controlling law in tort cases, regardless of the issue involved ... , that law no longer affords even a semblance of the general application that was once thought to be its great virtue. We conclude that the law of the place of the wrong is not necessarily the applicable law for all tort actions brought in the courts of this state." (67 C.2d 555.) *Loranger v. Nadeau* (1932) 215 C. 362, 10 P.2d 63, *supra*, §189, and other cases to the contrary, are overruled. (67 C.2d

555.)

(d) *New rule stated.* The objective of proper choice of law is to determine the law that most appropriately applies to the issue involved, on a consideration of the interests of the states and the litigants. (67 C.2d 555.)

(e) *New rule applied.*

(1) *California.* The present residence of plaintiffs is not significant. At the time of the accident, they were not California residents, and had no fixed plans to become domiciled here. If choice of law were made to turn on events happening after the accident, forum shopping would be encouraged. California, therefore, is only the forum, and disinterested in the only issue in dispute. (67 C.2d 555, 556.)

(2) *Missouri.* This state has a predominant interest in conduct within her borders. But a limitation of damages for wrongful death concerns compensation, not conduct. The proceeds are not part of the decedent's estate and hence do not provide a fund for local creditors. Also, insofar as the limitation expresses a concern for defendants, this concern is primarily local; there is no substantial interest in extending its benefits to travelers from out of state. Hence, the Missouri limitation does not apply. (67 C.2d 556.)

(3) *Ohio.* This is the state where plaintiffs and their decedents resided before the accident and where their estates are being administered. Giving effect to "Ohio's interests in affording full recovery to injured parties does not conflict with any substantial interest of Missouri." Defendant has no complaint, for Ohio's law is the same as that of his own domicile (California), and plaintiffs receive no more than they would have had if injured in their home state *Ohio*. (67 C.2d 556.) (See 56 Cal. L. Rev. 1635; 5 San Diego L. Rev. 365; 29 A.L.R.3d 603 [modern status of rule that substantive rights of parties to tort action are governed by law of place of wrong].)

The approach taken in California has been termed the "governmental interest approach," replacing the place of the wrong test with "a rule requiring an analysis of the respective interests of the states involved." (*Hurtado v. Superior Court* (1974) 11 C.3d 574, 579, 114 C.R. 106, 522 P.2d 666, *infra*, §200 [citing *Reich v. Purcell*]; see 16 Am.Jur.2d (2002 ed.), *Conflict of Laws* §130.)

The governmental interest approach has been frequently applied. (See *Schneider v. Schimmels* (1967) 256 C.A.2d 366, 373, 64 C.R. 273, *infra*, §199; *Fuller v. Greenup* (1968) 267 C.A.2d 10, 18, 72 C.R. 531, *infra*, §201; *Ramirez v. Wilshire Ins. Co.* (1970) 13 C.A.3d 622, 629, 91 C.R. 895; *Kelley v. Von Kuznick* (1971) 18 C.A.3d 805, 808, 96 C.R. 184; *Kasel v. Remington Arms Co.* (1972) 24 C.A.3d 711, 729, 101 C.R. 314, *infra*, §198; *Beech Aircraft Corp. v. Superior Court* (1976) 61 C.A.3d 501, 518, 522, 132 C.R. 541; *Pacific Diamond Co. v. Superior Court* (1978) 85 C.A.3d 871, 875, 878, 149 C.R. 813 [liability of innkeeper for loss of or damage to personal property]; *Anderson v. Savin Corp.* (1988) 206 C.A.3d 356, 366, 254 C.R. 627; *Denham v. Farmers Ins. Co.* (1989) 213 C.A.3d 1061, 1065, 262 C.R. 146; *Rivera v. Southern Pac. Trans. Co.* (1990) 217 C.A.3d 294, 298, 266 C.R. 11; *Tucci v. Club Mediterranee* (2001) 89 C.A.4th 180, 188, 107 C.R.2d 401.)

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CHAPTER IX - Torts

Witkin Summary of California Law

I. INTRODUCTION

E. Conflict of Laws.

2. Modern Approach.

c. Comparative Impairment Analysis.

5 Witkin Sum. Cal. Law Torts § 192

[§ 192] Comparative Impairment Analysis.

(1) *Bernhard Case: Statement of Test.* Where a "true conflict" exists, the task of the court, in applying California's governmental interest approach (supra, §191), is to determine which state's interest would be more impaired if its policy were subordinated to that of the other state. (*Bernhard v. Harrah's Club* (1976) 16 C.3d 313, 320, 128 C.R. 215, 546 P.2d 719; see 16 Am.Jur.2d (2002 ed.), Conflict of Laws §130.) In *Bernhard*, plaintiff's complaint alleged the following: Defendant, a Nevada corporation, owned and operated Nevada gambling establishments in which intoxicating liquors were sold, furnished, and given away for consumption on the premises. Also, defendant advertised for and solicited in California the business of California residents, knowing and expecting that many would use the public highways going to and from defendant's establishments. Mr. and Mrs. M, in response to defendant's advertising and solicitations, drove from their California residence to defendant's club, were served liquor to the point of obvious intoxication, and drove back to California. In California, Mrs. M, still intoxicated, was involved in a collision with plaintiff, a California resident, driving a motorcycle. Plaintiff suffered serious injuries and sued defendant under the then applicable California rule of *Vesely v. Sager* (1971) 5 C.3d 153, 95 C.R. 623, 486 P.2d 151, infra, §1067, imposing liability on tavern keepers for furnishing alcohol to intoxicated persons. Defendant demurred, citing the Nevada rule of nonliability. *Held*, judgment for defendant on demurrer reversed.

(a) *True conflicts case: both states have interests.* (1) Nevada has an interest in having its rule of decision applied to protect its resident tavern keepers from civil liability, which Nevada has not imposed. (2) California has an interest in applying its civil liability rule on tavern keepers for the protection of California residents injured in *California*. (16 C.3d 317.) Thus, because each state has an interest and both conflict, this is not a "false conflicts" case (like *Hurtado v. Superior Court* (1974) 11 C.3d 574, 579, 114 C.R. 106, 522 P.2d 666, infra, §200, and *Reich v. Purcell* (1967) 67 C.2d 551, 63 C.R. 31, 432 P.2d 727, supra, §191); "in the instant case for the first time since applying a governmental interest analysis as a choice of law doctrine in *Reich*, we are confronted with a 'true' conflicts case." (16 C.3d 319.)

(b) *Analysis required of comparative impairment of interests.* When, under the governmental interest approach, an apparent conflict of interest appears, determination of the appropriate law to be applied should be approached under principles of "comparative impairment," i.e., which state interest would be more impaired if its law were not applied. This is not a weighing process. The court does not weigh the conflicting governmental interests in the sense of determining which law manifests the better or worthier social policy on the issue; this would be difficult to justify under

our federal system, which leaves policies to each state. Rather, the process is an accommodation of conflicting state policies, imposing "limitations on the reach of state policies--as distinguished from evaluating the wisdom of such policies"; emphasis is on the appropriate scope of conflicting state policies rather than on the quality of those policies. (16 C.3d 320, 321.)

(c) *Examination of Competing State Policies.*

(1) "Defendant by the course of its chosen commercial practice has put itself at the heart of California's regulatory interest, namely to prevent tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state. It seems clear that California cannot reasonably effectuate its policy if it does not extend its regulation to include out-of-state tavern keepers such as defendant who regularly and purposely sell intoxicating beverages to California residents in places and under conditions in which it is reasonably certain these residents will return to California and act therein while still in an intoxicated state. California's interest would be very significantly impaired if its policy were not applied to defendant." (16 C.3d 322, 323.)

(2) While Nevada does not impose civil liability on tavern keepers, it does impose criminal liability for furnishing liquor to an intoxicated person. Hence, application of California's civil liability rule would not impose an entirely new duty requiring ability to distinguish between California residents and other patrons. "Rather the imposition of such liability involves an increased economic exposure, which, at least for businesses which actively solicit extensive California patronage, is a foreseeable and coverable business expense. Moreover, Nevada's interest in protecting its tavern keepers from civil liability of a boundless and unrestricted nature will not be significantly impaired when as in the instant case liability is imposed only on those tavern keepers who actively solicit California business." (16 C.3d 323.)

(d) *Conclusion.* Under this analysis, it must be concluded "that California has an important and abiding interest in applying its rule of decision to the case at bench, that the policy of this state would be more significantly impaired if such rule were not applied and that the trial court erred in not applying California law." (16 C.3d 323.)

The *Bernhard* opinion produced the expected volume of critical analysis and comment. (See 65 Cal. L. Rev. 290 [Bernhard]; 68 Cal. L. Rev. 477 [Use of Comparative Impairment To Resolve True Conflicts]; 95 Harv. L. Rev. 1079 [Comparative Impairment Reformed: Rethinking State Interests in the Conflict of Laws]; 29 Hastings L. J. 731 [The Need for a Reorientation in American Conflicts Law]; 30 Hastings L. J. 255 [Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws].)

(2) *Three-Step Analysis.* California's governmental interest approach is thus said to involve three steps: First, the court determines whether the foreign law differs from that of the forum. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law to determine whether a true conflict exists. Last, if each jurisdiction has a legitimate interest in the application of its rule of decision, the court analyzes the comparative impairment of the interested jurisdictions. The court applies the law of the state the interest of which would be the more impaired if its law were not applied. (*Tucci v. Club Mediterranee* (2001) 89 C.A.4th 180, 189, 107 C.R.2d 401.)

(3) *Minimal Interest in Outmoded Statute.* The comparative impairment analysis of *Bernhard* was applied in *Offshore Rental Co. v. Continental Oil Co.* (1978) 22 C.3d 157, 148 C.R. 867, 583 P.2d 721. Plaintiff, a California corporation with its principal place of business in California, derived a large part of its revenues from leasing oil drilling equipment in Louisiana. Defendant, a Delaware corporation with New York headquarters, did business in various states including Louisiana and California. K, plaintiff's vice-president, went from plaintiff's Texas office to Louisiana to confer with defendant's representatives, and while on defendant's premises was injured by defendant's negligence. Defendant compensated K for his injuries, but plaintiff brought this suit seeking damages for loss of the services of its "key" employee, under C.C. 49 and *Darmour Productions Corp. v. Herbert M. Baruch Corp.* (1933) 135 C.A. 351, 27 P.2d 664, *infra*, §755. Louisiana law did not recognize such liability, and the lower court, concluding that California law could not be applied, dismissed the action. *Held*, affirmed.

(a) *Governmental interest approach.* Where two states have interests, the underlying policies must be examined in determining the governing law. (22 C.3d 161, 163, 164, discussing *Hurtado v. Superior Court* (1974) 11 C.3d 574, 114 C.R. 106, 522 P.2d 666, *infra*, §200, and *Bernhard*.)

(b) *Interests of states.* (1) Louisiana decisions take the position that allowing recovery for loss of a key employee's services would lead to undesirable social and legal consequences; i.e., the state's policy is to protect negligent resident tortfeasors from excessive legal liability or exaggerated claims. (22 C.3d 163, 164.) (2) California, through C.C. 49, expresses an interest in protecting California employers from economic harm; and this policy of protection extends to injuries inflicted outside California, because its economy and tax revenues are affected regardless of the situs of physical injury. (22 C.3d 164.)

(c) *Resolution of conflict through comparative impairment analysis.* Governmental interest analysis calls for application of the law of the state whose interest would be the more impaired if its law were not applied. (22 C.3d 165.) Several factors are to be considered:

(1) *Whether the policy is one that was much more strongly held in the past than it is now.* If one of the competing laws is archaic, it may have to yield to the more prevalent and progressive law. (22 C.3d 165.) "Moreover, a particular statute may be an antique not only in comparison to the laws of the federal union, but also as compared with other laws of the state of its enactment. Such a statute may be infrequently enforced or interpreted even within its own jurisdiction, and, as an anachronism in that sense, should have a limited application in a conflicts case." (22 C.3d 166.)

(2) *The comparative pertinence of the underlying policy of the statute.* The policy may be less pertinent if the original object is no longer of pressing importance, and the statute has survived mainly because of inertia; or the policy may be satisfied by some means other than enforcement of the statute, e.g., by insurance to provide compensation to tort victims. (22 C.3d 166.)

(d) *Application of comparative impairment analysis to facts.* The majority of common law states do not sanction actions for harm to business employees, "recognizing that even if injury to the master-servant relationship were at one time the basis for an action at common law, the radical change in the nature of that relationship since medieval times nullifies any right by a modern corporate employer to recover for negligent injury to his employees." (22 C.3d 167.) Louisiana has joined this mainstream of American jurisdictions that refuse to allow actions based on negligent interference with contract. (22 C.3d 168.) And California has never squarely held its statute applicable to business employees, nor has any California court recently considered the issue. Thus, California's interest in application of "its unusual and outmoded statute" is comparatively less strong than Louisiana's interest in its "prevalent and progressive" law. (22 C.3d 168.) The situs of the injury, no longer controlling, is nevertheless a relevant consideration. And "[a]t the heart of Louisiana's denial of liability lies the vital interest in promoting freedom of investment and enterprise *within Louisiana's borders*, among investors incorporated both in Louisiana and elsewhere." (22 C.3d 168.) Moreover, insurance is available to guard against the exigencies of the present case; i.e., plaintiff could have procured key employee insurance, a reasonable business expense. (22 C.3d 168.) Defendant, dealing with key employees of companies incorporated in a number of states, would reasonably have based its insurance protection on *Louisiana law*. (22 C.3d 169.)

(e) *Conclusion.* "Upon examination of the nature and purpose of the states' respective laws, ... we have determined that the California statute has historically been of minimal importance in the fabric of California law, and that the Louisiana courts have recently interpreted their analogous Louisiana statute narrowly in light of that statute's obsolescence. We do not believe that California's interests in the application of its law to the present case are so compelling as to prevent an accommodation to the stronger, more current interest of Louisiana. We conclude therefore that Louisiana's interests would be the more impaired if its law were not applied, and consequently that Louisiana law governs the present case." (22 C.3d 169.) (See 30 *Hastings L. J.* 294; 68 *Cal. L. Rev.* 586; for overruling of *Darmour*, see *infra*, §755.)

The *Offshore Rental* rationale was applied in *Cable v. Sahara Tahoe Corp.* (1979) 93 C.A.3d 384, 155 C.R. 770. Plaintiff, a California resident, was a passenger in an automobile driven by S. She alleged that defendant, a Nevada corporation, served liquor to S, and that she was injured in Nevada when S lost control of the car. *Held*, no cause of action was stated. The California interest in protecting those injured by intoxicated persons who were furnished liquor outside of California was declared in *Bernhard*. (93 C.A.3d 395.) However, that policy related only to Nevada conduct causing injury in *California*. (93 C.A.3d 396.) Also, the policy in favor of protecting such injured persons was repudiated by 1978 amendments abrogating the doctrines of *Vesely* and *Bernhard* (see *infra*, §1070). Thus, impairment of this repudiated policy would have a minimal effect on California's governmental interest. (93 C.A.3d 395, 398.) (See 68 Cal. L. Rev. 591; 2 A.L.R.4th 952 [choice of law as to liability of liquor seller for injuries caused by intoxicated person].)

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3. Particular Torts.

a. Injuries to Person or Property.

5 *Witkin Sum. Cal. Law Torts* § 193

[§ 193] Injuries to Person or Property.

(1) *Personal Injuries*. Under the Restatement, the law of the state where a personal injury occurred determines the rights and liabilities of the parties, "unless, with respect to the particular issue, some other state has a more significant relationship ... to the occurrence and the parties." (*Rest.2d, Conflict of Laws* §146; see *16 Am.Jur.2d* (2002 ed.), *Conflict of Laws* §136; *77 A.L.R.2d* 1266 [what is place of tort causing personal injury for purpose of principle of conflict of laws that law of place of tort governs].)

In the ordinary case, conduct and injury occur in the same state, and these two elements usually call for application of the law of that state. (*Rest.2d, Conflict of Laws* §146, Comment d.) But when they occur in different states, a distinction is made: (a) The law of the state of injury will usually be applied, because persons who cause injury in a state should not escape liability under that state's law, and the place of injury is readily ascertainable. (b) Where, however, the purpose of the law is to punish conduct, the state where the conduct occurred may be more important; and the same is true where absolute liability is imposed. (*Rest.2d, Conflict of Laws* §146, §Comment e.)

(2) *Injury to Property*. The Restatement rule is similar to that applicable to personal injury. The law of the state where the injury occurred applies, subject to the same qualification as to the particular issue. (*Rest.2d, Conflict of Laws* §147.)

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3. Particular Torts.

b. Wrongful Death.

5 Witkin Sum. Cal. Law Torts § 194

[§ 194] Wrongful Death.

(1) *State Where Injury Occurred.* The statutory action for wrongful death raises a number of issues, such as the defenses available, the beneficiaries who will share in the recovery and the portions each will receive, the damages recoverable and any limitations on damages, and the persons who may bring the action. The Restatement rule generally calls for application of the law of the state *where the injury occurred*, with the usual exception for a state of more significant relationship. (*Rest.2d, Conflict of Laws* §175; see 12 *Pacific L. J.* 147 [wrongful death action against international air carrier]; for conflicting approaches to this problem, see 22 *Hastings L. J.* 1173; on defenses, see *Rest.2d, Conflict of Laws* §176; on beneficiaries, see *Rest.2d, Conflict of Laws* §177; on damages, see *Rest.2d, Conflict of Laws* §175; on person who may bring suit, see *Rest.2d, Conflict of Laws* §179.)

The place of injury is where the force set in motion by the actor first takes effect on the person. This is not necessarily the place where the death occurs or the pecuniary loss results. (*Rest.2d, Conflict of Laws* §175, Comment b; see 77 *A.L.R.2d* 1266 [what is place of tort causing personal injury or resultant damage or death, for purpose of principle of conflict of laws that law of place of tort governs].)

Where the conduct and injury occur in different states, a distinction is made: (a) The law of the state of injury is usually applied; e.g., where the decedent was domiciled or a resident there, or did business there. (b) But if the decedent was domiciled or a resident or did business in the state where the conduct occurred, that may be the state of most significant relationship. (*Rest.2d, Conflict of Laws* §175, Comment f.)

(2) *Death at Sea.* Where the act causing death occurs on the high seas, the governing law is the federal Death on the High Seas Act (46 U.S.C., §761). (*Gordon v. Reynolds* (1960) 187 C.A.2d 472, 477, 10 C.R. 73; *Offshore Logistics v. Tallentire* (1986) 477 U.S. 207, 106 S.Ct. 2485, 2488, 91 L.Ed.2d 174, 181; see *Garofalo v. Princess Cruises* (2000) 85 C.A.4th 1060, 1068, 102 C.R.2d 754 [federal Death on the High Seas Act preempts state wrongful death and survival claims, as well as employer's subrogation claim against third-party tortfeasor to recover sums that employer was obligated to pay employee under workers' compensation law]; 28 *So. Cal. L. Rev.* 78; 10 *Stanf. L. Rev.* 735.)

It has been held that California courts have concurrent jurisdiction with the federal admiralty courts over these claims. (See *Garofalo v. Princess Cruises*, *supra*, 85 C.A.4th 1079 [California courts may exercise concurrent

jurisdiction over Death on the High Seas Act claims; disagreeing with *Gordon v. Reynolds*, *supra*, 187 C.A.2d 478]; cf. *Touhey v. Carnivale Cruise Lines* (1980) 111 C.A.3d 958, 959, 168 C.R. 910 [where injury occurs at sea, federal jurisdiction is exclusive even though resulting death occurs on land].)

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(2) *Death at Sea*. The federal Death on the High Seas Act was renumbered 46 U.S.C., §30301 et seq. in 2006.



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c. Fraud.

5 *Witkin Sum. Cal. Law Torts* § 195

[§ 195] Fraud.

In determining choice of law in fraud cases, locating the place of loss presents some difficulties, and the Restatement distinguishes two situations:

(1) When the false representations and plaintiff's reliance take place in the *same state*, that state's law governs, subject to the usual exception for a state with a more significant relationship. (*Rest.2d, Conflict of Laws* §148(1).)

(2) When the plaintiff's reliance takes place in whole or in part in a *different state*, several contacts will be considered in determining the state of most significant relationship. These are: (a) the place of reliance; (b) the place where the representations were received by the plaintiff; (c) the place where the representations were made by the defendant; (d) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (e) the place where property that was the subject of the transaction was situated at the time; and (f) the place where the plaintiff was to render performance under a contract induced by the fraud. (*Rest.2d, Conflict of Laws* §148(2).) (See 16 *Am.Jur.2d* (2002 ed.), *Conflict of Laws* §137.)

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d. Defamation and Invasion of Privacy.

5 Witkin Sum. Cal. Law Torts § 196

[§ 196] Defamation and Invasion of Privacy.

(1) *Defamation*. The principal issues involving choice of law in an action for libel or slander are whether the communication is defamatory, whether it is libel or slander, whether proof of special damages is essential, what persons are protected, what constitutes publication, whether the publisher is strictly liable or liable only for intentional or negligent publication, the defenses of absolute or qualified privilege and truth, and matters considered in mitigation. (See *Rest.2d, Conflict of Laws* §149, Comment b.)

(a) If the publication occurs in a *single state*, the law of the state where it occurs applies, subject to the usual qualification for a state of more significant relationship. (*Rest.2d, Conflict of Laws* §149; see *Gallegos v. Union-Tribune Publishing Co.* (1961) 195 C.A.2d 791, 797, 16 C.R. 185 [libel published in Mexico].)

(b) If the defamatory matter is in a book, newspaper, broadcast, or moving picture that reaches *more than one state*, the right to sue is governed by the substantive single publication rule and only one cause of action arises. (See *infra*, §538.) The single publication rule also governs choice of law; otherwise the forum might be required to examine the law of a great many states. (*Rest.2d, Conflict of Laws* §150, Comment c.) Accordingly, in multistate defamation the law of the state of some significant relationship is applied: (1) When a natural person sues, usually the state of the person's domicile at the time, if the matter was published in that state. (2) When a corporation or some other legal person sues, usually the state of its principal place of business at the time, if the matter was published in that state. (*Rest.2d, Conflict of Laws* §150 and Comments e, f.) (See 77 *Harv. L. Rev.* 1463; 26 *U.C. Davis L. Rev.* 1045 [Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases].)

The defamation rule also applies to "injurious falsehood," e.g., disparagement of title to property or its quality (*infra*, §640). (*Rest.2d, Conflict of Laws* §151.)

(2) *Invasion of Privacy*. The same rule, and the same distinction for multistate publication, apply to invasion of the right of privacy. (*Rest.2d, Conflict of Laws* §§152, 153.) (On choice of law applicable to the distinguishable tort of invasion of the right of publicity (*infra*, §685), see 31 *U.C.L.A. L. Rev.* 640.)

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e. Malicious Prosecution and Abuse of Process.

5 *Witkin Sum. Cal. Law Torts* § 197

[§ 197] Malicious Prosecution and Abuse of Process.

The issues in an action for malicious prosecution or abuse of process (see *infra*, §§469 et seq., 517 et seq.) that involve choice of law include the possible requirement of a showing of actual pecuniary damage, and whether less substantial grounds for the defendant's belief in the merits will justify the institution of a civil (see *infra*, §486 et seq.) as opposed to a criminal proceeding. (*Rest.2d, Conflict of Laws* §155, Comment a.)

The governing law is that of the state where *the proceeding complained of occurred*, with the usual qualification for a state of more significant relationship (which is rare). (*Rest.2d, Conflict of Laws* §155.) (See *16 Am.Jur.2d* (2002 ed.), *Conflict of Laws* §138.)

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f. Products Liability.

5 *Witkin Sum. Cal. Law Torts* § 198

[§ 198] Products Liability.

There has been some uncertainty as to the law applicable in a strict products liability case. (See 60 *Cal. L. Rev.* 1; 78 *Harv. L. Rev.* 1452; 76 *A.L.R.2d* 130 [what law governs liability of manufacturer or seller for injury caused by product sold].) A California case examined the subject and offered an innovative solution.

In *Kasel v. Remington Arms Co.* (1972) 24 *C.A.3d* 711, 101 *C.R.* 314, defendant Remington created a Mexican affiliate--CDM--with interlocking or common directors and officers, and 40% stock ownership in Remington. Remington licensed the use of its trademark, and provided working equipment and training of personnel. CDM manufactured shotgun ammunition with the Remington label, somewhat similar to the American product. Plaintiff, a California resident on a hunting trip in Mexico, bought CDM shells from a Mexican dealer. A defective shell exploded in his gun, causing serious injuries. Recovery on the theory of strict products liability, and compensation for pain and suffering, could not be had under Mexican law. The trial judge ruled that California law applied, but instructed the jury that Remington would be liable only if it actually manufactured the shell in the United States or CDM manufactured it in Mexico as Remington's agent. Verdict was for defendant. *Held*, reversed.

(a) If *negligence* were involved, *conduct* would be of paramount concern, and Mexico would be the more important contact. But strict liability is not concerned with conduct. It is an expression of policy, concerned with compensating the injured consumer on the theory that the enterprise can spread the burdens of cost. (24 *C.A.3d* 733.)

(b) As *Reich v. Purcell* (1967) 67 *C.2d* 551, 553, 63 *C.R.* 31, 432 *P.2d* 727, *supra*, §191, points out, the state of the place of wrong has little or no interest in compensation when none of the parties reside there. (24 *C.A.3d* 734.)

(c) There is no support for a rule that the law of the *place of manufacture* is controlling in strict liability cases. And here, "the interest California has in compensating its residents injured by defective products outweighs any interest Mexico may have in the regulation of its own manufacturers where no Mexican citizen is a party to the action and where Mexican law does not even recognize the doctrine of strict liability in tort or make provision for compensating an injured person for pain or suffering, both of which principles constitute the public policy of California." (24 *C.A.3d* 735.)

(d) The *place of injury* was fortuitous; the shell might have been fired after plaintiff's return to *California*. (24 C.A.3d 736.)

(e) Remington is the only member of the enterprise available to suit in California by an injured California citizen. (24 C.A.3d 737.)

West's Key Number Digest, Products Liability k.3; Torts k.2

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

Witkin Summary of California Law

I. INTRODUCTION

E. Conflict of Laws.

4. Particular Issues.

a. Duty, Breach, and Causation.

5 *Witkin Sum. Cal. Law Torts* § 199

[§ 199] Duty, Breach, and Causation.

The Restatement makes the general rule of Section 145 (usually law of the state *where the injury occurred*; see *supra*, §190) applicable to most of the issues of tort liability.

(1) *Protected Interest and Duty*. The law of the state where the injury occurred usually governs the following: (a) The interest entitled to legal protection; e.g., recovery for emotional distress and any requirement of impact or intentional act; recovery for injuries to an unborn child; recovery for invasion of privacy; recovery for negligent misrepresentation; recovery for loss of consortium. (*Rest.2d, Conflict of Laws* §158 and Comment.) (b) The nature of the duty; e.g., manufacturer's liability without privity, affirmative duty of care, and liability for failure to act. (*Rest.2d, Conflict of Laws* §159 and Comment a; see 16 *Am.Jur.2d* (2002 ed.), *Conflict of Laws* §141.)

Schneider v. Schimmels (1967) 256 C.A.2d 366, 64 C.R. 273, was a husband's action to recover for loss of consortium. The place of wrong and marital domicile of the husband, as well as the residence of all parties, was Colorado, which authorized recovery. California, which at the time did not, was merely the state to which defendant moved after the act and the only place where he could be sued. Because California had earlier recognized the right to recover these damages (see *infra*, §1678), it had no strong public policy against an award; hence, application of Colorado law did not offend any California interest or concern. (256 C.A.2d 373.) (See 46 A.L.R.3d 880 [conflict of laws as to right of action for loss of consortium].)

In *Zimmerman v. Allstate Ins. Co.* (1986) 179 C.A.3d 840, 224 C.R. 917, plaintiff, an Illinois resident, was injured in an automobile collision with a car driven in Oklahoma by an Oklahoma resident. Plaintiff first sued the driver in Oklahoma; this suit was eventually settled. But plaintiff became a California resident, and brought another action in California against the driver's insurer under the Unfair Insurance Practices Act (*Ins.C.* 790) for wrongful failure to attempt settlement. California at that time recognized such an action (see 2 *Summary* (10th), *Insurance*, §253). The trial judge sustained defendant's demurrer on the ground that Oklahoma law, which did not recognize a third-party bad faith action against an insurer, applied. *Held*, affirmed.

(a) Oklahoma has an interest in protecting its defendant insurers, and, through them, its insureds who would ultimately absorb the cost of extending insurers' liability to third persons. (179 C.A.3d 846.)

(b) California's interest in regulating the practices of insurers and affording redress to California residents is irrelevant, because the conduct by defendant occurred in *Oklahoma*. (179 C.A.3d 846.) The factor supporting plaintiff's claim of California governmental interest is his status as a resident of California; but he did not become a resident until some months following the accident precipitating the conduct which is the subject of the suit. To hold that the law of plaintiff's residence applied would encourage forum shopping, and would also abrogate the interest of Oklahoma in application of its law to an insurance policy written in Oklahoma for an Oklahoma resident for an accident that occurred in that state, and to conduct of the insurer in *Oklahoma*. (179 C.A.3d 847.)

(2) *Breach*. The *standard of care*, whether established by statute, ordinance, or common law, is usually that of the state where the injury occurred. (*Rest.2d, Conflict of Laws §157*.) The same is true of the tortious character of the conduct; e.g., intentional wrong, negligence, recklessness, or liability without fault. (*Rest.2d, Conflict of Laws §156* and Comments c, d, and e.)

(3) *Causation*. Legal cause is governed by the same rule. (*Rest.2d, Conflict of Laws §160*.)

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SUPPLEMENT: [This section is current through the latest supplement]



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E. Conflict of Laws.

4. Particular Issues.

b. Damages.

5 *Witkin Sum. Cal. Law Torts* § 200

[§ 200] Damages.

(1) *In General.* The choice of law on damage issues presents several problems:

(a) What items of loss can be recovered, and what limitations are imposed on the amount of the recovery. These limitations are commonly encountered in actions for wrongful death. (See 49 *Cal. L. Rev.* 187; 74 *Harv. L. Rev.* 1652; 76 *Harv. L. Rev.* 1484; 10 *U.C.L.A. L. Rev.* 670; 16 *Hastings L. J.* 53; 3 Santa Clara Lawyer 190.) Under the Restatement, the principles of Section 6 govern. The state of conduct and injury is not primarily concerned, and the governing law should be that of the state with a dominant interest in this issue. (*Rest.2d, Conflict of Laws* §171, Comment b.) California follows this modern approach. (*Reich v. Purcell* (1967) 67 *C.2d* 551, 555, 63 *C.R.* 31, 432 *P.2d* 727, *supra*, §191; *Hernandez v. Burger* (1980) 102 *C.A.3d* 795, 799, 162 *C.R.* 564; see 56 *Cal. L. Rev.* 1635; 5 *San Diego L. Rev.* 365.)

(b) The principles of Section 6 also apply to apportionment of damages (*Rest.2d, Conflict of Laws* §171, Comment e) and exemplary damages (*Rest.2d, Conflict of Laws* §171, Comment d).

(c) The right to interest, and the rate, are likewise governed by these principles. (*Rest.2d, Conflict of Laws* §171, Comment c.)

(2) *Illustrations.* In *Hurtado v. Superior Court* (1974) 11 *C.3d* 574, 579, 114 *C.R.* 106, 522 *P.2d* 666, plaintiffs and the decedent were domiciled in Mexico. Defendants were domiciled in California, and the death occurred in California. Defendants sought to have Mexico's limited rule applied as the measure of damages (it would have been \$ 1,946.72). The trial judge ruled that California law applied, and defendants sought mandamus. *Held*, writ denied.

(a) *Determination of competing interests.* Only when it is suggested that foreign law should be the rule of decision must the forum determine the policy of its own and foreign laws. "[G]enerally speaking the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state. In such event he must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it." (11 *C.3d* 581.) The interest of a state in a rule limiting damages for wrongful death is to protect its residents from imposition of excessive financial burdens; and, since defendants are not Mexican

residents, Mexico has no interest in denying full recovery to its plaintiff residents injured by non-Mexican defendants. (11 C.3d 581.)

(b) *Misconceptions from Reich v. Purcell*. Defendants quoted the *Reich* opinion to the effect that the interest of the state is in determining the distribution of proceeds to beneficiaries, and that it extends only to local decedents and beneficiaries. This "reflects a serious misreading of *Reich* which apparently has not been confined to the parties before us." (11 C.3d 582.) *Reich* dealt separately with two state interests: (1) the interest in creating a cause of action for wrongful death so as to provide some recovery; and (2) the interest in limiting the amount of recovery. But in a cause of action for wrongful death there are three distinct aspects: (1) compensation for survivors; (2) deterrence of conduct (unlimited recovery strengthens the deterrent); (3) limitation on the damages recoverable (protecting local defendants against excessive financial burdens). Here, California has a decided interest in furthering its deterrent policy of full compensation by applying its own law to California defendants. (11 C.3d 584.) (See 63 Cal. L. Rev. 56 [on Supreme Court opinion in *Hurtado*]; 47 So. Cal. L. Rev. 817 [on Court of Appeal opinion in *Hurtado*]; 29 Stanf. L. Rev. 127 [same]; 21 U.C.L.A. L. Rev. 719, 781, 795 [same]; 10 U.S.F. L. Rev. 625 [same].)

In *Hall v. University of Nevada* (1977) 74 C.A.3d 280, 141 C.R. 439, the state of Nevada was held subject to suit for a vehicle tort of its employee in California; its sovereign immunity did not extend beyond its borders. (See 7 Summary (10th), *Constitutional Law*, §51.) It contended, however, that its statutory limitation of liability to \$ 25,000 in an action in which sovereign immunity was waived should govern. *Held*, California's policy interest in providing full protection to persons injured on its highways through negligence is stronger than Nevada's interest in protecting its residents against the business expense of increased insurance coverage. (74 C.A.3d 285, 286, following *Bernhard v. Harrah's Club* (1976) 16 C.3d 313, 128 C.R. 215, 546 P.2d 719, supra, §192.) (See *Nevada v. Hall* (1979) 440 U.S. 410, 99 S.Ct. 1182, 1190, 59 L.Ed.2d 416, 427 [rejecting constitutional challenges to California decision in this case]; 30 *Hastings L. J.* 283.)

In *Hernandez v. Burger* 1980) 102 C.A.3d 795, 162 C.R. 564, plaintiff, a Mexican resident and citizen, was struck by a vehicle driven in Mexico; defendants, the driver and the owner of the vehicle, were California residents and citizens. The suit was brought in California to obtain unlimited tort damages under California law. *Held*, the Mexican law of limited recovery (\$ 2,000 maximum) applied. The opinion reviewed all of the leading cases, distinguished *Hurtado*, and concluded that (a) California had no legitimate interest in application of its unlimited damages rule to a Mexican citizen; and (b) Mexico had an interest in application of its limited damages rule to nonresident motorists--fostering tourism. (102 C.A.3d 800, 802, 804.)

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SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

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I. INTRODUCTION

E. Conflict of Laws.

4. Particular Issues.

c. Defenses.

5 *Witkin Sum. Cal. Law Torts* § 201

[§ 201] Defenses.

(1) *In General.* The general Restatement choice of law rule for torts (*Rest.2d, Conflict of Laws* §145; see *supra*, §190) determines what defenses may be raised on the merits. (*Rest.2d, Conflict of Laws* §161.) Included are:

(a) Specific conditions of liability; e.g., whether an action can be maintained against a liability insurer without first getting judgment against the tortfeasor. (*Rest.2d, Conflict of Laws* §162 and Comment b.)

(b) Privilege to act. (*Rest.2d, Conflict of Laws* §163.)

(c) Contributory fault; e.g., the legal standard, the last clear chance doctrine, the effect of reckless conduct, and comparative negligence. (*Rest.2d, Conflict of Laws* §164 and Comments a, d, e, and f; see *86 A.L.R.3d 1206* [choice of law as to application of comparative negligence doctrine].)

(d) Assumption of risk; e.g., whether the defense may be raised by a defendant who has violated a statute enacted for the protection of persons in plaintiff's class. (*Rest.2d, Conflict of Laws* §165 and Comment a.)

(e) Imputed negligence; e.g., between spouses, parent and child, or driver and passenger. (*Rest.2d, Conflict of Laws* §166 and Comments a and b.)

(2) *Release or Covenant Not To Sue.* The rule of Section 145 applies to the determination of the effect of a release or covenant not to sue one tortfeasor on the liability of the others. (*Rest.2d, Conflict of Laws* §170.) Although most of the cases "have applied the local law of the state of conduct and injury," the Restatement questions this view. "If all of the interested parties are domiciled in the state where the instrument was executed, it would seem that, usually at least, this state would have the greatest interest in the issues." (*Rest.2d, Conflict of Laws* §170, Comment c.)

(3) *Guest Law.* The traditional rule of the place of wrong (*supra*, §189) was formerly applied in California to cases involving a "guest law" defense. (See *Loranger v. Nadeau* (1932) 215 C. 362, 366, 10 P.2d 63; *Emery v. Emery* (1955) 45 C.2d 421, 425, 289 P.2d 218; 16 *Hastings L. J.* 45.) Later cases take the modern approach (see *supra*, §190 et seq.). (On unconstitutionality of former California Guest Law, see *Brown v. Merlo* (1973) 8 C.3d 855, 882, 106 C.R. 388, 506 P.2d 212, 8 *Summary* (10th), *Constitutional Law*, §795.)

In *Fuller v. Greenup* (1968) 267 C.A.2d 10, 72 C.R. 531, plaintiff and defendant, domiciliaries of Alaska, took a motor trip in plaintiff's car through British Columbia to California. While in British Columbia plaintiff suffered injuries from defendant's negligent driving. British Columbia's guest statute bars recovery except for gross negligence; Alaska has no guest statute. *Held*, Alaska law applied. Both parties were domiciled there and the agreement to share expenses of the trip was made there. It is reasonable to assume that they contemplated the determination of their rights and liabilities by the law of their domicile and place of agreement; it is unreasonable to assume that they contemplated a change in such rights and liabilities each time they crossed a border. British Columbia, a fortuitous place of wrong, has little interest in the issue, and recovery by a guest is not against California's public policy. (267 C.A.2d 18.) (See *Kelley v. Von Kuznick* (1971) 18 C.A.3d 805, 809, 96 C.R. 184 [wrongful death involving California residents who drove through New Mexico in returning from a vacation trip; held that New Mexico had no legitimate interest, and instruction on right to recover for wilful misconduct under California law was proper]; 63 A.L.R.4th 167 [modern status of choice of law in applying guest statutes].)

(4) *Immunity*. The general Restatement torts rule determines whether the defendant can defend a tort suit on the ground that it is a *charity*. (See *Rest.2d, Conflict of Laws* §145, *supra*, §190.)

With respect to *intrafamily immunity*, the modern view was established in California in *Emery v. Emery*, *supra*. The law of the place of wrong is "fortuitous and irrelevant," and the applicable law is that of the domicile. "We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home. Since all of the parties to the present case are apparently domiciliaries of California, we must look to the law of this state to determine whether any disabilities or immunities exist." (45 C.2d 428.) (See 73 *Harv. L. Rev.* 785; 79 *Harv. L. Rev.* 1707; 40 *So. Cal. L. Rev.* 307; 13 *Stanf. L. Rev.* 731; 96 A.L.R.2d 973 [conflict of laws as to right of action between husband and wife or parent and child].)

The Restatement is in accord. The applicable law, selected by application of the Section 145 principles, is usually that of the parties' domicile. (*Rest.2d, Conflict of Laws* §169.) "Whatever the true explanation, the state of the parties' domicil will almost always be the state of dominant interest, and, if so, its local law should be applied to determine whether there is immunity in the particular case. One possible situation where the state of the parties' domicil would not be that of dominant interest is where the parties' relationship to the state of their domicil is considerably less close than is their relationship to some other state." (*Rest.2d, Conflict of Laws* §169, Comment b.)

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I. INTRODUCTION

E. Conflict of Laws.

4. Particular Issues.

d. Other Issues.

5 Witkin Sum. Cal. Law Torts § 202

[§ 202] Other Issues.

(1) *Joint and Concurrent Torts*. The law applicable to circumstances in which two or more persons are liable for acts of each other is determined under the general torts conflicts rule of Restatement, §145 (supra, §190), and is usually the law of the state of injury. (*Rest.2d, Conflict of Laws §172.*) The same is true of contribution and indemnity among tortfeasors, although the Restatement suggests that the rule may be different where both parties are domiciled in the same state. (*Rest.2d, Conflict of Laws §173*, and Comments a and b.) (See 29 *A.L.R.3d* 642 [modern status of rule that substantive rights of parties to a tort action are governed by the law of place of wrong]; 16 *Am.Jur.2d* (2002 ed.), *Conflict of Laws §143.*)

In *Caterpillar Tractor Co. v. Teledyne Industries* (1975) 53 *C.A.3d* 693, 126 *C.R.* 455, a Florida company received judgment in the federal district court in Florida against two California corporations, Caterpillar and Teledyne. Caterpillar satisfied the judgment and brought this action against Teledyne for contribution. Florida at that time had no contribution statute. *Held*, California law applied and Caterpillar was entitled to contribution. Applying the governmental interests test (see supra, §191), Florida was only interested in satisfaction of the judgment in favor of the Florida plaintiff; it had no interest in the relationship of the two California tortfeasors to each other, and California had an interest in applying its rule of contribution to them. (53 *C.A.3d* 698.)

(2) *Vicarious Liability*. Whether one person is liable for another's tort, e.g., in situations involving independent contractors, employer and employee, or driving with permission, the rule of Section 145 and the principles of Section 6 are the guidelines to determination of the proper choice of law. (*Rest.2d, Conflict of Laws §174*; see 16 *Hastings L. J.* 55 [owner's responsibility].) "These principles require that the forum consider (1) whether the relationship between the defendant and the other person makes the imposition of vicarious liability reasonable and (2) whether there is a reasonable relationship between the defendant and the state whose local law is to be applied." (*Rest.2d, Conflict of Laws §174*, Comment a; see 16 *Am.Jur.2d* (2002 ed.), *Conflict of Laws §144.*)

(3) *Survival*. The Restatement treats survival as one of the issues governed by Section 145. (*Rest.2d, Conflict of Laws §167.*) California has held, however, that the issue is not substantive but *procedural*. Hence, a cause of action for negligent personal injuries is maintainable here under our survival statute even though it has abated by the death of the tortfeasor in the state where it arose. (*Grant v. McAuliffe* (1953) 41 *C.2d* 859, 864, 264 *P.2d* 944 [noting that all parties

were California residents and estate was being administered here]; see 42 *Cal. L. Rev.* 803; 68 *Harv. L. Rev.* 1260; 13 *Stanf. L. Rev.* 729; 1 *U.C.L.A. L. Rev.* 380; on conflict of laws respecting survival and abatement, see 3 *Cal. Proc.* (4th), *Actions*, §102.)

(4) *Miscellaneous Jurisdictional and Procedural Issues*. Problems of jurisdiction and choice of law on procedural matters are considered in another work:

(a) *Jurisdiction*. The general rule is that a tort action is transitory and may be brought in any place where personal jurisdiction of the defendant may be obtained. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §139.) The principal exceptions are: (1) Actions involving foreign land. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §359.) (2) Actions contrary to public policy of the forum. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §361.) (3) Actions where the forum is inconvenient. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §365.)

(b) *Procedure*. Procedural matters are generally governed by the law of the forum. (See 3 *Cal. Proc.* (4th), *Actions*, §96.)

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *Survival*.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §52.

(4) *Miscellaneous Jurisdictional and Procedural Issues*.

(a) *Jurisdiction*.

General rule for tort action:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §145.

Actions involving foreign land:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §368.

Actions contrary to public policy:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §370.

Inconvenient forum:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §374.

(b) *Procedure*.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §46.



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CHAPTER IX - Torts

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II. GOVERNMENTAL LIABILITY

A. In General.

1. Common Law Doctrine of Sovereign Immunity.

5 *Witkin Sum. Cal. Law Torts* § 203

[§ 203] Common Law Doctrine of Sovereign Immunity.

"The theory of sovereign immunity originated in the fiction that the king can do no wrong. It may be said that the doctrine arose in former times from the practical necessity of enabling the state to exercise its governmental functions unhampered by the demands on the exchequer resulting from the carelessness or mistakes of its officers and agents in the discharge of their official duties. ... The doctrine has had widespread acceptance as a part of the American common law, and has been deemed to prevail except where it had been departed from by constitutional and statutory law, as interpreted and applied by the courts." (*People v. Superior Court (Pierpont)* (1947) 29 C.2d 754, 756, 178 P.2d 1.) (See Dobbs, *The Law of Torts* §260; 5 Harper, James & Gray 2d §29.1 et seq.; C.E.B., 1 *Government Tort Liability Practice* 4th, §1.25; 2 *California Affirmative Defenses* (2004 ed.), §38:56 et seq.; 70 *Harv. L. Rev.* 829; 74 *Harv. L. Rev.* 714; 50 *So. Cal. L. Rev.* 515 [economic analysis of sovereign immunity]; 57 *Am.Jur.2d* (2001 ed.), *Municipal, County, School, and State Tort Liability* §1 et seq.; on immunity of foreign country, see 67 *Harv. L. Rev.* 608; 23 *San Diego L. Rev.* 741; 17 *Stanf. L. Rev.* 501; 34 *Stanf. L. Rev.* 385; 45 *Am.Jur.2d* (1999 ed.), *International Law* §82 et seq.)

The doctrine has both substantive and procedural aspects; i.e., it embraces both immunity from liability and immunity from suit. (On immunity from suit and modern statutory consent to suit, see 4 *Cal. Proc.* (4th), *Pleading*, §87 et seq.; on jurisdictional nature of defense, see 2 *Cal. Proc.* (4th), *Jurisdiction*, §91.)

The immunity doctrine has been under fire by progressive courts and law writers for many years, and it has been urged in responsible quarters that it should be wholly abolished and full tort liability should be assumed by American state and local governments. (See *Talley v. Northern San Diego County Hosp. Dist.* (1953) 41 C.2d 33, 41, 257 P.2d 22 [dissenting opinion]; *Vater v. Glenn* (1958) 49 C.2d 815, 820, 323 P.2d 85; *Madison v. San Francisco* (1951) 106 C.A.2d 232, 249, 251, 253, 234 P.2d 995, 236 P.2d 141 [concurring opinion]; *Waterman v. Los Angeles County General Hosp.* (1954) 123 C.A.2d 143, 144, footnote 1, 266 P.2d 221; 47 *Cal. L. Rev.* 303; 7 *Hastings L. J.* 109; 7 *Hastings L. J.* 330 [New York Court of Claims Act]; 27 *So. Cal. L. Rev.* 492; 6 *U.C.L.A. L. Rev.* 1 [general discussion of alternatives to immunity].) As a result, "the traditional blanket immunities ... have been abolished or substantially modified both at the federal and at the state level. Nevertheless, some kind of immunity, or unique constraints on duties of governmental entities, remains everywhere." (Dobbs, *The Law of Torts* §260, p. 694; on abrogation of doctrine in California, see *infra*, §215.)

West's Key Number Digest, Municipal Corporations k.723, 744; States k.112(1), United States k.50.15

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §29.1 et seq. *Immunity from suit:*

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §101 et seq.

Jurisdictional nature of defense:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §90.



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II. GOVERNMENTAL LIABILITY
A. In General.
2. Federal Sovereign Immunity.

5 Witkin Sum. Cal. Law Torts § 204

[§ 204] Federal Sovereign Immunity.

The sovereign immunity doctrine is still recognized with respect to the federal Government, and, except where express statutory consent is conferred, the United States is not liable for torts. (See *Eastern Trans. Co. v. United States* (1927) 272 U.S. 675, 47 S.Ct. 289, 291, 71 L.Ed. 472, 475 [doctrine applicable]; *Rest.2d, Torts* §895A [tort immunity of United States]; Dobbs, *The Law of Torts* §261 et seq.; 48 *Cal. L. Rev.* 94 [immunity of United States in water rights litigation and effect of statutory waiver]; 71 *Cal. L. Rev.* 1707 [immunity for injuries resulting from violation of constitutional right; proposal for change]; 70 *Harv. L. Rev.* 829, 887; 73 *Harv. L. Rev.* 602 [liability under Tucker Act]; 77 *Harv. L. Rev.* 1 [suits against governments and officers]; 111 *Harv. L. Rev.* 2009 [federal government tort liability]; 23 *So. Cal. L. Rev.* 258; 12 *Southwestern L. Rev.* 457 [competing considerations]; on federal immunity from suit, see 4 *Cal. Proc.* (4th), *Pleading*, §87 et seq.)

The immunity cannot be overcome by an action ostensibly against a public officer when in substance it is against the Government or its instrumentality. (See *Larson v. Domestic & Foreign Commerce Corp.* (1949) 337 U.S. 682, 69 S.Ct. 1457, 1460, 93 L.Ed. 1628, 1634 [action to restrain War Assets Administrator from reselling property claimed by plaintiff under prior contract of purchase; held an action against federal Government, and dismissed]; *Alred v. Camp Irwin Non-Commissioned Officers' Open Mess* (1958) 156 C.A.2d 571, 574, 319 P.2d 654; *Wheeldin v. Wheeler* (1963) 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 [no tort liability for abuse of subpoena power]; 70 *Harv. L. Rev.* 831; 77 *Harv. L. Rev.* 136 [Wheeldin]; 12 *Stanf. L. Rev.* 691 [exemption of government contractors from strict liability for blasting]; 9 *A.L.R.3d* 382 [right of contractor with federal, state, or local public body to latter's immunity from tort liability].)

There are, however, a number of federal statutory waivers of immunity. (See 70 *Harv. L. Rev.* 875, 887, 888; 4 *Cal. Proc.* (4th), *Pleading*, §88.) In particular, the Federal Tort Claims Act of 1946 greatly broadened the area of liability. (See *infra*, §205 et seq.)

West's Key Number Digest, United States k.46 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
Federal immunity from suit:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §101 et seq.

Waiver of immunity:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §102.



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CHAPTER IX - Torts

Witkin Summary of California Law

II. GOVERNMENTAL LIABILITY

A. In General.

3. Liability Under Federal Tort Claims Act.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 205

[§ 205] In General.

(1) *Nature and Scope of Act.* In 1946, the Federal Tort Claims Act (28 U.S.C., §§1346(b), 2671 et seq.) was adopted, radically changing the former immunity rule with respect to the federal Government. Generally, the United States is liable for injury or damage caused by the negligent or wrongful act of a government employee while acting within the scope of the employee's office or employment. (See 28 U.S.C., §§1346(b), 2672, *infra*, §206.) The liability is the same as that imposed on a private person under the law of the place where the tort occurred. (See 28 U.S.C., §2672, 2674, *infra*, §206.)

(2) *Punitive Damages.* The United States is not liable for punitive damages. (28 U.S.C., §2674; see *Woodland Production Credit Assn. v. Nicholas* (1988) 201 C.A.3d 123, 128, 251 C.R. 791 [federal agency is immune from punitive damages in absence of explicit authorization for them]; *Molzof v. United States* (1992) 502 U.S. 301, 112 S.Ct. 711, 718, 116 L.Ed.2d 731, 742 [FTCA bars recovery only of common law punitive damages, i.e., those intended to punish intentional or egregious conduct; recovery was proper of compensatory damages for future medical expenses and loss of enjoyment of life of plaintiff's comatose husband]; 35A Am.Jur.2d (2001 ed.), *Federal Tort Claims Act* §§134, 135.) Where the state law prescribes a penal measure of damages on a cause of action, the federal Government is liable only for actual or compensatory damages, and the award need not conform to the state statutory limit on its penal sum. (*Massachusetts Bonding & Ins. Co. v. United States* (1956) 352 U.S. 128, 77 S.Ct. 186, 1 L.Ed.2d 189 [Massachusetts Death Act making recovery depend on culpability instead of pecuniary loss; statutory \$ 20,000 limit inapplicable and \$ 60,000 judgment for actual damages upheld].)

(3) *Interest and Attorneys' Fees.* The United States is not liable for interest prior to judgment. (28 U.S.C., §2674; see 35A Am.Jur.2d (2001 ed.), *Federal Tort Claims Act* §133.) And attorneys' fees are strictly limited (20% on claims settled administratively, 25% on judgment or settlement after commencement of action). (28 U.S.C., §2678; see 35A Am.Jur.2d (2001 ed.), *Federal Tort Claims Act* §§226, 227; 86 A.L.R. Fed 866 [attorneys' fees under FTCA].)

(4) *Indemnification.* The Act permits an indemnity action against the United States in the same manner and to the same extent that an action would lie against a private individual. (*Lockheed Aircraft Corp. v. United States* (1983) 460 U.S. 190, 103 S.Ct. 1033, 1037, 74 L.Ed.2d 911, 918.) However, a tortfeasor has no right of indemnity from the United States in cases involving injuries to military personnel. (*Stencel Aero Engineering Corp. v. United States* (1977) 431

U.S. 666, 97 S.Ct. 2054, 2057, 52 L.Ed.2d 665, 670 [allowing claim for indemnity by negligent aircraft manufacturer would circumvent *Feres* doctrine (no governmental liability to servicemen injured in the line of duty; see *infra*, §208), and same reasons of policy behind that doctrine were applicable here].) The United States has no right of indemnity from an employee whose negligence led to an award against it. (*United States v. Gilman* (1954) 347 U.S. 507, 74 S.Ct. 695, 696, 98 L.Ed. 898, 901; see 28 So. Cal. L. Rev. 176.)

(5) *Commentary.* The commentary on the Federal Tort Claims Act has been extensive. (See Dobbs, *The Law of Torts* §261 et seq.; 5 Harper, James & Gray 2d §29.12 et seq.; 70 *Harv. L. Rev.* 889; 72 *Harv. L. Rev.* 1363; 21 *Hastings L. J.* 1059; 15 *Pepperdine L. Rev.* 581 [liability for outer space accidents]; 31 *So. Cal. L. Rev.* 259 [possible liability for sonic boom damage]; 34 *So. Cal. L. Rev.* 377 [liability for injuries from explosion of rifle grenade on abandoned range]; 12 *Southwestern L. Rev.* 627 [liability for disease and injury from nuclear testing]; 15 *U.C. Davis L. Rev.* 997, 1003 [same]; 8 *U.S.F. L. Rev.* 452 [FAA controllers' duty to warn]; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §1 et seq.; 57 *A.L.R.2d* 1448 [who are "employees" of the United States within FTCA]; 74 *A.L.R.2d* 867 [effect of statutes imposing strict liability on aircraft owner]; 78 *A.L.R.2d* 888 [violation of state or municipal law or regulation as affecting liability under FTCA]; 16 *A.L.R.3d* 1394 [negligent operation of motor vehicle driven by federal employee]; 73 *A.L.R.4th* 582 [tort liability for nonmedical radiological harm]; 104 *A.L.R. Fed* 492 [application of collateral source rule in actions under FTCA]; 173 *A.L.R. Fed* 431 [liability of United States under FTCA for damages caused by ingestion or administration of government-approved drugs, vaccines, and medications]; 177 *A.L.R. Fed* 261 [liability of United States under Federal Tort Claims Act for death or injury sustained by visitor to area administered by National Park Service]; 193 *A.L.R. Fed* 1 [liability of United States under Federal Tort Claims Act for death or injury sustained by visitor to area administered by United States Forest Service or Army Corps of Engineers].)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Commentary.* See 5 Harper, James & Gray 3d §29.12 et seq.; 24 *A.L.R. Fed* 2d 329 [Construction and Application of Federal Tort Claims Act--United States Supreme Court cases].



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II. GOVERNMENTAL LIABILITY

A. In General.

3. Liability Under Federal Tort Claims Act.

b. Liability for Tortious Acts of Federal Employees.

5 Witkin Sum. Cal. Law Torts § 206

[§ 206] Liability for Tortious Acts of Federal Employees.

(1) *In General.* The United States is made liable generally for "injury or loss of property, or personal injury or death caused by the *negligent or wrongful* act or omission of any employee ... *while acting within the scope* of his office or employment." (28 U.S.C., §§1346(b), 2672; see *Sheridan v. United States* (1988) 487 U.S. 392, 108 S.Ct. 2449, 2455, 101 L.Ed.2d 352, 362 [government liable for negligently allowing assailant serviceman to leave Navy hospital with loaded weapon].)

The liability is for "wrongful," as well as negligent, acts. Although most intentional torts are expressly excluded (see *infra*, §208), liability extends to wilful torts that are outside the statutory waiver. (See *Hatahley v. United States* (1956) 351 U.S. 173, 76 S.Ct. 745, 751, 100 L.Ed. 1065, 1073 [no immunity for nonnegligent trespass]; 36 U.C. Davis L. Rev. 895 [federal government's liability for intentional torts of its law enforcement officials]; 35A Am.Jur.2d (2001 ed.), *Federal Tort Claims Act* §89 et seq.)

In *United States v. Demko* (1966) 385 U.S. 149, 87 S.Ct. 382, 17 L.Ed.2d 258, a federal prisoner injured in performance of an assigned task claimed and received an award under the related compensation act (18 U.S.C., §4126). *Held*, this was the prisoner's exclusive remedy and precluded any action under the Federal Tort Claims Act.

(2) *Who Are Federal Employees.* "Employees of the government" are defined in the statute as including officers or employees of "any federal agency," members of the military or naval forces, members of the National Guard while engaged in training or other prescribed duty, and persons "acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." (28 U.S.C., §2671; see *Logue v. United States* (1973) 412 U.S. 521, 93 S.Ct. 2215, 2221, 37 L.Ed.2d 121, 129 [federal Government was not liable for negligence of employees of county jail in which federal prisoner was held on narcotics smuggling charges; federal marshal had no authority to control their activities]; *United States v. Orleans* (1976) 425 U.S. 807, 96 S.Ct. 1971, 1977, 48 L.Ed.2d 390, 399 [agents and employees of community action agency that, though supported with federal funds and subject to federal standards, was local enterprise whose day-to-day operations were not supervised by federal Government were not federal employees within meaning of FTCA]; 75 Cal. L. Rev. 1513 [criticism of 42 U.S.C., §2212, extending Federal Tort Claims Act to private contractors involved in atomic weapons testing program].)

The term "federal agency" includes, for these purposes, "the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States." (28 U.S.C., §2671; see 166 A.L.R. *Fed* 187 [when is federal agency employee an independent contractor, creating exception to United States waiver of immunity under 28 U.S.C., §2671].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 7 A.L.R. *Fed* 2d 179 [when has federal employee acted within scope of employment for purposes of 28 U.S.C., §2679, permitting substitution of United States as defendant, in action asserting intentional tort involving personal injury, death, or threats of personal injury or death]; 12 A.L.R. *Fed* 2d 649 [when has federal employee acted within scope of employment for purposes of 28 U.S.C., §2679, permitting substitution of United States as defendant in action for negligence or other unintentional tort or for violation of state statute]; 14 A.L.R. *Fed* 2d 251 [when federal employee acts within scope of employment for purposes of 28 U.S.C., §2679, permitting substitution of United States as defendant in action asserting intentional tort not involving personal injury or death].



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3. Liability Under Federal Tort Claims Act.
c. Liability Is That of Private Person.

5 *Witkin Sum. Cal. Law Torts* § 207

[§ 207] Liability Is That of Private Person.

The liability is the same as that imposed on a "private person ... in accordance with the law of the place where the act or omission occurred." (28 U.S.C., §2672; see 28 U.S.C., §2674 [liability "in the same manner and to the same extent as a private individual under like circumstances"]; 70 *Harv. L. Rev.* 890; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §108.) But the traditional distinction between governmental and proprietary acts has no application. (*Indian Towing Co. v. United States* (1955) 350 U.S. 61, 76 S.Ct. 122, 124, 100 L.Ed. 48, 54 [Coast Guard operated lighthouse failed through negligence in inspection and repair]; *Rayonier v. United States* (1957) 352 U.S. 315, 77 S.Ct. 374, 376, 1 L.Ed.2d 354, 358 [negligence of firefighter]; 30 *So. Cal. L. Rev.* 234; 70 *Harv. L. Rev.* 134.)

In *Richards v. United States* (1962) 369 U.S. 14, 82 S.Ct. 585, 7 L.Ed.2d 492, the conflict of laws provision ("law of the place where the act or omission occurred") was given a broader meaning than internal substantive tort law. The statute requires application of "the whole law" of that state (82 S.Ct. 592, 7 L.Ed.2d 499), thus including its judicially declared conflict of laws rules. (See 76 *Harv. L. Rev.* 191; 10 *U.C.L.A. L. Rev.* 681.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) "Private person" does not include state or municipal entity: In *United States v. Olson* (2005) 546 U.S. 43, 126 S.Ct. 510, 163 L.Ed.2d 306, plaintiffs injured in a mine accident in Arizona sued the Mine Safety and Health Administration under the Federal Tort Claims Act, alleging negligence by federal mine inspectors. The federal district court granted the agency's motion to dismiss, but the Ninth Circuit Court of Appeals reversed on the ground that Arizona law would make a state or municipal entity liable in the alleged circumstances, reasoning that (1) where unique governmental functions are at issue, the Act waives sovereign immunity if a state or municipal entity would be held liable under the law where the activity occurred, and (2) federal mine inspections are unique governmental functions because there is no private sector analogue for mine inspections. *Held*, Court of Appeals judgment reversed and case remanded; the Act waives the federal Government's sovereign immunity only where local law would make a private person liable in tort, not where local law would make the state or a municipal entity liable.

(a) The Ninth Circuit's first premise is too broad, reading into the Act something that is not there. 28 U.S.C., §1346(b)(1) authorizes private tort actions against the Government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission

occurred." The provision says that it waives sovereign immunity "under circumstances where the United States, if a private person," not "the United States, if a state or municipal entity," would be liable. This Court has consistently adhered to this "private person" standard, even when uniquely governmental functions are at issue. (126 S.Ct. 512, 163 L.Ed.2d 310.)

(b) The Ninth Circuit's second premise reads the Act too narrowly in its determination that federal mine inspections have no private sector analogue. 28 U.S.C., §2674 makes the United States liable "in the same manner and to the same extent as a private individual under like circumstances." The words "like circumstances" do not restrict a court's inquiry to the same circumstances, but require it to look further afield. The Government in effect concedes, and other Courts of Appeals' decisions suggest, that private person analogies exist for the federal mine inspectors' conduct at issue, namely private persons who conduct safety inspections. The lower courts should have looked for a similar analogy in this case, and the case is remanded so that they may decide this matter in the first instance. (126 S.Ct. 513, 163 L.Ed.2d 311.)



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II. GOVERNMENTAL LIABILITY

A. In General.

3. Liability Under Federal Tort Claims Act.

d. Exceptions.

5 *Witkin Sum. Cal. Law Torts* § 208

[§ 208] Exceptions.

(1) *In General.* There are a number of express statutory exceptions to liability under the Federal Tort Claims Act. (See 28 U.S.C., §2680; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §33 et seq.) Some relate to claims compensable under other statutes. (See 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §14 et seq.; 135 *A.L.R. Fed* 403 [federal compensation acts, in nature of workers' compensation acts, as affecting recovery against United States under FTCA].) Others retain the governmental immunity for certain kinds of acts. Immunity provisions also appear in other statutes. (See, e.g., 33 U.S.C., §702(c).) And they may be judicially created. (See *Feres v. United States* (1950) 340 U.S. 135, 71 S.Ct. 153, 159, 95 L.Ed. 152, 161.) Some of the more important exceptions follow.

(2) *Discretionary Function or Duty.* Excluded from the Act are claims based on performance of or failure to perform "a discretionary function or duty." Immunity exists "whether the discretion be abused or not." (28 U.S.C., §2680(a); see *United States v. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)* (1984) 467 U.S. 797, 104 S.Ct. 2755, 2765, 81 L.Ed.2d 660, 675 [discretionary function exception covers both government agencies and government employees exercising discretion]; *Berkovitz v. United States* (1988) 486 U.S. 531, 108 S.Ct. 1954, 1961, 1963, 100 L.Ed.2d 531, 543 [decision on social, economic, or political issues is required for discretionary immunity; there must not be readily ascertainable constitutional, statutory, or regulatory standard]; *United States v. Gaubert* (1991) 499 U.S. 315, 111 S.Ct. 1267, 1275, 113 L.Ed.2d 335, 348 [discretionary function exception is applicable at any level of the governmental process, operational as well as planning; federal regulators' participation in management of savings and loan institution fell within provision]; 22 Cal. Western L. Rev. 175 [*Empresa*]; 15 *Ecology L. Q.* 477; 66 *Harv. L. Rev.* 488; 67 *Harv. L. Rev.* 1279; 70 *Harv. L. Rev.* 892; 12 *Southwestern L. Rev.* 627; 6 *Stanf. L. Rev.* 734; 30 *U.C. Davis L. Rev.* 691 [causation and discretionary function exception]; 38 *U.C.L.A. L. Rev.* 871; 11 *U.S.F. L. Rev.* 170 [critique of planning level-operational level test]; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §§35, 36; 35 *A.L.R. Fed* 481 [issuance of permits, licenses, and the like as within discretionary function exception]; 36 *A.L.R. Fed* 240 [claims based on law enforcement and regulatory activities as within discretionary function exception]; 37 *A.L.R. Fed* 537 [claims based on construction and maintenance of public property as within discretionary function exception]; 167 *A.L.R. Fed* 1 [claims arising from governmental conduct causing damage to plaintiff's real property as within discretionary function exception]; 169 *A.L.R. Fed* 421 [liability of United States for failure to warn of danger or hazard not directly created by act or omission of federal Government and not in national parks as affected by discretionary function exception]; 170

A.L.R. Fed 365 [liability of United States for failure to warn of danger or hazard resulting from governmental act or omission as affected by discretionary function exception]; 171 *A.L.R. Fed* 655 [liability of United States for failure to warn local police or individuals of discharge, release, or escape of person deemed dangerous to public as affected by discretionary function exception]; 172 *A.L.R. Fed* 407 [claims arising from conduct of governmental employee in administering or failing to administer medical care as within discretionary function exception]; 173 *A.L.R. Fed* 431 [liability of United States under discretionary function exception for damages caused by ingestion or administration of government-approved drugs, vaccines, and medications].)

(3) *Enforcement of Statute or Regulation*. The federal Government is immune from claims based on acts of employees exercising *due care* in the execution of a statute or regulation, whether valid or invalid. (28 U.S.C., §2680(a); see 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §34 et seq.)

(4) *Intentional Torts*. Claims arising out of *most* intentional torts, including "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," are excepted from the Act. (28 U.S.C., §2680(h); see 70 *Harv. L. Rev.* 891; 30 *A.L.R. Fed* 421 [exception for claims arising out of misrepresentation and deceit]; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §89 et seq.; 43 *A.L.R. Fed* 571 [exception for claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process]; 79 *A.L.R. Fed* 826 [exception for claims arising out of libel and slander]; 88 *A.L.R. Fed* 7 [exception for claims arising out of assault and battery]; 92 *A.L.R. Fed* 186 [exception for claims arising out of interference with contract rights].)

The reference in 28 U.S.C., §2680(h) to "misrepresentation, deceit," covers both intentional or fraudulent representation (deceit) and negligent misrepresentation (misrepresentation). (*United States v. Neustadt* (1961) 366 U.S. 696, 81 S.Ct. 1294, 1298, 6 L.Ed.2d 614, 619; see 75 *Harv. L. Rev.* 216; 31 *Hastings L. J.* 247 [arguing that 28 U.S.C., §2680(h) does not preclude liability for negligent airworthiness certification]; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §46.)

(5) *Foreign Torts*. Any claim "arising in a foreign country" is excepted from the Act. (28 U.S.C., §2680(k); see *United States v. Spelar* (1949) 338 U.S. 217, 70 S.Ct. 10, 11, 94 L.Ed.3, 5 [accident on leased air base in Newfoundland]; *United States v. Smith* (1991) 499 U.S. 160, 111 S.Ct. 1180, 1186, 113 L.Ed.2d 134, 146 [military doctor could not be held personally liable for malpractice occurring in Italy, even though action against United States was barred by 28 U.S.C., §2680(k)]; *Smith v. United States* (1993) 507 U.S. 197, 113 S.Ct. 1178, 1183, 122 L.Ed.2d 548, 554 [exception included claim arising in Antarctica, even though Antarctica has no recognized government and has no civil tort law of its own]; 22 *Loyola L.A. L. Rev.* 603; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §74; 158 *A.L.R. Fed* 137 [what constitutes "claim arising in a foreign country" under 28 U.S.C., §2680(k)].)

(6) *Transmission of Mail*. The federal government is immune from liability for the "loss, miscarriage, or negligent transmission of letters or postal matter." (28 U.S.C., §2680(b); see 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §79; cf. 18 *Santa Clara L. Rev.* 241 [arguing that 28 U.S.C., §2680(b) does not preclude liability of postal service supervisory personnel for lost or mishandled mail].)

(7) *Collection of Taxes or Detention of Goods*. The assessment or collection of a tax or customs duty or the detention of goods by a customs or other law enforcement officer is excepted from the Act. (28 U.S.C., §2680(c); see *Kosak v. United States* (1984) 465 U.S. 848, 104 S.Ct. 1519, 1524, 79 L.Ed.2d 860, 868 [28 U.S.C., §2680(c) precludes liability for negligent handling of detained property]; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §80 et seq.; 173 *A.L.R. Fed* 465 [construction and application of 28 U.S.C., §2680(c)].)

(8) *Combatant Activities*. "Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" is excepted. (28 U.S.C., §2680(j); see 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §87.)

(9) *Flood Control*. An exception exists for damage from floods or flood waters. (33 U.S.C., §702c; see *United States v. James* (1986) 478 U.S. 597, 106 S.Ct. 3116, 3121, 92 L.Ed.2d 483, 493 [33 U.S.C., §702c precludes recovery for personal injury caused by negligent failure to warn of release of waters from federal flood control projects]; *Central Green Co. v. United States* (2001) 531 U.S. 425, 121 S.Ct. 1005, 1008, 148 L.Ed.2d 919, 924 [in determining whether immunity attaches, courts should consider character of waters that cause relevant damage, not relation between that damage and flood control project]; 31 *McGeorge L. Rev.* 77 [Federal Tort Claims Act and immunity provision of Flood Control Act]; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §68.)

(10) *Injuries Incident to Military Service*. Under the so-called *Feres* doctrine, a judicially created exception, the federal Government is not liable for injuries "incident to service." (*Feres v. United States*, *supra* [servicemen injured on active duty from negligence of other service personnel]; see *United States v. Johnson* (1987) 481 U.S. 681, 107 S.Ct. 2063, 2069, 95 L.Ed.2d 648, 655 [*Feres* bars suit on service-related injuries even though they result from negligence of federal civilian employees]; 29 *Cal. Western L. Rev.* 307 [sexual harassment of female naval personnel]; 101 *Harv. L. Rev.* 350; 21 *Hastings L. J.* 1059; 24 *Hastings L. J.* 1281; 15 *Pacific L. J.* 1181; 15 *Pepperdine L. Rev.* 623 [Intramilitary Tort Immunity: A Constitutional Justification]; 24 *So. Cal. L. Rev.* 502; 12 *U.S.F. L. Rev.* 525; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §3.) The *Feres* doctrine applies to statutory as well as common law causes of action. (See *Estes v. Monroe* (2004) 120 C.A.4th 1347, 1355, 16 C.R.3d 616 [*Feres* doctrine precluded wrongful termination claim under Fair Employment and Housing Act by national guardsman who was disabled in accident].)

If the injury is not incident to military service, such as after discharge or on furlough, recovery is allowed. (*Brooks v. United States* (1949) 337 U.S. 49, 69 S.Ct. 918, 919, 93 L.Ed. 1200, 1203 [servicemen on leave negligently injured by government truck driver]; *United States v. Brown* (1954) 348 U.S. 110, 75 S.Ct. 141, 142, 99 L.Ed. 139, 143 [veteran injured on active duty and discharged; recovery allowed for subsequent negligent treatment of injury in Veterans Administration Hospital]; see 21 *Hastings L. J.* 1059; 29 *Hastings L. J.* 589 [remedies of overseas dependent for military medical malpractice]; 14 *Pacific L. J.* 333 [recovery for postservice tort]; 17 *Pacific L. J.* 1477 [postservice tort of failure to warn of previously unknown danger as means of circumventing *Feres* doctrine]; 31 *A.L.R. Fed* 146 [serviceman's right to recover under FTCA].)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Transmission of Mail*. In *Dolan v. United States Postal Service* (2006) 546 U.S. 481, 126 S.Ct. 1252, 163 L.Ed.2d 1079, a postal customer sued the United States Postal Service to recover for injuries sustained when she tripped over mail negligently left on her porch. *Held*, the federal Government's immunity from liability for negligent transmission of the mail did not apply. "Negligent transmission," for purposes of 28 U.S.C., §2680(b), "does not go beyond negligence causing mail to be lost or to arrive late, in damaged condition, or at the wrong address." (126 S.Ct. 1257, 163 L.Ed.2d 1088.) Had Congress intended to preserve immunity for all delivery-related torts, it would have used sweeping language similar to that used in other Federal Tort Claims Act exceptions. (126 S.Ct. 1259, 163 L.Ed.2d 1090.)

(7) *Collection of Taxes or Detention of Goods*. In *Ali v. Federal Bureau of Prisons* (2008) 552 U.S. ___, 128 S.Ct. 831, 169 L.Ed.2d 680, a federal prisoner brought an action against prison officials who allegedly lost his property while he was being transferred between prisons. *Held*, the immunity from liability for the detention of goods "by any officer of customs or excise or any other law enforcement officer" applied. The term "any other law enforcement officer" in 28 U.S.C., §2680(c) includes law enforcement officers of whatever kind. The word "any" generally has a broad meaning, and there is no indication that Congress intended to limit the scope of the statute to officers engaged in enforcing customs or excise laws. (128 S.Ct. 835, 169 L.Ed.2d 686, distinguishing *Dolan v. United States Postal Service*, *supra*.) (8) *Combatant Activities*. See 23 *A.L.R. Fed* 2d 489 [construction and application of combatant activities exception to Federal Tort Claims Act].

(10) *Injuries Incident to Military Service*. See 24 *A.L.R. Fed* 2d 529 [liability of civilian contractors providing services under contract to Department of Defense or Department of State for injuries to their employees, members of armed services, foreign nationals, and their survivors]. *Correction:* Page 349, ninth line of section, "33 U.S.C., §702(c)"

should be "33 U.S.C., §702c".



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3. Liability Under Federal Tort Claims Act.

e. Procedure in Suit Under Act.

5 *Witkin Sum. Cal. Law Torts* § 209

[§ 209] Procedure in Suit Under Act.

(1) *Jurisdiction and Venue.* Actions under the Federal Tort Claims Act must be brought in the federal district court where the plaintiff resides or where the act complained of occurred. (28 U.S.C., §§1346(b), 1402(b); see 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §§189, 203, 204; 8 *Am.Jur. Trials* 635 [Federal Tort Claims Act proceedings].)

(2) *Presentation of Claim and Commencement of Action.* No action may be instituted until a claim has been presented to the appropriate federal agency and has been finally denied. Claims must be presented within 2 years after they accrue, and actions must be commenced within 6 months of the final denial of the claim. (28 U.S.C., §§2401(b), 2675(a); see *United States v. Kubrick* (1979) 444 U.S. 111, 100 S.Ct. 352, 359, 62 L.Ed.2d 259, 267 [cause of action accrues when claimant learns of both existence and cause of injury; it is not required that claimant also know that the acts causing injury constituted medical malpractice]; *McNeil v. United States* (1993) 508 U.S. 106, 113 S.Ct. 1980, 1984, 124 L.Ed.2d 21, 29 [dismissal was proper where claimant failed to exhaust administrative remedies before filing suit, even though he did so before substantial progress was made in litigation]; 35 *San Diego L. Rev.* 391 [statute of limitations problem posed by FTCA claims deemed denied by administrative inaction]; 35A *Am.Jur.2d* (2001 ed.), *Federal Tort Claims Act* §§192, 193; 29 *A.L.R. Fed* 482 [statute of limitations under FTCA]; 101 *A.L.R. Fed* 27 [accrual of cause of action for purpose of statute of limitations in medical malpractice actions under FTCA].)

(3) *Settlement of Claim.* The governmental agency involved has power to settle claims before suit, subject to approval by the Attorney General for settlements above a prescribed amount. After suit is commenced, the Attorney General may settle claims in any amount. (28 U.S.C., §§2672, 2677; see 70 *Harv. L. Rev.* 896.) The amount demanded in the claim may not be increased in a suit subsequently filed in the absence of newly discovered evidence or intervening facts. (28 U.S.C., §2675(b).)

(4) *Trial by Court.* The trial is by the court without a jury. (28 U.S.C., §2402.)

(5) *Preclusive Effect of Procedure.* The judgment is a bar to any action against the employee by reason of the claim, and the procedure under the Act is the exclusive remedy against the federal agency. (28 U.S.C., §§2676, 2679.)

West's Key Number Digest, United States k.53(13) et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

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II. GOVERNMENTAL LIABILITY

A. In General.

4. Development of California Law.

a. Immunity Prior to Tort Claims Act.

1. General Immunity of Public Entities for Governmental but Not Proprietary Acts.

5 Witkin Sum. Cal. Law Torts § 210

[§ 210] General Immunity of Public Entities for Governmental but Not Proprietary Acts.

(1) *Immunity Where Activity Was Governmental.* It was originally held that the immunity of the *state and its agencies* extended to any acts except where a particular liability was imposed by special statutes; i.e., the functions of the state and state agencies were deemed exclusively governmental in character. (*Dillwood v. Riecks* (1919) 42 C.A. 602, 607, 184 P. 35; *Rauschan v. State Comp. Ins. Fund* (1927) 80 C.A. 754, 760, 253 P. 173.) The rule was subsequently established, however, that there may be proprietary activities of the state and its agencies, and that tort liability may be imposed for those activities. (See *People v. Superior Court (Pierpont)* (1947) 29 C.2d 754, 762, 178 P.2d 1.) Illustrative of state or state agency activities held governmental and protected by immunity were operation of a county courthouse (*Dineen v. San Francisco* (1940) 38 C.A.2d 486, 490, 101 P.2d 736); operation of a county jail (*Bryant v. Monterey* (1954) 125 C.A.2d 470, 473, 270 P.2d 897); construction and maintenance of public highways (*Bettencourt v. California* (1954) 123 C.A.2d 60, 62, 266 P.2d 201); maintenance of a bridge and roadway by an irrigation district (*Vater v. Glenn* (1958) 49 C.2d 815, 818, 323 P.2d 85); and operation of a county hospital (*Waterman v. Los Angeles County General Hosp.* (1954) 123 C.A.2d 143, 144, 266 P.2d 221). (For review of former law of governmental immunity, see C.E.B., 1 Government Tort Liability Practice 4th, §1.24 et seq.)

Municipal and quasi-municipal corporations, such as cities and municipal utility districts, were liable for the torts of their agents committed while acting in a proprietary capacity, but not while acting in a governmental capacity. (*Morrison v. Smith Bros.* (1930) 211 C. 36, 39, 293 P. 53; *McKinney v. San Francisco* (1952) 109 C.A.2d 844, 846, 241 P.2d 1060; 21 Cal. L. Rev. 383; 71 Harv. L. Rev. 744; 6 So. Cal. L. Rev. 269; 7 So. Cal. L. Rev. 48, 214, 295, 372; 6 U.C.L.A. L. Rev. 1.) The following are illustrations of municipal or quasi-municipal activities held governmental: collection and incineration of garbage or waste (*McNeil v. Montague* (1954) 124 C.A.2d 326, 268 P.2d 497); a municipal summer camp (*Kellar v. Los Angeles* (1919) 179 C. 605, 609, 178 P. 505); a public park or playground (*Carr v. San Francisco* (1959) 170 C.A.2d 48, 51, 338 P.2d 509 [merry-go-round]); a municipal swimming pool (*Barrett v. San Jose* (1958) 161 C.A.2d 40, 42, 325 P.2d 1026); street and highway maintenance (*Loewen v. Burbank* (1954) 124 C.A.2d 551, 553, 269 P.2d 121 [removal of trees]); maintenance of firefighting equipment and its water supply (*Stang v. Mill Valley* (1952) 38 C.2d 486, 488, 240 P.2d 980); and operations of police (*Henry v. Los Angeles* (1952) 114 C.A.2d 603, 604, 250 P.2d 643).

(2) *Liability Where Activity Was Proprietary.* In *People v. Superior Court (Pierpont)* (1947) 29 C.2d 754, 178 P.2d 1, the theory declared in a number of prior decisions, that the *state and its agencies* perform exclusively governmental functions, was repudiated. Plaintiff sued for injuries received from alleged negligent operation of the State Belt Railroad, which consisted of 5 miles of track serving carriers, wharves, and plants, operated by the state without profit. *Held*, the state was liable. The activity here, though without profit, performed an industrial function; and "where the state engages in industrial or business enterprises, as distinguished from purely governmental activities, tort liability attaches and may be adjudicated pursuant to the consent statute." (29 C.2d 762; see 22 So. Cal. L. Rev. 78; 27 So. Cal. L. Rev. 490.) The following are illustrative of state or state agency activities held proprietary: operation of San Francisco piers by Board of State Harbor Commissioners (*Schwerdtfeger v. California* (1957) 148 C.A.2d 335, 342, 306 P.2d 960; operation of housing authority for slum clearance and public housing (*Muses v. Housing Authority* (1948) 83 C.A.2d 489, 491, 189 P.2d 305); a state fair (*Guidi v. California* (1953) 41 C.2d 623, 625, 262 P.2d 3); and a district fair (*Brown v. Fifteenth Dist. Agricultural Fair Assn.* (1958) 159 C.A.2d 93, 96, 323 P.2d 131).

The following are among *municipal or quasi-municipal* activities that were held to be proprietary and not subject to immunity: water, gas and electric systems (*Davoust v. Alameda* (1906) 149 C. 69, 72, 84 P. 760); a municipal auditorium (*Chafor v. Long Beach* (1917) 174 C. 478, 483, 163 P. 670); a garage for repair of city automobiles (*Bertiz v. Los Angeles* (1925) 74 C.A. 792, 794, 241 P. 921); a municipal airport (*Coleman v. Oakland* (1930) 110 C.A. 715, 719, 295 P. 59); furnishing municipal employees as harbor pilots (*General Petroleum Corp. v. Los Angeles* (1937) 22 C.A.2d 332, 334, 70 P.2d 998); a community theatre in a public park (*Rhodes v. Palo Alto* (1950) 100 C.A.2d 336, 341, 223 P.2d 639); and a municipal golf course (*Plaza v. San Mateo* (1954) 123 C.A.2d 103, 106, 266 P.2d 523). (See 14 Cal. L. Rev. 229; 3 So. Cal. L. Rev. 353; 4 Stanf. L. Rev. 302.)

West's Key Number Digest, States k.112.1(1)

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a. Immunity Prior to Tort Claims Act.

2. Statutory Basis for Liability.

5 Witkin Sum. Cal. Law Torts § 211

[§ 211] Statutory Basis for Liability.

Prior to the judicial abrogation of the immunity doctrine (*infra*, §215), liability for governmental acts (*supra*, §210) existed only where imposed by specific legislation. (See *Rest.2d, Torts* §§895B, 895C; C.E.B., 1 Government Tort Liability Practice 4th, §1.28.) Much of this law was carried over into the Tort Claims Act (*infra*, §216 et seq.), and the prior decisions are therefore of some significance.

The important statutes were:

(1) The Public Liability Act (former Govt.C. 53051 et seq.) imposing liability on counties, municipalities, and school districts for the dangerous or defective condition of public property. (See *infra*, §212; for similar liability under current law, see *infra*, §249 et seq.)

(2) A statute (former Educ.C. 903) imposing liability on a school district for negligence of its officers or employees. (See *infra*, §213; for similar liability under current law, see *infra*, §321 et seq.)

(3) A statute (*Veh.C. 17000* et seq.) making the state and subdivisions liable for the negligent operation of motor vehicles by officers and employees. These sections were unaffected by the revision. (See *infra*, §331 et seq.)

(4) A statute (former Govt.C. 50140 et seq.) making counties and municipal corporations liable for injury to real or personal property caused by mobs or riots. This law was not carried over into the new statutes, and the former liability no longer exists. (See *16 Hastings L. J. 459*; *3 Lincoln L. Rev. 62*; *11 Santa Clara Lawyer 415* [proposal of new statute].)

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4. Development of California Law.

a. Immunity Prior to Tort Claims Act.

3. Dangerous Condition of Public Property.

5 Witkin Sum. Cal. Law Torts § 212

[§ 212] Dangerous Condition of Public Property.

(1) *General Nature of Liability.* The most important of the former statutes imposing liability for governmental activities was the Public Liability Act of 1923, under which counties, municipalities, and school districts were liable for injuries to person or property resulting from "the dangerous or defective condition of public streets, highways, buildings, grounds, works and property" where (a) the governing or managing board or other officer or person having authority to remedy the condition had knowledge or notice of it, and (b) failed or neglected for a reasonable time thereafter to remedy the situation or to take steps reasonably necessary to protect the public. (Former Govt.C. 53051.) Despite the reference to "injuries" alone, the statute was held applicable to actions for wrongful death. (*Arellano v. Burbank* (1939) 13 C.2d 248, 258, 89 P.2d 113; see 27 Cal. L. Rev. 622.)

The public entity was not liable in the same manner as a private corporation for negligence of its employees; nor was it enough to show a dangerous condition of property; the entity was required to "have had notice and have failed to exercise its opportunity to remedy the condition." (*Watson v. Alameda* (1933) 219 C. 331, 333, 26 P.2d 286.) However, the issue of what constitutes a dangerous condition was the same as in negligence cases; i.e., the "unreasonable risk" analysis was applied. (*Jones v. Los Angeles* (1951) 104 C.A.2d 212, 215, 231 P.2d 167.) The causation element was likewise the same as in negligence cases; the plaintiff had to show that the dangerous condition was the proximate cause of the injury. (*Osborn v. Whittier* (1951) 103 C.A.2d 609, 620, 230 P.2d 132 [discussing foreseeable consequences and holding that proximate cause was established]; *Bady v. Detwiler* (1954) 127 C.A.2d 321, 337, 273 P.2d 941 [fact that some other cause, such as act of third person, concurred with defective condition to cause injury did not absolve municipality].) The defense of contributory negligence was also available to the governmental agency. (*Brooks v. Monterey* (1930) 106 C.A. 649, 653, 290 P. 540.)

The "person having authority to remedy such condition" (former Govt.C. 53051) meant some officer or member of a governing board who could permanently correct the condition, and did not include employees generally. (*Sinclair v. Pasadena* (1937) 21 C.A.2d 720, 722, 70 P.2d 241; *Hoel v. Los Angeles* (1955) 136 C.A.2d 295, 304, 288 P.2d 989.) And the authority to remedy defects in a state highway running through a city was in the state Department of Public Works, not the city. (*Gillespie v. Los Angeles* (1952) 114 C.A.2d 513, 514, 250 P.2d 717.)

In order to escape liability, the public entity had to eliminate the dangerous condition or protect the public by adequate warning. Thus, dips or "humps" in a highway, jogs in a street, etc., might be made safe by adequate warning signs; but the sufficiency of these warnings was ordinarily a question of fact. (See *Bigelow v. Ontario* (1940) 37 C.A.2d 198, 205, 99 P.2d 298; *Barsoom v. Reedley* (1940) 38 C.A.2d 413, 419, 101 P.2d 743; cf. *Electrical Products Corp. v. Tulare* (1953) 116 C.A.2d 147, 253 P.2d 111 [remedial steps were held sufficient as matter of law where there was no substantial evidence to contrary].)

(2) *Public Property*. An essential basis of liability was that the injury had resulted from the dangerous or defective condition of "public streets, highways, buildings, grounds, works" or "property." (Former Govt.C. 53051.) The term was used in its broad and comprehensive sense, including personal as well as real property, and was not limited to the physical condition of streets or to property not used in the exercise of a police function. (*Bady v. Detwiler*, *supra*, 127 C.A.2d 327 [listing many types of defective property that had given rise to liability, including incinerator, piano in schoolroom, piling or telephone pole washed back and forth by ocean waves, shore of lake in public park, abandoned sewer system, white line along center of street, picnic shelter, boulevard stop sign, rubbish disposal dump, storm drain, and fence around public golf course].)

Liability was not imposed for the negligent *failure to install* property. Thus, the mere failure to place a sign at a dangerous intersection was only negligence in a governmental function for which the city was not liable. (*Perry v. Santa Monica* (1955) 130 C.A.2d 370, 372, 279 P.2d 92.)

No city or county was liable for failure to maintain a road unless it had been *accepted* by the governing body by resolution or otherwise. (See *Sts. & H.C. 941, 1806, 12 Summary* (10th), *Real Property*, §243.)

(3) *Types of Defects*. Many kinds of defects and dangers gave rise to liability. (See, e.g., *Arellano v. Burbank*, *supra*, 13 C.2d 251 [curved street created bottleneck, without mark or other warning]; *Durante v. Oakland* (1937) 19 C.A.2d 543, 549, 65 P.2d 1326 [negligent use of defective sewer pipes, and maintenance of sewer in such defective condition that plaintiff's basement flooded]; *Paxton v. Alameda* (1953) 119 C.A.2d 393, 400, 259 P.2d 934 [defective low grade roof sheathing on county building under construction, which gave way and injured roofer carrying tar].)

The bulk of the litigation under the Public Liability Act arose out of *minor street defects*, such as small holes or cracks in a sidewalk, sufficient to catch the heel of a shoe, and the case law developed in several cycles. The first approach was in favor of the plaintiff. (See, e.g., *Hook v. Sacramento* (1931) 118 C.A. 547, 550, 5 P.2d 643; 26 Cal. L. Rev. 135.) Subsequently, these early holdings were disapproved on the theory that these minor defects are common and impossible to prevent or to correct, unless notice of them is given to responsible city officials. The new decisions required that the conspicuousness or notoriety of the defect be sufficient to charge the city with constructive notice of both its existence and dangerous character. (See *Nicholson v. Los Angeles* (1936) 5 C.2d 361, 364, 54 P.2d 725; *Whiting v. National City* (1937) 9 C.2d 163, 165, 69 P.2d 990.) A few years after *Nicholson* and *Whiting*, however, the courts began to relax these strict requirements. (See *Allen v. Los Angeles* (1941) 43 C.A.2d 65, 68, 110 P.2d 75 [sidewalk 2 inches high, 6 inches wide, actual notice alleged; held sufficient on demurrer].) The effect of later decisions may be summarized as follows: (a) If the defect was obviously minor, the reviewing court would not sustain a judgment for the plaintiff; i.e., the trivial nature of the defect could be treated as a question of law. (See *Barrett v. Claremont* (1953) 41 C.2d 70, 73, 256 P.2d 977 [ridge in sidewalk slab 1/2-inch high, full of sticky asphaltum; authorities reviewed; following *Nicholson* and *Whiting* cases followed].) (b) If the nature of the defect, i.e., the question whether it gave rise to a duty to repair, was reasonably debatable, the question was one of fact for the jury. (See *Newman v. San Mateo* (1953) 121 C.A.2d 825, 831, 264 P.2d 594 [4- to 6-inch deep hole in sidewalk, long continued; verdict for plaintiff upheld].)

Defective *highway signals and lights*, such as a defectively operated stop signal at an intersection could give rise to liability. (*Bady v. Detwiler*, *supra*, 127 C.A.2d 330.) The mere failure to install a signal would not. (*Perry v. Santa Monica*, *supra*, 130 C.A.2d 375.) But the removal of an existing sign for repairs, without providing a temporary substitute, created a dangerous condition, and the statute applied. (*Irvin v. Padelford* (1954) 127 C.A.2d 135, 142, 273

P.2d 539.)

A county was liable for the dangerous or defective condition of a *highway shoulder* customarily traveled. (*Murphy v. Lake* (1951) 106 C.A.2d 61, 67, 234 P.2d 712.) And liability was extended to a situation where the shoulder was not customarily traveled if the circumstances showed that the driver was not negligent in departing from the traveled area, and if the defects or obstructions were "in close proximity to the traveled area" and "hidden from ordinary view." (*Alderson v. Santa Clara* (1954) 124 C.A.2d 334, 339, 268 P.2d 792 [shoulder with deep depressions and boulders hidden in tall weeds; plaintiff veered to avoid approaching car].)

A *natural condition* could constitute a dangerous condition. (See *Hawk v. Newport Beach* (1956) 46 C.2d 213, 217, 293 P.2d 48 [jury question whether large rock on city beach from which people frequently dived into shallow water was dangerous condition].)

(4) *Dangerous Activity Permitted*. Liability could be based on the dangerous manner in which the property was operated or allowed to be used. (See *Bauman v. San Francisco* (1940) 42 C.A.2d 144, 150, 108 P.2d 989 [playing of hard baseball on playground in close proximity to children's sand box].) The permitted activity had to be one which made the *property* dangerous. In *Jones v. Czapkay* (1960) 182 C.A.2d 192, 6 C.R. 182, plaintiff alleged that a contagious tubercular patient was negligently allowed to violate his quarantine, and contended that this created a dangerous condition of the street within the meaning of the Act. In rejecting this theory of liability for plaintiff's tuberculosis, the court said: "If this is so, then any negligence of the police in allowing a dangerous criminal on the streets, or in failing to arrest a person operating a motor vehicle in a dangerous manner would constitute a dangerous and defective condition of property. The section has always been considered to mean just what it says, that it is the *condition of property* that determines the waiver of the immunity and not the condition of persons on that property." (182 C.A.2d 203.)

(5) *Improper Planning or Construction*. Liability was also imposed for dangerous conditions resulting from *improper planning or construction* in the first instance. (See *Sandstoe v. Atchison, Topeka & Santa Fe Ry. Co.* (1938) 28 C.A.2d 215, 219, 82 P.2d 216 [improperly painted white traffic grade line on highway, causing plaintiff to strike obstruction].) In *Fackrell v. San Diego* (1945) 26 C.2d 196, 157 P.2d 625, the court said: "If the improvement is designed to be used without inspection and maintenance and under varying conditions which are normally to be anticipated then it should be made reasonably safe for ordinary use under all of those conditions and if, under any one or more of them, it is, or naturally will become, unsafe for such use because of its planned design then it is inherently dangerous." (26 C.2d 204.) It made no difference whether an inherently dangerous condition was present when the improvement was completed according to plan, or whether that situation arose through change of circumstances. (*McAtee v. Marysville* (1952) 111 C.A.2d 507, 513, 244 P.2d 936.) Because the dangerous condition arising from improper construction was deliberately created, no notice had to be shown, and the entity was not entitled to any reasonable time for correction. (*Sandstoe v. Atchison, Topeka & Santa Fe Ry. Co.*, *supra*; *Pritchard v. Sully-Miller Contracting Co.* (1960) 178 C.A.2d 246, 256, 2 C.R. 830.)

(6) *Notice of Condition*. Notice could be actual knowledge of the condition (*Rodriguez v. Los Angeles* (1963) 215 C.A.2d 463, 468, 30 C.R. 180) or constructive notice, arising from the long-continued existence of a defective condition (*Dawson v. Tulare Union High School* (1929) 98 C.A. 138, 142, 276 P. 424; *Bady v. Detwiler*, *supra*, 127 C.A.2d 334; see *Kirack v. Eureka* (1945) 69 C.A.2d 134, 140, 158 P.2d 270 [superintendent of streets failed to inspect]; *Jones v. Los Angeles* (1946) 74 C.A.2d 183, 184, 168 P.2d 480 [judgment for defendant reversed for failure to instruct jury on doctrine of constructive notice]). Evidence of other known accidents at the same place, e.g., a claim or suit filed by another injured person prior to the accident in question, was competent to prove notice. (*Bigelow v. Ontario*, *supra*, 37 C.A.2d 204; see *Maddern v. San Francisco* (1946) 74 C.A.2d 742, 756, 169 P.2d 425 [constructive notice of dangerous depression in street was sufficiently established, although only few days had elapsed between first evidence of it and accident].)

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4. Development of California Law.

a. Immunity Prior to Tort Claims Act.

4. School District's Liability for Negligence.

5 Witkin Sum. Cal. Law Torts § 213

[§ 213] School District's Liability for Negligence.

(1) *In General.* In addition to being responsible, under the Public Liability Act, for a known dangerous condition of property (see *supra*, §212), a school district was liable, under former Educ.C. 903, for injuries to person or property resulting from negligence of officers or employees acting within the scope of their employment. (See 15 *Hastings L. J.* 495, 567.) The standard of care required was "that which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances." (*Pirkle v. Oakdale Union Grammar School Dist.* (1953) 40 C.2d 207, 210, 253 P.2d 1.)

These duplicate bases of liability raised a problem where the plaintiff sued for injury resulting from a dangerous or defective condition of property of the district. Was it sufficient for him to establish *negligence* of the district's officers or employees in creating or maintaining the condition, or did he have to show *knowledge or notice* of the condition and failure to remedy it? (See, recognizing election to proceed under either statute, *Freund v. Oakland Bd. of Education* (1938) 28 C.A.2d 246, 249, 82 P.2d 197; *Bridge v. Board of Education of Los Angeles* (1934) 2 C.A.2d 398, 402, 38 P.2d 199; *Maede v. Oakland High School Dist. of Alameda County* (1931) 212 C. 419, 424, 298 P. 987; cf. *Hough v. Orleans Elementary School Dist. of Humboldt County* (1943) 62 C.A.2d 146, 155, 144 P.2d 383 [pupil collided with bolt protruding from flagpole brace; held that plaintiff had to bring his case within Act].)

(2) *Dangerous Activities in Classroom.* Recovery was allowed for injuries sustained in classroom activities on a showing of negligence. In *Bellman v. San Francisco High School Dist.* (1938) 11 C.2d 576, 81 P.2d 894, for example, a 17-year-old high school girl recovered for injuries sustained while performing a test exercise (a dive) in a tumbling class. It was held that the jury could determine that the exercise was inherently dangerous and that the teachers were negligent in permitting such a student to perform it. (11 C.2d 583.) (See *Lilienthal v. San Leandro Unified School Dist. of Alameda County* (1956) 139 C.A.2d 453, 457, 293 P.2d 889 [student threw homemade knife during metal craft class; held that jury could infer instructor's knowledge]; 28 *Cal. L. Rev.* 237.)

Recovery was denied in the absence of such a showing. (See *Pirkle v. Oakdale Union Grammar School Dist.*, *supra*, 40 C.2d 210 [judgment reversed for plaintiff injured playing touch football; activity was not inherently dangerous, boys were selected according to skill, participation was voluntary, and no harm resulted from delay in

treatment]; *Wright v. San Bernardino High School Dist.* (1953) 121 C.A.2d 342, 345, 263 P.2d 25 [physical education class; plaintiff, wearing rimless glasses, walked between boys batting tennis ball; no recovery].)

(3) *Dangerous Outside Activities.* Recovery was allowed in *Hanson v. Reedley Joint Union High School Dist.* (1941) 43 C.A.2d 643, 649, 111 P.2d 415, where the school arranged for transportation of students to tennis practice in other students' cars, and teachers permitted use of a defective car driven by a student known to be a reckless driver; and in *Taylor v. Oakland Scavenger Co.* (1941) 17 C.2d 594, 599, 110 P.2d 1044, where the authorities knew of the practice of a delivery truck coming on the school grounds and children running out to the athletic field, but failed to post warning signs or take other precautions to protect them. (See 29 Cal. L. Rev. 546.)

(4) *Failure To Supervise.* The negligence could consist of lack of proper supervision of activities of children during lunch or recreation periods. (*Lehmuth v. Long Beach Unified School Dist.* (1960) 53 C.2d 544, 551, 2 C.R. 279, 348 P.2d 887; see *Buzzard v. East Lake School Dist.* (1939) 34 C.A.2d 316, 319, 93 P.2d 233 [child permitted to ride bicycle among children at play]; *Forgnone v. Salvador Union Elementary School Dist.* (1940) 41 C.A.2d 423, 426, 106 P.2d 932 [absence of teacher from classroom where students were eating lunch; plaintiff injured in scuffle]; *Ziegler v. Santa Cruz City High School Dist.* (1959) 168 C.A.2d 277, 283, 335 P.2d 709 [children allowed to sit on stair railing; reasonably foreseeable that pupil might be jostled or lose balance]; 15 *Hastings L. J.* 498, 567.) It was necessary, however, that the lack of supervision be the proximate cause of the harm. (*Woodsmall v. Mt. Diablo Unified School Dist.* (1961) 188 C.A.2d 262, 265, 10 C.R. 47 [injury when children ran on playground and one pushed another into basketball goal pole; sudden act of pupil could occur equally as well in presence of supervisor].)

(5) *Distinction: Unforeseeable Independent Acts of Students.* Liability was dependent on proof of negligence of school officers or employees, e.g., instructors; it was not sufficient to show negligence of a student, even though the student was attempting to carry out the directions of an instructor. (*Perumean v. Wills* (1937) 8 C.2d 578, 584, 67 P.2d 96.) And liability for lack of supervision was imposed only where the dangerous act of a student could reasonably have been anticipated. (See *Weldy v. Oakland High School Dist. of Alameda County* (1937) 19 C.A.2d 429, 431, 65 P.2d 851 [not liable for injuries from unexpected rowdiness by student spectators at football game]; *Reithardt v. Board of Education of Yuba County* (1941) 43 C.A.2d 629, 636, 111 P.2d 440 [student suddenly pulled another student off her seat on a window ledge]; *Ford v. Riverside City School Dist.* (1953) 121 C.A.2d 554, 561, 263 P.2d 626 [plaintiff 9-year-old 3rd grader with another boy pulling thorns from palm tree outside school playground; no evidence of prior accident or activity there].)

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5. Limited Immunity of Public Employees.

5 Witkin Sum. Cal. Law Torts § 214

[§ 214] Limited Immunity of Public Employees.

(1) *General Rule of Liability.* The immunity accorded California public entities (see *supra*, §210) did not extend to their officers and employees, who were, as a general rule, liable for their torts to the same extent as private persons. (*Lick v. Madden* (1868) 36 C. 208, 213; *Fernelius v. Pierce* (1943) 22 C.2d 226, 233, 139 P.2d 12; see C.E.B., 1 Government Tort Liability Practice 4th, §1.29 et seq.)

(2) *Discretionary Immunity.* Even before enactment of the Tort Claims Act (see *infra*, §§216, 345), however, the rule had "become established that government officials are not personally liable for their discretionary acts with the scope of their authority." (See *Lipman v. Brisbane Elementary School Dist.* (1961) 55 C.2d 224, 229, 11 C.R. 97, 359 P.2d 465; on immunity of public entities for governmental acts, see *supra*, §210.)

(3) *Officer's Liability for Subordinate's Wrong.* The doctrine of respondeat superior was generally inapplicable to public officers and employees, i.e., they were ordinarily not liable for the tortious acts of their subordinates. (*Fernelius v. Pierce*, *supra*; *Marshall v. Los Angeles* (1955) 131 C.A.2d 812, 815, 281 P.2d 544; on liability of principal for agent's torts generally, see 3 *Summary* (10th), *Agency and Employment*, §163 et seq.)

However, under the common law theory of *legal identity* of an officer and the officer's deputy, applicable where the officer had unrestricted power to control and discharge deputies, the deputy was the representative of the officer, and the act was treated as though done by the officer. (*Foley v. Martin* (1904) 142 C. 256, 260, 71 P. 165, 75 P. 842; *Van Vorce v. Thomas* (1937) 18 C.A.2d 723, 724, 64 P.2d 772.) Hence principals, such as sheriffs, were liable for wrongful acts of their deputies or agents acting in their official capacities, within the scope of their duties. (*Abbott v. Cooper* (1933) 218 C. 425, 430, 23 P.2d 1027; *Reynolds v. Lerman* (1956) 138 C.A.2d 586, 592, 292 P.2d 559; see 71 A.L.R.2d 1140 [liability of clerk of court, county clerk, or surety on bond for negligent or wrongful acts of deputies or assistants]; 15 A.L.R.3d 1189 [liability of police officer for injuries or death of third persons resulting from operation of motor vehicle by subordinate].)

The officer was generally *not* liable when the subordinate was also an independent public officer. Where the deputy occupied an independent position established by statute or charter, and the principal officer had no unrestricted control

over the deputy (e.g., where the deputy worked under civil service regulations), the common law rule was repudiated, and the officer was not liable for the deputy's torts. (*Michel v. Smith* (1922) 188 C. 199, 202, 205 P. 113 [chief of police and sergeant]; *Placer v. Aetna Cas. & Surety Co.* (1958) 50 C.2d 182, 188, 323 P.2d 753 [justice court judge not liable for embezzlement by his clerk; position created by county board of supervisors]; *Van Vorce v. Thomas, supra* [marshal of municipal court and deputy marshal]; *Abrahamson v. Ceres* (1949) 90 C.A.2d 523, 526, 203 P.2d 98 [chief of police was not liable for wrongs of police officer appointed by city council]; *Payne v. Bennion* (1960) 178 C.A.2d 595, 599, 3 C.R. 14 [supervisor of rural schools, not employee of county superintendent of schools]; 11 So. Cal. L. Rev. 384.)

Even though the subordinate officer held a civil service position, the subordinate's superiors were liable if they *participated* in the wrongful act, or if they had power to remove or suspend the officer and failed to do so after *knowledge* of similar prior misconduct by the subordinate. (*Fernelius v. Pierce, supra*, 22 C.2d 235 [negligent failure of police chief and city manager to discharge "vicious" police officers who beat plaintiff's husband to death]; see 28 Cal. L. Rev. 780.) Part of this principle was codified in former Govt.C. 1954, which provided that the members of a board of supervisors or city council, etc., were liable for negligent acts of an employee if (a) they had knowledge or notice of the employee's inefficiency or incompetency when engaging the employee, or (b) they retained the employee after knowledge or notice of these facts.

(4) *Statutory Liability for Dangerous Conditions.* Former Govt.C. 1953 impliedly recognized a public officer's individual liability for injury from the defective or dangerous condition of public property, and stated certain limiting conditions: causation; notice; authority and duty to remedy; funds available; failure to remedy or warn within reasonable time; and plaintiff's due care. (See *Bettencourt v. California* (1956) 139 C.A.2d 255, 258, 293 P.2d 472 [defendant employees without warning raised bridge span in face of plaintiff's oncoming car]; *Bartlett v. California* (1956) 145 C.A.2d 50, 55, 301 P.2d 985 [complaint against highway patrol officers who removed defective stop sign; insufficient because no showing that they had authority to remedy]; on liability of public entities for dangerous condition of public property, see *supra*, §212.)

The causation element posed a question of interpretation. It must have appeared that the injury was "the *direct* and proximate result" of the condition. (Former Govt.C. 1953(a).) "Direct" was construed as the equivalent of "proximate," i.e., as including both direct causes and reasonably foreseeable intervening causes. (See *Hinton v. California* (1954) 124 C.A.2d 622, 629, 269 P.2d 154 [defective signal was direct cause of pedestrian's injuries despite intervening act (automobile striking pedestrian)].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Development of California Law.

b. Judicial Repudiation of Governmental Immunity.

5 Witkin Sum. Cal. Law Torts § 215

[§ 215] Judicial Repudiation of Governmental Immunity.

In *Muskopf v. Corning Hosp. Dist.* (1961) 55 C.2d 211, 11 C.R. 89, 359 P.2d 457, the rule of governmental immunity from tort liability was reevaluated and "discarded as mistaken and unjust." (55 C.2d 213.) In this case plaintiff, a paying patient in defendant's hospital, sued for injuries received by reason of negligence of the staff. The trial judge sustained a demurrer, holding that a hospital district was a state agency exercising a governmental function and therefore immune from liability (see *supra*, §210). In reversing the judgment, the Supreme Court reviewed the history of governmental immunity, condemned it as a court-established "anachronism, without rational basis," which has existed "only by the force of inertia," and can no longer be defended. (55 C.2d 216.) The arguments based on stare decisis and legislative inaction were examined and found insufficient to justify the continuance of an outmoded rule:

"Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus, in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we make no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend." (55 C.2d 221.) (For comments on the reasoning and effect of the decision, see C.E.B., 1 Government Tort Liability Practice 4th, §1.39; 49 Cal. L. Rev. 400; 34 So. Cal. L. Rev. 346; 36 So. Cal. L. Rev. 161; 9 U.C.L.A. L. Rev. 266.)

West's Key Number Digest, States k.112(2)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Adoption.

5 *Witkin Sum. Cal. Law Torts* § 216

[§ 216] Adoption.

In the session immediately following *Muskopf v. Corning Hosp. Dist.* (1961) 55 C.2d 211, 11 C.R. 89, 359 P.2d 457, supra, §215, the Legislature enacted former C.C. 22.3, reinstating the governmental immunity doctrine "to all matters and all governmental entities in the same manner and to the same extent that it was applied in this State on January 1, 1961." The enacting statute (Stats. 1961, Chap. 1404) disclosed that this was a *moratorium or interim measure* designed to enable the Legislature to determine whether, and to what extent, the immunity doctrine should be retained or abandoned, and provided that it was effective only until the 91st day after adjournment of the 1963 Legislature, and then automatically expired. The California Law Revision Commission duly submitted a report and recommendation for legislation to the 1963 Legislature. (See C.E.B., 1 Government Tort Liability Practice 4th, §1.40 et seq.; 36 So. Cal. L. Rev. 172.)

The 1963 Legislature enacted a comprehensive set of governmental liability statutes and repealed much inconsistent legislation. Generally, all public entities, state and local, are now liable in tort to the extent declared by statute, subject to stated immunities and defenses. (See *Govt.C.* 815 et seq.; infra, §217 et seq.) Public employees are liable to the same extent as private persons, again subject to various immunities and defenses. (See *Govt.C.* 820 et seq.; infra, §345 et seq.) (For a discussion of problems involved in drafting the legislation, see 15 *Stanf. L. Rev.* 163; 10 *U.C.L.A. L. Rev.* 463; and see generally C.E.B., 1 Government Tort Liability Practice 4th, §1.2 et seq.; C.E.B., Tort Guide 3d, Chap. 8; Dobbs, *The Law of Torts* §268 et seq.; Cal. Civil Practice, 2 Torts, Liability of Public Entities, Chap. 31; 3 *San Diego L. Rev.* 7; 57 *Am.Jur.2d* (2001 ed.), *Municipal, County, School, and State Tort Liability* §91 et seq.)

A great many statutes, inconsistent or superseded in whole or in part, were repealed or amended. But the Vehicle Code provisions on motor vehicle torts (*Veh.C.* 17000 et seq.) were left untouched. (See infra, §331 et seq.)

Although the legislative revision lacks an official short title, it has come to be referred to as the "Tort Claims Act." (See C.E.B., 1 Government Tort Liability Practice 4th, §1.2.)

The enacting statute provided for retroactive application "to the full extent that it constitutionally can be so

applied," and the retroactive provisions have been upheld. (See *Flournoy v. California* (1964) 230 C.A.2d 520, 532, 41 C.R. 190, 7 Summary (10th), *Constitutional Law*, §625 [stating and applying the three controlling factors determining constitutional retroactivity: nature and strength of policy interest served, nature of right modified, extent of modification]; *Burbank v. Superior Court* (1965) 231 C.A.2d 675, 682, 42 C.R. 23 [following *Flournoy*; causes of action arose during moratorium]; *Hayes v. California* (1964) 231 C.A.2d 48, 50, 41 C.R. 502, *infra*, §268 [same].)

West's Key Number Digest, States k.112(2)

SUPPLEMENT: [This section is current through the latest supplement]

Short title of legislation: Because of the broad scope of the legislation, the California Supreme Court has determined that " 'Government Claims Act' is a more appropriate short title than the traditional 'Tort Claims Act.' ... Henceforth, we will refer to division 3.6, parts 1 through 7 of the Government Code (§ 810 et seq.) as the Government Claims Act." (*Stockton v. Superior Court* (2007) 42 C.4th 730, 741, 68 C.R.3d 295, 171 P.3d 20, 3 Cal. Proc. (5th), *Actions*, §238.)



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5 *Witkin Sum. Cal. Law Torts* § 217

[§ 217] Statutory Framework.

The Tort Claims Act is embodied in Division 3.6 of the Government Code (*Govt.C. 810 et seq.*), in 8 Parts:

- (1) Definitions. (*Govt.C. 810 et seq.*; see *infra*, §§219, 220.)
- (2) Liability of Public Entities and Public Employees. (*Govt.C. 814 et seq.*; see *infra*, §§222 et seq., 345 et seq.)
- (3) Claims Against Public Entities. (*Govt.C. 900 et seq.*; see 3 *Cal. Proc.* (4th), *Actions*, §§223 et seq., 628 et seq.; *infra*, §370 et seq.)
- (4) Actions Against Public Entities and Public Employees. (*Govt.C. 940 et seq.*; see 3 *Cal. Proc.* (4th), *Actions*, §779 et seq.; *infra*, §370 et seq.)
- (5) Payment of Claims and Judgments. (*Govt.C. 965 et seq.*; see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §53.)
- (6) Insurance. (*Govt.C. 989 et seq.*; see *infra*, §231.)
- (7) Defense of Public Employees. (*Govt.C. 995 et seq.*; see *infra*, §371 et seq.)
- (8) San Francisco-Oakland Bay Bridge and I-880 Cypress Structure Disaster Relief. (*Govt.C. 997 et seq.*)

Procedure under the Act is covered in a number of sections considered, for the most part, elsewhere:

- (1) Filing claims against the entity. (*Govt.C. 950 et seq.*; see 3 *Cal. Proc.* (4th), *Actions*, §226 et seq.)
- (2) Statute of limitations on actions. (*Govt.C. 950.6*; see 3 *Cal. Proc.* (4th), *Actions*, §628 et seq.)
- (3) Venue in actions against the state. (*Govt.C. 955 et seq.*; see 3 *Cal. Proc.* (4th), *Actions*, §782 et seq.)
- (4) Process in actions against the state. (*C.C.P. 416.50*; *Govt.C. 955.6 et seq.*; see 3 *Cal. Proc.* (4th), *Actions*, §973

et seq.)

(5) Enforcement of the judgment. (*Govt.C.* 965 et seq.; see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §§53, 400 et seq.)

(6) Procedure where liability of the employee is involved. (*Govt.C.* 995 et seq.; see *infra*, §370 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Government Claims Act.

(3) *Claims Against Public Entities.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §§231 et seq., 688 et seq.

(4) *Actions Against Public Entities and Public Employees.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §862 et seq.

(5) *Payment of Claims and Judgments.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §61.

Procedures Under Act.

(1) *Filing claims.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §235 et seq.

(2) *Statute of limitations.*

Cross-Reference:

3 *Cal. Proc.* (5th), *Actions*, §688 et seq.

(3) *Venue.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §865 et seq.

(4) *Process.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1056 et seq.

(5) *Enforcement of judgment.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §§61, 429 et seq.



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5 Witkin Sum. Cal. Law Torts § 218

[§ 218] Exclusions and Limitations.

The Act does not affect the following:

(1) "[L]iability based on contract or the right to obtain relief other than money or damages against a public entity or public employee." (Govt.C. 814; see *Arthur L. Sachs v. Oceanside* (1984) 151 C.A.3d 315, 320, 198 C.R. 483, *infra*, §241 [immunity from liability for employee's misrepresentation was no bar to contract action for rescission]; *Schooler v. California* (2000) 85 C.A.4th 1004, 1013, 102 C.R.2d 343 [Govt.C. 814 does not resurrect legal or financial burdens barred by any immunity where to do so would create duty that particular immunity provision guards against]; *Utility Audit Co. v. Los Angeles* (2003) 112 C.A.4th 950, 957, 5 C.R.3d 520 [action against public entity for refund of overcharges, without more, is based on breach of contractual duty and is not affected by governmental tort immunity provisions].) Thus, the Act "has no effect on the contractual liabilities" of public entities or employees. Also, "the appropriate way to seek review of discretionary governmental actions is by an action for specific or preventive relief to control the abuse of discretion, not by tort actions for damages." (Legislative Com. Comment to Govt.C. 814.)

(2) *Rights under the Workers' Compensation Act.* (Govt.C. 814.2.)

(3) *Liability for damage to property in the course of a public use.* This liability is still covered by the constitutional provision on eminent domain. (See Cal. Const., Art. I, §19, 8 Summary (10th), *Constitutional Law*, §1112 et seq.)

(4) *Civil liability imposed on public officers under the federal Civil Rights Act.* (See 42 U.S.C., §1983, 8 Summary (10th), *Constitutional Law*, §§816, 818 et seq.)

West's Key Number Digest, States k.112(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) "[L]iability based on contract or the right to obtain relief other than money or damages against a public entity or public employee." See *Dinuba v. Tulare* (2007) 41 C.4th 859, 867, 62 C.R.3d 614, 161 P.3d 1168, Supp., *infra*, §289 [county's liability to redevelopment agency for misallocated tax revenue was unaffected by immunity provisions of

Government Claims Act; action to compel performance of statutory duty is not barred by Act, even though performance of duty may involve payment of money].

(New) Claim filing requirements: Govt.C. 814 does not operate to exclude breach of contract claims from the Act's claim filing requirements (see *Govt.C. 900* et seq.). *Govt.C. 814* "simply reaffirms the long-standing rule that governmental immunity does not encompass contractual liability. ... That proposition has no necessary connection to the requirement that a claim be presented before suit is filed." (*Stockton v. Superior Court* (2007) 42 C.4th 730, 741, 68 C.R.3d 295, 171 P.3d 20, 3 Cal. Proc. (5th), Actions, §238.)



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4. "Employee."

5 *Witkin Sum. Cal. Law Torts* § 219

[§ 219] "Employee."

"Employee," for purposes of the Tort Claims Act, "includes an officer, judicial officers as defined in *Section 327 of the Elections Code*, employee, or servant, whether or not compensated, but does not include an independent contractor." (*Govt.C. 810.2*; see *Govt.C. 811.9* [judges, subordinate judicial officers, and court executive officers of superior and municipal courts are deemed state officers, and trial court employees are deemed employees of that court, for purposes of *Govt.C. 995 et seq.* (defense of public employees)].) "Agent" was excluded from the definition as possibly expanding liability to a greater extent than desired. (Legislative Com. Comment to *Govt.C. 810.2*.)

Briggs v. Lawrence (1991) 230 C.A.3d 605, 281 C.R. 578, involved the distinction between employees and independent contractors. Defendants, who were public defenders for Monterey County, represented plaintiff in a murder trial. After he was acquitted, and without filing a claim against the county, plaintiff filed a malpractice action against defendants. Plaintiff contended that no claim was necessary because defendants were independent contractors, instead of county employees. *Held*, judgment for defendants on demurrer affirmed; defendants were employees, and hence the complaint was deficient for not alleging that a claim had been filed.

(a) Although his complaint acknowledged that defendants were employees of the county for some purposes, plaintiff argued that they were acting as independent contractors during the time in which they were fulfilling their professional duties, and hence were beyond the county's absolute control. This argument is untenable for two reasons:

(1) A person is *either* an employee *or* an independent contractor. Any attempt to subdivide what has traditionally been an all-or-nothing inquiry would inevitably create problems of judicial administration, e.g., which status would govern a public defender's claim for a work-related injury or unemployment benefits, or a third party's claim against the county for personal injuries caused by the defender's negligence. (230 C.A.3d 614.) Although one person could conceivably serve another person or entity as both employee and independent contractor, such as where a clerical employee agreed, for a separate consideration, to paint the employer's building on weekends, a dual capacity should be found only where the parties' intentions were made plain and the functions were clearly defined and separated. No clear separation was pleaded here. (230 C.A.3d 615.)

(2) Plaintiff's approach of relying exclusively on the control factor was rejected by *Tieberg v. Unemp. Ins. App. Bd.* (1970) 2 C.3d 943, 88 C.R. 175, 471 P.2d 975, 3 Summary (10th), *Agency and Employment*, §34, which pointed out that although the right to control the work in question is the most important test of the employment relationship, other factors, enumerated in Rest.2d, Agency §220, should also be considered. (230 C.A.3d 615.)

(b) A consideration of the Restatement factors leads to the following conclusions concerning the nature of defendants' work and their relationship with the county: (1) defendants are not engaged in a distinctive occupation or business, but rather act solely as public defenders for Monterey County; (2) defendant public defender presumably works without supervision, while defendant deputy public defender may have some supervision, but not from county employees outside the public defender's office; (3) defendants' occupation obviously requires skill; (4) the instrumentalities, tools, and workplaces necessary to defendants' functions are provided by the county; (5) defendants are subject to termination on reasonable notice for unsatisfactory performance; (6) defendants receive salaries paid at regular intervals without reference to particular cases or clients; (7) the work of public defenders, i.e., fulfilling the constitutional requirement of providing legal representation to indigent criminal defendants, is part of the county's regular business; (8) the county and defendants believed that they had created an employment relationship with many of its normal indicia, e.g., exclusive right to the employee's services, regular hours, employment benefits, etc.; (9) the county is "in business," and the provision of public defense service is a necessary part of that business. The preponderance of these factors, many of which are simply special indicators of control, and all of which are secondary to the control factor itself, suggests an employment relationship. (230 C.A.3d 616.)

(c) Although it is true that within the narrow perspective of a public defender's duty to serve a client's legitimate interests exclusively the defender is not subject to the county's control, in a broader perspective this devotion to the client's interest is exactly what the defender has been employed to provide. In this broader perspective, the county, which should be prepared to discharge a defender who does not comply with professional standards, does exercise control over the public defender's representation of clients. (230 C.A.3d 617.) Moreover, it does not follow that a person become an independent contractor merely because there is a certain amount of freedom inherent in the work performed. (230 C.A.3d 618.) (See 26 Pacific L. J. 1, 17 [Briggs]; on liability for acts of independent contractors, see *infra*, §244.)

SUPPLEMENT: [This section is current through the latest supplement]
Govt.C. 811.9 was amended in 2005 to delete the reference to municipal courts.



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5. Other Definitions.

5 Witkin Sum. Cal. Law Torts § 220

[§ 220] Other Definitions.

(1) *Public employee* "means an employee of a public entity." (*Govt.C. 811.4*; on definition of "employee," see *supra*, §219.)

(2) *Employment* "includes office or employment." (*Govt.C. 810.4*.)

(3) *Injury* "means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person." (*Govt.C. 810.8*.) "The purpose of the definition is to make clear that public entities and public employees may be held liable only for injuries to the kind of interests that have been protected by the courts in actions between private persons." (Law Revision Com. Comment to *Govt.C. 810.8*; see *Aubry v. Tri-City Hosp. Dist.* (1992) 2 C.4th 962, 968, 9 C.R.2d 92, 831 P.2d 317, 3 Summary (10th), *Agency and Employment*, §390 [harm caused by hospital district's failure to comply with prevailing wage laws was not "injury" under Tort Claims Act].) This definition, as applied to liability of a public entity for an "injury" caused by the dangerous condition of its property (see *infra*, §258), covers the loss sustained by a party entitled to implied indemnity. (*E.L. White v. Huntington Beach* (1978) 21 C.3d 497, 511, 146 C.R. 614, 529 P.2d 505, *supra*, §123; see *Wagner v. California* (1978) 86 C.A.3d 922, 927, 150 C.R. 489 [following *White*].)

(4) *Public entity* "includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." (*Govt.C. 811.2*.) The definition is intended to include "every kind of independent political or governmental entity." (Law Revision Com. Comment to *Govt.C. 811.2*.)

(5) *Enactment* "means a constitutional provision, statute, charter provision, ordinance or regulation." (*Govt.C. 810.6*.)

(6) *Regulation* "means a rule, regulation, order or standard, having the force of law, adopted by an employee or agency of the United States pursuant to the federal Administrative Procedure Act ... or as a regulation by an agency of

the state pursuant to the Administrative Procedure Act." (*Govt.C. 811.6.*)

(7) "*Law*" "includes not only enactments but also the decisional law applicable within this State as determined and declared ... by the courts of this State and of the United States." (*Govt.C. 811.*)

(8) "*Statute*" includes federal as well as California legislation, or "a statewide initiative act." (*Govt.C. 811.8.*)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Injury*: See *Dinuba v. Tulare* (2007) 41 C.4th 859, 867, 62 C.R.3d 614, 161 P.3d 1168, Supp., infra, §289 [county's failure to comply with statutory duty to correctly allocate and distribute collected tax revenue to redevelopment agency did not constitute "injury" within narrow meaning of *Govt.C. 810.8*].



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6. Construction.

5 Witkin Sum. Cal. Law Torts § 221

[§ 221] Construction.

The Annotated Codes contain two kinds of valuable notes on the purpose and effect of the various sections: Comments of the Law Revision Commission, taken from its reports, and Comments of the Legislative Committee (Senate Fact Finding Committee on Judiciary), taken from its Progress Report to the Legislature. The Supreme Court has stated that the Law Revision Commission's Reports, and comments taken from them, are entitled to substantial weight in construing the Act. (*Van Arsdale v. Hollinger* (1968) 68 C.2d 245, 249, 66 C.R. 20, 437 P.2d 508.)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Nature of Liability.

1. In General.

5 *Witkin Sum. Cal. Law Torts* § 222

[§ 222] In General.

By enacting the Tort Claims Act, the 1963 Legislature gave legislative approval to the judicial repudiation of sovereign immunity (see *supra*, §215), and also eliminated common law liabilities of the state and local entities for proprietary acts (see *supra*, §210). Now, all public entities, state and local, are liable in tort to the extent declared by statute, and have certain statutory immunities and defenses. (*Govt.C. 815*; see *infra*, §§223, 224, 226 et seq.; C.E.B., 1 *Government Tort Liability Practice* 4th, §1.6 et seq.; Dobbs, *The Law of Torts* §268 et seq.; 5 Harper, James & Gray 3d §29.1 et seq.; 57 *Am.Jur.2d* (2001 ed.), *Municipal, County, School, and State Tort Liability* §§1 et seq., 91 et seq.)

The provisions of the Act concerning public entities are "intended to include every kind of independent political or governmental entity in the State." (Law Revision Com. Comment to *Govt.C. 811.2*.) However, particular entities may be excluded by statute from its coverage. Under *Ins.C. 11873*, making Government Code provisions relating to state agencies inapplicable, with stated exceptions, to the State Compensation Insurance Fund, the Fund is not subject to the Act. (*Maxon Industries v. State Comp. Ins. Fund* (1993) 16 C.A.4th 1387, 1391, 20 C.R.2d 730; see *Security Officers Service v. State Comp. Ins. Fund* (1993) 17 C.A.4th 887, 892, 21 C.R.2d 653 [same]; *Tricor Calif. v. State Comp. Ins. Fund* (1994) 30 C.A.4th 230, 241, 35 C.R.2d 550 [Fund is not immune from punitive damages]; cf. *State Comp. Ins. Fund v. Superior Court* (2001) 24 C.4th 930, 935, 103 C.R.2d 662, 16 P.3d 85 [*Ins.C. 11758*, providing limited immunity for activities relating to collection of rating information, did not preclude claims against Fund for misallocating insured employers' expenses and reporting that misinformation to rating organizations, resulting in higher premiums].)

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SUPPLEMENT: [This section is current through the latest supplement]

See 5 Harper, James & Gray 3d §29.1 et seq.



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a. Nature of Liability.

2. No Common Law Liability.

5 *Witkin Sum. Cal. Law Torts* § 223

[§ 223] No Common Law Liability.

"Except as otherwise provided by statute," a public entity "is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (*Govt.C. 815(a)*.) This provision "abolishes all common law or judicially declared forms of liability." (Legislative Com. Comment to *Govt.C. 815*.) Hence, except as required by the federal or state constitutions (e.g., under the eminent domain guarantee), liability must be based on a California statute. (*Sava v. Fuller* (1967) 249 C.A.2d 281, 284, 57 C.R. 312, *infra*, §355; *Susman v. Los Angeles* (1969) 269 C.A.2d 803, 808, 75 C.R. 240; *Peter W. v. San Francisco Unified School Dist.* (1976) 60 C.A.3d 814, 819, 131 C.R. 854, *supra*, §8; *Tolan v. California* (1979) 100 C.A.3d 980, 986, 161 C.R. 307; see *Caldwell v. Montoya* (1995) 10 C.4th 972, 985, 42 C.R.2d 842, 897 P.2d 1320, *infra*, §353 [very purpose of Tort Claims Act is to afford categories of immunity where, but for its provisions, public agencies or employees would otherwise be liable under general principles of law]; *Cochran v. Herzog Engraving Co.* (1984) 155 C.A.3d 405, 409, 205 C.R. 1 ["sovereign immunity is the rule in California; governmental liability is limited to exceptions specifically set forth by statute"]; *Bame v. Del Mar* (2001) 86 C.A.4th 1346, 1355, 104 C.R.2d 183 [state agencies enjoy immunity from local regulation unless the state, through statute or provision of California Constitution, has consented to waive immunity].)

Occasional expressions in opinions indicate a reluctance to accept this basic premise. (See *Ramos v. Madera* (1971) 4 C.3d 685, 692, 94 C.R. 421, 484 P.2d 93, *infra*, §246 ["[u]nless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail"].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Ross v. San Francisco Bay Area Rapid Transit Dist.* (2007) 146 C.A.4th 1507, 1514, 53 C.R.3d 715 [public entity's liability for common law tort injuries can only be predicated on vicarious liability for wrongful acts of its employees, as authorized by *Govt.C. 815.2(a)* (see text, §237); *Govt.C. 815* establishes basic rule that public entities are immune from liability except as provided by statute].



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a. Nature of Liability.

3. Liability Under Statutes and Constitution.

5 Witkin Sum. Cal. Law Torts § 224

[§ 224] Liability Under Statutes and Constitution.

(1) *Tort Claims Act*. Liability under the Act is declared in three general provisions and in a number of provisions dealing with particular kinds of liability. The general provisions concern:

- (a) Vicarious liability for employees and independent contractors. (See *Govt.C. 815.2, 815.4*, *infra*, §237 et seq.)
- (b) Dangerous condition of property. (See *Govt.C. 830* et seq., *infra*, §249 et seq.)
- (c) Failure to discharge a mandatory duty. (See *Govt.C. 815.6*, *infra*, §245 et seq.)

Chapters dealing with particular kinds of liability include such matters as:

- (a) Police and correctional activities. (See *Govt.C. 844* et seq., *infra*, §290 et seq.)
- (b) Fire protection. (See *Govt.C. 850* et seq., *infra*, §310 et seq.)
- (c) Medical, hospital and public health activities. (See *Govt.C. 854* et seq., *infra*, §316 et seq.)

The Act contains separate provisions for state and local public entities on most aspects of filing claims, bringing actions, and obtaining payment of judgments. (See *Galli v. California* (1979) 98 C.A.3d 662, 675, 159 C.R. 721 [summarizing nature of provisions]; 3 *Cal. Proc.* (4th), *Actions*, §223 et seq.)

Detailed provisions cover general and specific immunities and defenses (see *infra*, §§226 et seq., 272 et seq., 292), but the liability issue should be determined before immunity issues are considered (see *infra*, §225).

(2) *Other Statutes*. Statutes outside the Tort Claims Act provide for governmental liability, including the following:

- (a) *Veh.C. 17000* et seq., concerning liability for motor vehicle torts. (See *infra*, §331 et seq.)
- (b) C.C. 3479 on nuisance liability. (See *infra*, §339.)

(c) *C.C.P. 1245.060*, recognizing liability arising from a public entity condemnor's entry to survey land. (See *infra*, §340.)

(3) *Self-Executing Constitutional Provisions*. Violation of a self-executing provision of the California Constitution, such as the right to vote guaranteed by Cal. Const, Art. II, §2, gives rise to a cause of action not barred by the Act. (*Fenton v. Groveland Community Services Dist.* (1982) 135 C.A.3d 797, 803, 805, 185 C.R. 758; see 75 A.L.R.5th 619 [implied cause of action for violation of state Constitution].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Torts Claims Act*. On replacement of "Tort Claims Act" nomenclature by "Government Claims Act," see Supp., *supra*, §216.

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §231 et seq.



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4. Liability Issue Tried First.

5 *Witkin Sum. Cal. Law Torts* § 225

[§ 225] Liability Issue Tried First.

Statutory immunity is not an issue until it is determined that the governmental entity owes a duty of care and would be liable in the absence of the immunity. In making the determination of liability, common law tort principles apply, even though the entity's immunity is governed exclusively by statute. (*Williams v. California* (1983) 34 C.3d 18, 22, 192 C.R. 233, 664 P.2d 137, *infra*, §291.)

Thus, immunity issues were never reached in *Davidson v. Westminster* (1982) 32 C.3d 197, 202, 185 C.R. 252, 649 P.2d 894, *infra*, §291. Plaintiff was stabbed by an assailant in a laundromat. She sued defendants city and police officers, alleging that women had been stabbed in the area on earlier occasions; that police officers had the laundromat under surveillance on the night of the assault, were aware of her presence, and saw a man who closely resembled the earlier attacker; and that they nevertheless failed to warn or protect her. The theory of liability urged was that a special relationship existed between plaintiff and the officers. *Held*, judgment for defendants on demurrer affirmed. It must first be determined that a duty of care is owed that would result in liability in the absence of immunity. If the duty is found, application of the relevant statutory immunity need only then considered. (32 C.3d 202.) Common law negligence principles apply in determining this duty. Here, there was no special relationship giving rise to a duty; the officers' decision to conduct the surveillance, observation of the potential assailant as the likely perpetrator of a previous assault, and failure to warn or otherwise protect plaintiff, were insufficient to create a relationship. Thus, immunity issues never arise. (32 C.3d 206.) (On affirmative duties arising from special relationships, see *infra*, §1038 et seq.)

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1. Statutory Immunities.

5 *Witkin Sum. Cal. Law Torts* § 226

[§ 226] Statutory Immunities.

The liability of a public entity "is subject to any immunity of the public entity provided by statute." (*Govt.C. 815(b)*; see C.E.B., 1 Government Tort Liability Practice 4th, §10.1 et seq.; Cal. Civil Practice, 2 Torts, Liability of Public Entities, §29:1 et seq.; 57 *Am.Jur.2d* (2001 ed.), *Municipal, County, School, and State Tort Liability* §1 et seq.) As a general rule, immunity provisions prevail over liability provisions. (Legislative Com. Comment to *Govt.C. 815*; see *Wright v. California* (2004) 122 *C.A.4th* 659, 672, 19 *C.R.3d* 92 [sovereign immunity is rule in California; governmental liability is limited to exceptions specifically set forth by statute]; on immunity under Tort Claims Act where liability is imposed by statute outside Act, see *infra*, §229.) However, public entities are not immune from constitutional or federal statutory claims. (*Buenavista v. San Francisco* (1989) 207 *C.A.3d* 1168, 1174, 255 *C.R.* 329.)

The statutory immunities are set forth both in the Tort Claims Act and in various statutes outside the Act. (See *infra*, §237 et seq.; on immunities of public employees, see *infra*, §345 et seq.; on defense of privilege or immunity generally, see *infra*, §131 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]



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2. Defenses of Private Person Are Available.

5 Witkin Sum. Cal. Law Torts § 227

[§ 227] Defenses of Private Person Are Available.

The liability of a public entity "is subject to any defenses that would be available to the public entity if it were a private person." (*Govt.C. 815(b)*; see *Heieck & Moran v. Modesto* (1966) 64 C.2d 229, 232, 49 C.R. 377, 411 P.2d 105, *infra*, §310 [nonliability of water provider for failure to maintain sufficient supply].)

Tort defenses commonly available to private persons, and therefore public entities, include comparative negligence (see *infra*, §1327 et seq.) and assumption of risk (see *infra*, §1281 et seq.). (Legislative Com. Comment to *Govt.C. 815*.)

General tort immunities applicable to private persons apply, when relevant, to public entities. (*Sanborn v. Chronicle Publishing Co.* (1976) 18 C.3d 406, 413, 134 C.R. 402; on defense of privilege or immunity generally, see *supra*, §131 et seq.)

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3. Immunity Where Employee Is Immune.

5 Witkin Sum. Cal. Law Torts § 228

[§ 228] Immunity Where Employee Is Immune.

A public entity "is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability," unless a statute provides otherwise. (*Govt.C. 815.2(b)*; see *Govt.C. 815.4*, *infra*, §244 [public entity is not liable for act or omission of independent contractor if entity would not have been liable had act or omission been that of employee of entity]; on immunities of employee, see *infra*, §§348, 351 et seq., 360, 362, 365, 368.)

The exception is made for liability otherwise provided by statute because "under certain circumstances it appears to be desirable to provide by statute that a public entity is liable even when the employee is immune." (Legislative Com. Comment to *Govt.C. 815.2* [citing as example, *Govt.C. 830* et seq., *infra*, §249 et seq., under which public entity may be liable for dangerous condition of public property even though no employee is personally liable].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Ross v. San Francisco Bay Area Rapid Transit Dist.* (2007) 146 C.A.4th 1507, 1516, 53 C.R.3d 715 [where public transit district employees were immune under *Govt.C. 821.6* (see text, §368) from liability for claims that they wrongfully initiated and prosecuted administrative proceedings against coemployee, transit district was also immune from liability under *Govt.C. 815.2(b)*]; *Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 C.A.4th 456, 468, 66 C.R.3d 157 [where county social workers were immune from liability, under *Govt.C. 820.2* (immunity for discretionary acts; see text, §351) and *Govt.C. 821.6* (immunity for institution or prosecution of proceeding; see text, §368), respecting their acts and omissions in investigating reports of possible child abuse, county was likewise immune pursuant to *Govt.C. 815.2(b)*].



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4. Tort Claims Act Immunities Extend to Liabilities Imposed by Other Statutes.

5 Witkin Sum. Cal. Law Torts § 229

[§ 229] Tort Claims Act Immunities Extend to Liabilities Imposed by Other Statutes.

In *O'Hagan v. Board of Zoning Adjustment* (1974) 38 C.A.3d 722, 113 C.R. 501, plaintiff's temporary use permit to operate a drive-in restaurant was revoked. In administrative mandamus proceedings under C.C.P. 1094.5 (see 8 Cal. Proc. (4th), *Extraordinary Writs*, §295 et seq.), he succeeded in having the revocation declared wrongful by a Court of Appeal decision. He then amended his mandamus petition to seek damages from defendant city for loss of goodwill, profits, and expenses, pursuant to C.C.P. 1095 (see 8 Cal. Proc. (4th), *Extraordinary Writs*, §211). *Held*, summary judgment for defendant affirmed; the city was immune.

(a) *Immunities under Tort Claims Act.* Govt.C. 820.2 (infra, §351) gives immunity to public employees for injuries resulting from an exercise of discretion. Govt.C. 821.2 (infra, §348) gives immunity to an employee where a license or permit is revoked. Govt.C. 818.4 (infra, §287) gives a similar immunity to the public entity. Hence, the Tort Claims Act provides complete immunity in the instant case. (38 C.A.3d 725, 726.)

(b) *Immunity where liability is imposed by statute outside Tort Claims Act.* The immunity provisions of the Tort Claims Act usually contain the qualification, "except as otherwise provided by statute." *Immunities* provided by other statutes clearly apply to *Tort Claims Act liabilities*; but the Act does not clearly indicate that *liabilities* created by other statutes are subject to *Tort Claims Act immunities*. C.C.P. 1095 presents a direct conflict with the Tort Claims Act immunity provisions, which must be resolved by construction. (38 C.A.3d 728.) The conflict should be resolved in favor of immunity:

(1) C.C.P. 1095 is a general statute providing for damages in mandamus proceedings embracing a great variety of actions; the Tort Claims Act, a special statute dealing expressly with liabilities and immunities of public entities and employees, takes priority. (38 C.A.3d 729.)

(2) Policy considerations favor this interpretation: Holding that C.C.P. 1095 abridges the immunities granted in the Tort Claims Act "would destroy the carefully wrought system of liabilities and immunities set forth therein. Since direct review of the licensing activities of the public entities is usually available through writ proceedings or other proceedings to review administrative action ... , all that a plaintiff would have to do to circumvent the immunity provisions of the

Tort Claims Act would be to effect a mere change in his pleading designating it a petition for writ of mandamus rather than a complaint for damages. Considering the strongly worded legislative intent, ... most certainly the Legislature cannot be deemed to have intended to impose liability and abrogate immunities through writ proceedings or by maneuvering with the rules of pleadings and procedure." (38 C.A.3d 730.)

The *O'Hagan* approach was followed in *Mikkelsen v. California* (1976) 59 C.A.3d 621, 629, 130 C.R. 780. Plaintiffs sued for wrongful deaths caused by the collapse of a freeway bridge during an earthquake. The trial judge found in favor of the state on the affirmative defense of design immunity (Govt.C. 830.6, infra, §280 et seq.), and then refused to permit plaintiffs to proceed on the theory of nuisance (C.C. 3479, infra, §339). *Held*, affirmed. The conduct amounting to a nuisance may be negligent or nonnegligent (59 C.A.3d 628); and, whether pleaded in language of negligence or nuisance, plaintiffs' cause of action was based on an allegedly defective plan or design. (59 C.A.3d 628.) To permit the design immunity to depend on the form of the pleading would be to thwart the legislative purpose. (59 C.A.3d 630.) (See *Longfellow v. San Luis Obispo* (1983) 144 C.A.3d 379, 384, 192 C.R. 580 [following *Mikkelsen*].)

SUPPLEMENT: [This section is current through the latest supplement]

On replacement of "Tort Claims Act" nomenclature by "Government Claims Act," see Supp., supra, §216.

Administrative mandamus:

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §300 et seq.

Damages in mandamus proceeding:

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §211.



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b. Scope of Immunities and Defenses.

5. No Punitive Damages.

5 Witkin Sum. Cal. Law Torts § 230

[§ 230] No Punitive Damages.

(1) *Statutory Rule*. "Notwithstanding any other provision of law," a public entity is not liable for exemplary or punitive damages. (*Govt.C. 818*.) (See 1 *A.L.R.4th* 448 [recovery of punitive damages from municipal corporation].)

An equal protection challenge to *Govt.C. 818* was rejected in *McAllister v. South Coast Air Quality Dist.* (1986) 183 *C.A.3d* 653, 228 *C.R.* 351. The court found sufficient justification for special treatment of public employers. (a) Because punishment is the objective of punitive damages, the group bearing the burden of the award, i.e., the citizens, would be the same one that would benefit from it; (b) because evidence of a defendant's wealth is admissible on the amount of punitive damages, plaintiffs would be able to introduce evidence of the public entity's unlimited taxing power; (c) a compromise that would allow punitive damages, but prohibit evidence of the entity's wealth, would eliminate one of the prime justifications for punitive damages, i.e., deterrence. (183 *C.A.3d* 660.)

(2) *Distinction: Collateral Source Rule*. The collateral source rule of damages is not penal in its effect and is properly applied to a public entity. (*Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 *C.3d* 1, 9, 84 *C.R.* 173, 465 *P.2d* 61, *infra*, §1632; on statutory post-trial hearing and offset, see *infra*, §1637 *et seq.*)

(3) *Distinction: Civil Penalties*. Damages that serve a legitimate compensatory or other nonpunitive function, though in the nature of a penalty, are not barred by *Govt.C. 818*. For example, the additional compensation given an employee under *Lab.C. 4553* for serious and wilful misconduct of an employer (see 2 *Summary* (10th), *Workers' Compensation*, §316 *et seq.*) is distinguishable from punitive damages and may properly be awarded against a public entity. The increase in the award constitutes merely more adequate compensation, rather than punishment. (*State Dept. of Corrections v. Work. Comp. App. Bd.* (1971) 5 *C.3d* 885, 888, 97 *C.R.* 786, 489 *P.2d* 818.)

People v. Superior Court (Oakland Port Commrs.) (1976) 16 *C.3d* 30, 127 *C.R.* 122, 544 *P.2d* 1322, reached a similar result. Here, after 125,000 gallons of oil were discharged into the waters of the Oakland Estuary from oil storage tanks located on land owned by the city of Oakland, the Attorney General, at the request of the Regional Water Quality Control Board, brought an action under *Water C. 13350*, seeking penalties provided by that section. *Held*, *Govt.C. 818* was not a defense. Although the civil liability imposed by *Water C. 13350* is admittedly punitive in that it seeks to deter

oil spills, the damages collected also serve a compensatory purpose because they are used to clean up waste or abate its effects on state waters. Thus, they are not simply and solely punitive, and are therefore not punitive damages within the meaning of *Govt.C. 818*. (16 C.3d 39.) (See *San Francisco Civil Service Assn. v. Superior Court* (1976) 16 C.3d 46, 50, 127 C.R. 131, 544 P.2d 1331 [following *People v. Superior Court (Oakland Port Commissioners)* in Attorney General's action under *Water C. 13385* to recover penalties for discharge of sewage into bay waters]; 7 *Golden Gate L. Rev.* 499 [*People v. Superior Court (Oakland Port Commissioners)*]; on enforcement of environmental protection statutes generally, see 12 *Summary* (10th), *Real Property*, §913.)

Govt.C. 818 does not preclude assessment of penalties designed to ensure compliance with a regulatory scheme. In *Kizer v. San Mateo* (1991) 53 C.3d 139, 279 C.R. 318, 806 P.2d 1353, the state Department of Health Services issued citations against a county health care facility under the Long-Term Care, Health, Safety and Security Act of 1973 (*Health & Saf.C. 1417* et seq.). The department then filed an action against defendant county to affirm the citations and assess the monetary penalties authorized by the Act. Defendant county demurred, contending that the penalties were punitive damages and forbidden by *Govt.C. 818*. The demurrer was sustained and the Court of Appeal affirmed the dismissal of the action. *Held*, reversed.

(a) Nowhere in the Tort Claims Act does the Legislature indicate an intention to immunize public entities from monetary sanctions imposed for failure to observe minimum health and safety standards adopted to protect patients. Granting an immunity to public entities from the penalties would be contrary to the intent of the Legislature to provide a citation system for imposing prompt and effective civil sanctions against long-term health care facilities in violation of state statutes and regulations. (53 C.3d 146.)

(b) Civil penalties under the Long-Term Care, Health, Safety and Security Act, "unlike damages, require no showing of actual harm per se." (53 C.3d 147.) They are imposed according to a range set by statute irrespective of actual damage suffered. Unlike punitive damages, they are imposed without regard to motive and require no showing of malfeasance or intent to injure; they can be imposed for negligent conduct. And damages serve to compensate the victim, while civil penalties under the Act are to be applied to offset the State's costs in enforcing the health and safety regulations. (53 C.3d 147.)

(c) Given the unquestionable importance of the legislative purpose of assuring a uniform standard of quality health care, there is no significant public policy reason to exempt a state licensed health-care facility from liability for statutory penalties simply because it is operated by a public rather than a private entity, even though it is the taxpayer who ultimately bears the burden when such penalties are imposed. The statutory citation and penalty provisions serve to encourage compliance with state-mandated standards for patient care and to deter conduct that may endanger patients. (53 C.3d 150.) (See 19 *Pepperdine L. Rev.* 272 [Kizer].)

In *Los Angeles County Metropolitan Trans. Authority v. Superior Court* (2004) 123 C.A.4th 261, 20 C.R.3d 92, plaintiff bus passenger sued a county metropolitan transportation authority and one of its drivers for violation of the Unruh Civil Rights Act, alleging that the driver assaulted plaintiff after directing homophobic remarks at him. The trial court denied a motion by the transportation authority to strike allegations supporting plaintiff's claim for a civil penalty under the Act. *Held*, affirmed. *Govt.C. 818* does not preclude recovery of the penalty. The penalty has nonpunitive purposes and is not imposed primarily for punishment. It clearly serves to advance the Legislature's intent to encourage and aid private parties to help in enforcing the civil rights laws by bringing civil suits against perpetrators of hate crimes. The penalty also helps to ensure that plaintiffs receive ample compensation, irrespective of their actual damages. (123 C.A.4th 268.)

(4) *Distinction: Enhanced Damages for Elderly or Dependent Adult Abuse.* In *Marron v. Superior Court* (2003) 108 C.A.4th 1049, 134 C.R.2d 358, plaintiffs' 44-year-old daughter entered a hospital owned and operated by defendant, Regents of the University of California, for a liver biopsy. Complications arose and emergency surgery was required. Plaintiff's daughter spent 2 months in the hospital's intensive care unit with an ever increasing number of complications. In the following months, she was released from the hospital several times, but always returned. This continued until her

death. Plaintiffs' complaint included a cause of action for dependent adult abuse, and sought the enhanced remedies allowed by Welf.C. 15657, i.e., damages for decedent's pain and suffering and an award of reasonable attorneys' fees and costs (see *infra*, §1686). Defendant moved for summary adjudication on the ground that the damages and attorneys' fees and costs were punitive damages, which, when awarded against public entities, were barred by Govt.C. 818. The trial court granted defendant's motion, and plaintiffs sought mandamus. *Held*, mandamus granted directing the trial court to vacate its order.

(a) *Statutory framework.* The Elder Abuse and Dependent Adult Civil Protection Act (Welf.C. 15600 et seq.) provides for criminal and private civil enforcement of elder and dependent adult abuse laws. The Act was amended in 1991 to allow enhanced remedies where the defendant committing the abuse or neglect is guilty of recklessness, oppression, fraud, or malice. Under these circumstances, Welf.C. 15657(a) requires the court to award reasonable attorneys' fees and costs, and Welf.C. 15657(b) provides that the limitation of C.C.P. 377.34 (decedent's personal representative may not recover damages for pain and suffering) does *not* apply. Under Govt.C. 818, a public entity is not liable for punitive damages or other damages imposed primarily for the sake of example and to punish the defendant. Thus, the issue where the defendant is a public entity is whether the enhanced remedies of Welf.C. 15657 are precluded by the prohibition of punitive damages in Govt.C. 818. (108 C.A.4th 1057.)

(b) *Pain and suffering.* Punitive damages and compensatory damages serve different purposes. Compensatory damages are intended to redress the concrete loss suffered by the plaintiff, and punitive damages are intended to punish the defendant and deter future wrongdoing. Pain and suffering damages, which are measured by the plaintiff's actual loss or injury and are not meant to punish the defendant, are compensatory. The fact that pain and suffering damages and punitive damages are two different things is made clear by C.C.P. 377.34, which allows a decedent's personal representative to recover punitive damages, but not pain and suffering damages. (108 C.A.4th 1059.) The trial court concluded that the express exception of Welf.C. 15657 to the general preclusion of awards of a decedent's pain and suffering damages in C.C.P. 377.34 equates to an award of punitive or exemplary damages under Govt.C. 818. However, considering the language of those statutes and the general statutory and common law regarding compensatory and punitive damages, the enhanced remedies are *not* punitive or exemplary in nature or "damages imposed primarily for the sake of example and by way of punishing the defendant" under Govt.C. 818. (108 C.A.4th 1062.)

(c) *Employers' liability for punitive damages.* Welf.C. 15657(c) provides that the standards of C.C. 3294(b) regarding the imposition of punitive damages on an employer based on the acts of an employee must be satisfied before damages or attorneys' fees may be imposed on an employer. Defendant argued that this incorporation of the standard for holding employers liable for punitive damages proves that the enhanced remedies of Welf.C. 15657 were intended to be punitive damages. (108 C.A.4th 1063.) "We are not persuaded. ... [I]ncorporation of that standard is merely a simple statutory means for setting forth what actions of an employer suffice for holding that employer liable for an employee's reckless neglect or other egregious conduct under section 15657. Section 15657, subdivision (c) incorporates a standard of conduct rather than the remedy or damages to be awarded if that conduct is found to have occurred." Furthermore, this argument does not apply to Welf.C. 15657 cases that do not involve employers. (108 C.A.4th 1064.)

(d) *Attorneys' fees and costs.* The legislative history of Welf.C. 15657 shows that the purpose of the provision authorizing attorneys' fees and costs was to act as an incentive for attorneys to accept elder or dependent adult abuse cases involving recklessness or more egregious conduct. There is nothing in the Act or legislative history to indicate that the purpose was to punish defendants. Furthermore, awards of statutorily authorized attorneys' fees are considered an element of costs, not damages, and as such they are paid to counsel, rather than to a party. Hence, an award of attorneys' fees and costs cannot be equated with punitive damages, which are awarded to a party. (108 C.A.4th 1064.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

c. Insurance Coverage.

5 *Witkin Sum. Cal. Law Torts* § 231

[§ 231] Insurance Coverage.

(1) *Statutory Treatment.* A number of scattered statutory provisions authorizing particular entities to insure were repealed by the Tort Claims Act, and a unified treatment was given in *Govt.C. 989* et seq. (local public entities) and *Govt.C. 11007.4* (state agencies). However, the validity of other insurance statutes is recognized. (See *Govt.C. 991, 11007.4(d)*.) (On insurance against public entity liability generally, see C.E.B., 1 *Government Tort Liability Practice* 4th, §§1.12, 5.4, 8.36; 3 *Pacific L. J. 400*; 71 *A.L.R.3d* 6 [validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees].)

(2) *Authorized Coverage.* Insurance coverage is permitted for the following:

(a) "[A]ll or any part of any tort or inverse condemnation liability." (*Govt.C. 990(a), 11007.4(b)(1)*.)

(b) "[T]he expense of defending a claim ... whether or not liability exists on such claim." (*Govt.C. 990(c), 11007.4(b)(3)*.)

Hospital districts may "participate in a reciprocal or interinsurance exchange with the members of its medical staff" as provided by *Ins.C. 1284*. (*Govt.C. 990(d), 11007.4(b)(1)*.)

Of course, insurance by itself neither creates liability nor impairs defenses. (*Govt.C. 991.2, 11007.4(e)*.)

(3) *No Indemnity for Punitive Damages.* A local public entity may obtain insurance that calls for the *defense of a claim* that seeks punitive damages, and such an insurance contract is valid, notwithstanding C.C. 1668 (see 1 *Summary* (10th), *Contracts*, §660), *Ins.C. 533* (see 2 *Summary* (10th), *Insurance*, §100), "or any other provision of law." (*Govt.C. 990(c)*.) However, it cannot contract for insurance that provides for *payment of a judgment* for punitive damages. (*Govt.C. 990(d)*.)

(4) *Insurance Methods.* Insurance for public entities may be provided by self-insurance as well as through authorized carriers. (*Govt.C. 990.4, 11007.4(c)*.) And two or more local entities may obtain joint insurance or be coinsured under a master policy with prorated premiums. (*Govt.C. 990.8(a), (b)*); see *Orange County Water Dist. v. Association of Calif. Water Agencies Joint Powers Ins. Authority* (1997) 54 C.A.4th 772, 777, 63 C.R.2d 182 [joint

powers self-insurance pool created under *Govt.C. 990.8* by public water agencies]; *Schools Excess Liab. Fund v. Westchester Fire Ins. Co. (2004) 117 C.A.4th 1275, 1285, 12 C.R.3d 626* [joint powers self-insurance pool was not "insurance" subject to commercial insurer's "other insurance" clause].)

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d. Liability Under Joint Powers Agreements.

5 *Witkin Sum. Cal. Law Torts* § 232

[§ 232] Liability Under Joint Powers Agreements.

Public entities may enter into several kinds of agreements under which some "function, service or act" is to be performed by one "with or for" any other. (See *Govt.C. 895*.) If a tort is committed in performance of such a function, etc., for which liability is imposed by statute, the parties to the agreement are *jointly and severally liable* to the injured person. (*Govt.C. 895.2*; see *Tucker Land Co. v. California* (2001) 94 C.A.4th 1191, 1197, 114 C.R.2d 891 [*Govt.C. 895* and *895.2* make clear that member entities of joint powers agreements are liable for torts, but not contracts; agreement in question stated that constituent members were not liable for agency's debts, as permitted by *Govt.C. 6508.1*]; on joint and several liability, see *supra*, §50 et seq.)

The Education Code assigns some powers to the county board of education and some to the county superintendent of schools; and in exercising an assigned power the county superintendent is a public entity within the meaning of *Govt.C. 895.2*. Hence the superintendent is liable, as a school district would be, for negligent supervision of students on a campus during school hours (see *infra*, §321 et seq.) and is not entitled, as an employee would be, to indemnity or contribution from other superintendents or districts jointly and severally liable. (*Ross v. Campbell Union School Dist.* (1977) 70 C.A.3d 113, 119, 138 C.R. 557.)

Among themselves, however, the entities may allocate the liability by provisions for *contribution or indemnification*. (*Govt.C. 895.4*; on contribution, see *supra*, §103 et seq.; on indemnification, see *supra*, §112 et seq.) And, in the absence of any provision, any entity that pays more than its pro rata share is entitled to contribution from the others. (*Govt.C. 895.6*.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Authority for Calif. Cities Excess Liab. v. Los Altos* (2006) 136 C.A.4th 1207, 1212, 39 C.R.3d 571 [city police chief's execution of document with other cities' police chiefs to form special law enforcement teams did not bind city to pay pro rata share with other cities of settlement with heirs of police officer killed during joint training session; document was not "agreement" between public entities within *Govt.C. 895*, because city council never considered or approved it].



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1. In General.

e. Compromise and Settlement of Claims.

5 Witkin Sum. Cal. Law Torts § 233

[§ 233] Compromise and Settlement of Claims.

Generally, the head of a state agency may compromise, adjust, or settle a pending action where a sufficient appropriation exists for payment of the claim or, if not, on recommendation of the Attorney General or other attorney authorized to represent the state and approval of the Department of Finance. (*Govt.C. 948.*) Also, the governing body of a local public entity is authorized to settle actions or delegate authority to do so. (*Govt.C. 949.*) (See *Ford v. California (1981) 116 C.A.3d 507, 515, 172 C.R. 162* [authority granted by *Govt.C. 948, 949* is broad]; C.E.B., 1 Government Tort Liability Practice 4th, §6.38.)

Judicial branch entities and judges are excluded from the coverage of *Govt.C. 948*. The Judicial Council is authorized to settle claims against a judicial branch entity or a judge in accordance with procedures set forth in the Rules of Court. (*Govt.C. 912.7.*) The manner of presentation and service of these claims is prescribed. (See *Govt.C. 915(c).*) "Judicial branch entity" includes the superior court, the Court of Appeal, the Supreme Court, the Judicial Council, and the Administrative Office of the Courts. (*Govt.C. 912.3.*) (See C.R.C., Rule 6.201 [claim and litigation procedure]; C.R.C., Rule 6.202 [claim and litigation management].)

SUPPLEMENT: [This section is current through the latest supplement]

Judicial branch entities and judges: Former C.R.C., Rules 6.201 and 6.202 were renumbered C.R.C., Rules 10.201 and 10.202, respectively, in 2006.



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1. In General.

f. Conference on Satisfaction of Judgment.

5 *Witkin Sum. Cal. Law Torts* § 234

[§ 234] Conference on Satisfaction of Judgment.

(1) *Availability of Conference.* In an action for personal injury or wrongful death, when a verdict is entered against a public entity in excess of \$ 100,000, the entity may request a mandatory settlement conference to consider methods of satisfying the judgment. (*Govt.C.* 962; see 19 *Pacific L. J.* 530.)

(2) *Request.* The request must be in writing and within the time prescribed for a new trial motion (*C.C.P.* 659; see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §56). The request may be noticed with any motion under *Govt.C.* 984 (periodic payment of judgment; *infra*, §235), *Govt.C.* 985 (reduction of judgment for collateral source payments; *infra*, §1637 et seq.), or *C.C.P.* 659. (*Govt.C.* 962.)

(3) *Date of Conference.* The court sets a date for the conference. The conference may not occur until after determination of any motion for a new trial, motion for judgment notwithstanding the verdict, motion for remittitur, and motion for additur. However, the conference must occur before hearing on any motions pursuant to *Govt.C.* 984 or 985. (*Govt.C.* 962.)

(4) *Conduct of Conference.* At the conference the parties must negotiate in good faith and must review and consider structured payment plans presented by either party. (*Govt.C.* 962.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Request.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §55.



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g. Periodic Payment of Judgment.

5 *Witkin Sum. Cal. Law Torts* § 235

[§ 235] Periodic Payment of Judgment.

Public entities have the right to make periodic payments on large judgments, in the following circumstances and subject to the following conditions (*Govt.C. 984*):

(1) *When Payments May Be Ordered.* The judgment may be ordered paid by periodic payments only if ordered under *C.C.P. 667.7* (periodic payment of future damages for medical malpractice; 7 *Cal. Proc. (4th), Judgment*, §31) or *Govt.C. 970.6* (installment payment of judgment against local public entity; 8 *Cal. Proc. (4th), Enforcement of Judgment*, §401), or if the entity has made an election under *Govt.C. 984(d)*, or the parties have agreed to it. (*Govt.C. 984(c)*.)

(2) *Election by Public Entity.* An entity may elect to satisfy a judgment by periodic payments if, after making any deductions pursuant to *Govt.C. 985* (reduction of judgment for collateral source payments; *infra*, §1637 et seq.), the judgment against the entity not insured is greater than a statutory minimum amount. The amount is \$ 725,000, increased 5% per year beginning in 1997. (*Govt.C. 984(d)*.)

(3) *Time and Manner of Payment.* After any amounts are reimbursed pursuant to *Govt.C. 985*, the judgment debtor must pay 50% of the remainder immediately, and the other 50% "over a period of time to be determined by the court, not to exceed 10 years or the length of the judgment-creditor's remaining life expectancy at the time the judgment is entered, whichever is less." (*Govt.C. 984(d)*.) Payments do not terminate on death of the judgment creditor. (*Govt.C. 984(e)(1)*.)

Interest accrues on the unpaid balance at the same rate as 1-year United States Treasury Bills as of January 1, each year. On each January 1 thereafter, the interest is adjusted until the judgment is fully satisfied. (*Govt.C. 984(e)(2)*.)

(4) *Duration of Liability.* Until the judgment is fully satisfied, the entity "shall remain liable for all payments due on the judgment and the interest." (*Govt.C. 984(e)(3)*.)

(5) *Enforcement and Modification.* The court retains jurisdiction in order to enforce, amend, modify, or approve settlement of the installment payments as may be just. On motion by the judgment-creditor, the court must accelerate

the installment payments "if it finds any unreasonable delay in, or failure to make payments." (*Govt.C. 984(e)(4).*)

The court on motion may modify the installment payments consistent with C.C. 1431 et seq. (see supra, §52 et seq.) "to account for the insolvency or uncollectability of amounts of the judgment owed by joint tortfeasors." The defendant must bring the motion under *C.C.P. 1010* (see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §56). (*Govt.C. 984(e)(5).*)

Nothing in the statute "shall prevent the parties from agreeing to settle an action on any other terms." (*Govt.C. 984(f).*)

(6) *Limitations on Applicability.* If the entity has commercial insurance as to a portion of the judgment, the statute applies only to that portion that is "not insured." (*Govt.C. 984(b)*; see *Govt.C. 984(a)* [defining "not insured"].)

The statute "does not apply to contribution and indemnity between joint tortfeasors" (see supra, §§103 et seq., 112 et seq.). (*Govt.C. 984(h).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Payment May Be Ordered.*

Future damages for medical malpractice:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §31.

Judgment against local entity:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §430 et seq.(5) *Enforcement and Modification.*

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §9.



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1. In General.

h. Defense or Indemnification of Witness.

5 *Witkin Sum. Cal. Law Torts* § 236

[§ 236] Defense or Indemnification of Witness.

(1) *General Rule.* On written request, a public entity may defend or indemnify a witness who has testified on behalf of the public entity in a criminal, civil, or administrative action. (*Govt.C.* 995.9; on right to defense or indemnification of public employee, see *infra*, §§371 et seq., 375 et seq.)

(2) *Discretion of Public Entity.* The decision to defend or indemnify the witness is within the discretion of the entity and may be based on any relevant factors, including, but not limited to, whether to do so would serve the public interest. However, the public entity may defend or indemnify the witness only if it determines that the action against the witness is based directly on the conduct requested of the witness related to the witness's testimony or provision of evidence. The entity may provide a defense alone apart from indemnity, and may offer to defend or indemnify or defend and indemnify while reserving all rights to subsequently withdraw these offers on reasonable notice. (*Govt.C.* 995.9.)

(3) *When Defense or Indemnification Prohibited.* The public entity may not defend or indemnify if (a) the testimony giving rise to the action against the witness was false in any material respect, (b) the testimony was otherwise not given with a good faith belief in its truth, (c) the action has not been commenced, or (d) the witness has not requested action for his or her benefit. (*Govt.C.* 995.9.)

(4) *Liability of Public Entity for Punitive Damages.* The public entity is not liable for indemnification of a defendant witness for punitive damages awarded to the plaintiff. If the plaintiff prevails in a claim for punitive damages, the defendant is liable to the public entity for the full costs incurred in providing representation. (*Govt.C.* 995.9.) (On liability of public entity for payment of punitive damages on behalf of employee, see *infra*, §378.)

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2. Liability for Torts of Employees.

a. Statutory Rule of Liability.

5 *Witkin Sum. Cal. Law Torts* § 237

[§ 237] Statutory Rule of Liability.

A public entity is ordinarily liable "for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (*Govt.C. 815.2(a)*; see *Bradford v. California* (1973) 36 C.A.3d 16, 19, 111 C.R. 852, *infra*, §246 [distinguishing derivative liability under *Govt.C. 815.2(a)* from direct liability under *Govt.C. 815.6* (*infra*, §245)]; C.E.B., 1 Government Tort Liability Practice 4th, §9.7 et seq.; on liability of public employees for their torts, see *infra*, §345 et seq.; on immunity for employee's misrepresentations, see *infra*, §§241, 242; on liability for intentional torts of elected officials, see *infra*, §243; on doctrine of respondeat superior generally, see 3 *Summary* (10th), *Agency and Employment*, §165 et seq.; cf. *Lueter v. California* (2002) 94 C.A.4th 1285, 1300, 115 C.R.2d 68 [because private person cannot be held liable for negligent spoliation of evidence, public entity and its employees likewise cannot be held liable]; *Forbes v. San Bernardino* (2002) 101 C.A.4th 48, 57, 123 C.R.2d 721 [same].)

Liability under *Govt.C. 815.2(a)* extends to intentional as well as negligent torts by public employees. (*Allison v. Ventura* (1977) 68 C.A.3d 689, 693, 137 C.R. 542 [false imprisonment].)

West's Key Number Digest, States k.112.1(1)

SUPPLEMENT: [This section is current through the latest supplement]

See *de Villers v. San Diego* (2007) 156 C.A.4th 238, 248, 67 C.R.3d 253 [employees of county office of medical examiner had no duty to prevent coworker from stealing drugs and murdering her husband and thus county was not vicariously liable for murder, where there was no evidence that employees undertook special protective relationship toward husband or that they knew coworker posed threat; nor was county directly liable on theory of negligent hiring and supervision of coworker in absence of statutory basis].



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2. Liability for Torts of Employees.

b. Employment by Public Entity.

5 *Witkin Sum. Cal. Law Torts* § 238

[§ 238] Employment by Public Entity.

It is not necessary in every case to identify the particular employee causing the injury; it is sufficient to show that "some employee of the public entity tortiously inflicted the injury in the scope of his employment under circumstances where he would be personally liable." (Legislative Com. Comment to *Govt.C. 815.2(a)*.) But proof is required that whoever caused the injury was an employee of the entity against which recovery is sought. (*Gonzales v. California* (1972) 29 C.A.3d 585, 590, 105 C.R. 804 [bus driver employed by school district was not state employee even though district's authority to employ drivers was derived from Legislature to carry out state's duty to educate children]; on definition of "employee," see *supra*, §219.)

In *Townsend v. California* (1987) 191 C.A.3d 1530, 237 C.R. 146, the court held that a student-athlete is not an employee of the school he represents. Plaintiff, a U.C.L.A. player in a varsity basketball game between U.C.L.A. and San Jose State, was attacked by L, a San Jose State player. He brought this personal injury action against L, the San Jose athletic director and coach, and the state. On motion for summary judgment, the trial judge ruled that L was not an employee of the university or the State. *Held*, judgment for defendants other than L affirmed.

(a) In the workers' compensation area, *Van Horn v. Industrial Acc. Com.* (1963) 219 C.A.2d 457, 33 C.R. 169, held that a California Polytechnic football player, receiving direct financial assistance from the school and a private booster club, was an employee. But the Legislature nullified the holding by enacting *Lab.C. 3352(k)*, excluding a player who receives an athletic scholarship. (191 C.A.3d 1536; see 2 *Summary* (10th), *Workers' Compensation*, §191.)

(b) "[C]onceptually, the colleges and universities maintaining these athletic programs are not in the 'business' of playing football or basketball any more than they are in the 'business' of golf, tennis or swimming. Football and basketball are simply part of an integrated multisport program which is part of the education process. Whether on scholarship or not, the athlete is not 'hired' by the school to participate in interscholastic competition." (191 C.A.3d 1536.) (See *Munoz v. Palmdale* (1999) 75 C.A.4th 367, 369, 89 C.R.2d 229 [unpaid volunteer helping at city senior center function was not employee of defendant city; relying on *Townsend* and public policy represented by *Lab.C. 3352(i)*, excluding unpaid volunteers from definition of "employee" for workers' compensation purposes].)

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c. Scope of Employment.

1. In General.

5 *Witkin Sum. Cal. Law Torts* § 239

[§ 239] In General.

The general principles relating to scope of employment (see 3 *Summary* (10th), *Agency and Employment*, §176 et seq.) apply to public employees. (*Mary M. v. Los Angeles* (1991) 54 C.3d 202, 209, 285 C.R. 99, 814 P.2d 1341, *infra*, §240; *Leger v. Stockton Unified School Dist.* (1988) 202 C.A.3d 1448, 1459, 249 C.R. 688; *Virginia G. v. ABC Unified School Dist.* (1993) 15 C.A.4th 1848, 1855, 19 C.R.2d 671; see *Thorn v. Glendale* (1994) 28 C.A.4th 1379, 1383, 35 C.R.2d 1 [city fire marshal who entered plaintiff's business premises under color of authority and then committed arson was not acting within scope of employment]; *Inouye v. Los Angeles* (1994) 30 C.A.4th 278, 281, 35 C.R.2d 367 [because off-duty safety police officers are authorized by statute to make arrests for reasonable cause, county policy of treating off-duty officers as not engaged in performance of duties did not insulate county from liability for officer's alleged wrongful conduct in making arrest]; *Myricks v. Lynwood Unified School Dist.* (1999) 74 C.A.4th 231, 241, 87 C.R.2d 734 [city recreation and parks employee driving van without city's permission was not acting within scope of her employment]; *Hoblitzell v. Ione* (2003) 110 C.A.4th 675, 2 C.R.3d 8 [while driving unmarked city car, city building inspector and city police officer in civilian clothes staged fake building inspection for personal reasons; extraordinary reasons existing in *Mary M.*, *supra*, for applying vicarious liability were not present here]; C.E.B., 1 Government Tort Liability Practice 4th, §9.11 et seq.; 17 A.L.R.4th 881 [liability of governmental unit for intentional assault by employee other than police officer].) The term "scope of employment" has been construed as broadly in public as in private tort litigation. (*Mary M. v. Los Angeles*, *supra*, 54 C.3d 210.)

Sanborn v. Chronicle Publishing Co. (1976) 18 C.3d 406, 134 C.R. 402, 556 P.2d 764, is illustrative. Plaintiff's funds had been deposited with defendant M, county clerk, as a result of an attachment. Although M had been instructed by a deputy city attorney not to release the money without a court order, he did so when plaintiff called on him and requested it. A few days later, M concluded that he had made a mistake, and, when interviewed by a newspaper reporter, said that "[i]t was a real con job," that plaintiff "ranted and raved," etc. The quoted remarks were published, and plaintiff sued M and defendant city and county, as his employer, for defamation. *Held*, judgment for plaintiff affirmed. The record supported the jury's implied finding that M was acting within the scope of his authority so as to give rise to liability of his public employer under the doctrine of respondeat superior. Although the statements in part tended to exculpate M personally, they also were in furtherance of the public purpose of informing the press and the

public of his performance of the duties of his office. (*18 C.3d 412.*)

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c. Scope of Employment.

2. Sexual Misconduct by Employee.

5 *Witkin Sum. Cal. Law Torts* § 240

[§ 240] Sexual Misconduct by Employee.

(1) *Sexual Assault by Police Officer. Mary M. v. Los Angeles* (1991) 54 C.3d 202, 285 C.R. 99, 814 P.2d 1341, held that a public entity can be held vicariously liable for a police officer's misuse of his official authority in raping a woman he has detained. Plaintiff, driving home alone, was stopped by defendant police officer for erratic driving. Defendant officer was on duty patrolling the streets, in uniform with a badge and gun, and driving a black and white police car. Plaintiff did not do well on her field sobriety test, and pleaded with defendant officer not to take her to jail. Defendant officer then ordered her to get into the police car, drove her home, and raped her. At the time of the detention, and after the rape, defendant officer sent false radio messages to the city police department concerning his activities. Plaintiff sued the officer and the city, and the jury returned a verdict for plaintiff against both, finding that at the time of the events the officer was acting within the scope of his employment. The Court of Appeal reversed the judgment against the city, holding that, as a matter of law, the officer was not acting within the scope of his employment. *Held*, reversed.

(a) In *Perez v. Van Groningen & Sons* (1986) 41 C.3d 962, 227 C.R. 106, 719 P.2d 676, 3 *Summary* (10th), *Agency and Employment*, §180, the court articulated three reasons for applying the doctrine of respondeat superior: "(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." (54 C.3d 209.)

(b) Under *Govt.C. 815.2*, the respondeat superior doctrine applies to public as well as private employers. And the courts have construed the term "scope of employment" in *Govt.C. 815.2* as broadly as in private tort litigation. (54 C.3d 210.)

(c) In *White v. Orange* (1985) 166 C.A.3d 566, 212 C.R. 493, the court held that a county could be held liable for the wrongful act of a deputy sheriff who detained a female motorist and threatened to rape and kill her. The court there observed that an officer is entrusted with a substantial degree of authority, and that the motorist submitted to that authority, stopping her car solely because the officer had ordered her to do so. Accordingly, the officer's wrongful acts flowed from the exercise of that authority. (54 C.3d 210.)

(d) In *John R. v. Oakland Unified School Dist.* (1989) 48 C.3d 438, 256 C.R. 766, 769 P.2d 948, *infra*, §329, on the other hand, the court held that a school district could not be held vicariously liable for sexual molestation of a junior high school student while at the teacher's apartment as part of an officially sanctioned extracurricular program. (54 C.3d 210.) Although the opinion did not determine whether *White v. Orange* was correctly decided, it suggested that the policy reasons underlying the doctrine of respondeat superior would justify its application when a police officer uses the officer's authority to commit a sexual assault. (54 C.3d 211.)

(e) Defendant city contends that *White v. Orange* was wrongly decided, and that a police officer's act of rape, even when preceded by an assertion of authority, is outside the scope of the officer's employment as a matter of law. This contention is unsound.

(1) Ordinarily the determination of scope of employment is a question of fact. (54 C.3d 213.) The test is whether "in the context of the particular enterprise an employer's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." (54 C.3d 214, quoting *Perez v. Van Groningen & Sons*, *supra*, 41 C.3d 968.) To assist in making that determination in this case the court will consider whether the three policy objectives underlying respondeat superior would be achieved by applying the doctrine. (54 C.3d 214.)

(2) The first is whether imposing liability creates a strong incentive for vigilance by those in a position to guard substantially against the evil. *John R.* concluded that the preventive measures that the employer could be forced to take would do more harm than good, for they would be far too likely to deter districts from authorizing extracurricular contacts between teachers and students. (54 C.3d 214.) But imposition of liability for sexual assaults by law enforcement officers would not impair the effectiveness of law enforcement. "There is little or no risk that preventative measures would significantly interfere with the ability of police departments to enforce the law and to protect society from criminal acts." (54 C.3d 215.)

(3) The second is greater assurance of compensation for the victim. The Legislature has recognized that imposition of vicarious liability on a public employer is an appropriate method to ensure that victims of police misconduct are compensated, by declining to grant immunity to public entities when their police officers engage in violent conduct. (54 C.3d 215.) And a number of appellate court decisions involving assaultive conduct have upheld liability. (54 C.3d 215, 216.)

(4) The third is spreading the risk of loss among the beneficiaries of the enterprise. In *John R.*, the court contrasted the difference in authority between a teacher and a police officer, pointing out that the authority of a police officer over a motorist is far greater than that of a teacher over a student. (54 C.3d 216.) "An officer who detains an individual is acting as the official representative of the state, with all of its coercive power. ... Inherent in this formidable power is the potential for abuse. The cost resulting from misuse of that power should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power." (54 C.3d 216.)

(f) The city nevertheless contends that a police officer who commits rape while on duty can never be acting within the scope of employment because the conduct is so unusual. This contention is not supported by principle or authority.

(1) In view of the considerable power and authority of police officers, it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct. The precise circumstances of the assault need not be anticipated, so long as the risk is one that is reasonably foreseeable. While sexual assaults by police officers are fortunately uncommon, the risk of these assaults is broadly incidental to law enforcement, and thus liability for them may appropriately be imposed on the employing public entity. (54 C.3d 217.)

(2) The fact that defendant officer was primarily pursuing his own interests does not bring this case within the exception for substantial deviation from duties (see 3 *Summary* (10th), *Agency and Employment*, §179). The officer was acting within the scope of his employment when he detained plaintiff and ordered her to get into the police car. Then,

misusing his authority, he drove her home and raped her. When plaintiff attempted to resist his criminal conduct, he continued to assert his authority by threatening to take her to jail. Viewing the transaction as a whole, it cannot be said that, as a matter of law, that the officer was acting outside the scope of his employment when he raped plaintiff. (54 C.3d 219.)

(3) The holding in this case does not mean that a public employer is liable as a matter of law whenever an on-duty officer commits a sexual assault. This is a question of fact for the jury. And, in the light of the facts set forth above, the jury could reasonably conclude that defendant officer was acting in the course of his employment. (54 C.3d 221, 242.) (See 105 Harv. L. Rev. 947 [*Mary M.*]; 20 Pepperdine L. Rev. 394 [same]; 28 U.S.F. L. Rev. 419 [same]; on governmental liability for police activities generally, see *infra*, §290 et seq.)

(2) *Sexual Harassment. Mary M.* was distinguished in *Farmers Ins. Group v. Santa Clara* (1995) 11 C.4th 992, 47 C.R.2d 478, 906 P.2d 440. Three female deputy sheriffs brought a federal court action for sexual harassment against a male deputy sheriff, the county that employed him, and others. The alleged harassment included requests for sexual favors, lewd and sexually suggestive comments, and offensive touching. The county refused to indemnify the male deputy, but he was able to obtain counsel paid for by his homeowners insurer. The federal court dismissed the claims of one of the federal plaintiffs, and the male deputy settled with the other two. The deputy and his insurer then filed this action against the county and others seeking indemnity for the amount the insurer paid in defending and settling the federal action. The trial judge granted summary judgment for the county, finding that the male deputy's conduct was outside the scope of his employment as a matter of law. The Court of Appeal reversed. *Held*, reversed; the deputy's conduct was outside the scope of his employment and the county was not liable to indemnify him.

(a) Although most of the harassment took place on county jail premises during working hours while the deputies were on duty, plaintiff's conduct was motivated by personal reasons unrelated to guarding inmates or his other duties, and was in direct violation of the county's sexual harassment policy. (11 C.4th 1007.)

(b) Although sexual harassment is a pervasive problem in many fields of employment, this does not necessarily mean that, for respondeat superior purposes, it is foreseeable in a county jail. In determining whether a risk is "unusual or startling" so as to relieve an employer of respondeat superior liability, the inquiry should be whether the risk was one that may fairly be regarded as "typical of or broadly incidental to" the enterprise undertaken by the employer. It is not enough that a risk be neither unusual nor startling as a general matter; rather the risk must be evaluated in the context of the employer's particular enterprise. Even if the evidence showed that the use of profanity and sexually explicit language was not uncommon at the county jail, it fell far short of establishing that serious misconduct such as asking individual employees for sexual favors and targeting those individuals for inappropriate touching is either typical of or broadly incidental to the operation of a county jail or to the duties and tasks of deputy sheriffs. (11 C.4th 1008.)

(c) Plaintiff was the supervisor of only one of the female deputies, and his power over her was in no way comparable to the extraordinary power police officers exercise over members of the public. As emphasized in *Mary M.*, police officers occupy a unique position of trust in our society. When officers abuse their authority by committing crimes against members of the community, they violate the public trust and may erode the community's confidence in the integrity of its police force. There was no parallel between the supervisory authority here and the formidable, official authority at issue in *Mary M.* Moreover, *Mary M.* did not suggest that an employer may be vicariously liable for an employee's misconduct whenever there is an abuse of a job-created, hierarchical relationship in which the employee is afforded a high degree of authority over the victim. Stressing quite clearly that its conclusion flowed from the unique authority vested in police officers, *Mary M.* distinguished but did not purport to overrule previous cases rejecting the application of respondeat superior for misconduct occurring in relationships of a hierarchical nature where, at least in the eyes of the victim, the wrongdoer's authority might be considered very great. (11 C.4th 1012.) (See *Doe 1 v. Murrieta* (2002) 102 C.A.4th 899, 906, 126 C.R.2d 213 [city was not vicariously liable to two boys who were sexually molested by advisor police officer during youth explorer program; following *John R.* and *Farmers Ins. Group*]; *K.G. v. Riverside* (2003) 106 C.A.4th 1374, 1379, 131 C.R.2d 762 [county was not vicariously liable when one of its deputy sheriffs sexually abused his stepdaughter, even though he threatened to use his authority as police officer against her if

she did not cooperate or disclosed his criminal activities and even though abuse sometimes occurred while sheriff was in uniform or in patrol car]; 24 *Pepperdine L. Rev.* 772 [*Farmers Ins. Group*]; 30 *U.S.F. L. Rev.* 825 [same]; 37 *U.S.F. L. Rev.* 1091 [*Doe 1 v. Murrieta*].)

Fowler v. Howell (1996) 42 *C.A.4th* 1746, 50 *C.R.2d* 484, involved the issue whether a *complaint* of sexual harassment may be within the scope of a public employee's employment. Defendant public employee had accused plaintiff coworker of sexual harassment. After the State Personnel Board found that most of defendant's charges were untrue, plaintiff filed this action for malicious prosecution. However, he did not first file a timely claim, as required by *Govt.C.* 950.2 (3 *Cal. Proc.* (4th), *Actions*, §242) when the employee is acting within the scope of employment. *Held*, judgment on the pleadings for defendant affirmed. *Govt.C.* 12940(h) (now *Govt.C.* 12940(j); see 8 *Summary* (10th), *Constitutional Law*, §922) requires an employer to prevent sexual harassment of one employee by another. "We hold as a matter of law that an employee who has been encouraged to complain and provided a procedure to complain of sexual harassment by a coworker acts within 'the scope of ... employment' by making such complaint." (42 *C.A.4th* 1751.) (See 18 *California Lawyer* 73 (November 1998) [investigating sexual harassment]; 34 *Cal. Western L. Rev.* 53 [what social sexual behavior is harassment]; 34 *Cal. Western L. Rev.* 457 [factors affecting employee perceptions and consequences of sexual harassment]; 27 *Southwestern U. L. Rev.* 265 [sexual harassment in primary and secondary classrooms]; 50 *Stanf. L. Rev.* 523 [student peer sexual harassment]; 51 *Stanf. L. Rev.* 161 [proposal for unified theory of gender harassment].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Sexual Harassment.Requirement of timely claim.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §252.



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B. Public Entities.

2. Liability for Torts of Employees.

d. Exception for Employee's Misrepresentation.

1. Immunity Rule.

5 *Witkin Sum. Cal. Law Torts* § 241

[§ 241] Immunity Rule.

(1) *In General.* "A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional." (*Govt.C. 818.8*.) This statute provides an absolute immunity from liability for misrepresentation of any sort. A similar immunity is provided to public employees by *Govt.C. 822.2* (*infra*, §348), except that an employee may be held liable where guilty of actual fraud, corruption, or actual malice. (Legislative Com. Comment to *Govt.C. 818.8*.) (See *Universal By-Products v. Modesto* (1974) 43 C.A.3d 145, 153, 154, 117 C.R. 525 [while public employee is liable for actual fraud, public entity is wholly immune]; *Grenell v. Hermosa Beach* (1980) 103 C.A.3d 864, 873, 163 C.R. 315 [comparing *Govt.C. 818.8* and 822.2]; *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 C.A.4th 30, 42, 43, 37 C.R.2d 860 [although immunity of public employee under *Govt.C. 822.2* for misrepresentation is qualified, immunity of public entity under *Govt.C. 818.8* for misrepresentation by employee is absolute]; C.E.B., 1 Government Tort Liability Practice 4th, §10.38 et seq.)

(2) *Illustrations.* *Govt.C. 818.8* is frequently applied. (See, e.g., *Tokeshi v. California* (1990) 217 C.A.3d 999, 1005, 1007, 266 C.R. 255 [county employee's advice to farmers to spray crops with pesticide that subsequently prevented them from harvesting or selling was within scope of *Govt.C. 818.8*]; *Brown v. Compton Unified School Dist.* (1998) 68 C.A.4th 114, 116, 80 C.R.2d 171 [school district, whose employee misrepresented that particular course satisfied NCAA requirements, thereby costing plaintiff basketball scholarship, was immune under *Govt. C. 818.8*, even if it owed duty to plaintiff].)

In *Brown v. Los Angeles* (1968) 267 C.A.2d 849, 73 C.R. 364, plaintiff lessee operated a massage parlor in a residential zone in Los Angeles. The city Department of Building and Safety notified her that this was illegal and should be discontinued. On several occasions, she sought to inspect zoning records but was only allowed to see the map. She discontinued the business and sued her lessor. In this suit, the records were subpoenaed and showed that a zoning variance for the property had been granted. She then sued the city. *Held*, defendant was immune; the erroneous demand that her activity had to be discontinued amounted to a misrepresentation under *Govt.C. 818.8*. (267 C.A.2d 850.)

In *Harshbarger v. Colton* (1988) 197 C.A.3d 1335, 243 C.R. 463, building inspectors employed by defendant city signed records stating that a house being built on plaintiffs' property complied with applicable building codes, even

though they knew it did not. As a result of defects in construction, plaintiffs were required to spend \$ 295,000 on reconstruction. *Held*, judgment for defendant on demurrer affirmed; defendant was immune.

(a) *Immunity and respondeat superior*. Under *Govt.C. 815.2* (supra, §237), a public entity is liable for injuries caused by the acts of an employee in the scope of employment, if the acts would give rise to a cause of action against the employee, and *Govt.C. 822.2* makes a public employee liable for actual fraud, corruption, or actual malice. Plaintiffs argued that, under these statutes, defendant was liable for the fraudulent misrepresentations of its building inspectors. However, *Govt.C. 818.8* provides a public entity with *absolute immunity* from liability for the negligent or intentional misrepresentations of its employees, and it is apparent that *Govt.C. 822.2* applies only to a public employee, not to a public entity such as defendant. (197 C.A.3d 1340.)

(b) *Suppression of fact*. Plaintiffs argued that suppression of fact is not "misrepresentation," as that term is used in *Govt.C. 818.8*. However, the cases support the conclusion that intentional concealment of a material fact is equivalent to direct affirmative misrepresentation. (197 C.A.3d 1343.)

(3) *Distinctions*. In *Arthur L. Sachs v. Oceanside* (1984) 151 C.A.3d 315, 320, 321, 198 C.R. 483, the court pointed out that *Govt.C. 818.8* gives immunity only from *tort* liability; under *Govt.C. 814* (supra, §218), a contract action for rescission based on fraud of an employee may be brought against a public entity. (Cf. *Janis v. California State Lottery Com.* (1998) 68 C.A.4th 824, 829, 80 C.R.2d 549 [state lottery was immune from charge that it misrepresented legality of particular game; although complaint termed action one for recession of contract, action actually was one for fraud, and immunity of *Govt.C. 818.8* applied].)

In *Tallmadge v. Los Angeles* (1987) 191 C.A.3d 251, 236 C.R. 338, plaintiff was arrested for unlawful possession of firearms, and the firearms were seized. He was convicted only of unlawful possession of machine guns, but by court order, both the machine guns and the other firearms were destroyed. In this action, he alleged that defendant deputy district attorney had represented to him that the other firearms would be returned, and that this representation was made to deceive and mislead him into not initiating legal process to get them. The trial judge granted summary judgment for defendant county and defendant district attorney. *Held*, reversed as to defendant county. The immunity of *Govt.C. 818.8* would ordinarily bar the action; but the complaint, incorporating the claim form by reference, could be construed to state a cause of action for *conversion*. It alleged that the property was destroyed without prior notice to plaintiff, contrary to P.C. 1418. (191 C.A.3d 254.) (See dissent, 191 C.A.3d 256, arguing that complaint could not be so construed.)

In *Jopson v. Feather River Air Quality Management Dist.* (2003) 108 C.A.4th 492, 133 C.R.2d 506, because of a miscalculation, defendant air quality management district issued plaintiff more marketable emission reduction credits (ERCs) than plaintiff had actually earned in recognition of its reduced burning of agricultural waste. While sale of the inflated credits was pending, plaintiff received notification of the mistake, which caused the sale price to be reduced by \$ 831,360. Plaintiff completed the sale and then sued defendant for *negligence*. However, on the basis of the *misrepresentation* immunity granted by *Govt.C. 818.8*, the trial court granted defendant's motion for summary adjudication. *Held*, affirmed.

(a) *Govt.C. 818.8* grants public entities immunity for negligent or intentional misrepresentation, but not for negligence. Here, plaintiff maintained that defendant's calculation of ERCs involved an *operational task* giving rise to a cause of action for negligence and not the *communication of information*, which would have involved a misrepresentation claim. However, every tort of negligent misrepresentation obviously involves both negligence and misrepresentation, and *United States v. Neustadt* (1961) 366 U.S. 696, 81 S.Ct. 1294, 6 L.Ed.2d 614, supra, §208, rejected the notion that the similar federal immunity statute (28 U.S.C., 2680(h)) does not apply when the gist of the claim lies in negligence underlying the inaccurate representation. Thus, merely distinguishing operational tasks from communication of information does not serve to clarify the scope of the immunity. (108 C.A.4th 495.)

(b) Defendant relied on a long line of California cases in which the courts, citing *Neustadt*, rejected the plaintiffs'

attempts to evade the *Govt.C. 818.8* immunity by characterizing the misconduct as something other than intentional or negligent misrepresentation. Essential to each claim was the plaintiff's reliance on misinformation communicated by the *Government*. (108 C.A.4th 498, citing *Grenell* and *Harshbarger*.)

(c) Plaintiff attempted to distinguish these cases, arguing that they addressed simple misrepresentations of *existing facts* as opposed to negligent performance of the technical operational tasks of identifying, calculating, and banking ERCs. This argument is without merit. The public entities in the cases cited by defendant did not simply act as conduits of information. In each case, the public entity took preliminary steps to ascertain information but, in doing so, either wrongfully or negligently obtained false information by either misapplying their own ordinances and rules to the relevant factual scenarios or failing to process applications properly. The same is true here. Defendant, by using an erroneous factor, also obtained false information. Like an inflated appraisal, an erroneous building inspection, a mistaken certificate of ownership, a false zoning report, or ill-advised instructions, the miscalculation of the ERCs constituted misinformation communicated by a governmental entity. Based on analogous facts in the cases cited by defendant, defendant is shielded from liability for having misrepresented the true fact that plaintiff had earned but a small percentage of the ERCs it was issued. (108 C.A.4th 499.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Exception for Employee's Misrepresentation.

2. Requirement of Commercial Relationship or Transaction.

5 Witkin Sum. Cal. Law Torts § 242

[§ 242] Requirement of Commercial Relationship or Transaction.

"Misrepresentation," as used in *Govt.C. 818.8*, is limited to "interferences with financial or commercial interest." (*Johnson v. California* (1968) 69 C.2d 782, 800, 73 C.R. 240, 447 P.2d 352, *infra*, §352; see *Harshbarger v. Colton* (1988) 197 C.A.3d 1335, 1341, 243 C.R. 463, *supra*, §241 [*Johnson* requirement was satisfied by allegation that building inspectors misrepresented that house conformed to building code, requiring homeowner's subsequent reconstruction]; *Bastian v. San Luis Obispo* (1988) 199 C.A.3d 520, 533, 245 C.R. 78, *infra*, §1080 [no immunity where complaint failed to allege interference with commercial or financial interest]; *Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 C.A.3d 816, 833, 283 C.R. 551 [quoting *Johnson*]; *Burden v. Santa Clara* (2000) 81 C.A.4th 244, 248, 96 C.R.2d 587 [misrepresentation as to terms of employment, causing plaintiff's relocation to another area and then his eventual return to original location, satisfied need for financial or commercial damage; *Govt.C. 818.8* immunity applied to both common law claim and claim under *Lab.C. 972*, 3 *Summary* (10th), *Agency and Employment*, §450].)

Connelly v. California (1970) 3 C.A.3d 744, 84 C.R. 257, is illustrative. Plaintiff, who operated marinas on the Sacramento River, periodically telephoned the State Department of Water Resources for anticipated changes in the level of the river during heavy rains. His complaint alleged that he called, was given erroneous information on which he set his docks to float, and a resulting rise caused extensive damage. *Held*, the misrepresentation immunity was inapplicable. The statute is concerned with misrepresentation affecting a financial or commercial interest. Here, although plaintiff suffered a commercial loss, it did not result from a commercial transaction with the state or from the state's interference with his commercial transactions; the complaint alleged a service gratuitously performed by the state in a negligent manner resulting in physical damage to property. (3 C.A.3d 752.) (See elaborate and forceful dissent, 3 C.A.3d 753.)

In *Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 C.A.3d 859, 247 C.R. 504, a child was relinquished for adoption when he was born, and was subsequently adopted. Ten years later this action was brought by the minor and his adoptive parent. Plaintiffs alleged that defendant county had concealed the fact that the child was suffering from a congenital nerve disorder (Sturge-Weber Syndrome), and the complaint sought damages for emotional distress and past and future medical expenses. Defendant's motion for summary judgment was granted on the basis of *Govt.C. 818.8. Held*, reversed.

(a) The scope of immunity under *Govt.C. 818.8* is limited; it generally provides immunity for interference with financial or commercial interests. (*201 C.A.3d 868* et seq., discussing *Johnson* and *Bastian*.)

(b) "The adoption process is not a commercial transaction, such as leasing and purchasing property or contracting for a pension." (*201 C.A.3d 872*.) The immunity provided governmental entities and public employees by *Govt.C. 818.8* and *822.2* does not shield defendant from liability for misrepresentation and deceit in the social service area. Although plaintiffs suffer a financial loss in the sense that they have incurred, and will continue to incur, substantial medical expenses, their loss does not result from a commercial transaction with defendant or from defendant's interference with a commercial transaction. (*201 C.A.3d 872*.)

(c) "Considerations of public policy support recognition of a cause of action against an adoption agency for intentional misrepresentation or fraudulent concealment in the adoption process." (*201 C.A.3d 872*.) An adoption agency cannot be made the guarantor of a child's future good health and should not be liable for mere negligence in providing information regarding the child's health. But here the evidence raised a triable issue of fact regarding the failure to disclose a material fact within the agency's possession that the examining physician would not render a prognosis for the child. The significance of that fact at the very least suggests that the nondisclosure was fraudulent. (*201 C.A.3d 874*.) (See *29 Golden Gate L. Rev. 181* [expanding adoption agency liability to include duties to investigate and to warn]; *105 Harv. L. Rev. 1761* [tort of "wrongful adoption"]; *29 Southwestern U. L. Rev. 167* [recovery of emotional distress damages in wrongful adoption cases]; *74 A.L.R.5th 1* [claims against adoption agencies where children have or develop mental or physical problems that are misrepresented or not disclosed].)

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5 *Witkin Sum. Cal. Law Torts* § 243

[§ 243] Intentional Torts of Elected Officials.

(1) *In General. Govt.C. 815.3* provides specific rules governing the liability of public entities for intentional torts, other than defamation, of elected officials. The legislative intent is that elected officials assume full fiscal responsibility for intentional torts not directly related to their official duties for which the public entity may also be liable, while maintaining fair compensation for persons injured by this conduct. (*Govt.C. 815.3(f).*)

The statute does not apply to criminal or civil enforcement actions brought on behalf of the state by an elected district attorney, city attorney, or Attorney General. (*Govt.C. 815.3(g)*; see C.E.B., 1 Government Tort Liability Practice 4th, §9.16.)

(2) *General Immunity of Public Entity Not Named As Codefendant.* Unless the elected official and the public entity are named as codefendants in the same action, a public entity is not liable to a plaintiff for an intentional tort, other than defamation, committed by an elected official employed by or otherwise representing the entity. The term "intentional tort" includes, but is not limited to, harassment, sexual battery, and intentional infliction of emotional distress. And, to the extent permitted by federal law, harassment in violation of state or federal law also constitutes an intentional tort. (*Govt.C. 815.3(a).*)

(3) *Tort Within Scope of Duties.* If the public entity is named as a codefendant and the elected official is held liable for an intentional tort other than defamation, the trier of fact must determine if the tort arose from and was directly related to the official's performance of official duties. If the answer is in the affirmative, the public entity is liable for the judgment as provided by law. Employee managerial functions, but not acts or omissions constituting sexual harassment, are deemed to arise from, and to directly relate to, the official's official duties. (*Govt.C. 815.3(b).*)

(4) *Tort Not Within Scope of Duties.* If the public entity is named as a codefendant, the elected official is held liable for an intentional tort other than defamation, and the trier of fact determines the elected official's act or omission did *not* arise from and was not directly related to the performance of official duties, the plaintiff is required, on a final judgment, to first seek recovery of the judgment against the assets of the official. If the court determines that the official's assets are insufficient to satisfy the judgment, including plaintiff's costs as provided by law, it must determine the amount of the deficiency. The plaintiff may then seek to collect the remainder of the judgment from the public

entity, which may pay the deficiency if it is otherwise authorized by law to do so. (*Govt.C. 815.3(c).*)

(5) *Public Entity's Pursuit of Creditor's Remedies.* To the extent that the public entity pays any portion of the judgment against the elected official or has expended defense costs in an action in which the trier of fact determines the official's action did not arise from and did not directly relate to the official's performance of official duties, the entity must pursue all available creditor's remedies against the official in indemnification, including garnishment, until the elected official has fully reimbursed the entity. (*Govt.C. 815.3(d).*)

(6) *Appeal by Public Entity.* If the public entity elects to appeal the judgment in an action brought under this statute, it must continue to provide a defense for the official until the case is finally adjudicated. (*Govt.C. 815.3(e).*)

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5 *Witkin Sum. Cal. Law Torts* § 244

[§ 244] Liability for Torts of Independent Contractors.

The judicially recognized liability of an employer for torts of independent contractors under certain circumstances (see *infra*, §1236 et seq.) is codified as a basis of governmental liability. "A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person." (*Govt.C. 815.4*; see *O'Gan v. King City Joint Union High School Dist.* (1970) 3 C.A.3d 641, 645, 83 C.R. 795 [nondelegable duty; negligent installation of sink in school restroom]; *Foster v. San Luis Obispo* (1993) 14 C.A.4th 668, 672, 17 C.R.2d 730 [county was not liable for negligence of attorney it appointed, as independent contractor, to represent indigent; county's duty extended only to appointment of licensed attorney, not to his subsequent performance]; *Bostrom v. San Bernardino* (1995) 35 C.A.4th 1654, 1665, 42 C.R.2d 669 [county was not liable for negligence of employee of aviation service company that leased land at county airport in absence of showing that lease gave rise to employer-independent contractor relationship].)

However, nothing in the statute "subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission *been that of an employee* of the public entity." (*Govt.C. 815.4*; see 56 Cal. L. Rev. 1762.)

The mere issuance of a permit by a public entity to a contractor who is actually employed by a private individual does not make the entity liable under the statute. (*Stanford v. Ontario* (1972) 6 C.3d 870, 879, 101 C.R. 97, 495 P.2d 425, *infra*, §271.)

Governmental liability in these circumstances is treated in detail in the discussion of employers' liability for independent contractors' torts generally. (See *infra*, §1236 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

Under *Govt.C. 815.4*, a public entity may be liable under the retained control doctrine (see text, §1241) for injury to an employee of an independent contractor hired by the public entity if the injury is proximately caused by the tortious act or omission of the independent contractor. (*McCarty v. Department of Trans.* (2008) 164 C.A.4th 955, 976, 79 C.R.3d 777.)



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CHAPTER IX - Torts

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II. GOVERNMENTAL LIABILITY

B. Public Entities.

4. Failure To Discharge Mandatory Duty.

a. Statutory Rule of Liability.

5 Witkin Sum. Cal. Law Torts § 245

[§ 245] Statutory Rule of Liability.

(1) *In General.* "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (*Govt.C. 815.6*; see *C.E.B.*, 1 Government Tort Liability Practice 4th, §9.25 et seq.; *BAJI*, No. 11.52; *CACI*, No. 423.) The negligence per se doctrine of *Ev.C. 669*, which is analogous and relates to statutory violations by tortfeasors generally, is treated elsewhere in this chapter. (See *infra*, §871 et seq.)

The term "enactment" includes an ordinance or regulation. (*Govt.C. 810.6*, *supra*, §220.) However, an *agreement* between a city and county for development of a particular area does not come within *Govt.C. 815.6*. (*Dateline Builders v. Santa Rosa* (1983) 146 C.A.3d 520, 528, 194 C.R. 258.) The same conclusion has been reached as to an internal order or guideline, not adopted pursuant to statutory authority and therefore not a regulation with the force of law. (*Posey v. California* (1986) 180 C.A.3d 836, 847, 849, 225 C.R. 830 [internal guideline of California Highway Patrol]; *People v. Superior Court (Wilson)* (1993) 18 C.A.4th 31, 38, 22 C.R.2d 110 [highway patrol order requiring, under specific circumstances, request that DMV reexamine person's driving ability is not duly adopted administrative regulation or otherwise "enactment" within meaning of *Govt.C. 815.6*].)

(2) *Elements of Liability.* *Govt.C. 815.6* contains a three-part test for determining whether liability may be imposed on a public entity: (a) An enactment must impose a mandatory, not discretionary, duty. (b) The enactment must intend to protect against the kind of risk of injury suffered by the party asserting *Govt.C. 815.6* as a basis for liability. (c) Breach of the mandatory duty must be a proximate cause of the injury suffered. (*California v. Superior Court (Perry)* (1984) 150 C.A.3d 848, 854, 197 C.R. 914.) In this case, plaintiffs alleged that they filed complaints with the Real Estate Commissioner concerning irregularities in a licensee's handling of money entrusted to him, and that the commissioner in one instance failed to investigate, and in another, investigated and found irregularities but never informed plaintiffs of his findings. The court held that a mandatory duty to investigate was imposed by *B. & P.C. 10176*, and that the statute was intended to protect against the risk of injury suffered here (unlawful appropriation of funds by the licensee). (150 C.A.3d 854, 855, 856.) However, proximate cause was not shown. The commissioner has a mandatory duty to investigate; the steps he may take--e.g., proceedings to suspend or revoke the license--are discretionary. (150 C.A.3d 857, 858.)

Each of these elements must be present. Just because a statute creates a mandatory public duty does not mean that it also creates a private cause of action for its violation. In *Haggis v. Los Angeles* (2000) 22 C.4th 490, 93 C.R.2d 327, 993 P.2d 983, defendant city ordered the owner of the property in a coastal bluff area to correct hazardous slide conditions existing on the property but failed to record notice of the conditions, as required by ordinance. Plaintiff subsequently purchased the property without knowledge of these conditions. When the home was destroyed in a landslide, plaintiff sued for damages under *Govt.C. 815.6*. *Held*, dismissal of action affirmed. *Govt.C. 815.6* is inapplicable because the enactment creating the duty here was not designed to protect against the type of injury suffered.

(a) For liability under *Govt.C. 815.6*, the enactment at issue must be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken. Equally important, however, is the requirement that the mandatory duty be designed to protect against the particular kind of injury the plaintiff suffered. Judicial inquiry in this regard goes to the legislative purpose of imposing the duty. That the enactment confers some benefit on the class to which plaintiff belongs is not enough; if the benefit is only incidental to the enactment's protective purpose, the enactment cannot serve as a predicate for liability under *Govt.C. 815.6*. (22 C.4th 498.)

(b) Defendant's contention that the enactment must expressly manifest the enacting body's intent to create a private right of action cannot be sustained. Whenever an enactment establishes a mandatory governmental duty and is designed to protect against the particular kind of injury the plaintiff suffered, *Govt.C. 815.6* provides that the public entity is liable for an injury proximately caused by its negligent failure to discharge the duty. It is *Govt.C. 815.6*, not the predicate enactment, that creates the private right of action. So long as the predicate enactment is of a type that supplies the elements of liability under *Govt.C. 815.6*, liability lies against the public entity, regardless of whether private recovery liability would have been permitted, in the absence of *Govt.C. 815.6*, under the predicate enactment alone. (22 C.4th 499.)

(c) The difficult question here is whether the ordinance was designed to protect against the particular kind of injury that plaintiff suffered. Plaintiff alleges that, had defendant recorded the required certificate, he would not have purchased the property and would therefore not have suffered the damages alleged. This, plaintiff contends, was the exact injury the ordinance's recordation requirement was designed to prevent by putting future purchasers (and others involved in property purchases, such as lenders and title companies) on notice of the instability. This is incorrect. The recordation requirement was designed not for the benefit of prospective purchasers, but as leverage to compel compliance with an order to comply. The requirement is simply an enforcement tool designed as protection for the general public as a whole against the effects of improper construction, rather than as protection against economic losses by purchasers or lenders. Its purpose is to encourage the landowner to undertake necessary stabilization work, for if he or she does not do so, a recorded certificate of substandard condition will seriously impair the value of the property for possible sale or security. True, the recordation also may provide warning to potential purchasers and lenders (assuming what has not been demonstrated, that the recorded notice would be disclosed by a standard title search), but that effect is merely incidental to the ordinance's enforcement goals. The ordinance exists to protect the public against unsafe building and land conditions, not to regulate the marketing of real estate. (22 C.4th 502.)

West's Key Number Digest, States k.112.1(1), 112.2(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

What constitutes "enactment": See *Tilton v. Reclamation Dist. No. 800* (2006) 142 C.A.4th 848, 862, 48 C.R.3d 366 [United States Army Corps of Engineers manual was not "enactment" within meaning of *Govt.C. 810.6*; manual did not impose mandatory duty on reclamation district to prevent leakage of levees that would support tort liability for alleged real property damage].

(2) *Elements of Liability.*

Enactment must impose mandatory duty: See *Shamsian v. Department of Conservation* (2006) 136 C.A.4th 621, 633, 39 C.R.3d 62 [mere statement of legislative intent does not impose mandatory duty on which liability may be based]; *Department of Corps. v. Superior Court* (2007) 153 C.A.4th 916, 931, 63 C.R.3d 624 [even where statute includes mandatory language, other factors may indicate that apparent obligatory language was not intended to foreclose exercise of discretion]; *In re Groundwater Cases* (2007) 154 C.A.4th 659, 691, 64 C.R.3d 827 [recitations of legislative goals and policies do not establish mandatory duties].

Enactment must be intended to protect against kind of risk of injury suffered: See *Tilton v. Reclamation Dist. No. 800*, *supra*, 142 C.A.4th 861 [plaintiff must show that particular injury is one of consequences that enacting body sought to prevent by imposing mandatory duty; that enactment confers incidental benefit on class to which plaintiff belongs is not enough].

Under *Govt.C. 815.6*, public entities will be held liable for injuries to the kinds of interests that have been protected by the courts in actions between private persons. (*N.V. Heathorn v. San Mateo* (2005) 126 C.A.4th 1526, 1533, 25 C.R.3d 400 [definition of "injury" for purposes of *Govt.C. 815.6* is that set forth in *Govt.C. 810.8*, i.e., injury that would be actionable if inflicted by private person (see text, §220)].)



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4. Failure To Discharge Mandatory Duty.

b. Illustrations Finding Liability.

5 Witkin Sum. Cal. Law Torts § 246

[§ 246] Illustrations Finding Liability.

A number of decisions have found a mandatory duty on which governmental liability may be predicated:

Thompson v. Lake Elsinore (1993) 18 C.A.4th 49, 58, 22 C.R.2d 344 [once defendant city determined that plaintiff's building complied with all regulations, issuance of certificate of occupancy was mandatory act].

Davila v. Los Angeles (1996) 50 C.A.4th 137, 140, 57 C.R.2d 651 [coroner had mandatory statutory duty to make diligent attempts to locate decedent's family; duty was designed, in part, to prevent unwanted cremation].

Walt Rankin & Associates v. Murrieta (2000) 84 C.A.4th 605, 612, 101 C.R.2d 48 [under statutory scheme requiring payment bond as condition of award of public contract, public entity had mandatory duty to require surety to be admitted surety insurer or to confirm sufficiency of surety prior to accepting bond].

Roe v. California (2001) 94 C.A.4th 64, 73, 113 C.R.2d 900 [breach of confidentiality clause of agreement settling disciplinary proceeding violated numerous statutes and regulations, and was thus violation of mandatory duty, not merely of private agreement].

In *Ramos v. Madera* (1971) 4 C.3d 685, 94 C.R. 421, 484 P.2d 93, plaintiffs, recipients of state aid for dependent children, brought a class action for declaratory relief and for damages for individual plaintiffs. The complaint alleged that the county closed schools to permit pupils to assist in the grape harvest; that they notified welfare recipients that those 10 years of age or older must work in the fields or have their assistance terminated; and that 19 families suffered this penalty for failure to send children into the fields. *Held*, a cause of action was stated. Even if the county and agents had discretion to establish additional requirements of eligibility, the Labor Code forbids employment of minors under 16 except under conditions not complied with here. And a public entity may be liable in tort "where it knows or should know that its failure to exercise its duty to reasonably supervise employees will result in coercing others to violate state laws, and where such violation proximately results in an injury of the kind which the law was designed to prevent." (4 C.3d 695.) The entities are conclusively presumed to have knowledge of these statutes. And they have a mandatory duty "not to coerce others--either by force or by a threatened withdrawal of life-sustaining aid--to violate state laws, whether or not the entity is specifically charged with enforcing that particular law. Nor does any employee have 'discretion' to

coerce California citizens to break the law." (4 C.3d 696.) (See 21 U.C.L.A. L. Rev. 624 [Ramos and other possible bases of liability for improper administration of welfare statutes].)

In *Sullivan v. Los Angeles* (1974) 12 C.3d 710, 117 C.R. 241, 527 P.2d 865, plaintiff was charged with several misdemeanors and felonies, was sentenced to jail for one misdemeanor on a guilty plea, and served the time. The other pending charges were dismissed, and pursuant to P.C. 1384, plaintiff was entitled to a discharge from custody. But the superior court neglected to issue a release order, and plaintiff remained in jail for about 10 days until freed after writing a letter to the court. In this action for false imprisonment against the county, the lower court granted defendant's motion for judgment on the pleadings. *Held*, reversed; a cause of action was stated. Because P.C. 1384 imposes a mandatory duty to release a defendant from jail on dismissal of all charges against him, Govt.C. 815.6 applies, under plaintiff's allegation (accepted in this attack on pleadings) that the sheriff knew or in the exercise of due care should have known that the charges had been dismissed. (12 C.3d 715.) (See 64 Cal. L. Rev. 602.)

In *Elton v. Orange* (1970) 3 C.A.3d 1053, 84 C.R. 27, plaintiff, declared a dependent child by the juvenile court, was placed in a foster home conducted by H. The complaint alleged negligence of defendant county, its Department of Social Welfare, and its Probation Department in certifying and supervising H, with the result that plaintiff was subjected to physical abuse in the home. *Held*, a cause of action was stated. The court rejected arguments based on various statutory immunities: (a) discretionary acts (infra, §351 et seq.); (b) failure to enforce a law (infra, §286); (c) failure to revoke a permit or license (infra, §287); and (d) failure to inspect property (infra, §288). Here, the theory was failure to perform mandatory duties of supervision required by state regulations, and the complaint alleged *deficiencies in operators* of the foster home, not physical inadequacies in it. (3 C.A.3d 1059.) (See 90 A.L.R.3d 1214 [governmental tort liability for social service agency's negligence in placement of children or supervision after placement].)

In *Bradford v. California* (1973) 36 C.A.3d 16, 111 C.R. 852, plaintiff was convicted of a sex offense, requiring registration as a sex offender under P.C. 290. He was placed on probation, and once he fulfilled the conditions, the proceeding was dismissed under P.C. 1203.4. The dismissal relieved him of all penalties and disabilities, including the duty to register as a sex offender; and P.C. 11116.6 and 11117 require appropriate record entries of the dismissal by state employees. In this action, plaintiff alleged that the entries were not made; that he was arrested for failure to register, booked, fingerprinted, and required to obtain bail and an attorney before securing a dismissal of the charge. *Held*, judgment on demurrer reversed. The statutory requirement of entry of the dismissal was designed to prevent the very type of harm plaintiff alleged. (36 C.A.3d 21.)

In *Trewin v. California* (1984) 150 C.A.3d 975, 198 C.R. 263, plaintiff alleged that the Department of Motor Vehicles issued a driver's license to W, age 87, with knowledge of his diminished capacity and the danger of driving; that this was a violation of its duty under former Veh.C. 12805(e) (now Veh.C. 12805(d)) to deny a license to a person unable to operate a vehicle safely because of disability; and that W, after jumping a divider in a road and driving on the wrong side, collided with plaintiff's vehicle and caused serious injuries. *Held*, a cause of action was stated. *Papelian v. California* (1976) 65 C.A.3d 958, 135 C.R. 665, and other cases finding the DMV not liable under similar circumstances (see supra, §287) are distinguishable in that the complaints there did not specifically allege that the DMV had determined *beforehand* that it was unsafe to issue a license because of the driver's physical handicaps. The statute creates a mandatory duty not to issue a license once the department decides that the person cannot drive safely. (150 C.A.3d 980, 981.)

In *Braman v. California* (1994) 28 C.A.4th 344, 33 C.R.2d 608, plaintiff's husband was detained under the Lanterman-Petris-Short Act (Welf.C. 5000 et seq.) as a person dangerous to himself or others. Shortly after his release, he purchased a pistol and killed himself. Plaintiff then instituted this action against defendant state, alleging that it had breached its mandatory duty under P.C. 12076 to conduct an investigation to determine the decedent's eligibility to purchase a firearm. *Held*, judgment for defendant on demurrer reversed.

(a) P.C. 12076 imposes a mandatory duty of inspection on the Department of Justice with respect to would-be purchasers of firearms capable of being concealed. Under P.C. 12076(k), the department's investigation remains

discretionary only if directed at the purchasers of firearms *other than* pistols, revolvers, or other weapons capable of being concealed on the person. In other words, the Legislature has made investigation mandatory. P.C. 12076(d) specifies that, in determining eligibility to purchase a firearm, the department must examine its own records, as well as those records that it is authorized to request from the state *Department of Mental Health*. (28 C.A.4th 350, 351.)

(b) Defendant argues that the complaint fails to state a cause of action because P.C. 12076 was not intended to protect against suicide. However, P.C. 12076 requires an investigation to determine if the purchaser is a person described in Welf.C. 8103, and that statute includes any person taken into custody not only because the person is a danger to others, but also because the person is a danger to himself or herself. (28 C.A.4th 355.)

In *Scott v. Los Angeles* (1994) 27 C.A.4th 125, 32 C.R.2d 643, defendant county was held liable, under Govt.C. 815.6, for failing to fulfill the mandatory duty imposed by a state regulation requiring social workers to make monthly visits to foster children and foster parents. Relying on the provision in Govt.C. 815.6 precluding liability if the public entity exercised "reasonable diligence to discharge the duty," defendant argued that it could have established reasonable diligence had it not been precluded from presenting evidence of its extreme budgetary limitations, which, it contended, prevented its employees from fully and literally complying with regulatory requirements. *Held*, exclusion of this evidence was proper.

(a) Exclusion of evidence of budgetary limitations was proper because the evidence is irrelevant. The financial limitations of governments have never been, and cannot be, an excuse for a public employee's failure to comply with mandatory duties imposed by law. (27 C.A.4th 146, citing *Robbins v. Superior Court* (1985) 38 C.3d 199, 211 C.R. 398, 695 P.2d 695, 7 Summary (10th), *Constitutional Law*, §602; *Wallace v. Los Angeles* (1993) 12 C.A.4th 1385, 16 C.R.2d 113, *infra*, §291.)

(b) Although Welf.C. 10001(a) makes the provision of public social services subject to "the limits of public resources," "sound public policy precludes delegating to individual public employees the determination of the manner in which limited resources are to be utilized, particularly where specific statutes or regulations state specific requirements." (27 C.A.4th 146, citing *Ramos*.)

(c) Policies for the supervision of children in foster care, including the requirements for the frequency of home visits to these children, are established at the state level by Department of Social Services regulations. "Local governments and their employees have the merely ministerial duty of carrying out these requirements. If the requirements cannot be fulfilled with funding available to a local agency, the agency must address its concerns to those with the authority to set policy, not to the courts by way of excusing violations of mandatory requirements." (27 C.A.4th 146.)

SUPPLEMENT: [This section is current through the latest supplement]
The following case is likewise illustrative of those finding liability:

N.V. Heathorn v. San Mateo (2005) 126 C.A.4th 1526, 1531, 25 C.R.3d 400 [unpaid subcontractor on public project had cause of action under Govt.C. 815.6 against public entity that failed to discharge its statutory duty to obtain payment bond from original contractor, which went bankrupt].



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c. Illustrations Finding No Liability.

5 Witkin Sum. Cal. Law Torts § 247

[§ 247] Illustrations Finding No Liability.

A number of decisions have found that there was no mandatory duty, no intention to protect against the kind of injury suffered, or no proximate causation of the injury by breach of the duty:

Nunn v. California (1984) 35 C.3d 616, 624, 200 C.R. 440, 667 P.2d 846 [statute prohibiting private security guards from carrying or using firearms unless they completed course of training was enacted to protect the public, not security guard while on duty].

Creason v. Department of Health Services (1998) 18 C.4th 623, 630, 76 C.R.2d 489, 957 P.2d 1323 [duty to devise accurate testing and reporting standards for hypothyroidism is discretionary, not mandatory, duty; defendant was tested, but results were not reported to his parents and physician because he did not meet specifications requiring reporting].

Hoff v. Vacaville Unified School Dist. (1998) 19 C.4th 925, 937, 80 C.R.2d 811, 968 P.2d 522, *infra*, §328 [Educ.C. 44807 (*infra*, §321), stating teacher's duty to supervise student's coming and going, was enacted to protect students and did not provide basis for liability of school district to nonstudent injured by student's driving].

Haggis v. Los Angeles (2000) 22 C.4th 490, 502, 93 C.R.2d 327, 993 P.2d 983, *supra*, §245 [no cause of action by buyer of unstable property against city that had failed to record certificate of substandard condition as required by ordinance; ordinance's purpose was to protect general public against effects of improper construction, rather than to protect purchasers or lenders against economic losses].

Smith v. Alameda County Social Services Agency (1979) 90 C.A.3d 929, 940, 153 C.R. 712, *supra*, §9 [no cause of action for alleged negligence of adoption agency in failing to obtain adopting parents for hard-to-place child].

Keech v. Berkeley Unified School Dist. (1984) 162 C.A.3d 464, 470, 210 C.R. 7 [Educ.C. 56000 *et seq.*, on special education for eligible handicapped children, are designed to attain stated educational goals, and do not impose mandatory duty to protect parents from expense of hospital treatment of disturbed children].

Fox v. Fresno (1985) 170 C.A.3d 1238, 1241, 1243, 216 C.R. 879 [Health & Saf.C. 17980, authorizing abatement of nuisances, does not impose mandatory duty on county to abate fire hazard, and county was not liable for damage

caused by fire].

Ibarra v. California Coastal Com. (1986) 182 C.A.3d 687, 692, 227 C.R. 371 [California Coastal Act (*Pub.Res.C.* 30000 et seq.) does not impose mandatory duty on Commission either to adopt policy denying permits for septic tank installation in specified area or to require county to abolish septic tank system; commission was not liable for damages from landslides].

Tirpak v. Los Angeles Unified School Dist. (1986) 187 C.A.3d 639, 643, 232 C.R. 61 [procedural provisions of Education Code dealing with suspension and expulsion of students do not give rise to actionable tort against school district].

First Interstate Bank v. California (1987) 197 C.A.3d 627, 636, 243 C.R. 8 [Former Educ.C. 81836, requiring community college chancellor to establish standards for facilities, was not intended to protect against community college district's default on financing agreement].

Brenneman v. California (1989) 208 C.A.3d 812, 818, 256 C.R. 363 [parole procedures manual, which granted Department of Corrections considerable discretion in deciding how to supervise parolees, did not impose mandatory duty to choose one course over another].

California v. Superior Court (Ushana D.) (1992) 8 C.A.4th 954, 958, 10 C.R.2d 527 [Educ.C. 44346 (grounds for denial of teaching credential) does not create private cause of action for failure to deny teaching credential to convicted sex offender].

Zolin v. Superior Court (1993) 19 C.A.4th 1157, 1162, 23 C.R.2d 871 [although Veh.C. 11205 requires DMV to publish list of licensed traffic violator schools, purpose is to aid courts and traffic violators, not to provide schools with equal competition; hence, school left off list had no cause of action under Govt.C. 815.6].

Washington v. Contra Costa (1995) 38 C.A.4th 890, 896, 45 C.R.2d 646 [county was not liable under Govt.C. 815.6 for failure to adequately regulate chemical company that released hazardous materials into atmosphere, where plaintiffs alleged general duty of county to protect them under Health and Safety Code, but failed to show specific statute that county violated].

Janis v. California State Lottery Com. (1998) 68 C.A.4th 824, 831, 80 C.R.2d 549 [breach of statute enacted to prevent false advertising of lottery games could not be basis for claim against state lottery for injury caused not by advertising, but by nature of game in question].

Trinkle v. California State Lottery (1999) 71 C.A.4th 1198, 1202, 84 C.R.2d 496 [state lottery was not liable to plaintiff vending machine operator for allowing illegal games that diverted funds from plaintiff; false advertising legislation was enacted to protect public, not gaming operators].

Becerra v. Santa Cruz (1998) 68 C.A.4th 1450, 1458, 81 C.R.2d 165 [to extent that Welf.C. 16501.1(c), regarding out-of-home placement of children, imposes mandatory duty, it requires county to weigh various factors before placing child, but does not mandate specific result; thus, where county made required assessment, it could not be successfully sued on basis of result reached].

Sutherland v. Fort Bragg (2000) 86 C.A.4th 13, 19, 102 C.R.2d 736 [despite use of some mandatory language, overall effect of duty imposed on city to review building permit applications was discretionary; even if duty was mandatory, its purpose was aesthetic and scenic, not to preserve access to light and air from adjoining lots].

Wilson v. San Diego (2001) 91 C.A.4th 974, 979, 111 C.R.2d 173 [Welf.C. 300.2, which states legislative goals and policies of juvenile dependency law, did not impose mandatory duty on children's center to prevent juvenile placed there in protective custody from running away].

Landeros v. Department of Corrections (2002) 99 C.A.4th 271, 274, 120 C.R.2d 867 [Government could not be sued for failing to discharge mandatory duty to comply with prevailing wage law where injury alleged was not within Tort Claims Act; following *Aubry v. Tri-City Hosp. Dist.* (1992) 2 C.4th 962, 9 C.R.2d 92, 831 P.2d 317, supra, §220, and distinguishing *Walt Rankin & Associates v. Murrieta* (2000) 84 C.A.4th 605, 101 C.R.2d 48, supra, §246].

Forbes v. San Bernardino (2002) 101 C.A.4th 48, 53, 123 C.R.2d 721 [state did not fail to discharge mandatory duty, where court records of prior action were destroyed; statutes imposed duty on trial courts and clerks to preserve court records, not on state].

Los Angeles v. Superior Court (Terrell R.) (2002) 102 C.A.4th 627, 639, 125 C.R.2d 637 [statutes and regulations relevant to issues showed preference for placing children with relatives, but did not make that placement mandatory].

In *Williams v. California* (1976) 62 C.A.3d 960, 133 C.R. 539, plaintiff, an applicant for welfare aid, sued the Director of the State Department of Benefit Payments, alleging that he had failed to issue a final decision within 60 days from the date of request for a fair hearing (as required by law), and that as a result of that delay, plaintiff had suffered emotional distress. *Held*, no cause of action was stated. In *Elton v. Orange* (1970) 3 C.A.3d 1053, 84 C.R. 27, supra, §246; *Ramos v. Madera* (1971) 4 C.3d 685, 94 C.R. 421, 484 P.2d 93, supra, §246; *Bradford v. California* (1973) 36 C.A.3d 16, 111 C.R. 852, supra, §246; and *Elson v. Public Util. Com.* (1975) 51 C.A.3d 577, 124 C.R. 305, *infra*, §248, liability was based on "the failure to perform a duty clearly designed to protect against the risk of the particular kind of injury for which damages were sought." (62 C.A.3d 969.) The purpose of the requirement of a prompt decision by the director was to assure timely relief to persons who request hearings; but this is only one step in the statutory proceedings to obtain benefits, and there is no assurance that they will be received even on the rendition of a favorable decision by the director. (62 C.A.3d 970.) In other words, the mandatory duty was not to act by awarding benefits to plaintiff; hence, the injury of which plaintiff complained was not "the particular kind of injury that the failure to render a decision would necessarily cover." (62 C.A.3d 969.) (See *Novoa v. Ventura* (1982) 133 C.A.3d 137, 144, 145, 183 C.R. 736 [following *Williams*; failure of county agencies to make reasonable efforts to locate plaintiff father and give him notice of juvenile court proceedings that deprived him of custody of his children for period of time].)

In *Shelton v. Westminster* (1982) 138 C.A.3d 610, 188 C.R. 205, plaintiffs' son was found dead shortly after plaintiffs filed a missing persons report with defendant city's police department, but he was listed by defendant's officials as an unknown person, and plaintiffs were not informed that he was their son until 8 months later. In this action for damages against defendant city, plaintiffs alleged that the city's failure to obtain their son's dental record pursuant to former P.C. 11114 (now P.C. 14200 et seq.) and forward it to the Department of Justice in a timely manner caused them investigation expense, grief and sorrow, emotional distress, and medical expense. *Held*, no cause of action was stated.

(a) There was no failure to discharge a mandatory duty. P.C. 11114 did not charge any specific person or body with a duty, but assigned various duties at various levels of government. (138 C.A.3d 614, 615.)

(b) The creation of a new cause of action by determining that a duty is owed depends on considerations of public policy, and the major factors to be considered are those set forth in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086. (138 C.A.3d 616, 617.) Liability has been imposed where the duty was clearly designed to protect against the risk of the particular kind of injury for which damages were sought. (138 C.A.3d 618, 619, 620, citing *Williams*, and similar cases.) Here, the direct cause of plaintiffs' suffering was the act of the murderer; the failure to request dental records with resultant delay in identification was not even a remote cause. (138 C.A.3d 618.)

Shelton was followed in *Bock v. Los Angeles* (1983) 150 C.A.3d 65, 197 C.R. 470, holding that the statutes relating to the coroner (Govt.C. 27460 et seq.) do not impose a mandatory duty to identify a body for the benefit of next of kin. (150 C.A.3d 69, 70.) However, the court reversed a judgment on demurrer in order to permit plaintiff to amend to allege a voluntary assumption of the duty, thereby creating a special relationship calling for due care in carrying out the duty (see *infra*, §1038). (150 C.A.3d 72, 73.)

P.C. 647(f) makes it a misdemeanor for a person to be found intoxicated in a public place, and P.C. 647(g) provides that a police officer must place such a person in protective custody for treatment under Welf.C. 5170. In *Stout v. Porterville* (1983) 148 C.A.3d 937, 196 C.R. 301, plaintiff alleged that he was walking on the street while intoxicated, that defendant police officer stopped and questioned him but did not place him in custody, and that he was struck by a vehicle and injured. *Held*, there was no breach of mandatory duty. The dangers of the street are dealt with in P.C. 647(f); minimizing them is not the purpose of subdivision P.C. 647(g); hence, the kind of harm plaintiff incurred is not covered in subdivision P.C. 647(g); i.e., it is not its purpose to create a cause of action in the inebriate. (148 C.A.3d 947.)

In *MacDonald v. California* (1991) 230 C.A.3d 319, 281 C.R. 317, plaintiff child, 22 months old, was injured when his day care provider burned his hands in scalding water. The complaint was brought against the day care provider and the state and county, on the theory that the Child Day Care Facilities Act (*Health & Saf.C. 1596.70 et seq.*) imposed a mandatory duty on the public entities and created a private right of action. *Held*, judgment on the pleadings for these defendants affirmed.

(a) The statement in *Health & Saf.C. 1597.30(a)* that the Legislature "has a responsibility to insure the health and safety of children in family homes that provide day care" is a general declaration of policy goals, and does not create a mandatory duty. (230 C.A.3d 330.) And the requirements for licensing of day care providers are generally considered discretionary; they do not create privately enforceable mandatory duties. (230 C.A.3d 330.) The requirement that the state or its delegatee establish procedures for handling complaints, including a site visit, likewise involves some exercise of discretion; and a mandatory duty to investigate is not the same as a mandatory duty to take action after the investigation. (230 C.A.3d 331.)

(b) With respect to the statute's scope of protection against the kind of injury suffered, *Tirpak v. Los Angeles Unified School Dist.*, *supra*, furnishes an instructive answer: The court concluded that certain administrative provisions of the Education Code were intended to attain legislative goals, not to create private causes of action for damages for breach. (230 C.A.3d 331.)

(c) *Elton v. Orange* (1970) 3 C.A.3d 1053, 84 C.R. 27, *supra*, §246, is distinguishable. Placing dependent children in licensed foster homes is different in kind and degree from licensing and related inspection duties with regard to family day care homes. (230 C.A.3d 333.)

(d) There was no special relationship between plaintiff and the public entities to give rise to a legal duty (see *infra*, §1038). They did not engage in any affirmative acts placing plaintiff in peril or increasing the risk of harm to him; there was no heightened duty of care to plaintiff based on his individualized placement in a position of peril; and requiring a public entity to enforce regulations designed to promote safety does not make the agency an insurer of safety. (230 C.A.3d 334.)

SUPPLEMENT: [This section is current through the latest supplement]
The following cases are likewise illustrative of those finding no liability:

Shamsian v. Department of Conservation (2006) 136 C.A.4th 621, 632, 39 C.R.3d 62 [action against Department of Conservation and department officials under *Govt.C. 815.6* could not be based on alleged violation of Beverage Container Recycling and Litter Reduction Act in failing to provide recycling opportunities; provision of Act imposing responsibility on department to provide these opportunities was mere statement of legislative intent and imposed no mandatory duty].

Tilton v. Reclamation Dist. No. 800 (2006) 142 C.A.4th 848, 862, 48 C.R.3d 366 [regulation that related only to construction and design of levees, but not their subsequent maintenance, did not impose mandatory duty on reclamation district to maintain levees so as to prevent leakage of levees that caused real property damage].

Department of Corps. v. Superior Court (2007) 153 C.A.4th 916, 931, 63 C.R.3d 624 [Department of Corporations was immune from liability arising from rescission of desist and refrain orders against brokers alleged to have subsequently sold fraudulent securities; language of governing enactment appeared mandatory but was within statutory framework that entrusted action to be taken to commissioner's sound judgment, expertise, and discretion].

In re Groundwater Cases (2007) 154 C.A.4th 659, 687, 64 C.R.3d 827 [public entity water purveyors were not liable for providing allegedly contaminated water to consumers; enactments allegedly creating mandatory duties either granted discretion or expressed objectives rather than duties].

de Villers v. San Diego (2007) 156 C.A.4th 238, 256, 67 C.R.3d 253 [employee of county office of medical examiner stole drugs and used them to poison her husband; any violation of 21 C.F.R., §1301.71, which requires effective steps to safeguard drugs against theft, was not basis of liability of county for wrongful death; regulation did not impose mandatory duty to guarantee against theft and was not designed to protect against this type of injury].

California Highway Patrol v. Superior Court (2008) 162 C.A.4th 1144, 1150, 76 C.R.3d 578 [impoundment of vehicle after arrest for driving with suspended license under Veh.C. 14602.6 is discretionary, not mandatory; officers who did not impound car after arrest were not liable for death of driver killed in collision shortly after arrestee was released].

Clark v. Optical Coating Laboratory (2008) 165 C.A.4th 150, 179, 80 C.R.3d 812 [water board's cleanup and abatement order, based on reports of soil contamination and hazardous leaks threatening water supply, did not trigger mandatory duty of board's employees to disclose discharge or threat of discharge under Health & Saf.C. 25180.7(b); statute requires knowledge, not mere reasonable suspicion, that discharge or threat is likely to cause substantial injury to public health or safety].



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4. Failure To Discharge Mandatory Duty.

d. Availability of Immunities.

5 *Witkin Sum. Cal. Law Torts* § 248

[§ 248] Availability of Immunities.

(1) *Employee Immunities Are Not Applicable.* The immunities applicable to employees (see *infra*, §345 et seq.) are not applicable in suits for failure to discharge a mandatory duty. Public entity liability under *Govt.C. 815.6* is not subject to the general rule of *Govt.C. 815.2(b)* that a public entity is entitled to the benefit of applicable employee immunities. It is not a defense under *Govt.C. 821.6* that the entity could not be vicariously liable under *Govt.C. 815.2(a)* (*supra*, §237). The statutory liabilities are cumulative, and "the fact that derivative liability under section 815.2 may be nullified by an employee immunity in no way affects direct liability based on section 815.6." (*Bradford v. California* (1973) 36 C.A.3d 16, 21, 111 C.R. 852, *supra*, §246.)

(2) *Immunities for Legislative or Enforcement Inaction or Licensing Action or Inaction Are Not Applicable.* The immunities for legislative or quasi-legislative inaction or failure to enforce a law (*Govt.C. 818.2*; see *infra*, §286) and for action or inaction on a license (*Govt.C. 818.4*; see *infra*, §287) are inapplicable in suits for failure to discharge a mandatory duty.

In *Elson v. Public Util. Com.* (1975) 51 C.A.3d 577, 124 C.R. 305, plaintiff alleged that defendant Public Utilities Commission by general order required passenger stage corporations to carry liability insurance; that a bus company had no liability insurance or assets to satisfy a judgment; that defendant, with knowledge of the facts, failed to perform its mandatory statutory duty to enforce its order by revocation of the bus company's operating authority; and that plaintiff, injured by a negligently driven stage of the bus company, recovered a judgment against it that could not be satisfied. *Held*, judgment for defendant on demurrer reversed; a cause of action was stated.

(a) The judicial and legislative history shows that the immunity under *Govt.C. 818.4* for action or inaction on a license is only for discretionary activities. (51 C.A.3d 587, 588.) The complaint alleged a mandatory duty (51 C.A.3d 581), and *Govt.C. 818.4* immunity did not exist (51 C.A.3d 589).

(b) The same is true of the immunity under *Govt.C. 818.2* for legislative or quasi-legislative inaction or failure to enforce a law; it also relates only to discretionary activities. (51 C.A.3d 589, citing *Elton v. Orange* (1970) 3 C.A.3d 1053, 84 C.R. 27, *supra*, §246.)

This problem was more fully examined and the same result was reached in *Morris v. Marin* (1977) 18 C.3d 901, 136 C.R. 251, 559 P.2d 606. *Lab.C. 3800* provides that a county that issues a building permit as a condition precedent to construction "shall require" that the applicant have a policy of workers' compensation insurance. Plaintiff, a worker employed by C, suffered serious injuries on the job. If C had carried insurance, plaintiff would have been entitled to over \$ 200,000 in benefits, but C had no insurance and was adjudicated a bankrupt. Plaintiff was given an award of benefits from the Uninsured Employers Fund (*Lab.C. 3715 et seq.*, 2 Summary (10th), *Workers' Compensation*, §153 et seq.), but the Fund was bankrupt and no payments were made. Plaintiff then brought this action against defendant county under *Govt.C. 815.6*. *Held*, judgment for defendant county on demurrer reversed.

(a) *Mandatory duty under Lab.C. 3800*. The language of *Lab.C. 3800*, construed in accordance with the general rule that "shall" is mandatory, establishes a mandatory duty under *Govt.C. 815.6*. (18 C.3d 907.) Many cases dealing with similar language reach the same conclusion. (18 C.3d 907, citing *Sullivan v. Los Angeles* (1974) 12 C.3d 710, 117 C.R. 241, 527 P.2d 865, *supra*, §246, *Bradford*, and *Elson*.)

(b) *No immunity*. Defendant claimed an absolute immunity under *Govt.C. 818.4* for issuance of a permit and under *Govt.C. 818.2* for failure to enforce a law. Both statutes, however, provide immunity only where the duty is *discretionary*, and not, as here, where the duty to require insurance is mandatory. *Govt.C. 818.4* has been interpreted by the drafters and the legislative committee to apply only to situations in which the governmental agency exercises discretion in determining whether to issue or deny a license. (18 C.3d 912.) The cases support this interpretation. (18 C.3d 914, citing *Elson* and *Elton* *supra*.) *O'Hagan v. Board of Zoning Adjustment* (1974) 38 C.A.3d 722, 113 C.R. 501, *supra*, §229, stating that the immunity under *Govt.C. 818.4* prevails over the liability imposed by *Govt.C. 815.6*, refers only to discretionary activity. (18 C.3d 915.) Although the language of *Govt.C. 818.2* does not expressly refer to the exercise of discretionary authority, the legislative comment makes it clear that it does, and the same reasons for immunity under *Govt.C. 818.4* apply here. (18 C.3d 916.)

(c) *Policy considerations*. "To uphold the position of the county would not only violate the letter of the statute but nullify its purpose. If we are to bestow immunity upon governmental entities that ignore the statutory requirement that the applicant for a building permit obtain workers' compensation insurance, the requirement becomes a dead letter. Future workers who rely upon the statute in the expectation that it will be enforced must inevitably find themselves unprotected and uninsured from injuries and losses incurred in devastating accidents. Surely we cannot erase the statute itself from the books and expose workers to such serious harm in the face of the Legislature's protective concern." (18 C.3d 917.) (See *Young v. Inglewood* (1979) 92 C.A.3d 437, 439, 154 C.R. 724 [following *Morris*, where complaint alleged failure by city to comply with another mandatory precondition for issuance of building permit: requiring that work be done either by state-licensed contractor or by one exempt from that licensing].)

(3) *Immunity for Failure To Inspect Private Property Is Applicable*. The immunity for failure to inspect private property in *Govt.C. 818.6* (*infra*, §288) *does* apply. In *Clayton v. Sunnyvale* (1976) 62 C.A.3d 666, 133 C.R. 306, the court distinguished the holding in *Elson* that the immunity for discretionary acts under *Govt.C. 818.2* and *818.4* did not apply where there was a failure to perform a mandatory duty. "Section 818.6 ... is not subject to the mandatory-discretionary dichotomy set forth in *Elson*. The grant of immunity provided by the statute is absolute on its face; there is nothing in the language of the section to indicate that it was intended to apply only to discretionary activities." (62 C.A.3d 670.) (See *Cochran v. Herzog Engraving Co.* (1984) 155 C.A.3d 405, 412, 205 C.R. 1 [quoting Legislative Committee Comment and citing *Clayton*]; *Powell v. California* (1991) 234 C.A.3d 910, 916, 286 C.R. 8 [following *Clayton*]; *Haggis v. Los Angeles* (2000) 22 C.4th 490, 503, 93 C.R.2d 327, 993 P.2d 983, *supra*, §245 [city was immune from mandatory duty liability for failure to report result of inspection].) The court in *Powell* stated: "The government undertakes licensing and inspection activities to insure public health and safety. The Legislature has apparently concluded that it is better public policy to leave an injured person to his remedy against the person actually causing the injury than it is to impose an additional liability on the government for negligently failing to prevent the injury, presumably because imposition of such liability would expose public entities to virtually unlimited risks and certain bankruptcy." (234 C.A.3d 917.)

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5. Dangerous Condition of Public Property.

a. Governing Statute.

5 Witkin Sum. Cal. Law Torts § 249

[§ 249] Governing Statute.

The liability formerly imposed by the Public Liability Act and similar statutes (*supra*, §211) is the subject of an extensive chapter entitled "Dangerous Conditions of Public Property." (*Govt.C. 830 et seq.*) (See C.E.B., 2 Government Tort Liability Practice 4th, Chap. 12; *57 Am.Jur.2d (2001 ed.)*, *Municipal, County, School, and State Tort Liability* §237 et seq.; 41 Proof of Facts 3d 109 [governmental liability for failure to maintain trees near public way].)

The general immunities applicable to all types of liability and the usual tort defenses of comparative negligence and assumption of risk (see *supra*, §227) are of course applicable to actions based on dangerous conditions of property. In addition, particular immunities and defenses are specified, including the following:

- (1) Reasonableness of the act or omission. (See *infra*, §272.)
- (2) Participation in hazardous recreational activities. (See *infra*, §275 et seq.)
- (3) Improper use of a reservoir or canal. (See *infra*, §§273, 274.)
- (4) Causation of the accident by weather conditions. (See *infra*, §279.)
- (5) Advance approval of a plan or design. (See *infra*, §280 et seq.)

West's Key Number Digest, States k.112.2(3)

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b. Public Property.

1. Property Covered.

5 Witkin Sum. Cal. Law Torts § 250

[§ 250] Property Covered.

"Public property," or "property of a public entity," is defined as "real or personal property owned or controlled by the public entity." (*Govt.C. 830(c)*; see *Arroyo v. California* (1995) 34 C.A.4th 755, 762, 40 C.R.2d 627, *infra*, §253 ["public property" within meaning of *Govt.C. 830(c)* includes wild animals]; *Huffman v. Poway* (2000) 84 C.A.4th 975, 989, 101 C.R.2d 325 [because *Govt.C. 830(c)* refers to property that is either owned or controlled, property owned by public entity does not lose public property status when entity cedes temporary control to third parties]; C.E.B., 2 Government Tort Liability Practice 4th, §12.9 et seq.)

The statutory liability does not apply to property not owned or controlled. (See *infra*, §251.) The statute is also inapplicable to certain kinds of unimproved property. (See *infra*, §252 et seq.) And governmental agencies maintaining emergency shelters are exempted from liability for injuries sustained as a result of the condition of the premises. (C.C. 1714.5.)

In *Warden v. Los Angeles* (1975) 13 C.3d 297, 118 C.R. 487, 530 P.2d 175, defendant city allowed its submerged sewer pipe to protrude into the waters of Santa Monica Bay, causing several boating accidents. Although the federal Government exercised jurisdiction over the navigable waters, the city obtained authorization for the construction, and it could have had adequate warning signals installed by applying to the Coast Guard. Hence, it was liable to plaintiff for damage caused when his boat struck the pipe. Its knowledge of the prior accidents imposed a duty to seek protective action by the *Coast Guard*. (13 C.3d 301.)

In *Low v. Sacramento* (1970) 7 C.A.3d 826, 87 C.R. 173, defendant county operated a hospital facing a street with a dirt parking strip between the sidewalk and the street. The strip was not properly maintained, and plaintiff, a visitor to the hospital, fell into a water-filled rut and was injured. *Held*, both the city and the county were liable.

(a) The statutory language ("owned or controlled") is ambiguous when ownership is separated from control. (7 C.A.3d 831.) Control is the important factor; i.e., ordinarily, the tenant rather than the landlord is liable to persons injured by dangerous conditions. (7 C.A.3d 832.)

(b) The old Public Liability Act (supra, §211) imposed liability on the governmental entity having *authority to remedy* the condition. Although this is no longer an express statutory standard, the courts have continued to resort to it; i.e., in identifying the defendant with whom control resides, location of the power to correct is an aid. (7 C.A.3d 832.)

(c) Out-of-state cases hold that when a private owner maintains a grassy parking strip between the sidewalk and street curb, the abutting owner exercises control, subordinate only to the city's street easement; and the abutting owner is liable where his or her failure to maintain it in reasonably safe condition results in injury to a pedestrian. (7 C.A.3d 833.)

(c) "In this case each defendant had a species of ownership in the parking strip--the city as holder of the street easement and the county as holder of the underlying fee. More important, each had control--the city as holder of the public easement and the county as abutting owner. Like a private abutting owner, the county ... had the power of control both to prevent its deterioration and to remedy it. ... Coupled with its ownership of the underlying fee was a set of powers amounting to 'control' in the statutory sense." (7 C.A.3d 834.)

West's Key Number Digest, States k.112.2(3)

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b. Public Property.

2. Property Not Owned or Controlled.

5 Witkin Sum. Cal. Law Torts § 251

[§ 251] Property Not Owned or Controlled.

Property cannot be "public property" unless owned or controlled by the public entity. (*Govt.C. 830(c)*, supra, §250; see *Avey v. Santa Clara* (1968) 257 C.A.2d 708, 712, 65 C.R. 181 [highway, with island in middle, was owned and controlled by state; summary judgment for defendant city and defendant county]; *Petersen v. Vallejo* (1968) 259 C.A.2d 757, 776, 66 C.R. 776 [property was, by reason of freeway agreement, in possession and control of state; summary judgment for city]; *Goss v. California* (1978) 82 C.A.3d 426, 430, 147 C.R. 110 [hole in county road reached by off-ramp, 150 feet from state highway and 53 feet from state's right-of-way boundary; distinguishing cases finding liability because of conditions on "adjacent property" (infra, §269)]; *Aaitui v. Grande Properties* (1994) 29 C.A.4th 1369, 1377, 1378, 35 C.R.2d 123 [although city inspected and issued safety violations for apartment swimming pool, it was privately owned and controlled; for purposes of *Govt.C. 830(c)*, municipal regulation of private pools does not, in itself, make pools public property].)

Control is the important factor where the property is not publicly owned. (See *Mamola v. San Bernardino* (1979) 94 C.A.3d 781, 788, 156 C.R. 614 [state relinquished ownership of road to county, reserving easement for ingress and egress; state had no control and could not be liable]; *Tolan v. California* (1979) 100 C.A.3d 980, 983, 161 C.R. 307 [state relinquished control and ownership of street to city]; *Longfellow v. San Luis Obispo* (1983) 144 C.A.3d 379, 383, 192 C.R. 580 [following *Tolan*; county did not own or control city property at time of injury]; *Searcy v. Hemet Unified School Dist.* (1986) 177 C.A.3d 792, 798, 223 C.R. 206 [portion of public street considerable distance from school grounds, used by school children as "short cut" on way home; school district not liable]; *Chatman v. Alameda County Flood Control & Water Conservation Dist.* (1986) 183 C.A.3d 424, 431, 228 C.R. 257 [defendant flood control district was not liable for subsidence damage caused by collapse of private developer's culvert; district did not build, accept, approve, or maintain culvert]; *Ramsey v. Lake Elsinore* (1990) 220 C.A.3d 1530, 1539, 270 C.R. 198 [city had no control over portion of state highway where accident occurred].)

Specifically excluded from the definition of "public property" are "easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity." (*Govt.C. 830(c)*.) The purpose of this exclusion is "in order to make clear that it is not the duty of the owner of the servient estate to inspect such property for hazards; rather, it is the duty of the person or entity that owns the easement, encroachment,

etc." (Law Revision Com. Comment to *Govt.C. 830*.)

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3. Unimproved Property.

aa. Property in Natural Condition: General Rule of Nonliability.

5 *Witkin Sum. Cal. Law Torts* § 252

[§ 252] Property in Natural Condition: General Rule of Nonliability.

For practical reasons, liability is denied for injury caused by "a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." (*Govt.C. 831.2*; see *McCauley v. San Diego* (1987) 190 C.A.3d 981, 986, 992, 235 C.R. 732, *infra*, §254 [no duty to warn of dangerous natural conditions on unimproved property]; C.E.B., 2 Government Tort Liability Practice 4th, §12.82 et seq.; 57 *Am.Jur.2d* (2001 ed.), *Municipal, County, School, and State Tort Liability* §243.) This statute provides an absolute immunity for these injuries. (Legislative Com. Comment to *Govt.C. 831.2*.)

Govt.C. 831.2 furthers a legislative policy "to permit the members of the public to use public property in its natural condition and to provide trails for hikers and riders and roads for campers into the primitive regions of the State." Because "the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use ... , it is not unreasonable to expect persons who voluntarily use unimproved public property in its natural condition to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received." (Legislative Com. Comment to *Govt.C. 831.2*.)

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bb. Illustrations.

5 *Witkin Sum. Cal. Law Torts* § 253

[§ 253] Illustrations.

(1) *In General.* The *Govt.C. 831.2* immunity is frequently applied. (See *Kuykendall v. California* (1986) 178 C.A.3d 563, 566, 223 C.R. 763 [immunity applied with respect to canyon, even though unidentified person had attached rope to overhanging tree limb]; *Winterburn v. Pomona* (1986) 186 C.A.3d 878, 881, 231 C.R. 105 [immunity where plaintiffs' son was killed when debris fell from roof of cave located in defendant city's "greenbelt"].)

(2) *Beaches.* A cliff on the beach of a state park, with no park facilities in the area, has been held to constitute unimproved property in its natural condition despite the existence of lifeguard towers and restrooms on other parts of the beach. (See *Fuller v. California* (1975) 51 C.A.3d 926, 937, 125 C.R. 586.) The same result has been reached with respect to injuries on a sandbar. (See *Geffen v. Los Angeles* (1987) 197 C.A.3d 188, 194, 242 C.R. 492 [sandbar was unimproved property even though surrounding beach had lifeguard building and towers, parking lots, food concessions, promenade, breakwater, pier, signs, and rock groin]; *Morin v. Los Angeles* (1989) 215 C.A.3d 184, 189, 263 C.R. 479 [sandbar was natural condition even assuming it was result of both natural forces and human activity; citing *Fuller*]; *Tessier v. Newport Beach* (1990) 219 C.A.3d 310, 314, 268 C.R. 233 [sandbar held natural condition; following *Morin*].)

In *Mercer v. California* (1987) 197 C.A.3d 158, 242 C.R. 701, sand dunes within the vehicular recreation area of a state beach were held to be unimproved property in natural condition. Various signs and fences did not change the physical nature or characteristics of the property at the location of plaintiff's injury, as required to remove the immunity conferred by *Govt.C. 831.2*. (197 C.A.3d 165.) (See *Bartlett v. California* (1988) 199 C.A.3d 392, 397, 245 C.R. 32 [following *Mercer*].)

Knight v. Capitola (1992) 4 C.A.4th 918, 6 C.R.2d 874, involved a body surfing accident on a public beach. The beach had been rebuilt 17 years earlier, when imported sand was deposited to replace a beach that had washed away and a rock groin was constructed to preserve the new beach. *Held*, summary judgment for defendant city affirmed. *Govt.C. 831.2* applies to *all* public beaches, so long as the accident was caused by a natural condition. (4 C.A.4th 927.) "[I]t appears as a matter of law that at most a combination of human activities and natural forces created the condition which

resulted in Knight's tragic injuries. Such a combination of forces, particularly where it produces, over a long period of time, a condition similar to those which occur in nature, has repeatedly been held to come within the immunity" provided by *Govt.C. 831.2*. (4 *C.A.4th* 929.) (See *Valenzuela v. San Diego* (1991) 234 *C.A.3d* 258, 261, 262, 286 *C.R. 1* [plaintiff injured when he dove from projecting rock on beach and struck his head on bottom]; *Lupash v. Seal Beach* (1999) 75 *C.A.4th* 1428, 1434, footnote 3, 89 *C.R.2d* 920 [public entities were immune from liability to children in city-sponsored junior lifeguard program, where injury was result of breaking waves and uneven ocean floor and entities did nothing to increase inherent risk of harm from ocean activities]; 26 *Pacific L. J. 1, 11* [Knight].)

(3) *Lakes*. As originally proposed, the immunity of *Govt.C. 831.2* was limited to a "natural lake." In enacting the section to refer to "any lake," the Legislature made it clear that the immunity extended to all public lakes. (*Osgood v. Shasta* (1975) 50 *C.A.3d* 586, 589, 590, 123 *C.R. 442* [Shasta Lake]; *Keyes v. Santa Clara Valley Water Dist.* (1982) 128 *C.A.3d* 882, 887, 180 *C.R. 586* [Lexington Reservoir]; *Eben v. California* (1982) 130 *C.A.3d* 416, 419, 422, 181 *C.R. 714* [Millerton Lake].)

(4) *Rivers*. A river is unimproved public property (*Govt.C. 831.2*), and a snag, consisting of uprooted trees washed away by erosive action and held together by mud and roots, is a "natural condition." (*Sacramento v. Superior Court* (Kuhn) (1979) 89 *C.A.3d* 215, 218, 152 *C.R. 391*.)

(5) *Wild Animals*. In *Arroyo v. California* (1995) 34 *C.A.4th* 755, 40 *C.R.2d* 627, plaintiff child, who was attacked by a mountain lion while hiking on a marked trail in a state park, sued defendant state for personal injuries. The trial judge sustained defendant's demurrer without leave to amend. *Held*, affirmed.

(a) Wild animals are a natural part of the condition of unimproved public property within the meaning of *Govt.C. 831.2*. It is the state's policy to encourage the use of hiking trails in primitive public regions. To implement this policy, the statute relieves the state from the burden of making those areas safe and consequently from defending suits for injuries arising from trail use. The statute requires the public to assume the risk of using hiking trails in state parks. (34 *C.A.4th* 761.)

(b) The immunity of *Govt.C. 831.2* is not restricted to conditions of real property. Under *Govt.C. 830(c)* (supra, §250), "property of a public entity" and "public property" include "personal property owned or controlled by the public entity," and wild animals fall within this definition, because they are owned by the state. (34 *C.A.4th* 762.)

(c) The state has no duty to place warning signs in state parks to alert people to the dangers of mountain lions on hiking trails. Liability for failure to warn is inconsistent with the absolute immunity that *Govt.C. 831.2* provides. That immunity applies whether or not the dangerous condition amounted to a hidden trap and whether or not the public entity had knowledge of it. (34 *C.A.4th* 762.)

(d) The trial judge properly refused plaintiff leave to amend to allege that defendant had placed signs in the park warning of snakes and ticks. The immunity of *Govt.C. 831.2* permits public entities to provide signs without incurring potential liability for failure to notify of every possible danger. Also, defendant did not negligently assume a voluntary protective service towards plaintiff merely because its signs, brochures, and verbal information generally indicated that, except for "various dangers," the park was reasonably safe. Absolute immunity is the rule, so long as the public entity's conduct does not amount to negligence in creating or exacerbating the degree of danger normally associated with a natural condition. (34 *C.A.4th* 763.)

SUPPLEMENT: [This section is current through the latest supplement]



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5 Witkin Sum. Cal. Law Torts § 254

[§ 254] Effect of Assuming Duty To Protect Public.

(1) *In General.* In *Gonzales v. San Diego* (1982) 130 C.A.3d 882, 182 C.R. 73, plaintiffs sued for wrongful death of their mother, who was drowned while swimming in a beach and surf area for which defendant city provided lifeguard and police protection. The complaint alleged that by providing these services, defendant assumed the obligation to post warnings of unsafe conditions such as the dangerous rip tide that resulted in the death of the decedent. *Held*, judgment for defendant on demurrer reversed.

(a) *Govt.C. 831.2* (supra, §252) applies to *natural* conditions, and "the complaint describes a hybrid dangerous condition, partially natural and partially artificial in character, the result of a combination of a natural defect within the property and the third party conduct of the City." (130 C.A.3d 885.)

(b) "[W]here a public entity *voluntarily assumes a protective duty* toward certain members of the public, even though there is no liability for its acts or omissions, upon undertaking the action on behalf of the public and *inducing a public reliance*, the entity will be held to the same standard of care as a private individual or entity." (130 C.A.3d 887.) (See 23 *San Diego L. Rev.* 723 [criticizing holding].)

Gonzales was distinguished in *McCauley v. San Diego* (1987) 190 C.A.3d 981, 235 C.R. 732. Plaintiff became intoxicated at an evening beach party in defendant city's recreational area, and fell off a cliff. The theory of the action was that defendant's posting of signs warning of false and slippery trails was an assumption of responsibility, and that the signs were insufficient to protect the public from the dangerous conditions of eroding cliffs. *Held*, judgment for defendant affirmed.

(a) The protective services voluntarily assumed in *Gonzales* "were active and ongoing and of the character to induce reasonable public reliance." Here, "the passive nature of a series of warning signs is designed simply to warn the people to take care if they assume the risk in using the unimproved public property in its natural condition." (190 C.A.3d 988.)

(b) In *Gonzales*, the city's voluntary assumption of the duty "induced public reliance upon the expertise of those who provided the lifeguard service in detecting and warning of the existence of dangerous rip currents, latent in character to the majority of the unknowing, swimming public." (190 C.A.3d 989.) Here, there was no hidden condition, only an undisguised cliff openly dangerous. And the city does not waive its statutory immunity merely because the signs were not visible at night. (190 C.A.3d 989.) "Indeed, *Gonzales* only stands for the proposition section 831.2 will not cloak a public entity with immunity *when its own conduct is partially responsible for inducing a person to be victimized by a dangerous condition of the nature of a hidden trap.*" (190 C.A.3d 989.)

(c) Public policy considerations support the conclusion reached here. The city could have avoided any liability by simply not posting any warning signs, but public policy is promoted by the minimally burdensome and passive intervention of sign placement. To allow public entities to place warnings of purely natural conditions on unimproved public property, without jeopardizing their Govt.C. 831.2 immunity, fosters the statute's legislative purpose. "A warning-signage program which does not contribute to the dangerousness of a natural condition constitutes a reasonable middle approach for a public entity to pursue, guaranteeing the retention of the cloak of immunity while promoting public safety by encouraging the governmental entity to warn the using public of the existence of known dangerous natural conditions." (190 C.A.3d 991.)

Subsequent decisions, following *McCauley*, have similarly denied liability and applied immunity, finding that the public entity's conduct did not induce reliance by the victim. (See *Geffen v. Los Angeles* (1987) 197 C.A.3d 188, 192, 242 C.R. 492 [sandbar hit by plaintiff when he dived into ocean]; *Morin v. Los Angeles* (1989) 215 C.A.3d 184, 193, 263 C.R. 479 [same]; *Mercer v. California* (1987) 197 C.A.3d 158, 166, 242 C.R. 701 [sand dunes used by all-terrain vehicles]; *Bartlett v. California* (1988) 199 C.A.3d 392, 399, 245 C.R. 32 [same]; *Santa Cruz v. Superior Court* (1988) 198 C.A.3d 999, 1005, 244 C.R. 105 [sandbar struck by plaintiff when he dived into river]; *Rombalski v. Laguna Beach* (1989) 213 C.A.3d 842, 852, 261 C.R. 820 [ocean floor struck by plaintiff when he dived from rock when tide was out]; *Knight v. Capitola* (1992) 4 C.A.4th 918, 930, 6 C.R.2d 874, supra, §253 [waves breaking closer than normal to shore and causing bodysurfer to hit ocean floor].)

(2) *Statutory Rejection of Liability in Beach Cases.* Govt.C. 831.21, enacted in 1987, partially rejects the liability imposed by *Gonzales*: "Public beaches shall be deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services, or signs." (Govt.C. 831.21(a).)

These provisions "shall apply only to natural conditions of public property and shall not limit any liability or immunity that may otherwise exist pursuant to this division." (Govt.C. 831.21(a).)

SUPPLEMENT: [This section is current through the latest supplement]



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dd. Roads, Trails, and Paths.

5 Witkin Sum. Cal. Law Torts § 255

[§ 255] Roads, Trails, and Paths.

(1) *In Recreational Areas or on Easements of Way.* Public entities have immunity where the injury is caused by the condition of any of the following:

(a) An "unpaved road" that "provides access" to "fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas" and that is not (1) a city street or highway, (2) a county, state, or federal highway, or (3) a public street or highway of a district formed for the improvement or building of public streets or highways. (*Govt.C. 831.4(a)*; see Legislative Com. Comment to *Govt.C. 831.4* [provision provides absolute immunity from liability for injuries resulting from condition of such roads as fire protection roads in timbered areas and irrigation district maintenance roads].)

(b) A "trail" that is used for these purposes. (*Govt.C. 831.4(b)*.)

(c) A "paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk which constitutes a hazard to health or safety." These warnings "shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any unpaved pathways or roads." (*Govt.C. 831.4(c)*.)

In *Giannuzzi v. California* (1993) 17 C.A.4th 462, 21 C.R.2d 335, the court analyzed the legislative history of *Govt.C. 831.4* and concluded that it embraces the following three related immunities: "(1) subdivision (a) precludes liability for injuries caused by the condition of unpaved roads providing access to 'fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas,' (2) subdivision (b) precludes liability for injuries caused by the condition of trails which are used for these activities, and (3) subdivision (c) precludes liability for injuries caused by the condition of any paved trail, walkway, path or sidewalk located on an 'easement of way which ... provides access to any unimproved property.'" (17 C.A.4th 466.) (See *Armenio v. San Mateo* (1994) 28 C.A.4th 413, 417, 33 C.R.2d 631 [*Govt.C. 831.4* applied to bicycle accident occurring on paved bicycle trail

in public park]; *California v. Superior Court (Young)* (1995) 32 C.A.4th 325, 328, 329, 39 C.R.2d 1 [state immune from liability to woman who fell from horse on state park trail when horse was spooked by mountain bicyclist]; *Carroll v. Los Angeles* (1997) 60 C.A.4th 606, 608, 70 C.R.2d 504 [paved bicycle path along Pacific Ocean was "trail" under Govt.C. 831.4; although path provided access to scenic view, statute applies to trail that is itself object of recreational activity]; *Farnham v. Los Angeles* (1998) 68 C.A.4th 1097, 1099, 80 C.R.2d 720 [paved bicycle path was "trail" even if it could be considered part of streets and highway system, because it was not open to public in general and because Govt.C. 831.4 does not exempt trails that are part of this system]; *Treweek v. Napa* (2000) 85 C.A.4th 221, 224, 101 C.R.2d 883 [standing alone, boat ramp is not "trail" for purposes of Govt.C. 831.4; however, statute might apply where ramp was part and essential to full use of trail]; 11 *Pacific L. J.* 665.)

(2) *Nondedicated Road.* A public entity is not liable for the grading, maintenance, repair, reconstruction, or replacement of a road that has not been accepted as part of the entity's road system, provided that the work is done with reasonable care and does not leave the road in a more dangerous or unsafe condition. Nor does the undertaking of this work give rise to any duty to continue it. (Govt.C. 831.3; see *Sts. & H.C. 941, 12 Summary* (10th), *Real Property*, §243 [immunity for failure to maintain road not yet accepted as part of county road system].)

Matthews v. San Bernardino (1991) 233 C.A.3d 1623, 285 C.R. 422, explained the relationship between Govt.C. 831.3 and *Sts. & H.C. 941* as follows: "Section 941 states that a county is not liable for *failure to maintain* unaccepted roads, while section 831.3 merely states that *if* public entities perform an act of maintaining, grading or repairing unaccepted roads, they may be liable *if* the work is not done with reasonable care and *if* the work leaves the road in a more dangerous or unsafe condition than it was in before the work began. Simply stated, section 941 immunizes a county from any claimed nonfeasance regarding its lack of maintaining unaccepted roads. Section 831.3 addresses in part a public entity's misfeasance in its action of maintaining, grading or repairing an unaccepted road. ... It is also noteworthy that section 941 is limited to counties, while section 831.3 includes all public entities." (233 C.A.3d 1633.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In Recreational Areas or on Easements of Way.* See *Amberger-Warren v. Piedmont* (2006) 143 C.A.4th 1074, 1083, 49 C.R.3d 631 [pathway in park could be characterized as "trail" under Govt.C. 831.4(b), even assuming that pathway could also be characterized as "sidewalk" and that Govt.C. 831.4(c) distinguishes between trails and sidewalks; Govt.C. 831.4(c) does not limit application of Govt.C. 831.4(b)]; *Prokop v. Los Angeles* (2007) 150 C.A.4th 1332, 1338, 59 C.R.3d 355 [paved bikeway was "trail" within meaning of Govt.C. 831.4; following *Farnham v. Los Angeles* (1998) 68 C.A.4th 1097, 80 C.R.2d 720, text, p. 425].

In *Astenius v. California* (2005) 126 C.A.4th 472, 23 C.R.3d 877, plaintiffs brought wrongful death actions against defendant state after their mother died while driving an off-highway vehicle in a state recreation area. *Held*, judgment for defendant on demurrer affirmed.

(a) Govt.C. 831.4 grants immunity to the state. Plaintiffs contended that Govt.C. 831.4 applies only to unimproved land, citing the Legislative Committee Comment to Govt.C. 831.2 (text, §252), which states in part that Govt.C. 831.2 and 831.4 provide absolute immunity from liability for injuries resulting from the natural conditions of a state park area where the only improvements are recreational roads and trails. Plaintiffs' reference to a legislative committee's comment "is unconvincing. The best place to find legislative intent is in the language of the statute. When the Legislature has intended to limit governmental immunity to unimproved property, it has expressly said so." (126 C.A.4th 476.) Thus, Govt.C. 831.2 limits immunity to injuries arising from "a natural condition of any unimproved public property." Govt.C. 831.4 contains no such limiting language and this court declines to add it. (126 C.A.4th 476.)

(b) Plaintiffs further contended that the state is not entitled to immunity under Govt.C. 831.4 because it failed to warn of the dangerous condition that caused the accident. But nothing in that statute makes immunity contingent on giving proper warnings. The immunity is absolute. For the same reason, the fact that the state charged a fee to enter the recreational area does not abrogate the state's immunity. (126 C.A.4th 476.)

(c) Nor does the state's duty under *Pub.Res.C. 5090.32* and *5090.35* to maintain trails affect its immunity. Even assuming that those statutes create a mandatory duty, any breach of that duty comes within the scope of *Govt.C. 831.4*. (126 C.A.4th 476.)



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5 Witkin Sum. Cal. Law Torts § 256

[§ 256] Tidelands, Submerged Lands, and School Lands.

Certain lands owned by the state but neither improved nor occupied are subject to a specific grant of immunity:

(1) Ungranted "tidelands," "submerged lands," and "beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits." (*Govt.C. 831.6(a).*)

(2) Unsold portions of specified "school lands." (*Govt.C. 831.6(b).*)

This statute "exempts the State from liability ... for conditions of the vast amounts of property, title to which has vested in the State because of its sovereignty, but which it has never occupied or improved." (Law Revision Com. Comment to *Govt.C. 831.6.*)

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ff. Injury or Damage on Adjacent Land.

5 Witkin Sum. Cal. Law Torts § 257

[§ 257] Injury or Damage on Adjacent Land.

(1) *General Rule of Liability.* In *Milligan v. Laguna Beach* (1983) 34 C.3d 829, 196 C.R. 38, 670 P.2d 1121, eucalyptus trees growing on unimproved property of defendant city fell, causing injury to plaintiffs' residence on adjacent property. The city, relying on the broad language of Govt.C. 831.2, contended that the absolute immunity applied to any injury caused by a natural condition on that property. *Held*, the immunity was inapplicable to injuries caused to *nonusers on adjacent property*. The legislative policy underlying the statute--that governmental agencies might prohibit the use of public property in its natural condition if they were put to the expense of making it safe for recreational use--had nothing to do with an injury sustained by an adjacent landowner from a falling tree. "[W]hile the natural condition immunity may be applicable when the decayed tree limb falls on a user of the governmental property, it is not applicable when the limb injures adjacent property or persons on adjacent property because there is no danger that the governmental agency will close the property to use." (34 C.3d 834.)

(2) *Exception for Land Failure.* The *Milligan* holding was partly nullified by the enactment of Govt.C. 831.25 in 1984. (See 16 *Pacific L. J.* 723.) Under this statute, a public entity is not liable "for any damage or injury to property, or for emotional distress unless the plaintiff has suffered substantial physical injury, off the public entity's property caused by land failure of any unimproved public property if the land failure was caused by a natural condition of the unimproved public property." (Govt.C. 831.25(a); see Govt.C. 831.25(e) [nothing in statute limits immunity provided by Govt.C. 831.2 (supra, §252)]; Govt.C. 831.25(f) [nothing in statute "creates a duty of care or basis of liability for damage or injury to property or of liability for emotional distress"]; *Schooler v. California* (2000) 85 C.A.4th 1004, 1009, 102 C.R.2d 343 [unsolicited pedestrian traffic on unimproved bluff adjacent to public beach did not, as matter of law, alter bluff's "natural condition" within meaning of Govt.C. 831.25; generally, conditions that occur in nature but are produced by combination of human and natural forces are natural conditions as matter of law].)

However, the statute "shall not benefit any public entity or public employee who had actual notice of probable damage that is likely to occur outside the public property because of land failure and who fails to give a reasonable warning of the danger to the affected property owners." (Govt.C. 831.25(d).) No liability arises from giving such a warning. (Govt.C. 831.25(d).) (See 20 *Pacific L. J.* 719.)

For purposes of the statute, "a natural condition exists and property shall be deemed unimproved notwithstanding the intervention of minor improvements made for the preservation or prudent management of the property in its unimproved state that did not contribute to the land failure." (*Govt.C. 831.25(b)*.) "Land failure," under the statute, means "any movement of land, including a landslide, mudslide, creep, subsidence, and any other gradual or rapid movement of land." (*Govt.C. 831.25(c)*.)

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c. Dangerous Condition as Cause.

1. In General.

aa. Elements of Liability.

5 Witkin Sum. Cal. Law Torts § 258

[§ 258] Elements of Liability.

"Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property" if the plaintiff establishes all of the following (*Govt.C. 835*):

- (1) That the property "was in a dangerous condition at the time of the injury." (*Govt.C. 835*.)
- (2) That the injury "was proximately caused by the dangerous condition." (*Govt.C. 835*.)
- (3) That the dangerous condition "created a reasonably foreseeable risk of the kind of injury which was incurred." (*Govt.C. 835*.)
- (4) Either that the dangerous condition was created by an employee's wrongful act or omission within the scope of employment (*Govt.C. 835(a)*) or that the entity had actual or constructive notice of the dangerous condition in time to take protective measures (*Govt.C. 835(b)*). (See *Paterno v. California* (1999) 74 C.A.4th 68, 98, 87 C.R.2d 754 [although levee with water against it was in "dangerous condition" and flooding was foreseeable result, issue remained whether dangerous condition was proximate result of defendant's negligence]; C.E.B., 2 Government Tort Liability Practice 4th, §12.15 et seq.; 50 Proof of Facts 2d 63 [failure to install median barrier]; 14 Proof of Facts 3d 527 [negligent design or maintenance of curve]; 65 Proof of Facts 3d 311 [governmental liability for injury to landowner's property from road construction on neighboring land]; 97 A.L.R.3d 11 [liability where ice or snow on surface of highway or street]; 98 A.L.R.3d 101 [liability for failure to repair pothole in highway or street]; 98 A.L.R.3d 439 [liability for defect or obstruction on roadside parkway or parking strip]; 2 A.L.R.4th 635 [liability for design, construction, or failure to warn of narrow bridge]; 19 A.L.R.4th 532 [liability for defect or obstruction in shoulder of street or highway]; 58 A.L.R. 4th 559 [liability as to highway median barriers]; 58 A.L.R. 4th 1197 [liability for injury to roller skater caused by sidewalk or street defects]; 111 A.L.R.5th 579 [liability of city or utility for injury resulting from defective streetlight]; BAJI, Nos. 11.53, 11.54, 16.30; CACI, Nos. 1100 et seq., VF-1100, VF-1101; on what constitutes dangerous condition, see *infra*, §259.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Metcalfe v. San Joaquin* (2008) 42 C.4th 1121, 72 C.R.3d 382, 176 P.3d 654, plaintiff motorist brought an action against defendant county under the Government Claims Act to recover for injuries he suffered in a vehicle collision at a T-intersection controlled by the county. Plaintiff alleged that the placement of signage and road markings constituted a dangerous condition of public property. The jury found that, although a dangerous condition existed, the county did not negligently or wrongfully create the condition, and that the county did not have notice of the condition for a sufficient time to have protected against it. Accordingly, the trial court entered judgment for the county. The Court of Appeal affirmed. *Held*, affirmed.

(a) *Plaintiff forfeited claim of instructional error.* Plaintiff agreed at trial to instructions requiring the jury to find either negligence or notice for plaintiff to prevail. Therefore, he may not argue on appeal that he was not required to establish negligence. (42 C.4th 1130.)

(b) *County was not liable in absence of either negligence or notice.* To provide guidance to future courts, the court discussed the merits of that issue. The plain language of Govt.C. 835 requires, as a basis for liability, either that the county acted negligently or wrongfully in creating the dangerous condition (Govt.C. 835(a)) or had notice of the condition (Govt.C. 835(b)). Govt.C. 835(a) imposed on plaintiff the burden of showing, under ordinary tort principles, unreasonable conduct by the county in light of the foreseeable risk of harm. The mere existence of the dangerous condition, even if deliberately created by the county, did not establish the requisite negligence or wrongdoing. (42 C.4th 1131.)

(c) *County had affirmative defense to negligence.* Govt.C. 835.4, providing that a public entity is not liable for a negligently created dangerous condition of public property if the public entity establishes that the act or omission that created the condition was reasonable, is an affirmative defense, unique to public entities, where the plaintiff establishes the public entity's negligence as a basis for liability for a dangerous condition of public property under Govt.C. 835(a). Public entities may defend against liability on the basis that, because of financial or political constraints, the public entity may not be able to accomplish what reasonably would be expected of a private entity. Govt.C. 835.4 does not place on the public entity the burden of showing its reasonableness in the absence of the plaintiff's showing of negligence. (42 C.4th 1136.)

One justice filed a concurring and dissenting opinion, agreeing that plaintiff's request for the instructions barred his contention that they were erroneous, but disagreeing on plaintiff's burden of proof as to negligence. (42 C.4th 1139.)

See 86 Proof of Facts 3d 327 [liability of municipality for sidewalk defects]; 92 Proof of Facts 3d 461 [liability of public authority for injury caused by pothole in street or highway]; 12 A.L.R.6th 645 [governmental liability for injury to bicyclist due to defect or obstruction in public roadway or sidewalk].



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bb. What Constitutes Dangerous Condition.

5 Witkin Sum. Cal. Law Torts § 259

[§ 259] What Constitutes Dangerous Condition.

(1) *In General*. "Dangerous condition" means a condition "that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (*Govt.C. 830(a)*; on minor or trivial defects, see *infra*, §261.) Thus, the elements of a dangerous condition are (1) "foreseeable use" by persons themselves acting with due care, and (2) a "substantial" risk of injury nevertheless. (*Swaner v. Santa Monica* (1984) 150 C.A.3d 789, 799, 198 C.R. 208; *Childs v. Santa Barbara* (2004) 115 C.A.4th 64, 74, 8 C.R.3d 823; see *Dahlquist v. California* (1966) 243 C.A.2d 208, 211, 52 C.R. 324 [pleading held sufficient]; *Callahan v. San Francisco* (1967) 249 C.A.2d 696, 703, 57 C.R. 639 [liability extends to persons generally, not just those acting with due care].) The standard applied in determining whether a dangerous condition existed is an objective one. (*Huffman v. Poway* (2000) 84 C.A.4th 975, 991, 101 C.R.2d 325 [whether open stage trapdoor met standard was question of fact].)

The phrase "used with due care" does not require the plaintiff to prove due care on the part of another tortfeasor, e.g., a bus driver, whose act contributed to the injury. "Rather, the statute means that the condition is dangerous if it creates a substantial risk of harm when used with due care by the public generally, as distinguished from the particular person charged as concurrent tortfeasor." (*Murrell v. California* (1975) 47 C.A.3d 264, 267, 269, 120 C.R. 812 [criticizing confusing instructions that failed to make the distinction clear]; see *Mathews v. California* (1978) 82 C.A.3d 116, 121, 145 C.R. 443, *infra*, §265 [quoting *Murrell*].) If it is shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, the property is not dangerous within the meaning of *Govt.C. 830(a)*. (*Fredette v. Long Beach* (1986) 187 C.A.3d 122, 131, 231 C.R. 598.)

(2) *Property Must Be That of Entity*. The public entity is liable only for the dangerous condition of *its own property*. However, it may be liable if that dangerous condition creates a risk of injury to adjacent property or persons on adjacent property, e.g., where a tree overhangs, or explosives are stored. (Law Revision Com. Comment to *Govt.C. 830*; on effect of unsafe condition of adjoining property, see *infra*, §269.)

(3) *Evidence of Happening of Accident or Subsequent Precautions*. Except where the doctrine of *res ipsa loquitur*

applies, the happening of the accident that results in the injury is not in and of itself evidence that public property was in a dangerous condition. Also, the fact that action was taken after the injury occurred to protect against a condition of public property is not evidence that the property was in a dangerous condition at the time of the injury. (*Govt.C.* 830.5; see *Brown v. Poway Unified School Dist.* (1993) 4 C.4th 820, 15 C.R.2d 679, 843 P.2d 624, 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §151 [discussing *res ipsa loquitur* in dangerous conditions cases, and rejecting contention that doctrine precludes summary judgment for public entity]; on doctrine of *res ipsa loquitur*, see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §114 et seq.; on evidence of subsequent precautions, see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §163 et seq.)

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cc. Illustrations of Dangerous and Non-Dangerous Conditions.

5 *Witkin Sum. Cal. Law Torts* § 260

[§ 260] Illustrations of Dangerous and Non-Dangerous Conditions.

(1) *Dangerous Conditions*. The following are illustrative of conditions found to be dangerous:

Ducey v. Argo Sales Co. (1979) 25 C.3d 707, 715, 718, 720, 159 C.R. 835, 602 P.2d 755 [reviewing cases and upholding liability of state for failing to erect median barrier in freeway].

Harland v. California (1977) 75 C.A.3d 475, 486, footnote 4, 142 C.R. 201 [bridge with various defects including guardrail which propelled driver of another vehicle across center median strip].

Morris v. California (1979) 89 C.A.3d 962, 966, 153 C.R. 117 [previously damaged and unrepaired median barrier in freeway].

Mamola v. San Bernardino (1979) 94 C.A.3d 781, 791, 156 C.R. 614 [inadequately barricaded open ravine adjacent to boulevard].

Erfurt v. California (1983) 141 C.A.3d 837, 843, 190 C.R. 569 [no warning to indicate that three-lane highway split off into two parts with pillar in the middle].

Constantinescu v. Conejo Valley Unified School Dist. (1993) 16 C.A.4th 1466, 1473, 20 C.R.2d 734 [heavily congested loading zone used to drop off and pick up young school children, and lacking any barrier between curb and nearby waiting area].

Childs v. Santa Barbara (2004) 115 C.A.4th 64, 74, 8 C.R.3d 823 [uneven surface of sidewalk].

(2) *Conditions That Are Not Dangerous*. The following are illustrative of conditions found not dangerous:

Rombalski v. Laguna Beach (1989) 213 C.A.3d 842, 849, 261 C.R. 820 [rock from which plaintiff dived into ocean after attempting to time surge of tide and after being warned not to dive from rocks].

Mathews v. Cerritos (1992) 2 C.A.4th 1380, 1385, 4 C.R.2d 16 [extremely steep, wet, grassy hill on which 8-year-old boy rode bicycle even though he knew of danger and had been told not to ride by his parents].

Schonfeldt v. California (1998) 61 C.A.4th 1462, 1465, 72 C.R.2d 464 [teenager who scaled fence near highway and was injured when crossing roadway was unforeseeable user, and state was not liable; fact that fence was slightly lower than recommended by state maintenance manual guidelines did not establish dangerous condition of highway].

Plattner v. Riverside (1999) 69 C.A.4th 1441, 1444, 82 C.R.2d 211 [unlighted crosswalk; city had no duty to install streetlight, and crosswalk was no more dangerous with inoperative light than if city had not installed light at all].

Brenner v. El Cajon (2003) 113 C.A.4th 434, 440, 6 C.R.3d 316 [increase in volume and speed of vehicular traffic on widened public street was not in itself sufficient to constitute dangerous condition].

Milligan v. Golden Gate Bridge Highway & Trans. Dist. (2004) 120 C.A.4th 1, 7, 15 C.R.3d 25 [bridge district could not be held liable for failing to install suicide barrier; persons who use bridge to commit suicide are not using bridge in manner used by general public exercising ordinary care].

In *Dominguez v. Solano Irr. Dist.* (1991) 228 C.A.3d 1098, 279 C.R. 470, an 8-foot-high sound wall was constructed as a barrier between a housing development and a canal. A boy, under 12, scaled the wall and fell into the canal. Affirming summary judgment for defendant, the court said: "Numerous California cases have held that public entities have no duty, as a matter of law, to prevent members of the public--including young children--from scaling walls and fences erected for the purpose of keeping them out of areas of relative danger." (228 C.A.3d 1103.)

In *Lompoc Unified School Dist. v. Superior Court* (1993) 20 C.A.4th 1688, 26 C.R.2d 122, plaintiff was injured when he was struck by a motorist who had been distracted by a football game being held on defendant school district's property. *Held*, defendant owed no duty to the users of an adjacent street to shroud its athletic field so that activities conducted thereon could not be seen or hear by passing motorists. If a motorist is exercising the requisite due care, the fact that an event is being held on property that he drives by poses no risk of harm (let alone a substantial risk) to pedestrians, bicyclists, or motorists on the adjacent public road. (20 C.A.4th 1697.)

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(2) *Conditions That Are Not Dangerous.* The following decisions illustrate conditions found not dangerous:

Dina v. People (2007) 151 C.A.4th 1029, 1053, 60 C.R.3d 559 [noise, dust, and vibrations emanating from highway construction did not render state liable for cracks later appearing in nearby homes and patio slabs; Govt.C. 835 applies only where there is some defect in public property itself and causal connection is shown between defect and injury].

Biscotti v. Yuba City Unified School Dist. (2007) 158 C.A.4th 554, 557, 69 C.R.3d 825 [chain link fence topped with metal prongs, separating school property from neighboring property, was not dangerous; 9-year-old boy climbed on bicycle propped against fence to reach oranges on neighbor's property; use was not foreseeable, and risk of injury was obvious even to child].

Sun v. Oakland (2008) 166 C.A.4th 1177, 1197, 83 C.R.3d 372 [intersection in which pedestrian was struck by negligent driver, where city had removed crosswalk markings when it installed bulb-out sidewalk extensions that shortened crossing distance, was not dangerous even though city had failed to comply with notice requirements for removing crosswalk (Veh.C. 21950.5); condition of intersection did not increase risk of injury caused by negligent drivers].



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dd. Minor or Trivial Defect.

5 *Witkin Sum. Cal. Law Torts* § 261

[§ 261] Minor or Trivial Defect.

A condition is not dangerous if the court determines as a matter of law that the risk was minor, trivial, or insignificant. (*Govt.C. 830.2*; see *Fielder v. Glendale* (1977) 71 C.A.3d 719, 734, 139 C.R. 876 [three-quarter-inch difference in the level of two adjoining slabs of sidewalk was not dangerous as matter of law]; *Ursino v. Big Boy Restaurants* (1987) 192 C.A.3d 394, 397, 398, 237 C.R. 413 [nongovernmental defendants may also assert triviality defense]; *Davis v. Pasadena* (1996) 42 C.A.4th 701, 703, 50 C.R.2d 8 [as matter of law, two flights of stairs converging at right angle, with diagonally rising handrail along line of convergence, do not constitute dangerous condition]; cf. *Dolquist v. Bellflower* (1987) 196 C.A.3d 261, 271, 241 C.R. 706 [trial judge improperly relied solely on size in determining that single piece of steel reinforcement extending one-quarter inch above surface of tire-stop was trivial defect as matter of law]; *Washington v. San Francisco* (1990) 219 C.A.3d 1531, 1539, 269 C.R. 58, *infra*, §264 [reduced visibility caused by freeway support pillars in middle of road and freeway's shadow were not minor, trivial, or insignificant risk as matter of law]; *Sambrano v. San Diego* (2001) 94 C.A.4th 225, 233, 114 C.R.2d 151 [fire ring containing hot coals covered by sand at city-owned park was not "dangerous condition" of property, where, over last 5 years, 130,700 had used park without similar incident; only reasonable conclusion was that when fire rings were used with due care by public, they posed only minor, insignificant, or trivial risk of injury].)

The concept of triviality has two facets, which were discussed in *Barone v. San Jose* (1978) 79 C.A.3d 284, 144 C.R. 836: (a) The court must first determine whether the defect is too trivial to be *dangerous* as a matter of law. (b) The larger question must then be considered, whether the nature of the defect, along with other circumstances, is sufficient to raise a *jury question* of *notice* of the dangerous character. "This initial inquiry into the question of 'dangerousness' would involve consideration of such matters as the size and location of the defect with respect to the surrounding area and lighting conditions and whether it has been the cause of other accidents; while the question of notice would necessarily involve not only the factors which are primarily related to 'dangerousness,' but also such matters as the visibility of the condition, the frequency of travel in the area and the probability, if any, that a reasonable inspection by the appropriate public officials would have discovered its existence and its dangerous character." (79 C.A.3d 291.) The court concluded that defendant city's showing--photographs of a crack in a sidewalk resulting in one part slightly

raised--was insufficient to justify summary judgment in its favor. (79 C.A.3d 291, 292.) (See *Antenor v. Los Angeles* (1985) 174 C.A.3d 477, 482, 220 C.R. 181 [quoting *Barone*].)

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See *Stathoulis v. Montebello* (2008) 164 C.A.4th 559, 568, 78 C.R.3d 910 [whether three one-inch gouges in street where plaintiff tripped and fell were trivial defect was triable question of fact in action against city, in view of conflicting evidence of how long gouges existed, whether city was aware of gouges, and whether gouges were jagged and contained loose material].



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ee. Recovery for Emotional Distress.

5 *Witkin Sum. Cal. Law Torts* § 262

[§ 262] Recovery for Emotional Distress.

In *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 C.3d 699, 190 C.R. 494, 660 P.2d 1168, two 15-year-old girls were drowned in a canal owned by a reclamation district, and actions for damages for wrongful death and emotional distress were brought by the mothers of the children and the sister of one of them. *Held*, there was no "canal immunity" (see *infra*, §273) or recreational purpose immunity (see *infra*, §1103), and recovery against the public entity for emotional distress was possible. *Govt.C. 835* imposes liability for a dangerous condition creating a reasonably foreseeable risk of injury, and *Govt.C. 810.8* defines injury to include injury to "feelings" of such a nature that it would be actionable if inflicted by a private person. "This imports a common law meaning into the statute which would include emotional distress." (33 C.3d 711.) And it is foreseeable that adult relatives would accompany children wading in a canal and would suffer emotional distress from watching them drown. (33 C.3d 711.)

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ff. Causation.

5 Witkin Sum. Cal. Law Torts § 263

[§ 263] Causation.

A plaintiff seeking to recover for injuries sustained as the result of an alleged dangerous condition must establish, as one of the elements of liability, that the injuries were proximately caused by the condition. (*Govt.C.* 835, *supra*, §258; see *Childs v. Santa Barbara* (2004) 115 C.A.4th 64, 74, 8 C.R.3d 823 [evidence supported finding that that county's failure to maintain sidewalk in safe condition proximately caused child's injury in fall from scooter]; *Milligan v. Golden Gate Bridge Highway & Trans. Dist.* (2004) 120 C.A.4th 1, 9, 15 C.R.3d 25 [alleged defects in design of bridge railing were not cause of death of person who committed suicide by leaping from bridge].) *Constance B. v. California* (1986) 178 C.A.3d 200, 223 C.R. 645, is illustrative. Defendant maintained a rest stop on a highway, with a restroom building close to the parking area. Plaintiff was sexually assaulted in the women's restroom at 12:30 a.m., and brought this action alleging that the rest stop was in a dangerous and defective condition because of improper patrolling, improper lighting, improper maintenance, and insufficient visibility. *Held*, summary judgment for defendant affirmed.

(a) *Legal duty established.* Defendant contended that in the absence of a showing of prior similar incidents at this or any other rest stop in the area, the assault was unforeseeable and consequently there was no duty to take precautions. But *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, *infra*, §1134, repudiated this view, and requires a holding that the duty exists under the facts of the present case. "The state's rest stops are open for public use at all hours of the day and night. ... The motoring public includes a portion of the criminal element of our society. ... It is predictable that such malefactors will take criminal opportunities in the course of their travels. We cannot conclude that the degree of predictability of criminal assaults under cover of darkness at rest stops is so low that a reasonably thoughtful administrator would *never* have a duty to anticipate such conduct and take account of it in guiding practical conduct concerning matters that might enhance the security of innocent users." (178 C.A.3d 206.)

(b) *Causation not established.* However, none of the theories offered by plaintiff supports a conclusion that the claimed dangerous condition was the cause of plaintiff's injury.

(1) The parking area was 15 yards from the restroom; but neither vision nor hearing was appreciably diminished by this displacement. (178 C.A.3d 209.)

(2) The entrances to the restroom were on the side of the building rather than the front; but no reasonable factfinder could conclude that the state should have recognized that side entrances to restrooms would increase the risk of criminal activity. (*178 C.A.3d 209.*)

(3) The placement of lights and trees produced heavy shadows at night which would provide concealment for an assailant; but the only inference to be drawn from the undisputed facts was that the assailant in this case was standing in the light. (*178 C.A.3d 211.*) (On governmental liability for injuries from criminal assaults on public property generally, see *infra*, §268.)

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aa. Lack of Signal.

5 *Witkin Sum. Cal. Law Torts* § 264

[§ 264] Lack of Signal.

Generally, a condition is not dangerous merely because of the failure to provide traffic control signals, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings, or other devices described in the Vehicle Code. (*Govt.C. 830.4, 830.8.*) *Govt.C. 830.4* relates to "regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in *Section 21460 of the Vehicle Code.*" *Govt.C. 830.8* relates more generally to "traffic or warning signals, signs, markings or devices described in the Vehicle Code," but excepts "liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in *Section 830.4*) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." In other words, liability may exist for failure to provide a signal or device of a type not listed in *Govt.C. 830.4* where the condition "constitutes a trap to a person using the street or highway with due care." (Law Revision Com. Comment to *Govt.C. 830.8.*) (See *Anderson v. Thousand Oaks* (1976) 65 C.A.3d 82, 93, 135 C.R. 296 [broad discretion allowed to public entity in placement of road control signs is limited by requirement under *Govt.C. 830.8* that there be adequate warning of dangerous conditions not reasonably apparent to motorists]; *Kessler v. California* (1988) 206 C.A.3d 317, 321, 253 C.R. 537 [*Govt.C. 830.8* applies not just to signs specifically described in Vehicle Code, but to all signs conforming to Department of Transportation standards]; *Frazier v. Sonoma* (1990) 218 C.A.3d 454, 459, 267 C.R. 39 [painted traffic islands, i.e., double yellow lines with white striping inside designed to keep turning traffic in right lane, are regulatory markings as described in *Govt.C. 830.4*]; *South Lake Tahoe v. Superior Court* (1998) 62 C.A.4th 971, 975, 73 C.R.2d 146 [exception in *Govt.C. 830.8* becomes applicable only when it is alleged that some type of sign, etc., other than those listed in *Govt.C. 830.4*, should have been provided]; *Brenner v. El Cajon* (2003) 113 C.A.4th 434, 442, 6 C.R.3d 316 [city's failure to install traffic regulation or safety devices to reduce dangers to pedestrians crossing busy public street was excluded by *Govt.C. 830.4* as basis for finding dangerous condition]; 31 Proof of Facts 3d 351 [establishing liability of state or local highway administration where injury results from failure to place or maintain adequate highway signs].)

The principles governing liability for failure to provide traffic signs and signals were discussed, and the two statutes

compared, in *Washington v. San Francisco* (1990) 219 C.A.3d 1531, 269 C.R. 58. The *Washington* case involved an action for the wrongful death of a motorcyclist who, while making a left turn from a street running under a freeway, was struck by an oncoming car. Visibility was reduced by metal support pillars in the middle of the street and by the freeway's shadow. *Held*, judgment for plaintiffs affirmed.

(a) *Govt.C. 830.4* provides immunity only where the alleged dangerous condition is caused *solely* by the absence of a regulatory traffic device or street marking. (219 C.A.3d 1534.) Here, there was expert testimony that the danger was caused not only by the absence of these markings or devices, but also by the limitations on visibility imposed by the pillars in the middle of the street and the freeway's shadow. (219 C.A.3d 1535.)

(b) Defendant argued that *Govt.C. 830.4* is inapplicable only if the failure to provide a traffic regulatory device results in a "trap." This argument is based on the presence of that exception in *Govt.C. 830.8*, but the two sections are distinguishable. *Govt.C. 830.8* is designed to provide immunity for the failure to provide regulatory or warning signals or devices *other than as described* in *Govt.C. 830.4*. (219 C.A.3d 1536.) Thus, defendant city's liability was not contingent on a finding that the condition constituted a trap. (219 C.A.3d 1537.)

In *South Lake Tahoe v. Superior Court*, *supra*, plaintiff was involved in a collision at an intersection that was normally controlled by stop signs, but the stop sign on the road on which he was traveling was missing due to another accident earlier on the same day. *Held*, the state was immune. Under *Govt.C. 830.4*, defendant had no duty to provide a stop sign, and thus, without incurring liability, could remove the sign at any time and for any reason. Drivers entering the intersection from the road with no stop sign were entering an uncontrolled intersection and were subject to the rules of the road applicable at such a crossing. (62 C.A.4th 976.)

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See *Weinstein v. Department of Trans.* (2006) 139 C.A.4th 52, 61, 42 C.R.3d 417 [simple absence of warning sign cannot create liability unless there is hidden dangerous condition]; *Cerna v. Oakland* (2008) 161 C.A.4th 1340, 1348, 75 C.R.3d 168 [intersection where children were struck was not in dangerous condition for failure to have blinking lights in pavement, crossing guard, or demarcation and signage required for crosswalks contiguous with school (*Veh.C. 21368*); failure to provide signals does not create dangerous condition, absence of guard is not physical characteristic of intersection, and closest school property was 50 feet from crosswalk].



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bb. Defective Signal.

5 *Witkin Sum. Cal. Law Torts* § 265

[§ 265] Defective Signal.

(1) *General Rules Apply.* The general rules of governmental liability for dangerous conditions (see *supra*, §249 et seq.) apply to defective traffic signals, signs, and markings. (See *Bakity v. Riverside* (1970) 12 C.A.3d 24, 30, 90 C.R. 541 [badly placed stop sign]; *Briggs v. California* (1971) 14 C.A.3d 489, 495, 92 C.R. 433 [mudslide on state highway, inadequate warning signs not clearly visible to passing motorists]; 1 A.L.R.5th 163 [governmental liability for detour accidents]; cf. *Mittenhuber v. Redondo Beach* (1983) 142 C.A.3d 1, 8, 9, 10, 190 C.R. 694 [no allegations that stop sign was defective or confusing or in unanticipated position]; *Chowdhury v. Los Angeles* (1995) 38 C.A.4th 1187, 1194, 45 C.R.2d 657 [city not liable for accident caused by motorist's failure to stop at intersection with obviously inoperative traffic signals during power outage; approaching motorists were bound by *Veh.C. 21800*, which transforms inoperative signal light into stop sign].)

Thus, the test of a dangerous condition that it be dangerous when used by the *public* with due care (see *supra*, §259) was applied in *Mathews v. California* (1978) 82 C.A.3d 116, 145 C.R. 443. Plaintiff alleged that the traffic lights at an intersection were malfunctioning in that the light of the street on which plaintiff was traveling was stuck on green, and the light of the intersecting street on which another vehicle was traveling was stuck on red. The other driver negligently drove through the red light and plaintiff was injured in the ensuing collision. *Held*, judgment on the pleadings reversed; the complaint stated a cause of action. Defendant state conceded that if all the lights had been stuck on green, the condition would have been dangerous. But it argued that the existing condition was rendered dangerous only by the negligent conduct of the other driver, and that liability should be imposed only if the condition is dangerous when all persons use it carefully. This argument is not consistent with the statute or case law. A third party's negligent use of the property does not negate the existence of a dangerous condition (see *supra*, §259). (82 C.A.3d 121.) Specifically: Motorist A approaching a stuck green signal can be deceptively lulled into a sense of freedom from interference by cross traffic, and may exercise a minimal degree of lookout; motorist B, after a period of delay at the stuck red light, will become aware of the fact, and is likely to take the risk of entering the intersection. If motorist A were aware of the malfunctioning lights, his degree of care and lookout for cross traffic would be heightened. "Thus, the fact that the light is stuck on red could reasonably be found to result in a greater risk for motorist 'A' and to create a dangerous condition

at the intersection to motorists generally." (82 C.A.3d 122.)

In *Teall v. Cudahy* (1963) 60 C.2d 431, 34 C.R. 869, 386 P.2d 493, the action was brought under former law, but the court pointed out that Govt.C. 835 did not materially differ in relation to the facts involved. The complaint alleged that plaintiff 7-year-old child mistakenly crossed the street when a truck was passing, because the only signal visible to her indicated that vehicular traffic would yield the right of way. *Held*, a cause of action was stated.

(a) "Pedestrians have a right to rely on traffic signals. The only signal visible to plaintiff indicated to her that north and south vehicular traffic would yield the right of way. Such a condition involves an unreasonable risk of injury to the public. It is not materially different from one in which, because of a mechanical defect, all lights at an intersection are green simultaneously." (60 C.2d 434.)

(b) Although defendant city had no duty to install an additional signal (Govt.C. 830.4, 830.8, *supra*, §264), it undertook to control traffic, invited reliance on the signals, and was liable if it created a dangerous or defective condition in doing so. (60 C.2d 434.)

(c) While the location of traffic signals involves an exercise of legislative discretion (see *infra*, §286), liability may result from an originally defective plan in the first place, and a dangerous condition resulting from an exercise of governmental discretion is not exempt from liability. (60 C.2d 434.)

(2) *Exception for Signals Under Control of Emergency Vehicle.* A public entity is not liable for an injury caused by "the operation or nonoperation" of signals "when controlled by an emergency vehicle" in accordance with Veh.C. 25258(a). (Govt.C. 830.9.)

SUPPLEMENT: [This section is current through the latest supplement]



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5 Witkin Sum. Cal. Law Torts § 266

[§ 266] Dangerous Activity Permitted.

In *Quelvog v. Long Beach* (1970) 6 C.A.3d 584, 86 C.R. 127, 4 Cal. Proc. (4th), Pleading, §582, the decedent was killed when the ladder on which he was working was struck down by an autoette (apparently a self-propelled electric vehicle) being driven on the public sidewalk. Plaintiffs alleged that the city had failed to enforce state law by allowing vehicles to be driven on the sidewalks, and had affirmatively encouraged this improper use by constructing special access areas along the curbing. *Held*, a cause of action was stated. (6 C.A.3d 591.) (See *Vedder v. Imperial* (1974) 36 C.A.3d 654, 660, 111 C.R. 728, *infra*, §314 [negligent storage of gasoline on city property].)

In *Hill v. People* (1979) 91 C.A.3d 426, 154 C.R. 142, the complaint alleged that defendant California Department of Transportation issued a permit to codefendants to transport an oversized load on the public highways; the designated route included an overpass with insufficient clearance; the tractor-trailer struck the overpass, and fell and struck plaintiff's vehicle, causing personal injury and property damage. *Held*, a cause of action was stated:

(a) Under the reasoning of *Quelvog*, although the overpass may not have been dangerous for normal vehicles, defendant's conduct in permitting its use by a vehicle that was too high created a dangerous condition of the highway. (91 C.A.3d 430.)

(b) As in the traffic signal cases (*supra*, §§264, 265), codefendants reasonably relied on defendant's implied representation (in designation of the route) that the passage was safe. (91 C.A.3d 431.)

SUPPLEMENT: [This section is current through the latest supplement]
Quelvog case:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §622.



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aa. In General.

5 Witkin Sum. Cal. Law Torts § 267

[§ 267] In General.

A public entity may be liable for injuries sustained on property that is foreseeably dangerous as a result of a combination of the condition of the property and negligent or criminal conduct by third persons on or about the property. (*Peterson v. San Francisco Community College Dist. (1984) 36 C.3d 799, 806, 205 C.R. 842, 685 P.2d 1193*, *infra*, §268; on liability based on dangerous activity on private premises, see *infra*, §1129 et seq.)

In *Zuniga v. Housing Authority of Los Angeles (1995) 41 C.A.4th 82, 48 C.R.2d 353*, plaintiffs were occupants of a unit in a housing project that was set on fire by arsonists, killing five members of plaintiffs' family. Plaintiffs filed a complaint for negligence and other torts against the housing authority that ran the project and the city in which the project was located. *Held*, judgment for defendants on demurrer reversed.

(a) Plaintiffs alleged that the dangerous condition of the property was inadequate security measures taken by defendants in the face of the existence of a centralized location where drug dealers with violent tendencies congregated (in front of plaintiffs' unit). Specifically, they alleged that defendants failed to warn the residents, failed to transfer residents, failed to expel criminal tenants, failed to place security barriers, and failed to otherwise take appropriate security measures. According to the complaint, plaintiffs were at risk simply by virtue of being assigned to the unit and became targets of increased hostility merely because they reported their difficulties to the authority. Such a pleading sufficiently alleges a dangerous condition to the property to overcome a demurrer. (*41 C.A.4th 95*.)

(b) The cases that have held that public and private landlords have no duty to guard against the criminal activity of third persons (see *infra*, §§268, 1143) have typically dealt with the situation in which the criminal activity was an isolated and unexpected occurrence that could not have been controlled by the landlord, absent the implementation of drastic precautions. However, in this case, the liability of defendants is based on allegations of the same perpetrators; the same location; an escalating pattern of behavior over a period of time, with repeated reports to the landlord; an awareness of the problems by defendant authority; and knowledge of the identity of the perpetrators by defendant city's police department. (*41 C.A.4th 94*.)

(c) The complaint also sufficiently alleged facts from which a special relationship might be found to have existed between plaintiffs and defendant authority, which assumed the duty of providing housing to plaintiffs, who, in turn, were apparently dependent on the authority to take responsibility for the hazards that existed within the project (see *infra*, §1038). In other words, plaintiffs reported the violence and harassment to the authority and the police, and depended on the authority to secure a transfer to other quarters. Indeed, it is clear from the complaint that the violence increased simply by virtue of reporting these incidents. (41 C.A.4th 95.)

The result is different, however, if the risk of injury from third parties is in no way increased by the condition of the property. (*Hayes v. California* (1974) 11 C.3d 469, 472, 113 C.R. 599, 521 P.2d 855, *infra*, §268.) In *Pekarek v. San Diego* (1994) 30 C.A.4th 909, 36 C.R.2d 22, plaintiffs, two minor children, sued defendant city for nuisance, alleging that one of the plaintiffs was injured when they crossed a city street after buying ice cream from an ice cream truck. The trial judge granted summary judgment for defendant. *Held*, affirmed.

(a) In interpreting *Govt.C. 830*, courts have consistently refused to characterize harmful third-party conduct as a dangerous condition, absent some concurrent contributing defect in the property itself. (30 C.A.4th 913, citing *Hayes*.) A plaintiff must demonstrate that some characteristic of public property contributed to the plaintiff's injury. Although there need not be a physical defect in the property, there must be something about its physical condition that increased the risk of harm to the plaintiff. (30 C.A.4th 913.)

(b) To establish that the block of the city street where the injury occurred was in a dangerous condition, plaintiffs had to demonstrate that defendant could have reduced the risk of harm to them by doing something to the street itself, as opposed to regulating the vehicles and pedestrians who used it. However, nothing suggested that any change in the street would have diminished the risk of injury. An outright ban on operation of ice cream trucks would not have altered the condition of the street. (30 C.A.4th 916.) (See 24 Proof of Facts 3d 1 [action against school arising out of criminal act]; cf. *Zelig v. Los Angeles* (2002) 27 C.4th 1112, 1131, 119 C.R.2d 709, 45 P.3d 1171 [liability under *Govt.C. 835* depends on existence of some defect in the property itself and causal relationship between that defect and plaintiff's injury; criticizing *Zuniga*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Sun v. Oakland* (2008) 166 C.A.4th 1177, 1197, 83 C.R.3d 372 [finding that driver was negligent when he struck pedestrian crossing street did not preclude finding of dangerous condition of intersection, but his conduct alone did not prove that intersection posed substantial risk of injury; there must be defect in condition of property that has causal relationship to third party's conduct that injures plaintiff]. *No liability where risk of injury from third parties is not increased by condition of property:* In *San Diego v. Superior Court (Hanson)* (2006) 137 C.A.4th 21, 28, 40 C.R.3d 26, illegal street racing in defendant city resulted in injuries to nonparticipants. *Held*, the city was not liable. There is no public liability caused solely by the acts of third parties; the third-party conduct must be coupled with a defective condition of property. A defective condition exists in third-party cases only where there is a dangerous physical condition and that condition has a causal relationship to the third-party conduct resulting in injury. Here, there was no physical defect in the roadway, which was straight and level, and, even assuming that lighting was insufficient, no evidence connected the absence of lighting to the injuries. (137 C.A.4th 28.)



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bb. Criminal Assault.

5 *Witkin Sum. Cal. Law Torts* § 268

[§ 268] Criminal Assault.

Actions to recover for injuries sustained from third-party conduct on public property have frequently involved criminal assaults.

(1) *Hayes Case and Subsequent Decisions.* In *Hayes v. California* (1974) 11 C.3d 469, 113 C.R. 599, 521 P.2d 855, two young men were attacked by unknown persons while sleeping on a beach at a state university. Their parents filed actions for personal injury and wrongful death, on the theory of failure to provide adequate police protection. Because this was concededly covered by statutory immunity (see *infra*, §302), they sought to amend to allege failure to warn of a dangerous condition of property. *Held*, judgment for defendant on demurrer affirmed.

(a) Liability may be imposed where a combination of a defective condition of the property and acts of third parties is shown. (11 C.3d 472; see *supra*, §267.) "However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition--absent some concurrent contributing defect in the property itself." (11 C.3d 472.)

(b) Although a warning might be beneficial in some instances, imposition of a duty to warn is unwise: (1) the public is already aware of violent crime in unlit and little used places; (2) such a warning might effectively close the area; and the regulation of the use of public property is better left to legislative and administrative bodies, rather than to the judiciary. (11 C.3d 473.)

Hayes was followed in *Sykes v. Marin* (1974) 43 C.A.3d 158, 117 C.R. 466. Defendant county operated a community center that had an unlighted parking lot. Plaintiff's 15-year-old daughter worked there as a volunteer, and plaintiff, attempting to pick her up at 6 p.m., was attacked by unknown assailants. *Held*, nonsuit affirmed. As in *Hayes*, the public entity was not required to protect against criminal activities of third persons; and the absence of lights in the parking area did not create a dangerous or defective condition.

In *Slapin v. Los Angeles Int. Airport* (1976) 65 C.A.3d 484, 135 C.R. 296, the court disagreed with the *Sykes* reasoning and distinguished *Hayes*. Plaintiff, while parking his car in defendant's airport parking lot, was assaulted by

unknown persons. His complaint alleged that defendants knew that the lot was dangerous unless properly maintained, and that it was inadequately lighted. *Held*, a cause of action was stated.

(a) "That a mugger thrives in dark public places is a matter of common knowledge." (65 C.A.3d 488.) Hence, if defendant so poorly lighted the lot as to create a substantial risk of muggings, plaintiff could establish the elements of liability under *Govt.C. 835*; i.e., the lot so maintained was in a dangerous condition. (65 C.A.3d 488, 489.)

(b) *Sykes* is distinguishable: (1) In *Sykes*, the plaintiff went to trial, while plaintiff here suffered judgment on demurrer. In *Sykes*, there was no showing of previous criminal activity on the lot; plaintiff in this case may be able to establish a history of crime that rendered the injury foreseeable. (65 C.A.3d 489.) (2) The *Sykes* court, on the evidence presented, held that the intentional criminal acts of the assailants were a superseding cause; but plaintiff may be able to show that defendant created a reasonably foreseeable risk of such third-party conduct. (65 C.A.3d 490.)

(c) *Hayes* is distinguishable in that it involved beach property in its natural condition; here, it was alleged that the parking lot had a specific defect--insufficient lighting--that contributed to the assault. (65 C.A.3d 490.)

The *Hayes* approach was followed, and *Slapin* was distinguished, in *Moncur v. Los Angeles* (1977) 68 C.A.3d 118, 137 C.R. 239. A terrorist placed a bomb in a coin-operated locker in the Los Angeles Airport, in an area completely accessible to the public; when it exploded, several persons were killed and injured. In these actions against the city for personal injuries and wrongful death, judgments of dismissal were entered on demurrers sustained. *Held*, affirmed. *Slapin* involved a defect in the condition of the property (the lighting), while here, the danger was created by the act of placing the bomb, unrelated to the physical condition of the property. (68 C.A.3d 123, 124.) There are many airport facilities equally available to a terrorist, and there is no way to foresee the place or manner of the terrorist's action. (68 C.A.3d 125.) The California Supreme Court has declared that airport preboarding inspection is constitutionally permissible only if "confined to *minimally intrusive techniques*." (68 C.A.3d 126, citing *People v. Hyde* (1974) 12 C.3d 158, 165, 115 C.R. 358, 524 P.2d 830.)

Branch v. California (1984) 159 C.A.3d 340, 205 C.R. 482, makes an obvious distinction: Plaintiff alleged that she was abducted at an unspecified place and then taken to state property where she was criminally assaulted. The court, citing many decisions, held that a "dangerous condition" is one that involves a risk of injury to a plaintiff who is using the property. Here, plaintiff was not on the property of her own volition and was not using it in the manner contemplated by *Govt.C. 830*. (159 C.A.3d 345.)

(2) *Peterson Case and Subsequent Decisions*. The California Supreme Court again considered the issue of public liability where there is a criminal assault in *Peterson v. San Francisco Community College Dist.* (1984) 36 C.3d 799, 205, C.R. 842, 685 P.2d 1193. Plaintiff, a state college student, was injured in an attempted daylight rape in the parking lot area of the campus. She brought this action against defendant district, alleging the following facts: The assailant jumped from behind "unreasonably thick and untrimmed foliage and trees" adjoining a stairway which she was ascending; the assailant used a modus operandi similar to that used in previous attacks on the same stairway; defendants were aware that other assaults of a similar nature had occurred in the area; they had taken steps to protect students, and plaintiff relied on this increased protection; but defendants did not publicize the prior incidents or in any way warn plaintiff that she was in danger of attack in this area. The trial judge gave judgment for defendants on demurrer. *Held*, reversed.

(a) Third-party conduct by itself, unrelated to the condition of the property, does not constitute a dangerous condition. This principle relies primarily on policy considerations and the definition of dangerous condition as a "condition of property." But nothing in *Govt.C. 835* precludes a finding of an affirmative duty under special circumstances (*infra*, §1038) to protect individuals against harmful criminal conduct on the defendant's property. (36 C.3d 811, and footnote 10.)

(b) It is also clear that intervening criminal conduct cannot absolve the defendant of liability where the plaintiff

alleges that the defendant maintained the property in such a way as to increase the risk of criminal activity. *Slapin v. Los Angeles Int. Airport* is indistinguishable from the present case. Plaintiff alleged that defendants were aware that the parking lot was unsafe unless properly supervised and maintained, and that it was poorly lighted. (36 C.3d 812.) Here, plaintiff alleged that the foliage and trees permitted the assailant to perpetrate his crime, and that defendants, aware of the condition, failed to take reasonable protective measures, including trimming the foliage or warning her of danger. "In light of the relationship between plaintiff and defendants as well as the facts known to the defendants," a cause of action was stated. (36 C.3d 812.)

(c) *Hayes v. California*, holding that a university was not liable for attacks on two young men using the university's beach at night, is distinguishable. "In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant proportion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime. Here the parking lot was not one of the 'unlit and little used places' to which we referred in *Hayes*. Plaintiff was lawfully on the campus and was attacked in broad daylight in a place where school officials knew she and others as well as the assailant might be. Further, the warnings sought here would not result in preventing the students from using the campus or its facilities, only in alerting them to unknown dangers and encouraging them to exercise more caution." (36 C.3d 813.)

Peterson was distinguished in *Rodriguez v. Inglewood Unified School Dist.* (1986) 186 C.A.3d 707, 230 C.R. 823. Plaintiff high school student was stabbed by a nonstudent third-party assailant while on the campus. He sued defendant school district, alleging that the high school had a long history of acts of violence involving dangerous weapons, and that defendant negligently failed to provide adequate security and protection against such acts. *Held*, although a special relationship existed between plaintiff student and defendant school district which imposed an affirmative duty on the district (see *infra*, §1054), no statutory liability was shown. The *Peterson* case held that thick and untrimmed trees around a parking lot could constitute a dangerous condition under the circumstances. Here, no physical defects or conditions were alleged; the complaint merely stated that plaintiff was stabbed while he was on the campus. (186 C.A.3d 718.) The constitutional guarantee of the right to safe schools (Cal. Const., Art. I, §28(c), adopted in 1982) and its implementing statutes were prospective in effect, and thus inapplicable to plaintiff's action based on injuries sustained in 1981. (186 C.A.3d 721, 722.) (See *Constance B. v. California* (1986) 178 C.A.3d 200, 206, 223 C.R. 645, *supra*, §263 [claimed dangerous condition presented by restroom at highway rest stop was not shown to be proximate cause of assault on plaintiff]; *Crow v. California* (1990) 222 C.A.3d 192, 205, 271 C.R. 349 [student assaulted in state college dormitory by another student did not state cause of action; discussing *Hayes*, *Peterson*, and *Constance B.*]; *Turner v. California* (1991) 232 C.A.3d 883, 894, 284 C.R. 349 [state had no duty to warn public of gang-related activity at Cal Expo; citing *Hayes*].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Peterson Case and Subsequent Decisions.* *Right to safe schools:* Cal. Const., Art. I, §28(c), was relettered Cal. Const., Art. I, §28(f)(1), at the 2008 general election.



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5. Condition on Adjacent Property.

5 Witkin Sum. Cal. Law Torts § 269

[§ 269] Condition on Adjacent Property.

Although a dangerous condition on public property may be actionable, even though not posing a hazard to persons using that property itself, where it is a hazard to adjacent property or persons using other property (*supra*, §259), a public entity cannot, of course, be held liable for dangerous conditions *on* other property. The entity "may be liable only for dangerous conditions of its own property." However, "its own property may be considered dangerous if a condition on the adjacent property exposes those using the public property to a substantial risk of injury." (Law Revision Com. Comment to *Govt.C.* 830.) (See 95 *A.L.R.3d* 778 [tree or limb falling onto highway from adjacent property]; 22 *A.L.R.4th* 624 [failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection].)

In *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 *C.4th* 139, 132 *C.R.2d* 341, 65 *P.3d* 807, plaintiff was struck by a car when she was crossing at an uncontrolled intersection (only a crosswalk) to reach a nearby bus stop maintained by defendant transit authority. The trial court entered judgment for plaintiff on a jury verdict expressly finding that the bus stop constituted a dangerous condition of public property. *Held*, affirmed.

(a) The fact that defendant needed the county's permission to move the bus stop to a safer location did not, as a matter of law, preclude defendant's potential liability for risks arising from the stop's present location, because there was no evidence that defendant had asked for permission and been refused. (30 *C.4th* 147.)

(b) Plaintiff argued that defendant's bus stop was in a dangerous condition because accessing it required crossing at a dangerous intersection. The statutory language neither precludes nor endorses this theory, but the Law Revision Commission comment to *Govt.C.* 830 expressly accepts it, and comments by the Law Revision Commission are persuasive, albeit not conclusive. Moreover, this theory has been applied in numerous cases. (30 *C.4th* 148, citing, among other examples, *Warden v. Los Angeles* (1975) 13 *C.3d* 297, 118 *C.R.* 487, 530 *P.2d* 175, *supra*, §250.)

(c) Defendant's contention that it cannot be liable for an injury that occurred on property (the street) that it neither owned nor controlled is rejected. Defendant owned and controlled its own bus stop, and a condition of *that* property (its physical location) caused users of the stop to be at risk from the immediately adjacent property. For similar reasons, it makes no difference that the injury occurred on adjacent property, rather than at the bus stop itself, or that the injury was

caused by the act of a third party (negligent driving). (30 C.4th 151, distinguishing *Seaber v. Hotel Del Coronado* (1991) 1 C.A.4th 481, 2 C.R.2d 405, Supp., infra, §1090, on the ground that the hotel involved in that case could not be relocated as easily as a bus stop.)

(d) This holding will not result in wholesale liability for conditions on nearby property being imposed on public entities. This case is concerned with only one element of liability, the dangerous condition of property, and it does not address other elements, such as the requirement that the risk be substantial. Moreover, this holding does not address the various immunities that might be relevant. Finally, the reasonableness of a public entity's creation or maintenance of a dangerous condition of its property must be balanced against the cost and benefits of alternative means of providing the public service. In other words, the government cannot go out of business. (30 C.4th 154.)

The following cases are also illustrative:

Holmes v. Oakland (1968) 260 C.A.2d 378, 389, 67 C.R. 197 [railroad track on property owned by defendant city adjacent to plaintiff's school, plaintiff minor run over by train].

Bakity v. Riverside (1970) 12 C.A.3d 24, 30, 90 C.R. 541 [intersection with view obstructed by trees on adjacent property].

De La Rosa v. San Bernardino (1971) 16 C.A.3d 739, 745, 94 C.R. 175 [visibility impaired by tree and shrubbery on adjacent property].

Jordan v. Long Beach (1971) 17 C.A.3d 878, 883, 95 C.R. 246 [protruding water pipe located on adjacent private property].

Carson v. Facilities Dev. Co. (1984) 36 C.3d 830, 841, 206 C.R. 136, 686 P.2d 656 [sign located on property adjacent to city intersection obstructing view of intersection].

Joyce v. Simi Valley Unified School Dist. (2003) 110 C.A.4th 292, 298, 1 C.R.3d 712 [open school yard gate that encouraged students to cross heavily traveled four-lane highway at crosswalk, rather than at signal-controlled intersection less than 500 feet away].

In *Branzel v. Concord* (1966) 247 C.A.2d 68, 55 C.R. 167, defendant city maintained an open unfenced field for public flying of motor-driven model airplanes. The planes were held on long wires and moved in a circle. Immediately adjacent were high voltage power lines, lawfully maintained without insulation, and with no sign or other warning of the danger. The plane which plaintiff's son was flying jerked loose. Plaintiff pursued and caught the wire just as the plane looped over the power lines, and was electrocuted. *Held*, defendant city was liable for wrongful death. It was foreseeable that a plane might break loose, that persons flying it or others present might attempt to catch it by the trailing wire, that the wire could come in contact with the power lines, and that in view of the high speeds attained by the planes, all this could take place in a few seconds. Thus, "the condition of the field can be considered dangerous because the condition of the adjacent power lines exposed those using the field to a substantial risk of injury." (247 C.A.2d 75.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Laabs v. Victorville* (2008) 163 C.A.4th 1242, 1259, 78 C.R.3d 372 [city that controlled southbound lanes of road could be liable for dangerous condition caused by inadequate stopping sight lines in northbound lanes owned and controlled by county; road had been widened in past, and both city and county had ability to effect change in design of roadway to protect against risk of injury].



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d. Culpable Conduct.

1. Act or Omission of Employee.

5 Witkin Sum. Cal. Law Torts § 270

[§ 270] Act or Omission of Employee.

In addition to a showing of dangerous condition and proximate cause, the plaintiff must establish one of two types of culpable conduct that justify the imposition of liability. The first is that the dangerous condition be created by "[a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment." (*Govt.C. 835(a)*.) (See *State v. Superior Court* (1968) 263 C.A.2d 396, 399, 69 C.R. 683 [no recovery where no negligent act; injury to small child who sat on white ash from hot coals on a state beach]; *Van Kempen v. Hayward Area Park, Recreation & Park Dist.* (1972) 23 C.A.3d 822, 827, 100 C.R. 498 [no recovery].) (For second type of culpable conduct, see *infra*, §271.)

West's Key Number Digest, States k.112.2(1)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Notice of Condition.

5 Witkin Sum. Cal. Law Torts § 271

[§ 271] Notice of Condition.

(1) *In General.* As an alternative to a negligent or wrongful act or omission (*supra*, §270), the second and more common basis of liability is that the public entity had "actual or constructive" notice of the dangerous condition "a sufficient time prior to the injury to have taken measures to protect against" it. (*Govt.C. 835(b)*; see *Flournoy v. California* (1969) 275 C.A.2d 806, 810, 80 C.R. 485 [state's notice of periodic formation of ice on bridge and of numerous prior accidents]; *Briggs v. California* (1971) 14 C.A.3d 489, 495, 92 C.R. 433 [mudslide on state highway, known to highway crews for 10 days to 2 weeks before accident]; *Van Kempen v. Hayward Area Park, Recreation & Park Dist.* (1972) 23 C.A.3d 822, 827, 100 C.R. 498 [no actual or constructive notice, and no recovery].)

"Protect against" includes "repairing, remedying or *correcting* a dangerous condition, providing *safeguards* against a dangerous condition, or *warning* of a dangerous condition." (*Govt.C. 830(b)*.) (See *Flournoy v. California*, *supra* [failure to post warning signs indicating ice on bridge or necessity of reducing speed]; *Cameron v. California* (1972) 7 C.3d 318, 329, 102 C.R. 305, 497 P.2d 777, *infra*, §281 [failure to warn of dangerous "S" curve].)

(2) *Actual Notice.* The entity has actual notice if it has "actual knowledge of the existence of the condition and knew or should have known of its dangerous character." (*Govt.C. 835.2(a)*.)

(3) *Constructive Notice.* The entity has constructive notice if the condition "existed for such a period of time and was of such an obvious nature" that the condition and its danger should have been discovered in the exercise of due care. And on the issue of due care, evidence is admissible on (a) whether the dangerous condition would have been discovered by a reasonably adequate inspection system, and (b) whether the entity operated an inspection system with due care and did not discover the condition. (*Govt.C. 835.2(b)*); see *Carson v. Facilities Dev. Co.* (1984) 36 C.3d 830, 842, 206 C.R. 136, 686 P.2d 656 [constructive notice of dangerous condition created by encroaching sign]; *Garber v. Los Angeles* (1964) 226 C.A.2d 349, 354, 38 C.R. 157 [street defect; constructive notice may be established by proof of a previous fall]; *Strongman v. Kern* (1967) 255 C.A.2d 308, 312, 62 C.R. 908 [plaintiff failed to meet burden of showing notice by circumstantial evidence]; *State v. Superior Court* (1968) 263 C.A.2d 396, 399, 69 C.R. 683 [no evidence that condition existed for any particular length of time]; *Erfurt v. California* (1983) 141 C.A.3d 837, 844, 845, 190 C.R. 569 [jury could reasonably find constructive notice of condition in existence over 10 years, since construction of highway];

Nishihama v. San Francisco (2001) 93 C.A.4th 298, 302, 112 C.R.2d 861 [to show constructive notice of city, it was proper to introduce evidence that city had system for finding and repairing potholes and that it had sufficient time to have repaired them prior to plaintiff's injury].)

(4) *Duration of Notice*. The notice may be of extremely short duration. In *Stanford v. Ontario* (1972) 6 C.3d 870, 101 C.R. 97, 495 P.2d 425, a homeowner, seeking to connect her dwelling with defendant city's sewer system, engaged a plumbing contractor to do the job. After the contractor obtained a permit and the city engineers staked out the proposed excavation, the contractor dug the trench to a depth of 9 feet, but, in violation of an Industrial Safety Order, provided no shoring or sloping. On the morning of the day following the improper excavation, plaintiff employee, while in the ditch laying the pipe, was injured by a cave-in. In this action against defendant city, a nonsuit was granted. *Held*, reversed. There was evidence that an inspector could at a glance have determined that the condition of the excavation was dangerous, and could have ordered suspension of the work. (6 C.3d 882.) Thus, jury questions were presented whether a reasonable inspection would have disclosed the dangerous condition, and whether there would have been adequate time to take preventive measures. "Where the lives of workmen are imperiled, certainly it cannot be said as a matter of law that such an inspection would impose an unreasonable burden on a public entity." (6 C.3d 883.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Reasonable Act or Omission.

5 Witkin Sum. Cal. Law Torts § 272

[§ 272] Reasonable Act or Omission.

A public entity is not liable for injuries resulting from a dangerous condition if (1) the act or omission that created the condition was reasonable or (2) the action it took to protect against the risk created by the condition, or its failure to take such an action, was reasonable. (*Govt.C. 835.4.*) This defense is provided in recognition that a public entity does not have the freedom of a private enterprise to decide not to engage in a particular activity that costs too much to keep safe. (Law Revision Com. Comment to *Govt.C. 835.4.*)

Reasonableness is determined by weighing the probability and gravity of potential injury against the practicability and cost of the action. (*Govt.C. 835.4*; see *Cardenas v. Turlock Irr. Dist. (1968) 267 C.A.2d 352, 362, 73 C.R. 69*, *infra*, §274 [failure to fence canal in which small children drowned could be found reasonable considering cost and practicality]; *Van Kempen v. Hayward Area Park, Recreation & Park Dist. (1972) 23 C.A.3d 822, 827, 100 C.R. 498* [park district's precautionary steps taken to secure bench were reasonable].)

The determination of reasonableness under *Govt.C. 835.4* is a question of fact for the jury, unlike the applicability of the "design immunity" of *Govt.C. 830.6* (*infra*, §280 et seq.), which is a question of law. (*De La Rosa v. San Bernardino (1971) 16 C.A.3d 739, 748, 94 C.R. 175.*)

West's Key Number Digest, States k.112.2(1)

SUPPLEMENT: [This section is current through the latest supplement]

See *Metcalfe v. San Joaquin (2008) 42 C.4th 1121, 1136, 72 C.R.3d 382, 176 P.3d 654*, [*Govt.C. 835.4* is affirmative defense where plaintiff establishes public entity's negligence as basis for liability for dangerous condition; statute does not place on public entity burden of showing reasonableness in absence of plaintiff's showing of negligence].



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aa. Statutory Rule.

5 *Witkin Sum. Cal. Law Torts* § 273

[§ 273] Statutory Rule.

Generally, a public entity or employee is not liable for an injury caused by the condition of a water improvement or distribution facility, if the injured person was using it for any purpose other than that intended or permitted. (*Govt.C. 831.8(a)*); on immunities and defenses of public employees concerning dangerous conditions generally, see *infra*, §360.) An example is use for swimming. (See *Cardenas v. Turlock Irr. Dist. (1968)* 267 C.A.2d 352, 356, 73 C.R. 69, *infra*, §274.) The following immunities or defenses are set forth in the statute:

(1) *Reservoirs*. Neither "a public entity nor a public employee" is liable for injuries from an unintended or unpermitted use caused by the condition of a reservoir. (*Govt.C. 831.8(a)*.)

(2) *Canals*. Neither "an irrigation district nor an employee thereof nor the State nor a state employee" is liable for injuries suffered in an untended use of *canals, conduits, or drains*. (*Govt.C. 831.8(b)*.) Irrigation and reclamation districts have long been separately classified; hence, the statutory immunity could not be claimed where children were drowned in a canal of defendant reclamation district. (*Delta Farms Reclamation Dist. v. Superior Court (1983)* 33 C.3d 699, 702, 703, 190 C.R. 494, 660 P.2d 1168; see dissent of two justices, arguing that there is no sharp distinction between an irrigation district and a reclamation district.)

(3) *Flood control and water conservation facilities*. Under prescribed conditions, neither "a public agency operating flood control or water conservation facilities nor its employees" are liable for injuries caused by the condition or use of "unlined flood control channels or adjacent groundwater recharge spreading grounds" where the person injured was using the property for a purpose other than that for which the public entity intended it to be use. (*Govt.C. 831.8(c)*); see *Govt.C. 831.9(a)* [records of injuries from unlined flood control channels or adjacent groundwater recharge spreading grounds in Los Angeles County and of resulting claims].) These provisions become inoperative on January 1, 2007. (*Govt.C. 831.8(f), 831.9(b)*.)

Govt.C. 831.8 specifies two exceptional situations in which liability may be asserted. (See *infra*, §274.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Flood control and water conservation facilities.* A limitation on immunity applies when the injured person is 16 years old or younger (see Supp., *infra*, §274). *Govt.C. 831.8(c)* and *831.9(a)* now become inoperative on January 1, 2013. (*Govt.C. 831.8(g)*, as amended in 2008; *Govt.C. 831.9(b)*, adopted in 2008.)



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bb. Exceptions.

5 Witkin Sum. Cal. Law Torts § 274

[§ 274] Exceptions.

A public entity or employee is not exonerated from liability for injury proximately caused by a dangerous condition of property in either of the following circumstances:

(1) *Noncriminal trespasser and concealed trap*. Where the injured person was not violating P.C. 552 et seq. (prohibiting trespassing on posted property; see 2 Cal. Crim. Law (3d), *Crimes Against Property*, §250), the condition created a substantial and unreasonable risk of harm to a person using the property with due care in a reasonably foreseeable manner, the condition was not reasonably apparent to a mature person acting with due care, and the entity or employee had actual knowledge of the condition and knew or should have known of its dangerous character in time to have protected against it. (Govt.C. 831.8(d).)

(2) *Children under 12 and attractive nuisance*. Where the injured person was a child under 12, the condition created a substantial and unreasonable risk of harm to such a child using the property with due care in a reasonably foreseeable manner, the child because of immaturity did not discover or appreciate the danger, and the entity or employee had actual knowledge of the condition and knew or should have known of its dangerous character in time to have protected against it. (Govt.C. 831.8(e); see *Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 C.A.2d 166, 170, 60 C.R. 364 [flood control district's improved waterway passing through residential area containing elementary school, normally dry, presenting hazard of drowning in time of heavy rainfall, unfenced, and without warning signs of danger].)

The exception now stated in Govt.C. 831.8(e) was found inapplicable, and liability was rejected, in *Cardenas v. Turlock Irr. Dist.* (1968) 267 C.A.2d 352, 73 C.R. 69. Defendant irrigation district had 250 miles of unfenced canals. A 9-mile branch ran through the residential area of Modesto. Though the canal was posted with no-trespassing and no-swimming warnings, children regularly swam in it. Two boys, ages 6 and 8, and unable to swim, were repeatedly warned by their parents to stay away from the canal. They were left unattended for about an hour and a half, and were later found drowned in the canal. *Held*, judgment for defendant affirmed.

(a) There was no unreasonable risk to these children. Unlike the situation in *King v. Lennen* (1959) 53 C.2d 340, 1 C.R. 665 (very young child, dirty water, sharp drop, slippery walls and bottom), the canal was not slippery, the flow was slow, and there were relatively few drownings over an 11-year period. (267 C.A.2d 358.)

(b) Even if there was an unreasonable risk, the evidence did not establish as a matter of law that the children did not appreciate the danger. They were of normal intelligence, and repeatedly warned. (267 C.A.2d 359.)

(c) The trial judge found on substantial evidence that considering costs, public function, etc., the failure to fence was reasonable, thus making applicable the "reasonableness" immunity of Govt.C. 835.4 (supra, §272). (267 C.A.2d 362.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) (New) *Persons age 16 or younger injured at flood control or water conservation facilities.* Govt.C. 831.8 was amended in 2008 to add an exception to immunity under Govt.C. 831.8(c). A public agency or employee is not exonerated if the person injured is age 16 or younger, the dangerous condition created a substantial and unreasonable risk of harm to children age 16 or younger using the property or adjacent property with due care and in a reasonably foreseeable manner, the injured person did not discover the condition or did not appreciate its dangerousness because of immaturity, and the public entity or employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time before the injury to have taken protective measures. (Govt.C. 831.8(f), added in 2008.)

Govt.C. 831.8(c) and 831.8(f) become inoperative on January 1, 2013. (Govt.C. 831.8(g).)



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aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 275

[§ 275] In General.

(1) *General Scope of Immunity.* A public entity is immune from liability for personal injury or property damage "arising out of" a "hazardous recreational activity." (*Govt.C. 831.7*; see *15 Pacific L. J. 686*.)

In *Decker v. Imperial Beach* (1989) 209 C.A.3d 349, 257 C.R. 356, an action for the wrongful death of plaintiff's son while surfing, plaintiff argued that defendant city was not immune under *Govt.C. 831.7* because its negligence during rescue attempts contributed to decedent's death. *Held*, summary judgment for defendant affirmed.

(a) In defining the scope of hazardous recreational activities immunity, the Legislature did not limit immunity to injuries "solely attributable" to the hazardous activity. Rather it granted immunity for an injury "arising out" of that activity. "This broad language is reasonably susceptible to an interpretation that it was intended to preclude liability for negligently inflicted injuries while rescuing a person who has been participating in a hazardous recreational activity because it can be said the rescue effort 'arises out of' the individual's participation in the hazardous recreational activity." (209 C.A.3d 355.)

(b) This interpretation is consistent with the statutory scheme, because none of the exceptions to the rule of immunity, as stated in *Govt.C. 831.7(c)* (*infra*, §278), applies to liability for injuries caused by *negligent* rescue attempts. (209 C.A.3d 356.)

(c) Under *Govt.C. 831.7(c)(5)* (*infra*, §278), immunity would not extend to rescue attempts involving *gross* negligence. Interpreting *Govt.C. 831.7* as granting immunity for emergency rescue services unless there is gross negligence is consistent with the numerous other statutes granting immunity to persons providing emergency assistance except when there is gross negligence. (209 C.A.3d 356.) And that interpretation is also consistent with the strong public policy of encouraging emergency assistance and rescue. (209 C.A.3d 357.)

(2) *C.C. 846 Inapplicable.* C.C. 846, the statute negating a duty to keep premises safe or to warn of hazards as to gratuitous users of property for recreational purposes (see *infra*, §1103 et seq.) applies only to private landowners, and

gives no immunity to public entities. (*Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 C.3d 699, 707, 190 C.R. 194, 600 P.2d 1168, supra, §262; *Nelsen v. Gridley* (1980) 113 C.A.3d 87, 91, 169 C.R. 757, infra, §1110.)

(3) *Recovery of Attorneys' Fees From State Funds*. The state Board of Control must allow a claim for reasonable attorneys' fees incurred by a public entity that gives permission to the public to enter or use real property for a recreational purpose and is sued by a person who allegedly suffers injury or damage on the property, or who seeks to restrict, prevent, or delay public use of the property, in any of the following circumstances:

(a) The court dismisses the action on a demurrer or motion for summary judgment by the public entity or on its own motion for lack of prosecution. (C.C. 846.1(b)(1).)

(b) The action is dismissed by the plaintiff without any payment from the public entity. (C.C. 846.1(b)(2).)

(c) The public entity prevails in the action. (C.C. 846.1(b)(3).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Scope of Immunity*. See *Avila v. Citrus Community College Dist.* (2006) 38 C.4th 148, 157, 41 C.R.3d 299, 131 P.3d 383, Supp., infra, §277 [Govt.C. 831.7 was adopted as premises liability measure, designed to limit liability based on public entity's failure either to maintain public property or to warn of dangerous conditions on public property; statute was not intended to limit public entity's liability arising from other duties, such as duty to supervise participation in particular activities].

(3) *Recovery of Attorneys' Fees From State Funds*. C.C. 846.1(b) was amended in 2006 to refer to the California Victim Compensation and Government Claims Board, rather than the state Board of Control.



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bb. Participants and Spectators.

5 *Witkin Sum. Cal. Law Torts* § 276

[§ 276] Participants and Spectators.

The public entity is not liable to any of the following:

- (1) A person "who *participates* in a hazardous recreational activity." (*Govt.C. 831.7(a).*)
- (2) A person "who *assists the participant.*" (*Govt.C. 831.7(a).*)
- (3) A "*spectator* who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave." (*Govt.C. 831.7(a).*)

SUPPLEMENT: [This section is current through the latest supplement]



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cc. Nature of Activity.

5 Witkin Sum. Cal. Law Torts § 277

[§ 277] Nature of Activity.

(1) *General Definition.* The term "hazardous recreational activity" is generally defined as "a recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator." (*Govt.C. 831.7(b)*; see *Wood v. San Joaquin (2003) 111 C.A.4th 960, 968, 4 C.R.3d 340* ["arising out of" language of *Govt.C. 831.7* encompasses objectively foreseeable risks of participating in hazardous recreational activity; thus, entity was not liable for deaths of fishermen resulting when their tethered canoe was struck by powerboat in channel used by public]; *80 A.L.R.3d 1192* [governmental liability for injury resulting from automobile road racing].)

(2) *Enumerated Activities.* The term also specifically includes various enumerated activities: (a) Water contact activities where no lifeguard is provided and warning has been given of the absence of a lifeguard or this should reasonably have been known. (b) Diving from other than a board or platform or where diving is prohibited and warning has been given. (c) "Animal riding, including equestrian competition, archery, bicycle racing or jumping, mountain bicycling, boating, cross-country and downhill skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, paragliding, body contact sports (i.e., sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants), surfing, trampolining, tree climbing, tree rope swinging, water skiing, white water rafting, and wind surfing." For these purposes, " 'mountain bicycling' does not include riding a bicycle on paved pathways, roadways, or sidewalks." (*Govt.C. 831.7(b)*.)

(3) *Illustrations in Cases.* The following cases have found particular activities to constitute hazardous recreational activities:

(a) *Diving.* (See *Morin v. Los Angeles (1989) 215 C.A.3d 184, 195, 263 C.R. 479* [diving from sand near shore's edge into ocean]; *Tessier v. Newport Beach (1990) 219 C.A.3d 310, 316, 268 C.R. 233* [same]; *Rombalski v. Laguna Beach (1989) 213 C.A.3d 842, 850, 261 C.R. 820* [diving from rock into ocean]; *Valenzuela v. San Diego (1991) 234 C.A.3d 258, 263, 286 C.R. 1* [following *Rombalski*]; *Berry v. California (1992) 2 C.A.4th 688, 692, 3 C.R.2d 382*

[diving from tree stump into river].)

(b) *Games*. (See *Yarber v. Oakland Unified School Dist.* (1992) 4 C.A.4th 1516, 1519, 6 C.R.2d 437 [playing full-court basketball in gym with unpadded concrete wall located 4 feet beyond end line]; *Ochoa v. California State University* (1999) 72 C.A.4th 1300, 1306, 85 C.R.2d 768 [adult college student voluntarily participating in intramural soccer game; following *Yarber*].)

(4) *Distinction: School Activities*. School physical educational classes, on the other hand, have been held not to constitute hazardous recreational activities. *Govt.C. 831.7* is inapplicable to injuries sustained on school grounds during a physical education class required by the school and conducted during school hours. Thus, a body contact sport incorporated into a physical education class is not a "recreational" activity, no matter how hazardous the activity may be in the abstract. (*Iverson v. Muroc Unified School Dist.* (1995) 32 C.A.4th 218, 227, 38 C.R.2d 35 [soccer match during physical education class on school grounds].)

The same is true of school-sponsored extracurricular activities under the supervision of school personnel. Nothing in *Govt.C. 831.7* or its history demonstrates a clear legislative intent to immunize school districts from liability for negligent supervision of extracurricular activities in general or athletics in particular. Nor is immunity conferred by necessary implication. Under *Govt.C. 831.7* a school district would not be liable for purely "recreational" activities that happen to be conducted on school property. However, a clear distinction exists between allowing the public to use school facilities and school-sponsored athletic practices under the supervision of school personnel after school or during the off-season. Furthermore, an activity is not "recreational" merely because it is voluntary. (*Acosta v. Los Angeles Unified School Dist.* (1995) 31 C.A.4th 471, 477, 37 C.R.2d 171 [school district was liable for injuries suffered by student gymnast during after-school practice session in off-season supervised by gymnastics coach].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Enumerated Activities*. See 29 A.L.R.6th 369 [governmental liability for injury sustained or caused by person sledding, tobogganing, or coasting on snow on government land]. (4) *Distinction: School Activities*. In *Avila v. Citrus Community College Dist.* (2006) 38 C.4th 148, 41 C.R.3d 299, 131 P.3d 383, a community college baseball player sued a rival community college for negligent supervision of a game after he was struck in the head by a pitched ball. The trial court sustained the college's demurrer on the ground that it was immune from liability under *Govt.C. 831.7*, and dismissed the action against it. *Held*, this was error; the statute "does not extend to injuries sustained during supervised school sports." (38 C.4th 152.)

(a) The legislative history of *Govt.C. 831.7* shows that it was adopted as a premises liability measure, modeled on C.C. 846 (see text, §1103 et seq.), and designed to limit liability based on a public entity's failure either to maintain public property or to warn of dangerous conditions on public property. Nothing in this history indicates that the statute was intended to limit a public entity's liability arising from other duties, such as a duty to supervise participation in particular activities. Consistent with the legislative history, cases applying *Govt.C. 831.7* immunity generally have done so only in the context of injuries sustained during voluntary, unsupervised, unsponsored activities. (38 C.4th 157.)

(b) Separate from the body of law governing premises liability claims, another body of law establishes that public schools and public colleges and universities owe certain nonproperty-based duties to their students. Public schools have a duty to supervise students, and this duty extends to athletic practice and play. Although public colleges and universities do not owe similarly broad duties of supervision to all their students, that development has not limited the recognition that they owe special duties to their athletes when conducting athletic practices and games. (38 C.4th 158.)

(c) *Acosta v. Los Angeles Unified School Dist.* (1995) 31 C.A.4th 471, 37 C.R.2d 171, text, p. 454, and *Iverson v. Muroc Unified School Dist.* (1995) 32 C.A.4th 218, 38 C.R.2d 35, text, p. 453, correctly acknowledge that school-sponsored and supervised sports activities are not "recreational" in the sense intended by *Govt.C. 831.7*, and thus the statute does not immunize public educational entities from liability to students for injuries sustained during participation in those activities. The legislative history demonstrates that the Legislature, by enacting *Govt.C. 831.7*,

intended to immunize public entities from liability for injuries sustained by members of the public during voluntary unsupervised play on public land, in order to prevent public entities from having to close off their land to this use in order to limit liability. These activities may be fairly characterized as recreational. Sports in the school environment, in contrast, are not "recreational" in the sense of voluntary unsupervised play, but rather part and parcel of the school's educational mission. (38 C.4th 159.)

(d) Nothing in the legislative history indicates that the Legislature ever contemplated or intended that Govt.C. 831.7 would overrule the body of law governing supervisorial duties and liability in the school sports context. Accordingly, the statute cannot be read as immunizing public entities from potential liability arising out of their oversight of school-sponsored activities. "[S]chool sports in general, and organized intercollegiate games in particular, are not 'recreational' within the meaning of the statute." (38 C.4th 160, disapproving *Ochoa v. California State University* (1999) 72 C.A.4th 1300, 85 C.R.2d 768, text, p. 453, to extent it suggests that Govt.C. 831.7 always immunizes universities against liability for injuries sustained by their adult student-athletes.)



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dd. Exceptions.

5 Witkin Sum. Cal. Law Torts § 278

[§ 278] Exceptions.

(1) *Liability of Entity*. The immunity under *Govt.C. 831.7* for hazardous recreational activities does not limit liability of the public entity that would otherwise exist for any of the following:

(a) *Failure to guard or warn after knowledge*. Failure of the entity to "guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity ... that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose." (*Govt.C. 831.7(c)(1)*.)

In *DeVito v. California* (1988) 202 C.A.3d 264, 248 C.R. 330, plaintiff was injured when she fell down a steep slope after swinging from a fire hose that was hanging from a tree. Plaintiff argued that *Govt.C. 831.7(c)(1)* was applicable because defendant state failed to warn her of a known dangerous condition. *Held*, judgment for defendant on demurrer affirmed. From the legislative history of *Govt.C. 831.7(c)(1)*, it is clear that the phrase "that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity" modifies the phrase "known dangerous condition," as well as the phrase "another hazardous recreational activity." (202 C.A.3d 271.) Because a person who swings from a hose hanging from a tree limb over a steep slope must be held to have reasonably assumed that an inherent part of the activity is the possibility of falling down the slope, *Govt.C. 831.7(c)(1)* was inapplicable. Hence, defendant was immune from liability. (202 C.A.3d 272.) (See *Rombalski v. Laguna Beach* (1989) 213 C.A.3d 842, 851, 261 C.R. 820 [diving from rock into ocean; following *DeVito v. California*]; *Perez v. Los Angeles* (1994) 27 C.A.4th 1380, 1386, 33 C.R.2d 55 [determination whether dangerous condition or hazardous recreational activity was reasonably assumed by the participant, within meaning of *Govt.C. 831.7(c)(1)*, is based on objective, instead of subjective, standard].)

In *Valenzuela v. San Diego* (1991) 234 C.A.3d 258, 263, 286 C.R. 1, the court said: "The inherent risk of diving from a rock into shallow water is hitting one's head. Here Valenzuela reasonably assumed this inherent risk. He dove from this rock twice on the day before the accident, and twice on the day of the accident. He knew the water was shallow and purposely dove at an angle in an attempt to avoid striking the bottom. Since hitting one's head is reasonably

assumed as an inherent risk of diving from a rock into shallow water," *Govt.C. 831.7(c)(1)* does not apply.

(b) *Permission to participate for fee.* Injury or damage suffered "where permission to participate in the hazardous recreational activity was granted for a specific fee. For the purpose of this paragraph, a "specific fee" does not include a fee or consideration charged for a general purpose such as a general park admission charge, a vehicle entry or parking fee, or an administrative or group use application or permit fee, as distinguished from a specific fee charged for participation in the specific hazardous recreational activity out of which the damage or injury arose." (*Govt.C. 831.7(c)(2).*)

(c) *Improper construction or maintenance.* Injury suffered "to the extent proximately caused by the negligent failure of the public entity or public employee to properly construct or maintain in good repair any structure, recreational equipment or machinery, or substantial work of improvement utilized in the hazardous recreational activity out of which the damage or injury arose." (*Govt.C. 831.7(c)(3).*)

(d) *Improper promotion of participation.* Injury or damage suffered "where the public entity or employee, recklessly or with gross negligence, promoted the participation in, or observance of, a hazardous recreational activity. For purposes of this paragraph, promotional literature or a public announcement or advertisement which merely describes the available facilities and services on the property does not in itself constitute a reckless or grossly negligent promotion." (*Govt.C. 831.7(c)(4).*)

(e) *Act of gross negligence.* An "act of gross negligence" by the entity "is the proximate cause of the injury." (*Govt.C. 831.7(c)(5)*; see *Decker v. Imperial Beach* (1989) 209 C.A.3d 349, 358, 257 C.R. 356, supra, §275 [gross negligence not established]; *Wood v. San Joaquin* (2003) 111 C.A.4th 960, 971, 4 C.R.3d 340 [failing to place speed limit signs in narrow harbor with boat docks was equivalent to "failing to enforce" *Harb. & Nav.C. 655.2*, but *Govt.C. 818.2* immunizes public entity for injury caused by "failing to enforce" any law; thus, failing to post speed limit signs was not "gross negligence" within meaning of *Govt.C. 831.7(c)(5)*].)

Nothing in *Govt.C. 831.7(c)* "creates a duty of care or basis of liability for personal injury or for damage to personal property." (*Govt.C. 831.7(c).*)

(2) *Liability of Others.* The immunity does not "limit the liability of an independent concessionaire, or any person or organization other than the public entity, whether or not the person or organization has a contractual relationship with the public entity to use the public property, for injuries or damages suffered in any case as a result of the operation of a hazardous recreational activity on public property by the concessionaire, person, or organization." (*Govt.C. 831.7(d).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Liability of Entity.*(b) *Permission to participate for fee.* See *Perry v. East Bay Regional Park Dist.* (2006) 141 C.A.4th 1, 13, 45 C.R.3d 477 [*Govt.C. 831.7(c)(2)* did not apply to drowning death of 14-year-old boy where fee for swimming in public lake was charged only when lifeguards were on duty and decedent drowned after lifeguards were no longer on duty; terms of exception require that fee be charged for "specific hazardous recreational activity out of which the damage or injury arose"].



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5 *Witkin Sum. Cal. Law Torts* § 279

[§ 279] Accident Caused by Weather Conditions.

It is a defense to governmental liability for a dangerous condition that the injury was a result of "the effect on the use of streets and highways of weather conditions," e.g., "fog, wind, rain, flood, ice or snow." (*Govt.C. 831*; see *Allyson v. Department of Trans. (1997) 53 C.A.4th 1304, 1312, 62 C.R.2d 490* [*Govt.C. 831* applied to snowstorm accident, where Caltrans had only discretionary, not mandatory, duty to do such things as post speed signs, establish chain control, plow snow from road, spread cinders, and post warning signs].)

This immunity does not exist, however, (1) if the effect "would not be reasonably apparent to, and would not be anticipated by, a person exercising due care," or (2) where the weather conditions "resulted in physical damage to or deterioration of" the street or highway. (*Govt.C. 831*; see *Erfurt v. California (1983) 141 C.A.3d 837, 845, 846, 190 C.R. 569* [effect would not be anticipated; blinding sunlight combined with pillar in middle of freeway].)

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5 Witkin Sum. Cal. Law Torts § 280

[§ 280] Nature of Defense.

(1) *Elements.* Under Govt.C. 830.6, setting forth the so-called design immunity defense (see *Cornette v. Department of Trans.* (2001) 26 C.4th 63, 68, 109 C.R.2d 1, 26 P.3d 332; *Hefner v. Sacramento* (1988) 197 C.A.3d 1007, 1014, 243 C.R. 291; *Wycoff v. California* (2001) 90 C.A.4th 45, 50, 108 C.R.2d 198), a public entity or employee is not liable for an injury where all of the following are shown:

(a) Causation of the injury by a defective plan or design for the construction or improvement of public property. (Govt.C. 830.6; *infra*, §281.)

(b) Advance approval of the plan or design by the entity's legislative body or by some other body or employee exercising discretionary authority (or preparation of the plan or design in conformity with standards previously so approved). (Govt.C. 830.6; *infra*, §282.)

(c) Reasonableness of the adoption or approval of the plan or standards. (Govt.C. 830.6; *infra*, §283.) (See *Hernandez v. Department of Trans.* (2003) 114 C.A.4th 376, 383, 7 C.R.3d 536 [first two of three elements of design immunity are questions of fact for jury; only last element, concerning reasonableness of design, is question of law for court]; 30 *Lincoln L. Rev.* 25 [design immunity in median barrier case]; 28 *San Diego L. Rev.* 241 [comprehensive review of cases decided under Govt.C. 830.6]; 11 *U.S.F. L. Rev.* 395; 45 *A.L.R.3d* 875 [governmental tort liability as to highway median barriers]; on immunities and defenses of public employees concerning dangerous conditions generally, see *infra*, §360.)

(2) *Purpose and Effect.* The legislative purpose of the defense is stated by the California Law Revision Commission as follows: "There should be immunity from liability for the plan or design of public construction and improvements where the plan or design has been approved by a governmental agency exercising discretionary authority, unless there is no reasonable basis for such approval. While it is proper to hold public entities liable for injuries caused by arbitrary abuses of discretionary authority in planning improvements, to permit reexamination in tort litigation of particular discretionary decisions where reasonable [persons] may differ on how the discretion should be exercised would create

too great a danger of impolitic interference with the freedom of decision-making by those public officials to whom the function of making such decisions has been vested." (4 Cal. Law Revision Com. Reports (1963), p. 823; see *Uyeno v. California* (1991) 234 C.A.3d 1371, 1376, 286 C.R. 328 [quoting commission].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Purpose and Effect.* See *Weinstein v. Department of Trans.* (2006) 139 C.A.4th 52, 61, 42 C.R.3d 417 [public entity held immune from liability because design is deemed reasonably adoptable cannot then be held liable for failing to warn that design is dangerous; to hold otherwise would be illogical]. *Correction:* Page 456, fourth line of section, "*Wyckoff v. California*" should be "*Wyckoff v. California*".



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bb. Causation of Injury by Design.

5 *Witkin Sum. Cal. Law Torts* § 281

[§ 281] Causation of Injury by Design.

(1) *In General.* Design immunity applies only to "an injury caused by the plan or design of a construction of, or an improvement to, public property." (*Govt.C. 830.6*; see *Fuller v. Department of Trans. (2001) 89 C.A.4th 1109, 1114, 107 C.R.2d 823* [setting speed limit is subject to design immunity analysis because it is related to road construction or improvement].)

The defense is available despite departures from the design plans where these are not material to the circumstances of the accident. (*Wyckoff v. California (2001) 90 C.A.4th 45, 52, 108 C.R.2d 198.*)

(2) *Defense Is Unavailable Where Concurrent Cause Subjects Entity to Liability.* Design immunity is not a defense if the injuries are caused, at least in part, by negligent acts or omissions of the public entity that are independent of the plan or design. (*Flournoy v. California (1969) 275 C.A.2d 806, 814, 80 C.R. 485.*) *Cameron v. California (1972) 7 C.3d 318, 102 C.R. 305, 497 P.2d 777*, is illustrative. Plaintiffs sued for injuries sustained when the automobile in which they were riding went out of control on a sharp curve in the roadway. The theory of the complaint was that the superelevation or banking changed abruptly without warning signs. *Held*, the design defense was not available. Even though the state may have had the defense against its active negligence in construction, it could still be held liable for its passive negligence in failing to warn of the danger, where that failure was "an independent, separate, concurring cause of the accident." (*7 C.3d 329.*) (See *61 Cal. L. Rev. 627.*) [*Cameron.*])

In *Bay Area Rapid Transit Dist. v. Superior Court (1996) 46 C.A.4th 476, 53 C.R.2d 906*, however, the plaintiff failed to show an independent ground for liability. Plaintiff boarded a car of defendant district. As plaintiff was preparing to sit down, the car lurched back and forth approximately five times, throwing her into a seat and injuring her. Plaintiff alleged negligent maintenance of the train and negligent supervision of train operators. Defendant unsuccessfully moved for summary judgment. *Held*, on writ of mandamus, trial judge directed to grant the motion; defendant was immune under *Govt. C. 830.6*.

(a) Design immunity is limited to design-caused accident; it does not immunize the public entity from liability for

negligence that is independent of design. (46 C.A.4th 480.)

(b) To prove that a design defect caused the accident (the other elements of the defense were not in controversy), defendant in moving for summary judgment introduced expert testimony that the design of its acceleration system produced some lurching motion during acceleration when the system sensed that the wheels were slipping. (46 C.A.4th 481.) To combat this evidence, plaintiff showed that a suitable ride was produced by proper functioning of all the systems, the malfunction of any of which could be caused by negligent maintenance or negligent supervision. However, she introduced no evidence regarding the negligence in maintenance or supervision, or the mechanism by which a failure with respect to these functions could cause lurching during acceleration. Plaintiff thus failed to meet her burden of proof. (46 C.A.4th 482.)

(3) *Distinction: Temporary Dangerous Condition Arising During Construction of Improvement.* Govt.C. 830.6 is inapplicable to a temporary dangerous condition of public property that arises during the construction of an improvement. The class of risks that attend construction work is dissimilar to that attending the design of improved public property. The risks inherent in the static design alternatives of a finished fixed installation are different in kind and are generally more limited and foreseeable than those that arise in the fluid process of construction. (*Winig v. California* (1995) 37 C.A.4th 1772, 1776, 45 C.R.2d 652 [excavation preparatory to installation of new median barrier on freeway].)

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5 *Witkin Sum. Cal. Law Torts* § 282

[§ 282] Advance Discretionary Approval.

To establish design immunity, the entity must show either that the plan or design "has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval" or that the plan or design "is prepared in conformity with standards previously so approved." (*Govt.C. 830.6*; see *Uyeno v. California* (1991) 234 C.A.3d 1371, 1376, 286 C.R. 328 [approval of design of traffic signal system]; *Sutton v. Golden Gate Bridge, Highway & Trans. Dist.* (1998) 68 C.A.4th 1149, 1157, 81 C.R.2d 155 [evidence showed adequate approval of plan to omit movable median barrier on Golden Gate Bridge]; *Hernandez v. Department of Trans.* (2003) 114 C.A.4th 376, 383, 7 C.R.3d 536 [element of design immunity that requires discretionary approval of design prior to construction is question of fact for jury]; 26 *Pacific L. J.* 1, 15 [*Uyeno*].)

The approval must be by an agency exercising discretionary authority. In *Johnston v. Yolo* (1969) 274 C.A.2d 46, 79 C.R. 33, plaintiff sued defendant county for injuries sustained when a car failed to negotiate a double curve in a county road. In rejecting the design defense, the court pointed out that the approval must be by the governmental agency exercising discretionary authority. Under the Streets and Highways Code, this was not the board of supervisors, but the county road commissioner, a qualified civil engineer. The evidence showed that the road commissioner disapproved of the design, but ordered it built anyway in deference to the wishes of a member of the county board of supervisors. This was not the approval required by the statute. The approval had to express both his official and professional approval, and did not. (274 C.A.2d 54.)

In *Bane v. California* (1989) 208 C.A.3d 860, 256 C.R. 468, *infra*, §284, a Caltrans engineer responsible for the safety of an intersection approved a plan for design changes, but did not sign it as required by *B. & P.C. 6735. Held*, the plan was nevertheless "approved" under *Govt.C. 830.6*.

(a) *B. & P.C. 6735* does not invalidate unsigned plans, and *Govt.C. 830.6* does not require that approved plans be signed. The only purpose for the signature requirement is to establish accountability. Hence, although a public entity will have a more difficult time demonstrating that unsigned plans were approved, it may nevertheless establish approval

by oral testimony, as was done here. (208 C.A.3d 869.)

(b) *Johnston v. Yolo*, *supra*, is distinguishable, because the "approving" commissioner in that case actually disapproved of the design. (208 C.A.3d 867.)

The approval must have included the alleged design feature that is in issue. (*Cameron v. California* (1972) 7 C.3d 318, 326, 102 C.R. 305, 497 P.2d 777, *supra*, §281 [accident where banking on sharp curve changed abruptly without warning; although plans had been approved, they contained no specification of banking].)

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5 *Witkin Sum. Cal. Law Torts* § 283

[§ 283] Reasonableness of Design.

Another requirement for design immunity is that "the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor." (*Govt.C. 830.6*; see *Cornette v. Department of Trans. (2001)* 26 C.4th 63, 68, 109 C.R.2d 1, 26 P.3d 332 [court, not jury, determines existence of substantial evidence to support reasonableness of initial adoption of plan or design]; *Levin v. California (1983)* 146 C.A.3d 410, 418, 194 C.R. 223 [no showing of reasonableness; silence of state's experts regarding absence of shoulder and guardrails at accident site]; *Morfin v. California (1993)* 12 C.A.4th 812, 816, 15 C.R.2d 861 [to establish unreasonable design of DMV building in which plaintiffs were sitting when it was hit by a car, evidence of number of vehicle-building collisions at other DMV facilities within preceding 10 years was relevant]; *Higgins v. California (1997)* 54 C.A.4th 177, 184, 62 C.R.2d 459 [reasonable basis for approval of design]; *Grenier v. Irwindale (1997)* 57 C.A.4th 931, 941, 67 C.R.2d 454, *infra*, §284 [when proving that design was reasonable, it is only necessary to produce some substantial evidence to that effect, that is, evidence of solid value that reasonably inspires confidence, such as opinion of civil engineer; it makes no difference that there is also contrary evidence]; *Arreola v. Monterey (2002)* 99 C.A.4th 722, 757, 122 C.R.2d 38 [holding that there was no substantial evidence on basis of which reasonable public employee could have approved culvert design that did not take flooding into account]; *Hernandez v. Department of Trans. (2003)* 114 C.A.4th 376, 386, 7 C.R.3d 536 [element of design immunity that requires substantial evidence supporting reasonableness of design is matter of law for court to decide; following *Cornette*].)

The requirement of reasonable design was not met in *Davis v. Cordova Recreation & Park Dist. (1972)* 24 C.A.3d 789, 101 C.R. 358. The dangerous condition was a lake in defendant district's park, intended for aesthetic and fishing purposes, not for swimming. Plaintiff's 4-year-old son drowned in the deep area. Defendant had actual knowledge of children playing in the lake. *Held*, there was no substantial evidence to support a conclusion of reasonableness of a "fish hole" or sump 51/2 feet deep at the bottom, properly described as a "trap." (24 C.A.3d 799.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Weinstein v. Department of Trans.* (2006) 139 C.A.4th 52, 58, 42 C.R.3d 417 [substantial evidence supported Department of Transportation's decision to omit median barrier at location of later accident; department could reasonably focus on cross-median accident rate in vicinity, rather than general accident rate there, in deciding whether barrier was required]; *Laabs v. Victorville* (2008) 163 C.A.4th 1242, 1262, 1267, 78 C.R.3d 372 [design immunity for dangerous condition of road where collision occurred was established by evidence that city's engineer had approved plan for construction and expert's declaration that design was not only "reasonable," but "excellent"; that design was reasonably approved was implicit in declaration].



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ee. Effect of Changed Conditions.

5 Witkin Sum. Cal. Law Torts § 284

[§ 284] Effect of Changed Conditions.

(1) *Baldwin Case*. In *Baldwin v. California* (1972) 6 C.3d 424, 438, 99 C.R. 145, 491 P.2d 1121, the court laid down a substantial limitation on the design defense, holding it to be unavailable where changed circumstances have produced a dangerous condition of which the entity has notice. In 1967, plaintiff, driving north on a four-lane highway through a city, waited in the high-speed left lane to make a left turn, and was struck from behind. He sued the state. Defendant offered evidence sufficient to show that the plan for the intersection without a left turn lane, made in 1942, was reasonable and properly approved at the time. In subsequent years, the traffic increased enormously, and commencing in 1961, complaints to the Division of Highways by the police, businesspersons, the city council, and others, called attention to the serious danger and listed numerous traffic injuries, including four deaths. The division notified the city that it was restudying the conditions, but took no action. *Held*, summary judgment for defendant reversed.

(a) *Design immunity is not perpetual*. The Law Revision Commission, in drafting Govt.C. 830.6, referred to the "similar" judicially developed rule of *Weiss v. Fote*, 7 N.Y.2d 579. But *Weiss* did not state an absolute and permanent immunity: "The clear teaching of *Weiss* is that design immunity persists only so long as conditions have not changed. Having approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard." (6 C.3d 434.) Because the Legislature explicitly adopted the *Weiss* rule, it did not intend that design immunity be perpetual. (6 C.3d 434.)

(b) *Function of trier of fact*. Juries should not be allowed to second-guess discretionary determinations of public officials. But where experience has revealed the dangerous nature of a public improvement under changed conditions, the trier of fact will not simply be reweighing the same technical data and policy criteria that went into the original plan; there will be objective evidence of its actual operation. (6 C.3d 435.)

(c) *Policy considerations*. This view also reflects considerations of public policy guiding judicial decisions in the field of governmental liability. (6 C.3d 436.) The argument that liability under the new rule will bankrupt public entities

by forcing them to spend vast sums for updating of hazardous or obsolescent public improvements is unsound. Under Govt.C. 835.4 (supra, §272), corrective action need only be reasonable, and in this case, barricades would have been sufficient. Also, past experience under the Public Liability Act of 1923 (supra, §212) before the design immunity law was enacted, and in other populous states such as New York and Illinois, shows no such fiscal disaster. (6 C.3d 437.)

(d) *Inverse condemnation liability is persuasive.* The constitutional liability, under Cal. Const., Art. I, §19 (8 Summary (10th), *Constitutional Law*, §1132), for injury to property by an improvement as deliberately designed and constructed overrides any statutory design immunity for injury to property. Consequently, where property is involved, a public entity is already under a continuing obligation to review the design of its public works in order to avoid liability constitutionally imposed. No insuperable additional burden is placed on a public entity by extending this duty to cases of personal injury. (6 C.3d 438.)

(e) *Conclusion.* "Where a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved, as being safe, nevertheless in its actual operation under changed physical conditions produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability" conferred on it by Govt.C. 830.6. (6 C.3d 438.) (See 56 Cal. L. Rev. 1756 [case law before *Baldwin*]; 4 U.S.F. L. Rev. 442 [same]; 61 Cal. L. Rev. 627; 3 Pacific L. J. 687 [proposing new statute to increase predictability of immunity]; 10 U.C. Davis L. Rev. 393; 11 U.S.F. L. Rev. 400.)

(2) *Legislative Expansion of Immunity.* To meet liability concerns raised by *Baldwin*, Govt.C. 830.6 was amended in 1979. (See 11 Pacific L. J. 658.) The following provisions were added:

(a) *Immunity while public entity seeks funding and performs remedial work.* "Notwithstanding notice" that the property may no longer be in conformity with a proper design, the immunity will continue for a reasonable period of time sufficient for the public entity to obtain funds and carry out remedial work to put the property in such conformity. (Govt.C. 830.6.)

(b) *Immunity where adequate warnings given.* If the public entity is unable to remedy the condition because of "practical impossibility or lack of sufficient funds," the immunity remains "so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition." However, failure of a person to heed the warning "shall not in itself constitute an assumption of the risk of the danger." (Govt.C. 830.6.)

There was some initial confusion on how these legislative changes affected the principles stated in *Baldwin*. *Bane v. California* (1989) 208 C.A.3d 860, 256 C.R. 468, held that these legislative changes nullified the *Baldwin* requirement of a change in physical conditions for loss of design immunity: "[I]n drafting the 1979 amendment to section 830.6, the Legislature is presumed to have been aware of the *Baldwin* holding, yet it did not limit the loss of immunity to changed physical conditions which result in a dangerous condition. Rather, the amendment language is unlimited; thus, the amendment should be construed to mean that immunity is lost if the subsequent history shows the design was unreasonable for any reason once the public entity has notice of the dangerous condition and has a sufficient time period to remedy it." (208 C.A.3d 871.)

However, the holding in *Bane* was subsequently rejected by several Courts of Appeal, including, ultimately, the court that rendered the decision. These courts held that the 1979 legislative changes, rather than expanding *Baldwin* to extinguish design immunity in a situation other than changed physical conditions, extended design immunity in circumstances when, under *Baldwin*, that immunity would otherwise be lost. (See *Compton v. Santee* (1993) 12 C.A.4th 591, 598, 15 C.R.2d 660 [rejecting *Bane* and following *Baldwin*]; *Grenier v. Irwindale* (1997) 57 C.A.4th 931, 945, 67 C.R.2d 454 [same]; *Sutton v. Golden Gate Bridge, Highway & Trans. Dist.* (1998) 68 C.A.4th 1149, 1162, 81 C.R.2d 155 [same]; *Alvarez v. California* (1999) 79 C.A.4th 720, 735, 95 C.R.2d 719 [*Bane* overruled by court that rendered that decision].)

(3) *Cornette Case: Elements Required for Loss of Immunity.* Any possible remaining confusion over the effect of the 1979 legislation was laid to rest in *Cornette v. Department of Trans.* (2001) 26 C.4th 63, 109 C.R.2d 1, 26 P.3d 332: Under *Baldwin* and *Govt.C.* 830.6, "to demonstrate loss of design immunity a plaintiff must establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (26 C.4th 72.)

(4) *Illustrations.* The following decisions illustrate what constitute "changed conditions" and the effect of the change:

Higgins v. California (1997) 54 C.A.4th 177, 187, 62 C.R.2d 459 [no changed circumstances where highway design approved in late 1960s and improved in late 1980s still complied with state standards; even if increased traffic had created hazard, defendant lacked requisite notice of this fact; distinguishing *Baldwin*].

Dole Citrus v. California (1997) 60 C.A.4th 486, 70 C.R.2d 348 [fact that new design manual required all new overpasses to be provided with screens, as well as existing overpasses considered to be dangerous, did not require retrofitting of all existing overpasses and did not establish changed circumstances making state liable for injuries sustained when object fell from unscreened overpass].

Sutton v. Golden Gate Bridge, Highway & Trans. Dist., supra [rejecting argument that technological advances in development of movable median barrier by 1994 constituted evidence of changed conditions defeating design immunity granted in 1985].

Wyckoff v. California (2001) 90 C.A.4th 45, 58, 108 C.R.2d 198 [changed circumstances, including increased traffic volume and increased speed limit, did not make absence of center divider at site of head-on collision dangerous condition that would result in loss of design immunity, where no relation appeared between these increases and higher cross-median accident rates].

Mirzada v. Department of Trans. (2003) 111 C.A.4th 802, 805, 4 C.R.3d 205 [plaintiffs failed to raise factual issue concerning whether lack of median barrier had become dangerous due to changed circumstances; increase in traffic alone proved nothing].

In *Grenier v. Irwindale, supra*, plaintiff was injured when an automobile skidded on flooded streets and struck him. He sued defendant city, but it obtained summary judgment on the ground of design immunity. *Held*, affirmed. Plaintiff has shown no change in physical conditions here. He has shown no evidence that this single accident in 7 years constituted a change in conditions. Also, although the city had undisputed knowledge that the street flooded during storms, this was not a *change* in conditions, but something that existed from the day the improvements were first implemented. (57 C.A.4th 945.)

In *Alvarez v. California, supra*, plaintiff was injured and her son was killed when an approaching vehicle crossed the median and struck her car. The highway in question had been widened into a six-lane highway with a dirt median between the north and southbound lanes. On most of the 30-mile stretch involved, defendant state had constructed median barriers, but there was a 3.42-mile stretch where no barrier had been erected, and the accident occurred within this segment. With respect to the construction of median barriers, defendant's policy was that barriers should be installed only if the result of colliding with the barrier would be less severe than the result if no barrier existed. Summary judgment was entered for defendant on the ground of design immunity. *Held*, affirmed; plaintiff failed to establish a triable issue of fact of changed conditions.

(a) While increased traffic volume may constitute changed physical conditions, design immunity is not lost simply because the design is operating under changed conditions. Instead, there must be evidence that, under the new

conditions, the design has produced a dangerous condition of which the state is aware, and "dangerous condition" means a condition creating substantial injury when the property is used with due care in a reasonably foreseeable manner. For example, there was no evidence that, after the road in question was widened, increased traffic, coupled with an aberrant accident history, indicated its dangerousness. (79 C.A.4th 737.)

(b) The fact that defendant had erected other barriers on other segments of the road in question merely showed defendant's general concern with safety; it did not constitute an admission that lack of a barrier created a dangerous condition. Given the probability that barriers might increase, rather than decrease, the likelihood of accidents, defendant did not choose to install barriers on every median. Rather, it sought to identify road segments where the benefit of a barrier might outweigh the expected detriment. This determination did not constitute a finding that a median without a barrier was a dangerous condition or that conditions had changed so that design immunity had ended. (79 C.A.4th 738.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Illustrations.* The following decisions also illustrate what constitute "changed conditions" and the effect of the change:

Weinstein v. Department of Trans. (2006) 139 C.A.4th 52, 60, 42 C.R.3d 417 [increase in traffic and corresponding increase in accidents did not result in loss of design immunity defense against liability for omission of median barrier; plaintiffs failed to produce evidence that either statistic made roadway's condition at accident location inconsistent with state standards or would have rendered defendant's approval of roadway's design unreasonable].

Laabs v. Victorville (2008) 163 C.A.4th 1242, 1268, 78 C.R.3d 372 [plaintiff injured in collision at intersection of public roads failed to show that city lost design immunity for dangerous condition as result of changed circumstances; there was no evidence that functioning of intersection had changed through time or that city could carry out remedial work].



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- 5. Dangerous Condition of Public Property.
 - e. Particular Immunities and Defenses.
 - 5. Advance Approval of Plan or Design.
 - ff. Protective Measures Against Earth Movement.

5 Witkin Sum. Cal. Law Torts § 285

[§ 285] Protective Measures Against Earth Movement.

(1) *Nature and Purpose of Legislation.* Govt.C. 865 et seq. deal with the problems created by gradual earth movement. The legislative finding is as follows: "The gradual movement of land, such as in prehistoric slide areas, or as a result of subsidence due to the depletion of underground or subterranean supporting substances, such as minerals, petroleum sources, water, and similar substances, can result in danger to persons or property. Although the movement is gradual and expressed in terms of inches, feet or meters per day, week or year, at some point the forces that are exerted by the movement will sever underground utilities, such as water, sewer, gas, electricity or telephone services and can cause the destruction of above ground structures whose foundations become undermined or where support is denied altogether. Unlike an earthquake or rapid rockslide or landslide, these gradual earth movements permit possible intervention to arrest the movement and avoid harm which is posed to persons or property. If there is an adequate manifestation of the problem before actual harm to persons or property, it is possible to make some determinations as to a method of remedial action which can abate the hazard. However, any undertaking to arrest the earth movement may not be successful or may have within it the potential for hastening the movement and the damages resulting from such movement. Regardless of how slight that potential for aggravating the damages, local public entities are unwilling to undertake action to alleviate the hazard if such undertaking may invite potential liability." (Govt.C. 865(a).)

These provisions were therefore enacted to create an incentive for local public entities to undertake remedial action to abate the movement or protect against its danger, without fear of liability. (Govt.C. 865(b).) (See Govt.C. 866(a) [defining "gradual earth movement"]; 11 *Pacific L. J.* 661 [noting possible grounds for constitutional challenge].)

(2) *Immunity of Local Public Entity.* A local public entity is not liable for injury to person or property resulting from the impending peril or from any action taken to abate it, if, "on the basis of expert opinion or other reasonable basis," it has done all of the following:

- (a) Found the existence of the impending peril. (Govt.C. 866(a)(1).)
- (b) Determined appropriate remedial action. (Govt.C. 866(a)(2).)

(c) Undertaken to implement that action. (*Govt.C. 866(a)(3).*)

However, if the local public entity is unable to take these steps because (a) the hazard has ceased, (b) the steps cannot be completed before it occurs, or (c) the legislative body determines that remedial action will not abate the danger, the immunity remains. (*Govt.C. 866(b).*)

Immunity under *Govt.C. 866* is in addition to any other immunity provided by law and any claim of liability is subject to the immunities and defenses available to a private person. (*Govt.C. 866(c).*)

(3) *Immunity of Employee.* An employee of a local public entity is not liable for injuries resulting from an impending peril or from any action taken to abate it pursuant to *Govt.C. 866*. (*Govt.C. 867*; on immunities of public employees respecting dangerous conditions generally, see *infra*, §360.)

(4) *Immunity Applicable Where Peril Exists on Entity's Land.* In *Pomona v. Superior Court* (1986) 182 C.A.3d 1093, 227 C.R. 714, the action was for property damage resulting from an explosion to collapse a dangerous cave on city property. The trial judge ruled that because the city was required under *Govt.C. 835* (*supra*, §258) to remedy dangerous conditions on its property and was granted immunity under *Govt.C. 835.4* (*supra*, §272) for reasonable attempts to do so, *Govt.C. 866* must be construed to apply solely to perils on private property. *Held*, there is nothing in either *Govt.C. 866* itself or the overall plan of the Tort Claims Act requiring this limited construction.

(a) *Govt.C. 835* is a general statute which by its terms recognizes that its applicability may be limited by such specific immunity provisions as *Govt.C. 866*. (182 C.A.3d 1100.)

(b) The Legislative Committee Comment to *Govt.C. 815* (*supra*, §226) makes it clear that the immunity provisions of the Act, unless specifically limited, prevail over all sections imposing liability. (182 C.A.3d 1100.) And *Govt.C. 866* contains no such limitation. (182 C.A.3d 1099.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Legislation or Law Enforcement.

5 *Witkin Sum. Cal. Law Torts* § 286

[§ 286] Legislation or Law Enforcement.

A public entity is not liable for "an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." (*Govt.C. 818.2*; see *Sacramento v. Superior Court* (1972) 8 C.3d 479, 485, 105 C.R. 374, 503 P.2d 1382, *infra*, §296 ["law" includes regulations of prison authorities]; *Nunn v. California* (1984) 35 C.3d 616, 621, 200 C.R. 440, 677 P.2d 846 [alleged negligent delay in promulgating regulations governing instruction in firearms use by private security guards]; *Ronald S. v. San Diego* (1993) 16 C.A.4th 887, 896, 20 C.R.2d 418 [county's release of child to adoptive parents after several police detentions involved use of county's coercive power, and hence constituted failure in "law enforcement"]; C.E.B., 1 Government Tort Liability Practice 4th, §§9.40, 10.51.)

The immunity only relates to legislative and quasi-legislative action and to the discretion of law enforcement officers in carrying out their duties; it is not available where liability is imposed for failure to perform a *mandatory* duty. (Law Revision Com. Comment to *Govt.C. 818.2*; *Morris v. Marin* (1977) 18 C.3d 901, 916, 136 C.R. 251, 559 P.2d 606, *supra*, §248; *Elton v. Orange* (1970) 3 C.A.3d 1053, 1059, 84 C.R. 27, *supra*, §246; *Elson v. Public Util. Com.* (1975) 51 C.A.3d 577, 589, 124 C.R. 305, *supra*, §248; on liability for failure to discharge mandatory duty, see *supra*, §245 et seq.)

Notwithstanding *Govt.C. 818.2*, a city or county that knowingly issues a permit improperly exempting property from seismic safety requirements may be liable for earthquake-related injuries or death. (*Pub.Res.C. 2621.8*.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Public Entities.
7. Action or Inaction on License.

5 Witkin Sum. Cal. Law Torts § 287

[§ 287] Action or Inaction on License.

A public entity is not liable for "an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization," where the public entity or an employee of the public entity has discretion to make the determination. (*Govt.C. 818.4*; see *California v. Superior Court (Veta Co.)* (1974) 12 C.3d 237, 246, 115 C.R. 497, 524 P.2d 1281 [denial of permit to developer]; *Nunn v. California* (1984) 35 C.3d 616, 627, 200 C.R. 440, 677 P.2d 846 [decision of college district on when student was permitted to complete test leading to certification for firearms instruction]; *Burns v. City Council* (1973) 31 C.A.3d 999, 1003, 107 C.R. 787 [denial of building permit]; *O'Hagan v. Board of Zoning Adjustment* (1974) 38 C.A.3d 722, 726, 730, 113 C.R. 501, supra, §229 [denial of temporary use permit to operate restaurant]; *Universal By-Products v. Modesto* (1974) 43 C.A.3d 145, 154, 117 C.R. 525 [rejection of bid for license to provide garbage collection service]; *Slagle Const. Co. v. Contra Costa* (1977) 67 C.A.3d 559, 564, 136 C.R. 748 [denial of building permit]; *Engel v. McCloskey* (1979) 92 C.A.3d 870, 881, 883, 155 C.R. 284 [delay in investigation of character of applicant for admission to bar]; *West v. California* (1986) 181 C.A.3d 753, 761, 227 C.R. 16 [issuance of contractor's license without comprehensive investigation and failure to investigate complaints]; *Cancun Homeowners Assn. v. San Juan Capistrano* (1989) 215 C.A.3d 1352, 1359, 264 C.R. 288 [issuance of grading and building permits where soil compaction did not meet standards of local ordinance]; *Colome v. State Athletic Com.* (1996) 47 C.A.4th 1444, 1454, 55 C.R.2d 300 [while duty of boxer to undergo exam before boxing is mandatory, duty of Boxing Commission to issue or deny license is discretionary]; *Inland Empire Health Plan v. Superior Court* (2003) 108 C.A.4th 588, 592, 133 C.R.2d 735 [health maintenance organization's decision to credential certain physician as eligible to receive Medi-Cal reimbursement was discretionary under *Govt.C. 818.4*, even though it could not license physicians]; C.E.B., 1 Government Tort Liability Practice 4th, §10.93 et seq.; 28 A.L.R.4th 184 [issuance of automobile certificate of title without discovering title defect]; 41 A.L.R.4th 99 [negligent issuance of building permit subsequently suspended or revoked]; cf. *Elton v. Orange* (1970) 3 C.A.3d 1053, 1059, 84 C.R. 27, supra, §246 [*Govt.C. 818.4* was not applicable to complaint based on county's failure to investigate and supervise foster home operator, rather than on negligence in issuing license].)

This immunity statute has applied to the alleged negligence of the Department of Motor Vehicles in issuing a driver's license to an incompetent driver. (*Papelian v. California* (1976) 65 C.A.3d 958, 962, 135 C.R. 665; *People v. Superior Court (Wilson)* (1993) 18 C.A.4th 31, 37, 22 C.R.2d 110 [immunity statute applied to licensing where DMV

had made no prior determination that diabetic was unable to operate vehicle safely]; *Waschek v. Department of Motor Vehicles* (1997) 59 C.A.4th 640, 644, 69 C.R.2d 296 [DMV was immune where accident was caused by 96-year-old driver whom, in exercise of discretion, it had licensed]; see 41 A.L.R.4th 111 [state's liability to one injured by improperly licensed driver]; cf. *Trewin v. California* (1984) 150 C.A.3d 975, 981, 198 C.R. 263, supra, §246 [*Papelian* distinguished where department knew of elderly driver's diminished capacity at time license was issued; issuance of license was not discretionary act in those circumstances].) However, the department is liable to a lienholder or good faith purchaser of a vehicle for injury proximately caused by its negligent omission of the lienholder's name from an ownership certificate. (*Govt.C. 818.5* [department's liability may not exceed actual cash value of vehicle]; see Stats. 1985, Chap. 437 [legislative intent that *Govt.C. 818.5* "not be construed as establishing any precedent for creating state liability in any other situation or circumstance"]; 17 *Pacific L. J.* 795.)

The immunity is not available where liability is imposed under *Govt.C. 815.6* (infra, §245) for failure to perform a mandatory duty. (See *Elson v. Public Util. Com.* (1975) 51 C.A.3d 577, 582, 124 C.R. 305, supra, §248 [*Public Utilities Commission's* failure to revoke bus company's license for disobeying Commission order requiring liability insurance]; *Trewin v. California*, supra.)

Direct review of abuse of discretion in licensing is available by extraordinary writ. (Legislative Com. Comment to *Govt.C. 818.4*; on review by administrative mandamus, see 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §257 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Richards v. Department of Alcoholic Beverage Control* (2006) 139 C.A.4th 304, 318, 42 C.R.3d 782 [under *Govt.C. 818.4*, Department of Alcoholic Beverages Control was immune from liability in restaurant owner's action challenging suspension of alcoholic beverage license; immunity is accorded only to discretionary activities, but department enjoys broad discretion in licensing decisions].

(New) What constitutes "certificate." In *Sonoma AG Art, LLC v. Department of Food & Agriculture* (2004) 125 C.A.4th 122, 22 C.R.3d 468, a grape grower sued the state and the Department of Food and Agriculture, alleging that they were negligent in issuing a certificate finding that the grower's vines were diseased. The trial court sustained defendants' demurrer without leave to amend and entered judgment of dismissal. *Held*, affirmed, the state and the department were immune from liability.

(a) Under *Govt.C. 818.4* and 821.2 (text, §348), a public entity or employee is immune if the entity or employee (1) issues a certificate and (2) exercises discretion in determining whether to issue the certificate. Both conditions are satisfied here. (125 C.A.4th 126.)

(b) Plaintiffs argue that a grapevine certificate is not covered by these immunities, because a "certificate" under these provisions is an authorization to act, not a mere "official statement." (125 C.A.4th 126.) This is incorrect. "[N]either the dictionary, nor statutes and case law, supports the argument" that a certificate cannot be, simply, an official statement. (125 C.A.4th 127.)

(c) The Food and Agriculture Code requires the state and the department to exercise significant discretion in testing grapevines and issuing grapevine certificates. (125 C.A.4th 128.) *Administrative mandamus*:

Cross-Reference: 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §258 et seq.



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B. Public Entities.
8. Inspection of Private Property.

5 Witkin Sum. Cal. Law Torts § 288

[§ 288] Inspection of Private Property.

A public entity is not liable for "injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its property, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety." (*Govt.C. 818.6*.) (See *Elton v. Orange* (1970) 3 C.A.3d 1053, 1059, 84 C.R. 27, supra, §246 [*Govt.C. 818.6* is applicable only to inspections of property; hence, there is no immunity for county's failure to investigate and supervise foster home operator]; *Harshbarger v. Colton* (1988) 197 C.A.3d 1335, 1344, 1348, 243 C.R. 463, supra, §241 [*Govt.C. 818.6* conferred immunity for fraudulent inspection and for negligent hiring and supervision of inspectors]; *Washington v. Contra Costa* (1995) 38 C.A.4th 890, 898, 45 C.R.2d 646 [under *Govt.C. 818.6*, county was immune for negligence in performing inspection of chemical plant required by statute even if inspection, if properly done, would have prevented release of hazardous materials into atmosphere]; *Haggis v. Los Angeles* (2000) 22 C.4th 490, 498, 93 C.R.2d 327, 993 P.2d 983, supra, §245 [*Govt.C. 818.6* immunity is not limited to inspection per se, but includes failure to report result of inspection]; C.E.B., 1 Government Tort Liability Practice 4th, §10.47 et seq.) Because the inspection activities of public entities are so extensive, "a public entity would be exposed to the risk of liability for virtually all property defects within its jurisdiction if this immunity were not granted." (Legislative Com. Comment to *Govt.C. 818.6*.)

The immunity given by *Govt.C. 818.6* is absolute and cannot be circumvented by invoking the mandatory duty liability under *Govt.C. 815.6* (supra, §245). (*Clayton v. Sunnyvale* (1976) 62 C.A.3d 666, 670, 133 C.R. 306, supra, §248.)

This immunity covers the many kinds of authorized or required inspections of private property. Where *public property* is involved, liability may be imposed under *Govt.C. 830* et seq. (supra, §249 et seq.) for negligent failure to discover a dangerous condition by conducting reasonable inspections. The public entity may also be held liable under *Govt.C. 815.6* for noncompliance with any mandatory legal duty it may have to inspect its property. (Legislative Com. Comment to *Govt.C. 818.6*.)

SUPPLEMENT: [This section is current through the latest supplement]



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9. Tax Collection or Administration.

5 Witkin Sum. Cal. Law Torts § 289

[§ 289] Tax Collection or Administration.

Neither a public entity nor a public employee is liable for an injury caused by either of the following:

(1) "Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax." (*Govt.C. 860.2(a)*.)

(2) "An act or omission in the interpretation or application of any law relating to a tax." (*Govt.C. 860.2(b)*.) (See *Rickley v. Los Angeles* (2004) 114 C.A.4th 1002, 1016, 8 C.R.3d 406 [county's alleged practice of recording liens and reporting them to credit agency when no taxes or penalties were owed fell squarely within *Govt.C. 860.2* immunity]; C.E.B., 2 Government Tort Liability Practice 4th, §11.122 et seq.; on immunities and defenses of public employees generally, see *infra*, §348.)

The term "tax" is defined to include "a tax, assessment, fee, or charge." (*Govt.C. 860*.)

The Comment to *Govt.C. 860*, which is also applicable to *Govt.C. 860.2*, suggests that the immunity conferred by *Govt.C. 860.2* is applicable only to discretionary acts. The court in *Mitchell v. Franchise Tax Bd.* (1986) 183 C.A.3d 1133, 228 C.R. 750, disagreed: "The language of section 860.2 is clear and unambiguous. It makes no distinction between discretionary and ministerial acts. We must therefore reject plaintiffs' request that we indulge in construction and interpret section 860.2 to apply only to discretionary acts." (183 C.A.3d 1137.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Bates v. Franchise Tax Bd.* (2004) 124 C.A.4th 367, 381, 21 C.R.3d 285 [immunity conferred by *Govt.C. 860.2* does not apply to violations of Information Practices Act (C.C. 1798 et seq., text, §667), which expressly provides for governmental liability].

In *Dinuba v. Tulare* (2007) 41 C.4th 859, 62 C.R.3d 614, 161 P.3d 1168, a county was statutorily required to collect property taxes on behalf of local taxing entities, including a city redevelopment agency, and then allocate and distribute the revenue to these entities. The county improperly computed the portion of tax revenue to which the agency was entitled, and the agency sued to recover the misallocated revenue. *Held*, *Govt.C. 860.2* did not bar recovery.

(a) *Wrong complained of is not "injury" within Government Claims Act.* Govt.C. 860.2 is expressly directed to limiting governmental liability for an "injury," which is defined in Govt.C. 810.8 (see text, §220) as "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person." The county's failure to comply with its statutory duty to correctly allocate and distribute tax revenue to other public entities does not constitute an "injury" within the narrow meaning of Govt.C. 810.8 and 860.2. The wrong complained of here is one that by its very nature could not exist in an action between private persons. (41 C.4th 867.)

(b) *Money damages are not sought.* Also, the immunity provisions of the Government Claims Act are only concerned with shielding public entities from having to pay money damages for torts. Govt.C. 814 (see text, §218) provides that liability based on contract or the right to obtain relief other than money damages is not affected by the Act. The agency does not seek damages; it seeks only to compel the county to perform its statutory duty. While compliance with the duty may result in the payment of money, that is distinct from seeking damages. (41 C.4th 867.)



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10. Police and Correctional Activities.
a. Scope of Liability.
1. In General.

5 *Witkin Sum. Cal. Law Torts* § 290

[§ 290] In General.

The provisions of the Tort Claims Act specifically directed to police and correctional activities (*Govt.C. 844 et seq.*) are phrased in the language of immunities (see *infra*, §292 et seq.), with specified narrow exceptions. These exceptions, i.e., bases for liability, are as follows:

(1) Dangerous condition of public property: Except for an injury to a prisoner (see *infra*, §294), a person may recover under *Govt.C. 830 et seq.* (*Govt.C. 844.6(c)*, 845.2; on liability for dangerous condition of public property, see *supra*, §249 et seq.)

(2) Motor vehicle tort of public employee under *Veh.C. 17000 et seq.* (*Govt.C. 844.6(b)*); on liability for negligent operation of vehicle by public employee, see *infra*, §331 et seq.)

(3) Intentional and unjustifiable interference, by a public employee, with the right of a prisoner to obtain a judicial determination or review of the legality of the prisoner's confinement. However, no cause of action accrues until it has first been determined that the confinement was illegal. (*Govt.C. 845.4*; on effect of interference with prisoner's right to judicial determination or review of legality of confinement generally, see *infra*, §306.)

(4) Failure to furnish medical care to a prisoner, where the employee knows or has reason to know that the prisoner is in immediate need and fails to take reasonable action to get it. (*Govt.C. 845.6*; on effect of failure to provide medical care to prisoner generally, see *infra*, §295.) (See C.E.B., 2 Government Tort Liability Practice 4th, §11.3 et seq.; 57 *Am.Jur.2d* (2001 ed.), *Municipal, County, School, and State Tort Liability* §394 et seq.; 36 *A.L.R.5th* 1 [municipal liability for injury or death caused by off-duty police officer's action or failure to act]; 62 *Am.Jur. Trials* 547 [obtaining damages in federal court for state and local police misconduct].)

Litigation regarding police or correctional activities often arises in situations outside the scope of statutory immunities. Where no immunity applies, the public entity or officer is liable, as in other cases, to the same extent as a private individual for negligent or intentional conduct that results in injury. (*Govt.C. 815.2(a)*, *supra*, §237; *Govt.C. 820(a)*, *infra*, §346.) Liability may result, for example, from ordinary police negligence in investigative, protective, or

traffic control activities. (*McCorkle v. Los Angeles* (1969) 70 C.2d 252, 74 C.R. 389, 449 P.2d 453, *infra*, §356; *Clemente v. California* (1985) 40 C.3d 202, 210, 219 C.R. 445, 707 P.2d 818.) Also, a duty of care may arise from a special relationship that has arisen under the circumstances between the entity or officer and the victim or a third person (*infra*, §291).

SUPPLEMENT: [This section is current through the latest supplement]

Situations outside scope of statutory immunities: See *Venegas v. Los Angeles* (2007) 153 C.A.4th 1230, 1249, 63 C.R.3d 741 [no statutory immunity in action based on police officers' alleged negligence in detaining plaintiffs and searching their home].



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10. Police and Correctional Activities.

a. Scope of Liability.

2. Liability Based on Special Relationship.

5 Witkin Sum. Cal. Law Torts § 291

[§ 291] Liability Based on Special Relationship.

(1) *In General.* A duty to act may be imposed on police or correctional authorities by a special relationship between them and either the plaintiff or a third party. The relationship arises from representations or conduct causing detrimental reliance. (*Stone v. California* (1980) 106 C.A.3d 924, 929, 165 C.R. 339; cf. *Von Batsch v. American Dist. Tel. Co.* (1985) 175 C.A.3d 1111, 1122, 222 C.R. 239 [that officers responded to burglar alarm at business premises and investigated did not alone create special relationship imposing special duty]; *Foremost Dairies v. California* (1986) 190 C.A.3d 361, 364, 366, 232 C.R. 71 [reviewing cases holding that no special relationship existed, and reaching same conclusion]; on affirmative duties arising from special relationships generally, see *infra*, §1038 et seq.)

In *Davidson v. Westminster* (1982) 32 C.3d 197, 185 C.R. 252, 649 P.2d 894, plaintiff was stabbed in a laundromat. She sued defendant city and police officers, alleging that on three earlier occasions women had been stabbed at the same or nearby laundromats; that the officers had this laundromat under surveillance on the night of the assault, were aware of her presence, and saw a man who closely resembled the attacker; and that the officers nevertheless did not warn or protect her. The theory of liability was that a special relationship existed between plaintiff and the officers and between the assailant and the officers. *Held*, judgment for defendants on demurrer affirmed. There was no special relationship giving rise to a duty.

(a) *Necessity of special relationship to establish duty of care.* Under *Rest.2d, Torts* §315, a duty may arise to control another's conduct or to warn those endangered by it if (1) a special relation exists between the actor and the third person imposing a duty to control his or her conduct; or (2) a special relation exists between the actor and the endangered party that gives the latter a right to protection. The principles governing that duty have been set forth in *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, *infra*, §352; *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *infra*, §1050; and *Thompson v. Alameda* (1980) 27 C.3d 741, 167 C.R. 70, 614 P.2d 728, *infra*, §299.)

(b) *No special relationship in this case.*

(1) Between the officers and the assailant, the minimal connection--visual identification from a distance--was

insufficient; a person's "mere proximity to an assailant, even with knowledge of his assaultive tendencies or status as a felon, does not establish a relation imposing a duty to control the assailant's conduct." (32 C.3d 205.)

(2) Between plaintiff and the officers, their decision to conduct the surveillance, observation of the potential assailant as the likely perpetrator of a previous assault, and failure to warn or otherwise protect her were insufficient. There was no voluntary assumption of a duty. (32 C.3d 206.) The police may sometimes conclude that warning all potential victims in the vicinity is prudent and necessary, but imposition of a general duty would be inappropriate. (32 C.3d 208.)

The same result was reached in *Williams v. California* (1983) 34 C.3d 18, 192 C.R. 233, 664 P.2d 137. Plaintiff alleged that while she was a passenger in an automobile, a piece of a heated brake drum from a passing truck was propelled through the windshield, causing serious injuries; that defendants, the State of California and California Highway Patrol officers, arrived within minutes and assumed the responsibility of investigating the accident; and that defendants so negligently investigated the accident as to destroy any opportunity for plaintiff to obtain compensation; i.e., they failed to investigate the brake drum part to determine that it was still hot, failed to identify other witnesses or the other motorists injured, and failed to attempt an investigation or pursuit of the owner or operator of the truck. *Held*, no cause of action was stated.

(a) *Duty to aid another: general principles.* (1) As a rule, one has no duty to come to the aid of another unless there is some special relationship between them that gives rise to a duty to act. (34 C.3d 23, citing *Rest.2d, Torts* §314.) (2) However, under the "good Samaritan" rule, a volunteer who undertakes to come to the aid of another is liable if the volunteer's lack of due care in performance increases the risk of harm, or the harm is suffered because of the other's reliance on the undertaking. (34 C.3d 23, citing *Rest.2d, Torts* §323.)

(b) *Application of principles to law enforcement activities.* Despite widely held misconceptions to the contrary, the general principles concerning duty or lack of duty apply to law enforcement personnel in carrying out routine traffic investigations. (1) The highway patrol has the right, but not the duty, to investigate accidents or to come to the aid of stranded motorists. *Veh.C.* 2412 merely states that officers of the Highway Patrol "may" investigate accidents for the purpose of prosecuting persons guilty of violation of the law. (2) However, where an officer voluntarily assumes a protective duty and undertakes action, he is held to the same standard of care as a private person. (34 C.3d 24.)

(c) *No special relationship arose from officers' conduct.* "[P]laintiff has not stated a cause of action in that she fails to establish a duty of care owed by defendant state. The officers did not create the peril in which plaintiff found herself; they took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed; there is no indication that they voluntarily assumed any responsibility to protect plaintiff's prospects for recovery by civil litigation; and there are no allegations of the requisite factors to a finding of special relationship, namely detrimental reliance by the plaintiff on the officers' conduct, statements made by them which induced a false sense of security and thereby worsened her position." (34 C.3d 27.)

Williams was followed in *Rose v. Plumas* (1984) 152 C.A.3d 999, 199 C.R. 842. Plaintiffs alleged that, while customers in a bar, they assisted the bartender in evicting unruly persons and were seriously injured, and that deputy sheriffs of defendant county investigated the disturbance and were aware of plaintiffs' need for emergency medical treatment and the importance of preserving evidence, but did nothing. *Held*, the complaint failed to state a cause of action; allegations of dependency alone, without reliance, do not establish the special relationship necessary to create a duty to act: "Nothing in the complaint even suggests that plaintiffs in any sense relied on the police for medical aid . . . The officers did not undertake any affirmative action which contributed to, increased or changed the risk which otherwise already existed . . . No express or implied promises were made by the officers indicating they would render aid. Nothing in the complaint suggests that plaintiff or anyone else held the subjective belief that emergency aid would be rendered by the officers." (152 C.A.3d 1004.)

(2) *Duty To Warn.* The issue has arisen in a number of cases in the context of failure to warn. (See *Davidson v.*

Westminster, supra.)

In *Denton v. Fullerton* (1991) 233 C.A.3d 1636, 285 C.R. 297, the requisite relationship was likewise found to be absent. A woman contacted defendant city's police department after being sexually assaulted in a laundry room of the apartment complex where plaintiff lived, and reported that she had seen the assailant enter a specified apartment. The only actions taken by the investigating officers were to check the outside of the apartment, ascertain from the apartment complex's management that it was rented to plaintiff, and run a registration check on a vehicle listed on the rental agreement as belonging to plaintiff's son. After coming home from work later that same night, plaintiff was taken from her apartment and raped. *Held*, summary judgment for defendant affirmed; the officers had no duty to warn plaintiff of the danger.

(a) Neither the investigation of a prior assault nor the fact that plaintiff was a foreseeable victim of a sexual assault created a special relationship between plaintiff and the police that would require them to warn her of the danger. (233 C.A.3d 1643.)

(b) Because plaintiff was completely unaware of the prior assault and the police investigation of it, she could not argue that she depended on the police to warn her of any potential danger. And because the police did nothing to change the risk that would have existed even if they had not conducted the earlier investigation, the mere fact that they were aware of plaintiff's identity and the potential risk she faced was not sufficient to impose liability on them. (233 C.A.3d 1643.)

(c) Because the police had no duty to warn plaintiff of the potential danger, they also had no obligation to ensure that the apartment manager would do so. And there was nothing in the actions taken by the officers to support plaintiff's argument that the manager was lulled into believing that no further action was necessary. (233 C.A.3d 1645.)

A contrary conclusion was reached in *Carpenter v. Los Angeles* (1991) 230 C.A.3d 923, 281 C.R. 500. Plaintiff sued defendant city for damages suffered when he was shot by an unknown assailant, allegedly in retaliation for having testified against a defendant at a preliminary hearing. The issue was "whether a city, through its police department, owes a duty to warn a witness, assisting in a criminal prosecution, about information it has received from a reliable source, regarding a threat to the witness's life, after earlier assuring the witness that he had no cause for concern." (230 C.A.3d 926.) *Held*, summary judgment for defendant city reversed.

(a) "While neither party has cited a California case directly in point and our independent research has revealed no such case, we conclude that appellant, as a witness in a criminal prosecution, who had been assured that the defendant posed no real danger to him, enjoyed a special relationship with the City, through its police department, such that the City owed appellant a duty of care, which required it to warn appellant" of the "subsequent threat to appellant's life." (230 C.A.3d 931.)

(b) Here, the city sought plaintiff's assistance in identifying Jenkins. The duty arose because the police, after assuring plaintiff that defendant posed no real danger, received reliable information that plaintiff's life was in danger and failed to warn him. And reasonable care required that the police, after lulling defendant into a false sense of security, inform him of the very real threat. (230 C.A.3d 933.) "We are speaking here of a duty to warn. As evidenced by the Witness Protection Program in which appellant was placed after being shot, the City already recognizes it has a duty to protect certain witnesses." (230 C.A.3d 933.) (See *Wallace v. Los Angeles* (1993) 12 C.A.4th 1385, 1401, 16 C.R.2d 113 [following *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, *infra*, §352, and *Carpenter v. Los Angeles, supra*, and holding that defendants breached duty to warn witness subpoenaed to testify in homicide case]; on duty to warn of release of prisoner, see *infra*, §299.)

West's Key Number Digest, Municipal Corporations k.747(3), 1060

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Minch v. Department of Calif. Highway Patrol* (2006) 140 C.A.4th 895, 906, 44 C.R.3d 846 [California Highway Patrol officers did not assume special relationship to tow truck operator who was injured only after he had finished extracting vehicle involved in accident and was parking truck with vehicle in tow, and thus had no duty to continue regulating traffic at accident scene through that time; operator was not in position of dependency on officers, and officers did not indicate that they would protect his safety].



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1. Immunity Rule.

5 Witkin Sum. Cal. Law Torts § 292

[§ 292] Immunity Rule.

(1) *Injury Caused by Prisoner.* A public entity is immune from liability for an injury "proximately caused by any prisoner." (Govt.C. 844.6(a)(1).)

The scope of the immunity is broad. In *Savitt v. Jordon* (1983) 142 C.A.3d 820, 191 C.R. 290, plaintiff, a deputy district attorney attending a parole hearing at San Quentin Prison, was attacked and stabbed by J, a prisoner. Plaintiff's action was based on the theory that the Department of Corrections had negligently allowed J to come into possession of the knife, i.e., that state officials had acted negligently in implementing ministerial acts and were therefore not accorded the immunity for discretionary acts (see Govt.C. 820.2, *infra*, §351 et seq.). *Held*, no cause of action was stated. The immunity of Govt.C. 844.6 applies to public entities, not public employees, and makes no distinction between discretionary and ministerial acts. "Thus, it is conceivable that if a homicidal prisoner is negligently permitted to have access to prison visitors and, in fact, murders a visitor, the state would be immune from liability for its negligence." (142 C.A.3d 822.)

P.C. 1618 precludes civil liability of the state or country for the criminal acts of persons committed or placed at Forensic Conditional Release Program (CONREP) facilities. (See *Ley v. California* (2004) 114 C.A.4th 1297, 1303, 8 C.R.3d 642 [immunity under P.C. 1618 is absolute]; on forensic conditional release programs, see 3 Cal. Crim. Law (3d), *Punishment*, §199.)

(2) *Injury Sustained by Prisoner.* The entity is also immune from liability for an injury "to any prisoner." (Govt.C. 844.6(a)(2); on original statute, see *Sanders v. Yuba* (1967) 247 C.A.2d 748, 754, 55 C.R. 852, *infra*, §295; *Hart v. Orange* (1967) 254 C.A.2d 302, 304, 62 C.R. 73, *infra*, §295; *Datil v. Los Angeles* (1968) 263 C.A.2d 655, 658, 69 C.R. 788, *infra*, §293; *Apelian v. Los Angeles* (1968) 266 C.A.2d 550, 552, 72 C.R. 265; *Hughes v. Los Angeles* (1973) 35 C.A.3d 349, 353, 110 C.R. 754 [immunity is constitutional].) (See generally 2 *Pacific L. J.* 697 [recommending repeal of immunity]; 41 *A.L.R.3d* 1021 [liability of prison authorities for injury to prisoner directly caused by assault by other prisoner]; 79 *A.L.R.3d* 1210 [civil liability of prison or jail authorities for self-inflicted injury or death of prisoner].)

The distinction drawn in Govt.C. 844.6 between injuries sustained by prisoners and those suffered by arrestees does

not offend equal protection principles, because the distinction between a person in the custody of law enforcement officers (an arrestee) and a person in the custody of correctional officers (a prisoner) is based on rational criteria related to the statute. (*Reed v. Santa Cruz* (1995) 37 C.A.4th 1274, 1281, 44 C.R.2d 149.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Who Are Prisoners.

5 Witkin Sum. Cal. Law Torts § 293

[§ 293] Who Are Prisoners.

(1) *In General.* The term "prisoner" is generally defined as "an inmate of a prison, jail or penal or correctional facility." (*Govt.C. 844.*) The immunity thus exists only where the injured person is confined in a prison, jail, or other correctional institution. In *Larson v. Oakland* (1971) 17 C.A.3d 91, 94 C.R. 466, a police officer chased plaintiff, a suspected traffic violator, and caught and handcuffed him. The officer then led plaintiff to the police car, where the officer slipped and fell, injuring plaintiff. *Held*, there was no immunity. Plaintiff was merely under restraint, and not yet actually arrested and booked. (17 C.A.3d 97.)

On the other hand, a person booked and arraigned and awaiting trial is a prisoner within the meaning of the statute. (*Sahley v. San Diego* (1977) 69 C.A.3d 347, 349, 138 C.R. 34.) The same is true of a convicted person waiting in a county jail to be processed after having been remanded for incarceration as a condition of probation. (*Peterson v. Los Angeles* (1986) 185 C.A.3d 705, 708, 230 C.R. 80.) A person confined to a county work furlough facility is a prisoner, even though the person may be permitted to leave the facility to engage in employment, education, or other activities permitted by the administrator. (*Badiggo v. Ventura* (1989) 207 C.A.3d 357, 361, 254 C.R. 771.)

(2) *Juvenile Court Ward.* The broad term "prisoner" includes a ward of the juvenile court in custody by reason of the court's placement. (*Jiminez v. Santa Cruz* (1974) 42 C.A.3d 407, 411, 116 C.R. 878.)

Jiminez was distinguished in *Patricia J. v. Rio Linda Unified School Dist.* (1976) 61 C.A.3d 278, 132 C.R. 211, where the juvenile was not in custody. Parents of a young girl sued two school districts for injuries (rape resulting in venereal disease) inflicted by a juvenile court ward employed as a custodian. The ward had been committed to the custody of his mother and placed under supervision of the county probation department; thereafter, one of the school districts, as administrator of a neighborhood youth program, obtained employment for the ward with the other district. *Held*, the prisoner immunity under *Govt.C. 844.6(a)(1)* was inapplicable. In *Jiminez*, the ward was in custody, even though the particular place of confinement was called a "foster home." Here, the minor was not in custody. To come within *Govt.C. 844.6*, "a prisoner must be a person confined in a correctional facility or institution under the authority of law enforcement authorities or legal process . . . The distinction to be drawn in juvenile cases is that between wards individually placed in private homes, either of a parent or private foster home and those placed in institutions or other

collective facilities of restraint established for youthful offenders." (61 C.A.3d 287.)

(3) *Person Whose Term Has Expired.* The immunity does not apply to a person whose term has already expired and who is in the eyes of the law no longer a "prisoner." Hence, his or her confinement may be actionable false imprisonment. (*Sullivan v. Los Angeles* (1974) 12 C.3d 710, 716, 117 C.R. 241, 527 P.2d 865, supra, §246; see dissent, arguing that by statutory definition, "an inmate" is a prisoner, despite his claim of illegal confinement.)

(4) *Person in Civil Protective Custody.* Under P.C. 647(g), a person arrested for public intoxication (P.C. 647(f)) may be placed in "civil protective custody" in a designated facility. *Meyer v. Oakland* (1980) 107 C.A.3d 770, 777, 778, 166 C.R. 79, held that such a person, though confined, is not a "prisoner" within the meaning of Govt.C. 844.6(a), and that the immunities under that statute do not apply. However, *Meyer* was disapproved in *Teter v. Newport Beach* (2003) 30 C.4th 446, 133 C.R.2d 139, 66 P.3d 1225. Plaintiff was arrested for public intoxication and booked into the city jail. Under P.C. 647(g), a person charged with this crime would normally be placed in civil protective custody and taken to a civil detoxification facility. However, defendant city had no such facility. Instead, it had a policy of releasing those arrested for public drunkenness if they satisfied three criteria. Prior to 6:30 the next morning, defendant planned to release plaintiff at 8:00 if he satisfied these criteria. However, at 7:00 plaintiff was assaulted by another prisoner who had been placed in the same cell, and he sued defendant. Defendant claimed immunity under Govt.C. 844.6(a). The trial court entered judgment against defendant, and the Court of Appeal affirmed on the ground that plaintiff was a detainee in civil protective custody, rather than a prisoner. *Held*, reversed.

(a) Under Govt.C. 844, a lawfully arrested person becomes a "prisoner" on his or her initial entry into a correctional facility for the purpose of being booked. Under this standard, plaintiff was a "prisoner." He nevertheless argued that he was in civil protective custody under P.C. 647(g). However, before an arrestee can be in this type of custody, the arresting officer must be reasonably able to place the arrestee in a civil detoxification facility, a requirement that was not met here, because defendant had no such facility. This fact distinguishes this case from *Meyer*. Moreover, the underlying premise of *Meyer*--that a P.C. 647(f) arrestee being held in jail pending transfer to a detoxification facility is not a "prisoner" for purposes of the immunity statute--is rejected as illogical. There is no good reason why a city's liability should depend on the availability within that city of a detoxification facility. Accordingly, *Meyer* is disapproved. (30 C.4th 452.)

(b) The Court of Appeal was of the opinion that a broad definition of "prisoner" would discourage cities from providing detoxification facilities lest they lose their immunity. However, the decision whether to expend county funds on detoxification facilities or on criminal enforcement of P.C. 647(f) is not for the courts to make, but for those exercising legislative authority at the state or county level. (30 C.A.4th 453.)

(c) An arrest that is valid when made remains a valid arrest for purposes of Govt.C. 844.6(a), even though the person is released under P.C. 849(b) and issued a certificate under P.C. 851.6 describing the action as a "detention." Otherwise, there would be a "disappearing lawful arrest." (30 C.4th 454.)

(d) Plaintiff argued that P.C. 647(f) arrestees who are temporarily detained to sober up in local jails, with no intention that they be charged or prosecuted, cannot be considered "prisoners," because they are afforded none of the due process prerequisites of criminal procedure. This argument is based on a false premise, i.e., that defendant had no intention of charging him when he was arrested. To the contrary, when plaintiff was arrested, the question whether he would be charged was still open based on his ability to satisfy the criteria for release, and this question remained open at the time that he was assaulted. No further process was due plaintiff. (30 C.4th 456.)

(5) *Person Arrested but Not Incarcerated.* In *Griffith v. Monrovia* (1982) 134 C.A.3d Supp. 6, 184 C.R. 709, plaintiff, arrested and taken to the rear seat of a police car, began to kick and yell, and a police officer sprayed him with mace. *Held*, he could sue for battery; the statute applies only to persons incarcerated in a penal facility. (134 C.A.3d Supp. 9, 10.)

(6) *Person Incarcerated but Not Yet Charged.* In *Datil v. Los Angeles* (1968) 263 C.A.2d 655, 69 C.R. 788, two persons, arrested for drunkenness and booked, were in the hallway of the jail when one assaulted the other. *Held*, they were prisoners because they were in the process of transfer from one jail to another, and *Govt.C. 844.6* therefore applied. They were prisoners even though they had not yet been charged with a crime. (263 C.A.3d 658.)

(7) *Significance of Booking.* In *Zeilman v. Kern* (1985) 168 C.A.3d 1174, 214 C.R. 746, the court said: "Notwithstanding a certain amount of deprivation attendant upon an arrest, all the cases do seem to recognize a distinction between persons who are simply under arrest and therefore not prisoners and those persons who have become 'confined in a correctional facility or institution under the authority of law enforcement authorities or legal process.' ... [I]t appears the line of demarcation between status as an arrestee and as a confined person is the completion of the booking process. Once an arrestee has been booked, the status of an arrestee changes since he or she has become confined to a correctional facility under the authority of law." (168 C.A.3d 1181.)

In *Terzian v. Ventura* (1994) 24 C.A.4th 78, 28 C.R.2d 809, the decedent was arrested and taken to jail at approximately 11:40 p.m., at which time decedent was searched, his wallet and other personal property taken, and he was given a property inventory slip and turned over to the jail personnel by the arresting officer. Decedent was then given a booking number and an armband and placed in a holding cell. Further booking procedures subsequently occurred, including being photographed and fingerprinted, and the official booking time was listed as 2:58 a.m., with a supplemental booking at 3:03 a.m. After complaining of chest pain, Decedent was seen by a nurse at 1:25 a.m. and by a doctor at some time between 1:25 a.m. and 9:25 a.m. Early the next evening, decedent was found in his cell unconscious, having suffered a heart attack. He died 1 month later, and his children instituted the present action against defendant county, claiming that at the time decedent first received allegedly negligent medical treatment, i.e., 1:25 a.m., he was not yet a prisoner because the booking process had not yet been completed. *Held*, decedent had become a prisoner before receiving any medical treatment; hence, defendant was immune under *Govt.C. 844.6*.

(a) There was evidence that there are several stages of booking, i.e., reception booking, master booking, supplemental booking, and final booking, and that the formal booking procedure could take from hours to days, depending on the number of arrestees in custody and the condition of the particular arrestee. However, once the initial reception booking is completed, i.e., search, property inventory, assignment of a booking number, and placement in a holding cell, the arresting officer leaves the scene, and the arrestee is confined to jail under legal process and is not free to leave of his or her own accord. At that point, the arrestee becomes a "prisoner." (24 C.A.4th 86.)

(b) Plaintiffs argued that *Zeilman v. Kern* stands for the proposition that an arrestee does not become a prisoner until the total booking procedure is completed, including photographing and fingerprinting. However, *Zeilman* did not hold that the booking process had to include photographing and fingerprinting before it could be considered completed; it merely held that it was impossible to state as a matter of law from the declarations presented that the plaintiff had been booked. Under plaintiffs' interpretation of *Zeilman*, an arrestee who had not been photographed or fingerprinted could not be said to have been "booked" even though he may have been incarcerated for an extended period of time and have lost his freedom to leave. Such a strained interpretation of "booking" is not reasonable. (24 C.A.4th 86.) (See *Reed v. Santa Cruz* (1995) 37 C.A.4th 1274, 1280, 44 C.R.2d 149, *supra*, §292 [following *Terzian*; person assaulted in holding room at county jail after completion of only booking processes necessary to warrant her lawful confinement in jail was prisoner as matter of law, even though detention officer had not finalized booking process by creating computer record].)

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3. Exceptions.

5 Witkin Sum. Cal. Law Torts § 294

[§ 294] Exceptions.

The immunities of a public entity under *Govt.C. 844.6* for injuries caused or sustained by prisoners are subject to a number of exceptions:

(1) *Liability As Provided in Govt.C. 844.6*. Liability attaches "as provided in this section." (*Govt.C. 844.6(a)*.) Actions are permitted in *Govt.C. 844.6* to recover for the following:

- (a) Negligent operation of a motor vehicle. (*Govt.C. 844.6(b)*; see *infra*, §331.)
- (b) Dangerous condition of public property. (*Govt.C. 844.6(c)*; see *supra*, §249.)

Govt.C. 844.6(c) applies "[e]xcept for an injury to a prisoner," thus making it clear that no wrongful death action can be brought if the prisoner would not have been able to recover for nonfatal injuries. (*Lowman v. Los Angeles* (1982) 127 C.A.3d 613, 616, 179 C.R. 709; *May v. Monterey* (1983) 139 C.A.3d 717, 721, 189 C.R. 63.) Similarly, a cause of action for consortium, though initiated by a person who is not a prisoner, is barred by *Govt.C. 844.6*, because it is based on injury to a prisoner. (*Badiggo v. Ventura* (1989) 207 C.A.3d 357, 361, 254 C.R. 771 [citing *Lowman* and *May*].)

(2) *Liability Under Other Specified Statutes*. Liability attaches as provided in certain other specified statutes. (*Govt.C. 844.6(a)*.) These include the following:

- (a) *Govt.C. 814* (contract liability or nonmonetary relief; see *supra*, §217).
- (b) *Govt.C. 814.2* (workers' compensation; see *supra*, §217.)
- (c) *Govt.C. 845.4* (interference with right of prisoner to seek judicial review of legality of confinement; see *infra*, §306).
- (d) *Govt.C. 845.6* (failure to summon medical care for prisoner in need of immediate medical care; see *infra*, §295).

(e) P.C. 3500 et seq. (biomedical and behavioral research; see 3 *Cal. Crim. Law (3d)*, *Punishment*, §65).

(3) *Other Liability*. Govt.C. 844.6 applies "[n]otwithstanding any other provision of *this part*." (Govt.C. 844.6(a).) The limitation to provisions of "this part" avoids any implication that liability imposed by the law outside the Tort Claims Act is precluded. For example, liability under P.C. 4900 for erroneous conviction is preserved. (Legislative Com. Comment to 1970 Amendment to Govt.C. 844.6.)

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4. Failure To Furnish Medical Care to Prisoner.

5 Witkin Sum. Cal. Law Torts § 295

[§ 295] Failure To Furnish Medical Care to Prisoner.

(1) *Statutory Provision.* A public entity or employee is generally immune from liability for injuries caused by "the failure of the employee to furnish or obtain medical care for a prisoner in his custody." (*Govt.C. 845.6*; see *Wright v. California (2004) 122 C.A.4th 659, 672, 19 C.R.3d 92* [state and Department of Corrections were immune from liability for prisoner's injuries allegedly arising from denial of timely surgery]; on immunities and defenses of public employees respecting police and correctional activities generally, see *infra*, §362.)

However, liability is imposed where the employee "knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care." (*Govt.C. 845.6*; on liabilities of public employees respecting police and correctional activities generally, see *infra*, §361.) This liability exists "except as otherwise provided" by *Govt.C. 855.8* and *Govt.C. 856*. *Govt.C. 855.8* gives immunity from liability for diagnosing or failing to diagnose or prescribe for mental illness or addiction (see *infra*, §317), and *Govt.C. 856* gives immunity from liability for determining whether to confine a person for mental illness or addiction or to release the person (see *infra*, §365).

(2) *Judicial Construction.* The relation between *Govt.C. 845.6* and *Govt.C. 844.6* (*supra*, §292) was examined in *Sanders v. Yuba (1967) 247 C.A.2d 748, 55 C.R. 852*. Plaintiff, a prisoner in the county jail, was injured when he sat up in bed and struck a towel rack. His complaint alleged not only a dangerous condition, but also negligent failure of the jailers to summon medical aid despite their knowledge of his need. *Held*, judgment on demurrer reversed; liability of defendant county and its employees (the jailers) could be based on the second theory. The difficult problem was the apparently conflicting catch-all immunity provision of *Govt.C. 844.6(a)(2)*: "Notwithstanding any other provisions of law," a public entity is not liable for "[a]n injury to any prisoner." (See *supra*, §292, for amendment changing statement to "any other provision of this part.") Examining the legislative history, the court pointed out that *Govt.C. 844.6* was never recommended by the Law Revision Commission and was deleted several times in the course of consideration of the Tort Claims Act, while *Govt.C. 845.6* remained and was strengthened by making the public entity liable as well as the employee. Then, reconciling the two sections by preferring the specific over the general, *Govt.C. 844.6* was interpreted to give immunity for the normal physical impact type of injury, with *Govt.C. 845.6* still providing liability for failure to summon immediate medical care when its need is known. (*247 C.A.2d 754.*)

Hart v. Orange (1967) 254 C.A.2d 302, 62 C.R. 73, followed *Sanders*, but suggested a different rationalization.

(a) *Govt.C. 844.6* is concerned with the person's status as a prisoner, and with injuries that would be actionable but for that status. *Govt.C. 845.6*, on the other hand, deals with the positive subject of creation of liability, not with reiteration of an immunity. Hence, it is not inhibited by the restrictions of *Govt.C. 844.6*. Under this view, the phrase "[n]otwithstanding any other provisions of law" of *Govt.C. 844.6* "would relate only to injuries recognized as actionable if inflicted by a private person and not to injuries resulting from breach of a newly-defined duty not applicable to private persons, created by the Legislature as a special burden to be borne by public entities under limited circumstances." (254 C.A.2d 306.)

(b) Also, *Govt.C. 844.6* appears to have been based on the contemplated magnitude of liability if immunity from traditional tort actions did not exist. But exposure to liability under *Govt.C. 845.6* would arise infrequently and establishes only a modest standard of care in an area of ethical duty--the moral obligation to come to the aid of a person in danger. "We see this distinction in point of view as a valid basis for differentiation in legislative policy." (254 C.A.2d 307.)

Govt.C. 845.6 was held inapplicable in *Lucas v. Long Beach* (1976) 60 C.A.3d 341, 131 C.R. 470. A 17-year-old boy, held in a juvenile detention cell while apparently under the influence of a drug, committed suicide. Verdict and judgment were against defendant city on the ground of negligent failure to summon immediate medical care. *Held*, reversed. The statute "envision[s] liability for injury resulting from the failure to treat the physical condition requiring treatment and not for some other incidental injury that might have been prevented by the mere presence of medical personnel." (60 C.A.3d 350.) In *Johnson v. Los Angeles* (1983) 143 C.A.3d 298, 316, 317, 191 C.R. 704, *infra*, §301, however, a complaint alleging failure to provide medical assistance to an obviously suicidal prisoner was held to state a good cause of action under *Govt.C. 845.6*.

In *Zeilman v. Kern* (1985) 168 C.A.3d 1174, 214 C.R. 746, the court, reversing a summary judgment for defendant county, pointed out that decisions such as *Lucas v. Long Beach* were based on failure of proof at the trial, and are not inconsistent with decisions such as *Hart v. Orange*. "In all cases it seems abundantly clear that the issues of the governmental entity's actual or constructive knowledge of an individual's immediate need for medical care and of the reasonable action of the governmental entity to provide such care are questions of fact." (168 C.A.3d 1186.)

In *Watson v. California* (1993) 21 C.A.4th 836, 841, 26 C.R.2d 262, the trial court granted summary judgment to the state on a *Govt.C. 845.6* claim based on failure to diagnose a prisoner's ankle injury properly as a torn Achilles tendon. *Held*, affirmed. The facts presented were not tantamount to failure to summon medical care. The duty imposed by the statute does not include a duty to provide reasonable medical care. (21 C.A.4th 841.)

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c. Injury Caused by Escaped Prisoner.

5 *Witkin Sum. Cal. Law Torts* § 296

[§ 296] Injury Caused by Escaped Prisoner.

(1) *Statutory Provision.* A public entity or employee is immune from liability for injury caused by an escaping or escaped prisoner. (*Govt.C. 845.8(b)(1)*; see 44 *A.L.R.3d* 899 [liability of public officer or body for harm done by prisoner permitted to escape]; on statutory duty to give notice of an escape, see *infra*, §300; on immunities and defenses of public employees respecting police and correctional activities generally, see *infra*, §362.)

(2) *Immunity Not Limited to Discretionary Acts or Omissions.* The contention that this immunity is only a particular application of the discretionary immunity under *Govt.C. 820.2* (see *infra*, §351 et seq.), and therefore subject to the discretionary-ministerial distinction of *Johnson v. California* (1968) 69 *C.2d* 782, 73 *C.R. 240*, 447 *P.2d* 352, *infra*, §352, was rejected in *Sacramento v. Superior Court* (1972) 8 *C.3d* 479, 105 *C.R. 374*, 503 *P.2d* 1382. Plaintiffs, heirs of F, sued defendant county for wrongful death of F. They alleged that two prisoners escaped from defendant's jail, burglarized F's home, and killed F in the process; that defendant acted negligently in classifying, supervising, and detaining the prisoners, as a result of which they escaped; that defendant failed to pursue them; and that defendant failed to warn local residents of their escape. Defendant's demurrer was overruled, and defendant sought prohibition. *Held*, writ granted.

(a) The sections of the Tort Claims Act dealing with peculiarly governmental functions, e.g., police, fire, tax, and mental hospital, show no pattern of immunity only for discretionary acts. The immunity of *Govt.C. 845.8(b)* is in terms absolute, and must be given effect unless there is a clear legislative intent to the contrary. And no such intention appears. (8 *C.3d* 482.)

(b) *Johnson* deals with *Govt.C. 845.8(a)*, which refers to "determining" whether to parole, etc.; *Govt.C. 845.8(b)* relates simply to injury caused by an escaping or escaped prisoner. (8 *C.3d* 484.)

(c) Plaintiffs alleged that defendant failed to lock or secure its doors and fences, thereby creating a dangerous condition under *Govt.C. 835* (*supra*, §§258, 259). It is questionable whether the condition of property becomes dangerous by reason of unlocked doors; but in any event, the specific statute dealing with an escaped prisoner prevails over the general section. (8 *C.3d* 485.)

(d) The absolute immunity, "encompassing both discretionary acts or omissions and ministerial acts or omissions," is based on sound policy. "[P]rison administrators would of necessity be inhibited in maintaining rehabilitative programs allowing liberal prisoner freedom if the result is to increase greatly the risk of escape, and the entity is to be held responsible to third persons for injuries caused by the escaped prisoner." (8 C.3d 485.)

(3) *Prisoner's Injury to Self*. In *Ladd v. San Mateo* (1996) 12 C.4th 913, 50 C.R.2d 309, 911 P.2d 496, plaintiff, a ward of the juvenile court, was being transported to juvenile hall by defendant county employees in a county automobile. Plaintiff's hands were handcuffed in front of her, and she was placed, alone, in the back seat of the automobile. When the vehicle stopped for a red light, plaintiff jumped from the vehicle and was severely injured while attempting to board a slow-moving freight train. In the ensuing personal injury action against the county and various county employees, summary judgment was granted for defendants, in part because they were immune under *Govt.C. 845.8(b)(1)*. *Held*, affirmed.

(a) Plaintiff argues that *Govt.C. 845.8* does not cover the present case, because that statute is only applicable to injuries caused *by* the escaping prisoner, not to injuries *to* the prisoner. This contention is without merit. There is nothing in the statutory language ("caused by") that suggests an exception for injuries caused by a prisoner to himself or herself. In either case, there would be a chilling effect on law enforcement if public entities were to be held liable. Furthermore, it would be an anomalous result if the entity were immune for injuries to a third party, but liable for injuries suffered by the prisoner. (12 C.4th 920.)

(b) Several statutes in the same part of the Government Code specifically provide immunity for injuries caused *by*, and ones caused *to*, certain escaped persons. However, this is not indicative of an intent in *Govt.C. 845.8* to exclude self-inflicted injuries suffered by escaped prisoners. The aforementioned statutes included the "caused to" language to make it clear that the entity is also immune for injuries caused to the escaped person *by the government or a third party*. The addition of the "caused to" language is not necessary to provide immunity for injuries caused by the escaped person to himself or herself, because that immunity is already provided by the "caused by" language. (12 C.4th 921.)

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d. Injury Caused by Arrested Person.

5 *Witkin Sum. Cal. Law Torts* § 297

[§ 297] Injury Caused by Arrested Person.

(1) *Statutory Provision.* The escaped prisoner immunity (see *supra*, §296) set forth in the original Tort Claims Act was extended in 1970 to injuries caused by "[a]n escaping or escaped arrested person," and "[a] person resisting arrest." (*Govt.C. 845.8(b)*); see Law Revision Com. Comment to 1970 Amendment ["[t]his probably codifies former law".])

(2) *What Constitutes Arrest.* In *Kisbey v. California* (1984) 36 C.3d 415, 204 C.R. 428, 682 P.2d 1093, police officers, responding to an official broadcast of a possible felony at a service station, observed a car leaving the premises without lights and entering an intersection against a red light. They pursued and stopped the car, and got out of their own car to question the occupants and cite the driver for traffic violations. However, the driver suddenly started the car, fled the scene at high speed, and a few seconds later struck plaintiff's vehicle. He was then arrested for Vehicle Code violations. *Held*, the immunity of *Govt.C. 845.8(b)* was applicable even though the escaper had not technically been arrested. "It seems clear that the purpose of the broadening amendment to subdivision (b) was to immunize public entities and employees from the entire spectrum of potential injuries caused by persons actually or about to be deprived of their freedom to take physical measures of one kind or another to avoid the constraint or to escape from it. It would plainly violate the legislative intent if particular words of the statute--such as 'arrest' or 'resisting'--were given such technical meanings that a case fell between the cracks of the immunity because, for example, the police had not intended a full arrest--as distinguished from a temporary detention--when the subject fled, or because at the time of the escape the process had not reached the point of physical control over the suspect." (36 C.3d 419.)

(3) *Effect of Negligent Operation of Motor Vehicle.* In *Thomas v. Richmond* (1995) 9 C.4th 1154, 40 C.R.2d 442, 892 P.2d 1185, a suspected criminal, who was struck by a pursuing police vehicle while fleeing on foot from police officers, brought an action for personal injuries against the city that employed the officers. The trial judge granted summary judgment for the city, finding it immune from liability for plaintiff's injuries under *Govt.C. 845.8(b)*. *Held*, reversed.

(a) Three Court of Appeal decisions, *Duarte v. San Jose* (1980) 100 C.A.3d 648, 161 C.R. 140, *San Jose v. Superior Court (Martinez)* (1985) 166 C.A.3d 695, 212 C.R. 661, and *Stark v. Los Angeles* (1985) 168 C.A.3d 276, 214 C.R. 216, have concluded that the liability of *Veh.C. 17001* for negligent operation of a motor vehicle (see *infra*, §331 et seq.) prevails over the immunity of *Govt.C. 845.8*. In apparent reaction to these decisions, the Legislature enacted *Veh.C.*

17004.7 (infra, §336), providing immunity in vehicular pursuit cases if the entity employing the police officers adopts a written policy on those pursuits. In effect, the Legislature overruled these cases in part but impliedly approved them to the extent it did not modify them. (9 C.4th 1159.)

(b) Although the broad language of *Kisbey* arguably supported the city's position with respect to immunity, that case is distinguishable. There, the court had no occasion to consider the relevance of *Veh.C. 17001*, because, at the moment of escape, the officers were no longer driving. (9 C.4th 1163.)

(c) A public entity's liability under *Veh.C. 17001* prevails over the *Govt.C. 845.8(b)* immunity, except as provided in *Veh.C. 17004.7*. That exception was inapplicable here because plaintiff was fleeing on foot. (9 C.4th 1165.) (See 24 *Pepperdine L. Rev.* 792 [Thomas]; on governmental liability for police or correctional activities involving motor vehicle torts generally, see supra, §290.)

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e. Injury From Release of Prisoner.

1. Immunity Rule.

5 *Witkin Sum. Cal. Law Torts* § 298

[§ 298] Immunity Rule.

A public entity is immune from liability for "injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release." (*Govt.C. 845.8(a)*); see *Martinez v. California* (1980) 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 [rejecting constitutional challenge of *Govt.C. 845.8(a)*]; *Johnson v. Ventura* (1994) 29 C.A.4th 1400, 35 C.R.2d 150, *infra*, §319 [immunity for release by police of escaped mental patient]; *Fleming v. California* (1995) 34 C.A.4th 1378, 1382, 41 C.R.2d 63 [immunity for failure to arrest parolee who left state in violation of parole terms]; *Swift v. Department of Corrections* (2004) 116 C.A.4th 1365, 1370, 11 C.R.3d 406 [immunity extends to negligent supervision of parolees]; 6 A.L.R.4th 1155 [governmental tort liability for injuries caused by negligently released individual]; on duty to warn of prisoner's release, see *infra*, §§299, 300.)

This statute is said to be a specific application of the discretionary immunity recognized in *Govt.C. 820.2* (*infra*, §351). (*Leyva v. Nielsen* (2000) 83 C.A.4th 1061, 1065, 100 C.R.2d 236 [chairman of Board of Prison Terms was immune from liability to prisoner for extending time when prisoner was eligible for parole and for later finding him unsuitable for parole].) However, it has been extended, generally, to the ministerial implementation of correctional programs as well. (*Swift v. Department of Corrections, supra*, 116 C.A.4th 1373; on liability for failure to warn, see *infra*, §299.)

The rationale for the immunity is that the freedom to be accorded prisoners for rehabilitative purposes and the precautions necessary to prevent escape "are matters that should be determined by the proper public officials unfettered by any fear that their decisions may result in liability." (Law Revision Com. Comment to *Govt.C. 854.8*.)

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See *Perez-Torres v. California* (2007) 42 C.4th 136, 142, 64 C.R.3d 155, 164 P.3d 583 [plaintiff was arrested and jailed on mistaken belief that he was another person and had violated parole, but his innocence did not render P.C. 845.8(a) grant of immunity inapplicable; statutory reference to "any injury" includes injuries to innocent parties].



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2. Duty To Warn Where Special Relationship Exists.

5 Witkin Sum. Cal. Law Torts § 299

[§ 299] Duty To Warn Where Special Relationship Exists.

(1) *In General.* A duty to warn the plaintiff of the release of a prisoner may be imposed on police or correctional authorities by a special relationship arising from representations or conduct causing detrimental reliance. In *Morgan v. Yuba* (1964) 230 C.A.2d 938, 41 C.R. 508, A, having threatened the life of plaintiffs' mother, was arrested at her instigation. In this complaint by her minor children, it was alleged that the sheriff and deputies of defendant county, with knowledge of the threat, undertook to warn her immediately upon A's release on bail, that they did not give the warning, and that A, on his release, killed the mother. *Held*, judgment on demurrer reversed; a cause of action could be stated.

(a) *Immunity for determination to release.* Under Govt.C. 845.8, neither an entity nor an employee is liable for injury resulting from a determination whether to release a prisoner; this rule is within the general principle of Govt.C. 820.2 (immunity for discretionary acts; see *infra*, §351). Hence, if the negligence charged were release of a dangerous prisoner, there would be no liability. (230 C.A.2d 941.)

(b) *Liability of officers for failure to warn.* The negligence charged, however, was failure to warn, as promised, that a dangerous prisoner was about to be released. No discretion is involved in carrying out the promise; i.e., regardless of discretion to release or not, notification called for a simple ministerial act. (230 C.A.2d 942.) Either a private person or a public employee may be liable for failure to perform a voluntary undertaking where the plaintiff, "in reasonable reliance thereon, suffers harm, as by refraining from securing other necessary assistance." (230 C.A.2d 944.) The pleading failed to allege this reliance, but this defect could be remedied by amendment. (230 C.A.2d 945.)

(c) *Respondeat superior liability of public entity.* Under Govt.C. 815.2, a public entity is liable only for acts or omissions of the employee within the scope of employment, and defendants contended that the officers, in making this promise and omitting to perform it, were not acting in the public interest but on their own as "good Samaritans." But "scope of employment" goes beyond acts merely in furtherance of the principal's interest. "The giving of reassurance and protection to members of the public who have been threatened with violence is within the scope of a policeman's and sheriff's employment, even though the officer has not been authorized to give such reassurance--or, in fact, has been expressly forbidden so to do." (230 C.A.2d 946.) (On affirmative duties of law enforcement authorities where special

relationship exists generally, see *supra*, §291; on statutory duty to notify, see *infra*, §300.)

(2) *Specific Victim Required.* The duty to warn is limited to a situation that involves specific, foreseeable victims. In *Thompson v. Alameda* (1980) 27 C.3d 741, 167 C.R. 70, 614 P.2d 728, the complaint alleged that a juvenile offender had been confined in defendant county's institution under court order; that defendant knew that he had the propensity to commit sexual assaults on young children, and that he had "indicated that he would, if released, take the life of a young child residing in the neighborhood"; that defendant released him on temporary leave in his mother's custody at her home, and did not advise the mother, the local police, or parents of young children within the immediate vicinity of the mother's house, of the known facts; that plaintiffs, husband and wife and their minor son, lived a few doors from the mother's home; and that within 24 hours of his release, the offender murdered their son in the garage of the mother's home. *Held*, no cause of action was stated. The county was protected by statutory immunity, and had no duty to warn.

(a) *Statutory immunity under Govt.C. 820.2 and 845.8.*

(1) The decision to release an offender is discretionary, and renders the releasing authorities immune under Govt.C. 820.2 (*infra*, §351) and the "basic policy decision test" of *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, *infra*, §352. "The decision, requiring as it does, comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of 'discretion.' " (27 C.3d 749.)

(2) Defendant is also protected by the specific immunity conferred by Govt.C. 845.8 (*supra*, §298). This immunity "is provided when the questioned acts involve policy decisions made prior to or as an integral part of the decision to release . . . The selection of [the offender's] mother as custodian and the degree of supervision to be exercised over her clearly involved such protected policy decisions." (27 C.3d 749.)

(b) *No duty to warn police, neighborhood parents, or custodian.* Even if no statutory immunity were applicable, defendant had no affirmative duty that it failed to perform.

(1) *Johnson and Tarasoff distinguished.* In *Johnson* the state placed the specific plaintiff in a position of clearly foreseeable danger; and in *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *infra*, §1050, the patient posed a serious threat of violence to a foreseeable victim. (27 C.3d 751.) Here, the complaint did not allege a special relationship between plaintiffs and defendant county through which defendant placed the decedent in danger, and it did not allege that the decedent was a foreseeable or readily identifiable target of the offender's threats. (27 C.3d 753.)

(2) *Policy considerations.* Parole and probation decisions are inherently imprecise, and each member of the general public who comes in contact with a parolee bears the risk that the rehabilitative effort will fail. (27 C.3d 753.) Further, there are significant practical obstacles in the imposition of an affirmative duty to warn of the release of an inmate with a violent history who has made "nonspecific threats of harm directed at nonspecific victims." (27 C.3d 754.) The generalized warnings would do little to increase the precautions of any particular members of the public, and might also negate the rehabilitative purposes of the parole and probation system by stigmatizing the released offender in the public's eye. (27 C.3d 755.)

(3) *Analysis of proposed warnings.*

First, warnings to the *police* would be of little benefit to potential victims of violence unless the police had a concurrent duty to act on these warnings. In *Tarasoff*, *supra*, the duty was recognized only to an identifiable potential victim or to those who would advise that person of potential danger. To require the police to knock on individual doors in the community or to furnish 24-hour police escort for the offender or all possible victims would divert an inordinate amount of time and manpower. (27 C.3d 756.)

Second, warnings to *neighborhood parents* would likewise require an expenditure of time and limited resources of parole and probation agencies of questionable value, and also might substantially jeopardize rehabilitative efforts by

stigmatizing released offenders and by inhibiting their release. (27 C.3d 756.)

Third, warnings to the *juvenile's mother* would not have the desired effect of warning potential victims; it is doubtful that the mother would voluntarily inform neighborhood parents or children that her son posed a general threat to their welfare. The speculation by dissenting justices that she might have taken special care to control her 18-year-old son is insufficient to support the imposition of civil liability. (27 C.3d 757, 758.)

(c) *Conclusion*. "In summary, whenever a potentially dangerous offender is released and thereafter commits a crime, the possibility of the commission of that crime is statistically foreseeable. Yet the Legislature has concluded that the benefits to society from rehabilitative release programs mandate their continuance. Within this context and for policy reasons the duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim. ... In those instances in which the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger, a releasing agent may well be liable for failure to warn such persons. Despite the tragic events underlying the present complaint, plaintiffs' decedent was not a known, identifiable victim, but rather a member of a large amorphous public group of potential targets. Under these circumstances we hold that County had no affirmative duty to warn plaintiffs, the police, the mother of the juvenile offender, or other local parents." (27 C.3d 758.) (See *Santa Barbara v. Superior Court* (1971) 15 C.A.3d 751, 757, 93 C.R. 406 [no liability where victim was member of general public, not individual known to defendant county's employees and capable of being warned]; *Duffy v. Oceanside* (1986) 179 C.A.3d 666, 671, 672, 224 C.R. 879 [Thompson does not require that verbal threat have been made to victim]; *Brenneman v. California* (1989) 208 C.A.3d 812, 818, 256 C.R. 363 [state had no duty to warn parents of boy who was killed by paroled child molester living in same neighborhood; citing *Thompson*]; 8 *Pepperdine L. Rev.* 551; 15 *U.S.F. L. Rev.* 563.)

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3. Statutory Duty of Notification.

5 *Witkin Sum. Cal. Law Torts* § 300

[§ 300] Statutory Duty of Notification.

P.C. 11155 requires the Department of Corrections to notify the victim, the victim's next of kin, the police, and the county sheriff of a prisoner's release or escape under certain circumstances. (See *14 Pacific L. J.* 602.)

(1) *Notice of Placement in Reentry or Work Furlough Program.* As soon as an inmate's placement in any reentry or work furlough program is planned, but in no case less than 60 days before placement, the department must "send written notice, if such notice has been requested, to all of the following: (1) the chief of police of the city, if any, in which the inmate will reside, if known, or in which placement will be made, (2) the sheriff of the county in which the inmate will reside, if known, or in which placement will be made, and (3) the victim, if any, of the crime for which the inmate was convicted or the next of kin of the victim if the crime was a homicide, if the victim or the next of kin has submitted a request for notice with the department." (P.C. 11155(a).)

(2) *Notice of Escape.* In the event of an escape, the department must "immediately notify, by the most reasonable and expedient means available the chief of police of the city, and the sheriff of the county, in which the inmate resided immediately prior to the inmate's arrest and conviction, and, if previously requested, to the victim, if any, of the crime for which the inmate was convicted, or to the next of kin of the victim if the crime was a homicide. If the inmate is recaptured, the department shall send written notice thereof to the persons designated in this subdivision within 30 days after regaining custody of the inmate." (P.C. 11155(b).)

(3) *Manner of Notice to Requesting Party.* The department is generally required to send the required notices to the last address provided by the requesting party, and it is the requesting party's responsibility to provide the department with a current address. (P.C. 11155(c).) However, the department must send notice to a victim by return receipt mail, and make a diligent, good faith effort to discover the victim's whereabouts if the victim does not live at the last address given to the department. (P.C. 11155(d).)

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4. Release of Suicidal Arrestee.

5 Witkin Sum. Cal. Law Torts § 301

[§ 301] Release of Suicidal Arrestee.

In *Johnson v. Los Angeles* (1983) 143 C.A.3d 298, 191 C.R. 704, plaintiffs, wife and daughter of decedent, sued defendant county and sheriff's officers for wrongful death. The complaint alleged that decedent was arrested for driving on the wrong side of a freeway; that he informed the officers that he was attempting to commit suicide and that people were trying to torture him; that his wife thereafter informed the officers that he was a paranoid schizophrenic with suicidal tendencies who required immediate medication and should not be released; that the officers promised to act accordingly, but instead, released him from jail without notice to plaintiffs; and that 2 days later, he committed suicide. *Held*, a cause of action was stated.

(a) *Immunity from liability for failure to confine or medicate.* Govt.C. 856(a)(1) gives immunity from liability for any determination to confine or not to confine a person for mental illness, and for all determinations involved in the process of commitment. (143 C.A.3d 314, 315; see *infra*, §319.) Govt.C. 855.8(a) gives immunity from liability for diagnosing or failing to diagnose mental illness, or from failing to prescribe for mental illness. (143 C.A.3d 316; see *infra*, §§318, 365.)

(b) *Liability for failure to warn of impending release based on special relationship.* Under the principles discussed in *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, *infra*, §352, *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *infra*, §1050, *Thompson v. Alameda* (1980) 27 C.3d 741, 167 C.R. 70, 614 P.2d 728, *supra*, §299, and *Davidson v. Westminster* (1982) 32 C.3d 197, 202, 185 C.R. 252, 649 P.2d 894, *supra*, §291, defendants were in a special relationship to both decedent and plaintiffs, and had a duty to warn plaintiffs before releasing decedent. (143 C.A.3d 311.) "The instant case is unique in that, since it involves a suicide, the person whose conduct needed to be controlled was also the foreseeable victim of that conduct. In light of the policy considerations underlying the imposition of affirmative duties, this singular setting does not undermine, but rather supports, the imposition of a duty: in the case of Decedent, Sheriffs stood in a special relationship *both* to the victim and to the person whose conduct created the danger. By releasing Decedent from custody without a prior warning to Appellants, Sheriffs placed Decedent in a position of clearly foreseeable danger. Decedent was not only a foreseeable target of the danger--he was the specific and identified potential victim. Decedent had made a *specific threat of harm*, directed at a *specific victim*--himself The fact that the warning in the case at bar should have been given to

Appellants (and not to the immediate 'victim' of the suicide) does not foreclose plaintiffs. As wife and child of their non compos mentis loved one, Appellants are the real and foreseeable 'victims' of this tragedy, and entitled to maintain a wrongful death action . . . Moreover, Appellants could have been notified without appreciable burden to Sheriffs upon whom they depended for 'protection' against the very eventuality that occurred." (143 C.A.3d 311.)

(c) *No discretionary immunity.* The immunity for discretionary acts, as explained in *Johnson v. California*, extends only to basic policy decisions; and under the allegations of the complaint, the officers' failure to warn of a clearly foreseeable danger did not rise to that level. (143 C.A.3d 312, 313.) Moreover, *Johnson* points out that the public agency must demonstrate that its employee in fact consciously exercised discretion, i.e., that the employee made a basic policy decision. (143 C.A.3d 313.)

(d) *Liability for failure to furnish immediately needed medical care.* The complaint also stated a cause of action under Govt.C. 845.6 (supra, §295). The scope of the immunities under Govt.C. 855.8 and 856 is more limited than the scope of the general duty to summon medical care created by Govt.C. 845.6. (143 C.A.3d 316, 317.)

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1. Immunity Rule.

5 *Witkin Sum. Cal. Law Torts* § 302

[§ 302] Immunity Rule.

A public entity or employee is immune from liability for failure to establish a police department or to provide sufficient police protection service. (*Govt.C. 845*; see *Antique Arts Corp. v. Torrance* (1974) 39 C.A.3d 588, 592, 114 C.R. 332 [delay in responding to alarm, resulting in escape of robbers]; *Hartzler v. San Jose* (1975) 46 C.A.3d 6, 9, 120 C.R. 5 [failure to send officer to woman whose estranged husband, after threats, came and killed her]; *Lopez v. San Diego* (1987) 190 C.A.3d 678, 681, 235 C.R. 583 [delay in rescuing victims of mass random shooting]; *Zuniga v. Housing Authority of Los Angeles* (1995) 41 C.A.4th 82, 99, 48 C.R.2d 353, *supra*, §267 [*Govt.C. 845* immunity, while it applied to various failures of housing authority involving provision and activities of police officers, did not cover authority's failure to transfer tenants, to warn them about crime problems in particular unit, to arrest or reprimand perpetrators of offenses, to erect barriers to keep out intruders, or to evict those tenants who sold drugs and harassed other tenants]; *Zelig v. Los Angeles* (2002) 27 C.4th 1112, 1141, 119 C.R.2d 709, 45 P.3d 1171 [defendant public entity was immune from liability for failure to provide sufficient police protection to prevent decedent from being killed by ex-husband while she was in courthouse awaiting hearing in dissolution proceeding]; 39 A.L.R.4th 691 [failure to respond to emergency call]; 90 A.L.R.5th 273 [liability of municipality or other governmental unit for failure to provide police protection from crime]; 94 *Harv. L. Rev.* 821 [Police Liability for Negligent Failure To Prevent Crime]; on immunities and defenses of public employees respecting police and correctional activities generally, see *infra*, §362.)

"Whether police protection should be provided at all, and the extent to which it should be provided, are political decisions which are committed to the policy-making officials of government. To permit review of these decisions by judges and juries would remove the ultimate decision-making authority from those politically responsible for making the decisions." (Law Revision Com. Comment to *Govt.C. 845*.)

Specifically excluded from the immunity is a police department's failure to respond to a request for service via a burglar alarm or an alarm company referral service solely on the basis that a permit from the city was not obtained. (*Govt.C. 845*; see 24 *Pacific L. J.* 1027.)

Similar immunity is created by *Govt.C. 845.2* for failure to provide a prison, jail, or penal or correctional facility, or sufficient equipment, personnel, or facilities there (unless a dangerous condition of public property results). (See *Taylor*

v. Buff (1985) 172 C.A.3d 384, 387, 390, 218 C.R. 249 [immunity from liability for providing allegedly inadequate door-locking system in jail].)

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2. Discriminatory Allocation of Protective Services During Riot.

5 Witkin Sum. Cal. Law Torts § 303

[§ 303] Discriminatory Allocation of Protective Services During Riot.

In *Gates v. Superior Court* (1995) 32 C.A.4th 481, 38 C.R.2d 489, plaintiffs, three individuals who were injured during a riot, alleged that defendants, the city's chief of police and numerous senior commanders in the police department, violated their rights under C.C. 51.7 (right to be free from violence) and C.C. 52 (liability for denial of civil rights), by the discriminatory deployment of police officers during the riot, which resulted in the lack of a police presence where they were injured. Specifically, plaintiffs alleged that defendants' improper conduct included the failure to properly train and mobilize officers; the withdrawal of officers from minority neighborhoods; the failure to properly deploy or redeploy officers; the failure to respond to telephone calls for emergency police assistance; the absence of a police response to acts of violence and looting; and the denial of protective services. The trial judge overruled defendants' demurrers. *Held*, defendants were immune from money damages under *Govt.C. 845* (supra, §302), and the demurrers should have been sustained without leave to amend.

(a) Prior to the abrogation of the judicial doctrine of sovereign immunity in *Muskopf v. Corning Hosp. Dist.* (1961) 55 C.2d 211, 11 C.R. 89, 359 P.2d 457, supra, §215, public entities and their employees were generally immune from suit for activities relating to law enforcement, including the failure to enforce a law or make an arrest, except for property damage occurring during a riot, which was the subject of a specific statute (former Political Code 50140) providing for liability. Therefore, there was no liability for nonriot-related property damage and all personal injuries occasioned by the failure to enforce the law. The Tort Claims Act recreated these pre-*Muskopf* immunities, and the repeal of former Political Code 50140 et seq. increased the scope of the money damage immunity for failure to provide adequate police protection services beyond that in existence prior to *Muskopf*. (32 C.A.4th 496.)

(b) The conduct alleged by plaintiffs fell squarely within the ambit of "failure to provide sufficient police protective service" within the meaning of *Govt.C. 845*. Further, other provisions of the Tort Claims Act indicate a legislative intent to immunize the police from liability for money damages for the failure to properly respond to a riot. And the fact that the Legislature adopted the statute concurrently with the repeal of former Political Code 50140 et seq. is of material consequence in applying the statute. (32 C.A.4th 503.)

(c) Although some courts have held that the individual negligence of on-scene officers in performing law

enforcement functions, such as moving a police cruiser or laying out a warning flare pattern, are outside the scope of the *Govt.C. 845* immunity from money damages, this case is different. Defendants were senior officials in the police department. They were alleged to have made unlawfully discriminatory policy decisions as to the allocation of police resources in the second largest city in the country in the midst of a riot. That is the kind of political decision by policymaking officials that *Govt.C. 845* was designed to cover. By its terms, it applies to a discretionary policy determination concerning police deployment. (32 C.A.4th 507.)

(d) The fact that the action alleged intentional discrimination was of no consequence. The unlawful motive for failure to deploy an adequate number of officers, intentional discrimination, did not change the injury-causing event, a "failure to provide sufficient police protection services," within the meaning of *Govt.C. 845*. Because governmental tort immunities from damages apply to intentional torts, defendants' alleged unlawful discriminatory motive did not take plaintiffs' claims outside the scope of the statute. (32 C.A.4th 508.)

(e) The Unruh Civil Rights Act does not supersede the immunity provided by *Govt.C. 845*. First, the immunity is a jurisdictional bar to pursuing any claim for money damages against a public entity or employee. Second, there is no indication either in the wording or legislative history of C.C. 51.7 and 52 that the Legislature ever contemplated the effect of the immunity, that it intended the Tort Claims Act immunities to be inapplicable to a civil rights cause of action, or that it ever sought to address the question of public entity and employee immunity from the duty to pay money claims arising from the failure to enforce the law or provide adequate police protection. (32 C.A.4th 508.)

(f) Application of *Govt.C. 845* did not violate plaintiffs' equal protection rights. The statute makes no classification premised on race or nationality. Moreover, there was no evidence that the statute was neutral in its wording but "grossly discriminatory in its operation," which would have given rise to heightened equal protection analysis. The statute meets the rational basis equal protection test (see 8 *Summary* (10th), *Constitutional Law*, §704), because it was neutrally drawn with no race-or nationality-based distinctions. Further, it could not be concluded that the Legislature's determination to provide immunity in a riot situation for the failure to provide adequate police protective services was irrational. (32 C.A.4th 513.) Likewise, plaintiffs had no right to sue for damages under the equal protection provisions of Cal. Const., Art. I, §7(a), lacking evidence that the voters intended to authorize damages for a violation of that provision. (32 C.A.4th 516.)

(g) Nevertheless, this decision did not affect any right plaintiffs may have had to seek equitable relief. "This opinion, which discusses the section 845 immunity from the duty to pay monetary damages, may not be read that equitable relief is unavailable when police supervisors discriminate in the deployment of protective resources for racial reasons." (32 C.A.4th 494.)

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3. Duty To Protect Where Special Relationship Exists.

5 Witkin Sum. Cal. Law Torts § 304

[§ 304] Duty To Protect Where Special Relationship Exists.

Where a special relationship arises between the public entity and plaintiff by which the entity voluntarily assumes a duty to act, the immunity for failure to provide police protection does not apply. (*Hartzler v. San Jose* (1975) 46 C.A.3d 6, 9, 120 C.R. 5; *Stone v. California* (1980) 106 C.A.3d 924, 929, 165 C.R. 339; on affirmative duties of law enforcement where special relationship exists generally, see *supra*, §291.) However, several decisions have held that no special relationship exists under the particular facts:

In *M.B. v. San Diego* (1991) 233 C.A.3d 699, 284 C.R. 555, someone entered plaintiff's bedroom window while she was sleeping and stole some lingerie. When she called the police, the investigating officers told her "not to worry" and that "these guys never come back." A short time later, plaintiff began receiving phone calls from J, who told her that he had committed the burglary and was going to return. When she informed the police, an officer told her that "they never do." He also agreed to send a squad car by to check on her, but none ever arrived. Two days later J returned and raped plaintiff. She sued defendant city, alleging police negligence in investigating the case and giving advice. *Held*, summary judgment for defendant affirmed; there was no special relationship between plaintiff and the police that would impose a duty on them to control J's behavior.

(a) The police did not make special promises to protect plaintiff, took no affirmative steps to provide her with special protection, and did nothing to increase her peril by making it more likely that J would return. Rather, the essence of plaintiff's complaint is that the police failed to take such *affirmative* acts as adequately investigating the case, uncovering J's prior record, and warning her that J might return. "These failures ... did not *increase* the risk [J] would decide to return to her house and harm her; they merely failed to *decrease* the risk. The police actions resulted in maintaining the status quo." (233 C.A.3d 706.)

(b) The officer's offer after the burglary to send a patrol car to check on plaintiff did not create the required special relationship. First, this offer was made in response to plaintiff's call for assistance. These responses are basic to police work and hence are not "special" to a particular individual. Second, even assuming the offer amounted to the voluntary assumption of a special protective role by the police, that role was limited to protecting plaintiff on the night of the burglary. Hence, any police negligence in failing to send a patrol car at that time could not have caused a rape that

occurred 2 days later. (233 C.A.3d 706.)

In *Hernandez v. San Jose* (1993) 14 C.A.4th 129, 17 C.R.2d 589, two police officers of defendant city stopped a vehicle at about 11 p.m. for speeding. Because all of the occupants of the vehicle, including plaintiff's son, the decedent, were underage and without a driver's license, the officers impounded the vehicle. Decedent eventually accepted a ride in another individual's car, which was involved in a one-car accident that resulted in decedent's death. Plaintiff sued defendant for the alleged negligence of the officers in failing either to provide safe transportation for decedent or to notify plaintiff of his whereabouts. *Held*, summary judgment for defendant affirmed; the officers had no duty to protect decedent.

(a) Although decedent was in violation of defendant's curfew ordinance, no duty can be premised on the officers' failure to take decedent into custody. Under *Govt.C. 846* (infra, §305), public entities and employees may not be held liable for injuries resulting from a failure to make an arrest or to retain an arrested person in custody. (14 C.A.4th 133.)

(b) Neither decedent's presence in the stopped vehicle nor the fact that he was a minor established any special relationship or protective duty toward him that could be imposed on the officers. (14 C.A.4th 134.)

(c) Nor did the officers create a peril by voluntarily assuming a duty to protect, and then discharging that duty negligently. "That the officers impounded the vehicle did not create any peril to [decedent] and the other young men as none of them could have lawfully driven the vehicle. Nor did the impounding of the vehicle and alleged refusal to let the young men get a ride with the tow truck driver increase any risk of harm to [decedent] that otherwise existed. A one-car accident caused by the driver of the vehicle the young men headed home with was no more a risk before the officers impounded the vehicle than it was after." (14 C.A.4th 135.)

Hernandez v. Pomona (1996) 49 C.A.4th 1492, 57 C.R.2d 406, held that no special relationship creating a duty to protect existed between the police and plaintiff's son, who was killed by fellow gang members when testimony he gave incriminated a gang member in a previous murder. The court emphasized the following points:

(a) The fact that the police officers allegedly assured the decedent that he would not be harmed if he gave them a statement did not create a duty to protect, because there was no allegation that this *assurance* amounted to a specific or implicit undertaking to provide the decedent with protection at any time, or that he relied on it for his safety. (49 C.A.4th 1502.)

(b) The present case does not involve the duty to warn, but rather, involves the duty to protect, which requires commitment of substantially greater resources. (49 C.A.4th 1503, distinguishing *Carpenter v. Los Angeles* (1991) 230 C.A.3d 923, 281 C.R. 500, supra, §291, and *Wallace v. Los Angeles* (1993) 12 C.A.4th 1385, 16 C.R.2d 113, supra, §291.) And the applicable statute, P.C. 13835.5(b), clearly makes it a matter of police discretion whether to place a witness in the Witness Protection Program. There is no duty to do so. (49 C.A.4th 1503.)

(c) Citizens have a duty to give testimony in criminal trials. In performing this duty, it is natural that they have some fear of reprisal, especially where they are testifying against a fellow gang member. However, if this fear, by itself, were strong enough to create a duty to protect on the part of the police, it would be prohibitively expensive, and it would cause criminal investigation, in its present status, to grind to a halt. Thus, absent a specific undertaking to protect a witness, there is no duty to do so in the course of investigating and prosecuting criminal activity. (49 C.A.4th 1504.)

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g. Injury From Failure To Arrest or Retain in Custody.

5 *Witkin Sum. Cal. Law Torts* § 305

[§ 305] Injury From Failure To Arrest or Retain in Custody.

A public entity or employee is immune from liability for injury caused by failure to make an arrest or to retain an arrested person in custody. (*Govt.C. 846*; see *Santa Barbara v. Superior Court* (1971) 15 C.A.3d 751, 756, 93 C.R. 406 [release on bail of prisoner who had exhibited extremely violent behavior]; *Truong v. James* (1985) 168 C.A.3d 833, 835, 215 C.R. 33 [failure to arrest intoxicated plaintiff who subsequently walked into traffic and was injured]; *Hernandez v. San Jose* (1993) 14 C.A.4th 129, 135, 17 C.R.2d 589, *supra*, §304 [failure to take into custody for curfew violation minor who subsequently died in traffic accident]; *Fleming v. California* (1995) 34 C.A.4th 1378, 1382, 41 C.R.2d 63 [failure to arrest parolee who left state in violation of parole terms]; 41 A.L.R.3d 700 [personal liability of peace officer or bond for injury suffered as result of failure to enforce law or arrest lawbreaker]; on immunities and defenses of public employees respecting police and correctional activities generally, see *infra*, §362.)

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h. Interference With Prisoner's Right to Judicial Review.

5 Witkin Sum. Cal. Law Torts § 306

[§ 306] Interference With Prisoner's Right to Judicial Review.

A public entity, and a public employee acting within the scope of employment, are generally immune from liability for "for interfering with the right of a prisoner to obtain a judicial determination or review of the legality of his confinement." (*Govt.C. 845.4*; on defenses and immunities of public employees respecting police and correctional activities generally, see *infra*, §362.)

Liability is imposed, however, "for injury proximately caused by the employee's intentional and unjustifiable interference with such right." No cause of action for this injury "shall be deemed to accrue until it has first been determined that the confinement was illegal." (*Govt.C. 845.4*; on liabilities of public employees respecting police and correctional activities generally, see *infra*, §361.)

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i. Traffic Injuries.
1. Failure To Prevent Driving.

5 Witkin Sum. Cal. Law Torts § 307

[§ 307] Failure To Prevent Driving.

Several cases involve liability for permitting an intoxicated motorist to continue driving. In *Green v. Livermore* (1981) 117 C.A.3d 82, 172 C.R. 461, the complaint alleged that police officers stopped an automobile with three intoxicated occupants, that the police arrested only one of them and left the other two in the automobile with its keys, and that the others drove away and subsequently struck plaintiffs' automobile, causing injuries and death. *Held*, a cause of action was stated. Because the officers' duty to prevent the others from operating the automobile was allegedly predicated on an enactment imposing a mandatory duty, pursuant to *Govt.C. 815.6* (supra, §245), plaintiffs did not have to plead the existence of a special relationship to create a duty of care. (117 C.A.3d 89.)

Green was disagreed with in *Lehto v. Oxnard* (1985) 171 C.A.3d 285, 217 C.R. 450. Plaintiff, injured in a collision with vehicle driven by a drunken driver, alleged that defendant police officers had stopped the vehicle for a traffic violation; that they knew or should have known that the driver was drunk and incapable of safely operating the car, and that they nevertheless allowed him to continue driving. *Held*, no cause of action was stated.

(a) *Davidson v. Westminster* (1982) 32 C.3d 197, 185 C.R. 252, 649 P.2d 894, supra, §291, and *Williams v. California* (1983) 34 C.3d 18, 192 C.R. 233, 664 P.2d 137, supra, §291, set forth the factors necessary to establish a special relationship imposing a duty on the officers, and none is present here. (171 C.A.3d 291.) Hence, *Green*, to the extent that it predicated a duty of care on general tort theory, is no longer authority. (171 C.A.3d 292.)

(b) Plaintiff's reliance on *Govt.C. 815.6* is also unpersuasive in the light of the authorities, for no specific statute or regulation imposing such a duty was pleaded. (171 C.A.3d 293.) "In view of these cases and others, *Green* made a quantum leap from the specific to the general when it permitted a plaintiff to allege the breach of a mandatory duty without identifying the particular enactment relied on." (171 C.A.3d 293.)

(c) "The *Green* rationale would also allow a plaintiff to bootstrap a general obligation to enforce the law into a general duty of care owed to the public. This, of course, runs afoul of the language in both *Davidson* and *Williams* that carefully limits the duty owed by police to individual members of the general public. Although phrased in terms of a breach of mandatory duty, the allegations of negligence in *Green*, as well as those in the instant case, actually derive

from defendants' status as police officers and the implied contention that they failed to do what reasonably prudent officers would have done in similar circumstances. Such pleading is an attempt to avoid the special relationship doctrine and the requirements of [Govt.C. 815.6] and impose a duty on law enforcement greater than that imposed on others." (171 C.A.3d 293.)

The same result has been reached in a number of other decisions. (See *Jackson v. Clements* (1983) 146 C.A.3d 983, 988, 194 C.R. 553; *Harris v. Smith* (1984) 157 C.A.3d 100, 107, 203 C.R. 541; *Hucko v. San Diego* (1986) 179 C.A.3d 520, 522, 523, 224 C.R. 552 [calling attention to the contrary rule in some other jurisdictions]; *Sunnyvale v. Superior Court* (1988) 203 C.A.3d 839, 844, 250 C.R. 214; 48 A.L.R.4th 320 [failure to restrain drunk driver as ground of liability of state or local government unit or officer]; 1 Proof of Facts 3d 545 [negligent failure to detain drunk driver].)

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2. Failure To Remove Parked Car.

5 *Witkin Sum. Cal. Law Torts* § 308

[§ 308] Failure To Remove Parked Car.

The California Highway Patrol has the authority to remove a vehicle from a highway when its condition creates a hazard to other traffic (*Veh.C. 22651(b)*); but this statutory provision does not create a mandatory duty (*supra*, §245). A decision to remove or not to remove is discretionary and within the immunity of *Govt.C. 820.2* (*infra*, §351). (*Bonds v. California* (1982) 138 C.A.3d 314, 321, 187 C.R. 792; *Posey v. California* (1986) 180 C.A.3d 836, 846, 225 C.R. 830.)

In rejecting a "special relationship" argument (see *supra*, §291), the *Bonds* opinion states: "Here, there is nothing in the actions of the CHP that could have caused Bonds or the other motorists to rely on CHP protection. The CHP had not investigated the plight of specific persons; it merely ticketed an illegally parked car. Its actions did not place Bonds in a position of foreseeable danger that would not be readily discoverable by him if he were exercising due care. Nor did the CHP's actions contribute to, increase or change a risk which otherwise existed." (138 C.A.3d 319.)

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3. Inadequate Assistance to Stranded Motorist.

5 *Witkin Sum. Cal. Law Torts* § 309

[§ 309] Inadequate Assistance to Stranded Motorist.

(1) *Liability Formerly Imposed: Mann Case.* In *Mann v. California* (1977) 70 C.A.3d 773, 139 C.R. 82, a highway patrol officer observed two stranded cars in a speed-change lane of a freeway and pulled up behind them. Then: (a) he stood in the speed-change lane without instructing persons on the scene to get back into their cars; (b) after a tow truck arrived, he departed without advising anyone of the fact, and without waiting for the tow truck to assume the protective rearward position with a flashing light; (c) he failed to put protective flares on the highway. Shortly after he left, an old car driven by a partially blind driver sideswiped one of the stalled cars and struck plaintiff. The trial judge directed a verdict for defendant state on the theory that the intervening negligence of the driver was a superseding cause. *Held*, reversed. The driver's negligence was reasonably foreseeable, hence was not a superseding cause; the officer's negligence was a basis for liability of the state, and the immunity of *Govt.C. 845* (failure to provide protection; *supra*, §302) was not a defense.

(2) *Repudiation of Mann Holding.* The 1979 Legislature responded to the *Mann* decision by the adoption of *Govt.C. 820.25* as an urgency measure. The enacting statute (Stats. 1979, Chap. 806) points out that the *Mann* court found the initial decision to stop discretionary but the decision to leave not discretionary; hence, to avoid liability, "a traffic officer, or a state or local law enforcement official, would have to either not render assistance to motorists who are not involved in an accident or, having stopped to give assistance, remain at the scene even though more serious emergency situations may arise elsewhere in the meantime."

Under *Govt.C. 820.25(a)*, the decision of a peace officer or other law enforcement official "to render assistance to a motorist who has not been involved in an accident or to leave the scene after rendering assistance, upon learning of a reasonably apparent emergency requiring his immediate attention elsewhere or upon instruction from a superior to assume duties elsewhere, shall be deemed an exercise of discretion." Under *Govt.C. 820.25(b)*, acts or omissions in the performance of a ministerial duty ("a plain and mandatory duty involving the exercise of a set task to be performed without the exercise of discretion") are excluded. (See 11 *Pacific L. J.* 663; on immunities and defenses of public employees respecting police and correctional activities generally, see *infra*, §362.)

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(2) *Repudiation of Mann Holding.* See *Minch v. Department of Calif. Highway Patrol* (2006) 140 C.A.4th 895, 903, 44 C.R.3d 846 [criticizing plaintiff's reliance on *Mann v. California* (1977) 70 C.A.3d 773, 139 C.R. 82, text, p. 503, in action against California Highway Patrol; decision has been repudiated by Legislature and legal foundations of holding have since been rejected by California Supreme Court].



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11. Fire Protection.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 310

[§ 310] In General.

As in the police and correctional area (*supra*, §290 et seq.), immunity from liability for injuries resulting from fire protection activities is the rule, and liability for those injuries is the exception. (See *Govt.C. 850* et seq.; C.E.B., 2 Government Tort Liability Practice 4th, §11.58 et seq.) Thus, a public entity is immune from liability for the following:

(1) *Failure to provide fire protection service.* Failure to establish a fire department or otherwise to provide fire protection service. (*Govt.C. 850*; see *Cochran v. Herzog Engraving Co. (1984) 155 C.A.3d 405, 413, 205 C.R. 1* [inadequate inspection for fire hazards; *Govt.C. 850* applicable]; *Colapinto v. Riverside (1991) 230 C.A.3d 147, 151, 281 C.R. 191* [improper method of fighting fire]; 69 *A.L.R.4th* 739 [negligent fire inspection and subsequent enforcement]; on immunity of public employees respecting these activities, see *infra*, §363.)

(2) *Failure to provide or maintain sufficient personnel, equipment, or facilities.* Where fire protection service has been undertaken, failure to provide or maintain sufficient personnel, equipment, or other facilities. (*Govt.C. 850.2*; see *Cochran v. Herzog Engraving Co., supra* [inadequate inspection for fire hazards; *Govt.C. 850.2* applicable]; on immunity of public employees respecting these activities, see *infra*, §363.)

In *Heieck & Moran v. Modesto (1966) 64 C.2d 229, 49 C.R. 377, 411 P.2d 105*, plaintiff alleged that a fire started on adjoining premises, that city employees had closed a valve in the water main for relocation of water and had failed for a month to turn it on again or notify the fire department, and that the fire spread to plaintiff's premises. *Held*, no cause of action was stated against defendant city.

(a) *Govt.C. 815* (*supra*, §227) gives a public entity any defenses available to a private person, and the case law has established nonliability of a private water company for failure to maintain sufficient water supply. (64 *C.2d* 232.)

(b) *Govt.C. 850.2* and *850.4* expressly give immunity from liability for failure to provide fire protection facilities or for the condition of fire protection equipment. (64 *C.2d* 233.)

(c) The further allegation that, on learning there was no water, the fire department negligently failed to summon available county firefighting equipment, did not support liability. *Govt.C. 815.2(b)* (*supra*, §228) makes the entity

immune where the employee is immune, and there was no allegation that any city employee promised or represented that assistance would be summoned. (64 C.2d 234.) (See *New Hampshire Ins. Co. v. Madera* (1983) 144 C.A.3d 298, 304, 305, 192 C.R. 548 [valve in city water system used to furnish water to fight fires is part of city fire protection "facilities," subject to Govt.C. 815.2 immunity; following *Heieck*]; *Lainer Inv. v. Department of Water & Power* (1985) 170 C.A.3d 1, 7, 215 C.R. 812 [sprinkler system controlled by city did not work effectively; following *Heieck*].)

(3) *Inadequate condition of equipment or facilities.* Injury resulting from the condition of fire protection or firefighting equipment or facilities. (Govt.C. 850.4.) (See *Heieck & Moran v. Modesto*, *supra*; *Cochran v. Herzog Engraving Co.*, *supra* [inadequate inspection for fire hazards; Govt.C. 850.4 applicable]; cf. *Valley Title Co. v. San Jose Water Co.* (1997) 57 C.A.4th 1490, 1495, 67 C.R.2d 636 [Pub.Util.C. 774 grants same immunity to water companies that Govt.C. 850.4 grants to governmental entities, i.e., water company is immune for all damage caused by failure to maintain fire protection equipment, even when equipment is not being used in firefighting activities]; *Pacific Bell v. San Diego* (2000) 81 C.A.4th 596, 601, 96 C.R.2d 897 [Govt.C. 850.4 did not preclude plaintiff from maintaining inverse condemnation action for water damage caused by bursting fire hydrant pipe]; on immunity of public employees respecting these activities, see *infra*, §363.)

In *Razeto v. Oakland* (1979) 88 C.A.3d 349, 151 C.R. 791, plaintiffs alleged that a fire hydrant had been negligently installed across the street with its spout pointing toward their house; that vandals had turned it on; and that the stream of water caused damage to the house and contents. *Held*, summary judgment for defendant affirmed. Although the original intent in drafting Govt.C. 850.4 had been to state an immunity for damage caused in firefighting activities (see *infra*, §311), the section as ultimately drafted extended the immunity to include dangerous and defective fire protection equipment. (88 C.A.3d 352.)

(4) *Transportation of injured person.* Where a person has been injured by a fire or fire protection operation, injury sustained in connection with transporting the injured person to a doctor or hospital without objection. (Govt.C. 850.8; on immunity and liability of public employees respecting these activities, see *infra*, §363.)

(5) *Injury caused in fighting fire.* Generally, injury caused in fighting fire. Govt.C. 850.4 (*infra*, §311 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Failure to provide fire protection service.* See *People v. Superior Court (United Water Conservation Dist.)* (2008) 159 C.A.4th 1072, 1077, 72 C.R.3d 53 [in action by California Department of Forestry and Fire Protection to recover costs of fighting fire caused by defendants, fire protection immunities under Govt.C. 850 et seq. barred defendants from asserting affirmative defenses of comparative negligence and failure to mitigate damages to challenge reasonableness of methods department used to fight fire].



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11. Fire Protection.

b. Injury Caused in Fighting Fire.

1. General Immunity Rule.

5 Witkin Sum. Cal. Law Torts § 311

[§ 311] General Immunity Rule.

Subject to exceptions and distinctions (*infra*, §312), a public entity is immune from liability for "any injury caused in fighting fires." (*Govt.C. 850.4*; on immunity and liability of public employees respecting firefighting injuries, see *infra*, §363.)

In *Heimberger v. Fairfield* (1975) 44 C.A.3d 711, 117 C.R. 482, plaintiff alleged that he sustained injuries when defendant city's fireman rescued him from a fire. *Held*, no cause of action was stated. *Govt.C. 850.4* applies not only to the condition of equipment (see *supra*, §310), but to the conduct of firefighters; and an injury resulting from the rescue of a person trapped in a burning structure is one incurred in the course of fighting fires. (44 C.A.3d 715.)

In *Bettencourt v. California* (1975) 51 C.A.3d 892, 124 C.R. 542, plaintiffs attempted to overcome the immunity statute, after alleging that state firefighters cut plaintiffs' wire fence to fight a grass fire (immunity clear), by additionally alleging that the firefighters, after the fire had been extinguished, negligently failed to repair the fence or notify plaintiffs of its condition with the result that plaintiffs' cattle went through the opening and were killed on the highway. The court rejected this "semantic technique" as one that would emasculate this and other immunity statutes. (51 C.A.3d 894.) (See lengthy dissent, 51 C.A.3d 896, strongly supporting plaintiffs' theory.)

California v. Superior Court (Nagel) (2001) 87 C.A.4th 1409, 105 C.R.2d 499, involved governmental liability to a nonemployee participating in a firefighting operation. The decedent was killed while piloting an airplane and attempting to drop fire retardant material on a forest fire. In this action for wrongful death, defendant state demurred on the ground that it was immune under *Govt.C. 850.4*. *Held*, mandamus issued directing the trial judge to sustain the demurrer; defendant was immune.

(a) Had decedent been a public employee, his only remedy would have been through the workers' compensation system, and the matter would never have reached the civil courts. Had decedent been a nonparticipating third-party victim of the fire, it is equally clear from the statutory language that defendant would have been immune. The novel question raised here results from the fact that decedent was a participant in fighting the fire, and was neither a public employee nor a classic third-party victim. (87 C.A.4th 1412.)

(b) *Govt.C. 850.4* and related statutes were enacted to protect the discretion of public officials in determining whether fire protection should be provided and, if so, to what extent and with what facilities. Here, many of the alleged negligent acts related to the advice or instructions given (or not given) by state employees. Had these employees negligently selected the wrong fight path, they would have been immune from liability for increased property damage. They would also have been immune had decedent's plane crash caused injury to a private person. The result is no different with respect to plaintiffs' efforts to recover for decedent's death. (87 C.A.4th 1413.)

(c) *Govt.C. 850.4* speaks of injuries "caused" in fighting fires, rather than injuries "suffered" while fighting fires, and the Law Revision Commission remarked that firefighters should be able to take whatever action they think desirable without fear that a jury will later find them liable. Arguably, this suggests that the statute is directed at suits by members of the public, but, in relation to state employees whose putative negligence resulted in decedent's death, decedent was a member of the public. (87 C.A.4th 1414.)

(d) Plaintiffs contended that if the accident had occurred other than during firefighting activities, such as during a training run, defendant would not have been immune. Assuming that this is true, it does not help plaintiffs' case. Insofar as the statutes protect actions taken during the heat of firefighting, the statutory immunity is not lost merely because no immunity would have been available for the same action or decision taken without urgency. Decisions as to the scope of immunity are for the Legislature, not the courts. (87 C.A.4th 1415.)

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b. Injury Caused in Fighting Fire.

2. Exceptions and Distinctions.

5 *Witkin Sum. Cal. Law Torts* § 312

[§ 312] Exceptions and Distinctions.

(1) *Motor Vehicle Torts*. An exception from the general immunity for injuries from fighting fires (*supra*, §311) exists for motor vehicle torts under *Veh.C. 17000* et seq. (*infra*, §331 et seq.) (*Govt.C. 850.4*; on liability of public employees respecting these activities, see *infra*, §363.)

(2) *Extraterritorial Services*. Liability is imposed when a public entity provides fire protection or firefighting service outside its regular area. The entity *providing* the service is liable under any of the statutes imposing liability for the torts of its employees. The entity *receiving* the service is not liable for these torts, but it may agree on indemnification of the providing entity. (*Govt.C. 850.6*.)

(3) *Conduct Before Fire Started*. In *Potter v. Oceanside* (1981) 114 C.A.3d 564, 170 C.R. 753, the complaint alleged that plaintiff, operating a trenching machine, broke a natural gas line; he called the fire department, and the fire captain negligently told him to start the machine and move it from the area; he started the machine and escaping gas ignited, causing injuries to him. *Held*, the governmental immunity did not apply; there was no allegation that the fire captain was fighting a fire when the alleged negligent act occurred. (114 C.A.3d 566.)

(4) *Rescue Unrelated to Firefighting*. *Heimberger v. Fairfield* (1975) 44 C.A.3d 711, 117 C.R. 482, *supra*, §311, was distinguished in *Lewis v. Mendocino Fire Protection Dist.* (1983) 142 C.A.3d 345, 190 C.R. 883. The complaint alleged that plaintiff, while camping in a state park, was trapped by a fallen tree and that members of defendant's volunteer fire department, responding to the emergency, negligently tried to remove the tree, with the result that it twice fell back on plaintiff, causing further injuries. *Held*, the action was maintainable; although this rescue operation may be within the normal activities of a fire department, it was unrelated to combating fires and therefore not within the immunity. (142 C.A.3d 347, 348.)

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 3. Immunity Despite Wilful Misconduct.

5 Witkin Sum. Cal. Law Torts § 313

[§ 313] Immunity Despite Wilful Misconduct.

Firefighting activities subject to *Govt.C. 850.4* include wilful misconduct as well as ordinary negligence. In *San Francisco v. Superior Court (Lourdeaux)* (1984) 160 C.A.3d 837, 207 C.R. 6, plaintiffs alleged that their home was located 300 feet from a fire station; on the evening of the fire, all members were away from the station at a social dinner; the fire was reported by persons who ran directly to that station instead of calling department headquarters; and, as a result, response to the fire was delayed and extensive damage to the property resulted. *Held*, no cause of action was stated.

(a) The trial judge, in overruling the demurrer, concluded that the allegations of intentional, wilful, or reckless conduct distinguished the case from those involving ordinary negligence of firefighters. This is incorrect. The *Govt.C. 850.4* immunity for injury caused in fighting fires extends to wilful misconduct by the firefighters. (160 C.A.3d 841.)

(b) Even if *Govt.C. 850.4* could be so narrowly construed as to apply to actions only after the firefighters reached the fire, the immunity of *Govt.C. 850* (supra, §311) would apply, for then the acts of the firefighters must be viewed as a failure "to provide fire protection service." (160 C.A.3d 842.)

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c. Fire on Public Property.

5 *Witkin Sum. Cal. Law Torts* § 314

[§ 314] Fire on Public Property.

In *Vedder v. Imperial* (1974) 36 C.A.3d 654, 111 C.R. 728, plaintiffs were lessees of business property at defendant city's airport. They alleged that defendant city negligently stored large amounts of gasoline and other highly combustible chemicals on the property, and that a fire, negligently started by other defendants, caused damage to plaintiffs' property and loss of profits. *Held*, a cause of action against the city was stated on the dangerous condition theory (*supra*, §266). The city permitted a dangerous condition to exist, the other defendants negligently started the fire, and the wrongful conduct of both proximately caused the injury. (36 C.A.3d 660.) The immunity defenses offered by the city under *Govt.C. 850* and *850.2* (*supra*, §311), concerning failure to provide fire protection service, personnel, equipment, or facilities, were designed to protect a public entity from liability for its political decision to provide or not provide fire protection for the public generally. "They should not be applied to allow a public entity to escape responsibility for damages resulting from its failure to provide for protection on property which it owns and manages itself, particularly where it has permitted a dangerous fire condition to exist on the property. In that situation, lack of fire protection is a proper factor to be considered as contributing to the existence of a dangerous condition on the property." (36 C.A.3d 660, citing *Quelvog v. Long Beach* (1970) 6 C.A.3d 584, 86 C.R. 127, *supra*, §266.) (See *Cairns v. Los Angeles* (1997) 62 C.A.4th 330, 334, 72 C.R.2d 460 [closed road that could not be used for firefighting, although termed dangerous condition of property by plaintiff, was actually failure to provide either protective service or firefighting facilities within meaning of firefighting immunity statutes; distinguishing *Vedder*].)

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12. Protection From Hazardous Substances.

5 Witkin Sum. Cal. Law Torts § 315

[§ 315] Protection From Hazardous Substances.

(1) *Immunity Rule.* Generally, neither public entities nor designated types of public employees are liable for injuries or property damage caused by action, within the scope of employment, to abate or attempt to abate "hazards reasonably believed to be an imminent peril to public health and safety caused by the discharge, spill, or presence of a hazardous substance." (*Health & Saf.C. 25400(b)*); see *Govt.C. 821.5* [immunity of public entities and employees from liability for failing to restrict travel in tunnels by flammable liquid carriers]; *Govt.C. 8655.5* [immunity from liability arising from use of community warning system in Contra Costa County to warn of hazardous materials release]; *Health & Saf.C. 25402.1* [immunizing local agency from liability for hazardous substance release where site investigation and remedial action are undertaken under California Land Environmental Restoration and Reuse Act (*Health & Saf.C. 25401 et seq.*)].)

A "hazardous substance" is one that presents a threat to the public because of its "toxicity, radioactivity, flammability, or other characteristic dangerous to the public health or the environment." (*Health & Saf.C. 25400(d)(1)*.) An "imminent peril" includes a peril that, if not mitigated, "threatens the public health or welfare, or the environment." (*Health & Saf.C. 25400(d)(2)*.)

The legislative finding declares the intent, by providing a qualified immunity, to encourage public entities, county public health directors, public safety employees, members of radiation emergency screening teams, persons authorized by a public entity, and registered sanitation employees to abate these hazards. (*Health & Saf.C. 25400(a)*.)

(2) *Exception: Motor Vehicle Torts.* Motor vehicle torts under *Veh.C. 17000 et seq.* (*infra*, §331 *et seq.*) are excepted from the immunity. (*Health & Saf.C. 25400(b)*); on liability of public employees respecting these activities, see *infra*, §363.)

(3) *Qualification: Bad Faith or Gross Negligence.* The immunity is not available if the employee performed "in bad faith or in a grossly negligent manner." (*Health & Saf.C. 25400(b)*.) However, it is *presumed* that the employee acted in good faith and without gross negligence, and this presumption is one affecting the burden of proof. (*Health & Saf.C. 25400(c)*); on effect of presumption, see 1 *Cal. Evidence (4th)*, *Burden of Proof and Presumptions*, §57.) (See *Washington v. Contra Costa* (1995) 38 C.A.4th 890, 899, 45 C.R.2d 646 [county was immune from liability for failure to adequately regulate chemical company that released hazardous materials into atmosphere; plaintiffs' allegations that

accident was result of company's abnormal activities and its failure to report situation to proper authorities precluded finding that county acted with gross negligence or in bad faith].)

(4) *Qualification: County Public Health Directors or Registered Sanitarian Employees.* Immunity for these persons exists only where, at the request of a public safety employee in charge of scene management, they give "emergency assistance or advice at the scene of the peril" concerning a "hazardous substance problem on public or private property." (*Health & Saf.C. 25400(f).*)

(5) *Liability of Person Creating Hazard.* "It is not the intent" of *Health & Saf.C. 25400* "to impair any cause of action against the person, firm, or entity creating the spill, discharge, or presence of the hazardous material giving rise to the response" of the public entity or employee. (*Health & Saf.C. 25400(e).*)

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B. Public Entities.

13. Medical, Hospital, and Public Health Activities.

a. Liabilities.

5 *Witkin Sum. Cal. Law Torts* § 316

[§ 316] Liabilities.

The provisions of the Tort Claims Act specifically directed to medical, hospital, and public health activities (*Govt.C. 854 et seq.*) recognize the following types of liability:

- (1) *Motor vehicle torts.* Motor vehicle torts under *Veh.C. 17000 et seq.* (*infra*, §331). (*Govt.C. 854.8(b).*)
- (2) *Dangerous condition of property.* Injury from the dangerous condition of public property (see *Govt.C. 830 et seq.*, *supra*, §249 *et seq.*), except for injury to a patient of a mental institution. (*Govt.C. 854.8(c).*)
- (3) *Failure to provide required equipment, personnel, or facilities.* Failure to provide adequate or sufficient equipment, personnel, or facilities required by statute or regulation prescribing minimum standards, unless reasonable diligence is exercised in an attempt to comply. (*Govt.C. 855(a), (b)*; see *Baber v. Napa State Hosp. (1989) 209 C.A.3d 213, 220, 257 C.R. 55* [whether hospital failed to comply with prescribed minimum standards is question of fact that cannot be resolved by motion for nonsuit].)
- (4) *Interference with right to judicial review.* Intentional and unjustifiable interference, by a public employee, with the right of an inmate of a medical facility to obtain a judicial determination or review of the legality of the confinement. However, no cause of action accrues until it has first been determined that the confinement was illegal. (*Govt.C. 855.2*; see *82 Harv. L. Rev. 1771* [medical malpractice leading to excessive incarceration].)
- (5) *Failure to admit patient where mandatory duty.* Failure to admit a person to a medical facility where the entity is under a mandatory duty to do so. (See *Govt.C. 856.4* and Legislative Committee Comment.)
- (6) *Negligent examination or diagnosis for purpose of treatment.* Negligence in an examination or diagnosis for the purpose of treatment, or negligent injury in the course of an examination. (See *Govt.C. 855.6* and Legislative Committee Comment; *Colome v. State Athletic Com. (1996) 47 C.A.4th 1444, 1458, 55 C.R.2d 300* [purpose of physical conducted as condition to issuance of boxing license was for examination rather than treatment].) (On liability respecting medical, hospital, and public health activities generally, see *C.E.B., 2 Government Tort Liability Practice 4th*, §11.75 *et seq.*; on liabilities of public employees respecting medical, hospital, and public health activities, see *infra*,

§364.)

For purposes of these provisions, the term "medical facility" includes a hospital, infirmary, clinic, dispensary, mental institution, or similar facility, unless the context otherwise requires. (*Govt.C. 854.*) A "mental institution" includes any state hospital for the mentally disordered or retarded, the California Rehabilitation Center, or a county psychiatric hospital. (*Govt.C. 854.2.*)

Litigation regarding medical, hospital, and public health activities often arises in situations outside the scope of immunities in these or other provisions of the Act. Where no immunity applies, a public entity or employee is liable, as in other cases, to the same extent as a private individual for negligent or intentional conduct that results in injury. (*Govt.C. 815.2(a)*, supra, §237; *Govt.C. 820(a)*, infra, §346.) Thus, liability may result from ordinary negligence in rendering these services. (See *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 436, 131 C.R. 14, 551 P.2d 334, infra, §1050 [psychiatric treatment].)

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *Failure to provide required equipment, personnel, or facilities.*

Requirement of minimum standards: In *Lockhart v. Los Angeles* (2007) 155 C.A.4th 289, 66 C.R.3d 62, the son of a patient who committed suicide in a county mental health hospital sued for wrongful death, alleging failure to provide adequate or sufficient equipment, facilities, or personnel in violation of *Govt.C. 855. Held*, summary judgment for hospital affirmed.

(a) Under *Govt.C. 855*, liability is limited to breaches of duties set forth in statutes and regulations of the State Department of Health Services, Social Services, Developmental Services, or Mental Health. Violations of other enactments are insufficient for liability. (155 C.A.4th 304.)

(b) Also, under the statute, the statute or regulation must be one "prescribing minimum standards." It must require something specific of the governmental entity and not simply set forth a goal, leaving it to the entity's discretion as to how to meet that goal. (155 C.A.4th 307.)

(c) The complaint fails to identify any statute or regulation, violation of which would support liability under the statute. Accordingly, no triable issue of fact exists. Plaintiff attempts to create liability under *Govt.C. 855* for violations of county regulations, federal regulations, and standards of the Joint Commission on Accreditation of Healthcare Organizations. Plaintiff cannot proceed on the basis of any of these authorities, as they are not statutes or regulations of the State Department of Health Services, Social Services, Developmental Services, or Mental Health. Plaintiff also attempts to create liability under several regulations of these departments. However, these regulations, which require "adequate" or "sufficient" equipment, personnel, or facilities, cannot provide a basis for liability because they do not prescribe "minimum standards," i.e., specific requirements, within the scope of the statute. (155 C.A.4th 310.)



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b. Immunities.

5 *Witkin Sum. Cal. Law Torts* § 317

[§ 317] Immunities.

Subject to the exceptions stated in the previous section, the following immunities apply under the provisions of the Tort Claims Act specifically directed to medical, hospital, and public health activities (*Govt.C. 854 et seq.*):

(1) *Injury caused by mental patient.* Injury caused by a patient of a mental institution. (*Govt.C. 854.8(a)(1)*; see *Moxon v. Kern* (1965) 233 C.A.2d 393, 396, 43 C.R. 481 [immunity for death of mental patient killed by fellow patient]; on definition of "mental institution," see *Govt.C. 854.2*, supra, §316.) The term "patient" includes both inpatients and outpatients. (Legislative Committee Com. to 1970 Amendment to *Govt.C. 854.8*; see *Guess v. California* (1979) 96 C.A.3d 111, 120, 17 C.R. 618 [outpatient of county mental health center]; *Buford v. California* (1980) 104 C.A.3d 811, 826, 829, 164 C.R. 264 [person on leave of absence from mental institution].)

(2) *Injury to mental patient.* Injury to an inpatient of a mental institution. (*Govt.C. 854.8(a)(2)*; see *Los Angeles v. Superior Court* (1965) 62 C.2d 839, 842, 44 C.R. 796, 402 P.2d 868 [*Govt.C. 854.8(a)(2)* reflects policy to provide immunity for diagnosing and treating mentally ill]; *Foy v. Greenblott* (1983) 141 C.A.3d 1, 6, 190 C.R. 84, *infra*, §983 [county not liable for alleged negligent failure to supervise care of incompetent inpatient who became pregnant]; *Guzman v. Los Angeles* (1991) 234 C.A.3d 1343, 1347, 286 C.R. 317 [alleged negligent administration of medication; summary judgment for county hospital affirmed]; *Hata v. Los Angeles County Harbor/UCLA Med. Center* (1995) 31 C.A.4th 1791, 1800, 37 C.R.2d 630 [immunity under *Govt.C. 854.8(a)(2)* is jurisdictional and need not be raised as affirmative defense by public entity].) The term "inpatient" refers only to inmates and not outpatients. (Legislative Committee Com. to 1970 Amendment to *Govt.C. 854.8*.)

(3) *Interference with right to judicial review.* Interference with a medical facility inmate's right to a judicial determination or review of the legality of the confinement (unless intentional and unjustifiable and determined to have been illegal). (*Govt.C. 855.2*; see *supra*, §316.)

(4) *Injury from decision respecting quarantine or disease control.* Injury caused by a discretionary decision to institute or not to institute quarantine or other disease prevention or control measures, or by an act or omission in carrying out such a decision with due care. (*Govt.C. 855.4*; see *Wright v. Los Angeles* (2001) 93 C.A.4th 683, 687, 113 C.R.2d 352 [*Govt.C. 855.4* provides exception to liability for dangerous condition of public property under *Govt.C. 835*

(supra, §258), even though statutes are in different chapters of Tort Claims Act]; cf. *Jones v. Czapkay* (1960) 182 C.A.2d 192, 197, 6 C.R. 182 [decided on theory of discretionary act (see infra, §351)].)

(5) *Failure to make adequate examination.* Injury caused by failure to make an adequate physical or mental examination to determine whether a hazard to health or safety exists. (Govt.C. 855.6; see supra, §316.)

(6) *Diagnosing or failing to diagnose or prescribe for mental illness or addiction.* Injury resulting from the diagnosis or failure to diagnose a mental illness or addiction, or failure to prescribe for it. (Govt.C. 855.8(a); see Govt.C. 854.4 [mental illness or addiction defined]; *Fish v. Regents of Univ. of Calif.* (1966) 246 C.A.2d 327, 331, 332, 54 C.R. 656 [plaintiff's temporary detention by county physician for observation for possible mental illness; nonsuit properly granted in false imprisonment action].)

(7) *Confinement or release of mental patient or addict.* Determination whether to confine a person for mental illness or addiction, the terms of confinement, or whether to parole, grant a leave of absence to, or release such a person. (Govt.C. 856(a).)

(8) *Escape of persons confined.* Injury caused by an escaping or escaped person confined for mental illness or addiction, or death or injury suffered by the escaper. (Govt.C. 856.2; see infra, §320.)

(9) *Failure to admit patient absent mandatory duty.* Failure to admit a person to a medical facility (unless a mandatory duty exists). (Govt.C. 856.4.)

(10) *National influenza program.* Injury caused by an act or omission of a participant in the National Influenza Program of 1976. (Govt.C. 856.6(a); see *Heitz v. Sacramento* (1978) 87 C.A.3d 754, 758, 151 C.R. 429 [statute is valid, and exclusive remedy for injuries is claim against the United States under 42 U.S.C., §247b]; 65 Cal. L. Rev. 754 [Tort Law and Mass Immunization Programs].) (On immunities respecting medical, hospital, and public health activities generally, see C.E.B., 2 Government Tort Liability Practice 4th, §11.89 et seq.; on immunities of public employees respecting medical, hospital, and public health activities, see infra, §365.)

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c. Failure To Conduct Physical or Mental Examination.

5 Witkin Sum. Cal. Law Torts § 318

[§ 318] Failure To Conduct Physical or Mental Examination.

Except for an examination for purposes of treatment, neither a public entity nor an employee acting in the scope of employment is liable for injury caused by failure to make a physical or mental examination, or an adequate one, to determine whether a person has a disease or condition constituting a hazard to the health or safety of that person or of others. (*Govt.C. 855.6*; see *Lucas v. Long Beach* (1976) 60 C.A.3d 341, 349, 131 C.R. 470 [failure to examine arrested juvenile exhibiting symptoms of intoxication who subsequently committed suicide in cell; immunity applied]; *Colome v. State Athletic Com.* (1996) 47 C.A.4th 1444, 1458, 55 C.R.2d 300 [doctor examining boxer to determine fitness for purpose of licensure was immune under *Govt.C. 855.6*]; *Creason v. Department of Health Services* (1998) 18 C.4th 623, 635, 76 C.R.2d 489, 957 P.2d 1323 [*Govt.C. 855.6* immunity applied to screening test given to all infants to determine whether they had hypothyroidism, because test was not one given for "treatment" within exception to that immunity]; on immunity of public employee for injury from failure to make medical or mental examination, see *infra*, §365.)

In *Smith v. Kern* (1993) 20 C.A.4th 1826, 25 C.R.2d 716, plaintiff police officer, while acting in the line of duty, became exposed to the blood of D, who claimed to have AIDS. Plaintiff requested defendant county to conduct an AIDS blood test on D, but defendant mistakenly tested for hepatitis instead. By the time this mistake had been discovered, D had been released and the remainder of his blood sample destroyed. In plaintiff's action for negligence, the main issue was whether defendant was immune under *Govt.C. 855.6*. *Held*, defendant was not immune; because the blood test was for the purpose of treatment, *Govt.C. 855.6* was inapplicable.

(a) *Govt.C. 855.6* grants immunity for injury caused by the failure to make a physical or mental examination, "[e]xcept for an examination or diagnosis for the purpose of treatment." Hence, the issue is whether the AIDS test of D's blood was an examination "for the purpose of treatment." (20 C.A.4th 1833.)

(b) The resolution of this issue is guided by the inapplicability of *Govt.C. 855.6* immunity in related situations. For example, it is clear that *Govt.C. 855.6* would not provide immunity if defendant's laboratory had undertaken to test plaintiff's blood for AIDS in order to assist in the diagnosis of whether he had contracted the disease. And in various circumstances, a medical laboratory might test an animal or a plant to aid in the examination or diagnosis of a person, such as a test on an animal to determine whether it had rabies. (20 C.A.4th 1834.)

(c) Hence, "[w]e conclude the source of the material examined is not determinative of the applicability of [Govt.C. 855.6]. Rather, the question is whether the public employee's actions were taken to facilitate the delivery of medical diagnosis or care to the individual who is injured by the employee's actions." (20 C.A.4th 1835.) Here, the facts alleged permit a reasonable inference that defendant's laboratory undertook to perform the test on D's blood for the purpose of assisting plaintiff's physician in examining or diagnosing his exposure to *AIDS*. (20 C.A.4th 1835.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Public Entities.

13. Medical, Hospital, and Public Health Activities.

d. Confinement or Release of Mental Patient or Addict.

5 *Witkin Sum. Cal. Law Torts* § 319

[§ 319] Confinement or Release of Mental Patient or Addict.

(1) *Immunity for Decisions To Confine or Release.* Neither a public entity nor a public employee acting within the scope of employment is liable for injury resulting from a determination, in accordance with a statute or other regulation, of any of the following:

(a) Whether to confine a person for mental illness or addiction. (*Govt.C. 856(a)(1).*)

(b) The terms and conditions of confinement. (*Govt.C. 856(a)(2).*)

(c) Whether to parole or release or grant a leave of absence to the person confined. (*Govt.C. 856(a)(3)*; see 38 *A.L.R.3d* 699 [liability of one releasing institutionalized mental patient for harm patient causes].) (On immunity of public employee for confinement or release of mental patient or addict, see *infra*, §365.)

In *Hernandez v. California* (1970) 11 *C.A.3d* 895, 90 *C.R.* 205, an inmate of a state mental hospital was released from confinement, and 2 months later, killed his mother. The heirs of decedent sued the state on the theory that employees of the hospital had negligently failed to keep proper records required by *Welf.C. 7251*, thereby depriving the releasing authority of full information, resulting in the inmate's release in a dangerous condition. *Held*, *Govt.C. 856(a)(3)* gives absolute immunity to the state and its employees for injuries from release of a mental patient. Plaintiffs' attempted distinction between those who determine to release and those who negligently maintain records was rejected. The immunity "extends to all those involved in the process leading to release and its protection is not restricted to the custodial officer who makes the final determination to release." (11 *C.A.3d* 899.) The statutes indicate a policy of encouraging free release from confinement, unfettered by the possibility of charges of negligence, which would have an inhibiting effect on the speed and frequency of release. (11 *C.A.3d* 900.)

(2) *Other Immunities or Defenses.* Other immunities or defenses have been held to bar recovery for injuries resulting from release of a mental patient, either in the absence of or in conjunction with immunity under *Govt.C. 856(a)*.

In *McDowell v. Alameda* (1979) 88 *C.A.3d* 321, 151 *C.R.* 779, defendant public hospital sent a mental patient to

defendant private hospital in a taxicab. He escaped in some manner, and 2 days later, shot and killed decedent. In a wrongful death action, judgment for defendants on the pleadings was affirmed.

(a) *Govt.C. 856(a)(1)* provides an absolute immunity only for injuries resulting from the determination whether to confine. *Govt.C. 856(c)* (*infra*, §364) makes it clear that there is no immunity for negligent failure to carry out the determination. (85 C.A.3d 326.)

(b) However, there was no negligence in using a taxicab rather than an ambulance in transporting the patient; defendant public hospital could have simply released him. (85 C.A.3d 327.)

In *Katona v. Los Angeles* (1985) 172 C.A.3d 53, 218 C.R. 19, plaintiffs' daughter killed herself approximately 6 months after being released from defendant county's mental health facility, where she had been treated on numerous occasions for various mental illnesses, including suicidal ideation. Defendant knew that decedent had applied for the purchase of a handgun and had completed its purchase after her release. In this wrongful death action, defendant received judgment on demurrer. *Held*, affirmed.

(a) Plaintiffs wisely eschew any claim that defendant's liability rests on the release of decedent from custody or the failure to otherwise directly control defendant's conduct. *Govt.C. 856(a)(3)* grants a public entity an immunity for injury resulting from a determination to release a mental patient. (172 C.A.3d 59.)

(b) Decedent was unconditionally released, and defendant had no contact with her or her parents during the 6 weeks between her release and death; hence, there was no basis for imposing a duty on defendant to supervise decedent in an attempt to prevent her suicide. (172 C.A.3d 59.) *Vistica v. Presbyterian Hosp. & Med. Center of San Francisco* (1967) 67 C.2d 465, 62 C.R. 577, 432 P.2d 193, and *Meier v. Ross General Hosp.* (1968) 69 C.2d 420, 71 C.R. 903, 445 P.2d 519, holding that a hospital has a duty to protect its patients and that an action will lie where a confined patient commits suicide while undergoing psychiatric treatment, are not applicable here. (172 C.A.3d 59.)

(c) Neither *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *infra*, §1050, where a mental patient threatened a specific person, nor *Johnson v. Los Angeles* (1983) 143 C.A.3d 298, 191 C.R. 704, *supra*, §301, where defendant promised decedent's wife that he would be cared for, is authority for imposing a duty on defendant to warn a law enforcement agency or the gun store that decedent was suicidal. (172 C.A.3d 60.) (On psychotherapist's duty to warn generally, see *infra*, §§1045, 1050, 1051.)

In *Johnson v. Ventura* (1994) 29 C.A.4th 1400, 35 C.R.2d 150, plaintiffs brought a wrongful death action against a city and a county, after a patient left a county hospital and stabbed plaintiffs' decedent to death. The patient had been admitted to the hospital for self-inflicted stab wounds, and a plan was adopted to admit him to the county mental health department after he received treatment for his wounds. While still being treated, the patient walked out of the hospital. City police officers located him and discovered that he had broken into homes, but determined that he was not a danger to himself or others and allowed him to walk back to the hospital without notifying the hospital. The patient then entered decedent's home and stabbed her. The trial judge, finding that the governmental immunity statutes precluded recovery, sustained defendants' demurrers and dismissed the action. *Held*, affirmed.

(a) *City not liable*. The action against the city was barred for the following reasons:

(1) The city owed the decedent no special duty, because the city provided a service to the county, not the decedent. (29 C.A.4th 1406.)

(2) There was no indication that the police had induced decedent's reliance on a promise, express or implied, that they would provide her with protection; thus, no special relationship existed between the city and decedent. And, the conduct of the police did not increase the risk of harm to decedent. (29 C.A.4th 1406.)

(3) Further, the action against the city was barred by *Govt.C. 815* (immunity of governmental entity from liability

unless otherwise provided by statute; see *supra*, §223); *Govt.C. 820.2* (immunity of public employee for discretionary acts; see *infra*, §351); and *Welf.C. 5154* (immunity of peace officer for release of mental patient). (29 *C.A.4th* 1406.)

(4) *Tarasoff v. Regents of Univ. of Calif.*, *supra*, holding that police officers are immune from liability for releasing a mental patient after a brief confinement, barred any action against the police officers. (29 *C.A.4th* 1407.)

(b) *County not liable*. The action against the county was barred for the following reasons:

(1) Under *Tarasoff*, the scope of the immunity under *Govt.C. 856* extends not only to the final determination to confine or not to confine the person for mental illness, but to all determinations involved in the process of commitment. (29 *C.A.4th* 1407.)

(2) Under *Buenavista v. San Francisco* (1989) 207 *C.A.3d* 1168, 255 *C.R.* 329, lacking a threat to a specific individual, there is no liability for negligent failure to warn; thus, the county had no duty to warn the general public. (29 *C.A.4th* 1408.)

(3) Immunity under *Govt.C. 856.2* (*infra*, §320) was applicable even though the plan to confine and treat the patient never materialized. For purposes of the statute, the term "confined" applies to persons voluntarily or temporarily admitted for treatment. (29 *C.A.4th* 1408.)

(4) The county was not liable under *Govt.C. 856(c)* (public employee liable for negligence in determinations relating to confinement of person for mental illness, *infra*, §364). The statute applies only to public employees, not public entities. (29 *C.A.4th* 1409.)

(5) The county was not negligent in carrying out the plan to confine the patient. The decision to commit him at a later date was one of the determinations involved in the process of commitment. (29 *C.A.4th* 1409.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Immunity for Decisions To Confine or Release*. See *Coburn v. Sievert* (2005) 133 *C.A.4th* 1483, 1504, 35 *C.R.3d* 596 [*Welf.C. 5154*, providing immunity to treating psychiatrist and others for action by person released early from involuntary commitment under Lanterman-Petris-Short Act, imposes subjective "honest-in-fact" standard of belief on psychiatrist that release is proper, not objective standard of reasonableness].



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e. Escape of Mental Patient or Addict.

5 *Witkin Sum. Cal. Law Torts* § 320

[§ 320] Escape of Mental Patient or Addict.

Public entities and employees are not liable for either of the following:

(1) Injury caused by an escaping or escaped person confined for mental illness or addiction. (*Govt.C. 856.2(a)(1).*)

(2) Injury or death suffered by the escaper. (*Govt.C. 856.2(a)(2).*) (See *Johnson v. Ventura* (1994) 29 C.A.4th 1400, 35 C.R.2d 150, supra, §319 [immunity applied even though patient escaped before actually admitted to county mental facility]; on immunity of public employees for escape of mental patient or addict, see *infra*, §365.)

Use of the word "confined" in *Govt.C. 856.2* makes it clear that the immunity extends to a mental patient who is voluntarily confined. (*Forde v. Los Angeles* (1976) 64 C.A.3d 477, 479, 134 C.R. 549 [action by patient who escaped and jumped off bridge; summary judgment for county affirmed].)

In *Los Angeles County-U.S.C. Med. Center v. Superior Court* (1984) 155 C.A.3d 454, 202 C.R. 223, plaintiff, with a history of mental illness, was brought to the county mental health services evaluation unit. The doctor completed an application for a 72-hour detention, and, while still on the hold, plaintiff was transferred to the county medical center for tests which required equipment not at the unit. Before the equipment could be procured, plaintiff escaped and jumped from a freeway overpass. The complaint was drafted on the theory that plaintiff, without being released from confinement, was negligently placed "in an unrestrained environment." *Held*, defendant medical center was entitled to summary judgment.

(a) Detention on a 72-hour hold constitutes "confinement" within the meaning of *Govt.C. 856.2*, for use of the word "confined" in lieu of "committed" enlarged the scope of the immunity to include a person temporarily detained. (158 C.A.3d 460, citing *Forde*.)

(b) Confinement does not invariably require holding in custody; C.C.P. 854.5 defines "confine" in the disjunctive ("admit, commit, place, detain or hold in custody"). Hence, the contention that plaintiff was not confined when left unattended at the hospital is unsound. (155 C.A.3d 462.)

(c) Plaintiff's contention that defendant failed to *adequately confine* a mental patient confuses the issue of

negligence with the immunity issue. As pointed out in *Forde*, confinement turns on the person's *status* as a patient "confined" for mental illness, not on whether physical restraints are imposed. (155 C.A.3d 462, 463.)

(d) The argument that *Govt.C. 856.2* gives immunity only where the person escapes from a licensed health care facility is likewise unsound. Plaintiff was not confined in an unauthorized facility. The mere fact that at the precise moment she escaped she was in a location within the county medical center that housed medical testing equipment and was not 'in custody' in the psychiatric ward at the huge and complex county facility does not a fortiori rule out escape immunity. (155 C.A.3d 463.) (See *Buenavista v. San Francisco* (1989) 207 C.A.3d 1168, 1173, 255 C.R. 329 [mental patient was "confined," even though left unrestrained and unattended in waiting area; following *Los Angeles County-U.S.C. Med. Center v. Superior Court*].)

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14. School Operations.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 321

[§ 321] In General.

Under the old Educational Code (former Educ.C. 903), school authorities had a duty to supervise the conduct of children on school grounds. And the standard of care was the same as that required in performance of other duties: i.e., the care that a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances. (See *Taylor v. Oakland Scavenger Co.* (1941) 17 C.2d 594, 600, 110 P.2d 1044; *Pirkle v. Oakdale Union Grammar School Dist.* (1953) 40 C.2d 207, 210, 253 P.2d 1.)

Under the Tort Claims Act, a public entity is liable for an act or omission of an employee in the scope of employment if that act or omission would have given rise to an action against that employee. (*Govt.C. 815.2(a)*, supra, §237; on liability of public employees for torts, see *infra*, §345 et seq.) This basic provision carries over the respondeat superior liability previously imposed on school districts, making it applicable to all public entities. Hence, the decisions applying the Educational Code provision are still good law: "The pattern of vicarious liability for employees' negligence is essentially identical under both statutes. We have found no evidence indicating an intention on the part of the Legislature to alter the duty to provide supervision of students while on school grounds, the standard of care required of those undertaking to provide supervision, or the amount of evidence necessary to support a finding of negligence." (*Dailey v. Los Angeles Unified School Dist.* (1970) 2 C.3d 741, 747, footnote 3, 87 C.R. 376, 470 P.2d 360, *infra*, §322; see *Biggers v. Sacramento City Unified School Dist.* (1972) 25 C.A.3d 269, 274, 101 C.R. 706 [referring to decisions prior to Act]; *Castro v. Los Angeles Bd. of Education* (1976) 54 C.A.3d 232, 235, 126 C.R. 537 [same].)

Several statutes outside the Tort Claims Act likewise affect the liability of school districts for their employees' torts. (See *Educ.C. 35330*, *infra*, §323; *Educ.C. 39226* [limitation on liability of school district board members for buildings not constructed according to statutory requirements]; *Educ.C. 44808*, *infra*, §323; *Educ.C. 81177* [limitation on liability of community college board members for buildings not constructed according to statutory requirements]; *Educ.C. 87706*, *infra*, §323.)

With respect to the conduct of school employees, for which the district may be vicariously liable, public school teachers are required to hold pupils "to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess." (*Educ.C. 44807*; see *Torsiello v. Oakland Unified School Dist.* (1987) 197 C.A.3d 41, 45, 242 C.R. 752 [in absence of evidence of improper conduct, *Educ.C. 44807* imposes no general duty to investigate

students' activities while going to and from school].)

West's Key Number Digest, Schools k.89 et seq.

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14. School Operations.

b. Activities on School Grounds.

5 *Witkin Sum. Cal. Law Torts* § 322

[§ 322] Activities on School Grounds.

Actions against school districts often arise from activities on school grounds. (See *Lucas v. Fresno Unified School Dist.* (1993) 14 C.A.4th 866, 872, 18 C.R.2d 79 [student injured during recess by thrown rock did not, as matter of law, assume risk that school authorities would breach duty under *Educ.C. 44807* (supra, §321) to provide supervision during recess]; *Iverson v. Muroc Unified School Dist.* (1995) 32 C.A.4th 218, 227, 38 C.R.2d 35 [school district was not immune from liability for injuries sustained by student in soccer match during physical education class on school grounds]; *Skinner v. Vacaville Unified School Dist.* (1995) 37 C.A.4th 31, 37, 43 C.R.2d 384 [record did not support jury's finding on causation in negligence action against school district by student injured in attack by another student during volleyball game in physical education class]; *Ochoa v. California State University* (1999) 72 C.A.4th 1300, 1305, 85 C.R.2d 768 [institutions of higher learning have no duty to their adult students to protect them against criminal acts of third persons; student participating in intramural soccer game was punched by student on opposing team]; *Thompson v. Sacramento City Unified School Dist.* (2003) 107 C.A.4th 1352, 1361, 132 C.R.2d 748 [school district was not liable for assault by student who had been readmitted after being suspended, because decision to readmit was discretionary]; 41 U.C.L.A. L. Rev. 1101 [school districts' liability under 42 U.S.C., §1983 for failure to provide safe learning environment]; 57 *Am.Jur.2d* (2001 ed.), *Municipal, County, School, and State Tort Liability* §479 et seq.; 1 A.L.R.4th 1099 [liability of university, college or other school for failure to protect student from crime]; 66 A.L.R.5th 1 [liability for accidents occurring in school physical education classes].)

In *Dailey v. Los Angeles Unified School Dist.* (1970) 2 C.3d 741, 87 C.R. 376, 470 P.2d 360, decedent, a 16-year-old high school student, went to the boys' gymnasium during the lunch hour. He and a friend then began to "slap box" before a group of 30 watchers. After some 5 to 10 minutes, decedent fell backwards, fractured his skull on the asphalt paving, and died. Plaintiffs, his parents, sued the school district and two teachers for wrongful death. They introduced evidence that slap boxing was not permitted and would have been stopped by a teacher, but that defendant head of the physical education department and defendant physical education instructor were not observing the students in the lunch area at the time of the accident; and that although three administrative employees and two teachers had been assigned to supervise students during the lunch period, the gymnasium area was the specific responsibility of the physical education department. The trial judge granted a directed verdict for defendants. *Held*, reversed.

(a) *Duty to supervise.* Defendants owed a duty to maintain supervision during recess and lunch periods, to maintain

discipline, and to protect students against harm from aggressive, reckless, or intentional misconduct, including boisterous or dangerous play. Although high school pupils may be more capable of self-control than grammar school children, they are not adults and require supervision. (2 C.3d 748.) "Recognizing that a principal task of supervisors is to anticipate and curb rash student behavior, our courts have often held that a failure to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student may constitute negligence." (2 C.3d 748.)

(b) *Negligent supervision*. The evidence showed that (1) defendant department head "had failed to develop a comprehensive schedule of supervising assignments and had neglected to instruct his subordinates as to what was expected of them while they were supervising"; and (2) defendant instructor, ostensibly on duty, remained in his office doing other things and not observing the students outside. This was sufficient for a jury to reach a verdict of negligence. (2 C.3d 750.)

(c) *Causation*. Actual cause was clearly established. Slap boxing was prohibited, and supervision would have prevented the accident. (2 C.3d 750, footnote 7.) And neither the involvement of a third party nor the victim's own wrongful act were superseding causes. The testimony showed that horseplay and roughhousing are normal activities of high school boys, and the events that occurred "are precisely what one would expect from unsupervised adolescents." (2 C.3d 751.) The exact injuries need not be foreseeable; it is enough that injuries of the same general type would be likely to occur. (2 C.3d 751.)

In *Perna v. Conejo Valley Unified School Dist.* (1983) 143 C.A.3d 292, 192 C.R. 10, the complaint alleged that plaintiff sisters, aged 12 and 14, were kept after school to help the teacher grade papers, and that when they left, the crossing guard was no longer on duty and they were struck by a vehicle at an intersection. *Held*, a cause of action was stated, under the theory of *Hoyem v. Manhattan Beach City School Dist.* (1978) 22 C.3d 508, 150 C.R. 1, 585 P.2d 851, *infra*, §327. There would have been no liability if the children had been allowed to leave the school on time; but here, as in *Hoyem*, if the school district failed to properly supervise a student on the school premises, it cannot automatically escape liability simply because the injury occurred off the premises. (143 C.A.3d 295, 296.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Hemady v. Long Beach Unified School Dist.* (2006) 143 C.A.4th 566, 576, 49 C.R.3d 464 [injuries sustained by student in middle school golf class were subject to prudent person standard of care that ordinarily determines liability of school districts and their employees for injuries to students during school hours, rather than limited duty of care applicable to certain sports activities governed by primary assumption of risk doctrine (see text, §1339 et seq.)].



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5 Witkin Sum. Cal. Law Torts § 323

[§ 323] Activities Outside School Grounds.

The distinct problem of the duty to supervise pupils not on school property is the subject of several sections in the Education Code. Under *Educ.C. 44808* (elementary and secondary schools) and *Educ.C. 87706* (community colleges), the district is not liable for pupils' conduct or safety outside school property unless (1) school authorities have "undertaken" either to provide transportation to and from school or to sponsor a school activity off school premises, or (2) responsibility or liability has been "otherwise specifically assumed," and the liability in the event of a "specific undertaking" is imposed "only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board." Under *Educ.C. 35330*, however, persons making a "field trip or excursion" waive all claims against the district or state. (See *Torsiello v. Oakland Unified School Dist. (1987) 197 C.A.3d 41, 47, 242 C.R. 752* [teacher's stopping his van "out of curiosity" to question students about their activity was not specific undertaking under *Educ.C. 44808*]; *Hoff v. Vacaville Unified School Dist. (1998) 19 C.4th 925, 80 C.R.2d 811, 968 P.2d 522*, *infra*, §328 [undertaking responsibility to supervise main school parking lot did not assume responsibility for all student driving at school]; *Myricks v. Lynwood Unified School Dist. (1999) 74 C.A.4th 231, 238, 87 C.R.2d 734* [where participation in summer basketball league was neither required nor for credit, *Educ.C. 44808* did not render school district liable for injuries sustained by players while traveling to league game, and fact that district paid its employees for their travel expenses did not constitute sufficient ratification to make district liable; to extent trip was voluntary excursion, immunity of *Educ.C. 35330* applied]; *Casterson v. Superior Court (2002) 101 C.A.4th 177, 186, 123 C.R.2d 637* [field trip immunity of *Educ.C. 35330* applies to employees of school districts, even though statute mentions only school districts and State of California; if immunity did not extend to employees, school districts and state would become vicariously liable for torts of their employees, in contravention of legislative policy]; *Ramirez v. Long Beach Unified School Dist. (2002) 105 C.A.4th 182, 188, 129 C.R.2d 128* [*Educ.C. 44808* immunity applied to death of student while attending camp not affiliated with defendant school district, even though defendant strongly recommended camp and actively recruited candidates for it]; *Stockinger v. Feather River Community College (2003) 111 C.A.4th 1014, 1028, 4 C.R.3d 385* [requirement in *Educ.C. 87706* that school-sponsored activity be under direct supervision of school district employee refers to supervision during excursion itself, not to classroom supervision; cases where liability for off-campus injuries was based on on-campus negligence involved elementary or high school students, not college students]; *Guerrero v. South Bay Union School Dist. (2003) 114 C.A.4th 264, 268, 7 C.R.3d 509* [under *Educ.C. 44808*, school district was immune from liability for injuries suffered by elementary school student after

school when struck by car on adjacent street, absent specific undertaking to supervise students until they were picked up by parents or otherwise reached place of safety from traffic]; 68 A.L.R.5th 519 [school's liability for injury sustained on school field trip]; 72 A.L.R.5th 469 [school's liability for injury sustained walking to or from school].)

In *Castro v. Los Angeles Bd. of Education* (1976) 54 C.A.3d 232, 126 C.R. 537, an action for wrongful death of a high school student, the death occurred while he was participating in ROTC summer training under the supervision of employees of defendant board of education. *Held*, the complaint stated a cause of action.

(a) Govt.C. 815.2, the general statute imposing liability on a public entity for torts of its employees, applies to school districts. (54 C.A.3d 235; see supra, §321.) However, *Educ.C. 44808* limits liability to school grounds except where there is "a specific undertaking." (54 C.A.3d 235.) *Educ.C. 35330* further limits liability by providing that persons making a "field trip or excursion" waive all claims against the district or state. (54 C.A.3d 236.) A field trip is "a visit made by students and usually a teacher for purposes of first hand observation (as to a factory, farm, clinic, museum)." An excursion is "a journey chiefly for recreation." (54 C.A.3d 236, footnote 1.) The specific immunity of *Educ.C. 35330* prevails over the general liability provided in *Educ.C. 44808* when, but only when, there is a field trip or excursion. (54 C.A.3d 236.)

(b) "The Legislature, by these sections, recognized that not all educational facilities can be provided within the confines of each school's property. To accomplish a school's educational aims, it therefore is necessary for students to accomplish portions of their study off the school's property. Students who are off of the school's property for required school purposes are entitled to the same safeguards as those who are on school property, within supervisory limits. Students who participate in nonrequired trips or excursions, though possibly in furtherance of their education but not as required attendance, are effectively on-their-own; the voluntary nature of the event absolves the district of liability." (54 C.A.3d 236.) Thus, plaintiffs should be permitted to prove that the ROTC "summer camp, bivouac and summer training" was a school-sponsored activity and part of the curriculum. (54 C.A.3d 236, 237.) (See *Wolfe v. Dublin Unified School Dist.* (1997) 56 C.A.4th 126, 129, 65 C.R.2d 280 [citing *Castro* and holding that specific immunity of *Educ.C. 35330* prevailed with respect to pupil who was injured in a traffic accident while returning home from voluntary field trip].)

In *Farley v. El Tejon Unified School Dist.* (1990) 225 C.A.3d 371, 274 C.R. 780, decedent, a 7-year-old schoolboy, was riding defendant's school bus. The driver stopped the bus at a bus stop where children disembarked and then had to cross the road. The driver continued on his way. Decedent was struck and killed by a car while crossing the road. In this wrongful death action, plaintiff parents alleged that defendant acted in violation of its special undertaking under *Educ.C. 44808*. The trial judge concluded that no duty of care had been assumed, and granted summary judgment. *Held*, reversed. The evidence presented established that defendant, through its bus driver employees, its director of transportation, and the principal of the school, was aware prior to the accident that children being discharged from the school bus at the bus stop customarily crossed the road to meet family members and be transported the rest of the way to their homes. That defendant was aware that this practice was a hazard to the children's safety is demonstrated by the principal's letter to parents and the school bus driver's instructions to the children not to cross the road until the school bus was out of sight. Having undertaken to provide transportation to its pupils to and from the school premises, respondent had an obligation to supervise the children during that transportation and a duty to provide a reasonably safe system. Whether the exercise of reasonable care under the circumstances of this case required defendant to supervise the children's safe crossing of the road here is a question to be resolved by the trier of fact. (225 C.A.3d 380.)

In *Barnhart v. Cabrillo Community College* (1999) 76 C.A.4th 818, 90 C.R.2d 709, plaintiffs, members of a community college soccer team, sued the college and their coach for injuries suffered in an automobile accident when the coach, a college employee, was driving plaintiffs from the college to a soccer game in a van owned by the college. *Held*, summary judgment for defendants affirmed. Although *Educ.C. 87706* states a general rule of a community college district's vicarious liability in this situation, an administrative regulation (5 Cal. Code Reg. §55450) overrides this rule by immunizing the district from liability for accidents occurring during field trips or excursions.

(a) Cal. Const., Art. IX, §14, authorizes the Legislature to allow the governing board of a school district to act in any manner that is not in conflict with the purposes for which school districts are established. A school district may act under this general authority without specific statutory authorization. In addition, the Legislature has directed community colleges to adopt regulations incorporating the text of repealed statutes (Stats. 1990, Chap. 1372, §708). The regulation in question is identical to former Educ.C. 72640. From this background, it is clear that this regulation is no ordinary regulation, but instead possesses equal dignity with *Educ.C. 87706*. (76 C.A.4th 824.)

(b) As support for their argument that immunity attaches where the activity is required rather than voluntary, defendants rely on *Wolfe* and *Castro*, *supra*. However, *Wolfe* discussed the voluntary participation issue only as part of its discourse on *Castro*, and under that case, the test is not whether the student's participation is voluntary or not, but whether the off-premises activity is part of the school curriculum. Also, neither the statute nor the regulation involved here mentions the voluntary-required dichotomy. Thus, the disputed facts about the voluntary or involuntary nature of plaintiffs' participation on the soccer team are immaterial. (76 C.A.4th 825.)

(c) *Educ.C. 87706* applies to a "school-sponsored activity" and the regulation to a "field trip or excursion." Strictly speaking, plaintiffs' trip does not appear to be a "field trip or excursion," as that term was defined in *Castro*. Nevertheless, the regulation expressly states that field trips or excursions include trips conducted in connection with school-related athletic activities. Plaintiffs were thus on a field trip or excursion, and the specific regulation takes precedence over the general statute. (76 C.A.4th 821, 827.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Mosley v. San Bernardino City Unified School Dist.* (2005) 134 C.A.4th 1260, 1264, 36 C.R.3d 724 [school district was immune from liability for death of student who fell off van driven by coach, where death did not occur on school premises or during official school-sponsored or -sanctioned activity; under *Educ.C. 44808*, school districts are not liable for injuries off campus and after school unless they result from negligence by district occurring on school grounds or from specific undertaking by district performed in negligent manner]; *Bassett v. Lakeside Inn* (2006) 140 C.A.4th 863, 870, 44 C.R.3d 827 [under *Educ.C. 44808*, school district was immune from liability for death of student killed by drunk driver while crossing street on way to school bus stop, occurring off campus and outside supervision of district, notwithstanding that district had designated school bus stop at allegedly dangerous intersection]; *Patterson v. Sacramento City Unified School Dist.* (2007) 155 C.A.4th 821, 829, 66 C.R.3d 337 [school district owed duty of care to student participating in adult education truck driver training course who was injured during required off-campus community service project conducted for purpose of teaching students how to load trailers safely; *Educ.C. 44808* and *87706* immunities did not apply, because project was school-sponsored activity and student was or should have been under immediate and direct supervision of district employee]; *Cerna v. Oakland* (2008) 161 C.A.4th 1340, 1348, 1358, 75 C.R.3d 168 [school districts are not responsible for safety of students outside school property absent specific undertaking; school district did not assume liability for safety of children crossing street near school by preparing environmental impact report analyzing traffic safety, by adopting resolution finding that site selection safety standards were met, or by telling parents that it would take steps to make it safe for children to walk to school]. *Field trip or excursion:* As amended in 2007, *Educ.C. 35330* also provides for waiver of claims against charter schools.



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d. Extracurricular Activities.

5 *Witkin Sum. Cal. Law Torts* § 324

[§ 324] Extracurricular Activities.

The duty of a school district to exercise reasonable care in supervising students and its vicarious liability under *Govt.C. 815.2(a)* (supra, §237) for the negligence of school personnel do not end when classes are dismissed for the day. Extracurricular activities are generally recognized as a fundamental ingredient of the educational process. School-sponsored activities, such as sports, though denominated "extracurricular," nevertheless form an integral and vital part of the educational program. (*Acosta v. Los Angeles Unified School Dist. (1995) 31 C.A.4th 471, 477, 37 C.R.2d 171* [school district was liable for injuries suffered by student gymnast during after-school off-season practice session supervised by gymnastics coach]; see 22 *Pepperdine L. Rev.* 213 [university's liability for actions of student organizations]; 25 *A.L.R.5th* 784 [liability for injury to student resulting from cheerleader activities]; 68 *A.L.R.5th* 663 [liability for accidents occurring during school athletic events].)

School authorities' duty to supervise under *Educ.C. 44807* (supra, §321) does not include the duty to decrease risks that a student assumes under the primary assumption of risk doctrine (infra, §1339 et seq.) in pursuing extracurricular activities. This would include the risk of injury from a gymnastic stunt in cheerleader practice. (*Aaris v. Las Virgenes Unified School Dist. (1998) 64 C.A.4th 1112, 1118, 75 C.R.2d 801.*)

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e. Activities Unrelated to School Function or Program.

5 *Witkin Sum. Cal. Law Torts* § 325

[§ 325] Activities Unrelated to School Function or Program.

School districts have generally not been found liable for injuries sustained in activities unrelated to school. (See 57 *Am.Jur.2d* (2001 ed.), *Municipal, County, School, and State Tort Liability* §479 et seq.; 17 *A.L.R.5th* 179 [school's liability for suicide of student]; 85 *A.L.R.5th* 301 [school's liability for accident involving motor vehicle operated by student].)

In *Bartell v. Palos Verdes Peninsula School Dist.* (1978) 83 *C.A.3d* 492, 147 *C.R.* 898, for example, plaintiffs alleged that their 12-year-old son and a companion gained access to a school playground after school hours, either through an unlocked gate or a hole in the fence, and that the son suffered fatal injuries in a fall playing a game in which he was slung from the end of a rope while riding a skateboard. *Held*, judgment for defendant on demurrer affirmed.

(a) *No dangerous condition.* The first theory of the complaint was that the playground was known to be used for the dangerous skateboard game, and hence was maintained in a dangerous condition (see *supra*, §266). (83 *C.A.3d* 497, 498.) But the alleged defects (in the gate or fence) merely allowed access to the area, and the injury was not a result of any dangerous condition of the property. (83 *C.A.3d* 492.)

(b) *No negligent failure to supervise.* The broad language of *Dailey v. Los Angeles Unified School Dist.* (1970) 2 *C.3d* 741, 87 *C.R.* 376, 470 *P.2d* 360, *supra*, §322, should be limited to school-related or encouraged activities taking place during school hours. "To require virtual round-the-clock supervision or prison-tight security for school premises" would impose an unwarranted financial burden on school districts. "We find no special circumstances here which would impose a general duty on the school district to supervise and control the conduct of persons on its premises apart from school-related activities and functions which require persons to be on school grounds." (83 *C.A.3d* 500.)

Several cases have involved misuse of alcohol by students. (See *Baldwin v. Zoradi* (1981) 123 *C.A.3d* 275, 291, 292, 176 *C.R.* 809 [university trustees and dormitory advisors who allegedly failed to prevent college students in dormitories from consuming liquor in violation of regulations, leading to speed contest and automobile collision, were not liable for negligent failure to supervise; citing *Bartell*]; *Crow v. California* (1990) 222 *C.A.3d* 192, 209, 271 *C.R.* 349 [following *Baldwin*]; 62 *A.L.R.4th* 81 [liability of college or university for student injury resulting from own or fellow student's intoxication].)

In *Tanja H. v. Regents of Univ. of Calif.* (1991) 228 C.A.3d 434, 278 C.R. 918, plaintiff was a first year university student, living in a dormitory on the campus. Plaintiff and other students constantly violated the regulations forbidding use of alcohol by minors, and after one party plaintiff was raped and sexually assaulted by fellow students. She brought this action against the students, the university, and university officials. *Held*, judgment for defendants on demurrer affirmed. Universities are not generally liable for "the sometimes disastrous consequences which result from combining young students, alcohol, and dangerous or violent impulses." (228 C.A.3d 437, discussing *Baldwin* and *Crow*.) A university as operator of a dormitory "is more akin to an innkeeper, who does not have a duty to search guests for contraband, separate them from each other, or monitor their private social activities." (228 C.A.3d 438.) As campuses have moved away from their former role as semimonastic environments subject to intensive regulation of student lives by college authorities, they have become microcosms of society; and unfortunately, sexually degrading conduct or violence are all too common within society at large. "College administrators have a moral duty to help educate students in this respect, but they do not have a legal duty to respond in damages for student crimes." (228 C.A.3d 438.)

In *Brownell v. Los Angeles Unified School Dist.* (1992) 4 C.A.4th 787, 5 C.R.2d 756, plaintiff high school student sued defendant school district for negligent supervision after he was shot by gang members, who mistakenly thought that he was a member of a rival gang. The shooting took place on a public street adjacent to school property and occurred approximately 5 minutes after school hours while plaintiff was waiting in front of the school for some friends with whom he was going to walk to a bus stop. *Held*, judgment for plaintiff reversed.

(a) A school district may be liable for injuries suffered by a student off school premises and after school hours if the injury resulted from the school's negligence while the student was on school premises (4 C.A.4th 795, citing *Perna v. Conejo Valley Unified School Dist.* (1983) 143 C.A.3d 292, 192 C.R. 10, *supra*, §322, and *Hoyem v. Manhattan Beach City School Dist.* (1978) 22 C.3d 508, 150 C.R. 1, 585 P.2d 851, *infra*, §327.) However, the district need only exercise reasonable care in supervising the conduct of its students; it is not an insurer of the students' safety. (4 C.A.4th 796.) Here, defendant satisfied this standard, considering that it had no advance warning of potential gang violence pertaining to the incident involving plaintiff, and it had always taken general precautions to minimize gang-related problems, e.g., prohibiting wearing gang colors and confiscating weapons. (4 C.A.4th 796.)

(b) Although the school was located in a gang neighborhood and attended by rival gangs, and trouble had occurred on occasion, it does not follow that defendant had a duty to scout the neighborhood for gang members off the campus and to wait until it was "all clear" before releasing students for the day. Given the suddenness of the attack on plaintiff and the normalcy of having gang members in the vicinity of the school, imposing a duty of visual precaution would be unwarranted and impractical. Under these circumstances, reasonable school personnel should not be required to engage in visual precaution absent either "(1) any specific indication of a real and imminent gang-related threat at the particular time and place of the shooting, or (2) prior incidents reflecting not necessarily this identical type of assault but that 'the possibility of this type of harm was foreseeable.' " (4 C.A.4th 797, quoting *Frances T. v. Village Green Owners Assn.* (1986) 42 C.3d 490, 503, 229 C.R. 456, 723 P.2d 573, *supra*, §39.)

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f. Use of Facilities by Other Organizations.

5 *Witkin Sum. Cal. Law Torts* § 326

[§ 326] Use of Facilities by Other Organizations.

School districts are required to authorize the use of school facilities or grounds by nonprofit organizations that promote youth and school activities, when an alternative location is not available. (*Educ.C. 38134(a)*; see Pacific L. J. 636.) With respect to liability arising from these activities, *Educ.C. 38134(i)* sets forth the following rules:

(1) The school district is liable for injuries resulting from the negligence of the district in the ownership and maintenance of the facilities or grounds.

(2) A group using the facilities or grounds is liable for negligence of that group during the use.

(3) The district and the group must each bear the cost of insuring against its respective risks and of defending itself against claims arising from those risks.

(4) Nothing in this provision may be construed to limit or affect a school district's immunity or liability for injuries caused by a dangerous condition (see *supra*, §249 et seq.).

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g. Injury to Truant.

5 Witkin Sum. Cal. Law Torts § 327

[§ 327] Injury to Truant.

Hoyem v. Manhattan Beach City School Dist. (1978) 22 C.3d 508, 150 C.R. 1, 585 P.2d 851, held that liability could be imposed on a school district where negligent supervision of students on school premises permitted a truant to leave and be exposed to injury off the premises. The complaint alleged that plaintiff, a 10-year-old boy, attended summer school. On the day of the accident, he came to school, but left before the end of scheduled classes. He was struck by a motorcyclist four blocks from the school yard and suffered serious injuries. *Held*, a cause of action was stated against the school district.

(a) *Duty to supervise students on school premises.* The complaint alleged that defendant failed to exercise ordinary care in supervising him while he was on the premises, and this brought the pleading within the rule of *Dailey v. Los Angeles Unified School Dist.* (1970) 2 C.3d 741, 87 C.R. 376, 470 P.2d 360, *supra*, §322. The arguments against application of the *Dailey* holding are not persuasive:

(1) The administrative regulation against pupils leaving the school premises before the closing hour is in part for the pupils' protection, and school authorities had the duty to exercise ordinary care to enforce the rule. (22 C.3d 514.)

(2) Emphasis on the situs of the *injury* is misplaced; i.e., the district does not automatically escape liability simply because the injury occurs off the school premises. A federal Court of Appeals case, dealing with similar New Mexico law, supports the conclusion that negligent supervision permitting truants to leave and be exposed to injury can be the basis of liability. (22 C.3d 516.)

(3) *Educ.C. 44808* (*supra*, §323) does not absolve the district of responsibility for an off-premises injury. The statute contains an exception where the school district "has failed to exercise reasonable care under the circumstances," a fact alleged in this case. (22 C.3d 517.) Further, the legislative intention was to limit liability for injuries suffered either before or after school hours when pupils were going to school or coming home. (22 C.3d 517, 518.)

(4) The contention that this holding will lead to "truant-proof" schools, with drastic restriction of student freedom, is unsound. The district will be liable only for injuries that proximately result from failure to exercise ordinary care; "schools must be reasonably supervised, not truant-proof." (22 C.3d 519.)

(b) *Causation*. Proximate cause is a question of fact for the jury, and the trial court erred in concluding that, as a matter of law, the alleged negligent supervision did not proximately cause the injury.

(1) *Foreseeability*: A jury could conclude that defendants could have reasonably foreseen that the temptation to wander off from school might be especially strong during summer months. (22 C.3d 520.)

(2) *Intervening cause*: The fact that the injury was directly caused by a third party does not make his act a superseding cause as a matter of law. The risk of injury at the hands of a negligent motorist may be foreseeable. (22 C.3d 521.) The district, however, may join the motorcyclist as a cross-defendant and seek comparative indemnity. (22 C.3d 521.)

Three justices strongly dissented. (22 C.3d 523.) (See 68 Cal. L. Rev. 881; 30 Hastings L. J. 1893; 19 Santa Clara L. Rev. 1125; 12 West L.A. L. Rev. 107.)

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h. Injury to Nonstudent.

5 *Witkin Sum. Cal. Law Torts* § 328

[§ 328] Injury to Nonstudent.

In *Hoff v. Vacaville Unified School Dist.* (1998) 19 C.4th 925, 80 C.R.2d 811, 968 P.2d 522, a school provided supervision for its main parking lot, but not for an overflow lot. A student at the school, leaving the overflow lot on the last day of the school year, lost control of his vehicle, careened across the street, and struck and injured plaintiff, a nonstudent who was not on school property. Plaintiff's main theory was that defendant school district was vicariously liable for the negligence of school personnel in failing to supervise the driver as he left the overflow parking lot. *Held*, judgment of nonsuit for defendant affirmed; school personnel breached no duty of care owed to plaintiff.

(a) *Vicarious liability.*

(1) As a nonstudent, plaintiff did not claim that a special relationship existed between himself and defendant. Rather, he argued that the requisite special relationship existed between defendant and the student driver causing the accident, and that this relationship imposed on defendant a duty to exercise reasonable care to control the driver to protect all persons foreseeably endangered by his conduct. Although California decisions have recognized that a *student* may recover for injuries proximately caused by breach of this duty of supervision, no decision has considered whether breach of the duty may support recovery by nonstudents. (19 C.4th 933.)

(2) In answering this question, it is instructive to consider the common law limitations on the duty that parents owe to third persons as a result of their duty to supervise their children, because the relationship between school personnel and their students is analogous to the relationship between parents and their children. To be liable to third persons, a parent must have both the ability to control the child and actual or constructive knowledge that control is necessary. Given this similarity, any duty that school employees owe off-campus nonstudents should be no greater in scope than the duty that parents owe third persons. Accordingly, because school personnel neither knew nor had reason to know that this particular student driver had a propensity to drive recklessly, they owed plaintiff no duty, and defendant school district could thus not be held vicariously liable under *Govt.C. 815.2* for any breach of duty by its employees. (19 C.4th 934.)

(3) Plaintiff also contended that school personnel had a *statutory* duty to plaintiff, and that the breach of this duty imposed vicarious liability on defendant. Specifically, he argued that *Educ.C. 44807* (supra, §321), which requires in

part that every teacher's duty to supervise extends to the student's coming and going, obviously applied to driving, because virtually all teachers are aware that automobile driving is the most dangerous activity that students are routinely permitted to do on school property. This argument is without merit. Under the negligence per se doctrine (*infra*, §871 et seq.), a presumption of negligence may arise from the violation of a statute if the statute is enacted to protect a class of persons of which the plaintiff is a member. However, *Educ.C. 44807* was enacted to protect students, not nonstudents such as plaintiff, and thus it is inapplicable to the present case. (*19 C.4th 937.*)

(b) *Direct liability.*

(1) Plaintiff also argued that defendant was directly liable under *Govt.C. 815.6* (*infra*, §245) for violating the *mandatory duty* imposed on the school district by *Educ.C. 44807*. However, that statute requires only "teachers" to hold students to strict accountability for their conduct; it does not purport to impose a broader duty that would extend to any public entity. Moreover, because plaintiff's injury did not fall within the risk of an injury against which *Educ.C. 44807* was designed to protect, he cannot base a direct claim against defendant on any duty imposed by this statute. (*19 C.4th 939.*)

(2) Finally, plaintiff alleged direct liability in that defendant or an officer or employee, by undertaking responsibility to supervise the main parking lot, placed the burden on the jury to determine whether that undertaking was a "specific assumption" within the meaning of *Educ.C. 44808* (*supra*, §323) and, if so, whether defendant's subsequent failure to supervise the overflow lot constituted negligence. However, the decision to supervise the main lot was not a "specific assumption" of responsibility for a student's off-campus conduct. In any event, plaintiff could not expand the decision to supervise one parking lot into the assumption of a general duty to supervise all student driving at the school. (*19 C.4th 940.*) (See *85 A.L.R.5th 301* [school's liability for accident involving motor vehicle operated by student].)

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i. Sexual Misconduct.

5 *Witkin Sum. Cal. Law Torts* § 329

[§ 329] Sexual Misconduct.

In *John R. v. Oakland Unified School Dist.* (1989) 48 C.3d 438, 256 C.R. 766, 769 P.2d 948, a 9th grade junior high school student, was asked by his mathematics teacher to participate in the school's work-experience program, under which high-performing students received both school credit and monetary payments for assisting teachers in such tasks as grading papers. Although the student did not have high grades, the teacher sought to develop a close personal relationship with him, and then, by threat of failing grades, succeeded in pressuring him into sexual acts, and made further threats of retaliation if he told his parents what he had done. Ten months later the student told his parents, and thereafter the student's parents, on behalf of the student and themselves, brought this action for damages against defendant school district on two theories: (a) direct liability of the district for negligent hiring and supervision of the teacher, and (b) vicarious liability for the teacher's acts under the doctrine of respondeat superior. The trial judge sustained demurrers and granted defendant's motion for nonsuit; the Court of Appeal reversed. *Held*: (a) Court of Appeal judgment affirmed on direct liability, thus allowing plaintiffs to pursue that theory in the trial court; (b) Court of Appeal judgment reversed on vicarious liability; the demurrer was properly sustained as to that cause of action.

(a) Courts have struggled in recent years over whether and how to apply the respondeat superior doctrine to the sexual misconduct of employees. The historical and perhaps still prevailing point of view declines to impose vicarious liability in these circumstances, but the other school of thought has its adherents as well. (48 C.3d 447; see *supra*, §240.) The theory of the minority view is that the tort is a consequence of the employer's conferring of official authority on the employee. (48 C.3d 448, 449.) And the extensive control teachers are authorized to exercise over students lends some credence to the proposition that a school district should not be immune from liability where a teacher's molestation of a student directly flows from the exercise of that job-created authority. (48 C.3d 449, 450.)

(b) However, the three considerations on which the modern doctrine of respondeat superior rests are not present in this case.

(1) *The spur toward accident prevention.* Although it is important to encourage both careful selection of school teachers and close monitoring of their conduct, these concerns are better addressed by subjecting school districts to liability only for their own direct negligence. "Applying the doctrine of respondeat superior to impose, in effect, strict liability ... would be far too likely to deter districts from encouraging, or even authorizing, extracurricular and

one-on-one contacts between teachers and students or to induce districts to impose such rigorous controls on activities of this nature that the educational process would be negatively affected." (48 C.3d 451.)

(2) *Assurance of compensation for victims.* The acts here differ from the normal range of risks; application of the doctrine would make insurance harder to obtain and could lead to the diversion of needed funds from the classroom to cover claims. (48 C.3d 451.)

(3) *Spreading the risk among the beneficiaries of the enterprise.* "[T]he connection between the authority conferred on teachers to carry out their instructional duties and the abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer." (48 C.3d 452.)

(c) It is unnecessary to decide whether the cases involving sexual misconduct by police (supra, §240) were properly decided or whether the job-created authority theory has any validity in evaluating vicarious liability for the torts of police officers. It suffices here to note that the authority of a police officer over a motorist (bolstered most immediately by his uniform, badge, and firearm, and only slightly less so by the prospect of criminal sanctions for disobedience) plainly surpasses that of a teacher over a student. The teacher's authority is different in both degree and kind, and it is simply not great enough to persuade the court that vicarious liability should attach here for the teacher's tort. Also, invoking respondeat superior here would raise an entirely different specter of untoward consequences, or interference with the purposes for which the authority was conferred in the first place, than might result from the imposition of vicarious liability in the limited context of a police officer's abuse of authority. While it is doubtful that police departments would deprive their officers of weapons or preclude them from enforcing the laws, there is a significant and unacceptable risk that school districts would be dissuaded from permitting teachers to interact with their students on any but the most formal and supervised basis. (48 C.3d 452.) (See *Kimberly M. v. Los Angeles Unified School Dist.* (1989) 215 C.A.3d 545, 548, 263 C.R. 612 [following *John R.*]; *Virginia G. v. ABC Unified School Dist.* (1993) 15 C.A.4th 1848, 1855, 19 C.R.2d 671 [cause of action could be stated against district for negligence in hiring and supervising teacher with prior history of sexual misconduct towards students]; *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 C.A.4th 1023, 1057, 75 C.R.2d 777 [school district was not vicariously liable for sexual molestation by teacher]; *Steven F. v. Anaheim Union High School Dist.* (2003) 112 C.A.4th 904, 908, 6 C.R.3d 105 [no evidence that school district was directly negligent in hiring or supervising teacher who had sexual affair with high school student, where affair was kept secret; under *John R.*, district could not be held vicariously liable]; 86 A.L.R.5th 1 [school's liability for employee's sexual misconduct toward student]; 31 Proof of Facts 3d 261 [liability of school districts under common law tort theories for sexual molestation of student by teacher].)

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Witkin Summary of California Law
II. GOVERNMENTAL LIABILITY

B. Public Entities.
14. School Operations.
j. Exposure to Asbestos.

5 Witkin Sum. Cal. Law Torts § 330

[§ 330] Exposure to Asbestos.

School districts (and their officers, directors, and employees) are not liable for injury, disease, death, or economic loss arising from exposure, on or after January 1, 1989, to asbestos in any school district building, except on proof of negligence. No presumption of negligence applies. (*Govt.C. 905.5.*) The statute does not apply to actions against manufacturers, contractors, or persons making, selling, distributing, furnishing or installing asbestos-containing material. And it affects neither the law pertaining to workers' compensation claims nor the district's right to seek indemnification. (*Govt.C. 905.5.*)

SUPPLEMENT: [This section is current through the latest supplement]



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II. GOVERNMENTAL LIABILITY

B. Public Entities.

15. Operation of Motor Vehicles.

a. In General.

5 Witkin Sum. Cal. Law Torts § 331

[§ 331] In General.

(1) *Liability Rules.* *Veh.C. 17000* et seq. govern the liability of public entities for motor vehicle injuries. (See C.E.B., *Governmental Tort Liability Practice* §4.57; 5 *So. Cal. L. Rev.* 339; 57 *Am.Jur.2d* (2001 ed.), *Municipal, County, School, and State Tort Liability* §187 et seq.; on filing claim, see 3 *Cal. Proc.* (4th), *Actions*, §223 et seq.; on pleading, see 4 *Cal. Proc.* (4th), *Pleading*, §577 et seq.; on liability of public employees for motor vehicle torts, see *infra*, §366.)

(a) *Liability for employees' torts within scope of employment.* Of primary significance, a public entity "is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment." (*Veh.C. 17001.*)

(b) *Liability as owner based on permissive use.* Subject to *Govt.C. 825* et seq. (see *infra*, §375 et seq.), a public entity is liable under *Veh.C. 17150* et seq. ("driving with permission" law, *infra*, §1260) "to the same extent as a private person." (*Veh.C. 17002.*)

(2) *Definitions.* For purposes of *Veh.C. 17000* et seq., "employee" includes "an officer, employee, or servant, whether or not compensated," but not an independent contractor. (*Veh.C. 17000(a).*)

"Public entity" includes "the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state." (*Veh.C. 17000(c).*)

(3) *General Immunity Provisions Are Inapplicable.* The specific provision of *Veh.C. 17001* for public entity liability for a public employee's negligent or wrongful operation of a motor vehicle overrides the general derivative immunity provided by *Govt.C. 815.2(b)* (*supra*, §228) for a public employer when its employee is immune. (*Sacramento v. Superior Court (George)* (1982) 131 *C.A.3d* 395, 400, 182 *C.R.* 443.) Similarly, the general immunity of *Govt.C. 845.8* (*supra*, §297) for injuries caused by an escaping arrested person or a person resisting arrest does not provide immunity from liability predicated on *Veh.C. 17001*. (See *Thomas v. Richmond* (1995) 9 *C.4th* 1154, 1159, 40 *C.R.2d* 442, 892 *P.2d* 1185, *supra*, §297.) (On specific immunity provisions relating to emergency vehicles, see *infra*, §§334, 335.)

(4) *Employees Working on Highway*. Under *Veh.C. 21053*, the provisions of "this code" (with stated exceptions) do not apply to public employees while actually engaged in work on a highway. In *Yarrow v. California* (1960) 53 C.2d 427, 2 C.R. 137, 348 P.2d 687, the state contended that this language was directed to *Veh.C. 17000* et seq. as well as to the rest of the code. The court held, however, that *Veh.C. 21053* refers only to the penal consequences of violation of the Vehicle Code, and cannot be construed "to relieve the public employee or the public employer from civil liability for personal or property damage caused by negligent operation of motor vehicles by public employees while so engaged." (53 C.2d 441.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Liability Rules*.

Filing claim:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §231 et seq.

Pleading action against government entity:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §617 et seq.



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15. Operation of Motor Vehicles.

b. Negligent or Wrongful Conduct.

5 *Witkin Sum. Cal. Law Torts* § 332

[§ 332] Negligent or Wrongful Conduct.

Liability under *Veh.C. 17001* (supra, §331) is predicated on a "negligent or wrongful" act or omission by an employee operating the motor vehicle within the scope of employment. Although the statute thus includes intentional torts, the entity's liability is ordinarily for negligence, and the legal duty of care is determined by applying the policy factors generally governing negligence analysis (see, e.g., *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *infra*, §1179). (*Reenders v. Ontario* (1977) 68 C.A.3d 1045, 1052, 137 C.R. 736.)

In *Reenders*, police officers pursued a drunken and reckless motorcycle driver, and the motorcyclist struck plaintiff's vehicle. Plaintiff's theory was that the officers were negligent in undertaking and continuing the pursuit. *Held*, summary judgment for defendant city affirmed. To impose a duty not to pursue a lawbreaker engaged in dangerous conduct on the city streets would severely restrict necessary law enforcement, and might have even more tragic consequences, e.g., if the reckless driver had lost control of his vehicle and had run over persons on a sidewalk. (68 C.A.3d 1054.)

Reenders was distinguished in *Gibson v. Pasadena* (1978) 83 C.A.3d 651, 148 C.R. 68. Two police officers observed a car driven by S run a red light. They pursued the car, with proper lights and sirens, at high speeds through about 25 intersections of city streets. S's car then crashed into decedent's vehicle, causing it to run into a third vehicle. Plaintiff administrator brought this action for wrongful death against the city alone. *Held*, judgment for defendant on demurrer reversed.

(a) The driver of an authorized emergency vehicle must act with due care. (83 C.A.3d 657, citing *Torres v. Los Angeles* (1962) 58 C.2d 35, 22 C.R. 866, 372 P.2d 906.) Plaintiff's complaint sufficiently alleged negligence for the purposes of the demurrer. (83 C.A.3d 658.)

(b) The acts of the officers were ministerial, hence not within the immunity for discretionary acts (see *infra*, §§351 et seq., 356); i.e., although they exercised judgment in determining to pursue S's vehicle, the conduct of the pursuit itself was ministerial. Whether they were negligent in that pursuit--driving at over 100 miles an hour through city streets to apprehend a driver for a traffic infraction was a question of fact. (83 C.A.3d 660.)

(c) In *Reenders*, the pursuit was of a suspect wanted for assault with a deadly weapon and hit-and-run driving, not of a mere traffic offender. In *Reenders*, the officers did not commence the pursuit of the suspect until he began to drive dangerously in traffic, and the collision was not necessarily a result of the pursuit; in this case plaintiff alleged that the officers' pursuit caused the suspect to drive at faster speeds. *Reenders* was an appeal from a summary judgment; here, the only issue was sufficiency of the pleading. (83 C.A.3d 662.)

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c. Operation of Vehicle.

5 *Witkin Sum. Cal. Law Torts* § 333

[§ 333] Operation of Vehicle.

Liability under *Veh.C. 17001* (supra, §331) exists only where the injury results from the "operation" of the motor vehicle. (On what is a "motor vehicle," see C.E.B., 2 Government Tort Liability Practice 4th, §11.130; 77 A.L.R.2d 945 [what is "motor vehicle" within statute waiving governmental immunity as to operation of motor vehicles].)

In *Chilcote v. San Bernardino* (1933) 218 C. 444, 23 P.2d 748, plaintiff alleged injury that occurred when his car skidded in oil negligently left on a highway by county trucks. *Held*, no cause of action was stated. The injury did not result from operation of the vehicles. (218 C. 446.) And in *Greenberg v. Los Angeles* (1952) 113 C.A.2d 389, 391, 248 P.2d 74, the holding was the same where the complaint alleged that a patient died as a result of the delay of the county hospital's ambulance driver, who had stopped to pick up another patient. On the other hand, *Marshall v. Los Angeles* (1955) 131 C.A.2d 812, 814, 281 P.2d 544, held that a dump truck being unloaded by tilting and shaking its bed was in operation. And in *Bright v. East Side Mosquito Abatement Dist.* (1959) 168 C.A.2d 7, 14, 335 P.2d 527, allegations that a jeep and trailer sprayed chemical dust that obscured vision on the highway, causing a collision, were held to state a cause of action.

In *Champion v. San Diego* (1996) 47 C.A.4th 972, 55 C.R.2d 205, a prisoner escaped from a county van in which he was being transported, murdered a man, and terrorized a passenger in the man's car. The decedent's widow and the passenger sued the county and various county employees alleging negligent operation of a motor vehicle. The negligent acts alleged involved defendant county's failure to adequately supervise its employees and to restrain the prisoner. *Held*, judgment for defendants affirmed.

(a) If liability under *Veh.C. 17001* and immunity for escaping prisoners under *Govt.C. 845.8(b)* (supra, §296) were both applicable, the Vehicle Code liability would prevail. (47 C.A.4th 977, citing *Thomas v. Richmond* (1995) 9 C.4th 1154, 1159, 40 C.R.2d 442, 892 P.2d 1185, supra, §297.) However, neither the negligent supervision of employees nor the failure to restrain a prisoner constitutes the negligent operation of a motor vehicle within the meaning of *Veh.C. 17001*. Thus, the immunity statute is operable in this case. (47 C.A.4th 977.)

(b) Plaintiffs argued that they adequately alleged negligent operation of a motor vehicle. "We disagree. Review of the complaint and plaintiffs' argument demonstrates that there are no allegations of negligence in operating the van as it

is commonly understood. There are no allegations the van was being driven in an erratic manner or that the manner of driving the van caused any highway hazard which injured plaintiffs. Rather, the entire thrust of the negligence alleged is failure to properly train county personnel and failure to secure and supervise [the prisoner] leading to his escape. Plaintiffs' inventive characterization of the lack of security and supervision as 'negligent loading' and [the prisoner] as cargo that 'exploded,' cannot change the fact the injuries occurred because [the prisoner] *escaped* from the van, not because the van was driven in an unsafe manner." (47 C.A.4th 979.)

In *Ladd v. San Mateo* (1996) 12 C.4th 913, 50 C.R.2d 309, 911 P.2d 496, supra, §296, a prisoner handcuffed alone in the back seat in a county car was able to escape. Placing her in the car was not "negligent operation of a motor vehicle," as used in *Veh.C. 17001*, even though a motor vehicle was indirectly involved. (12 C.4th 923.)

SUPPLEMENT: [This section is current through the latest supplement]



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15. Operation of Motor Vehicles.

d. Authorized Emergency Vehicle.

1. Exemption and Immunity.

5 *Witkin Sum. Cal. Law Torts* § 334

[§ 334] Exemption and Immunity.

(1) *Exemption From Traffic Regulations.* Drivers of authorized emergency vehicles, when on emergency calls, are exempt from the provisions of the Vehicle Code governing speed and other traffic rules, provided that they sound their sirens "as may be reasonably necessary" and display front red lights as a warning. (*Veh.C. 21055.*)

However, they are not relieved of the general duty to drive with due care, nor are they protected from the consequences of arbitrary exercise of these special privileges. (*Veh.C. 21056*; see *Reed v. Simpson* (1948) 32 C.2d 444, 448, 196 P.2d 895 [driver is required, by suitable warning, to give others reasonable opportunity to yield right of way]; *Mulligan v. West Coast Fast Freight* (1957) 151 C.A.2d 791, 795, 312 P.2d 59 [matters from which emergency vehicle drivers may be exempted include rules under *Veh.C. 21659* for passing on three-lane roadways]; *Torres v. Los Angeles* (1962) 58 C.2d 35, 47, 51, 22 C.R. 866, 372 P.2d 906 [emergency vehicle drivers must exercise degree of care that, under all circumstances, does not impose on others unreasonable risk of harm]; *Dillenbeck v. Los Angeles* (1968) 69 C.2d 472, 478, 72 C.R. 321, 446 P.2d 129, 1 Cal. Evidence (4th), Hearsay, §115 ["Daily Training Bulletins" of Police Department are "safety rules of employer" admissible as evidence of due care]; C.E.B., 2 Government Tort Liability Practice 4th, §§11.140, 11.143; 10 Proof of Facts 3d 203 [negligent operation of emergency vehicle]; 83 A.L.R.2d 383 [police vehicle]; 84 A.L.R.2d 121 [ambulance]; 87 A.L.R.5th 1 [construction of statutory provision requiring motorist to yield right of way to emergency vehicle].)

The duty to exercise due care includes the duty to give the statutory warning by flashing red lights or sounding the siren. (*Grant v. Petronella* (1975) 50 C.A.3d 281, 286, 123 C.R. 399; see *Sacramento v. Superior Court (George)* (1982) 131 C.A.3d 395, 405, 182 C.R. 443, supra, §331 [emergency vehicle driver who fails to activate red light, and siren where necessary, is not exempt from rules of road, and negligence liability may be based on violation of those rules]; *Stark v. Los Angeles* (1985) 168 C.A.3d 276, 283, 214 C.R. 216 [city was subject to liability for police officers' negligence in failing to activate siren in conduct of pursuit].)

(2) *Immunity From Liability.* Public employees are immune from all liability "resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or

other emergency call." (*Veh.C. 17004*.) (See 11 So. Cal. L. Rev. 172, 187.)

Veh.C. 17004 does not require the "immediate pursuit" to involve an actual emergency situation, as opposed to a routine traffic stop for the purpose of issuing a ticket. Nor does that statute withhold immunity in a case involving negligent conduct of the pursuing officer, such as failing to activate lights or siren. (*Cruz v. Briseno* (2000) 22 C.4th 568, 573, 93 C.R.2d 715, 994 P.2d 986.)

(3) *What Are Authorized Emergency Vehicles.* *Veh.C. 165* defines "authorized emergency vehicle" as any of the following:

(a) A public ambulance, lifeguard equipment, or lifesaving equipment, or private ambulance licensed by the Commissioner of the Highway Patrol to respond to emergency calls.

(b) A public vehicle operated by federal, state, or local police officers in the performance of their duties, or by a forestry or fire department organized as provided in the Health and Safety Code.

(c) A state or bridge and highway district vehicle used for fighting fires, towing, or servicing other vehicles, caring for injured persons, or repairing lighting or electrical equipment.

(d) A state vehicle used for emergency fire, rescue, or communications calls and operated by the Office of Emergency Services or by agencies or fire departments to which the office has assigned the vehicle.

(e) A federal vehicle used for emergency fire, ambulance, or lifesaving calls or actively engaged in law enforcement work.

(f) A vehicle for which the Commissioner has issued an authorized emergency vehicle permit.

Veh.C. 2416 specifies the vehicles for which the Commissioner may issue a permit, and requires a finding "that the vehicle is used in responding to emergency calls for fire or law enforcement or for the immediate preservation of life or property or for the apprehension of law violators."

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Exemption From Traffic Regulations.* See *Monroy v. Los Angeles* (2008) 164 C.A.4th 248, 256, 78 C.R.3d 738 [in action against officer arising from accident involving police vehicle, it was error to instruct that officer would not be negligent for failure to follow rules of road if he was responding to urgent "Code 3" emergency, where officer had admitted that he was not responding to "Code 3" at time of collision; error was prejudicial where jury found that officer was not negligent despite ample evidence that he was speeding].



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15. Operation of Motor Vehicles.

d. Authorized Emergency Vehicle.

2. Entity Liable Even Though Driver Is Not.

5 Witkin Sum. Cal. Law Torts § 335

[§ 335] Entity Liable Even Though Driver Is Not.

Veh.C. 17001 (supra, §331), the general statute establishing public liability for motor vehicle torts of employees, contains no exception covering the operation of emergency vehicles. Accordingly it has been held that even though the driver is not liable, the governmental agency is liable if the driver fails to exercise due care. (*Thomas v. Richmond* (1995) 9 C.4th 1154, 1159, 40 C.R.2d 442, 892 P.2d 1185, supra, §297; *Gibson v Pasadena* (1978) 83 C.A.3d 651, 656, 148 C.R. 68, supra, §332; *Sacramento v. Superior Court (George)* (1982) 131 C.A.3d 395, 400, 182 C.R. 443, supra, §331; see *Raynor v. Arcata* (1938) 11 C.2d 113, 120, 65 P.2d 838 [fire chief's car]; *Brummett v. Sacramento* (1978) 21 C.3d 880, 883, 885, 148 C.R. 361, 582 P.2d 952 [police officers pursuing suspect drove at excessive speed into an intersection, unaware of color of light]; *Eddy v. Los Angeles* (1938) 28 C.A.2d 89, 94, 82 P.2d 25 [police car, no siren, negligently driven; driver exempt but city liable].)

In *San Jose v. Superior Court (Martinez)* (1985) 166 C.A.3d 695, 212 C.R. 661, the complaint alleged that defendant police officers negligently engaged in a high-speed chase of a speeding driver, and that the speeder's vehicle struck that of plaintiff. Held, defendant city was liable.

(a) In *Brummett v. Sacramento*, the police vehicle struck that of the victim; in *Sacramento v. Superior Court*, the speeder's vehicle collided with the victim's; and in *Duarte v. San Jose* (1980) 100 C.A.3d 648, 161 C.R. 140, the drunk driver's car caused the collision. In each case the entity was held liable although the police officers were immune. (166 C.A.3d 698.)

(b) Defendant city contended that *Kisbey v. California* (1984) 36 C.3d 415, 204 C.R. 428, 682 P.2d 1093, supra, §297, impliedly overruled *Duarte*; but, notwithstanding the sweep of the language in the *Kisbey* opinion, its narrow holding does not conflict with either *Duarte* or *Sacramento* (166 C.A.3d 701, and footnote 3.) (See *Stark v. Los Angeles* (1985) 168 C.A.3d 276, 287, 214 C.R. 216 [agreeing with *San Jose* court on this point].)

However, because the basis of liability of the city or state is the tort of the driver, no public liability is imposed unless the emergency vehicle driver abuses the privileges under *Veh.C. 21055*, e.g., by failure to sound the siren, or fails to exercise due care for the safety of others under *Veh.C. 21056*. (*Lucas v. Los Angeles* (1938) 10 C.2d 476, 479, 75

P.2d 599 [police car siren sounded, and no other abuse shown, city not liable]; *Head v. Wilson* (1939) 36 C.A.2d 244, 251, 97 P.2d 509 [city could not be found liable where driver's conduct was exempt under *Veh.C.* 21055, 21056].)

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15. Operation of Motor Vehicles.

e. Police Pursuit.

1. Nature and Scope of Immunity.

5 *Witkin Sum. Cal. Law Torts* § 336

[§ 336] Nature and Scope of Immunity.

A public agency that adopts a written policy on vehicular pursuits is immune from liability for personal injury, death, or property damage resulting from the collision of a vehicle operated by an actual or suspected violator of the law who is pursued by a peace officer. (*Veh.C. 17004.7(b)*; see *McGee v. Laguna Beach* (1997) 56 C.A.4th 537, 543, 65 C.R.2d 506 [*Veh.C. 17004.7* applies where pursuing officer is riding on motorcycle, as well as when in automobile]; *Ketchum v. California* (1998) 62 C.A.4th 957, 962, 73 C.R.2d 152 [because there was a rational relationship between pursuit policy and immunity, *Veh.C. 17004.7* does not violate due process]; *Weaver v. California* (1998) 63 C.A.4th 188, 199, 73 C.R.2d 571 [*Veh.C. 17004.7* immunity was applicable to injury to passenger in pursued vehicle even though vehicle was deliberately rammed by police car in attempt to end pursuit]; 100 A.L.R.3d 815 [liability to pedestrian or occupant of parked vehicle, or for damage to vehicle, as result of police chase]; 4 A.L.R.4th 865 [liability for injury to innocent occupant of moving vehicle, or for damage to such vehicle, as result of police chase]; on requisites of pursuit policy, see *infra*, §337.)

The immunity is "in addition to any other immunity provided by law," and the adoption of a policy is discretionary. (*Veh.C. 17004.7(a)*; on immunity of public employee responding to emergency call or conducting vehicular pursuit, see *supra*, §334.)

The immunity applies whether the action is brought by the fleeing suspect or by a third party. (*Thomas v. Richmond* (1995) 9 C.4th 1154, 1164, 40 C.R.2d 442, 892 P.2d 1185, *supra*, §297.)

Lewis v. Sacramento (2001) 93 C.A.4th 107, 113 C.R.2d 90, considered the issue of when a "collision" results for purposes of the statute. Decedent was a passenger on a motorcycle being driven by a suspect and pursued by a police vehicle. As the suspect was attempting to make a left turn, the motorcycle skidded down, and decedent either jumped or fell. Immediately thereafter, decedent was struck and killed by the pursuing police vehicle. Plaintiff parents brought a wrongful death action against the county and its sheriff's department, contending that *Veh.C. 17004.7* only applies when the injury or death "resulted from a collision" between a vehicle being driven by a suspect and the pursuing police car. In rejecting this argument, the court made the following points:

(a) If the motorcycle went down onto the street, i.e., crashed, this would constitute a "collision" of the motorcycle with the ground within the common meaning of that word. And if the decedent jumped off or fell off the motorcycle as it began to crash, it must be said that this "resulted" from the collision, i.e., his jumping off or falling off was a consequence of the collision. For the same reason, if the pursuing patrol car then struck and killed the decedent when he jumped off or fell off as the motorcycle crashed in the path of the patrol car, it must be said that the death resulted from the collision of the motorcycle with the ground. (93 C.A.4th 120.)

(b) Had the Legislature intended to restrict the statutory immunity to situations where the injury or death resulted *solely* from a collision of the suspect's vehicle, without any contributory conduct of the peace officer driving a police vehicle, it could have drafted *Veh.C. 17004.7* to reflect this intent. However, *it did not do so*. (93 C.A.4th 125.) (See *Nguyen v. Westminster* (2002) 103 C.A.4th 1161, 1164, 127 C.R.2d 388 [immunity applied even though decedent was struck by trash bin with which police collided, rather than by vehicle, and even if pursuing officer did not comply with guidelines concerning vehicular pursuits; relying on *Lewis*].)

SUPPLEMENT: [This section is current through the latest supplement]

Veh.C. 17004.7 was amended in 2005, effective July 1, 2007. (See *Veh.C. 17004.7(g)*.) The immunity applies to a public agency that adopts "and promulgates" a written policy on vehicular pursuits "and provides regular and periodic training on an annual basis." (*Veh.C. 17004.7(b)(1)*.) Promulgation of the policy must include, but is not limited to, a requirement that all peace officers of the agency certify in writing that they have received, read, and understand the policy. However, an individual officer's failure to sign a certification may not be used to impose liability on the officer or agency. (*Veh.C. 17004.7(b)(2)*.) "Regular and periodic training" means annual training including, at a minimum, coverage of each of the subjects and elements set forth in *Veh.C. 17004.7(c)* (Supp., *infra*, §337) and complying, at a minimum, with training guidelines established pursuant to P.C. 13519.8. (*Veh.C. 17004.7(d)*.)

Entities that may claim immunity: See *Alcala v. Corcoran* (2007) 147 C.A.4th 666, 669, 53 C.R.3d 908 [city is "public agency," entitled to immunity provided by *Veh.C. 17004.7* when city adopts requisite vehicular pursuit policy; terms "public entity" and "public agency" are used interchangeably in statute and both include city within their definitions].



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e. Police Pursuit.

2. Adoption of Pursuit Policy.

5 Witkin Sum. Cal. Law Torts § 337

[§ 337] Adoption of Pursuit Policy.

(1) *Manner of Adoption.* In *Colvin v. Gardena* (1992) 11 C.A.4th 1270, 15 C.R.2d 234, a city police chief's issuance of a directive on police vehicular pursuits was held to satisfy the requirement of *Veh.C. 17004.7* for adoption of a vehicular pursuit policy. Issuance of the directive "was appropriate in light of the police chief's role as head of a form of public authority." (11 C.A.4th 1279.) (See *Brumer v. Los Angeles* (1994) 24 C.A.4th 983, 987, 29 C.R.2d 515 [following *Colvin*].)

Ketchum v. California (1998) 62 C.A.4th 957, 73 C.R.2d 152, determined that a California Highway Patrol policy signed by a deputy commissioner, rather than by the commissioner of the CHP, was properly "adopted," where the commissioner had approved the policy and the deputy commissioner was only acting in the commissioner's absence. (62 C.A.4th 962.)

(2) *Requisite Provisions.* The policy on vehicular pursuits must provide all of the following:

(a) That, if available, there be supervisory control of the pursuit. (*Veh.C. 17004.7(c)(1).*)

(b) Procedures for designating the primary pursuit vehicle and for determining the total number of vehicles to be permitted to participate at one time in the pursuit. (*Veh.C. 17004.7(c)(2).*)

(c) Procedures for coordinating operations with other jurisdictions. (*Veh.C. 17004.7(c)(3).*)

(d) Guidelines for determining when the interests of public safety and effective law enforcement justify a vehicular pursuit and when a vehicular pursuit should not be initiated or should be terminated. (*Veh.C. 17004.7(c)(4).*)

Whether a policy complies with these requirements "is a question of law for the court." (*Veh.C. 17004.7(d).*)

(3) *Policy Need Not Actually Be Followed.* In *Kishida v. California* (1991) 229 C.A.3d 329, 280 C.R. 62, plaintiffs were injured when their automobile collided with another car that was fleeing from Highway Patrol units during a high-speed chase. To overcome the immunity of *Veh.C. 17004.7*, plaintiffs contended that the word "adopt," where used

with reference to the written policy on vehicular pursuits, necessarily imported the requirement that it be "implemented"; hence that, to claim the immunity, the defendant must demonstrate that during the particular chase the officers actually employed the procedures prescribed for safe pursuits. *Held*, summary judgment for defendant affirmed. The statutory language does not imply or import the requirement that there be proof that the policy procedures were actually followed. (229 C.A.3d 338.) (See *Weiner v. San Diego* (1991) 229 C.A.3d 1203, 1210, 280 C.R. 818 [following *Kishida*]; *Brumer v. Los Angeles*, *supra* [same].)

(4) *Sufficiency of Particular Policies*. The adequacy of vehicular pursuit policies has been considered in a number of cases. (See *Bryant v. Los Angeles* (1994) 26 C.A.4th 919, 923, 32 C.R.2d 285 [policy that otherwise complied with requirements of *Veh.C. 17004.7(c)(4)* was not insufficient even though it failed to cover situation where suspect was driving stolen police vehicle]; *McGee v. Laguna Beach* (1997) 56 C.A.4th 537, 543, 65 C.R.2d 506 [pursuit policy satisfied minimum requirements of *Veh.C. 17004.7* where it contained general guidelines, but left specifics to officer, e.g., it contained policy concerning radio communication, but no specific prohibition against high-speed pursuit if radio was malfunctioning]; *Ketchum v. California*, *supra*, 62 C.A.4th 966 [guidelines adequate; court refused to impose guideline limiting pursuits to certain offenses or situations].)

In *Colvin v. Gardena*, *supra*, the provision regarding the initiation and termination of police vehicular pursuits read as follows: "A. Initiation of pursuits: Pursuits may be initiated when an officer has reasonable cause to stop a vehicle and the driver fails to stop as required by law. ... B. Discontinuance of pursuits: Justification to continue a pursuit will be based on what reasonably appears to be the facts known or perceived by the officer. Officers should consider discontinuing a pursuit when it poses a serious and unreasonable risk of harm to the pursuing officer or to the public balanced against the seriousness of the violation, or when directed to do so by a supervisor." The provision regarding designation of the primary pursuit vehicle and the determination of the number of such vehicles stated that a pursuit initiated by a motorcycle or unmarked police vehicle should be abandoned when a marked four-wheeled vehicle becomes available, and that the number of vehicles may vary with the circumstances, but should be kept to a minimum. *Held*, the provision on the initiation and termination of pursuits violated *Veh.C. 17004.7(c)(4)*, and the provision on designating the primary pursuit vehicle and the total number of vehicles violated *Veh.C. 17004.7(c)(2)*; policies adopted under *Veh.C. 17004.7* must clearly and with specificity set forth standards to guide officers in the field.

(a) The language respecting initiation of pursuits fails to articulate any guidelines for determining when the gravity of a particular situation justifies initiation of a pursuit. Under its "reasonable cause to stop a vehicle" standard, a pursuit could apply to a mere Vehicle Code violation for a nonfunctional tail lamp or other minor violation. The language respecting termination is similarly vague. By failing to set forth such obvious factors as "weather, visibility, vehicular and pedestrian traffic, surface and other roadway conditions, speed, experience of the officers, nature of the offense, capacity of police vehicle, and distance traveled," defendant city's policy constitutes an impermissible delegation of basic policy matters to police officers. (11 C.A.4th 1285.)

(b) The provision on determining the main pursuit vehicle merely reflects the obvious fact that some vehicle will initiate a pursuit. The only guideline stated is that an initiating unmarked police car or motorcycle should abandon the pursuit in favor of a marked four-wheeled unit. And the provision on the number of vehicles merely states in a conclusionary manner that such number should be kept to a minimum. These provisions do not afford adequate guidelines for either selecting the lead vehicle or determining the number of vehicles to be permitted to participate at one time in the pursuit. (11 C.A.4th 1286.) (See *Payne v. Perris* (1993) 12 C.A.4th 1738, 1746, 16 C.R.2d 143 [following *Colvin*; compliance with *Veh.C. 17004.7(c)(4)* requires more than merely directing pursuing officers to exercise their discretion and use their best judgment]; *Berman v. Daly City* (1993) 21 C.A.4th 276, 282, 26 C.R.2d 493 [following *Payne*].)

In *Billester v. Corona* (1994) 26 C.A.4th 1107, 32 C.R.2d 121, defendant city's pursuit policy contained general guidance on when to initiate or terminate a pursuit, e.g., pursuits should normally be initiated when, in the officer's judgment, an individual clearly shows an intent to avoid arrest by using a vehicle to flee, but the fact that most pursuits originate from misdemeanors should be considered; a pursuit should be terminated when, in the pursuing officer's

judgment, a serious hazard is present to the public or the officer. In addition, the policy listed the following factors that an officer must consider during pursuits: time, speed, distance, the importance of and necessity for apprehension of the suspect, traffic in the vicinity, and the availability of assistance. The policy also directed the officer to consider whether his or her life is in danger. *Held*, the policy meets the requirements of *Veh.C. 17004.7(c)(4)*; the specific factors required to be considered provide the additional guidance that was lacking in *Payne* and *Berman*. (26 C.A.4th 1121.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Manner of Adoption*. See *Alcala v. Corcoran* (2007) 147 C.A.4th 666, 674, 669, 53 C.R.3d 908 [testimony by chief of police that vehicular pursuit policy was in police department's policies and procedures manual when he was hired, that he used it as field training officer, and that, as police chief, he formally re-adopted policy as department's policy was sufficient to establish that department had adopted policy as required by *Veh.C. 17004.7*].

(2) *Requisite Provisions*. *Veh.C. 17004.7* was amended in 2005, effective July 1, 2007. (See *Veh.C. 17004.7(g)*.) The policy on vehicular pursuits must do all of the following:

(a) Determine under what circumstances to initiate a pursuit. The policy must define a "pursuit," articulate the reasons for which a pursuit is authorized, and identify the issues that should be considered in reaching the decision to pursue. It must also address the importance of protecting the public and balancing the known or reasonably suspected offense, and the apparent need for immediate capture, against the risks to peace officers, innocent motorists, and others. (*Veh.C. 17004.7(c)(1)*.)

(b) Determine the total number of law enforcement vehicles authorized to participate in a pursuit, establish the authorized number of law enforcement units and supervisors who may be involved in a pursuit, describe the responsibility of each authorized unit and the role of each peace officer and supervisor, and specify if and when additional units are authorized. (*Veh.C. 17004.7(c)(2)*.)

(c) Determine the communication procedures to be followed during a pursuit, specify pursuit coordination and control procedures, and determine assignment of communications responsibility by unit and organizational entity. (*Veh.C. 17004.7(c)(3)*.)

(d) Determine the role of the supervisor in managing and controlling a pursuit. Supervisory responsibility must include management and control of a pursuit, assessment of risk factors associated with a pursuit, and when to terminate a pursuit. (*Veh.C. 17004.7(c)(4)*.)

(e) Determine driving tactics and the circumstances under which the tactics may be appropriate. (*Veh.C. 17004.7(c)(5)*.)

(f) Determine authorized pursuit intervention tactics. Pursuit intervention tactics include, but are not limited to, blocking, ramming, boxing, and roadblock procedures. The policy must specify under what circumstances and conditions each approved tactic is authorized to be used. (*Veh.C. 17004.7(c)(6)*.)

(g) Determine the factors to be considered by a peace officer and supervisor in determining speeds throughout a pursuit. Evaluation must take into consideration public safety, peace officer safety, and the safety of the occupants in a fleeing vehicle. (*Veh.C. 17004(c)(7)*.)

(h) Determine the role of air support, where available. Air support must include coordinating the activities of resources on the ground, reporting on the progress of a pursuit, and providing peace officers and supervisors with information to evaluate whether to continue the pursuit. (*Veh.C. 17004.7(c)(8)*.)

(i) Determine when to terminate or discontinue a pursuit. Factors to be considered include, but are not limited to, (1) ongoing evaluation of risk to the public or pursuing peace officers, (2) protection of the public, balancing the known or reasonably suspected offense and apparent need for immediate capture against the risks to the public and

peace officers, (3) vehicular or pedestrian traffic safety and volume, (4) weather conditions, (5) traffic conditions, (6) speeds, (7) availability of air support, and (8) procedures when an offender is identified and may be apprehended at a later time or when the location of the pursuit vehicle is no longer known. (*Veh.C. 17004.7(c)(9).*)

(j) Determine procedures for apprehending an offender following a pursuit. Safety of the public and peace officers during the law enforcement effort to capture an offender must be an important factor. (*Veh.C. 17004.7(c)(10).*)

(k) Determine effective coordination, management, and control of interjurisdictional pursuits. The policy must include, but may not be limited to, (1) supervisory control and management of a pursuit that enters another jurisdiction, (2) communications and notifications among the agencies involved, (3) involvement in another jurisdiction's pursuit, and (4) roles and responsibilities of units and coordination, management, and control at the termination of an interjurisdictional pursuit. (*Veh.C. 17004.7(c)(11).*)

(l) Provide reporting and postpursuit analysis as required by *Veh.C. 14602.1*, establish the level and procedures of postpursuit analysis, review, and feedback, and establish procedures for written postpursuit review and follow-up. (*Veh.C. 17004.7(c)(12).*)

These requirements represent minimum policy standards and do not limit an agency from adopting additional policy requirements. Nothing in *Veh.C. 17004* precludes the adoption of a policy that limits or restricts pursuits. (*Veh.C. 17004.7(d).*) *Compliance with requirements as question of law*: Effective July 1, 2007, *Veh.C. 17004.7(d)* is relettered *Veh.C. 17004.7(f)*.

(4) *Sufficiency of Particular Policies*. See *Alcala v. Corcoran*, *supra*, 147 C.A.4th 669 [vehicle pursuit policy must do more than simply advise pursuing officers to exercise discretion and use their best judgment; policy must clearly set forth specific criteria to control and channel officers' discretion that meet minimum standards of *Veh.C. 17004.7(c)*].



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16. Use of Pesticides.

5 Witkin Sum. Cal. Law Torts § 338

[§ 338] Use of Pesticides.

(1) *In General*. "A public entity is liable for injuries caused by its use of a pesticide to the same extent as a private person." (*Govt.C. 862(b)*.) "Pesticide" is broadly defined to include materials used to control weeds as well as pests. (See *Govt.C. 862(a)*.) (See C.E.B., 2 Government Tort Liability Practice 4th, §§11.126, 11.127; 57 *Am.Jur.2d* (2001 ed.), *Municipal, County, School, and State Tort Liability* §594.)

However, the presumption of negligence per se applicable to a private person's violation of a statute or regulation (see *infra*, §871) is qualified: No presumption of negligence arises from the failure of a public entity or a public employee to comply with a provision of a statute or regulation relating to the use of a pesticide "if the statute or regulation by its terms is made inapplicable to the public entity or the public employee." (*Govt.C. 862(b)*.)

In *Farmers Ins. Exchange v. California* (1985) 175 C.A.3d 494, 221 C.R. 225, plaintiff insurance companies, having found numerous claims of policyholders for paint damage to automobiles caused by the state's aerial spraying of fruit-fly infested areas, sued the state to recover the amounts paid. On the cause of action based on *Govt.C. 862* the court took note of the Law Revision Commission Comment, that "[a]lthough it appears that the effect of the California statutes and regulations relating to the use of pesticides is to impose 'strict' liability for injuries resulting from such use, this conclusion will remain uncertain until there has been a judicial determination of the question in California." The court then held that a demurrer was properly sustained to this cause of action on either of two alternative grounds:

(a) The Attorney General argued that the statute applies only where the state is carrying out proprietary activities on property it owns or controls, and not where it is acting in a governmental capacity to abate a statewide nuisance. "We tend to agree with this interpretation of the statute." (175 C.A.3d 504.)

(b) "In any case," the state would be immune from liability under *Govt.C. 862* by virtue of *Govt.C. 8655* (*infra*, §341), making the state immune from liability for discretionary conduct under the Emergency Services Act. Here, the spraying program, instituted by the Governor's declaration of a state of emergency pursuant to the Act, was clearly the exercise of a discretionary function. (175 C.A.3d 505.) (See *LaBadie v. California* (1989) 208 C.A.3d 1366, 1368, 256 C.R. 604 [state was immune under *Govt.C. 8655* for injuries suffered by plaintiff from malathion spraying; following *Farmers Ins. Exchange*]; cf. *Adkins v. California* (1996) 50 C.A.4th 1802, 1812, 59 C.R.2d 59 [state in undertaking pest eradication program was not immune under *Govt.C. 8655* for failing to use its best efforts to accurately notify citizens

of health and safety precautions; this duty was ministerial and the statute immunizes only discretionary acts].)

(2) *Decisions of County Agricultural Departments.* The immunity for discretionary acts of a public employee (*Govt.C. 815.2*, supra, §228, and *Govt.C. 820.2*, infra, §351) applies to decisions of county agriculture departments and their employees when enforcing state or local pest control or pest eradication laws. (*Food & Ag.C. 2286.*)

SUPPLEMENT: [This section is current through the latest supplement]



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17. Nuisances.

5 Witkin Sum. Cal. Law Torts § 339

[§ 339] Nuisances.

(1) *Recovery Permitted Under Former Law.* A public entity has traditionally been held liable in damages under C.C. 3479 (13 Summary (10th), *Equity*, §133) for maintaining a nuisance, despite the fact that it was engaged in a governmental activity. (See *Phillips v. Pasadena* (1945) 27 C.2d 104, 106, 162 P.2d 625; *Flournoy v. California* (1962) 57 C.2d 497, 498, 20 C.R. 627, 370 P.2d 331; *Mulloy v. Sharp Park Sanitary Dist.* (1958) 164 C.A.2d 438, 441, 330 P.2d 441.)

(2) *Continuation Under Tort Claims Act.* The Tort Claims Act bars liability "except as otherwise provided by statute" (*Govt.C. 815*, supra, §223), and there is no provision for nuisance liability. Nevertheless, recovery under a nuisance theory, for damages as well as injunctive relief, has been permitted. In *Nestle v. Santa Monica* (1972) 6 C.3d 920, 101 C.R. 568, 496 P.2d 480, over 700 plaintiffs sued defendant city for property and personal injury damages caused by defendant's operation of its airport. They alleged that vibration, fumes, and noise emanating from takeoff and landing of jet aircraft interfered with the free enjoyment of their property and resulted in physical pain, suffering, and emotional disturbance. The complaint asserted four theories of recovery (inverse condemnation, negligence, zoning violations, and nuisance), but the main holding was on nuisance, reversing the judgment for defendant.

(a) The Tort Claims Act neither provides for nor precludes liability for a nuisance, but C.C. 3479, the general nuisance section, provides the necessary statutory basis for the action. And an amendment to the Tort Claims Act proposed by the Law Revision Commission in 1970, to state an express immunity from nuisance liability, was not enacted. "[W]e must conclude that the Legislature, with due deliberation, decided to reject the commission's proposal to bar suits against public entities for nuisance. Consequently it is manifest that the Legislature intended to allow such causes of action if they could be tailored to meet the specifications of statutory provisions," such as C.C.3479. (6 C.3d 935.)

(b) This conclusion finds further support in the Legislature's demonstrated interest in combating pollution. "Since it is well-documented that a nuisance theory provides an effective means for redress in a wide range of actions resulting from pollution including noise disturbance, it appears that, in deleting the commission's recommendation to preclude governmental nuisance liability, the Legislature intended to preserve this additional weapon in the arsenal available to combat grievous injury to the environment." It must therefore be concluded that *Govt.C. 815* does not bar nuisance actions against public entities to the extent these actions are founded on C.C.3479 or applicable statutes. (6 C.3d 936.)

(See strong dissent of two justices; and see 61 *Cal. L. Rev.* 648; 9 *Cal. Western L. Rev.* 199, 310; 5 *Southwestern L. Rev.* 197; C.E.B., 1 *Government Tort Liability Practice* 4th, §9.79.)

The *Nestle* holding has been followed in a number of later cases. (See *Vedder v. Imperial* (1974) 36 C.A.3d 654, 661, 111 C.R. 728, supra, §314 [complaint on nuisance theory sufficient]; *Buchanan v. Los Angeles County Flood Control Dist.* (1976) 56 C.A.3d 757, 768, 128 C.R. 770 [same]; *Greater Westchester Homeowners Assn. v. Los Angeles* (1979) 26 C.3d 86, 101, 160 C.R. 733, 603 P.2d 1329 [recovery against city by homeowners for personal injuries and emotional distress sustained by reason of noise from aircraft using defendant's airport]; *Andrews v. Orange* (1982) 130 C.A.3d 944, 963, 182 C.R. 176 [following *Greater Westchester*]; *Paterno v. State* (1999) 74 C.A.4th 68, 103, 87 C.R.2d 754 [nuisance allegations sufficient].)

Nuisance actions are subject to immunities under the Act that apply to the particular facts. (*Mikkelsen v. California* (1976) 59 C.A.3d 621, 628, 630, 130 C.R. 780, supra, §229 [dangerous condition of property, design immunity]; *Longfellow v. San Luis Obispo* (1983) 144 C.A.3d 379, 384, 192 C.R. 580 [following *Mikkelsen*]; cf. *Pfleger v. Superior Court* (1985) 172 C.A.3d 421, 431, 218 C.R. 371 [plaintiff may simultaneously assert causes of action for nuisance and for dangerous condition of real property].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Continuation Under Torts Claims Act.* On replacement of "Tort Claims Act" nomenclature by "Government Claims Act," see Supp., supra, §216.



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18. Condemnor's Entry To Survey Land.

5 Witkin Sum. Cal. Law Torts § 340

[§ 340] Condemnor's Entry To Survey Land.

A public entity with the power of eminent domain "may enter upon property to make studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use." (*C.C.P. 1245.010.*) It is liable, however, notwithstanding *Govt.C. 821.8* (*infra*, §348, giving a public employee immunity for an authorized entry), for "actual damage to property or for substantial interference with the possession or use of property." (*C.C.P. 1245.060.*)

C.C.P. 1245.060 is intended to comply with the constitutional guarantee of compensation for damaging property (Cal. Const., Art. I, §19; see 8 *Summary* (10th), *Constitutional Law*, §1132), and the Law Revision Commission Comment emphasizes two factors limiting recovery:

(1) The term "actual" precludes an award for merely nominal or "constructive" damages not based on physical injury to property.

(2) The phrase "substantial interference" precludes recovery for entries and activities which do not seriously impinge on or impair possession and use of the property.

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19. Emergency Activities.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 341

[§ 341] In General.

(1) *General Immunity*. The state and its political subdivisions are immune from liability for claims based on the exercise, or failure to exercise, a discretionary function in carrying out the Emergencies Services Act (*Govt.C. 8550 et seq.*) (*Govt.C. 8655.*) (On application of *Govt.C. 8655* to pest eradication programs, see *supra*, §338.)

Training persons to respond to disasters is the type of discretionary act that, even if negligently performed, immunizes the state from liability for resulting injuries. The courts must abstain from deciding the appropriateness of the design or execution of the training exercises. That the exercises may place the participants at risk does not lessen the inappropriateness of judicial intervention. (*Soto v. California* (1997) 56 C.A.4th 196, 199, 65 C.R.2d 11.)

(2) *Extraterritorial Activities*. All immunities that apply to public employees when performing emergency functions within the territorial limits of their political subdivisions apply equally when they are performing these functions extraterritorially under the Emergency Services Act. (*Govt.C. 8656.*)

No other state or its employees rendering aid in this state under an interstate arrangement is liable for any good faith act or omission in connection with an emergency. (*Govt.C. 8660.*)

(3) *Volunteer and Impressed Workers*. Volunteer emergency workers and persons impressed into service during an emergency are subject to the same liabilities and immunities as public employees performing similar work. (*Govt.C. 8657(a).*)

Public entities and their employees, including volunteer emergency workers and persons impressed into service, are immune from liability for personal injuries or property damage sustained by volunteers and impressed persons while engaged in or training for emergency duties. (*Govt.C. 8657(b).*)

(4) *Removal and Release of Prisoners*. Persons in charge of correctional institutions are immune from liability respecting removal or release of inmates whose lives are threatened by an emergency. (*Govt.C. 8658.*)

(5) *Liabilities of Health Care Providers*. Physicians, hospitals, and other medical providers are immune from liability for injuries sustained from nonwilful acts or omissions in rendering emergency services at the request of the

responsible public official or agency. (*Govt.C. 8659.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Immunity.* In *Thousand Trails v. California Reclamation Dist. No. 17* (2004) 124 C.A.4th 450, 21 C.R.3d 196, campground owners sued a reclamation district for property damage that resulted when the district, during a declared state of emergency due to flooding, cut a levee in an effort to divert raging floodwaters. The district's action unintentionally caused further flooding of the campground. *Held*, summary judgment for district affirmed.

(a) Under *Govt.C. 8655*, the state and its political subdivisions are not liable for the exercise of discretionary functions in carrying out the Emergency Services Act. When the state is called on to quell an emergency, "it must be able to act with speed and confidence, unhampered by fear of tort liability. A state of emergency imposes severe time constraints, forcing decisions to be made quickly and often without sufficient time to carefully analyze all potential repercussions. Therefore, the immunity granted by the Act is broad and specifically extended to encompass not only discretionary actions, but also the performance of or failure to perform those discretionary actions." (124 C.A.4th 458.)

(b) The fact that the district later adopted a specific flood prevention plan does not preclude immunity here. To strip an agency of immunity because, after the fact, it attempts to improve its response to an emergency would conflict with public policy. (124 C.A.4th 459.)

(c) To subject the emergency measures taken by governmental entities to microscopic examination would be contrary to the Act's purpose. Under the severe time constraints inherent in a declared state of emergency, decisions must be made quickly and often without the time necessary to carefully analyze all of the potential repercussions. (124 C.A.4th 460.) Given the undisputed facts on the record, the trial court did not err in granting summary judgment. (124 C.A.4th 461.) (2) *Extraterritorial Activities.* See *Thousand Trails v. California Reclamation Dist. No. 17*, *supra*, 124 C.A.4th 459 [reclamation district that cut levee in effort to divert floodwaters during declared state of emergency did not lose immunity under Emergency Services Act merely because levee was outside its jurisdiction].



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19. Emergency Activities.

b. Earthquake and Volcanic Warnings.

5 *Witkin Sum. Cal. Law Torts* § 342

[§ 342] Earthquake and Volcanic Warnings.

The Governor, "at his or her discretion," may warn the public of "an earthquake or volcanic prediction determined to have scientific validity." (*Govt.C. 955.1(b)*.) The state and its agencies and employees are not liable for any injury resulting from the decision to issue or not to issue a warning. (*Govt.C. 955.1(b)*.) (On immunity of members of the California Earthquake Prediction Evaluation Council, see *Govt.C. 8657(c)*.)

Public entities and public employees may take or fail or refuse to take any action on the warning, or execute or fail or refuse to execute any earthquake or volcanic prediction response plan, and they are not liable for any injuries thus caused. Nor are they liable for injuries resulting from the preparation of, or failure or refusal to prepare, an earthquake hazard or damage prediction map, an evacuation plan, and other plan elements. (*Govt.C. 955.1(c)*.)

An earthquake or volcanic warning is a basis for a declaration of a state of emergency. Public entities and public employees are immune from liability in accordance with all immunity provisions applicable during the state of emergency. (*Govt.C. 955.1(d)*); on immunities applicable during emergencies generally, see *supra*, §341.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. 911 Calls.

5 *Witkin Sum. Cal. Law Torts* § 343

[§ 343] 911 Calls.

Ma v. San Francisco (2002) 95 C.A.4th 488, 115 C.R.2d 544, held that public entities employing emergency dispatchers may be liable for injuries attributable to a dispatcher's negligence or delay in responding to a 911 call. It was overruled in *Eastburn v. Regional Fire Protection Authority* (2003) 31 C.4th 1175, 7 C.R.3d 552, 80 P.3d 656, in which injuries were allegedly sustained from an emergency dispatcher's failure to respond promptly to a 911 call. The minor and her parents sued the public entities that provided the 911 emergency dispatch services. The trial court sustained defendants' demurrer without leave to amend and entered judgment of dismissal. *Held*, affirmed.

(a) *Intent of Tort Claims Act to confine governmental liability.* Govt.C. 815(a) (supra, §223) provides that a public entity is not liable for an injury "[e]xcept as otherwise provided by statute." As that language indicates, the intent of the Tort Claims Act is to confine potential governmental liability, not expand it. (31 C.4th 1179.)

(b) *No direct liability.* No statute imposes *direct* liability on the defendant agencies here.

(1) Govt.C. 820(a) (infra, §346) provides only that public *employees* are liable for injuries from their acts or omissions in the scope of their employment to the same extent as private persons, unless otherwise provided by statute; no similar provision makes public *agencies* liable for their own negligent conduct or omission to the same extent as a private person or entity. (31 C.4th 1179.)

(2) Govt.C. 815.6 (supra, §245) makes a public entity directly liable for its breach of a statutory "mandatory duty." But with the exception of *Health & Saf.C. 1799.107* (supra, §136), the general *immunity* provision for emergency services, no statutory provision declares or defines a public agency's duty of care with respect to handling 911 emergency calls. (31 C.4th 1180.)

(3) C.C. 1714 (infra, §833), which imposes a general duty of care on all persons, and the common law principles that statute codifies are alone insufficient bases for imposing direct liability on public agencies. Direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care. Otherwise, the general rule of immunity for public entities would be largely eroded by the routine application of general tort principles. (31 C.4th 1183.)

(c) *Vicarious liability is limited.* *Govt.C. 815.2(a)* (supra, §237) makes a public entity *vicariously* liable for its employee's negligent acts or omissions within the scope of employment (see *Govt.C. 820*), but *Govt.C. 815.2(b)* (supra, §228) adds the important qualification that a public entity is not liable for injuries committed by an employee who is immune from liability for the injuries. Once again, *Health & Saf.C. 1799.107* is the only statute pertaining to the subject of the liability and immunity of public employees performing emergency rescue services such as 911 dispatching. (31 C.4th 1180.)

(d) *Qualified immunity exists under Health & Saf.C. 1799.107.* The critical statute at issue here is *Health & Saf.C. 1799.107*. It provides in pertinent part that a "qualified immunity from liability shall be provided for public entities and emergency rescue personnel providing emergency services" and that "neither a public entity nor emergency rescue personnel shall be liable for any injury caused by an action taken by the emergency rescue personnel acting within the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner." (31 C.4th 1180.) The statutory language unambiguously applies to 911 emergency dispatching. (31 C.4th 1184.)

(e) *Conclusion.* Absent a showing of bad faith or gross negligence, defendants are immune under *Health & Saf.C. 1799.107* for the acts or omissions of the 911 emergency dispatchers in their employ. (31 C.4th 1185.) Plaintiffs' pleadings and briefs failed to set forth any facts to support a finding of bad faith or gross negligence. Accordingly, the judgment must be affirmed. (31 C.4th 1186.)

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II. GOVERNMENTAL LIABILITY
B. Public Entities.
20. National Guard Operations.

5 Witkin Sum. Cal. Law Torts § 344

[§ 344] National Guard Operations.

Govt.C. 816, enacted to conform to federal law, provides that a public entity is not liable for an injury arising out of any activity conducted by a California National Guard member pursuant to 32 U.S.C., §§316, 502, 503, 504, or 505, and compensated pursuant to the Federal Tort Claims Act. (See 14 *Pacific L. J.* 704; 52 A.L.R.4th 1095 [immunity of state National Guard members].)

In *Chester v. California* (1994) 21 C.A.4th 1002, 26 C.R.2d 575, plaintiffs, the wife and children of a deputy sheriff who was killed in a helicopter crash during a drug interdiction operation, sued defendant state, alleging that the accident was caused by the negligence of the helicopter pilot, who was a member of the California National Guard. *Held*, summary judgment for defendant affirmed.

(a) Under *Govt.C. 815.2(b)* (supra, §228), a public entity is not liable for the negligence of an employee if the employee is immune from liability, unless another statute creates liability. And *Mil. & Vet.C. 392* (infra, §349) immunizes members of the state militia on active service for any act done in the performance of their duty. Because it is undisputed that members of the California National Guard are "members of the militia" within the meaning of the statute, the combined effect of *Govt.C. 815.2(b)* and *Mil. & Vet.C. 392* is to immunize defendant for the pilot's negligence unless another statute expressly provides otherwise. (21 C.A.4th 1005.)

(b) Plaintiffs argued that *Govt.C. 816* is such a statute. Specifically, they argued that this statute *creates* public entity liability for any act committed by a member of the National Guard where, as here, the victims are not compensated by the federal Government under the Federal Tort Claims Act. This argument is without merit. Prior to the enactment of *Govt.C. 816*, both the federal and state Governments were liable for the negligence of National Guard members who had not been called up to active federal service. *Mil. & Vet.C. 392* was thus enacted to ensure that California would not be held liable for the torts of the members of the National Guard where federal liability applies and federal compensation is made. In other words, the statute was enacted to restrict liability, not to expand it. (21 C.A.4th 1006.)

(c) Also without merit is plaintiffs' contention that *Govt.C. 816* is a superfluous law because at the time it was enacted the state was already immune from suit under *Mil. & Vet.C. 392*. When *Govt.C. 816* was enacted, other statutes rendered the state liable for acts of National Guard personnel in particular situations, such as the negligent operation of

a motor vehicle. Hence, the Legislature could have legitimately concluded that *Govt.C. 816* was necessary to ensure that the state would no longer be held liable for injuries resulting from a National Guard member's negligent operation of a motor vehicle if such injuries were compensated by the federal *Government*. (21 C.A.4th 1008.)

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C. Public Employees.

1. In General.

a. Statutory Framework.

5 *Witkin Sum. Cal. Law Torts* § 345

[§ 345] Statutory Framework.

The Tort Claims Act (*Govt.C. 810 et seq.*) covers liability of public entities and public employees; most of the sections on particular liabilities and immunities deal with both. Hence, to a great extent, the treatment of liability of public employees must parallel that of liability of public entities, and cases involving employee liability generally involve entity liability as well. (See *supra*, §222 *et seq.*) (See C.E.B., 1 Government Tort Liability Practice 4th, §9.3 *et seq.*; Dobbs, *The Law of Torts* §273; for definitions of "employee," "public employee," and other essential terms, see *supra*, §§219, 220; on liability of public entities for torts of their employees, see *supra*, 237 *et seq.*)

The Act deals separately with *actions* against public employees (see *infra*, §370), *defense* of these actions (see *infra*, §371 *et seq.*), and *indemnification* of employees (see *infra*, §375 *et seq.*).

Liability of public employees is treated not only in the Act, but in other state statutes as well. (See *Educ.C. 44807, 44808*, *supra*, §321 *et seq.* [school employees].) A public employee may also be subject to liability under federal civil rights legislation. (See 42 U.S.C., §1983 (civil relief for deprivation of federal constitutional or statutory rights under color of state law); for detailed discussion of liability under federal civil rights legislation, see 8 *Summary* (10th), *Constitutional Law*, §816 *et seq.*; 3 *Cal. Proc.* (4th), *Actions*, §236.)

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Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §245.



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1. In General.

b. Nature of Liability.

5 *Witkin Sum. Cal. Law Torts* § 346

[§ 346] Nature of Liability.

(1) *Same Liability as Private Person.* At common law, there was no compelling policy that called for a broad immunity for ordinary ministerial officers, and these officers were liable for intentional or negligent wrongs. (See *Silva v. MacAuley* (1933) 135 C.A. 249, 258, 26 P.2d 887; *People v. Standard Acc. Ins. Co.* (1941) 42 C.A.2d 409, 411, 108 P.2d 923; *Collenburg v. Los Angeles* (1957) 150 C.A.2d 795, 803, 310 P.2d 989; *Armstrong v. Belmont* (1958) 158 C.A.2d 641, 322 P.2d 999; *Rest.2d, Torts* §895D; 47 *Cal. L. Rev.* 322; 2 *A.L.R.3d* 822 [personal liability of public officer for killing or injuring animal while carrying out statutory duties with respect to it]; 34 *A.L.R.4th* 228 [personal liability of public school teacher in negligence action for personal injury or death of student]; 35 *A.L.R.4th* 328 [personal liability in negligence action of public school employee, other than teacher or executive or administrative officer, for personal injury or death of student].)

The Tort Claims Act codified the preexisting law. "Except as otherwise provided by statute ... , a public employee is liable for injury caused by his act or omission to the same extent as a private person." (*Govt.C. 820(a)*; see *Lueter v. California* (2002) 94 C.A.4th 1285, 1300, 115 C.R.2d 68 [because private person is not liable for spoliation of evidence, public employee is also not liable].)

(2) *Specific Types of Liability.* This basic rule is supplemented by a number of sections dealing with special kinds of liability of public employees. (See *infra*, §359 et seq.)

Also, a number of the general immunity sections (see *infra*, §348) contain provisos or exceptions recognizing liability, including the following:

(a) *Govt.C. 820.4* [false arrest or false imprisonment excepted from general immunity for execution of laws].

(b) *Govt.C. 820.8* [negligent or wrongful act or omission excepted from general immunity for acts of omissions of others].

(c) *Govt.C. 821.8* [negligent or wrongful act or omission excepted from general immunity for authorized entry on property].

(d) *Govt.C. 822* [negligent or wrongful act or omission excepted from general immunity for money stolen from custody].

(e) *Govt.C. 821.4* [negligent inspection of entity's property excepted from general immunity for negligent inspection].

(f) *Govt.C. 822.2* [actual fraud, corruption, or malice excepted from general immunity for misrepresentations].

Liability is also provided, under specified circumstances, under statutes outside the Tort Claims Act. (See *supra*, §345.)

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1. In General.

c. Punitive Damages May Be Recoverable.

5 *Witkin Sum. Cal. Law Torts* § 347

[§ 347] Punitive Damages May Be Recoverable.

A public employee may be held liable for punitive damages. In *Runyon v. Superior Court* (1986) 187 C.A.3d 878, 232 C.R. 101, plaintiffs, former employees of a county marshal's department, sued defendant marshal and his assistants for damages for wrongful employment practices and violation of civil rights (42 U.S.C., §1983) and, on allegations of malice, prayed for punitive damages. The trial court granted defendant's motion to strike the allegations and the prayer for punitive damages, on the theory that *Govt.C. 818* precludes such an award against a *public entity* (see *supra*, §230), and that the alleged conduct of the individual defendants is imputable to the county. *Held*, *Govt.C. 818* was not a bar.

(a) *Govt.C. 820(a)* makes it clear that a public employee is liable to the same extent as a private person, and *Govt.C. 818* sets forth an immunity only for public entities. (187 C.A.3d 881.)

(b) *Govt.C. 825* on indemnification of employees (see *infra*, §375 et seq.), makes this even clearer: It expressly does not authorize an entity to pay that part of a judgment for punitive damages against the employee unless certain findings are made. "Thus, the statutory scheme now contains express recognition that individual public employees may be held liable for punitive or exemplary damages." (187 C.A.3d 882.)

(c) *Govt.C. 820.2*, providing immunity for discretionary acts (*infra*, §351), does not preclude the award. Where the section applies, no punitive damages may be recovered because the immunity is a complete defense to the entire cause of action. Thus, if it is eventually found that the acts or omissions alleged by plaintiffs were the result of the exercise of defendants' official discretion within the meaning of *Govt.C. 820.2*, that finding would preclude plaintiffs from recovering any damages. However, "the possible availability of that immunity does not justify the granting of a motion to strike a claim for punitive damages apart from a final determination the immunity exists." (187 C.A.3d 882.)

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1. In General.

d. Nature of Immunities and Defenses.

5 *Witkin Sum. Cal. Law Torts* § 348

[§ 348] Nature of Immunities and Defenses.

Under *Govt.C. 820(b)*, liability of a public employee established by the Tort Claims Act (see *supra*, §346) "is subject to any defenses that would be available to the public employee if he were a private person." (See *Sanborn v. Chronicle Publishing Co.* (1976) 18 C.3d 406, 413, 134 C.R. 402 [general tort immunities applicable to private persons apply, when relevant, to public employees]; on defense of privilege or immunity generally, see *supra*, §131 et seq.) Also, succeeding sections list a large number of acts for which liability does not exist:

(1) *Discretionary acts or omissions.* Discretionary acts or omissions, regardless of whether the employee's discretion is abused. (*Govt.C. 820.2*; see *infra*, §351 et seq.)

(2) *Execution or enforcement of law.* Acts or omissions, exercising due care, in the execution or enforcement of any law. (*Govt.C. 820.4*.)

(3) *Acting under invalid or inapplicable statute.* Acts in good faith, without malice, and under apparent authority of an unconstitutional, invalid, or inapplicable statute (except to the extent that liability would have arisen had the statute been valid and applicable). (*Govt.C. 820.6*; see *Pierson v. Ray* (1967) 386 U.S. 547, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288, 296, *supra*, §166 [officers who arrested plaintiffs had good defense of reliance on statute believed valid though later held unconstitutional]; 12 So. Cal. L. Rev. 127, 147.) The aggrieved party may, of course, seek specific relief by injunction against enforcement. (See Legislative Committee Com. to *Govt.C. 814*; 7 *Summary* (10th), *Constitutional Law*, §98.)

(4) *Acts or omissions of others.* Acts or omissions of another person. (*Govt.C. 820.8*.)

(5) *Adoption or failure to adopt or enforce enactment.* Adoption of, failure to adopt, or failure to enforce a statute or regulation. (*Govt.C. 821*.) (See *Roseville Community Hosp. v. California* (1977) 74 C.A.3d 583, 588, 141 C.R. 593 [failure to enforce statute].)

(6) *Action or inaction on license.* Issuance, denial, suspension, or revocation of a permit, license, certificate, approval, order, or similar authorization; or failure or refusal to take that action. (*Govt.C. 821.2*; see *O'Hagan v. Board*

of *Zoning Adjustment* (1974) 38 C.A.3d 722, 725, 113 C.R. 501, supra, §229 [revocation of permit]; *Colome v. State Athletic Com.* (1996) 47 C.A.4th 1444, 1456, 55 C.R.2d 300 [state employees were immune from liability for denial of boxing license].)

(7) *Inspection of private property.* Failure to inspect, or inadequate or negligent inspection of, property to determine whether it violates a statute or regulation or constitutes a hazard to health or safety. (*Govt.C.* 821.4 [noting exception for property of the public entity]; see 70 A.L.R.3d 1239 [negligence in carrying out governmentally required inspection of motor vehicle].)

(8) *Institution or prosecution of proceeding.* Institution or prosecution of a judicial or administrative proceeding within the scope of employment. (*Govt.C.* 821.6; see infra, §368.)

(9) *Entry on property.* Entry on property where entry is expressly authorized by law. (*Govt.C.* 821.8 [noting exception for negligent or wrongful act or omission]; see *Cowing v. Torrance* (1976) 60 C.A.3d 757, 761, 131 C.R. 830 [city inspector, authorized by ordinance to enter business premises to determine whether appropriate license had been obtained, entered by strategem--following mail carrier who had key; immunity applied]; cf. *Ogborn v. Lancaster* (2002) 101 C.A.4th 448, 462, 124 C.R.2d 238 [*Govt.C.* 821.8 did not apply to conversion claim].)

(10) *Money stolen from custody.* Theft of money from employee's official custody without employee's fault. (*Govt.C.* 822.)

(11) *Misrepresentation.* Misrepresentation, negligent or intentional, without actual fraud, corruption, or actual malice. (*Govt.C.* 822.2; see *Schonfeld v. Vallejo* (1975) 50 C.A.3d 401, 410, 123 C.R. 669 [immunity under *Govt.C.* 822.2 exists "unless, in addition to the essentials of common law deceit, a public employee is motivated by corruption or actual malice, i.e., a conscious intent to deceive, vex, annoy or harm the injured party in his business"]; *Grenell v. Hermosa Beach* (1980) 103 C.A.3d 864, 875, 163 C.R. 315 [*Govt.C.* 822.2 is not limited to misrepresentations made in course of discretionary governmental act]; *Golden West Baseball Co. v. Talley* (1991) 232 C.A.3d 1294, 1305, 284 C.R. 53 [affirming summary judgment for city manager on basis of uncontested declaration that he acted in scope of employment and without actual fraud, corruption, or actual malice]; *Harshbarger v. Colton* (1988) 197 C.A.3d 1335, 1339, 243 C.R. 463, supra, §241 [demurrer was properly sustained to complaint seeking recovery for county employees' misrepresentations respecting plaintiff's disability retirement pension that failed to allege fraud, corruption, or malice]; *Brown v. Compton Unified School Dist.* (1998) 68 C.A.4th 114, 116, 80 C.R.2d 171 [school district counselor who misrepresented that particular course satisfied NCAA requirements, thereby costing plaintiff basketball scholarship, was immune]; on similar immunity granted public entity by *Govt.C.* 818.8, without exception for actual fraud, corruption, or actual malice, see supra, §241.)

(12) *Tax collection or administration.* Institution of judicial or administrative proceeding for assessment or collection of a tax, or interpretation or application of a tax law. (*Govt.C.* 860.2.)

(13) *Abatement of peril from gradual earth movement.* Action taken to abate a peril from gradual earth movement. (*Govt.C.* 867; see supra, §285.)

In addition, a number of sections of the Act respecting immunities of public entities (see supra, §222 et seq.) apply also to public employees. (See, e.g., *Govt.C.* 831, supra, §279 and infra, §360 [highway accident caused by weather conditions].)

Immunities of public employees are likewise set forth in other statutes. The following are illustrative:

(a) C.C. 43.55, supra, §161 [arrest under warrant regular on face].

(b) C.C.P. 262.1, supra, §161 [execution of process regular on face].

(c) *C.C.P. 1566* [payment or delivery of money or property to claimant, or other transaction under Unclaimed Property Law]. (See *Harris v. Westly* (2004) 116 C.A.4th 214, 224, 10 C.R.3d 343 [Controller was immune from suit arising from allegedly defective sale of escheated corporate stock pursuant to Unclaimed Property Law]; *Fong v. Westly* (2004) 117 C.A.4th 841, 851, 12 C.R.3d 76 [same].)

(d) *Health & Saf.C. 25400*, supra, §315 [action taken to protect against hazardous substance].

Even if an act is otherwise immune, liability arises if a reasonable employee knows, or should know, that the act violates a clearly established constitutional right. (*Southern Calif. Rapid Transit Dist. v. Superior Court* (1994) 30 C.A.4th 713, 726, 36 C.R.2d 665, 3 Summary (10th), *Agency and Employment*, §288; see *Conway v. Pasadena Humane Soc.* (1996) 45 C.A.4th 163, 177, 52 C.R.2d 777 [humane society officer who conducted warrantless search without plaintiffs' consent and in absence of exigent circumstances was not immune; reasonable officer would have known that search was unconstitutional].)

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(3) *Acting under invalid or inapplicable statute.* See *O'Toole v. Superior Court* (2006) 140 C.A.4th 488, 503, 44 C.R.3d 531 [under Govt.C. 820.6, police officers were immune from liability for preventing plaintiffs from speaking or distributing literature on community college campus where they acted in good faith and without malice under apparent authority of district permit policy, even assuming that policy was unconstitutional]. (6) *Action or inaction on license.* See *Sonoma AG Art, LLC v. Department of Food & Agriculture* (2004) 125 C.A.4th 122, 125, 22 C.R.3d 468, Supp., supra, §287 [issuance of certificate finding that grapevines were diseased; "certificate," within Govt.C. 821.2, need not provide authority to act but may be mere official statement]; *Richards v. Department of Alcoholic Beverage Control* (2006) 139 C.A.4th 304, 318, 42 C.R.3d 782 [under Govt.C. 821.2, Department of Alcoholic Beverages Control employees were immune from liability in restaurant owner's action challenging suspension of alcoholic beverage license; while immunity under statute is accorded only to discretionary activities, discretion in making alcoholic beverage licensing decisions is broad].

(11) *Misrepresentation.* See *Kern v. Sparks* (2007) 149 C.A.4th 11, 20, 56 C.R.3d 551 [immunity under Govt.C. 822.2 is not absolute; it applies only when misrepresentation involves interference with financial or commercial interests]; *Curcini v. Alameda* (2008) 164 C.A.4th 629, 649, 79 C.R.3d 383 [jail chaplains, who claimed fraud by sheriff's employees in relation to contract for chaplain services, failed to allege actual fraud, corruption, or actual malice to overcome immunity under Govt.C. 822.2; they alleged that defendants put contract out for bid to cover mismanagement of funds and rigged bidding process, but did not allege connection between corruption and harm they suffered].



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C. Public Employees.

1. In General.

e. Particular Employees.

5 *Witkin Sum. Cal. Law Torts* § 349

[§ 349] Particular Employees.

Certain statutory liabilities or immunities relate to particular employees or their relatives. The following are illustrative:

(1) *Local Officials and Board Members*. "Members of city councils, mayors, members of boards of supervisors, members of school boards, members of governing boards of other local public entities, members of locally appointed boards and commissions, and members of locally appointed or elected advisory bodies are not vicariously liable for injuries caused by the act or omission of the public entity or advisory body." However, nothing in this statute "exonerates an official from liability for injury caused by that individual's own wrongful conduct," or "affects the immunity of any other public official." (*Govt.C. 820.9*.)

(2) *Police Officer's Survivors*. A police officer's widow, widower, and heirs are not liable individually for injury or death resulting from an act or omission of the officer in the line of duty, including an act or omission directly related to the officer's death. However, nothing in this statute precludes an action against the officer's estate. (*Govt.C. 823*.)

(3) *Juvenile Court and Child Protection Workers*. The civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to conduct investigations or proceedings under the Juvenile Court Law (*Welf.C. 200 et seq.*, 10 *Summary* (10th), *Parent and Child*, §440 et seq.) does not extend to specified improper acts where committed with malice. (See *Govt.C. 820.21*, *infra*, §368.)

(4) *National Guard Members*. "Members of the militia on active service of the State" are not liable civilly or criminally for any act done in the performance of their duty. (*Mil. & Vet.C. 392*; on immunity of state for National Guard operations, see *supra*, §344.)

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1. In General.

f. Insurance Coverage.

5 Witkin Sum. Cal. Law Torts § 350

[§ 350] Insurance Coverage.

A public entity may procure insurance for both its own liability (see *supra*, §231) and that of its employees. A public entity may insure any employee "against all or any part of his liability for injury resulting from an act or omission in the scope of his employment." (*Govt.C. 990(b)* [local public entity]; *Govt.C. 11007.4(b)(2)* [state agency].) It may also insure against the expense of defending a claim against the employee, whether or not liability exists on the claim. (*Govt.C. 990(c)* [local public entity]; *Govt.C. 11007.4(b)(3)* [state agency].) (See *Govt.C. 990.2* [authorizing counties to insure court officers and attache's against liability for claims in scope of employment and expenses of defense].)

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C. Public Employees.

2. Discretionary Acts.

a. Immunity Rule.

5 *Witkin Sum. Cal. Law Torts* § 351

[§ 351] Immunity Rule.

Even before enactment of the Tort Claims Act (see *supra*, §216), the rule had become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious. (See *Hardy v. Vial* (1957) 48 C.2d 577, 582, 311 P.2d 494; *Jones v. Czapkay* (1960) 182 C.A.2d 192, 198, 6 C.R. 182; 49 Cal. L. Rev. 400, 772; 34 So. Cal. L. Rev. 346.) The basis of the rule is that "[t]he subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation." (*Lipman v. Brisbane Elementary School Dist.* (1961) 55 C.2d 224, 229, 11 C.R. 97, 359 P.2d 465.)

This rule was codified on adoption of the Act. "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (*Govt.C. 820.2; 19 Hastings L. J. 561; 3 San Diego L. Rev. 7.*)

Many cases deal with the rule and the test of a discretionary act. (See *infra*, §352 et seq.)

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2. Discretionary Acts.

b. What Constitutes Discretionary Act.

5 *Witkin Sum. Cal. Law Torts* § 352

[§ 352] What Constitutes Discretionary Act.

(1) *Earlier Cases.* The earlier decisions involving *Govt.C. 820.2* (supra, §351) failed to establish reliable guidelines for application of the elusive distinction, i.e., between discretionary and ministerial, on which the statute rests.

In *Ne Casek v. Los Angeles* (1965) 233 C.A.2d 131, 43 C.R. 294, the court pointed out that discretionary acts have ministerial features once a decision is made, and most ministerial acts have discretionary aspects. Because mechanical classification is not possible, the category of a particular activity should be guided by the purpose of the discretionary immunity doctrine: Subjecting officials to the danger of torts trials would impair the performance of their functions. (233 C.A.2d 135.) (See 60 Cal. L. Rev. 1020; 39 So. Cal. L. Rev. 470.)

In *Sava v. Fuller* (1967) 249 C.A.2d 281, 57 C.R. 312, infra, §355, the court declared that immunity does not inevitably follow after an exercise of discretion, but is granted only where the act or omission "was the result" of the exercise of discretion. (249 C.A.2d 285.)

(2) *Basic Policy Decision Test.* In *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, the court took a new approach to this problem.

(a) A semantic inquiry is not helpful, for it is difficult to conceive of any official act that does not admit of some discretion. Hence, a literal or mechanical interpretation of the term is inappropriate, and the proper approach concentrates on policy considerations. (69 C.2d 789.)

(b) The historical justification for discretionary immunity was protection of public employees from "the spectre of extensive personal tort liability," which "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." (69 C.2d 790, quoting Learned Hand.) But this danger no longer exists: (1) A sued employee may, under *Govt.C. 825* (infra, §375), call on the public entity to defend the employee and to pay any judgment rendered. (2) Under *Govt.C. 825.4, 825.6* (infra, §375), an entity that is sued and held liable ordinarily has no indemnity against the employee unless the act was outside the scope of employment or the employee was guilty of actual fraud or malice. (69 C.2d 792.)

(c) An employee's concern over the potential liability of the employer has the wholesome effect of promoting careful work. (69 C.2d 792.)

The court then announced a practical test based on the separation of basic policy decisions (discretionary) and implementation of the decisions (ministerial), sometimes described as the distinction between "planning" and "operational" levels. (69 C.2d 793.) (For specific holding in case, see *infra*, §357.)

The *Johnson* test has been discussed and applied in many later cases. (See *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 447, 131 C.R. 14, 551 P.2d 334, *infra*, §1050; *Sanborn v. Chronicle Publishing Co.* (1976) 18 C.3d 406, 415, 134 C.R. 402, 556 P.2d 764; *Thompson v. Alameda* (1980) 27 C.3d 741, 749, 167 C.R. 70, 614 P.2d 728, *supra*, §299; *Nunn v. California* (1984) 35 C.3d 616, 622, 200 C.R. 440, 677 P.2d 846; *Caldwell v. Montoya* (1995) 10 C.4th 972, 981, 42 C.R.2d 842, 897 P.2d 1320, *infra*, §353; *Toney v. California* (1976) 54 C.A.3d 779, 790, 126 C.R. 869; *Whitcombe v. Yolo* (1977) 73 C.A.3d 698, 710, 141 C.R. 189; *Roseville Community Hosp. v. California* (1977) 74 C.A.3d 583, 589, 141 C.R. 593; *Kemmerer v. Fresno* (1988) 200 C.A.3d 1426, 1438, 246 C.R. 609; *Susan A. v. Sonoma* (1991) 2 C.A.4th 88, 96, 3 C.R.2d 27, *infra*, §578; *Sandrini Bros. v. Voss* (1992) 7 C.A.4th 1398, 1408, 9 C.R.2d 763; *Ronald S. v. San Diego* (1993) 16 C.A.4th 887, 897, 20 C.R.2d 418; *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 C.A.4th 30, 47, 37 C.R.2d 860; *Odello Bros. v. Monterey* (1998) 63 C.A.4th 778, 792, 73 C.R.2d 903; *Becerra v. Santa Cruz* (1998) 68 C.A.4th 1450, 1458, 81 C.R.2d 165; 58 Cal. L. Rev. 303; 60 Cal. L. Rev. 1022; 15 Santa Clara Lawyer 454 [aftermath of *Johnson*]; for illustrative fact situations, see *infra*, §354 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Basic Policy Decision Test.* See *Taylor v. Los Angeles Dept. of Water & Power* (2006) 144 C.A.4th 1216, 1238, 51 C.R.3d 206 [applying test of *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, text, p. 561; Govt.C. 820.2 immunity was no defense in FEHA action based on retaliatory acts by city supervisor against employee for opposing race discrimination against coworker].



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2. Discretionary Acts.
c. Causes of Action Subject to Immunity.

5 *Witkin Sum. Cal. Law Torts* § 353

[§ 353] Causes of Action Subject to Immunity.

Immunity for discretionary acts under *Govt.C. 820.2* applies to statutory as well as common law causes of action. In *Caldwell v. Montoya* (1995) 10 C.4th 972, 42 C.R.2d 842, 897 P.2d 1320, plaintiff, a terminated school superintendent, sued defendant school board members for breach of contract and retaliatory discharge in violation of public policy, and also alleged that defendants discriminated against him on the basis of age and race in violation of the California Fair Employment and Housing Act (FEHA) (*Govt.C. 12900 et seq.*; see 8 *Summary* (10th), *Constitutional Law*, §915 et seq.). The trial judge sustained defendants' demurrers. *Held*, the demurrers were properly sustained.

(a) *Common law causes of action.*

(1) *Govt.C. 820.2* affords discretionary act immunity for plaintiff's common law causes of action. Applying the test established by *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, *supra*, §352, which distinguishes between "planning" (discretionary) and "operational" (ministerial) functions of government, votes by members of a school district's governing board whether to renew the superintendent's employment contract qualified as discretionary acts. (10 C.4th 981.)

(2) *Johnson* precludes a finding of immunity solely on grounds that the affected employee's general course of duties is "discretionary" and requires a showing that the specific conduct giving rise to the suit involved an actual exercise of discretion, i.e., a conscious balancing of risks and advantages. But *Johnson* does not require a strictly careful, thorough, formal, or correct evaluation. That standard would swallow an immunity designed to protect against claims of carelessness, malice, bad judgment, or abuse of discretion in the formulation of policy. Plaintiff's complaint contained allegations that the school board made an actual, conscious, and considered collective policy decision to replace plaintiff as superintendent. It admitted of no theory that the board acted unconsciously or failed to weigh pros and cons. (10 C.4th 983.)

(b) *Statutory causes of action.* Plaintiff could not proceed against defendants on the FEHA causes of action. He argued that the FEHA counts fell within the limiting phrase "[e]xcept as otherwise provided by statute" in *Govt.C. 820.2*. (10 C.4th 984.) No prior California decision has interpreted this phrase, and its meaning is not utterly clear on its face. (10 C.4th 984.) Under the construction proposed by plaintiff--that the phrase means that whenever a "statute" of

general application creates a liability applicable to public employees, the exception has been satisfied--public employees might enjoy discretionary act immunity from common law forms of relief, but they would be stripped of that immunity for statutory causes of action. (10 C.4th 985.) However, the context of the Tort Claims Act indicates that a far more limited exception to immunity was intended:

(1) The intent of the Act is not to expand the rights of plaintiffs in suits against governmental entities or employees, but to confine potential governmental liability to rigidly delineated circumstances; governmental immunity is waived only if the various requirements of the Act are satisfied. The very purpose of the Act is to afford categories of immunity where, but for its provisions, public agencies or employees would otherwise be liable under general principles of law. (10 C.4th 985.)

(2) The Act's purpose, that specific immunities should prevail over general rules of actionable duty, is made particularly clear in the provisions dealing with public employees. Even though *Govt.C. 820.2* uses the generic phrase "is not liable" to describe the situations where suit is forbidden, it does not grant or withhold its protection on the basis of whether the legal duty asserted arose by common law or by statute. Instead, the statute erects a separate barrier of immunity at a point beyond the threshold issue of legal duty. Therefore, public employees are immune for their discretionary acts, even those constituting breaches of actionable duty, unless a statute otherwise provides. It follows that where the immunity would otherwise apply, it cannot be abrogated by a statute that simply imposes a general legal duty or liability on persons, including public employees. Such a statute may render the employee liable for violations unless a specific immunity applies, but it does not remove the immunity. This further effect can only be achieved by a clear indication of legislative intent that statutory immunity is withheld or withdrawn in the particular case. (10 C.4th 985.)

(3) FEHA does not meet this test. It generally prohibits employment discrimination by both public and private "employer[s]" and provides civil remedies when its provisions are violated. But even if those liabilities extend to individuals, including public employees, as "agents" or "aiders and abettors" of culpable "employer[s]," FEHA contains no indication of an additional intent that individual public officials or employees may be sued despite a specific statutory immunity that would otherwise apply. Thus, FEHA does not abrogate the specific grant of immunity to public employees for discretionary acts provided by *Govt.C. 820.2*. (10 C.4th 986.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Taylor v. Los Angeles Dept. of Water & Power* (2006) 144 C.A.4th 1216, 1238, 51 C.R.3d 206 [although *Govt.C. 820.2* immunity extends, where applicable, to liabilities imposed by prohibitory statutes of general application such as FEHA (citing *Caldwell v. Montoya* (1995) 10 C.4th 972, 42 C.R.2d 842, 897 P.2d 1320, text, p. 562), city supervisor's alleged retaliatory acts against subordinate for opposing race discrimination against coworker were not discretionary within scope of immunity].



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1. Immunity Applicable.

5 *Witkin Sum. Cal. Law Torts* § 354

[§ 354] Immunity Applicable.

Various acts have been found discretionary and the *Govt.C. 820.2* immunity applied. The following cases are illustrative:

Ramos v. Madera (1971) 4 C.3d 685, 693, 695, 94 C.R. 421, 484 P.2d 93, supra, §246 [planning and establishment of eligibility standards for county aid, followed by imposition of radically different standards on persons otherwise entitled to aid, was discretionary].

Nunn v. California (1984) 35 C.3d 616, 623, 200 C.R. 440, 677 P.2d 846 [formulation of regulations involving holding of public hearings and review of public comments; subjecting administrative agency to tort liability would interfere with deliberative process and contravene doctrine of separation of powers which underlies immunity].

Caldwell v. Montoya (1995) 10 C.4th 972, 982, 42 C.R.2d 842, 897 P.2d 1320, supra, §353 [votes by members of school district's governing board whether to renew superintendent's employment contract were discretionary acts].

Osborne v. Huntington Beach Union High School Dist. (1970) 5 C.A.3d 510, 514, 85 C.R. 793 [advice by one governmental agency to another, not to perform an unenforceable oral contract with a third person, was discretionary act].

Saltares v. Kristovich (1970) 6 C.A.3d 504, 518, 85 C.R. 866 [public administrator's determination not to make payments on mortgages and to allow estate property to be foreclosed was discretionary].

Kemmerer v. Fresno (1988) 200 C.A.3d 1426, 1438, 246 C.R. 609 [decision to institute disciplinary proceeding against civil service employee was policy decision involving discretion].

Alicia T. v. Los Angeles (1990) 222 C.A.3d 869, 882, 271 C.R. 513 [social worker's decision to institute dependency proceedings was discretionary].

Ronald S. v. San Diego (1993) 16 C.A.4th 887, 897, 20 C.R.2d 418 [preadoption work of county social service

employees, as well as decision to approve adoption, constituted discretionary activity].

Masters v. San Bernardino County Employees Retirement Assn. (1995) 32 C.A.4th 30, 47, 37 C.R.2d 860 [adjudicatory decisions of county employees retirement association board members relating to claim for disability retirement benefits were discretionary].

Skinner v. Vacaville Unified School Dist. (1995) 37 C.A.4th 31, 39, 43 C.R.2d 384 [decision of school district not to expel student was discretionary].

Odello Bros. v. Monterey (1998) 63 C.A.4th 778, 792, 73 C.R.2d 903 [decision with respect to county flood plan and decision to breach designated levee in particular manner were policy choices].

Becerra v. Santa Cruz (1998) 68 C.A.4th 1450, 1458, 81 C.R.2d 165 [both determination to place child in particular foster home and whether to intervene and discontinue placement were immune discretionary acts].

Leyva v. Nielsen (2000) 83 C.A.4th 1061, 1065, 100 C.R.2d 236 [decisions of Chairman of Board of Prison Terms as to eligibility and suitability for parole were discretionary].

Ma v. San Francisco (2002) 95 C.A.4th 488, 517, 115 C.R.2d 544, *supra*, §343 [design and content of 911 emergency medical service were discretionary, although manner in which that program is administered by 911 dispatchers was ministerial].

Ogborn v. Lancaster (2002) 101 C.A.4th 448, 460, 124 C.R.2d 238 [decision declaring that certain property was to be demolished as nuisance was discretionary, although acts involving actual demolition were ministerial].

Los Angeles v. Superior Court (2002) 102 C.A.4th 627, 643, 125 C.R.2d 637 [placement of child with foster family was discretionary act].

Thompson v. Sacramento City Unified School Dist. (2003) 107 C.A.4th 1352, 1361, 132 C.R.2d 748 [decision to readmit suspended student].

In *Glickman v. Glasner* (1964) 230 C.A.2d 120, 40 C.R. 719, defendant, enforcement officer for the state Koshur Food Law, sent a letter on the official letterhead of the State Department of Public Health to kosher food wholesalers, retailers, restaurateurs, and other interested persons, advising them that plaintiff, a slaughterer, was disqualified to act. Plaintiff sued for libel. *Held*, defendant's duties involved the exercise of discretion and he was immune from liability. (230 C.A.2d 125.)

In *Widdows v. Koch* (1968) 263 C.A.2d 228, 69 C.R. 464, plaintiff was engaged in the business of offering ambulances for hire. He advised city officials that without a subsidy he would have to stop, and when the subsidy was refused he cut the service to a single unit. The city's counsel then offered an ambulance operator in an adjoining community the privilege of stationing a unit on city property; and the city officials issued a strong directive, posted at the community hospital (a city-operated facility), that the new service was to be preferred. Plaintiff sued for damages for conspiracy to restrain trade. *Held*, judgments on demurrer, for defendant city officials and the new ambulance operator, affirmed. The city officials' actions were discretionary and immune from liability. (263 C.A.2d 238.)

In *Bank of America v. Los Angeles* (1969) 270 C.A.2d 165, 174, 75 C.R. 444, estate executors held a probate sale of a large parcel of land the bid of a particular corporation was received. The board of supervisors adopted resolutions to condemn the property, and directed a deputy county counsel to advise the court. The deputy county counsel appeared and made the announcement. Later the condemnation proceedings were abandoned. In this action against the county, plaintiffs contended that the announcement stifled higher bids, and the judge so found; but recovery was denied under *Govt.C. 820.2*. *Held*, judgment for defendant affirmed. The board's decision to notify the court was discretionary and carried out its public responsibility; the manner of announcement by the deputy counsel was an appropriate ministerial

carrying out of that discretion. (270 C.A.2d 174.)

SUPPLEMENT: [This section is current through the latest supplement]

The following cases are also illustrative:

Kern v. Sparks (2007) 149 C.A.4th 11, 20, 56 C.R.3d 551 [sheriff's certification of department payrolls resulting in certain employees receiving unauthorized pay adjustments was discretionary; decision involved policy-making, not implementation of existing policy].

Jacqueline T. v. Alameda County Child Protective Services (2007) 155 C.A.4th 456, 465, 66 C.R.3d 157 [social worker's decisions relating to investigation of child abuse, removal of minor from home, and instigation of dependency proceedings are discretionary decisions subject to immunity under Govt.C. 820.2; holding is necessary to protect social workers in their vital work from harassment of civil suits and to prevent dilution of protection afforded to minors by dependency provisions of Welfare and Institutions Code].

Ortega v. Sacramento County Dept. of Health & Human Services (2008) 161 C.A.4th 713, 727, 74 C.R.3d 390 [social worker's release of child from protective custody to father, who stabbed child shortly thereafter, was discretionary act subject to immunity under Govt.C. 820.2; statute and regulation requiring investigation do not set forth ministerial duties, and social worker conducted investigation required by county and reached considered decision, although with inadequate information].

Curcini v. Alameda (2008) 164 C.A.4th 629, 648, 79 C.R.3d 383 [sheriff's employees' conduct in awarding contract for jail chaplain services to one organization and not awarding it to another involved discretionary acts immunizing them from fraud claims, notwithstanding allegations that employees falsely represented that they would evaluate bids fairly].



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2. Immunity Not Applicable.

5 *Witkin Sum. Cal. Law Torts* § 355

[§ 355] Immunity Not Applicable.

A number of cases, in varying circumstances, have found the discretionary acts immunity inapplicable. The following are illustrative:

Tarasoff v. Regents of Univ. of Calif. (1976) 17 C.3d 425, 447, 131 C.R. 14, 551 P.2d 334, *infra*, §1050 [failure of publicly employed therapist to warn of dangers from mental patient is not a basic policy decision protected by immunity for discretionary acts].

Sanborn v. Chronicle Publishing Co. (1976) 18 C.3d 406, 415, 134 C.R. 402, 556 P.2d 764 [governmental officer's discussions with public or press regarding functioning of office fall within category of routine, ministerial duties incident to normal operations of that office].

Connelly v. California (1970) 3 C.A.3d 744, 751, 84 C.R. 257, *supra*, §242 [while "determination to issue flood forecasts is a policy-making function, a discretionary activity within the scope of governmental immunity, ... gathering, evaluating and disseminating flood forecast information are administrative or ministerial activities outside the scope of governmental immunity"].

Elton v. Orange (1970) 3 C.A.3d 1053, 1058, 84 C.R. 27, *supra*, §246 [although it was policy decision to declare plaintiff a dependent child, negligent implementing acts of placement and supervision of home were ministerial].

Toney v. California (1976) 54 C.A.3d 779, 792, 126 C.R. 869 [press release by officials of state college defaming plaintiff professor; decision to issue press releases concerning college events was discretionary act, but timing of a particular release, its content, and manner of making were operational and not protected by immunity].

Susan A. v. Sonoma (1991) 2 C.A.4th 88, 96, 3 C.R.2d 27, *infra*, §578 [statement to press by psychologist retained by public defender to evaluate minor charged with criminal offense was not type of basic policy decision entitled to immunity].

Sandrini Bros. v. Voss (1992) 7 C.A.4th 1398, 1408, 9 C.R.2d 763 [seizure of crop treated with unregistered

pesticide in violation of *Food & Ag.C. 12648* was ministerial].

Scott v. Los Angeles (1994) 27 C.A.4th 125, 140, 32 C.R.2d 643 [social worker's noncompliance with Department of Social Services regulation requiring monthly visits to foster children and foster parents was ministerial].

Masters v. San Bernardino County Employees Retirement Assn. (1995) 32 C.A.4th 30, 48, 37 C.R.2d 860 [conduct of county employees retirement association administrator in withholding medical records relating to claim for disability retirement benefits from association's board was ministerial].

Zuniga v. Housing Authority of Los Angeles (1995) 41 C.A.4th 82, 98, 48 C.R.2d 353, *supra*, §267 [housing authority's failure to warn tenants of criminal activity was ministerial].

Alejo v. Alhambra (1999) 75 C.A.4th 1180, 1192, 89 C.R.2d 768 [duty of police officer under Child Abuse and Neglect Reporting Act (see *infra*, §140 et seq.) was ministerial].

Ma v. San Francisco (2002) 95 C.A.4th 488, 517, 115 C.R.2d 544, *supra*, §343 [although design and content of 911 emergency medical service were discretionary, manner in which that program is administered by 911 dispatchers was ministerial].

Ogborn v. Lancaster (2002) 101 C.A.4th 448, 460, 124 C.R.2d 238 [while decision declaring that certain property was to be demolished as nuisance was discretionary, acts involving actual demolition were ministerial].

In *Sava v. Fuller* (1967) 249 C.A.2d 281, 57 C.R. 312, plaintiff's 4-year-old child was sick. The doctor requested the state botanist to analyze a plant substance the child might have ingested. In this complaint for wrongful death of the child, plaintiff alleged that the state botanist negligently examined it and identified it as "toxic," and that the doctor treated the child on that basis, whereas the child actually was suffering from bronchopneumonia, and died of this the next day. *Held*, judgment for defendant state botanist and the state on demurrer reversed. The state botanist exercised discretion by agreeing to analyze the plant substance, but the exercise of discretion ended at that point. Government may, in its sole and uninhibited discretion, reasonably or arbitrarily (even maliciously) exercise, extend, or withhold its services to its citizens, but once the determination has been made that a service will be furnished and the service is undertaken, public policy demands (except when the Legislature specifically decrees otherwise) that government be held to the same standard of care the law requires of its private citizens in the performance of duties imposed by law or assumed. (249 C.A.2d 290.)

SUPPLEMENT: [This section is current through the latest supplement]



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5 *Witkin Sum. Cal. Law Torts* § 356

[§ 356] Police Officers.

Special immunity provisions apart from the general discretionary acts immunity address a number of specific types of police activity. (See *Govt.C. 844.6* (supra, §292 et seq.) [injuries by or to prisoner]; *Govt.C. 845* (supra, §302) [failure to provide police protection]; *Govt.C. 845.8* (supra, §296 et seq.) [injury caused by escaped prisoner, escaped arrestee, or person resisting arrest]; *Govt.C. 846* (supra, §305) [failure to make arrest]; *Veh.C. 17004.7* (supra, §§336, 337) [vehicular pursuit where written pursuit policy]; on liability of police officers generally, see *infra*, §361.)

However, the applicability of *Govt.C. 820.2* is also sometimes in issue. (See *Ne Casek v. Los Angeles* (1965) 233 C.A.2d 131, 137, 43 C.R. 294, supra, §352 [complaint alleging negligence in permitting arrestees to escape; *Govt.C. 820.2* applied]; *McCarthy v. Frost* (1973) 33 C.A.3d 872, 875, 109 C.R. 470 [decision of highway patrolman to investigate or not investigate an accident is exercise of discretion; *Govt.C. 820.2* applies]; *Gibson v. Pasadena* (1978) 83 C.A.3d 651, 659, 148 C.R. 68, supra, §332 [although officers exercised discretion in determining to pursue vehicle, speed, and other conduct during pursuit were ministerial]; *Watts v. Sacramento* (1982) 136 C.A.3d 232, 186 C.R. 154 [sheriff's officers' ordering plaintiffs to leave M's property, where dispute arose as to plaintiffs' right to grow and harvest crops there, was exercise of discretion, and county was not liable for M's alleged conversion of crops]; *Sullivan v. Sacramento* (1987) 190 C.A.3d 1070, 1081, 235 C.R. 844 [police dispatcher's decision to phone victim after neighbors' reports of cries for help was discretionary]; *Wallace v. Los Angeles* (1993) 12 C.A.4th 1385, 1403, 16 C.R.2d 113, supra, §291; [officer's decisions to refrain from either warning homicide witness of dangers involved or offering her protection were ministerial]; *Johnson v. Ventura* (1994) 29 C.A.4th 1400, 35 C.R.2d 150, supra, §319 [release by police of escaped mental patient was discretionary]; 15 Santa Clara Lawyer 467; 39 So. Cal. L. Rev. 470; on discretion in rendering assistance to stranded motorist, see *Govt.C. 820.25*, supra, §309.)

In *Scruggs v. Haynes* (1967) 252 C.A.2d 256, 60 C.R. 355, a police officer, claiming that plaintiff driver involved in a collision was obstructing his attempt to arrest the other driver, beat plaintiff severely. Plaintiff sued for damages for assault and battery. *Held*, judgment for plaintiff against the officer and the city affirmed. Under the pre-Tort Claims Act common law rule, a peace officer making an arrest was liable to the person arrested for using unreasonable force (252 C.A.2d 264), and no case has applied the discretionary immunity doctrine to this situation. (252 C.A.2d 266.) To give immunity would encourage police brutality. (252 C.A.2d 267.)

In *McCorkle v. Los Angeles* (1969) 70 C.2d 252, 74 C.R. 389, 449 P.2d 453, plaintiff's automobile collided with another vehicle. A police officer, on arriving at the scene, asked plaintiff to show him the point of impact, and plaintiff followed him into the street. Though aware of traffic approaching when the green light was on, the officer did not use flares, and plaintiff was struck by another vehicle. *Held*, judgment against city affirmed. The city argued that the officer had no duty to investigate the accident, and only did so in the exercise of discretion. This assumption was questioned, but accepted because the record did not contain proof of that duty. (70 C.2d 261, footnote 8.) However, it was not a defense. Even though an act is discretionary, liability will be imposed where, after the discretion is exercised by doing the act, the employee is negligent in performing it. (70 C.2d 261.) Because the essential requirement of Govt.C. 820.2--a causal connection between the exercise of discretion and the injury--did not exist, the statutory immunity does not apply. (70 C.2d 262.)

A claim for property damage from police action should be evaluated under the provisions of the Tort Claims Act, rather than those of the inverse condemnation law. (*Customer Co. v. Sacramento* (1995) 10 C.4th 368, 391, 41 C.R.2d 658, 895 P.2d 900, 8 Summary (10th), *Constitutional Law*, §1142 [store owner's claim for damages caused by police efforts to arrest suspect].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Parole Officers.

5 *Witkin Sum. Cal. Law Torts* § 357

[§ 357] Parole Officers.

In *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, *supra*, §352, a parole agent of the California Youth Authority asked plaintiff and her husband to provide a foster home for a 16-year-old boy. They did, and, 5 days later, the boy assaulted plaintiff. Plaintiff alleged that the state, through the Youth Authority, acted negligently in placing a boy with homicidal tendencies and a record of violence and cruelty, with knowledge of these propensities and without disclosure. The state contended that it had discretionary immunity and owed no duty of care to plaintiff. *Held*, summary judgment for defendant state reversed. The legal duty to warn of the foreseeable danger was clear under established law (see *infra*, §905). As to discretionary immunity, the court first undertook an elaborate examination of the policies involved and then applied the basic policy decision test laid down by the court (see *supra*, §252):

(a) The decision to place the youth on parole was reached by weighing the risks and benefits. This was a discretionary act. (69 C.2d 795.)

(b) After that policy decision was reached, no further discretion was involved. The state's contention that the parole agent had to exercise professional judgment as to what part of the boy's record should be communicated was unsound. The determination whether to warn the foster parents was "at the lowest, ministerial rung of official action." Thus, the *Govt.C. 820.2* immunity was inapplicable. (69 C.2d 795.)

(c) Two specific immunities urged by defendant are likewise inapplicable. The first is *Govt.C. 845.8* (determination to parole or release prisoner; *supra*, §298). Once the discretionary determination is made, the role of *Govt.C. 845.8* ends, and "subsequent negligent actions, such as the failure to give reasonable warnings to the foster parents actually selected, are subject to legal redress." (69 C.2d 799.) The second is *Govt.C. 818.8* (misrepresentation by employee; *supra*, §348). This section deals only with the common law tort of deceit--interference with financial or commercial interests. (69 C.2d 799.) (See *Morgan v. Yuba* (1964) 230 C.A.2d 938, 942, 41 C.R. 508, *supra*, §299 [failure to give promised warning of release on bail of dangerous prisoner was ministerial act]; 58 *Cal. L. Rev.* 303; 60 *Cal. L. Rev.* 1022; 15 *Santa Clara Lawyer* 454; 44 *A.L.R.4th* 638 [probation officer's liability for negligent supervision of probationer].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Perez-Torres v. California* (2007) 42 C.4th 136, 142, 64 C.R.3d 155, 164 P.3d 583 [although P.C. 845.8(a) immunity applied to plaintiff's arrest and jailing on mistaken belief that he was another person and had violated parole, it did not extend to his continued incarceration after parole officers knew or should have known that he was wrong man; following *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, text, p. 570].



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5. Public Defenders.

5 *Witkin Sum. Cal. Law Torts* § 358

[§ 358] Public Defenders.

Barner v. Leeds (2000) 24 C.4th 676, 102 C.R.2d 97, 13 P.3d 704, deals with whether the immunity for discretionary acts applies to a public defender representing a defendant in a criminal case. Plaintiff had been convicted of bank robbery. On the basis of later evidence, the original conviction was set aside, and plaintiff was found factually innocent of the charge. However, by this time, plaintiff had spent approximately a year in prison. Plaintiff filed the present malpractice action alleging that his conviction and incarceration resulted from defendant's negligence in failing to pursue various leads. Concluding that a deputy public defender is immune under *Govt.C. 820.2*, the trial judge entered summary judgment for defendant, but the Court of Appeal reversed. *Held*, judgment of the Court of Appeal affirmed; the entry of summary judgment for defendant was error.

(a) The term "discretionary," as used in *Govt.C. 820.2*, refers to basic policy decisions, not to operational decisions, even though the latter may involve the use of discretion (as that term is used in everyday language). (24 C.4th 685.)

(b) With respect to whether the application of a professional duty of care is a basic policy decision or an operational decision, *Tarasoff v. Regents of University of California* (1976) 17 C.3d 425, 551 P.2d 334; 131 C.R. 14, *infra*, §1050, held that a psychologist's decision whether to warn a third person was an operational decision. And the fact that *Govt.C. 855.6* (*supra*, §317) creates immunity for public health officials suggests that providing health services does not constitute "discretion" within the meaning of *Govt.C. 820.2*, because otherwise the immunity set forth in *Govt.C. 855.6* would have been unnecessary. Finally, it has been held that a public employee's initial decision whether to provide professional services involves discretion under *Govt.C. 820.2*, but that once these services are undertaken, the employee is not immune for the negligent performance of duties not amounting to policy or planning decisions. (24 C.4th 686, citing *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, *supra*, §352.)

(c) The same analysis applies to public defenders. Only the initial decision to provide representation is a policy decision covered by *Govt.C. 820.2*; the actual representation, although requiring the exercise of considerable skill and judgment, consists of noncovered operational decisions. (24 C.4th 688.)

(d) Allegations of deficient performance of counsel are also encountered in connection with claims of ineffective

assistance of counsel in violation of the Sixth Amendment, and the standard applied there also applies in civil malpractice actions. Hence, subjecting public defenders to civil tort liability for the same conduct that constitutes ineffective assistance of counsel does not add measurably to the demands already imposed on all criminal defense attorneys or involve an unseemly interference by the judiciary in the policy decisions of a coordinate branch. (24 C.4th 689.)

(e) Plaintiff contended that public defender immunity could be based on the fact that public defenders are often at odds with their clients and thus run a greater risk of being accused of malpractice should they provide zealous representation. This argument is without merit. Both public defenders and private attorneys owe the same duty of care to their clients. If sued personally, public defenders, in the absence of bad faith, may obtain both defense and indemnity from their employers. Finally, a public defender's exposure to liability for malpractice is lessened by the requirement that a defendant in a criminal action must prove actual innocence by a preponderance of the evidence. (24 C.4th 690.)

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C. Public Employees.
3. Dangerous Condition of Public Property.
a. Liability.

5 Witkin Sum. Cal. Law Torts § 359

[§ 359] Liability.

A plaintiff seeking to recover for injuries resulting from a dangerous condition of public property must first establish the *basic elements* of liability, i.e., public property, dangerous condition, foreseeable risk of injury, and proximate causation. (*Govt.C. 840.2*; on elements of governmental liability for dangerous conditions generally, see *supra*, §249 et seq.) The plaintiff must then show *either* of the following:

(1) *Wrongful Act*. That the dangerous condition "was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee" and the employee "had the authority and the funds and other means immediately available to take alternative action which would not have created the dangerous condition." (*Govt.C. 840.2(a)*.)

(2) *Failure To Take Protective Measures*. That the employee "had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for doing so were immediately available to him," and the employee "had actual or constructive notice of the dangerous condition ... a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (*Govt.C. 840.2(b)*.)

An employee has *actual notice* if the employee had "actual personal knowledge of the existence of the condition and knew or should have known of its dangerous character." (*Govt.C. 840.4(a)*.)

An employee has *constructive notice* "only if the plaintiff establishes (1) that the public employee had the authority and it was his responsibility as a public employee to inspect the property of the public entity or to see that inspections were made to determine whether dangerous conditions existed in the public property, (2) that the funds and other means for making such inspections or for seeing that such inspections were made were immediately available to the public employee, and (3) that the dangerous condition had existed for such a period of time and was of such an obvious nature that the public employee, in the exercise of his authority and responsibility with due care, should have discovered the condition and its dangerous character." (*Govt.C. 840.4(b)*.) (See *Govt.C. 840* [except as provided in *Govt.C. 840* et seq., public employee is not liable for injury caused by condition of public property existing because of employee's act or omission within scope of employment]; on governmental liability for dangerous condition of public property generally,

see supra, §249 et seq.)

West's Key Number Digest, States k.112.2(3)

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3. Dangerous Condition of Public Property.
b. Immunities.

5 *Witkin Sum. Cal. Law Torts* § 360

[§ 360] Immunities.

A public employee's specific immunities and defenses in connection with liability for dangerous conditions, generally similar to those of a public entity, relate to the following:

- (1) Advance approval of a reasonable plan. (*Govt.C. 830.6*; see *supra*, §280.)
- (2) Failure to provide traffic signals or devices. (*Govt.C. 830.8*; see *supra*, §264.)
- (3) The effect of weather conditions on the use of streets and highways. (*Govt.C. 831*; see *supra*, §279.)
- (4) Natural conditions of unimproved and unoccupied tidelands, beds of navigable waters, or school lands. (*Govt.C. 831.6*; see *supra*, §256.)
- (5) Improper use of a reservoir, canal, drain, or an unlined flood control channel or adjacent groundwater recharge spreading grounds, except for a concealed trap or attractive nuisance. (*Govt.C. 831.8*; see *supra*, §273.)
- (6) Reasonableness of the act or omission creating the condition or of the action taken to protect against the risk of injury. (*Govt.C. 840.6*; on comparable provision governing public entities, see *Govt.C. 835.4*, *supra*, §272.)
- (7) Protective measures against earth movement. (*Govt.C. 867*; see *supra*, §285.)

The employee has the general statutory immunities (*supra*, §348) and any defenses which would be available to a private person (*supra*, §346).

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C. Public Employees.

4. Police and Correctional Activities.

a. Liabilities.

5 Witkin Sum. Cal. Law Torts § 361

[§ 361] Liabilities.

Liabilities of public employees specifically relating to police and correctional activities, given indirect recognition as exceptions in the immunity sections relating to those activities and generally paralleling liabilities of the public entity (see *supra*, §290), are for the following:

- (1) Negligent or wrongful acts or omissions causing injury to a prisoner. (*Govt.C. 844.6(d).*)
- (2) Dangerous condition of a prison, jail, or other correctional facility. (*Govt.C. 845.2*; see *supra*, §290.)
- (3) Intentional and unjustifiable interference with a prisoner's right to judicial determination of the legality of confinement. (*Govt.C. 845.4*; see *supra*, §306.)
- (4) Failure to furnish medical care to a prisoner known to be in immediate need. (*Govt.C. 845.6*; see *supra*, §295.)

However, litigation regarding police or correctional activities often arises in situations outside the scope of these or other statutory immunities. Where no immunity applies, the public officer is liable, as in other cases, to the same extent as a private individual, for negligent or intentional conduct that results in injury. (See *supra*, §346.) Also, a duty of care may arise from a special relationship between the entity or officer and the victim or a third person. (See *infra*, §291.) (On governmental liability for police and correctional activities generally, see *supra*, §290 et seq.)

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C. Public Employees.

4. Police and Correctional Activities.

b. Immunities.

5 *Witkin Sum. Cal. Law Torts* § 362

[§ 362] Immunities.

Immunities available to public employees engaged in law enforcement and correctional activities parallel those of the public entity (see *supra*, §292 et seq.). They are as follows:

(1) Failure to establish a police department or to provide police protection service. (*Govt.C. 845*; see *supra*, §302.)

(2) Failure to provide a prison, jail, or other correctional facility or sufficient equipment or personnel in that facility, unless a dangerous condition results. (*Govt.C. 845.2*; see *supra*, §302; *73 Harv. L. Rev. 600* [warden not liable for negligent assignment of prisoner to dormitory where fellow inmates murdered him].)

(3) Interference with a prisoner's right to judicial determination of the legality of the confinement, unless intentional and unjustifiable. (*Govt.C. 845.4*; see *supra*, §306.)

(4) Failure to furnish medical care for a prisoner, absent a known immediate need. (*Govt.C. 845.6*; see *supra*, §295.)

(5) Determination to parole or release a prisoner. (*Govt.C. 845.8(a)*; see *supra*, §298; *5 A.L.R.4th 773* [public officer's immunity from liability for injuries caused by negligently released individual].)

(6) Injury caused by an escaping or escaped prisoner or arrested person, or by a person resisting arrest. (*Govt.C. 845.8(b)*; see *supra*, §§296, 297.)

(7) Injury caused by failure to arrest or retain custody. (*Govt.C. 846*; see *supra*, §305.)

The employee also has the general statutory immunities (*supra*, §348) and any defenses that would be available to a private person (*supra*, §346).

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C. Public Employees.
5. Fire Protection.

5 Witkin Sum. Cal. Law Torts § 363

[§ 363] Fire Protection.

(1) *Liabilities*. The only specific liabilities of public employees that are recognized in the provisions governing fire protection activities are for motor vehicle torts under *Veh.C. 17000* et seq. (*Govt.C. 850.4*; see *infra*, §366) and wilful misconduct in transporting or arranging transportation to a doctor or hospital of a person injured by a fire or fire protection operation (*Govt.C. 850.8*). However, the employee is generally liable, as in other cases, to the same extent as a private person for negligent or intentional conduct that results in injury. (See *supra*, §346.)

(2) *Immunities*. The immunities are the same as those of the entity (see *supra*, §310 et seq.):

(a) Injuries received in fighting a fire. (*Govt.C. 850.4*; see *supra*, §311 et seq.)

(b) Failure to establish a fire department or provide fire protection service. (*Govt.C. 850*; see *supra*, §310.)

(c) Failure to provide sufficient personnel, equipment, or facilities. (*Govt.C. 850.2*; see *supra*, §310.)

(d) The condition of equipment, except where a motor vehicle tort is involved. (*Govt.C. 850.4*; see *supra*, §310.)

(e) Transportation to a doctor or hospital of an injured person, absent wilful misconduct. (*Govt.C. 840.8*; see *supra*, §310.)

The employee also has the general statutory immunities (*supra*, §348) and any defenses that would be available to a private person (*supra*, §346). (On governmental liability resulting from fire protection activities generally, see *supra*, §310 et seq.)

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6. Medical, Hospital, and Public Health Activities.
a. Liabilities.

5 Witkin Sum. Cal. Law Torts § 364

[§ 364] Liabilities.

Liabilities of public employees that are recognized in the provisions declaring immunities concerning medical, hospital, and public health activities (see *infra*, §365) are for the following:

(1) Negligent or wrongful acts or omissions causing injury to an inpatient of a mental institution. (*Govt.C. 854.8(d).*)

(2) Intentional and unjustifiable interference with the right of an inmate of a medical facility to judicial determination of the legality of the confinement. (*Govt.C. 855.2*; see *supra*, §316.)

(3) Negligent or wrongful acts in prescribing or administering treatment for mental illness or addiction. (*Govt.C. 855.8(c), (d).*)

(4) Negligent or wrongful acts or omissions in carrying out or failing to carry out (a) a determination to confine or not to confine a person for mental illness or addiction; (b) the terms or conditions of confinement; (c) a determination to parole, grant a leave of absence to, or release a person from confinement. (*Govt.C. 856(c).*)

(5) Failure to admit a person to a public medical facility where this is a mandatory duty under statute or regulation. (*Govt.C. 856.4*; see *supra*, §316.)

(6) Negligence in examination or diagnosis for the purpose of treatment, or negligent injury in the course of an examination. (*Govt.C. 855.6* and Legislative Committee Comment; see *supra*, §316.)

The employee is generally liable, as in other cases, to the same extent as a private person for negligent or intentional conduct that results in injury (*supra*, §346). (On governmental liability for medical, hospital, and public health activities generally, see *supra*, §316 *et seq.*)

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6. Medical, Hospital, and Public Health Activities.
b. Immunities.

5 *Witkin Sum. Cal. Law Torts* § 365

[§ 365] Immunities.

Specific immunities available to public employees engaged in medical, hospital, and public health activities, in part paralleling those of public entities (see *supra*, §317), are as follows:

(1) Interference with a medical facility inmate's right to a judicial determination of the legality of the confinement (unless intentional and unjustifiable and determined to have been illegal). (*Govt.C. 855.2*; see *supra*, §§316, 317.)

(2) Injury caused by a discretionary decision to institute or not to institute quarantine or other disease prevention or control measures, or by an act or omission in carrying out such a decision with due care. (*Govt.C. 855.4*; see *supra*, §317.)

(3) Injury caused by failure to make an adequate physical or mental examination to determine whether a hazard to health or safety exists. (*Govt.C. 855.6*; see *supra*, §§317, 318.)

(4) Injury resulting from diagnosing or failing to diagnose mental illness or addiction, or failing to prescribe for it. (*Govt.C. 855.8(a), (b)*; see *supra*, §317.)

(5) Unless negligent or wrongful, (a) a determination whether to confine a person for mental illness or addiction, the terms of confinement, or whether to parole, grant a leave of absence to, or release such a person, or (b) an act or omission in carrying out this determination. (*Govt.C. 856*; see *supra*, §§317, 319.)

(6) Injury caused by an escaping or escaped person confined for mental illness or addiction, or death or injury suffered by the escaper. (*Govt.C. 856.2*; see *supra*, §§317, 320.)

(7) Failure to admit a person to a medical facility (unless a mandatory duty exists). (*Govt.C. 856.4*; see *supra*, §317.)

(8) Injury caused by an act or omission of a participant in the National Influenza Program of 1976. (*Govt.C. 856.6(a)*; see *supra*, §317.)

The employee also has the general statutory immunities (*supra*, §348) and any defenses that would be available to a private person (*supra*, §346).

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C. Public Employees.
7. Operation of Motor Vehicles.

5 *Witkin Sum. Cal. Law Torts* § 366

[§ 366] Operation of Motor Vehicles.

A public employee operating a motor vehicle is generally liable, as in other cases, to the same extent as a private person for negligent or intentional conduct that results in injury (*supra*, §346).

Drivers of authorized emergency vehicles, when on emergency calls, are exempt from certain speed restrictions and other traffic rules, provided that they sound their sirens "as may be reasonably necessary" and display front red lights as a warning and that due care is exercised. (*Veh.C.* 21055, 21056; see *supra*, §334.) Also, drivers are given complete immunity from liability arising from operation of an emergency vehicle while "responding to an emergency call" or "in the immediate pursuit of an actual or suspected violator of the law," but not when "returning from a fire alarm or other emergency call." (*Veh.C.* 17004; see *supra*, §334.) The public entity, however, may be liable in these circumstances. (See *supra*, §335.) (On cases concerning governmental liability for motor vehicle torts, see *supra*, §331 et seq.)

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C. Public Employees.
8. Improper Expenditure of Public Funds.

5 *Witkin Sum. Cal. Law Torts* § 367

[§ 367] Improper Expenditure of Public Funds.

Stanson v. Mott (1976) 17 C.3d 206, 130 C.R. 697, 551 P.2d 1, involved the basis of liability of an executive officer for improper expenditure of public funds. Plaintiff, in a taxpayer's suit, alleged that defendant, director of the Department of Parks and Recreation, authorized expenditure of public funds to promote the passage of a bond issue to provide for future acquisition of park land and recreational and historical facilities by state and municipal authorities. The complaint sought a personal judgment requiring defendant to repay the funds. The governing statute (*Pub.Res.C. 512*) authorized publications only for the purpose of "disseminating information" regarding a bond issue, rather than for promoting a partisan position. *Held*, judgment for defendant on demurrer reversed.

(a) Expenditures cannot be sustained unless the power is clearly stated, and out-of-state decisions hold that use of public funds for partisan campaign purposes is improper. (17 C.3d 217.) Hence, if plaintiff can prove the allegation of improper campaign expenditures, he is entitled to declaratory or injunctive relief or both. (17 C.3d 222.)

(b) In *Mines v. Del Valle* (1927) 201 C. 273, 257 P. 530, the court held that, in addition, individual public officers were personally liable for the improper expenditures despite their good faith belief in the propriety of their action. This view is no longer sound. The line between proper and improper expenditures is not always clear; and imposition of strict liability on public officials who in good faith, but mistakenly, authorize improper expenditures is incompatible with subsequent legislative developments in related areas, e.g., the indemnification provisions of the *Tort Claims Act*. (17 C.3d 224, 225.) Hence, *Mines* is overruled on this point. (17 C.3d 226.)

(c) The proper standard is not strict liability or fraud, but due care, i.e., "reasonable diligence, in authorizing the expenditure of public funds." Because the complaint did not allege failure to exercise due care, plaintiff should be permitted to amend. (17 C.3d 227.) (See 65 Cal. L. Rev. 482.)

The reasoning and tests of *Stanson v. Mott* were followed in *Miller v. Miller* (1978) 87 C.A.3d 762, 151 C.R. 197, an action challenging expenditure of public funds by the California Commission on the Status of Women. The complaint alleged, and the commission acknowledged, that it was actively involved in the promotion of ratification of the Equal Rights Amendment (see 8 *Summary* (10th), *Constitutional Law*, §762 et seq.). *Held*, summary judgment for defendants reversed. There was a triable issue of fact whether the commission's activities involved improper election campaigning. (87 C.A.3d 767, 772.)

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C. Public Employees.

9. Institution or Prosecution of Judicial or Administrative Proceeding.

5 Witkin Sum. Cal. Law Torts § 368

[§ 368] Institution or Prosecution of Judicial or Administrative Proceeding.

(1) *In General.* A public employee is not liable "for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." (Govt.C. 821.6; see *Brown v. Los Angeles* (1968) 267 C.A.2d 849, 851, 73 C.R. 364 [city was immune under Govt.C. 821.6 from liability for plaintiff's discontinuance of his business pursuant to erroneous notice that business violated zoning ordinance and should be shut down]; *Stearns v. Los Angeles* (1969) 275 C.A.2d 134, 137, 79 C.R. 757 [deputy coroner improperly performed autopsy on plaintiff's wife, resulting in unfounded murder charge against plaintiff]; *Blackburn v. Los Angeles* (1974) 42 C.A.3d 175, 178, 116 C.R. 622 [rejecting constitutional challenge to Govt.C. 821.6]; *Scannell v. Riverside* (1984) 152 C.A.3d 596, 604, 199 C.R. 644 [county detective who prosecuted plaintiff despite previously granting him immunity from prosecution was within Govt.C. 821.6]; *Kemmerer v. Fresno* (1988) 200 C.A.3d 1426, 1436, 246 C.R. 609 [civil service disciplinary proceeding is "administrative proceeding" under Govt.C. 821.6]; *Ronald S. v. San Diego* (1993) 16 C.A.4th 887, 899, 20 C.R.2d 418 [adoption proceedings, being judicial in nature, are covered by Govt.C. 821.6]; *Gensburg v. Miller* (1994) 31 C.A.4th 512, 518, 37 C.R.2d 97, supra, §181 [employees of state and county departments of social services were immune from liability for actions taken in connection with suspension of foster home license]; *Javor v. Taggart* (2002) 98 C.A.4th 795, 807, 120 C.R.2d 174 [employees of Uninsured Employers Fund, in seeking reimbursement from illegally uninsured employers after state pays benefits to injured employee, are within immunity granted by Govt.C. 821.6]; 17 *Santa Clara L. Rev.* 429; 100 *A.L.R.5th* 341 [immunity of law enforcement officer from liability in defamation action]; cf. *Ogborn v. Lancaster* (2002) 101 C.A.4th 448, 462, 124 C.R.2d 238 [where complaint did not allege that public employee acted improperly with respect to proceedings declaring certain property a nuisance, but instead claimed that inhabitants' private belongings were destroyed, there was no Govt.C. 821.6 immunity]; on liability for malicious prosecution generally, see *infra*, §469 et seq.)

Govt.C. 821.6 is given an expansive interpretation to further the rationale of the immunity, i.e., to allow the free exercise of the prosecutor's discretion and to protect against harassment in the performance of duties related to the prosecution process. (*Ingram v. Flippo* (1999) 74 C.A.4th 1280, 1291, 89 C.R.2d 60, 9 *Cal. Proc. (4th)*, *Administrative Proceedings, Supp.*, §25 [statements in press release that district attorney had investigated alleged open meeting violations and that, although no charges were to be filed, there had been some minor violations, were immune as part of prosecution process within meaning of Govt.C. 821.6].)

The immunity is not limited to conduct leading up to the institution of the proceeding, but includes conduct during and after it. (*Alicia T. v. Los Angeles* (1990) 222 C.A.3d 869, 883, 271 C.R. 513; see *Jenkins v. Orange* (1989) 212 C.A.3d 278, 284, 260 C.R. 645 [social worker was immune from liability for negligence both in investigating child abuse report and in weighing and presenting evidence]; *Cappuccio v. Harmon* (1989) 208 C.A.3d 1496, 1499, 257 C.R. 4 [investigating officer who, after prosecution for underweighing squid, published incorrect figures was not liable for defamation].)

Any injury inducing conduct is within the scope of the immunity. Thus, it extends to both discretionary and ministerial acts. (*Kaplan v. LaBarbera* (1997) 58 C.A.4th 175, 180, 67 C.R.2d 903 [public employees were immune for both discretionary and ministerial acts in connection with collecting child support].)

The immunity is not confined to the sorts of proceedings that are the traditional subject of malicious prosecution actions. For example, the immunity has been applied to actions based on the publication of disciplinary actions taken. (See *Citizens Capital Corp. v. Spohn* (1982) 133 C.A.3d 887, 889, 184 C.R. 269 [newspaper publicity of plaintiffs' alleged improper operation of collection agencies].) In *Kayfetz v. California* (1984) 156 C.A.3d 491, 203 C.R. 33, the state Board of Medical Quality Assurance and its diversion program administrator published an official "Action Report" distributed to hospitals and doctors concerning plaintiff's participation in a drug rehabilitation program for impaired physicians. Plaintiff sued the state, alleging that the published report was inaccurate and in violation of promised confidentiality. *Held*, defendants were immune.

(a) *Citizens Capital Corp. v. Spohn*, *supra*, supports this broad application of the immunity statute. Publication of disciplinary action is part of a statutory scheme for enforcement of the *Medical Practice Act*. (156 C.A.3d 497.)

(b) Plaintiff contended that the statute did not apply because the act of which he complained did not arise from institution of a proceeding but rather from an unauthorized publication 5 months after the proceeding was dismissed. But the proceeding was not dismissed at the time of publication; dismissal occurred the following year, after successful rehabilitation. Publication was part of an ongoing proceeding, contemplating continued diversion program participation and eventual dismissal. (156 C.A.3d 498.)

If the action is based on contract, however, the immunity of *Govt.C. 821.6* does not apply. (*Roe v. California* (2001) 94 C.A.4th 64, 69, 113 C.R.2d 900 [action alleging that defendant public entities violated confidentiality clause of settlement agreement terminating disciplinary proceeding against plaintiff].)

(2) *Effect of Misrepresentations*. In *Tur v. Los Angeles* (1996) 51 C.A.4th 897, 59 C.R.2d 470, plaintiff sued defendant public employees for malicious prosecution based on misrepresentations regarding an aviation incident. The trial judge instructed, in accordance with *Govt.C. 822.2* (*supra*, §348), that defendants were immune for misrepresentations made in the scope of their employment, *unless* guilty of actual fraud, corruption, or actual malice (as was the case here). The judge rejected an instruction based on *Govt.C. 821.6* that defendants were immune *even* if they acted maliciously and without probable cause. *Held*, judgment for plaintiff reversed; *Govt.C. 821.6* controls. The source of immunity is *Govt.C. 821.6*, because both that statute and the present action involve malicious prosecution. It thus makes little difference whether a statute (*Govt.C. 822.2*) that is not the source of immunity creates an exception to the general rule of immunity where fraudulent misrepresentations are involved. (51 C.A.4th 901.) In addition, *Govt.C. 822.2* and its companion statute, *Govt.C. 818.8* (*supra*, §241), were enacted to grant qualified immunity for misrepresentations. They are concerned with common law deceit, a wrong that is different from malicious prosecution. (51 C.A.4th 902.)

(3) *Immunity Not Limited to Claims by Target of Proceeding*. In *Amylou R. v. Riverside* (1994) 28 C.A.4th 1205, 34 C.R.2d 319, plaintiff was raped by an individual who also raped and murdered her friend. During the course of the investigation, an antagonistic relationship developed between plaintiff and the investigating officers, and the present action, which included claims for negligent and intentional infliction of emotional distress, followed. *Held*, the officers were immune from liability; *Govt.C. 821.6* bars liability for any injury caused by the prosecution of the prior judicial or

administrative proceeding, even if the person suffering the injury is not the target of that prosecution.

(a) *Govt.C. 821.6* defines claims as to which a public employee is immune on the basis of how they were caused, not on the basis of the identity of the person bringing the claim. Nothing in the language of the statute suggests that immunity be limited to claims made by a target of the former proceeding. (28 C.A.4th 1211.)

(b) Public policy is against limiting the scope of *Govt.C. 821.6*. "That public policy of trying to prevent an officer's decisions from being tainted by his or her concern over the possibility of subsequent claims for damages does not apply solely to claims made by the target of the prior proceeding. Claims made by persons who were injured by the officer's decisions but who were not the actual target of the investigation or prosecution have the same potential to inhibit the officer from following his or her professional judgment and thus to interfere with the evenhanded enforcement of the law." (28 C.A.4th 1213.) (See *Baughman v. California* (1995) 38 C.A.4th 182, 190, 45 C.R.2d 82 [following *Amylou R.* and holding that campus police officers acting under search warrant in investigation of campus computer theft were immune from liability for destruction of floppy disks, even though owner of disks was not target of investigation].)

(4) *Proceedings Under Juvenile Court Law*. Under *Govt.C. 820.21(a)*, the immunity of juvenile court social workers, child protection workers, and other public employees authorized to conduct investigations or proceedings under the Juvenile Court Law (*Welf.C. 200 et seq.*, 10 *Summary* (10th), *Parent and Child*, §440 et seq.) does not extend to the following acts if committed with malice:

- (a) Perjury.
- (b) Fabrication of evidence.
- (c) Failure to disclose known exculpatory evidence.
- (d) Obtaining testimony by duress, fraud, or undue influence.

For this purpose, "malice" means conduct intended to cause injury to the plaintiff or despicable conduct carried on with a wilful and conscious disregard of the rights or safety of others. (*Govt.C. 820.21(a)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Ross v. San Francisco Bay Area Rapid Transit Dist.* (2007) 146 C.A.4th 1507, 1516, 53 C.R.3d 715 [public transit district employees were immune under *Govt.C. 821.6* from liability for claims that they wrongfully initiated and prosecuted administrative proceedings against coemployee]; *Gillan v. San Marino* (2007) 147 C.A.4th 1033, 1047, 55 C.R.3d 158 [city and police officials were immune under *Govt.C. 821.6* from liability for defamation or intentional infliction of emotional distress based on press releases and other public statements made in course of investigation of purported crime; statutory immunity is not limited to claims for malicious prosecution]; *Miller v. Filter* (2007) 150 C.A.4th 652, 666, 58 C.R.3d 671 [de facto deputy district attorney operating under colorable claim of authority has same prosecutorial immunity as de jure deputy district attorney]; *Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 C.A.4th 456, 467, 66 C.R.3d 157 [social worker's decisions relating to investigation of child abuse, removal of minor from home, and determination whether to institute dependency proceedings are prosecutorial or quasi-prosecutorial decisions subject to immunity under *Govt.C. 821.6*; immunity covers not just act of filing criminal complaint, but also other prosecutorial or quasi-prosecutorial functions such as weighing and presenting evidence when rendering decision whether to proceed with litigation]; *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)* (2007) 157 C.A.4th 1056, 1066, 69 C.R.3d 176 [constitutional right to privacy does not limit scope of immunity under *Govt.C. 821.6*]. *Ingram case*:

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §31.

Expansive interpretation of statute: See *Gillan v. Marino*, *supra*, 147 C.A.4th 1048 [*Govt.C. 821.6* is broadly construed to protect public employees performing prosecutorial duties from threat of harassment through civil suits];

Miller v. Filter, *supra*, 150 C.A.4th 668, quoting *Ingram v. Flippo* (1999) 74 C.A.4th 1280, 89 C.R.2d 60, text, p. 580.

Preparatory activities: See *Richards v. Department of Alcoholic Beverage Control* (2006) 139 C.A.4th 304, 317, 42 C.R.3d 782 ["administrative proceeding" in Govt.C. 821.6 is liberally construed to include investigatory and other activities in preparation for more formal proceedings]; *Gillan v. Marino*, *supra* [prior investigation is part of prosecution of judicial proceeding for purposes of Govt.C. 821.6, even if authorities later decide not to file charges]; *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)*, *supra*, 157 C.A.4th 1062 [videotaping teacher at her wedding and honeymoon during investigation of teacher's workers' compensation claim was within scope of school district employees' duties for purpose of Govt.C. 821.6 immunity].



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CHAPTER IX - Torts

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C. Public Employees.
10. False Arrest or Imprisonment.

5 Witkin Sum. Cal. Law Torts § 369

[§ 369] False Arrest or Imprisonment.

(1) *No Immunity.* While a public employee is not liable for an act or omission, exercising due care, in executing or enforcing the law (supra, §348), nothing in this immunity "exonerates a public employee from liability for false arrest or false imprisonment." (*Govt.C. 820.4.*) Also, the immunity for institution or prosecution of a judicial or administrative proceeding (see *Govt.C. 821.6*, supra, §348) is for malicious prosecution, *not* false imprisonment. (*Sullivan v. Los Angeles* (1974) 12 C.3d 710, 719, 722, 117 C.R. 241, 527 P.2d 865, supra, §246, disapproving contrary language in *Herndon v. Marin* (1972) 25 C.A.3d 933, 935, 102 C.R. 221; *Scannell v. Riverside* (1984) 152 C.A.3d 596, 605, 199 C.R. 644.)

In *McKay v. San Diego* (1980) 111 C.A.3d 251, 168 C.R. 442, the opinion states that "there is no false arrest governmental immunity for a public employee who maliciously arrests and imprisons another by personally serving an arrest warrant issued solely on information deliberately falsified by the arresting officer himself." (111 C.A.3d 253.) "It would be absurd indeed to hold [the arresting officer], and vicariously [the county], liable for false arrest and imprisonment had [the arresting officer] acted with malice in serving the warrant without participating in the acts leading up to the issuance of the warrant, but grant immunity when, in addition to the foregoing, he also devised and carried out the scheme outlined." (111 C.A.3d 257.)

The causes of action of false imprisonment and malicious prosecution, although distinct, are not necessarily mutually exclusive; a cause of action for false arrest or imprisonment may lie where the same facts also support a cause of action for malicious prosecution. Under the facts of a given case, the distinction between the two causes of action--and with it, the existence of statutory immunity--may depend on whether the defendant charged with maliciously instituting the prosecution personally also made the arrest. (*Harden v. San Francisco Bay Area Rapid Transit Dist.* (1989) 215 C.A.3d 7, 17, 16, 263 C.R. 549 [holding, however, that immunity was unavailable where public employee took very active role in securing arrest warrant and participated in having it served by fellow police officer].)

(2) *Measure of Damages Where Both False Arrest and Malicious Prosecution Are Involved.* False arrest leading to malicious prosecution raises an issue of the measure of damages. In *Jackson v. San Diego* (1981) 121 C.A.3d 579, 175 C.R. 395, plaintiff was arrested without a warrant by defendant city's police officer for murder and robbery; the grand jury returned an indictment, and he was tried, convicted, and sentenced to state prison. During his incarceration another person confessed to the crime, was tried and convicted, and the judgment against plaintiff was vacated. Plaintiff, having

spent 10 months in custody, sued for damages for false imprisonment and received a jury award of \$ 280,000. *Held*, judgment reversed for retrial on issue of damages. If the grand jury had voted not to indict, damages for false arrest would have been limited to the period from arrest to release. When the grand jury did indict, however, lawful process commenced, and immunity under *Govt.C. 821.6* precluded any action for malicious prosecution. (121 C.A.3d 587.) The Legislature's intent in providing liability for false arrest or imprisonment and immunity for malicious prosecution was to place a ceiling on damages for false arrest or imprisonment, limiting those damages to the period of incarceration beginning with the false arrest, but ending when the lawful process begins. (121 C.A.3d 582, 588.)

This damages issue and the holding in *Jackson* were examined by the California Supreme Court in *Asgari v. Los Angeles* (1997) 15 C.4th 744, 63 C.R.2d 842, 937 P.2d 273. Plaintiff was arrested for suspicion of a drug offense as a result of an undercover police operation, was placed in jail, and 7 days later was officially charged with the sale of heroin. After remaining in jail for 7 months, plaintiff was tried and acquitted. He then instituted the present action against defendant police officer for false arrest and imprisonment and related offenses. The trial judge, in accordance with a federal decision, instructed the jury that liability for false arrest could include damages sustained by the arrestee after the filing of formal charges, if there was nothing to break the chain of causation between the false arrest and the damages. Examples of acts that would not break this chain of causation might include causing the district attorney to act contrary to his independent judgment or presenting the district attorney with information known by defendant to be false. The jury awarded plaintiff substantial damages. The Court of Appeal affirmed the instruction and the false arrest damages. *Held*, Court of Appeal judgment reversed insofar as it approved the principle that damages for false arrest could include harm suffered after the formal charge.

(a) A police officer is liable for false arrest under *Govt.C. 820.4*, but is immune from liability for malicious prosecution under *Govt.C. 821.6*. This scheme recognizes the basic differences: with respect to false arrest, there is no legal process, and the interest protected is freedom from restraint of movement, while malicious prosecution is based on lawful process, and the interest served is freedom from unjustifiable litigation. (15 C.4th 754.) California law is thus statutory, and, in assessing false arrest damages, focuses on the nature of the offense. Here, plaintiff's false imprisonment ended when he was arraigned on the felony complaint 7 days after his arrest. In other words, "the Legislature's imposition of liability when a police officer causes a suspect to be confined unlawfully (false arrest), coupled with the Legislature's grant of absolute immunity when a police officer, maliciously and without probable cause, causes a suspect to be confined through the initiation of lawful process (malicious prosecution), evidences a legislative intent to shield police officers from liability for damages that are attributable to a suspect's incarceration after the institution of lawful process." (15 C.4th 758, citing *Jackson*.)

(b) Federal law is different in two major respects. The question of immunity for false arrest and subsequent acts is based on the common law, rather than on statute, and the focus is on the nature of the duties involved, rather than the nature of the crime. These differences mean that the factfinder, in assessing false arrest damages, may consider all acts *proximately caused* by the false arrest, even if they constitute malicious prosecution. (15 C.4th 755.) In California, once the plaintiff is held under lawful process (malicious prosecution), the false arrest as well as the assessment of damages ends. (15 C.4th 757.)

(c) *Jackson*, while recognizing that police officers are shielded from liability for damages attributable to a suspect's incarceration after institution of lawful process, held that defendant in that case could recover damages for false arrest suffered during the period from his arrest to the date he was rearrested pursuant to his grand jury indictment. This latter holding was based on *Gill v. Epstein* (1965) 62 C.2d 611, 44 C.R. 45, 401 P.2d 397, *infra*, §1553, in which the court held that indictment on formal charges was an insufficient superseding cause to break the chain of causation between false arrest and the damages sustained. However, "we decline to follow the decision in *Gill v. Epstein* ... and disapprove the decision in *Jackson v. City of San Diego* ... to the extent they hold that the recovery of damages for post-arraignment confinement is permitted." (15 C.4th 758, footnote 10.)

(3) *Measure of Damages Where Both False Arrest and Federal Civil Rights Act Violation Are Involved.* In *Los Angeles v. Superior Court (Valentin)* (2000) 78 C.A.4th 212, 92 C.R.2d 668, plaintiffs brought an action for false arrest

and false imprisonment, as well as for violation of their federal civil rights under 42 U.S.C., §1983. Generally, the court followed *Asgari*, but added the following qualifications:

(a) Under their state law claims, plaintiffs were entitled to all damages attributable to injuries arising from the false arrest and false imprisonment that preceded arraignment and the filing of the complaint. However, plaintiffs were also entitled to recover for damage suffered beyond the filing date, if the damages were caused by *prefiling* conduct. *Asgari* and other cases did not intend to arbitrarily cut off compensation for continuing injuries caused by false arrest and false imprisonment once the plaintiff is released from custody or indicted. (78 C.A.4th 218.)

(b) Under federal law, the plaintiff is generally limited to recovery for injuries caused prior to the filing of a criminal complaint, not because police officers are immune for malicious prosecution, but because it is presumed that the prosecutor filing the complaint exercises independent judgment and thus breaks the chain of causation so that further injuries from incarceration are not attributable to the false arrest or false imprisonment. Thus, the plaintiffs here can recover for injuries arising after the filing of the criminal complaint but attributable to prefiling conduct, if they can show that the complaint was not the product of the prosecutor's independent conduct. In addition, plaintiffs can claim damages resulting from *posfiling* conduct, because under federal law, plaintiffs can recover for what amounts to malicious prosecution (subject again to the condition that the decision to file charges not be based on independent judgment). (78 C.A.4th 224.)

(c) Plaintiffs who have been falsely arrested and imprisoned by employees of a public entity are entitled to the same damages in a 42 U.S.C., §1983 action filed in a California court as they would receive in such an action filed in federal court. Thus, the ceiling on malicious prosecution damages imposed by Govt.C. 821.6 (supra, §368) is not enforceable in a state action brought under 42 U.S.C., §1983. (78 C.A.4th 227.) (On liability under federal civil rights legislation generally, see 8 Summary (10th), *Constitutional Law*, §816 et seq.; 3 Cal. Proc. (4th), *Actions*, §236.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *No Immunity.*

Statutory immunity for institution or prosecution of judicial or administrative proceeding does not apply: See *Gillan v. San Marino* (2007) 147 C.A.4th 1033, 1048, 55 C.R.3d 158 [Govt.C. 821.6 (see text, §368) does not provide immunity from liability to person detained without probable cause].(3) *Measure of Damages Where Both False Arrest and Federal Civil Rights Act Violation Are Involved.* *Manta Management Corp. v. San Bernardino* (2008) 43 C.4th 400, 412, 75 C.R.3d 353, 181 P.3d 159, 8 Summary (10th), *Constitutional Law*, Supp., §830A, disapproved of *Gill v. Epstein* (1965) 62 C.2d 611, 44 C.R. 45, 401 P.2d 397, text, p. 585, to the extent it is contrary to the rule that, where a court is provided with appropriate facts to adjudicate a motion for a preliminary injunction or a motion for a stay pending appeal, the court's intervening exercise of independent judgment breaks the chain of causation for purposes of liability under 42 U.S.C., §1983. *Cross-Reference:* 3 Cal. Proc. (5th), *Actions*, §245.

(4) *(New) Damages Are Limited to Period of Arrest or Imprisonment.* Although a public employee (see Govt.C. 820.4) and his or her public entity employer (see Govt.C. 815(a)) may be liable for false arrest or imprisonment, "the recoverable damages are limited to damages for injuries caused by conduct that occurred during the period of false imprisonment." Govt.C. 821.6 (see text, §368) precludes damages for injuries caused by conduct that occurs after the false imprisonment has ended, even if that conduct is causally related to the false imprisonment. (*Gillan v. San Marino*, supra, 147 C.A.4th 1049 [subsequent press releases and other public statements; citing *Asgari v. Los Angeles* (1997) 15 C.4th 744, 63 C.R.2d 842, 937 P.2d 273, text, p. 584].)



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C. Public Employees.

11. Procedure.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 370

[§ 370] In General.

A public employee may have a right to a defense by (see *infra*, §371 et seq.) and indemnification from (see *infra*, §375 et seq.) the public entity. Other important procedural aspects of liability of public employees have been covered elsewhere:

(1) The abolition of the requirement of filing a claim against the public employee, and the effect of the claims requirement for action against the public entity. (*Govt.C. 950* et seq.; see 3 *Cal. Proc.*, 4th, *Actions*, §§241, 242.)

(2) The statute of limitations on actions after rejection of claim or excuse for filing claim. (*Govt.C. 950.6*; see 3 *Cal. Proc.*, 4th, *Actions*, §632.)

(3) Payment of judgments. (*Govt.C. 965* et seq.; see 8 *Cal. Proc.*, 4th, *Enforcement of Judgment*, §§400, 401.)

(4) Specificity of a complaint against a publicly elected or appointed official. (*Govt.C. 951*; see 4 *Cal. Proc.* (4th), *Pleading*, Supp., §584.)

Liability on an official bond, and the procedure to enforce it, are set forth in *C.C.P. 995.810* et seq. and *996.410* et seq.

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Abolition of claim filing requirement:*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §§251, 252.

(2) *Statute of limitations:*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §693.

(3) Payment of judgments:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §429 et seq.

(4) Specificity of complaint against public official:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §624.



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C. Public Employees.

11. Procedure.

b. Defense by Public Entity.

1. Employee's Right to Defense.

5 *Witkin Sum. Cal. Law Torts* § 371

[§ 371] Employee's Right to Defense.

Generally, a public entity must, on request of an employee or former employee, provide for the defense of a civil action or proceeding (or cross-action) brought against the employee, in the employee's official or individual capacity or both, "on account of an act or omission in the scope of his employment." (*Govt.C.* 995.) (See *Sinclair v. Arnebergh* (1964) 224 C.A.2d 595, 597, 36 C.R. 810 [Los Angeles city attorney properly represented police officer sued in civil tort action arising out of employment]; C.E.B., 1 Government Tort Liability Practice 4th, §4.2 et seq.; for exceptions to requirement, see *infra*, §§372, 373; on right to defense of witness who testifies on behalf of public entity, see *supra*, §236.)

If a proper request is refused and the employee retains his or her own counsel, the employee may recover reasonable attorneys' fees, costs, and expenses from the entity. (*Govt.C.* 996.4.) This remedy is not exclusive; i.e., it does not deprive the employee of the right to mandamus to compel the entity to perform its mandatory duty (*Govt.C.* 996.4), and it is in addition to any other right the employee may have by contract, statute, or regulation (*Govt.C.* 996.6). The employee may recover attorneys' fees, costs, and expenses only if the proceeding arose out of an act or omission in the scope of employment. (*Farmers Ins. Group v. Santa Clara* (1995) 11 C.4th 992, 1007, 47 C.R.2d 478, 906 P.2d 440, *supra*, §240 [county was not liable to deputy sheriff and his insurer under *Govt.C.* 996.4 for costs incurred in defending sexual harassment action against deputy where his conduct was outside scope of employment]; *San Diego Police Officers Assn. v. San Diego* (1994) 29 C.A.4th 1736, 1741, 35 C.R.2d 253 [city was not liable to police officer under *Govt.C.* 996.4 for costs incurred in defending action by informal citizen informant for sexual battery based on acts occurring in officer's condominium while officer was off duty].)

In *Zamudio v. California* (1998) 62 C.A.4th 673, 73 C.R.2d 79, plaintiff, an officer of the Youth Authority and a union representative, was sued for allowing other employees at a youth camp to violate the terms of the union contract with the state regarding sex discrimination. *Held*, *Govt.C.* 995 did not obligate defendant state to defend the suit, because the misconduct alleged related to plaintiff's duties as a union representative and not as an employee.

(a) Although plaintiff was performing youth counselor duties at the time of the wrongful conduct for which he was sued, the lawsuit was not brought against him "on account of" an act or omission in the scope of his employment. The

alleged wrongful conduct had nothing to do with his duties as a youth counselor. (62 C.A.4th 678.)

(b) Plaintiff argued that his union duties were themselves within the scope of employment. This position is unpersuasive. Although the employees had the right to form a union, they did not have to do so, and defendant employer, as a state entity, had nothing to do with the union's existence. Defendant and the union were separate entities, with separate functions, and defendant had no control over the existence or operation of the union. (62 C.A.4th 679.)

(c) Imposing vicarious liability on defendant would not further the policy justifications of the respondeat superior doctrine. Defendant could do nothing to guard against lax union representation; the union, with its own structure, budget, and employees, was the proper vicarious party in this situation; the enterprise that gave rise to the alleged injuries was the union, and its members were the ones who benefit from the union's existence. It is thus equitable that the union bear the cost of any losses to members (and associated defense costs). (62 C.A.4th 681.)

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11. Procedure.

b. Defense by Public Entity.

2. When Defense May Be Refused.

5 *Witkin Sum. Cal. Law Torts* § 372

[§ 372] When Defense May Be Refused.

A public entity may refuse to provide for the defense of an action or proceeding against an employee or former employee if it determines any of the following:

(1) The act or omission was "not within the scope of his or her employment." (*Govt.C. 995.2(a)(1)*; see *Stone v. Regents of Univ. of Calif.* (1999) 77 C.A.4th 736, 747, 92 C.R.2d 94 [holding that there was substantial evidence, at time public agency was asked to provide defense, to support agency's decision that physician in fertility clinic was involved in "egg stealing" and that this conduct was beyond physician's scope of employment].)

(2) The employee acted or failed to act because of "actual fraud, corruption, or actual malice." (*Govt.C. 995.2(a)(2)*.)

(3) The defense would create "a specific conflict of interest" between the employee and the entity. (*Govt.C. 995.2(a)(3)*; see *Stewart v. Pismo Beach* (1995) 35 C.A.4th 1600, 1605, 42 C.R.2d 382 [city had right to withdraw defense for former city police officer in federal civil rights action against it and officer where officer's agreement to testify for federal plaintiffs in exchange for dismissal of action against him created actual and specific conflict of interest between officer and city within meaning of *Govt.C. 995.2(a)(3)*].)

If the employee requests in writing that the public entity provide for a defense, the entity must, within 20 days, inform the employee whether it will provide a defense, and the reason for refusal to provide a defense. (*Govt.C. 995.2(b)*.) If an actual and specific conflict of interest becomes apparent subsequent to the 20-day period following the employee's written request for defense, the public entity may refuse to provide further defense to the employee, provided that the employee is informed of the reason. (*Govt.C. 995.2(c)*.)

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11. Procedure.

b. Defense by Public Entity.

3. When Defense Is Optional.

5 *Witkin Sum. Cal. Law Torts* § 373

[§ 373] When Defense Is Optional.

A public entity may, but is not required to, provide for the defense of the following actions or proceedings against an employee or former employee:

(1) An action or proceeding *by the entity* to remove, suspend, or otherwise *penalize* the employee, or an appeal to a court from an administrative proceeding brought for that purpose. (*Govt.C. 995.4(a).*)

(2) An action or proceeding brought *by the entity* against the employee in his or her *individual capacity*, or an appeal from that action or proceeding. (*Govt.C. 995.4(b).*)

(3) An *administrative* proceeding or *criminal* proceeding (including a proceeding to remove an officer; see 2 *Cal. Crim. Law* (3d), *Crimes Against Governmental Authority*, §109 et seq.) brought against the employee on account of an act or omission in the scope of employment if it determines (a) that this defense would be in the best interest of the entity and (b) that the employee acted or failed to act in good faith, without actual malice, and in the apparent interests of the entity. (*Govt.C. 995.6, 995.8*; see *Los Angeles Police Protective League v. Los Angeles* (1994) 27 *C.A.4th* 168, 173, 32 *C.R.2d* 574, 3 *Summary* (10th), *Agency and Employment*, §124 [under *Govt.C. 995.8*, which prevails over *Lab. C. 2802* (general right of agent to indemnification for expenditures or losses discharging duties), city had no duty to indemnify police officers for costs incurred in successful criminal defense].)

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11. Procedure.

b. Defense by Public Entity.

4. Methods of Providing Defense.

5 Witkin Sum. Cal. Law Torts § 374

[§ 374] Methods of Providing Defense.

(1) *In General*. The entity may use its own attorney, employ other counsel, or purchase insurance requiring the insurer to provide the defense. The expense is a proper charge against the entity, and it has no right to recover it from the employee or former employee defended. (*Govt.C.* 996; see 71 *A.L.R.3d* 6 [validity and construction of statutes authorizing or requiring procurement of liability insurance covering public employees].)

(2) *No Duty To Provide Independent Counsel*. *Laws v. San Diego* (1990) 219 *C.A.3d* 189, 267 *C.R.* 921, involved an action against a county sheriff's department and many of its employees for both compensatory and punitive damages on theories of police misconduct. The court rejected the employees' claim that a conflict of interest with the county required it to provide them with independent counsel on the model established in insurance cases by *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc.* (1984) 162 *C.A.3d* 358, 208 *C.R.* 494, 2 *Summary* (10th), *Insurance*, §287. "We have examined [these] claims in light of the extensive statutory scheme governing the indemnification and defense of public employees ... and in light of the *Cumis* analysis, and have concluded the statutory scheme adequately protects the rights of public employees to a defense and indemnification in such cases so that there is no room and no need for a judicially declared right to independent counsel of the *Cumis* variety. So broad an extension of existing law would be a matter for the Legislature, not this court." (219 *C.A.3d* 192.) (See *Huntington Beach v. Petersen Law Firm* (2002) 95 *C.A.4th* 562, 566, 115 *C.R.2d* 568 [even assuming that there is actual or potential conflict of interest, public entity cannot be forced to provide separate defense for its employees; relying on *Laws v. San Diego*].)

SUPPLEMENT: [This section is current through the latest supplement]



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11. Procedure.

c. Indemnification of Employee.

1. In General.

5 *Witkin Sum. Cal. Law Torts* § 375

[§ 375] In General.

(1) *Duty To Pay Judgment or Reimburse Employee.* If the employee or former employee makes a written request for defense not less than 10 days before trial, and reasonably cooperates in good faith in the defense, the public entity must pay any judgment or any compromise of the claim or action to which it has agreed, whether or not it conducts the defense, unless it reserves its rights. (*Govt.C. 825(a)*; see *C.E.B.*, 1 *Government Tort Liability Practice* 4th, §4.14 et seq.; 71 *A.L.R.3d* 90 [validity and construction of statute authorizing or requiring indemnification of public employee for liability arising out of performance of duties]; 47 *A.L.R.5th* 553 [reimbursement of legal fees incurred in defending action against public official]; on right to indemnification of witness who testifies on behalf of public entity, see *supra*, §236.) With exceptions for serious misconduct and failure to cooperate, if the entity pays the claim or judgment against itself or the employee, it cannot claim indemnity from the employee. (*Govt.C. 825.4*.) And an employee who pays the claim or judgment or any portion of it may ordinarily recover the amount paid from the entity. (*Govt.C. 825.2(a)*; see *Govt.C. 996.4*, *supra*, §371 [indemnification for attorneys' fees, costs, and expenses where entity refuses proper request for defense]; on controlling effect of memorandum of understanding, see *Govt.C. 825(c)*, *825.2(c)*, *825.6(d)*; on indemnification by state of health care providers, see *Govt.C. 827*.)

The right of indemnity applies to actions brought under the federal Civil Rights Act. (*Williams v. Horvath* (1976) 16 *C.3d* 834, 847, 129 *C.R.* 453, 548 *P.2d* 1125; on actions under federal Civil Rights Act generally, see 8 *Summary* (10th), *Constitutional Law*, §816 et seq.; 3 *Cal. Proc.* (4th), *Actions*, §236.)

(2) *Optional Payment or Indemnification.* Generally, with respect to injuries to prisoners (*supra*, §361) or inpatients of mental institutions (*supra*, §364), a public entity "may but is not required to indemnify any public employee, in any case where the public entity is immune from liability." However, it must pay a judgment or settlement for medical malpractice by any employee "lawfully engaged in the practice of one of the healing arts." (*Govt.C. 844.6(d)*, *854.8(d)*.)

(3) *Improper Conduct by Employee.* Indemnity is unavailable where the employee or former employee acted or failed to act because of actual fraud, corruption, or actual malice, or wilfully failed or refused to conduct his or her defense in good faith, or failed to reasonably cooperate in good faith in the defense conducted by the entity. (*Govt.C. 825*, *825.2(b)*, *825.6(a)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Duty To Pay Judgment or Reimburse Employee.* *Civil rights actions:*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §245.



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2. Employee Must Act Within Scope of Employment.

5 Witkin Sum. Cal. Law Torts § 376

[§ 376] Employee Must Act Within Scope of Employment.

For the entity's duty to indemnify to arise, the claim against the employee must arise from an act or omission occurring within the scope of employment. (*Govt.C. 825(a)*, 825.2; see *Farmers Ins. Group v. Santa Clara* (1995) 11 C.4th 992, 1007, 47 C.R.2d 478, 906 P.2d 440, supra, §240 [county was not required to indemnify deputy sheriff and his insurer for insurer's payments in settlement of action against deputy sheriff for sexual harassment, where his conduct was outside scope of employment].)

In *Henriksen v. Rialto* (1993) 20 C.A.4th 1612, 25 C.R.2d 308, M, a police officer, sued fellow officer H and the city employing them for negligence after H's service revolver accidentally discharged and wounded M while both officers were socializing off duty. H answered M's complaint, asserting that H was acting within the scope of his employment, and that if he were found to be negligent, the city should be held responsible under the doctrine of *respondeat superior*. H also cross-complained against the city under *Govt.C. 825(a)* and 995 et seq. (supra, §371 et seq.) for indemnification of damages and cost of suit. The trial judge granted summary judgment for the city on the cross-complaint, ruling that H was not acting within the scope of his employment at the time that M was injured. *Held*, affirmed.

(a) "We recognize that under respondeat superior an employer may be held directly liable for the acts of an employee under a theory of vicarious liability, while under the statutes at issue in this case an employer may be required to indemnify an employee for a judgment arising out of the employee's acts; the two doctrines are conceptually and procedurally distinct. ... In the present case, however, the similarities between the two doctrines are more significant than the differences. ... The critical issue under the indemnification statutes is whether the employee's actions, which resulted in the injury for which the indemnification is sought, occurred within the scope of employment." Analysis of this issue under a theory of respondeat superior, the analysis is equally applicable to the indemnification issue here. (20 C.A.4th 1617, footnote 2.)

(b) None of the factors deemed critical in relevant cases were present here: "[T]he incident did not occur during working hours, was not accomplished by use of [H's] authority as a police officer, did not occur in the course of acts that [H] was carrying out under his employer's instructions or on his employer's behalf. The injury to [M] did not occur

after [H] had drunk alcohol provided by the employer or permitted by the employer on the employer's premises. Even the relationship between [H] and [M] predated [H's] employment by many years and did not arise out of the employment relationship." (20 C.A.4th 1619, 1620.)

(c) The fact that the city expected the loaded weapon to be on M's person while off duty so that he could respond to emergencies was of no import. A weapon should be treated like another potentially dangerous instrumentality, i.e., the automobile, wherein the employee must be driving it on employer business and not for his own benefit before the employer is liable for an accident resulting from its operation. (20 C.A.4th 1620, 1621.)

(d) Moreover, the policy factors underlying the doctrine of respondeat superior listed in *Mary M. v. Los Angeles* (1991) 54 C.3d 202, 285 C.R. 99, 814 P.2d 1341, supra, §240, i.e., the prevention of recurrence of the tortious conduct, compensation for the victim, and spreading the risk, do not compel a different result. Officers themselves, when they make the decision to socialize after hours, are the ones in a position to take the necessary safeguards to mitigate any increased risk, and if they fail to do so, they, not the public, must bear the loss. (20 C.A.4th 1621, 1622.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Where Entity Fails To Defend or Defends Under Reservation of Rights.

5 Witkin Sum. Cal. Law Torts § 377

[§ 377] Where Entity Fails To Defend or Defends Under Reservation of Rights.

If the public entity did not conduct the employee's defense against the action or claim, or conducted the defense pursuant to an agreement with the employee reserving the rights of the public entity against the employee, an employee paying a claim or judgment may recover from the entity "only if he establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity and the public entity fails to establish that he acted or failed to act because of actual fraud, corruption or actual malice or that he willfully failed or refused to conduct the defense of the claim or action in good faith or to reasonably cooperate in good faith in the defense conducted by the public entity." (*Govt.C. 825.2(b).*)

In *Rivas v. Kerman* (1992) 10 C.A.4th 1110, 13 C.R.2d 147, defendant city refused to defend O, one of its police officers, in an action instituted against him by F and R alleging that O had shot F without justification. Defendant's refusal to defend was based on claims that, at the time of the shooting, O was acting with fraud, corruption, or malice and not within the scope of his employment. O agreed to a stipulated judgment for F and R of \$ 5,825,000, based on agreements assigning to them his claim against defendant in return for their promise not to execute on the judgment. The three parties then brought the present action against defendant, alleging that *Govt.C. 825(a)* (*supra*, §375) required defendant to pay the stipulated judgment on O's behalf. *Held*, judgment for defendant on demurrer affirmed.

(a) *Basis of decision.* The trial judge sustained defendant's demurrer on the ground that the stipulated judgment was not a "judgment" within the meaning of *Govt.C. 825(a)*. But the relevant question, and the only one decided here, is whether *Govt.C. 825(a)* is even applicable when the public entity has declined to provide a defense for an employee or former employee. The holding here on appeal is that *Govt.C. 825(a)* applies only where the public entity provides a defense for the employee. (10 C.A.4th 1116.)

(b) *Construction of Govt.C. 825(a).*

(1) The first paragraph of *Govt.C. 825(a)* requires the employer to pay a judgment if the employee requests a defense not less than 10 days before the trial date and cooperates in good faith in the defense. From the use of the word "cooperates" it is clear that the public entity must agree to provide the defense. If the statute intended to provide

indemnity regardless of whether the public entity acceded to the employee's request for defense, some indication of this intention would be present. None is provided, and it is implicit in paragraph one that "the defense" in which the employee must cooperate is one that the public entity provided, and not one that the employee provided on his or her own after refusal by the public entity. (10 C.A.4th 1116.)

(2) The introductory phrase of the second paragraph of *Govt.C. 825(a)*, which is basically a restatement of the first paragraph, *explicitly* states the statute applies where "the public entity conducts the defense." Plaintiffs' argument that paragraph two refers only to the situation in which the entity provides the defense under a reservation of rights is untenable; because the remainder of paragraph two concerns the situation in which defense is provided under a reservation of rights, the introductory clause would be mere surplusage if it too were interpreted as applying only in the reservation of rights situation. (10 C.A.4th 1117.)

(c) *Relationship between Govt.C. 825 and 825.2.*

(1) *Govt.C. 825.2(b)* provides that when the public entity defends under a reservation of rights, the employee may not recover if the entity establishes that the employee failed to "reasonably cooperate in good faith in the defense conducted by the public entity." Because *Govt.C. 825* and *825.2* are part of one comprehensive statutory framework, the phrase "the defense" should be construed in *Govt.C. 825* to have the same meaning as that explicitly given it by the Legislature in *Govt.C. 825.2*. (10 C.A.4th 1117.)

(2) *Govt.C. 825.2(b)* not only deals with the situation where the public entity defends under a reservation of rights, but also deals with the situation where the entity does not conduct the defense. In either situation, it provides that the employee is entitled to indemnity only if the employee establishes that he or she acted within the scope of employment and the employer fails to establish either that the employee acted because of actual fraud or malice or that the employee refused to conduct the defense in good faith. Hence, to hold that *Govt.C. 825* applies even if the public entity did not defend would allow employees to circumvent the protections for public entities contained in *Govt.C. 825.2(b)*. (10 C.A.4th 1119.)

(3) The legislative history of the 1972 amendments to *Govt.C. 825* and *825.2*, which added the requirement of good faith cooperation in the defense, shows that the Legislature intended a public entity to be required to indemnify an employee if (a) liability arose out of the scope of employment; (b) liability was not the result of the employee's corruption or actual fraud or malice; and (c) the employee presented a good faith defense against liability or cooperated with the entity's presentation of defense. (10 C.A.4th 1119.)

(4) *Govt.C. 825.2(a)* (*supra*, §375) provides that if a public employee *pays* any claim or judgment against the employee that the public entity is required to pay under *Govt.C. 825*, the employee is entitled to recover the amount of the payment from the entity if he or she satisfies the requirements of *Govt.C. 825.2(b)*. To require payment by the employee before his or her right to recover arises would (a) be contrary to the legislative intent by imposing a fourth requirement not intended by the Legislature, and (b) cause many employees to bankrupt themselves before triggering any duty on the part of the entity to reimburse them for their losses. Hence, the correct interpretation is that if judgment is entered against the employee after the entity declined to defend, and the employee subsequently satisfies the requirements of *Govt.C. 825.2(b)*, he or she will be held harmless by the entity. (10 C.A.4th 1120.)

(d) *Public policy considerations.*

(1) "If [*Govt.C. 825*] were interpreted to include situations in which the public entity declined an employee's request for defense, the public entity would have no protection against an employee's stipulated judgment and would be required to pay such a judgment in full even though the issue of whether the employee acted with fraud or malice or whether the employee was acting within the scope of his or her employment had never been determined. In fact, the public entity could not even contest the amount of damages to which the employee and the victim agreed. Obviously, such an interpretation invites fraud and/or collusion between the employee and the alleged victim. Therefore, if [*Govt.C.*

825] were interpreted to apply to situations in which the public entity did not defend the employee, public entities would be forced to protect themselves from potentially fraudulent or collusive situations by providing a defense in all cases, presumably under a reservation of rights, regardless of the merits." (10 C.A.4th 1122.)

(2) Plaintiffs admit that their interpretation of *Govt.C. 825(a)* requires such an outcome, but argue that defendant could have protected itself from having to pay the judgment by providing a defense. Were this position adopted, it would result in a de facto repeal of *Govt.C. 995.2*, which sets forth the situations in which a public entity may refuse to provide a defense (see *supra*, §372). And there is nothing in *Govt.C. 825(a)* indicating that it was intended to limit or repeal *Govt.C. 995.2*. (10 C.A.4th 1123.)

(3) Plaintiffs also argued that the interpretation adopted here means that a public entity can always avoid being compelled to pay a judgment on behalf of its employee, because it can, with impunity, refuse to defend the employee. This argument is without merit. *Govt.C. 825.2* protects employees in this situation by ensuring that they will be held harmless provided they are able to demonstrate they were acting within the scope of their employment at the time of the incident in question. It is plaintiffs' "interpretation that works a hardship as it would require a public entity to provide a defense in every case, regardless of whether the evidence overwhelmingly supports a conclusion the employee acted outside the scope of his employ, fraudulently or with actual malice towards the victim." (10 C.A.4th 1123.) (See *Johnson v. Fresno (2003) 111 C.A.4th 1087, 1090, 4 C.R.3d 475* [where stipulated judgment was entered against public employee after his employer declined to defend him, and employee satisfied *Govt.C. 825.2(b)*, he was entitled to recover from employer; distinguishing *Rivas*].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Payment of Punitive Damages.

5 Witkin Sum. Cal. Law Torts § 378

[§ 378] Payment of Punitive Damages.

A public entity other than the state may pay punitive damages if it finds that (1) the judgment was based on an act or omission within the scope of employment, (2) the act or omission occurred in good faith, without actual malice, and in the apparent best interests of the entity, and (3) payment would be in the entity's best interest. (*Govt.C. 825(b)*.) (On general rule against payment of punitive damages, see *supra*, §230; on payment of punitive damages on behalf of witness, see *supra*, §236.)

A state government entity may pay punitive damages with the approval of the Legislature, based on the recommendation of the appointing power of the employee whose act or omission was the basis for the judgment and on a finding by the Legislature and the appointing authority that the three conditions for payment of a punitive damages claim exist. The payment of a punitive damages claim is subject to *Govt.C. 965.6(a)* (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §400), which requires legislative authorization for payment of a specific tort judgment against the state. (*Govt.C. 825(b)*.)

Nothing in *Govt.C. 825* affects the provisions of *Govt.C. 818* (see *supra*, §230) prohibiting punitive damage awards against public entities. (*Govt.C. 825(e)*.) In any trial in which it is alleged that the employee is liable for punitive damages, neither the discovery or introduction of evidence of the entity's assets nor the disclosure of the possibility that it may pay the punitive damages is permitted. (*Govt.C. 825(b)*.) And the payment of punitive damages may not be a subject of consideration of the meet and confer provisions of the Meyers-Milias-Brown Act (*Govt.C. 3500 et seq.*; see 3 *Summary*, (10th), *Agency and Employment*, §571 et seq.). (*Govt.C. 825(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §429.



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5. Contribution From Employee's Insurer.

5 *Witkin Sum. Cal. Law Torts* § 379

[§ 379] Contribution From Employee's Insurer.

Where there is neither a concession nor a contract provision that renders an employee's insurance available to satisfy the public entity's obligation to the victim or to its employee, the entity's insurer may not obtain contribution from the employee's insurer. (*Pacific Indem. Co. v. American Mut. Ins. Co.* (1972) 28 C.A.3d 983, 995, 105 C.R. 295 [also stressing legislative purpose to place burden on public entity].) But if the employee and the entity have taken out complementary insurance coverage, the employee's insurer may be held primarily liable for payment. (*Yunker v. San Diego* (1991) 233 C.A.3d 1324, 1331, 285 C.R. 319; see *Oxnard Union High School Dist. v. Teachers Ins. Co.* (1971) 20 C.A.3d 842, 846, 99 C.R. 478 [noting that 87% of liabilities involved were reasonably placed on insurer of employee who was himself immune from liability].)

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6. Elected Officials.

5 Witkin Sum. Cal. Law Torts § 380

[§ 380] Elected Officials.

(1) *Tortious Influence of Outcome of Judicial Proceeding.* Generally, a public entity may not pay a judgment, compromise, or settlement arising from a claim or action against an elected official based on the official's tortiously intervening or attempting to intervene in, or tortiously influencing or attempting to influence, the outcome of a judicial action or proceeding for the benefit of a particular party by contacting the trial judge or a commissioner, a court-appointed arbitrator, mediator, or special referee, or the court clerk, bailiff, or marshal after the action has been filed, unless the official was the counsel of record acting lawfully on behalf of that party. And if the entity conducted the defense and the elected official was found liable by the trier of fact, the court must order the official to pay the entity the cost of that defense. (*Govt.C. 825(f)(1).*)

An exception exists in case of insufficiency of funds: The plaintiff must first seek recovery of the judgment against the assets of the elected official, but if those assets are insufficient to satisfy the judgment, as determined by the court, the public entity may pay the deficiency if it is authorized by law to do so. (*Govt.C. 825(f)(2).*)

A public entity that pays any portion of the judgment or is entitled to reimbursement of defense costs must pursue all available creditor's remedies against the elected official, including garnishment, until the official has fully reimbursed the entity. (*Govt.C. 825(f)(3).*)

These provisions do not apply to any criminal or civil enforcement action brought by an elected district attorney, city attorney, or Attorney General in the name of the state. (*Govt.C. 825(f)(4).*)

(2) *Commission of Felony.* An elected official or former elected official who is convicted of violating *Govt.C. 1195* (diverting subordinate's salary) or P.C. 68, 86, 93, 165, 504, or 518 (receiving or offering bribes, embezzlement, extortion) for an act or omission while in office forfeits any right to defense or indemnification with respect to a claim for damages for an injury arising from that act or omission. (*Govt.C. 825.6(b)(1).*)

If a public entity pays a claim or judgment either against itself or against an elected official or former elected official for injury from an act or omission constituting a felony under these statutes, the entity, on felony conviction of

the official, is entitled to recover from the official the amount of that payment and the cost of any defense to a civil action filed against the official. (*Govt.C. 825.6(b)(2).*)

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A. Assault and Battery.

1. Nature and Distinctions.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 381

[§ 381] In General.

Assault and battery are crimes as well as torts, and the statutory definition of the crimes is in the Penal Code: "An assault is an unlawful *attempt*, coupled with a present ability, to commit a violent injury on the person of another." (P.C. 240.) "A battery is any wilful and unlawful *use* of force or violence upon the person of another." (P.C. 242.) In tort actions for assault and battery, the courts usually assume that these Penal Code definitions and related criminal cases are applicable. (See *Fraguglia v. Sala* (1936) 17 C.A.2d 738, 742, 62 P.2d 783; on criminal assault and battery, see 1 *Cal. Crim. Law* (3d), *Crimes Against the Person*, §1 et seq.) (See generally Dobbs, *The Law of Torts* §§28 et seq., 33 et seq.; 1 Harper, James & Gray 3d, §3.3; Cal. Civil Practice, 1 Torts, Assault and Battery, Chap. 12; 31 *Pepperdine L. Rev.* 363 [sexual abuse by clergy]; 6 *Am.Jur.2d* (1999 ed.), *Assault and Battery* §1 et seq.; 44 *A.L.R.5th* 91 [validity and effect of assault and battery exclusion in liability insurance policy]; 46 *A.L.R.5th* 813 [secondary smoke as battery]; 1 *Proof of Facts* 3d 613 [assault and battery]; BAJI, No. 7.50 [definition and elements of battery]; CACI, Nos. 1300, 1301 [same].)

The popular use of the term "assault" when "battery" is intended occurs occasionally in pleadings and judicial opinions. (See *Estrada v. Orwitz* (1946) 75 C.A.2d 54, 57, 170 P.2d 43 [court terms battery an "assault"]; *Vaughn v. Jonas* (1948) 31 C.2d 586, 603, 191 P.2d 432 [plaintiff pleaded that defendant "assaulted" him by firing a loaded revolver, with bullet passing through his body; court observes that this was technically inaccurate because act pleaded was battery].) The confusion is enhanced by the statutory felonious "assaults" (see P.C. 244 et seq.), which, in their tort aspect, would be batteries.

West's Key Number Digest, Assault and Battery k.2

SUPPLEMENT: [This section is current through the latest supplement]
See 6 *Am.Jur.2d* (2008 ed.), *Assault and Battery* §1 et seq.



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5 *Witkin Sum. Cal. Law Torts* § 382

[§ 382] Statutory Actions.

(1) *In General.* Civil claims for particular types of assault or battery have been created by statute. Thus, C.C. 43.93 authorizes recovery against a psychotherapist for sexual conduct with a patient by therapeutic deception. (See *infra*, §416.) And C.C. 1708.7 creates the tort of stalking. (See *infra*, §662.)

(2) *Sexual Battery.* A claim for sexual battery arises from either of the following:

(a) Sexually offensive contact with another person resulting directly or indirectly from an act done with the intent to cause harmful or offensive contact either with an intimate part of another person, or with another person by use of the actor's intimate part. (C.C. 1708.5(a)(1), (a)(2).)

(b) Sexually offensive contact directly or indirectly resulting from an act done to cause imminent apprehension of the above mentioned conduct. (C.C. 1708.5(a)(3).)

"Intimate part" refers to the sexual organ, anus, groin, or buttocks of any person, or the breast of a female. (C.C. 1708.5(d).) "Offensive contact" refers to contact that offends a reasonable sense of personal dignity. (C.C. 1708.5(f).)

The victim may recover general, special, and punitive damages. (C.C. 1708.5(b).) And the court may award equitable relief, including injunction, costs, and any other relief deemed proper. (C.C. 1708.5(c).)

These rights and remedies are in addition to any others provided by law. (C.C. 1708.5(e).) (See 91 Am.Jur. Trials 151 [litigating clergy sexual abuse cases]; BAJI, No. 7.56 [sexual battery].)

West's Key Number Digest, Assault and Battery k.2

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5 *Witkin Sum. Cal. Law Torts* § 383

[§ 383] Offensive Contact.

Harmful or offensive contact, intentionally done, is the essence of battery (*Rest.2d, Torts* §18), while apprehension of that contact is the basis of assault (*Rest.2d, Torts* §21). Mere words, however threatening, will not amount to an assault. (*Rest.2d, Torts* §31; cf. 12 A.L.R.2d 971 [indecent proposal to woman]; on liability for emotional distress caused by threatening or offensive words, see *infra*, §449 et seq.) (See *Barouh v. Haberman* (1994) 26 C.A.4th 40, 44, 31 C.R.2d 259 [in instruction defining battery as intentional, unlawful, and harmful contact, word "unlawful" needed clarifying instruction that it meant only that contact must be without consent]; *Fluharty v. Fluharty* (1997) 59 C.A.4th 484, 497, 69 C.R.2d 244 [plaintiff initiated contact to prevent defendant's suicide; defendant, who intended only to harm himself, committed no wrongful or offensive act]; BAJI, No. 7.51 ["offensive contact" defined]; CACI, Nos. 1300, 1301 [same].)

A civil action for battery may be brought by the victim of rape. (See *Delia S. v. Torres* (1982) 134 C.A.3d 471, 480, 184 C.R. 787; 8 *Golden Gate L. Rev.* 479.)

Where force is used to effect a restraint of the person, the defendant may be liable for both false imprisonment (*infra*, §426 et seq.) and assault and battery. But force in treatment of a person hospitalized by false imprisonment may not constitute assault and battery in all circumstances. "[T]here is not necessarily such a close relationship between detention and treatment that any treatment, even though in itself proper, becomes unlawful merely because it is given during an unlawful detention." (*Maben v. Rankin* (1961) 55 C.2d 139, 144, 10 C.R. 353, 358 P.2d 681, *infra*, §429.)

The plaintiff must prove the use of unreasonable force when the defendant is a police officer. (See *Edson v. Anaheim* (1998) 63 C.A.4th 1269, 74 C.R.2d 614, *infra*, §424.)

West's Key Number Digest, Assault and Battery k.5 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See CACI, No. 1306 [Sexual Battery--Essential Factual Elements].



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2. Elements.
b. Intent.

5 *Witkin Sum. Cal. Law Torts* § 384

[§ 384] Intent.

If the striking takes place in the performance of an unlawful act, the intent to injure is immaterial; the actor is answerable for all consequences that directly and naturally result, though unintended. (*Rest.2d, Torts* §16(1).) And if the defendant attempts to strike one person and actually hits another, the defendant is liable to the person struck under the theory of constructive or transferred intent. (See *Rest.2d, Torts* §§16(2), 20(2); 1 *Cal. Crim. Law* (3d), *Elements*, §16.)

In *Lopez v. Surchia* (1952) 112 C.A.2d 314, 318, 246 P.2d 111, defendant's son and R were in a fist fight. Plaintiff, looking for R, but not participating, came close. Defendant rushed out with a gun to protect his son, fired, and hit plaintiff. *Held*, judgment for damages affirmed. (112 C.A.3d 318.) (See *Singer v. Marx* (1956) 144 C.A.2d 637, 642, 301 P.2d 440 [facts warranted inference that defendant 9-year-old boy aimed rock at B and struck D].)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Austin B. v. Escondido Union School Dist.* (2007) 149 C.A.4th 860, 872, 57 C.R.3d 454, Supp., *infra*, §425 [where touching is lawful, jury instruction that defendant must intend to harm or offend victim to be liable for battery is not only appropriate, but required]; CACI, No. 1321 [Transferred Intent].



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c. Present Ability.

5 Witkin Sum. Cal. Law Torts § 385

[§ 385] Present Ability.

Under P.C. 240 (supra, §381), to constitute an assault the wrongdoer must have a *present ability* to injure. Hence, threatening to shoot a person with an unloaded gun would not be an assault, at least so far as criminal liability is concerned. (*People v. Sylva* (1904) 143 C. 62, 64, 76 P. 814; *People v. Simpson* (1933) 134 C.A. 646, 650, 25 P.2d 1008; 1 Cal Crim. Law (3d), *Crimes Against the Person*, §7 et seq.) However, in *Lowry v. Standard Oil Co. of Calif.* (1944) 63 C.A.2d 1, 7, 146 P.2d 57, the court, without discussing the Penal Code section or the criminal cases, declared that pointing a gun at another in a threatening manner constitutes an assault unless the *plaintiff knows* it is in fact unloaded.

Under the Restatement, it is immaterial whether the actor has or believes that he or she has the ability; if the actor intends to put the other in apprehension, and the other believes that he or she has the ability to injure, the tort is committed. (*Rest.2d, Torts* §33.)

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a. Nature of Defense.

5 *Witkin Sum. Cal. Law Torts* § 386

[§ 386] Nature of Defense.

A person may, by participating in a game or by other conduct, consent to an act that might otherwise constitute a battery. (See *Rest.2d, Torts* §49 et seq.; *Dobbs, The Law of Torts* §95 et seq.; 1 *Harper, James & Gray* 3d, §3.10; 6 *Am.Jur.2d* (1999 ed.), *Assault and Battery* §124 et seq.; *BAJI*, No. 7.52 [consent to battery]; *CACI*, No. 1302 [same].) Consent is not a defense, however, if the defendant's conduct exceeds the scope of that consent. (See *infra*, §394.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Austin B. v. Escondido Union School Dist.* (2007) 149 *C.A.4th* 860, 875, 57 *C.R.3d* 454, Supp., *infra*, §425 [autistic minors were not incapable, because of their disabilities, of consenting to being touched by special education instructor; parents, by enrolling them in school, consented to reasonable touching necessary to guide and control them in school environment]; 6 *Am.Jur.2d* (2008 ed.), *Assault and Battery* §116 et seq.; 100 *Proof of Facts* 3d 295 [injured sports participant's recovery for intentional act].



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b. Participation in Illegal Activity.

5 *Witkin Sum. Cal. Law Torts* § 387

[§ 387] Participation in Illegal Activity.

Although the authorities are divided, the Restatement recognizes consent as a defense against tort liability even where the act is illegal, e.g., a fist fight constituting a breach of the peace, or a criminal abortion. (See *Rest.2d, Torts* §§60, 892(c)(1); Dobbs, *The Law of Torts* §105; 1 Harper, James & Gray 3d, §3.10; 26 *So. Cal. L. Rev.* 472; 28 *So. Cal. L. Rev.* 103.)

The Restatement rule was followed in *Sayadoff v. Warda* (1954) 125 *C.A.2d* 626, 271 *P.2d* 140. Plaintiff woman, having had illicit relations with defendant and two prior abortions at his expense, had another at his "importuning." Alleging that this resulted in sterility and other harm, she sought damages for conspiracy to commit assault and battery. *Held*, consent was a complete defense. The court rejected the theory that the state's interest in an individual's health vitiates the consent, and took a realistic view of the policy involved. "Admittedly, the court should discourage the violation of the penal statutes of this state, but it is highly doubtful that this end should be sought through the medium of civil litigation. It is also highly doubtful that any deterrent would be afforded by allowing damages in such a case as this. Such holding might well encourage a line of conduct such as we have before us--the submission to abortions with no complaint if they are successful, but with the assurance of financial reward if the woman participant is injured." (125 *C.A.2d* 631.) (See 28 *So. Cal. L. Rev.* 103; 2 *U.C.L.A. L. Rev.* 145.)

An exception is recognized for invasions made criminal for the protection of a particular class. (*Rest.2d, Torts* §61.) In *Hudson v. Craft* (1949) 33 *C.2d* 654, 204 *P.2d* 1, defendants, conducting a carnival, held a series of unlicensed boxing exhibitions in violation of law. Plaintiff, an 18-year-old boy, was solicited to compete for \$ 5, and was seriously injured. He sued defendant promoters and his opponent, but the latter was not served. *Held*, defendants were liable. The theory of the decision was that the public policy of the state seeks to protect contestants from the dangers of unlicensed boxing matches conducted in violation of the regulatory statutes, and that where the violation of these criminal statutes is the cause of physical harm, it should give rise to civil liability of the promoter, "the activating force." With this as the basis of liability, the defense of consent could not be raised because plaintiff was a member of the class that the criminal statutes were designed to protect. (33 *C.2d* 657.) (See 23 *So. Cal. L. Rev.* 135.)

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c. Consent to Operation or Treatment.

1. In General.

5 *Witkin Sum. Cal. Law Torts* § 388

[§ 388] In General.

A surgical operation or other medical treatment performed without consent is a battery. (*Estrada v. Orwitz* (1946) 75 C.A.2d 54, 57, 170 P.2d 43; *Berkey v. Anderson* (1969) 1 C.A.3d 790, 803, 82 C.R. 67, *infra*, §396.) But if a competent adult consents to the procedure, no cause of action for battery arises when it is performed within the scope of the consent. (See *Kritzer v. Citron* (1950) 101 C.A.2d 33, 38, 224 P.2d 808 [surgery]; *Conte v. Girard Orthopaedic Surgeons Med. Group* (2003) 107 C.A.4th 1260, 1266, 132 C.R.2d 855 [consent authorizing surgeon to perform open surgical repair, but also permitting any advisable procedure for plaintiff's medical well-being, authorized surgeon, after examining shoulder arthroscopically, to refrain from doing open shoulder repair, even though plaintiff was disappointed by result of operation]; *Dobbs*, *The Law of Torts* §95 et seq.; 54 *Hastings L. J.* 1575 [role of consent forms in informed consent process]; 22 *Thomas Jefferson L. Rev.* 89 [extension of informed consent doctrine to vaccinations]; 4 *U.C.L.A. L. Rev.* 631 [effect of typical hospital general consent forms]; 25 *A.L.R.3d* 1439 [patient's mental competence to consent]; 77 *A.L.R.5th* 541 [damage action for HIV testing without consent]; 87 *A.L.R.5th* 277 [construction and application of patient bill of rights statutes]; 35 *Am.Jur. Trials* 637 [informed consent to brain surgery]; *BAJI*, No. 6.10 [necessity for consent to operation or treatment]; *CACI*, No. 530 [medical battery]; on health care provider's immunity when acting in accordance with health care directive, see 14 *Summary* (10th), *Wills and Probate*, §886.)

A wife may give her own consent to an operation; the husband has no legal interest that is invaded by a doctor's medical treatment of the wife without his consent. (*Rosenberg v. Feigin* (1953) 119 C.A.2d 783, 786, 260 P.2d 143; see *Kritzer v. Citron*, *supra* [wife's express consent to sterilization]; 89 *A.L.R.3d* 32 [questions of consent in connection with treatment of genital or urinary organs].)

Formerly, although abortions were illegal except under narrowly specified conditions, a woman's consent to that operation was sometimes held to bar recovery for death or injury. Other courts permitted the action to be maintained. (See 36 *A.L.R.3d* 630 [right of action for injury to or death of woman who consented to illegal abortion].) With the liberalization of abortion laws (see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §117 et seq.), the problem has become generally moot. (On effect of participation in illegal activity generally, see *supra*, §387.)

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See *125 A.L.R.5th 403* [lack of informed consent to extraction of teeth]; on negligence liability of medical practitioners, see text, §933 et seq.



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 - 2. Minor or Incompetent Patient.
 - aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 389

[§ 389] In General.

(1) *Consent of Parent or Guardian.* The consent of a parent or guardian is ordinarily necessary to authorize an operation on or other medical treatment of a minor. (See *Cobbs v. Grant* (1972) 8 C.3d 229, 243, 104 C.R. 505, 514, 502 P.2d 1, *infra*, §396; Dobbs, *The Law of Torts* §99; 1 Harper, James & Gray 3d, §3.10; 16 So. Cal. L. Rev. 109; 4 U.C.L.A. L. Rev. 634; 67 A.L.R.4th 511 [medical malpractice in treatment of child without parent's consent]; 4 A.L.R.5th 1000 [surgical invasion of incompetent or minor for benefit of third party]; BAJI, Nos. 6.10, 6.12 [authority to consent for minor or incompetent patient]; CACI, No. 531 [same].)

(2) *Consent of Minor.* A minor may consent to medical or dental care, and the consent of the minor's parent or guardian is unnecessary, where the minor:

(a) Has entered into a valid marriage, whether or not the marriage has been dissolved. (*Family C. 7002(a); 7050(e)(1).*)

(b) Is on active duty with the armed forces. (*Family C. 7002(b); 7050(e)(1).*)

(c) Has received a declaration of emancipation. (*Family C. 7002(c); on emancipation of minor, see Family C. 7110 et seq.; 10 Summary (10th), Parent and Child* §298 et seq.)

(d) Is 15 or older, living separate and apart from the parents or guardian, and managing his or her own financial affairs. (*Family C. 6922.*)

(e) Is seeking care relating to the prevention or treatment of pregnancy, other than sterilization. (*Family C. 6925; on minor's consent to abortion, see infra*, §391.)

(f) Is 12 or older and may have come into contact with an infectious, contagious, or communicable disease. (*Family C. 6926.*)

(g) Is 12 or older and has been raped. (*Family C. 6927.*)

(h) Has been sexually assaulted. (*Family C. 6928.*)

(i) Is 12 or older and has a drug-or alcohol-related problem. (*Family C. 6929.*) (See 33 *Golden Gate L. Rev.* 105 [informed consent of children in medical research]; 48 *So. Cal. L. Rev.* 1417 [argument that minor's constitutional right of privacy includes right to consent to medical treatment]; 25 *A.L.R.3d* 1439 [mental competency to consent]; on consent by minor to medical treatment generally, see 1 *Summary* (10th), *Contracts*, §§34, 38 et seq.)

(3) *Consent of Authorized Adult.* The parent or guardian of a minor "may authorize in writing an adult into whose care the minor has been entrusted" to consent to medical or dental care for the minor. (*Family C. 6910*; see *Family C. 6901* [defining "dental care"]; *Family C. 6902* [defining "medical care"]; *Family C. 6903* [defining "parent or guardian"].)

(4) *Consent of Court.* On application by a minor, the court may summarily grant consent for the minor on a determination that the minor is 16 or older, resides in the state, and has no parent or guardian available to give the consent. (*Family C. 6911.*)

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 - bb. Treatment of Mental Disorders.

5 *Witkin Sum. Cal. Law Torts* § 390

[§ 390] Treatment of Mental Disorders.

(1) *Psychosurgery or Shock Treatment.* Welf.C. 5325 et seq. specifies the requirements of informed consent to psychosurgery and shock treatment. (See 6 *Pacific L. J.* 434; 9 *U.S.F. L. Rev.* 738 [criticizing former legislation]; 15 *Santa Clara Lawyer* 725.) In *Aden v. Younger* (1976) 57 *C.A.3d* 662, 129 *C.R.* 535, these provisions were held unconstitutional for vagueness and invasion of privacy. (See 7 *Summary* (10th), *Constitutional Law*, §598.) The 1976 Legislature then amended the provisions, making them applicable to all forms of convulsive shock treatments, and adding new sections greatly strengthening the patient's right to exercise a voluntary and informed consent. The amending statute states: "Recognizing the danger of a violation of a mental patient's constitutional right to privacy, the Legislature intends by this enactment to assure that the integrity and free choice of every such patient is fully recognized and protected. Because those who are emotionally disturbed are vulnerable to being unduly influenced, the Legislature believes the protection of their rights requires a careful process of informing and consenting in order to assure the protection and vindication of their rights." (Stats. 1976, Chap. 1109, §1.) (See 8 *Pacific L. J.* 391; 17 *Santa Clara L. Rev.* 39, 73.)

Under these provisions, specified information must be given the patient for a valid informed consent. (Welf.C. 5326.2.) The treating physician may use a standard form for this purpose, adding details relevant to the individual patient. (Welf.C. 5326.3.) The treating physician must explain to the patient the nature of the treatment and its purpose and consequences and administer the execution of the consent form, which must be dated and witnessed. The consent form must be available to the patient, to the patient's attorney, guardian, and conservator, and, if the patient consents, to a responsible relative of the patient's choosing. (Welf.C. 5326.4.) Consent must be knowing and intelligent and may be given only after 24 hours have elapsed from the time the required information has been given. (Welf.C. 5326.5.) The therapies may be used only if prescribed conditions are met. (See Welf.C. 5326.6 et seq.) Special civil penalties are provided for violations, and an intentional violation is a ground for license revocation. (Welf.C. 5326.9.) (See *Conservatorship of Waltz* (1986) 180 *C.A.3d* 722, 732, 227 *C.R.* 436 [psychotic patient who, during rational periods, understood that electroconvulsive therapy was recommended to help him, but had rational fears of side effects and believed that medication was better, was capable of consenting to or refusing treatment].)

(2) *Antipsychotic Medication.* An attending physician or surgeon of a resident in a skilled nursing facility who prescribes, orders, or increases an order for an antipsychotic medication must do both of the following:

(a) *Obtain the resident's informed consent.* (*Health & Saf.C. 1418.9(a)(1)*; see *Health & Saf.C. 1418.9(c)(1)* [defining "resident" as patient "who has the capacity to consent to make decisions concerning his or her health care, including medications"].)

(b) Seek the resident's consent to *notify an interested family member* designated in the medical record, and, if the resident consents, make reasonable attempts to notify that person within 48 hours. (*Health & Saf.C. 1418.9(a)(2)*.) Notification is not required if no interested family member is designated in the medical record, the resident has been diagnosed as terminally ill and is receiving hospice services, or the resident does not consent to the notification. (*Health & Saf.C. 1418.9(b)*.)

The *consent* of the interested family member is not required. (*Health & Saf.C. 1418.9(d)*.)

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 - cc. Abortion Without Parental Consent.

5 *Witkin Sum. Cal. Law Torts* § 391

[§ 391] Abortion Without Parental Consent.

C.C. 34.5, as enacted in 1953, provided that an unmarried minor could give consent to medical care related to prevention or treatment of pregnancy, and that consent of the parent or parents of the minor was not required. (See 1 *Summary* (10th), *Contracts*, §39.) The statute was construed in *Ballard v. Anderson* (1971) 4 C.3d 873, 878, 95 C.R. 1, 484 P.2d 1345, as emancipating minors for the purpose of obtaining therapeutic abortions without parental consent. (4 C.3d 880, 883, 884.) (See 11 Santa Clara Lawyer 469.)

C.C. 34.5 was amended in 1987 to provide that it may not be construed "to authorize an unemancipated minor to receive an abortion without the consent of a parent or guardian other than as provided in *Section 25958 of the Health and Safety Code*." C.C. 34.5 and *Health & Saf.C. 25958* have since been recodified as *Family C. 6925* and *Health & Saf.C. 123450*, respectively. *Health & Saf.C. 123450* provides that, except in a medical emergency, no abortion may be performed on an unemancipated minor unless (1) she has obtained the written consent of one of her parents or her legal guardian, or (2) the juvenile court, on petition of the minor, orders performance of the abortion without the consent of, or notice to, the parents or guardian. (See 19 *Pacific L. J.* 646.) However, the Supreme Court has declared that these statutory restrictions on a minor's right to obtain an abortion are an unconstitutional violation of the right to privacy (Cal. Const., Art. I, §1). (See *American Academy of Pediatrics v. Lungren* (1997) 16 C.4th 307, 314, 66 C.R.2d 210, 940 P.2d 797, 7 *Summary* (10th), *Constitutional Law*, §579.) (See 25 *Golden Gate L. Rev.* 463 [parental consent to abortion and right to privacy]; 20 *Pacific L. J.* 1167 [Eroding *Roe*: The Politics and Constitutionality of California's Parental Consent Abortion Statute].)

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dd. Procedure When Long-Term Health Facility Resident Loses Competency.

5 *Witkin Sum. Cal. Law Torts* § 392

[§ 392] Procedure When Long-Term Health Facility Resident Loses Competency.

(1) *In General.* *Health & Saf.C. 1418.8* prescribes the procedures to be followed when a resident of a skilled nursing facility or an intermediate care facility loses the capacity to give informed consent to medical intervention and there is no person with legal authority to give consent. (See 24 *Pacific L. J.* 981.) Physicians and facilities complying with *Health & Saf.C. 1418.8* are not required to obtain a court order under *Prob.C. 3201* (judicial authorization of medical treatment for incompetent adult; see 14 *Summary* (10th), *Wills and Probate*, §1063 et seq.) prior to administering a medical intervention. (*Health & Saf.C. 1418.8(i).*)

A resident lacks the capacity to make a decision regarding his or her health care if the resident is unable to understand the nature and consequences of the proposed medical intervention or unable to express a preference regarding it. (*Health & Saf.C. 1418.8(b).*) A person with the legal authority to make medical treatment decisions for a patient is a person designated under a valid Durable Power of Attorney for Health Care, or a guardian, conservator, or next of kin. (*Health & Saf.C. 1418.8(c)*; see *Pagarigan v. Libby Care Center* (2002) 99 C.A.4th 298, 302, 120 C.R.2d 892 [*Health & Saf.C. 1418.8(c)* does not authorize next of kin to sign arbitration agreement on patient's behalf.]

(2) *Nonemergencies.* In nonemergencies, the facility must conduct an interdisciplinary team review prior to administration of the prescribed medical intervention. (*Health & Saf.C. 1418.8(e).*) The team, composed of the resident's attending physician, a registered nurse with responsibility for the resident, other staff as needed, and, where practicable, a patient representative, must review the physician's assessment of the resident's condition, the reason for the proposed medical intervention, its frequency and duration, the probable impact of using or not using the intervention, reasonable alternatives, and the desires of the patient, where known. (*Health & Saf.C. 1418.8(e)*; on who may serve as a patient representative, see *Health & Saf.C. 1418.8(f).*)

(3) *Emergencies.* In case of an emergency, the facility may immediately administer the prescribed medical intervention after obtaining a physician's order. (*Health & Saf.C. 1418.8(h).*) The team must meet within 1 week of an emergency for an evaluation of the medical intervention if the emergency results in application of physical or chemical restraints. (*Health & Saf.C. 1418.8(h).*)

(4) *Administrative Sanctions.* A physician or other health care provider acting in accordance with reasonable medical standards is not subject to administrative sanction if he or she believes in good faith that the action is consistent with *Health & Saf.C. 1418.8* and the resident's desires or, if unknown, the resident's best interests. (*Health & Saf.C. 1418.8(k).*)

(5) *Right to Judicial Review.* Residents retain the right to seek judicial review of a decision to provide medical intervention. (*Health & Saf.C. 1418.8(j).*)

(6) *No Violation of Privacy Rights.* *Health & Saf.C. 1418.8* does not violate patients' privacy rights under Cal. Const., Art. I, §1. (See *Rains v. Belshe* (1995) 32 C.A.4th 157, 38 C.R.2d 185, 7 Summary (10th), *Constitutional Law*, §655.)

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3. Implied Consent.

5 *Witkin Sum. Cal. Law Torts* § 393

[§ 393] Implied Consent.

A fictional "implied consent" or privilege authorizes a doctor to perform an operation in an *emergency* without actual consent. (*Cobbs v. Grant* (1972) 8 C.3d 229, 243, 104 C.R. 505, 502 P.2d 1, *infra*, §396; *Wheeler v. Barker* (1949) 92 C.A.2d 776, 781, 208 P.2d 68; *Piedra v. Dugan* (2004) 123 C.A.4th 1483, 1495, 21 C.R.3d 36; see *Rest.2d, Torts* §§62, 892D; 53 *Cal. L. Rev.* 860 [lifesaving medical treatment without consent]; 74 *Cal. L. Rev.* 1951 [court-ordered cesareans]; 4 *U.C.L.A. L. Rev.* 627 [discussion of other theories, e.g., agency or reasonableness]; BAJI, No. 6.10 [implied consent]; CACI, Nos. 530, 533 [same]; on immunity of doctor rendering emergency care, see *B. & P.C.* 2395 *et seq.*, *supra*, §133 *et seq.*)

In *Preston v. Hubbell* (1948) 87 C.A.2d 53, 196 P.2d 113, a dentist, removing a wisdom tooth, caused a fracture of the patient's jaw, and proceeded to repair it. The court pointed out that the almost universal use of anesthesia in surgery makes it impossible to obtain express consent in surgical emergencies, and that the surgeon previously selected by the patient is the logical representative of the patient in judging the necessity for the additional act. However, the court added: "This is not, of course, to hold that consent to one operation is *always* to be regarded as implied consent to the performance of another operation, unanticipated by the patient, but which the surgeon, upon discovering unexpected conditions, may deem advisable." (87 C.A.2d 59.)

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4. Exceeding Scope of Consent.

5 *Witkin Sum. Cal. Law Torts* § 394

[§ 394] Exceeding Scope of Consent.

An operation or treatment performed without consent is a battery (see *supra*, §388), and the same is true where a doctor is authorized to perform one medical procedure and goes beyond the scope of the consent to perform another. (*Hundley v. St. Francis Hosp.* (1958) 161 C.A.2d 800, 806, 327 P.2d 131; see *Cobbs v. Grant* (1972) 8 C.3d 229, 239, 104 C.R. 505, 502 P.2d 1, *infra*, §396 [distinction between battery from exceeding scope of consent and negligent failure to warn of known risk]; *Estrada v. Orwitz* (1946) 75 C.A.2d 54, 57, 170 P.2d 43 [dentist, engaged to extract one tooth, extracted five others]; see 18 So. Cal. L. Rev. 67; 4 U.C.L.A. L. Rev. 627; 56 A.L.R.2d 695 [liability of physician or surgeon for extending operation or treatment beyond that expressly authorized]; BAJI, No. 6.10.5 [treatment without or beyond consent]; CACI, No. 533 [same].)

When a patient consents to a procedure but places *conditions* on that consent, a physician who exceeds the conditions may be liable. However, the physician must intentionally violate the condition in order to commit a battery. (*Piedra v. Dugan* (2004) 123 C.A.4th 1483, 1494, 21 C.R.3d 36 [battery is intentional tort; physician who is unaware of condition on consent is liable at most for negligence].)

Even where the particular treatment is by consent, mishandling of the patient or use of unnecessary force is tortious. (*Inderbitzen v. Lane Hosp.* (1932) 124 C.A. 462, 468, 12 P.2d 744 [woman in labor roughly handled and subjected to jibes by doctors and medical students]; see 89 A.L.R.2d 983 [liability of doctor or dentist using force to restrain or discipline patient].)

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See *Kaplan v. Mamelak* (2008) 162 C.A.4th 637, 645, 75 C.R.3d 861 [where patient consented to operation on specific spinal disk, whether surgeon's operation on wrong disk is substantially different procedure, thus constituting battery rather than only negligence, is question for jury]; CACI, No. 530A [Medical Battery].



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aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 395

[§ 395] In General.

(1) *Informed Consent Doctrine*. The operation or treatment must be performed with the patient's *informed* consent. The doctor has a duty to disclose to the patient all information material to the patient's making an informed decision whether to undergo the procedure. Where the physician's disclosure is inadequate, the defense of consent is generally unavailable and the doctor is subject to tort liability. (*Cobbs v. Grant* (1972) 8 C.3d 229, 239, 104 C.R. 505, 502 P.2d 1, *infra*, §396.) (On scope of required disclosure, see *infra*, §400; on informed consent to medical experimentation, see *infra*, §411 *et seq.*)

No disclosure is required where the patient requests that he or she not be informed of the risks. And none is required if the procedure is simple and the danger remote and commonly appreciated to be remote. (*Cobbs v. Grant*, *supra*, 8 C.3d 246; see *Piedra v. Dugan* (2004) 123 C.A.4th 1483, 1490, 21 C.R.3d 36 [physicians need not discuss risks inherent to common procedures that very rarely result in serious ill effects].) Also, the duty to inform is subject to a statutory exclusion for emergencies. (See *B. & P.C.* 2397, *infra*, §399.)

(2) *No Discretion To Withhold Information*. Any suggestion that the doctor has discretion to withhold information to avoid alarming a patient (see *Salgo v. Leland Stanford Jr. University Bd. of Trustees* (1957) 154 C.A.2d 560, 578, 317 P.2d 170) has been rejected as unsound. The patient does not have the doctor's knowledge, trusts the doctor, and has the right to make the determination whether to subject himself or herself to treatment. (*Cobbs v. Grant*, *supra*, 8 C.3d 243.)

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(3) *(New) Duty of Referring Physician*. In *Quintanilla v. Dunkelman* (2005) 133 C.A.4th 95, 34 C.R.3d 557, *Supp.*, *infra*, §400, a physician who referred a patient to a surgeon was held equally liable in negligence as the surgeon for failure to obtain informed consent where the referring physician owned all the stock in the medical group that employed the surgeon, met with the patient, made the diagnosis, discussed the treatment with her, and directed the surgeon

regarding what procedures were to be performed. (133 C.A.4th 118.)

In *Wilson v. Merritt* (2006) 142 C.A.4th 1125, 1134, 48 C.R.3d 630, defendant physician referred plaintiff for a procedure performed by a chiropractor that resulted in injury. Plaintiff claimed that he was not warned of the risks of the procedure. Evidence was introduced at trial indicating that defendant had direct contact with plaintiff, suggested and assisted in the procedure, and was the medical director of the clinic in which the procedure was performed. *Held*, entry of nonsuit was error. This evidence raised a question of fact whether defendant was a mere consulting expert or shared joint responsibility with the chiropractor for managing plaintiff's care. (142 C.A.4th 1134, citing *Quintanilla*.)



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bb. As Battery.

5 *Witkin Sum. Cal. Law Torts* § 396

[§ 396] As Battery.

(1) *In General.* Formerly, there was some uncertainty whether the tort was battery or negligence. (See 55 *Cal. L. Rev.* 1396, 1399; 34 *So. Cal. L. Rev.* 217.) But the test has now been established for California: Where the doctor performs the treatment to which consent was given but fails to make a proper disclosure, the tort is negligence (*infra*, §397); if the doctor performs a different one, the tort is battery (*Rainer v. Community Memorial Hosp.* (1971) 18 *C.A.3d* 240, 255, 95 *C.R.* 901).

In *Berkey v. Anderson* (1969) 1 *C.A.3d* 790, 82 *C.R.* 67, plaintiff injured his neck. He was treated for some time by defendant Dr. A, who concluded that diagnosis of his problem required a myelogram. Plaintiff testified that Dr. A merely told him that "[w]e have to get to the bottom of this," that a myelogram "was simply exploratory and nothing to worry about," that the most uncomfortable thing about it was being harnessed to a cold table and tilted about, and that he would have a pain-killing injection. Plaintiff also testified that he had no knowledge of what was involved in the procedure and, having heard of dire results from spine injections, would never have permitted a puncture of his spine. The myelogram was performed by defendant Dr. R, a qualified expert, who duly introduced the needle into the lumbar area to obtain spinal fluid. During the process plaintiff felt a "terrific thrust as if someone were jamming an icepick into his lower spine," and suffered excruciating pain. He ended up with a "rubber leg," i.e., a weakness in dorsiflexion of the left foot. The medical testimony as to the cause was vague and inconclusive, and the trial judge granted a nonsuit. *Held*, reversed.

(a) The propriety of the nonsuit depended on whether the doctor obtained the informed consent of the plaintiff. "It involves the duty of a doctor to properly explain the contemplated procedure and the question whether the patient reasonably comprehended the explanation. If appellant did not give his informed or knowledgeable consent, the performance of the myelogram would constitute a technical battery ... for which the defendant would be liable for all damages proximately resulting, whether the myelogram was or was not skillfully performed ... and whether they could be anticipated or not." (1 *C.A.3d* 803.)

(b) The jury could have found that Dr. A gave plaintiff no information which would enable him to understand the

procedure, and that the information he did give would have a tendency to mislead; i.e., they could have found that plaintiff's query, "is it like the electromyograms that I have been having?" called for "more than a few mollifying words which grossly understated the seriousness of the procedure." (1 C.A.3d 804.)

In *Cobbs v. Grant* (1972) 8 C.3d 229, 239, 104 C.R. 505, 502 P.2d 1, infra, §397, the court likewise classified the *Berkey* situation as battery, i.e., as a deliberate intent to deviate from the given consent. The consent was to performance of "a procedure no more complicated than the electromyograms plaintiff had previously undergone, when the actual procedure was a myelogram involving a spinal puncture."

(2) *Conditional Consent*. A battery also occurs where the consent is conditional and the condition is violated. (See *Grieves v. Superior Court* (1984) 157 C.A.3d 159, 164, 203 C.R. 556 [plaintiff wife, pregnant, consented to tubal ligation only if her child was born without abnormalities; different doctor performed operation without informing her that child was born with fatal genetic disorder].)

In *Ashcraft v. King* (1991) 228 C.A.3d 604, 278 C.R. 900, plaintiff, age 16, needed surgery to correct a curvature of the spine, and consented to an operation by defendant. According to her testimony and that of her mother, the consent was expressly conditioned on the use of only family-donated blood for necessary transfusions, and members of her family gave blood before and during the operation. Defendant, however, took all of the blood from general supplies on hand at the hospital. Later it was discovered that some blood had come from an HIV positive donor, and plaintiff then took a test that was positive. She brought this malpractice action against defendant on theories of battery and negligence; she was nonsuited on the battery cause, and the jury verdict on the negligence cause was for defendant. *Held*, judgment for defendant reversed for error in granting the nonsuit. A patient may place conditions on the doctor's authority to perform an operation, and the doctor who violates the conditions may be liable for battery. (228 C.A.3d 610.) The evidence introduced by plaintiff was sufficient for a jury to infer an intent of defendant to wilfully disregard the conditional consent. (228 C.A.3d 613.)

In *Kerins v. Hartley* (1994) 27 C.A.4th 1062, 1077, 33 C.R.2d 172, defendant performed surgery on plaintiff without disclosing that he was infected with HIV. Plaintiff sought recovery for battery, contending that she effectively conveyed, as a condition on her consent, her desire to avoid any risk of exposure to AIDS and to be operated on by a healthy doctor. *Held*, summary judgment for defendant affirmed. The record established that there was no significant risk that plaintiff would develop AIDS as the result of exposure to HIV during the surgery. (See 25 Southwestern U. L. Rev. 205 [*Kerins*].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Kaplan v. Mamelak* (2008) 162 C.A.4th 637, 645, 75 C.R.3d 861 [where patient consented to operation on specific spinal disk, whether surgeon's operation on wrong disk is substantially different procedure, thus constituting battery rather than only negligence, is question for jury]; CACI, No. 530A [Medical Battery]. (2) *Conditional Consent*. See CACI, No. 530B [Medical Battery--Conditional Consent].



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- cc. As Negligence.

5 *Witkin Sum. Cal. Law Torts* § 397

[§ 397] As Negligence.

In *Cobbs v. Grant* (1972) 8 C.3d 229, 104 C.R. 505, 502 P.2d 1, plaintiff suffered from a duodenal ulcer. Defendant, a surgeon called in by plaintiff's family doctor, recommended surgery and explained the nature of the operation, but did not discuss the inherent risks. The operation was performed, but complications required two subsequent operations: removal of the spleen (a result of injury that occurs in about 5% of ulcer operations); and a gastrectomy with removal of half the stomach (a result of a new gastric ulcer, a risk inherent in the first operation). Plaintiff was also hospitalized again for internal bleeding due to premature absorption of a suture, another inherent risk. In this malpractice suit the jury returned a general verdict against defendant, which could have been based on either negligence or failure to obtain an informed consent to the treatment. *Held*, judgment for plaintiff reversed.

(a) Prosser's suggestion should be followed that the matter presented in cases like this involves standards of professional conduct and that the action is for negligence in failing to conform to the proper standard. "Although this is a close question, either prong of which is supportable by authority, the trend appears to be towards categorizing failure to obtain informed consent as negligence. That this result now appears with growing frequency is of more than academic interest; it reflects an appreciation of the several significant consequences of favoring negligence over a battery theory. ... [A] doctor could be held liable for punitive damages under a battery count, and if held liable for the intentional tort of battery he might not be covered by his malpractice insurance." (8 C.3d 240.)

(b) The test was then set forth as follows: "The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence." (8 C.3d 240.)

(c) The instant case clearly sounds in negligence. "Defendant performed the identical operation to which plaintiff

had consented. The spleen injury, development of the gastric ulcer, gastrectomy and internal bleeding as a result of the premature absorption of a suture, were all links in a chain of low probability events inherent in the initial operation." (8 C.3d 241.) (See *Freedman v. Superior Court* (1989) 214 C.A.3d 734, 739, 263 C.R. 1, *infra*, §416 [patient induced to accept drug by deceptive statement regarding its purpose may bring action for negligence, but not battery]; *Daum v. SpineCare Med. Group* (1997) 52 C.A.4th 1285, 1313, 61 C.R.2d 260 [where patient consents to operation and doctor performs that operation, but undisclosed complication of low probability occurs, doctor is guilty of negligence, not battery; citing *Cobbs*]; on significance and effect of *Cobbs*, see 6 *Loyola L.A. L. Rev.* 384; 12 *Pacific L. J.* 915 [Informed Consent and the Material Risk Standard]; 18 *Santa Clara L. Rev.* 971 [Sterilization Regulation: Government Efforts To Guarantee Informed Consent]; 8 *U.S.F. L. Rev.* 261 [Medical Malpractice: The Right To Be Informed]; 8 *U.S.F. L. Rev.* 320 [The Patient-Physician Relationship: Present Law and Trends for the Future Implied in *Cobbs v. Grant*].)

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 - dd. Causation of Injury.

5 *Witkin Sum. Cal. Law Torts* § 398

[§ 398] Causation of Injury.

The doctor's failure to inform must be the cause of the injury to the plaintiff; i.e., it must be established that, had disclosure been made, the consent to treatment would not have been given. (*Cobbs v. Grant* (1972) 8 C.3d 229, 245, 104 C.R. 505, 502 P.2d 1, supra, §397.) *Cobbs* adds this caution: "The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable; i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils." (8 C.3d 245.) (See *Morgenroth v. Pacific Med. Center* (1976) 54 C.A.3d 521, 532, 126 C.R. 681 [causation not established]; *Spann v. Irwin Memorial Blood Centers* (1995) 34 C.A.4th 644, 656, 40 C.R.2d 360 [deceased patient's husband failed to raise issue of fact that blood bank's failure to disclose risk of AIDS from blood transfusions as treatment for life-threatening blood disease caused patient's injury, because no reasonable person in patient's position would have declined treatment had full disclosure been made]; 8 U.S.F. L. Rev. 261, 320.)

The general damages rule applies: The defendant is liable for the amount that will compensate for all the detriment caused by the tort (see C.C. 3333, *infra*, §1553). Thus, a patient who was not told of a risk of bone disease from surgery could recover damages for risks that *had* been disclosed, as well as for the bone disease, where he would not have consented to an operation at all if he had been adequately informed. (*Warren v. Schechter* (1997) 57 C.A.4th 1189, 1203, 67 C.R.2d 573.)

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See *Wilson v. Merritt* (2006) 142 C.A.4th 1125, 1138, 48 C.R.3d 630 [causation of injury by failure to inform must be established by objective test, i.e., plaintiff must show that reasonable prudent persons in patient's position would decline procedure if they knew all significant perils].



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ee. Emergency Exception to Duty To Inform.

5 *Witkin Sum. Cal. Law Torts* § 399

[§ 399] Emergency Exception to Duty To Inform.

The judicially declared duty to inform a patient of the risks of treatment (see *supra*, §395) is subject to a statutory exception under *B. & P.C. 2397* for emergencies. (See *Pacific L. J.* 679; *BAJI*, No. 6.16; *CACI*, No. 554.)

(1) *Scope of Immunity*. The immunity is given to a physician for emergency situations in the physician's office or in a hospital requiring immediate services or diagnosis and treatment. (*B. & P.C. 2397(a)*, (c).)

(2) *Conditions Excusing Failure To Inform*. Failure to inform does not give rise to liability where it is caused by any of the following:

(a) The patient is unconscious. (*B. & P.C. 2397(a)(1)*.)

(b) The medical procedure is undertaken without the consent of the patient because the physician reasonably believes that a medical procedure should be undertaken immediately and that there is insufficient time to inform the patient. (*B. & P.C. 2397(a)(2)*.)

(c) A medical procedure is performed on a person legally incapable of giving consent, and the physician reasonably believes that a medical procedure should be undertaken immediately and that there is insufficient time to obtain the informed consent of a person authorized to give consent for the patient. (*B. & P.C. 2397(a)(3)*.)

(3) *Liability for Negligence*. This exception applies only to failure to inform; it does not give immunity for negligence in rendering or failing to render treatment. (*B. & P.C. 2397(b)*.)

The same immunity was extended to *dentists* by *B. & P.C. 1627.7*. (See *10 Pacific L. J.* 601.)

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- 6. Required Disclosure.
- aa. In General.

5 Witkin Sum. Cal. Law Torts § 400

[§ 400] In General.

The kind of disclosure required is discussed briefly in *Berkey v. Anderson* (1969) 1 C.A.3d 790, 803, 82 C.R. 67, supra, §396, and comprehensively in *Cobbs v. Grant* (1972) 8 C.3d 229, 104 C.R. 505, 502 P.2d 1, supra, §397:

(a) *General scope of disclosure.* The physician's duty is to disclose all information material to a patient's decision whether to undergo a course of treatment. "[A]s an integral part of the physician's overall obligation to the patient there is a duty of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each." (*Cobbs v. Grant*, supra, 8 C.3d 243.)

(b) *Medical community standard not controlling.* Nearly every jurisdiction which has considered the question has adopted the medical community standard as the test of reasonable disclosure. Both *Berkey* and *Cobbs* reject this rule: "We cannot agree that the matter of informed consent must be determined on the basis of medical testimony any more than that expert testimony of the standard practice is determinative in any other case involving a fiduciary relationship. We agree with appellant that a physician's duty to disclose is not governed by the standard practice of the physicians' community, but is a duty imposed by law which governs his conduct in the same manner as others in a similar fiduciary relationship. To hold otherwise would permit the medical profession to determine its own responsibilities to the patients in a matter of considerable public interest." (*Berkey v. Anderson*, supra, 1 C.A.3d 805.)

The majority rule "is needlessly overbroad," and if there is a medical community standard "it appears so nebulous that doctors become, in effect, vested with virtual absolute discretion." The doctor's expert function is to disclose the risks of a decision not to undergo the treatment and the probability of a successful outcome of the treatment. "But once this information has been disclosed, that aspect of the doctor's expert function has been performed. The weighing of these risks against the individual subjective fears and hopes of the patient is not an expert skill. Such evaluation and decision is a nonmedical judgment reserved to the patient alone." (*Cobbs v. Grant*, supra, 8 C.3d 243.)

(c) *Measured by patient's need.* The doctor need not engage in a lengthy medical discussion, and need not cover the relatively minor risks inherent in common procedures. However, "the jury should be instructed that when a given

procedure inherently involves a known risk of death or serious bodily harm, a medical doctor has a duty to disclose to his patient the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur. Beyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner in good standing would provide under similar circumstances." (*Cobbs v. Grant*, *supra*, 8 C.3d 244.)

(d) *Summary*. "In sum, the patient's right of self-decision is the measure of the physician's duty to reveal. That right can be effectively exercised only if the patient possesses adequate information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is whatever information is material to the decision. Thus the test for determining whether a potential peril must be divulged is its materiality to the patient's decision." (*Cobbs v. Grant*, *supra*, 8 C.3d 245.)

The scope of required disclosure has been frequently considered. (See *Morgenroth v. Pacific Med. Center* (1976) 54 C.A.3d 521, 534, 126 C.R. 681 [Cobbs test met]; *Jambazian v. Borden* (1994) 25 C.A.4th 836, 30 C.R.2d 768 [where physician's declaration established no evidence of diabetes, patient, to avoid summary judgment, needed to produce expert evidence that he had diabetes and that it created special surgical risks not identified by defendant]; *Warren v. Schecter* (1997) 57 C.A.4th 1189, 1205, 67 C.R.2d 573 [adequacy of disclosure is measured under objective standard, and plaintiff has no obligation to prove that he was subjectively misled]; 61 Cal. L. Rev. 634; 12 Pacific L. J. 915; 10 San Diego L. Rev. 913; 6 U.C. Davis L. Rev. 133; 28 U.C.L.A. L. Rev. 52 [argument in favor of physician's duty to disclose medical mistakes]; 29 Pepperdine L. Rev. 585 [comparative provider statistics and informed consent]; 8 U.S.F. L. Rev. 261, 320; 2 West L.A. L. Rev. 61; 69 A.L.R.3d 1223 [duty to inform of nature and hazards of radiation or X-ray treatments]; 88 A.L.R.3d 1008 [modern status of views as to general measure of physician's duty to inform]; 89 A.L.R.4th 799 [physician's duty, under informed consent doctrine, to obtain patient's consent to treatment in pregnancy or childbirth cases]; 28 A.L.R.5th 497 [informed consent as to breast augmentation, reduction, or reconstruction]; BAJI, No. 6.11 [comprehensively stating physician's duty of disclosure under *Cobbs v. Grant*]; CACI, No. 532 [same].)

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SUPPLEMENT: [This section is current through the latest supplement]

Commentary: See 58 Hastings L.J. 967 [requiring physicians' disclosure of off-label prescriptions and conflicts of interest].

(New) *Execution of consent form is not conclusive:* In *Quintanilla v. Dunkelman* (2005) 133 C.A.4th 95, 34 C.R.3d 557, the patient, who was fluent in Spanish but could not read it, testified that she was given Spanish-language forms to initial and sign, but that the forms were not interpreted for her and she was not given an adequate oral explanation of the procedures to be performed. *Held*, substantial evidence supported the jury's finding that informed consent was not obtained. *Ev.C.* 622, establishing a conclusive presumption of the truth of facts recited in a written instrument (see 1 Cal. Evidence (4th), *Burden of Proof*, §161), is inapplicable. Not only is there no authority to support its application in the context of informed consent, its application is inconsistent with the rationale supporting the informed consent doctrine, that is, the desirability of frank and open disclosure of relevant medical information. Where, as here, there is substantial evidence that the patient is unable to read the language on the form, the presumption is clearly inappropriate. (133 C.A.4th 117.)



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- bb. Duty To Disclose Risks of Not Consenting.

5 *Witkin Sum. Cal. Law Torts* § 401

[§ 401] Duty To Disclose Risks of Not Consenting.

Liability may result not only from administration of a medical procedure on the patient's consent without disclosure of related risks, but also from failure to administer a procedure where the patient refuses to consent without being informed of the risks of *not* consenting. In *Truman v. Thomas* (1980) 27 C.3d 285, 165 C.R. 308, 611 P.2d 902, plaintiff children sued for wrongful death of their mother, who died of cancer of the cervix. The theory of the complaint was that defendant doctor failed to inform the mother of the risks of not consenting to a pap smear test, which is an accurate detector of cervical cancer. Reversing a judgment for defendant, the court held that the duty to disclose is not limited to cases in which the patient consents to the recommended procedure; the doctor's duty of disclosure of information material to the patient's decision applies also to cases where the patient declines the recommended course of action. (27 C.3d 292.) A dissent of three justices argued that the new duty recognized by the decision imposes an intolerable burden on doctors and on persons desiring treatment for specific complaints. (27 C.3d 297, 298, 299.) (See 12 *Pacific L. J.* 915; 19 *San Diego L. Rev.* 823; 14 *U.C. Davis L. Rev.* 1105; BAJI, No. 6.11.5 [based on *Truman*].)

The theory of the *Truman* case has been referred to as the "informed refusal" doctrine. (*Moore v. Preventive Medicine Med. Group* (1986) 178 C.A.3d 728, 737, 223 C.R. 859 [following *Truman*].)

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cc. Duty To Disclose Information Unrelated to Patient's Health.

5 *Witkin Sum. Cal. Law Torts* § 402

[§ 402] Duty To Disclose Information Unrelated to Patient's Health.

The duty to disclose all information material to a patient's decision to undergo treatment does not extend to the patient's nonmedical interests, such as financial interests. A physician is not the patient's financial adviser; the disclosure requirement is imposed to protect the patient's freedom to exercise control over his or her body in directing the course of medical treatment. (*Arato v. Avedon* (1993) 5 C.4th 1172, 1188, 23 C.R.2d 131, 858 P.2d 598, *infra*, §410 [nondisclosure of statistical life expectancy of persons with patient's illness].)

On the other hand, the physician has a duty to disclose his or her own research or economic interest in the treatment that is not related to the patient's health. (*Moore v. Regents of Univ. of Calif.* (1990) 51 C.3d 120, 271 C.R. 146, 793 P.2d 479, *infra*, §704.) The issue in *Moore* was whether plaintiff had stated a cause of action against his physician and other defendants (the hospital and other researchers) for using his blood cells, obtained in the course of surgery to remove his spleen, in potentially lucrative medical research without his permission. *Held*, a cause of action was stated against the physician for breach of fiduciary duty to disclose facts material to plaintiff's consent, or performing medical procedures without having first obtained his informed consent.

(a) As pointed out in *Cobbs v. Grant* (1972) 8 C.3d 229, 104 C.R. 505, 502 P.2d 1, *supra*, §397, a patient's consent to treatment must be an informed consent, and in soliciting that consent, the physician has a fiduciary duty to disclose all information material to the patient's decision. (51 C.3d 129.) Hence: "(1) a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment; and (2) a physician's failure to disclose such interest may give rise to a cause of action for performing medical procedures without informed consent or breach of fiduciary duty." (51 C.3d 129.)

(b) Questions about the validity of a patient's consent typically arise when the physician allegedly fails to disclose medical risks; but the concept of informed consent is broad enough to encompass the case where the physician allegedly has a personal interest. (51 C.3d 129.) The objective of protecting patients from possible conflicts of interest has also motivated legislative enactments, e.g., B. & P.C. 654.1 and 654.2, on referrals by the physician to an organization in which the physician has an interest. (51 C.3d 129.) A physician who has his own research interests "may be tempted to

order a scientifically useful procedure or test that offers marginal, or no, benefits to the patient." (51 C.3d 130.)

(c) The contention that the scientific use of cells that have already been removed cannot possibly affect the patient's medical interests is only partly correct. "[A] physician who does have a preexisting research interest might, consciously or unconsciously, take that into consideration in recommending the procedure." (51 C.3d 131.)

(d) It is possible that required disclosure may corrupt the patient's own judgment by distracting the patient from the requirements of his or her health. But the physician does not have unlimited discretion to decide what to disclose: it is the prerogative of the patient to make the ultimate informed decision. (151 C.3d 131.)

(e) The allegations of the complaint against the physician were sufficient to state a cause of action: they plainly state that the physician concealed an economic interest in the postoperative procedures. (51 C.3d 132.) The remaining defendants were not physicians and owed no fiduciary duty; but the question whether plaintiff has stated a cause of action on the basis of respondeat superior should be considered by the trial judge on remand. (51 C.3d 133, 134.) (See 27 Cal. Western L. Rev. 209; 104 Harv. L. Rev. 808; 24 Loyola L.A. L. Rev. 115 [proposed legislative solution]; 23 Pacific L. J. 267; 18 Pepperdine L. Rev. 1216; 28 San Diego L. Rev. 455; 35 San Diego L. Rev. 951 [physician's fiduciary duty to disclose managed care financial incentives]; 34 U.S.F. L. Rev. 733 [same]; 16 A.L.R.5th 143 [physician's use of patient's tissue, cells, or bodily substances for medical research or economic purposes].)

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dd. No Duty To Inform Respecting Unrecommended Procedure.

5 *Witkin Sum. Cal. Law Torts* § 403

[§ 403] No Duty To Inform Respecting Unrecommended Procedure.

In *Scalere v. Stenson* (1989) 211 C.A.3d 1446, 1453, 260 C.R. 152, the court said: "The dissent would draw a new duty-to-disclosure line. Though a doctor proposes neither surgery nor medical procedure, though he recommends no therapy and is unaware of any other school of doctors who would recommend therapy, the dissent would require such a doctor to disclose 'the risks and benefits of non-treatment.' Such a line, like one drawn with a finger in the air, is without precision and predictability. It would impose significant new burdens on already harried doctors without awarding demonstrable benefits to their patients. 'It seems obviously prohibitive and unrealistic to expect physicians to discuss with their patients every risk of proposed treatment ...--no matter how small or remote--and generally unnecessary from the patient's viewpoint as well.' " (211 C.A.3d 1453.)

In *Munro v. Regents of Univ. of Calif.* (1989) 215 C.A.3d 977, 263 C.R. 878, plaintiffs contended that, even though defendants did not recommend a Tay-Sachs screening test, defendants were under a duty to inform plaintiffs of the incidence of Tay-Sachs disease and its costs, in order to enable them to decide whether to undergo testing. "Plaintiffs would have us impose on defendants a duty to give plaintiffs information regarding a genetic test defendants did not recommend because it was not indicated by any facts which plaintiffs told to defendants, or even any facts of which plaintiffs were aware. Reason, as well as precedent, compels our refusal to impose such a duty." (215 C.A.3d 988.) (See *Vandi v. Permanente Med. Group* (1992) 7 C.A.4th 1064, 1070, 9 C.R.2d 463 [no duty to advise patient of availability of nonrecommended CT scan; citing *Scalere v. Stenson*]; *Parris v. Sands* (1993) 21 C.A.4th 187, 193, 25 C.R.2d 800 [citing *Vandi*; no duty to discuss nonrecommended administration of prophylactic antibiotics to patient with compromised immune system during course of cancer treatment].)

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ee. No Duty To Inform Respecting Illegal Procedure.

5 *Witkin Sum. Cal. Law Torts* § 404

[§ 404] No Duty To Inform Respecting Illegal Procedure.

In *Schiff v. Prados* (2001) 92 C.A.4th 692, 112 C.R.2d 171, decedent child underwent surgery for cancer in her brain and around her spinal cord. Because some residual tumor remained, decedent, on the recommendation of defendant doctor, underwent about 3 months of chemotherapy and radiation. Towards the end of this period, plaintiffs, her parents, discovered that a doctor in Texas was using an alternative cancer treatment. Although aware that this treatment was not approved by the Food and Drug Administration, that Texas was attempting to remove this doctor's license, and that defendant was opposed to the treatment and instead recommended participation in clinical trials, plaintiffs decided to have the controversial treatment used. Although use of the alternative treatment allegedly helped decedent, she died from complications apparently caused by the radiation that she had previously received on defendant's recommendation. Plaintiffs then instituted the present wrongful death case, alleging that defendant, by failing to advise them of the alternative treatment, had not obtained their informed consent. *Held*, summary judgment for defendant affirmed.

(a) *Cobbs v. Grant* (1972) 8 C.3d 229, 104 C.R. 505, 502 P.2d 1, *supra*, §397, holds that informed consent requires a doctor to disclose to a patient "available" treatments with respect to a proposed therapy. Many cases have echoed the statement in *Cobbs* that the duty of disclosure extends only to available choices. A treatment that cannot be legally administered in this state is not "available" within the meaning of this rule, and thus a physician cannot be held liable for failing to disclose the existence of such a treatment. (92 C.A.4th 701.)

(b) In order to prevent persons from being misled by unproved and untested cancer treatments, *Health & Saf.C.* 109250 et seq. were enacted to enable the public to have complete knowledge of the cancer treatments "available in this state." Under *Health & Saf.C.* 109300 and 109325, a cancer drug is not legally "available in this state" unless (1) it has been approved by the FDA, (2) a current new drug application (IND) is on file with the FDA, or (3) specified alternative conditions, including filings with the Medical Board of California, have been fulfilled. There is no evidence here that (1) and (3) had been met. With respect to (2), the evidence revealed that an IND was on file for the use of capsules of the alternative medication for the treatment of breast cancer, but that decedent's treatment could not have been authorized under this IND, because she required large doses of the medication that had to be administered intravenously. Thus, at the time that defendant allegedly should have disclosed the existence of the alternative

treatment, it would have been illegal to administer that treatment in *California*. (92 C.A.4th 703.)

(c) Plaintiffs argued that defendant should have informed them about the alternative treatment in order to afford them the choice to investigate whether that treatment would have become available in California through FDA-approved clinical trials in time to have saved decedent's life. However, to rule that a physician may have a duty to disclose a treatment that is currently unavailable but that might become available in the future would be to discard the availability requirement altogether. (92 C.A.4th 706.) Plaintiffs further argued that defendant was obligated to advise them that the alternative treatment was available in Texas. However, requiring physicians to inform patients of treatment alternatives illegal in California but available in other states is beyond what the law expects of doctors. Finding legal alternatives is a job more suitable to lawyers. Indeed, the difficulty with determining what is "available" in another state is well illustrated in this case, where the use of the alternative treatment was twice held to be legal under Texas law and twice held to be illegal. (92 C.A.4th 707.)

(d) Because cancer drugs in FDA-approved clinical trials were not "unavailable" under the foregoing analysis, the present decision would not serve to discourage participation in these trials. (92 C.A.4th 708.)

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- ff. Duty of Specialist.

5 *Witkin Sum. Cal. Law Torts* § 405

[§ 405] Duty of Specialist.

In *Townsend v. Turk* (1990) 218 C.A.3d 278, 266 C.R. 821, plaintiff injured her back in a plane crash. She was examined in an emergency room by Dr. W, who asked Dr. T, a radiologist, to look at X-rays of plaintiff's spine. After Dr. T informed Dr. W that the X-rays showed a mild compression fracture, plaintiff was sent home, where she suffered severe pain and loss of mobility from damage to posterior elements of the vertebrae that required surgery. Plaintiff argued that Dr. T should have informed her of the alternative of a CT scan, which would have revealed the more serious injury. *Held*, no such duty existed.

(a) The proper approach is to confine a patient's claims against a specialist, such as a consulting radiologist, to theories of medical negligence, as opposed to permitting the assertion that informed consent on each treatment level should be obtained. (218 C.A.3d 287.)

(b) The record here shows that it was the clinician, Dr. W, who had the responsibility of deciding what course of action to take, what tests to order, and what treatment to prescribe, in view of the information given him by the radiologist. Dr. T did not deal directly with plaintiff or make decisions about her care. (218 C.A.3d 287.)

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- 7. Particular Procedures and Information.
- aa. Breast Cancer.

5 *Witkin Sum. Cal. Law Torts* § 406

[§ 406] Breast Cancer.

A physician and surgeon has a duty to inform a patient being treated for breast cancer by means of "a standardized written summary ... in layman's language and in a language understood by the patient" of "alternative efficacious methods of treatment which may be medically viable, including surgical, radiological, or chemotherapeutic treatments or combinations thereof." (*Health & Saf.C. 109280(a), (b).*) Failure to so inform the patient constitutes unprofessional conduct. (*Health & Saf.C. 109280(b).*) (See 12 *Pacific L. J.* 595.)

The summary, which is developed and made available by the Medical Board of California and based on recommendations by the Cancer Advisory Council, informs the patient of "the advantages, disadvantages, risks, and descriptions" of the alternative procedures and also includes information regarding breast cancer treatments in the investigational or clinical trial stage (and recognized by the Physician's Data Query of the National Cancer Institute). (*Health & Saf.C. 109280(c).*)

Prior to a biopsy, the physician and surgeon must note on the patient's chart that he or she has given the patient the required written summary. (*Health & Saf.C. 109280(d).*)

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Health & Saf.C. 109275(b), as amended in 2006, refers to a duty to provide a standardized written summary in "layperson's" language, rather than in "layman's" language. *Correction:* "*Health & Saf.C. 109280*" should be "*Health & Saf.C. 109275*".



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- 7. Particular Procedures and Information.
- bb. Hysterectomy.

5 Witkin Sum. Cal. Law Torts § 407

[§ 407] Hysterectomy.

Prior to performance of a hysterectomy, a physician or surgeon must give detailed information to the patient, verbally and in writing, concerning her right to refuse the operation, the existence of any alternative forms of treatment, and the nature of the surgery, its discomforts and risks, its benefits, and its cost. (*Health & Saf.C. 1690(a)*.) The patient must sign a written statement indicating that she has read and understood the written information, discussed it with her doctor, and has been advised that the operation will render her permanently sterile. (*Health & Saf.C. 1690(b)*.) An exception to these informed consent requirements exists when the operation is performed in a life-threatening emergency situation. (*Health & Saf.C. 1690(c)*); on emergency exception to duty to inform, see *supra*, §399.) (See *19 Pacific L. J. 631*.)

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- 7. Particular Procedures and Information.
- cc. Sperm or Ova Removal.

5 *Witkin Sum. Cal. Law Torts* § 408

[§ 408] Sperm or Ova Removal.

A physician who removes sperm or ova from a patient for implantation in one other than the patient or his or her spouse is required to obtain a prescribed consent. (*B. & P.C. 2260(a)*.) The consent must be in writing, contain specified language, and be signed by both the patient and the physician. (*B. & P.C. 2260(b)*.) Not only does violation constitute unprofessional conduct (*B. & P.C. 2260(d)*), but a civil penalty is assessed against a physician who fails for a second time to obtain any consent so required; this penalty is additional to other available remedies (*B. & P.C. 2260(e)*).

Nothing in this statute affects the obligation of a physician to obtain the patient's informed consent before performing a medical procedure that may significantly affect the patient's reproductive health or ability to conceive. (*B. & P.C. 2260(c)*.)

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- 7. Particular Procedures and Information.
- dd. Cosmetic Implants.

5 *Witkin Sum. Cal. Law Torts* § 409

[§ 409] Cosmetic Implants.

Physicians are required to inform patients of the risks and possible side effects of silicone implants (*B. & P.C. 2259*) or collagen injections (*B. & P.C. 2259.5*) used in cosmetic, plastic, reconstructive or similar surgery before performing the surgery. (See *B. & P.C. 2259(i)* [defining "silicone implant"]; *B. & P.C. 2259.5(i)* [defining "collagen injection"]; 24 *Pacific L. J.* 653.)

Physicians may comply with this requirement by furnishing the patient with (1) a copy of the standardized written summary for the implants or injections prepared by the state Department of Health on a determination that the federal Food and Drug Administration has not authorized related written information intended for laypersons, or (2) written information authorized for use by the FDA prepared by the manufacturer based on the physician package insert. (*B. & P.C. 2259(a)*, (e), 2259.5(a), (e).) The standardized summary must (1) use language readily understood by laypersons; (2) contain a disclaimer that the state neither endorses any procedures nor provides an exhaustive analysis of the potential benefits or associated risks; and (3) provide only information approved by the FDA. (*B. & P.C. 2259(e)*, 2259.5(e).)

Failure to comply constitutes unprofessional conduct, but is not a misdemeanor. (*B. & P.C. 2259(c)*, (h), 2259.5(c), (h).) Compliance does not modify a physician's existing duties, including duties relating to informed consent. A physician may not be held liable as a distributor of a standardized written summary or written information allegedly containing erroneous or incomplete information. (*B. & P.C. 2259(c)*, 2259.5(c).)

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- 7. Particular Procedures and Information.
- ee. Statistical Life Expectancy.

5 *Witkin Sum. Cal. Law Torts* § 410

[§ 410] Statistical Life Expectancy.

In *Arato v. Avedon* (1993) 5 *C.4th* 1172, 23 *C.R.2d* 131, 858 *P.2d* 598, decedent died of pancreatic cancer after undergoing a treatment program consisting of chemotherapy and radiation. His wife and children instituted this action based on defendant physicians' failure to disclose the high statistical mortality rate associated with pancreatic cancer. Plaintiffs alleged that had decedent been given this information, he would have refused the treatment, choosing instead to live out his last days at peace with plaintiffs and placing his business affairs in order. *Held*, defendants did not breach their duty of disclosure.

(a) *General versus specific information.*

(1) The fount of the doctrine of informed consent in California is *Cobbs v. Grant* (1972) 8 *C.3d* 229, 245, 104 *C.R.* 505, 502 *P.2d* 1, *supra*, §397. "Together with companion decisions in other jurisdictions, *Cobbs v. Grant* ... is one of the epochal opinions in the legal recognition of the medical patient's protectible interest in autonomous decision making. After more than a generation of experience with the judicially broadened duty of physician disclosure, the accumulated medicolegal comment on the subject of informed consent is both large and discordant. Those critics writing under the banner of 'patient autonomy' insist that the practical administration of the doctrine has been thwarted by a failure of judicial nerve and an unremitting hostility to its underlying spirit by the medical profession. Others, equally earnest, assert that the doctrine misapprehends the realities of patient care and enshrines moral ideals in the place of workable rules." (5 *C.4th* 1184.)

(2) The particular issue to be addressed here is whether the holding in *Cobb*, as embodied in BAJI, No. 6.11, adequately states the standard to be used in determining the adequacy of the disclosure to the patient, or whether the standard instruction should be revised to mandate specific disclosures, such as a patient's life expectancy as revealed by mortality statistics. (5 *C.4th* 1185.)

(3) "In our view, one of the merits of the somewhat abstract formulation of BAJI No. 6.11 is its recognition of the importance of the overall medical context that juries ought to take into account in deciding whether a challenged

disclosure was reasonably sufficient to convey to the patient information material to an informed treatment decision. The contexts and clinical settings in which physician and patient interact and exchange information material to therapeutic decisions are so multifarious, the informational needs and degree of dependency of individual patients so various, and the professional relationship itself such an intimate and irreducibly judgment-laden one, that we believe it is unwise to require *as a matter of law* that a particular species of information be disclosed." (5 C.4th 1185.)

(4) The fact-bound assessment stated in BAJI, No. 6.11 is particularly appropriate in the case of life expectancy projections for cancer patients based on statistical samples, because standard morbidity values derived from the experience of population groups are inherently unreliable regarding the fate of the individual patient. (5 C.4th 1186.)

(b) *Relevancy of nonmedical interests.* Plaintiffs contended that decedent's statistical life expectancy was admissible because it was material to his nonmedical interests, i.e., his business and investment affairs. This claim is founded on a premise not recognized in California. The doctrine of informed consent does not impose a duty on physicians to disclose information material to a patient's nonmedical interests. (5 C.4th 1188; see supra, §402.)

(c) *Use of expert evidence.* Two expert witnesses for defendants testified that the standard of medical practice cautions against disclosing to pancreatic cancer patients specific life expectancy data, unless the patient directly requests that information. The admission of this testimony was proper. Although the role of expert testimony is limited in informed consent litigation, especially as related to disclosures involving the risk of death or serious injury, there may be some situations where the adequacy of disclosure may turn on the standard of practice within the relevant medical community. In such a case, expert testimony will usually be appropriate. (5 C.4th 1191.) Because statistical life expectancy data information lies outside the significant risks associated with a given treatment, it falls within the scope of the additional information that a skilled physician would provide. And because the question whether a physician should disclose that information turns on the standard of practice within the medical community, expert testimony was properly admitted in this case. (5 C.4th 1192.) (See 22 Pepperdine L. Rev. 348 [Arato].)

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d. Consent to Medical Experimentation.

1. Nature of Statute.

5 Witkin Sum. Cal. Law Torts § 411

[§ 411] Nature of Statute.

(1) *Adoption and Purpose.* The Protection of Human Subjects in Medical Experimentation Act (*Health & Saf.C. 24170 et seq.*), enacted in 1978, concerns informed consent (see generally supra, §395 et seq.) of subjects of medical experimentation. (See *10 Pacific L. J. 510*; *20 Stanf. L. Rev. 99*; *34 U.C.L.A. L. Rev. 67* [Bridging the Gap Between Ethical Thought and Current Practice].) *Health & Saf.C. 24171* provides in part:

"The Legislature hereby finds and declares that medical experimentation on human subjects is vital for the benefit of mankind, however such experimentation shall be undertaken with due respect to the preciousness of human life and the right of individuals to determine what is done to their own bodies."

"It is, therefore, the intent of the Legislature, in the enacting of this chapter, to provide minimum statutory protection for the citizens of this state with regard to human experimentation and to provide penalties for those who violate such provisions."

(2) *Meaning of "Medical Experiment."* The significant term is defined as follows:

(a) "The severance or penetration or damaging of tissues of a human subject or the use of a drug or device, as defined in Section 109920 or 109925, electromagnetic radiation, heat or cold, or a biological substance or organism, in or upon a human subject in the practice or research of medicine in a manner not reasonably related to maintaining or improving the health of the subject or otherwise directly benefiting the subject." (*Health & Saf.C. 24174(a).*)

(b) "The investigational use of a drug or device as provided in Sections 111590 and 111595." (*Health & Saf.C. 24174(b).*)

(c) "Withholding medical treatment from a human subject for any purpose other than maintenance or improvement of the health of the subject." (*Health & Saf.C. 24174(c).*)

(3) *No Waiver of Rights or Requirements.* A purported waiver of the rights guaranteed or requirements prescribed in the Act is void. (*Health & Saf.C. 24176(f).*)

West's Key Number Digest, Assault and Battery k.11

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d. Consent to Medical Experimentation.

2. Scope of Statute.

5 *Witkin Sum. Cal. Law Torts* § 412

[§ 412] Scope of Statute.

The Protection of Human Subjects in Medical Experimentation Act does not supersede the existing laws relating to use of experimental drugs in prisons. (*Health & Saf.C. 24177.*) Also, the Act does not apply to the following:

(1) Subject to specified exceptions, an investigator conducting an experiment within an authorized institution who obtains informed consent pursuant to federal regulations. (*Health & Saf.C. 24178.*)

(2) A pharmacist dispensing drugs on a prescription. (*Health & Saf.C. 24179.*)

(3) An adult person in a terminal condition who executes a directive for withholding or withdrawal of life-sustaining procedures under the Health Care Decisions Law (14 *Summary* (10th), *Wills and Probate*, §876 et seq.). (*Health & Saf.C. 24179.5.*)

(4) A patient subject to a life-threatening emergency. (*Health & Saf.C. 24177.5(a)*; see *Health & Saf.C. 24177.5(b)* [exemption does not relieve any party of any other legal duty, including duty to act in nonnegligent manner]; *Health & Saf.C. 24177.5(c)* [exemption remains in effect until January 1, 2011]; 29 *McGeorge L. Rev.* 657 [*Health & Saf.C. 24177.5.*]) The following conditions must be met:

(a) Care is provided in accordance with the procedures and protections set forth in 21 C.F.R., Part 50 and 45 C.F.R., Part 46 (regulations of the federal Department of Health and Human Services relating to the protection of human subjects), in effect on January 1, 1997. (*Health & Saf.C. 24177.5(a)(1).*)

(b) The patient is in a life-threatening situation necessitating urgent intervention, and available treatments are unproven or unsatisfactory. (*Health & Saf.C. 24177.5(a)(2).*)

(c) The patient is unable to give informed consent as a result of the patient's medical condition. (*Health & Saf.C. 24177.5(a)(3).*)

(d) Obtaining informed consent from the patient's legally authorized representatives is not feasible before the

treatment must be administered. However, the proposed investigational plan must define the length of time of the potential therapeutic window based on scientific evidence, and the investigator must commit to attempting to contact a legally authorized representative for each subject within that length of time and, if feasible, to asking the legally authorized representative contacted for consent within that length of time rather than proceeding without consent. (*Health & Saf.C. 24177.5(a)(4).*)

(e) There is no reasonable way to identify prospectively the individuals likely to become eligible for participation in the clinical investigation. (*Health & Saf.C. 24177.5(a)(5).*)

(f) Valid scientific studies have been conducted that support the potential for the intervention to provide a direct benefit to the patient. Risks associated with the investigation must be reasonable in relation to what is known about the medical condition of the potential class of subjects, the risks and benefits of standard therapy, if any, and what is known about the risks and benefits of the proposed intervention or activity. (*Health & Saf.C. 24177.5(a)(6).*)

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3. Experimental Subject's Bill of Rights.

5 *Witkin Sum. Cal. Law Torts* § 413

[§ 413] Experimental Subject's Bill of Rights.

Health & Saf.C. 24172 sets forth the "experimental subject's bill of rights," which includes, but is not limited to, the rights to:

- (a) "Be informed of the nature and purpose of the experiment."
- (b) "Be given an explanation of the procedures to be followed in the medical experiment, and any drug or device to be utilized."
- (c) "Be given a description of any attendant discomforts and risks reasonably to be expected from the experiment."
- (d) "Be given an explanation of any benefits to the subject reasonably to be expected from the experiment, if applicable."
- (e) "Be given a disclosure of any appropriate alternative procedures, drugs or devices that might be advantageous to the subject, and their relative risks and benefits."
- (f) "Be informed of the avenues of medical treatment, if any, available to the subject after the experiment if complications should arise."
- (g) "Be given an opportunity to ask any questions concerning the experiment or the procedures involved."
- (h) "Be instructed that consent to participate in the medical experiment may be withdrawn at any time and the subject may discontinue participation in the medical experiment without prejudice."
- (i) "Be given a copy of the signed and dated written consent form as provided for by Section 24173 or 24178."
- (j) "Be given the opportunity to decide to consent or not to consent to a medical experiment without the intervention of any element of force, fraud, deceit, duress, coercion, or undue influence on the subject's decision."

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4. Consent Required.

5 *Witkin Sum. Cal. Law Torts* § 414

[§ 414] Consent Required.

(1) *Requirement and Exceptions.* Subject to specified exceptions, "no person shall be subjected to any medical experiment unless the informed consent of such person is obtained." (*Health & Saf.C. 24175(a).*) The exceptions generally relate to situations in which a conservator may give consent (*Health & Saf.C. 24175(b), (c)*), and to situations in which consent is obtained for a developmentally disabled person without a guardian or conservator, pursuant to Welf.C. 4655(c) (*Health & Saf.C. 24175(d)*). However, consent given by a person other than the human subject "shall only be for medical experiments related to maintaining or improving the health of the human subject or related to obtaining information about a pathological condition of the human subject." (*Health & Saf.C. 24175(e).*) (See 33 *Golden Gate L. Rev.* 105 [informed consent of children in medical research].)

(2) *Nature and Conditions.* The subject or the subject's conservator, guardian, or other representative must sign and date a copy of the subject's bill of rights and a written consent form. (*Health & Saf.C. 24173(a), (b).*) The subject or representative must also be informed, both verbally and within the written consent form, "in nontechnical terms and in a language" in which he or she "is fluent," of all the important facts that might influence his or her decision. (*Health & Saf.C. 24173(c)* [specifying numerous matters that must be covered].) The written consent form must be signed and dated by some other person who can attest that the requirements have been satisfied. (*Health & Saf.C. 24173(d).*) The consent must be freely given, without force, fraud, deceit, duress, coercion, or undue influence. (*Health & Saf.C. 24173(e).*)

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- A. Assault and Battery.
 - 3. Plaintiff's Consent to Act.
 - d. Consent to Medical Experimentation.
 - 5. Civil and Criminal Sanctions.

5 Witkin Sum. Cal. Law Torts § 415

[§ 415] Civil and Criminal Sanctions.

(1) *Civil Penalties.* (a) A person who negligently allows an experiment to be conducted without informed consent is liable in a minimum amount of \$ 500 and a maximum of \$ 10,000. (*Health & Saf.C. 24176(a)*, as amended in 2003.) (b) A person who wilfully fails to obtain informed consent is liable in a minimum amount of \$ 1,000 and a maximum of \$ 25,000. (*Health & Saf.C. 24176(b).*)

(2) *Criminal Sanctions.* The following persons are guilty of a misdemeanor punishable by a county jail sentence of not over 1 year or a fine of \$ 50,000 or both:

(a) A person who *wilfully fails to obtain informed consent* "and thereby exposes a subject to a known substantial risk of serious injury, either bodily harm or psychological harm." (*Health & Saf.C. 24176(c).*)

(b) A representative or employee of a *pharmaceutical company* who contracts with another person for the conduct of an experiment and who *wilfully withholds information* of its risks and hazards from such person and thereby exposes the subject to substantial risk of serious injury, either bodily harm or psychological harm. (*Health & Saf.C. 24176(d).*)

(3) *Separate Offenses.* "Each medical experiment performed in violation of any provision" of the Protection of Human Subjects in Medical Experimentation Act "is a separate and actionable offense." (*Health & Saf.C. 24176(e).*)

(4) *Recovery of Damages.* Nothing in *Health & Saf.C. 24176* "shall be construed to limit or expand the right of an injured subject to recover damages under any other applicable law." (*Health & Saf.C. 24176(g).*)

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3. Plaintiff's Consent to Act.

e. Consent Fraudulently Obtained.

5 *Witkin Sum. Cal. Law Torts* § 416

[§ 416] Consent Fraudulently Obtained.

(1) *Fraud as Vitiating Consent.* A consent fraudulently obtained is invalid, and the act consented to may therefore be actionable. Thus, in *Barbara A. v. John G.* (1983) 145 C.A.3d 369, 193 C.R. 422, defendant induced plaintiff to have intercourse with him on the false representation that he was sterile. The court held that a cause of action was stated for fraud (see *infra*, §790) and also for battery: (a) the act of impregnation exceeded the scope of the consent, and (b) the consent was fraudulently induced. (145 C.A.3d 375.)

In *Rains v. Superior Court* (1984) 150 C.A.3d 933, 198 C.R. 249, plaintiff psychiatric patients sued defendant psychiatrists alleging that batteries occurred as part of an in-patient psychiatric treatment program in which the patients participated. The complaint stated that plaintiffs consented to the use of physical violence on themselves as an aspect of the treatment, because defendants persuaded them that the physical abuse was necessary to effect a cure, and that the violence was not in fact administered for a therapeutic purpose but in order to subjugate them and control their behavior to defendants' personal advantage. The trial court sustained defendants' demurrer. *Held*, mandamus issued to compel vacation of the order. Plaintiffs state a cognizable cause of action for battery. Deceit as to the therapeutic purpose of an otherwise offensive contact vitiates consent. (150 C.A.3d 936.) To vitiate a patient's consent to a medical procedure on the basis of a physician's misrepresentation, the mistaken understanding of the patient must extend to the essential character of the act itself. The essential character is that which makes it harmful or offensive, rather than some collateral matter that merely operates as an inducement. The deception here, however, does not relate to a collateral matter operating as an inducement but "goes to the essential nature of the act itself." (150 C.A.3d 941.)

In *Freedman v. Superior Court* (1989) 214 C.A.3d 734, 263 C.R. 1, a malpractice action involving childbirth by Cesarean section, plaintiff's battery cause of action was based on the administration of the drug Pitocin. Plaintiff alleged that her consent to the treatment was fraudulently obtained because she was told by defendant doctors that the drug was necessary to prevent infection when, in fact, its purpose is to induce labor. After defendants' demurrer was sustained, plaintiff petitioned for review. *Held*, petition denied.

(a) *Rains v. Superior Court* held that, for fraud to vitiate a patient's consent to treatment, the patient must establish that the purpose of the treatment was nontherapeutic. (214 C.A.3d 737.) Here, plaintiff did not allege that defendants' purpose was other than the rendition of therapeutic treatment, and she did not allege that defendants' deception was for

any independent or improper motive. Hence she did not allege a cause of action for battery. "She was induced to accept a drug by deception, but the deception did not have to do with the mutual purpose of patient and physician, which was treatment. They both knew the 'essential character' of the treatment, and the deception by the physician as to the specific medical objective was a collateral matter not vitiating consent." (214 C.A.3d 739.)

(b) This does not mean that plaintiff is without a cause of action. *Cobbs v. Grant* (1972) 8 C.3d 229, 104 C.R. 505, 502 P.2d 1, supra, §397, held that a patient whose consent was exceeded by a well-meaning physician attempting therapeutic treatment should be relegated to a negligence cause of action. Similarly, a patient whose consent was obtained by a well-meaning deception as to the precise effect of a treatment should also be relegated to a negligence action. (214 C.A.3d 740.) "We would expect it to be a very common phenomenon that patients whose course of treatment turns unsuccessful would, on reflection, conclude that had they known at the beginning what they know at the end they would not have permitted the treatment. We believe that the pleading of such cases should be restricted to negligence, or with appropriate facts to the tort of deceit, and that it will not serve society to permit the bringing of such actions as batteries." (214 C.A.3d 741.) (On negligence recovery for uninformed consent generally, see supra, §397.)

(2) *Statutory Action for Injuries From Sexual Contact With Psychotherapist*. C.C. 43.93 provides a cause of action for injury resulting from sexual contact with a psychotherapist in prescribed circumstances. (See 19 Pacific L. J. 508.) The cause of action exists if the sexual contact occurs under any of the following conditions:

(a) During the period the patient is receiving psychotherapy from the psychotherapist. (C.C. 43.93(b)(1).)

(b) Within 2 years following termination of therapy. (C.C. 43.93(b)(2).)

(c) By means of therapeutic deception. (C.C. 43.93(b)(3).) "Therapeutic deception" is defined as "a representation by a psychotherapist that sexual contact with the psychotherapist is consistent with or part of the patient's or former patient's treatment." (C.C. 43.93(a)(5).)

It is not a defense that the contact occurs outside a therapy or treatment session or off the premises regularly used. However, no cause of action exists between spouses within a marriage. (C.C. 43.93(c).)

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4. Privilege of Defendant.

a. Self-Defense and Defense of Third Person.

1. Nature and Scope of Privilege.

5 *Witkin Sum. Cal. Law Torts* § 417

[§ 417] Nature and Scope of Privilege.

"Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest." (C.C. 50.) Acts that would normally amount to assault or battery may thus be excused under the privilege to protect oneself and certain others. (See *Villines v. Tomerlin* (1962) 206 C.A.2d 448, 23 C.R. 617 [evidence insufficient]; Dobbs, *The Law of Torts* §70 et seq.; 1 Harper, James & Gray 3d §3.11 et seq.; 2 California Affirmative Defenses, §50:1 et seq.; 6 *Am.Jur.2d* (1999 ed.), *Assault and Battery* §129 et seq.; 67 *A.L.R.2d* 405 [pleading self-defense in civil assault and battery action]; 9 *A.L.R.3d* 933 [relationship with assailant's wife as provocation depriving defendant of right of self-defense]; 35 *A.L.R.4th* 947 [provocation insufficient to create right to self-defense as basis for mitigation of damages]; 3 *Proof of Facts* 2d 211 [privileged use of force in self-defense]; 71 *A.L.R.4th* 940 [construction and application of statutes justifying use of force to prevent use of force against another]; BAJI, No. 7.55 [self-defense and defense of others]; CACI, No. 1304 [same]; cf. *Bartosh v. Banning* (1967) 251 C.A.2d 378, 385, 59 C.R. 382 [obligation of person acting in self-defense not to harm innocent bystander in public bar]; on exception where lawful arrest is being attempted, see *infra*, §424.)

The privilege under C.C. 50 covers only the defense of oneself, relatives, members of the household, and guests, while under the Restatement the actor may defend *any third person* under the same circumstances that would have justified defense of himself or herself. (*Rest.2d, Torts* §76; see 10 *A.L.R.3d* 619 [duty to protect another against criminal attack].)

West's Key Number Digest, Assault and Battery k.13, 14

SUPPLEMENT: [This section is current through the latest supplement]
See 6 *Am.Jur.2d* (2008 ed.), *Assault and Battery* §120 et seq.



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2. Conditions.

5 *Witkin Sum. Cal. Law Torts* § 418

[§ 418] Conditions.

The person claiming the privilege must *reasonably believe* that danger exists, and must use only such force as is *reasonably necessary*. (*Fraguglia v. Sala* (1936) 17 C.A.2d 738, 745, 62 P.2d 783; *Rest.2d, Torts* §63; see *Marriott v. Williams* (1908) 152 C. 705, 711, 93 P. 875 [burden of proof is on defendant]; *Lopez v. Surchia* (1952) 112 C.A.2d 314, 317, 246 P.2d 111 [fistfight between two boys, not involving imminent danger of great bodily harm; father of one, who fired gun at the other, was not privileged]; *Sheward v. Magit* (1951) 106 C.A.2d 163, 166, 234 P.2d 708 [father pushed away boy who was assaulting his son; privilege upheld]; 25 A.L.R.2d 1215 [danger or apparent danger of great bodily harm or death as condition of self-defense in civil action for assault and battery]; 43 Cal. L. Rev. 119 [burden of proof in wrongful death action based on intentional homicide]; 13 Proof of Facts 3d 219 [use of excessive force].)

However, the test of necessary force is the reasonable appearance, and not the actual necessity. Hence, it is improper to instruct that the right to use force in self-defense "is always limited by the condition that the force used must be no more than is reasonably adequate and necessary to the occasion." (*Vaughn v. Jonas* (1948) 31 C.2d 586, 599, 191 P.2d 432 ["[i]n emphasizing that the law of self-defense is a law of necessity courts should never lose sight of the fact that the necessity may be either real or apparent"].)

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 - 4. Privilege of Defendant.
 - b. Defense or Recapture of Property.
 - 1. Use of Reasonable Force.

5 *Witkin Sum. Cal. Law Torts* § 419

[§ 419] Use of Reasonable Force.

(1) *General Rule.* Under C.C. 50 (supra, §417), "[a]ny necessary force may be used to protect from wrongful injury the ... property of oneself," one's relatives, and specified others. (See Dobbs, *The Law of Torts* §76; 6 *Am.Jur.2d* (1999 ed.), *Assault and Battery* §137 et seq.)

(2) *Wilful Trespasser.* Force may be used by the legal possessor of real or personal property, to defend his or her possession, provided the force used is not excessive. (*Walker v. Chanslor* (1908) 153 C. 118, 131, 94 P. 606; *Townsend v. Briggs* (1893) 99 C. 481, 483, 34 P. 116; *Fawkes v. Reynolds* (1922) 190 C. 204, 212, 211 P. 449; *MacLeod v. Fox West Coast Theatres Corp.* (1937) 10 C.2d 383, 388, 74 P.2d 276; see *Lowry v. Standard Oil Co.* (1942) 54 C.A.2d 782, 788, 130 P.2d 1 [plaintiff was injured by fall during pursuit by defendant's service station manager; manager was privileged to attempt to apprehend him, if reasonable cause existed to suspect him of attempted robbery]; *Rest.2d, Torts* §81; cf. *Haworth v. Elliot* (1944) 67 C.A.2d 77, 82, 153 P.2d 804 [barroom proprietor was liable for beating administered to patron in course of his ejection for quarrelling with another patron].)

The landowner usually should first warn or request the trespasser to leave. (*Chapell v. Schmidt* (1894) 104 C. 511, 514, 38 P. 892; *Phelps v. Arnold* (1931) 112 C.A. 518, 524, 297 P. 31.)

West's Key Number Digest, Assault and Battery k.15

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* See 6 *Am.Jur.2d* (2008 ed.), *Assault and Battery* §128 et seq.



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- b. Defense or Recapture of Property.
- 2. Use of Deadly Force.

5 Witkin Sum. Cal. Law Torts § 420

[§ 420] Use of Deadly Force.

(1) *General Rule.* Deadly force or force likely to cause bodily harm is ordinarily not justified merely in defense of property, as in ejecting a trespasser or recovering a chattel. (*Deevy v. Tassi* (1942) 21 C.2d 109, 119, 130 P.2d 389; see Dobbs, The Law of Torts §76; 1 Harper, James & Gray 3d §3.13.) Under the Restatement, deadly force is permitted "if, and only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect." (*Rest.2d, Torts* §79.)

(2) *Spring Gun or Trap.* Spring guns or other deadly mechanical devices are, under the rule of the Restatement, privileged only where deadly force personally employed would have been justifiable; while barbed wire and spiked walls are generally permissible where reasonably necessary. (*Rest.2d, Torts* §§84, 85; see *People v. Ceballos* (1974) 12 C.3d 470, 476, 116 C.R. 233, 526 P.2d 241, 1 Cal. Crim. Law (3d), *Defenses*, §79 [recognizing exception permitting use of spring gun where defendant, if present, would have been justified in using deadly force, but holding it to be inapplicable under the facts]; 64 Cal. L. Rev. 396 [Ceballos]; 47 A.L.R.3d 646 [use of set gun, trap, or similar device on defendant's own property].)

(3) *Felonious Trespasser.* Against a felonious trespasser, the use of deadly force without warning may be excusable. In *Nakashima v. Takase* (1935) 8 C.A.2d 35, 38, 46 P.2d 1020, defendant restaurant proprietor, suspecting a burglary, hid in a passageway and, when two men broke in and entered, shot without warning, killing one. Held, he was not liable for the wrongful death. The act was both a justifiable homicide under P.C. 197 (1 Cal. Crim. Law (3d), *Defenses*, §§64, 78) and a privileged battery. (See *Boyer v. Waples* (1962) 206 C.A.2d 725, 730, 24 C.R. 192 [long-continued harassment and threats by vandals, followed by trespass in nighttime by persons apparently carrying explosives or gasoline; shooting with .22 rifle, after disregard of warnings and warning shots, was justifiable]; 43 Cal. L. Rev. 119; 9 So. Cal. L. Rev. 375 [discussion of similar problem arising under claim of self-defense]; 100 A.L.R.2d 1021 [use of firearm in defense of habitation or property]; 29 A.L.R.4th 144 [private person's liability to third person injured by shots fired at fleeing criminal].)

Nakashima was followed in *Gilmore v. Superior Court* (1991) 230 C.A.3d 416, 281 C.R. 343. Defendant was awakened at 2 a.m. by a sound outside his second story living room window, and saw decedent standing on a ladder and

attempting to remove the window screen. Defendant got his gun, went out the front door, and pulled the ladder down, knocking decedent to the ground. Decedent regained his feet, moved toward defendant and then backed away. Defendant ordered him to "freeze," and fired two warning shots near him; Decedent ran away, and defendant fired four more shots to decedent's side, hoping to frighten him into stopping. Fragments from a bullet, though not aimed at decedent, ricocheted off the asphalt and killed him. In a criminal prosecution, defendant's conviction for manslaughter was reversed on the ground that the evidence showed a justifiable homicide. In the present action by decedent's mother for wrongful death, defendant moved for summary judgment. *Held*, the motion should have been granted.

(a) An act resulting in justifiable homicide as defined by P.C. 197 is, in legal effect, a privileged act; i.e., though it would ordinarily be tortious, under the circumstances it does not subject the actor to liability. (230 C.A.3d 420, 421, citing the text.) Thus, the holding in *Nakashima* was that the shooting of the victim was both a justifiable homicide and a privileged battery. (230 C.A.3d 420, citing the text.)

(b) In *People v. Ceballos*, *supra*, the court pointed out that the common law sanctioned the use of deadly force only in situations where the felony being committed could be characterized as "forcible and atrocious"; and that where the offense is burglary, this standard is satisfied; the circumstances establish that the perpetrator's conduct "threatened, or was reasonably believed to threaten, death or serious bodily harm." (230 C.A.3d 422.) Here the undisputed facts establish that defendant did in fact entertain the belief that he was so threatened and that his belief was reasonable. He testified on deposition that when he looked out and saw decedent on the ladder he was "absolutely frantic"; his initial intent was to keep the intruder outside of his house, and he sought to accomplish it by making an arrest. And in his statement of undisputed facts defendant asserted that he was "afraid for his life." (230 C.A.3d 422.)

West's Key Number Digest, Assault and Battery k.15

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- b. Defense or Recapture of Property.
- 3. No Privilege for Forcible Entry.

5 Witkin Sum. Cal. Law Torts § 421

[§ 421] No Privilege for Forcible Entry.

A tenant holding over without permission is technically a trespasser. But by statute the owner must use the unlawful detainer procedure, and, if the owner ousts the tenant forcibly, the tenant may regain possession by an action for forcible entry. (See *C.C.P. 1159* et seq.; 5 *Cal. Proc. (4th), Pleading*, §608 et seq.) There is a conflict of authority on whether the owner is liable in damages for battery in the case of the forcible ouster. (See 6 *Am.Jur.2d (1999 ed.)*, *Assault and Battery* §139.) California formerly did not allow recovery by the tenant. (See *Walker v. Chanslor* (1908) 153 C. 118, 131, 94 P. 606.) However, the *Walker* case was overruled in *Daluiso v. Boone* (1969) 71 C.2d 484, 500, 78 C.R. 707, 455 P.2d 811.

In *Daluiso*, plaintiff, owner of a ranch, conveyed it to his son for a nominal consideration, reserving the right of possession during his lifetime. A dispute arose over the boundary, defendant contending that plaintiff's fence was on defendant's land. Defendant sent men to remove and relocate it, and in the bitter altercation plaintiff, an elderly man with a known heart condition, suffered emotional distress. He sued for intentional infliction of mental distress and injury to personal property. The trial judge refused to consider defendant's claim of privilege based on title to the disputed strip, and gave judgment for plaintiff without determining the issue. *Held*, affirmed.

(a) *Former California law.* Under the ancient common law, a person entitled to possession of land was privileged to enter and use such force--short of causing death or serious bodily harm--as reasonably appeared to be necessary to regain possession. The forcible entry statutes made this unlawful; but California, in *Walker v. Chanslor*, followed the minority American view that, where the defendant used no more force than necessary, the action provided by the statute was the exclusive remedy. (71 C.2d 497.)

(b) *New rule.* The policy of the forcible entry statutes is to discourage self-help. "In the light of this legislative policy, we are persuaded to hold that where as in the instant case a plaintiff is in peaceable possession of land, he may recover *in tort* for all damages for injuries to his person or goods which are the natural and proximate result of a forcible entry by another irrespective of whether the entering party has title or the right to possession." (71 C.2d 499.) The *Walker* case, to the extent inconsistent, is overruled. (71 C.2d 500.)

(c) *Scope of holding.* The court cautioned that its holding was confined to the possessor's action for damages for injuries to his person or his goods; it did not reach the questions whether the possessor can sue for damages for trespass on the land thus possessed; or whether a person peaceably on the land but not in possession of it, e.g., an invitee or guest, can recover from the forcibly entering defendant. (71 C.2d 499, and footnote 14.) (See 58 Cal. L. Rev. 297; 7 San Diego L. Rev. 163.)

The question whether the possessor can sue for damages for trespass, left open in *Daluiso v. Boone*, was answered in the affirmative in *Allen v. McMillion* (1978) 82 C.A.3d 211, 147 C.R. 77. The court said: "*Daluiso* could not more emphatically condemn the employment of self-help methods in controversies over the right to possession of real property. The only real difference between that case and this is that here there was no actual confrontation during the removal of the fence. But this is a difference for which the parties in the case must be grateful. It would be incongruous in the extreme to say that one in the peaceable possession of land who protests forcible intrusion on his possession and thereby suffers physical injury has a cause of action against the intruder while one similarly circumstanced who avoids a potentially explosive confrontation does not. In effect this would be to encourage a showdown over the possession of the property. Contrary to the clear legislative policy against forcible self-help measures, this position would hold out the hope to would-be self-helpers that the person being forcibly dispossessed would, whether through fear or caution, suffer in silence rather than meet force with force. If since *Daluiso* the law has appeared to permit this loophole it must be because there arose no occasion to close it. This is the occasion." (82 C.A.3d 218.)

SUPPLEMENT: [This section is current through the latest supplement]
See 6 Am.Jur.2d (2008 ed.), *Assault and Battery* §130.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §649 et seq.



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- b. Defense or Recapture of Property.
- 4. Recaption of Personal Property.

5 Witkin Sum. Cal. Law Torts § 422

[§ 422] Recaption of Personal Property.

A person wrongfully deprived of chattels may sometimes, after demand, use necessary force to retake them. (*Rest.2d, Torts §101.*) But this privilege is a limited one. The person must act *promptly*, or after timely discovery. (*Rest.2d, Torts §103.*) Where the property was rightfully acquired, but subject to a security interest, the seller is not justified in committing assault and battery in repossessing it for default in payments. (*Silverstin v. Kohler & Chase* (1919) 181 C. 51, 54, 183 P. 451 [conditional sale]; see *Rest.2d, Torts §108*; cf. *Blair v. Pitchess* (1971) 5 C.3d 258, 277, 96 C.R. 42, 486 P.2d 1242, 6 Cal. Proc. (4th), *Provisional Remedies*, §248 [holding former claim and delivery statute unconstitutional and indicating that contractual consent to taking of property may be ineffectual].)

In *Deevy v. Tassi* (1942) 21 C.2d 109, 130 P.2d 389, chattel mortgagees, relying on a mortgage provision giving them possession on default "either with or without process of law and using all necessary force so to do," were held liable for beating the mortgagors who resisted the attempt to take possession. (21 C.2d 118.)

In *Rogers v. Kabakoff* (1947) 81 C.A.2d 487, 184 P.2d 312, defendant, having parked his car in plaintiff's lot, refused to pay the full sum demanded. Plaintiff then removed the ignition key and defendant struck him twice, knocking him to the pavement and causing serious injuries. *Held*, defendant was liable for battery on two theories: (a) plaintiff was a bailee, in actual rightful possession, and forcible retaking was therefore improper; (b) even if defendant had been entitled to forcible recaption, the evidence justified the finding that unreasonable force was used. (81 C.A.2d 490.)

SUPPLEMENT: [This section is current through the latest supplement]

Blair case:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §246.



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- c. Defense Against Animal.

5 *Witkin Sum. Cal. Law Torts* § 423

[§ 423] Defense Against Animal.

In *Devincenzi v. Faulkner* (1959) 174 C.A.2d 250, 344 P.2d 322, plaintiff's two Great Danes entered defendant's yard and attacked and injured his small cocker spaniel. A neighbor frightened the attackers away and defendant put his dog in the car to take him to a veterinarian. En route he saw plaintiff's dogs headed for a boy who had just dismounted from his bicycle. Believing they were about to attack, he drove his car against one dog, fatally injuring him. Then he continued to the veterinarian's, returning later to the scene. Plaintiff sued for damages for death of the dog. *Held*, judgment for defendant affirmed.

(a) The right under C.C. 3341(2) (*supra*, §157) to kill a dog worrying other animals is inapplicable because dogs are not among the specified other animals. However, defendant is entitled to kill the apparently attacking dog as an abatement of a nuisance (see 13 *Summary* (10th), *Equity*, §153). Plaintiff's contention that defendant's failure to stop, in violation of the hit-and-run statute (*infra*, §1077), deprived him of this right, is rejected on the ground that the failure to stop followed and was not a part of striking the dog. (174 C.A.2d 253.)

(b) The view of some courts that one who uses force on a human being takes the risk that the person defended may not have had the right of self-defense should not be applied to the use of force against animals. Hence, defendant's testimony, showing a reasonable belief that the dogs were about to attack the boy, was sufficient for the jury to find justification. (174 C.A.2d 255.) (See 74 A.L.R.2d 770 [privilege to kill or injure nontrespassing licensed dog to defend third person from harm or attack by animal]; 37 Proof of Facts 2d 711 [justifiable destruction of animal].)

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Witkin Summary of California Law III. INTENTIONAL INVASIONS OF INTERESTS IN PERSONALITY

- A. Assault and Battery.
- 4. Privilege of Defendant.
- d. Arrest by Police Officer.

5 *Witkin Sum. Cal. Law Torts* § 424

[§ 424] Arrest by Police Officer.

(1) *Exception to Self-Defense Privilege for Arrest.* The normal right of a person to resist what appears to be a battery (see *supra*, §417) does not exist where a lawful arrest is being attempted. "If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest." (P.C. 834a; see *Susag v. Lake Forest* (2002) 94 C.A.4th 1401, 1410, 115 C.R.2d 269 [arrestee was convicted of resisting or obstructing peace officer in violation of P.C. 148(a); because lawfulness of arresting officers' conduct was established by conviction, arrestee was precluded from bringing assault and battery claims arising from his arrest].)

(2) *Reasonable Force by Officer Is Permitted.* The arresting officer may use reasonable force to restrain the person arrested without being liable for battery. (P.C. 843, 835a, 835.) "A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." (P.C. 835a.) (See Dobbs, *The Law of Torts* §82 et seq.; 25 *Pacific L. J.* 171 [Police Brutality: Problems of Excessive Force Litigation]; 83 *A.L.R.3d* 174 [right of peace officer to use deadly force in attempting to arrest fleeing felon]; 83 *A.L.R.3d* 238 [peace officer's civil liability for death or personal injuries caused by intentional force in arresting misdemeanor]; 82 *A.L.R.4th* 598 [burden of proof in civil action for using unreasonable force in making arrest as to reasonableness of force used]; on authority to break into house to make arrest, see P.C. 844, 845, 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §40.)

In *Fobbs v. Los Angeles* (1957) 154 C.A.2d 464, 316 P.2d 668, defendant police officers gave plaintiff F a traffic citation, then called at his home to exchange the proper copy for the court's copy inadvertently handed to him. Plaintiff F struck an officer, and with plaintiff T, his mother, continued to kick and battle until subdued and arrested. After their acquittal of the criminal charge of assault and battery they brought this action for damages for assault and battery. *Held*, the arrest was lawful (the misdemeanor of striking the officer was committed in his presence), and the force used was not excessive. (154 C.A.2d 469.)

(3) *Liability for Excessive Force.* An arresting officer and the public entity are liable for the use of excessive force. (*Scruggs v. Haynes* (1967) 252 C.A.2d 256, 264, 60 C.R. 355, *supra*, §356; see BAJI, No. 7.54 [use of force by arresting

officer]; CACI, No. 1305 [same].)

Use of excessive force is an element to be proved by the plaintiff. In *Edson v. Anaheim* (1998) 63 C.A.4th 1269, 74 C.R.2d 614, defendant police officer shot and killed a suspect who appeared to be reaching for a gun. Decedent's widow and children filed a wrongful death action, and the cause was submitted to the jury on a battery claim. The trial judge instructed the jury that plaintiffs had the burden of proving that the officer used unreasonable force. The jury returned a special verdict finding that the officer acted reasonably. *Held*, affirmed.

(a) *Majority rule adopted: Plaintiff must prove unreasonable force as element of tort.* The issue raised here is one of first impression in California. In a battery action against a police officer, must plaintiff prove unreasonable force as part of the cause of action or must the officer prove reasonable force as an affirmative defense? Plaintiffs argued that because they proved a prima facie battery, justification was an affirmative defense for the defense to prove; this is the rule in battery actions against private citizens. Defendants countered that the trial court's instruction was correct because a police officer is entitled to use reasonable force in making an arrest, and, therefore, plaintiffs must prove unreasonable force to make a prima facie showing of battery. Other jurisdictions are fairly evenly split in these circumstances. A slim majority hold that unreasonable force is an element of the tort. A minority hold that a police officer, like any defendant seeking to justify a battery, has the burden of proving justification. The majority rule is the better one: Plaintiff must prove unreasonable force as an element of the tort. (63 C.A.4th 1272.)

(b) *Rule consistent with Penal Code and standard jury instruction.* Under P.C. 835a, a police officer in California may use reasonable force to make an arrest, prevent escape, or overcome resistance, and need not desist in the face of resistance. The standard jury instruction in police battery actions recognizes this. "A peace officer who uses unreasonable or excessive force in making a lawful arrest or detention commits a battery upon the person being arrested or detained as to such excessive force." (63 C.A.4th 1272, quoting BAJI (8th ed.), No. 7.54, which is carried on, in substance, in BAJI, No. 7.54.) By definition then, a prima facie battery is not established unless and until plaintiff proves that unreasonable force was used. (63 C.A.4th 1273.)

(c) *Police defendants and private citizens are not similarly situated.* The rule adopted here takes into account the special situation of a police defendant. Unlike private citizens, police officers act under color of law to protect the public interest and are charged with acting affirmatively and using force as part of their duties. They are not similarly situated to the ordinary battery defendant and need not be treated the same. A police officer must have control over the manner and means of making an arrest or detention. Police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation. Placing the burden of proof on the plaintiff gives the police appropriate maneuvering room in which to make these judgments, free from the need to justify every action in a court of law. (63 C.A.4th 1273.)

(d) *Same rule applies in actions under Federal Civil Rights Act.* In federal civil rights actions under 42 U.S.C., §1983, the federal counterpart of state battery or wrongful death actions, the rule is that plaintiff must establish, as part of the affirmative case, the unreasonableness of the force used. The federal practice is all the more significant because plaintiffs sometimes join federal and state claims against police defendants, either in federal or state court. To avoid jury confusion and to ease judicial administration, it makes sense to require plaintiff to prove unreasonable force on both claims. (63 C.A.4th 1274.)

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5 Witkin Sum. Cal. Law Torts § 425

[§ 425] Control of Pupils.

(1) *Common Law and Constitutional Background.* The early common law rule that a schoolteacher could use reasonable force to discipline a child, by parental delegation, has been replaced by the modern view that the state itself may authorize moderate corporal punishment of children in public schools. (See *Ingraham v. Wright* (1977) 430 U.S. 651, 97 S.Ct. 1401, 1407, 1419, 51 L.Ed.2d 711, 724, 737, 7 Summary (10th), *Constitutional Law*, §226 [Eighth Amendment's prohibition against cruel and unusual punishment is inapplicable to school paddlings]; 37 A.L.R.4th 842 [public school teacher's self-defense as justification for use of force against student]; for argument that corporal punishment violates substantive due process, see 33 *Hastings L. J.* 1245.)

(2) *Former Authorization of Corporal Punishment With Parental Consent.* School districts in California were formerly empowered to adopt rules authorizing reasonable corporal punishment, provided that it could not be administered without the written approval of the pupil's parent or guardian. (Former Educ.C. 49000 et seq.; see 7 *Pacific L. J.* 425.)

(3) *Corporal Punishment Prohibited.* Educ.C. 49000 and 49001 prohibit all corporal punishment of a pupil, based on the following legislative findings and declarations: "[The] protection against corporal punishment, which extends to other citizens in other walks of life, should include children while they are under the control of the public schools. Children of school age are at the most vulnerable and impressionable period of their lives and it is wholly reasonable that the safeguards to the integrity and sanctity of their bodies should be, at this tender age, at least equal to those afforded to other citizens." (Educ.C. 49000.)

The prohibition is in Educ.C. 49001(b): "No person employed by or engaged in a public school shall inflict, or cause to be inflicted corporal punishment upon a pupil. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing the infliction of corporal punishment upon a pupil attending a public school is void and unenforceable."

However, only "the willful infliction of, or willfully causing the infliction of, physical pain on a pupil," is prohibited. (Educ.C. 49001(a).) Neither the use of reasonable force to quell a disturbance threatening persons or property, to protect one's self, or to remove weapons or other dangerous objects from a pupil, nor the physical pain or

discomfort caused by voluntary athletic competition or other recreational activity, constitutes corporal punishment. (*Educ.C. 49001(a).*)

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(4) (*New*) *Privilege To Maintain Reasonable Control*. In *Austin B. v. Escondido Union School Dist.* (2007) 149 C.A.4th 860, 57 C.R.3d 454, two minors who suffered from severe autism sued their special education teacher for battery, alleging that he engaged in abusive conduct toward them while in school. The trial court included in its instructions and special verdict form a requirement that, to prove battery, defendant's touching of plaintiffs had to be unreasonable, within the context of a teacher's role in controlling the conduct of students, particularly autistic or special needs children. *Held*, there was no error. California recognizes that, both under the common law and by statute, a teacher stands in loco parentis to his or her students. Accordingly, a teacher may maintain that degree of control over a student that is "reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning." (149 C.A.4th 874, quoting *Educ.C. 44807*, text, §321.) This is particularly true where, as here, the students are autistic children who admittedly need, and in some circumstances desire, touching to calm, guide, and control them. If the reasonableness of the touching is eliminated as an element of battery in these circumstances, that could lead to a form of strict liability for battery as to special education teachers who engage in therapeutic touching of students. (149 C.A.4th 874.) The court did not err in requiring that the jury find that defendant's touching be unreasonable. (149 C.A.4th 875.)



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B. False Imprisonment.

1. Nature of Tort.

a. Definition and Distinctions.

5 *Witkin Sum. Cal. Law Torts* § 426

[§ 426] Definition and Distinctions.

The statutory definition of false imprisonment, like that of battery (*supra*, §381), is in the Penal Code: "False imprisonment is the unlawful violation of the personal liberty of another." (P.C. 236; see *Parrott v. Bank of America* (1950) 97 C.A.2d 14, 22, 217 P.2d 89 [definition of crime and tort are the same]; *Stallings v. Foster* (1953) 119 C.A.2d 614, 619, 259 P.2d 1006 [same]; Dobbs, *The Law of Torts* §36 et seq.; Cal. Civil Practice, 1 Torts, False Imprisonment and False Arrest, Chap. 13; 152 A.L.R. Fed 605 [Federal Tort Claims Act exemption of false imprisonment claims]; 15 Am.Jur. Trials 555 [police misconduct litigation--plaintiff's remedies]; 75 Am.Jur. Trials 1 [chemical and physical restraint in nursing home].)

False imprisonment involves the intentional confinement of another against the person's will. The elements are (1) nonconsensual, intentional confinement of a person, (2) without lawful privilege, (3) for an appreciable period of time, however brief. (See *Easton v. Sutter Coast Hosp.* (2000) 80 C.A.4th 485, 496, 95 C.R.2d 316, *supra*, §150; *Rest.2d, Torts* §35; 1 Harper, James & Gray 3d §3.7; BAJI, No. 7.60 et seq.; CACI, No. 1407; on pleading cause of action, see 5 Cal. Proc. (4th), *Pleading*, §719 et seq.; on nature of restraint or confinement, see *infra*, §427 et seq.)

A *false arrest* is one way to commit a false imprisonment; i.e., because the arrest involves detention or restraint, it always involves imprisonment. False arrest and false imprisonment are therefore not separate torts. (*Moore v. San Francisco* (1970) 5 C.A.3d 728, 735, 85 C.R. 281; *Collins v. San Francisco* (1975) 50 C.A.3d 671, 673, 123 C.R. 525, citing the text; see 44 Cal. L. Rev. 600; 19 *Hastings L. J.* 974; 32 *Am.Jur.2d* (1995 ed.), *False Imprisonment* §2.)

In *Ware v. Dunn* (1947) 80 C.A.2d 936, 183 P.2d 128, the court appears to have confused assault, trespass, and false imprisonment, with the result that an unusually broad and questionable test of false imprisonment was given. Plaintiff wife registered alone at a hotel in her married name. Plaintiff husband registered there later, but, through a mistake of the hotel clerk, defendants, police officers of a "Vice Squad Bureau," were informed that the room was registered only to the woman. While plaintiffs were in bed, the officers, acting on a tip, entered without knocking to determine whether a misdemeanor was being committed, questioned plaintiff husband (who answered voluntarily with no protest) about his registration, and left. A verdict for damages of \$ 1,000 was upheld, the court stressing the propositions that (a) there is no right to arrest on suspicion of a misdemeanor not committed in the presence of the officer, and (b) the constitutional guarantee against unreasonable search and seizure cannot be impaired by the pretext

of "investigation" by police officers. The opinion properly concludes that defendants' "entry under pretended color of official right was therefore an abuse of the authority invested in them as peace officers, and relegated them to the category of trespassers." (80 C.A.2d 944.) However, the court also suggested that there might have been an assault, even though no violence was employed or threatened. (80 C.A.2d 942.) More important, the court held that false imprisonment was established because "the words and conduct of the officers may well be held to be of such a character as to induce a reasonable apprehension or fear ... of the use of force should they resist the entry into their room and the conduct of the others therein." (80 C.A.2d 943.) It would seem, however, that the evidence clearly established trespass and nothing else; there was no threat of injury to constitute an assault, and no attempt at detention to constitute false imprisonment. (See 21 So. Cal. L. Rev. 431.)

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Pleading cause of action:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §763 et seq.

False arrest: See 32 Am.Jur.2d (2007 ed.), *False Imprisonment* §2.



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B. False Imprisonment.

1. Nature of Tort.

b. Necessity of Restraint.

5 *Witkin Sum. Cal. Law Torts* § 427

[§ 427] Necessity of Restraint.

The tort requires *direct restraint* of the person for some appreciable length of time, however short, compelling the person to stay or go somewhere against his or her will. (*Rest.2d, Torts* §35 et seq.; 1 Harper, James & Gray 3d §3.8; 44 *Cal. L. Rev.* 601; 11 *A.L.R.4th* 228 ["deprogramming" member of religious sect]; 32 *Am.Jur.2d* (1995 ed.), *False Imprisonment* §11 et seq.; 40 *Proof of Facts* 2d 81 [confinement in nursing home or hospital].) Merely preventing a person from *going* to a particular place is not false imprisonment, though it may, in some situations, constitute another actionable wrong. (See *Rest.2d, Torts* §36(3).)

The necessity of restraint is illustrated in *Snyder v. Evangelical Orthodox Church* (1989) 216 C.A.3d 297, 264 C.R. 640. Plaintiffs R and S, members of defendant church who were having an extramarital affair, confessed this information to various church officials, who promised confidentiality. However, the information was divulged to the congregation and the public, and plaintiffs were excommunicated. Each plaintiff filed a complaint alleging multiple causes of action, including, in R's case, one for false imprisonment. The trial judge granted defendants' motions for partial summary judgment on the false imprisonment claim. *Held*, affirmed.

(a) When R confessed to defendant B, a bishop, B asked him to move to the city where the church was headquartered to accept pastoral guidance and care. Allegedly, he was ordered to abandon his family, the absolution of his sins was conditioned on his pursuing this course of action, and he was again promised confidentiality if he cooperated. When R asked for a week to consider, defendant H, another bishop to whom he had confessed, requested that he spend the week in a motel "to struggle for his soul without outside contact." R agreed to do that. (216 C.A.3d 304.)

(b) Although R claimed that he was "trapped" in the motel cabin without transportation or telephone, the record established consent and lack of physical restraint. On several occasions, he left the cabin and had contact with S and family members, and he disobeyed H's order to return. (216 C.A.3d 304.) R's argument that his consent to isolation was induced by threats to reveal his confidences and to withhold absolution if he did not comply is untenable. *Molko v. Holy Spirit Assn. for the Unification of World Christianity* (1988) 46 C.3d 1092, 252 C.R. 122, 762 P.2d 46, *infra*, §770, rejected a similar contention on the ground that such threats are privileged religious speech that may not serve as the basis for tort liability. (216 C.A.3d 305.)

SUPPLEMENT: [This section is current through the latest supplement]
See 32 *Am.Jur.2d* (2007 ed.), *False Imprisonment* §10 et seq.



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B. False Imprisonment.

1. Nature of Tort.

c. Methods of Restraint.

5 *Witkin Sum. Cal. Law Torts* § 428

[§ 428] Methods of Restraint.

(1) *Physical Force or Threats of Force.* Any exercise of force, or threat of force, by which a person is compelled to remain where the person is or to go to another location is a sufficient restraint. (*Vandiveer v. Charters* (1930) 110 C.A. 347, 355, 294 P. 440.)

The physical force may be slight. (*Hanna v. Raphael Weill & Co.* (1949) 90 C.A.2d 461, 462, 203 P.2d 564 [defendant's special officer took plaintiff by arm saying, "You go back with us. It will be better for you if you do."].)

Actual physical force is not essential; the restraint may be by apprehension of force resulting from words, gestures, or acts. (*Vandiveer v. Charters*, *supra*; *Rest.2d, Torts* §§35, 40, 40A; see *Parrott v. Bank of America* (1950) 97 C.A.2d 14, 23, 217 P.2d 89 [plaintiff was coerced into being interrogated at superior's desk by threats of prosecution for alleged misappropriation]; *Baines v. Brady* (1953) 122 C.A.2d Supp. 957, 959, 265 P.2d 194 [plaintiff was ordered into police patrol wagon, searched, and released without arrest; cf. P.C. 849, *infra*, §447, on release of arrested person].)

The restraint is sufficient where a person voluntarily submits to a show of authority by an officer threatening arrest. (*Vandiveer v. Charters*, *supra*; *Rest.2d, Torts* §41; cf. *Gibson v. J.C. Penney Co.* (1958) 165 C.A.2d 640, 644, 331 P.2d 1057 [issue raised by facts but not discussed on appeal]; see 44 *Cal. L. Rev.* 601.)

(2) *Liability in Absence of Physical Force or Threats.* There may be false imprisonment with neither physical force nor threats of force.

In *Schanafelt v. Seaboard Finance Co.* (1951) 108 C.A.2d 420, 239 P.2d 42, defendant A, agent of defendant finance company, went to the home of plaintiff, a pregnant woman, to repossess furniture for delinquent payments. He blocked her driveway to prevent her driving off, ordered her to stay until the truck arrived, and refused to allow her to get food. The detention lasted from 11:00 a.m. to 2:15 p.m., when the truck took the furniture out and defendant A left. An award of \$ 500 compensatory and \$ 2,000 punitive damages was upheld. Although A did not physically restrain plaintiff, his conduct effectively prevented her from leaving, for her car was her only means of transportation. (108 C.A.2d 423.)

In *Scofield v. Critical Air Medicine* (1996) 45 C.A.4th 990, 52 C.R.2d 915, *infra*, §430, three children were injured while in Mexico, and their father arranged for a particular air transport service to pick them up. However, defendant, also an air transport service, learned of the job, and succeeded in getting there first and transporting the children. The children, through their father as guardian ad litem, brought a false imprisonment action against defendant. *Held*, judgment for plaintiffs affirmed. Under *Rest.2d, Torts §40A*, false imprisonment may be by means of any form of unreasonable duress. (45 C.A.4th 1002.) Similarly, P.C. 236, relevant because the crime and tort of false imprisonment are defined as the same (*supra*, §426), recognizes that false imprisonment can be perpetrated by fraud or deceit. (45 C.A.4th 1001.) This result is not changed by the fact that BAJI, No. 7.60 refers to false imprisonment as being accomplished by force or threat of force; that instruction is limited to situations where the false imprisonment is carried out in the stated manner, and does not purport to address the situations where it is accomplished by fraud, deceit, or unreasonable duress. (45 C.A.4th 1002.)

(3) *Failure To Provide Means of Escape*. Although no general duty is recognized to provide a means of escape from confinement, *Rest.2d, Torts §45* declares such a duty where the plaintiff's confinement was induced by the defendant's representation that assistance would be given when needed. (See 7 *So. Cal. L. Rev.* 102.)

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B. False Imprisonment.

1. Nature of Tort.

d. Persons Restrained.

5 Witkin Sum. Cal. Law Torts § 429

[§ 429] Persons Restrained.

(1) *Minors*. Unlawful confinement in a juvenile court detention home may constitute false imprisonment. This is so despite the fact that these homes are deemed to be in the nature of shelters for abandoned or mistreated children. (*McAlmond v. Trippel* (1928) 93 C.A. 584, 588, 269 P. 937; see 17 Cal. L. Rev. 71; 20 A.L.R.3d 1441 [detaining child].)

(2) *Mentally Ill Persons*. The involuntary hospitalization of a person in a mental institution in violation of statute constitutes false imprisonment. *Maben v. Rankin* (1961) 55 C.2d 139, 10 C.R. 353, 358 P.2d 681, involved the application of former Welf.C. 5750 et seq., which provided for involuntary hospitalization of mentally ill persons in private institutions without judicial proceedings for commitment, but required a disinterested physician's statement, and an opportunity for the patient to notify others of his detention and have a court hearing. Without complying with these provisions defendant psychiatrist, at the request of plaintiff's husband, forcibly anesthetized her and took her to a private hospital where he gave her electroshock treatments. She remained there against her will for 15 days. In this action for false imprisonment and assault and battery, the court held that there might be liability, but that an error in instructions necessitated reversal. The criticized instruction told the jury that the burden was on defendants (the doctor and his medical partnership) to prove that the husband consented in good faith on behalf of plaintiff. "This placed an excessive burden of proof on defendants with respect to the husband's good faith. A doctor is not required to investigate whether the consenting husband has an ulterior motive in the absence of circumstances which put him on notice that the husband is acting in bad faith. The burden of proving that the doctor was put on notice is on the plaintiff. Good faith is presumed." (55 C.2d 142.) (See 30 A.L.R.3d 523 [false imprisonment in institution of, or conduct in connection with, insanity proceedings]; 44 Proof of Facts 3d 217 [wrongful confinement to mental health or developmental disabilities facility].)

In *Culbertson v. Santa Clara* (1968) 261 C.A.2d 274, 67 C.R. 752, a deputy, acting under a court order, took plaintiff into custody as a mentally ill person. But the statute expressly required service of the order of detention and the petition, and failure of the deputy to make this service resulted in wrongful detention. (261 C.A.2d 276.)

Significant immunities for the detention of the mentally ill are provided by statute. (See *Health & Saf.C. 1799.111* and Welf.C. 5000 et seq., supra, §136.)

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B. False Imprisonment.

1. Nature of Tort.

e. Necessity for Awareness or Harm.

5 Witkin Sum. Cal. Law Torts § 430

[§ 430] Necessity for Awareness or Harm.

Under the Restatement, there is no liability for false imprisonment "unless the person physically restrained knows of the confinement or is harmed by it," which harm must be more than nominal. (*Rest.2d, Torts §42* and Comment b.) However, a California Court of Appeal departed from this rule in *Scofield v. Critical Air Medicine* (1996) 45 C.A.4th 990, 52 C.R.2d 915, supra, §428. The father of children injured in Mexico arranged for a particular air transport service to pick them up, but defendant, also an air transport service, learned of the job, and succeeded in getting there first and transporting the children. None of the children knew that defendant was not the service arranged for by their father. Neither the crew nor the plane bore distinctive marks that would have told the children of the error involved. The children, through their father as guardian ad litem, brought a false imprisonment action against defendant, and received a verdict of over \$ 180,000. *Held*, affirmed.

(a) *Contemporaneous awareness of unlawful restraint is not necessary.*

(1) The original Restatement of Torts required contemporaneous awareness, but that position was questioned by Prosser. The Second Restatement takes the position that false imprisonment is accomplished whenever there is either contemporaneous awareness or harm to the victim, although the harm must be more than merely nominal. There is a dearth of persuasive authority on this question in other states, so it is necessary for California to make its own determination on the significance of the victim's state of mind. (45 C.A.4th 1003.)

(2) It is readily apparent that a victim may sustain substantial harm from a false imprisonment, even if not immediately cognizant of being wrongfully detained, as where a person in a diabetic coma is locked up as a drunk, and, on later being made aware of the confinement, suffers humiliation and emotional distress. (45 C.A.4th 1006, citing *Rest.2d, Torts §42*, Comment b.) "Therefore, contemporaneous awareness of the false imprisonment is not, and need not be, an essential element of the tort. Such an arbitrary limitation would leave persons harmed by false imprisonment uncompensated, while allowing perpetrators of an intentional tort to escape liability. Instead, the relevant factor is whether the unlawful restraint or confinement resulted in *harm*." (45 C.A.4th 1006.)

(b) *Actual damage is not necessary.* Nominal harm is sufficient to support a cause of action for false imprisonment. While the Second Restatement requires that the wrongful restraint cause more than nominal damages, C.C. 3360 (infra,

§1546) allows recovery whenever there has been a breach of duty, even if the harm is only nominal, and both the California Supreme Court and BAJI have recognized that only nominal damages are required for false imprisonment. (45 C.A.4th 1007, citing *Maher v. Wilson* (1903) 139 C. 514, 73 P. 418, and BAJI, No. 7.60.) The advantages of an award of nominal damages, other than psychological, are two: The plaintiff (1) is entitled to costs and (2) may be entitled to punitive damages. In addition to nominal damages, the victim of false imprisonment frequently suffers compensable emotional distress, and may also be entitled to compensation for such harms as loss of time, physical discomfort, illness, or injury, business interruption, and damage to reputation. (45 C.A.4th 1008.) (On damages recoverable for false imprisonment generally, see *infra*, §1698.)

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B. False Imprisonment.

2. Privilege.

a. Reasonable Detention Without Arrest.

1. Judicially Created Privileges.

5 Witkin Sum. Cal. Law Torts § 431

[§ 431] Judicially Created Privileges.

(1) *Detention by Property Owner*. Several jurisdictions, including California, have extended the privilege of lawful arrest (*infra*, §434 et seq.) to a privilege of detention without arrest. A property owner (usually a storekeeper), on probable cause to believe a theft has been committed, may *detain* the suspected person for a reasonable time, to conduct an investigation in a reasonable manner. (*Collyer v. S.H. Kress & Co.* (1936) 5 C.2d 175, 180, 54 P.2d 20; *Bettolo v. Safeway Stores* (1936) 11 C.A.2d 430, 431, 54 P.2d 24; see *Roberson v. J.C. Penney Co.* (1955) 136 C.A.2d 1, 4, 288 P.2d 275 [probable cause is question of law for court]; *Gibson v. J.C. Penney Co.* (1958) 165 C.A.2d 640, 644, 331 P.2d 1057 [same]; *Lowry v. Standard Oil Co.* (1942) 54 C.A.2d 782, 789, 130 P.2d 1 [same privilege applies in action for assault based on attempt to apprehend]; *King v. Andersen* (1966) 242 C.A.2d 606, 609, 51 C.R. 561, citing the text [shoplifter]; 25 Cal. L. Rev. 119; 13 *Hastings L. J.* 156; 10 So. Cal. L. Rev. 103; 28 *Stanf. L. Rev.* 589 [Merchants' Responses to Shoplifting: An Empirical Study]; 3 U.C.L.A. L. Rev. 269; 32 *Am.Jur.2d* (1995 ed.), *False Imprisonment* §74 et seq.; BAJI, No. 7.65 [right of reasonable detention by property owner]; CACI, No. 1409 [same].)

The detention must be reasonable. In *Moffatt v. Buffums'* (1937) 21 C.A.2d 371, 375, 69 P.2d 424, plaintiff, an employee of defendant corporation, was called to the manager's office, charged with theft, and told that she could not leave until she signed a confession. After threats and forcible detention for 5 hours she signed and was released. *Held*, this was false imprisonment; she was not detained for investigation of an alleged present theft, but for the purpose of securing a confession of an offense already completed. Defendant also urged that because plaintiff was an employee, there was no false imprisonment in calling her to the office during working hours, but the court declared that her obligation of service did not authorize forcible detention to compel a confession. (21 C.A.2d 375.)

In *Alterauge v. Los Angeles Turf Club* (1950) 97 C.A.2d 735, 218 P.2d 802, plaintiff, with a criminal record well known to defendants, was allowed to pay admission and attend the races. However, after leaving during a race, and while sitting in his car, he was accosted by track police and forced to go to the office by threats. There his coat was torn, and he was searched for evidence of bookmaking. A judgment for both compensatory damages and exemplary damages was affirmed. The theory of the defense was that statutes and regulations of the Racing Board require exclusion of known undesirables and persons of immoral character; that revocation of a license may result from failure to comply with these conditions; and that they were therefore privileged to detain plaintiff for investigation in protection of their

property (license). The court did not disapprove of the theory, but upheld the jury's determination that, on the facts, there was no reasonable investigation; defendants already knew everything about plaintiff and the needless infliction of pain and indignities was unwarranted. (97 C.A.2d 738.)

(2) *Detention by Police Officer*. A police officer has a privilege to detain a suspect for questioning when the circumstances indicate that this is called for in the proper discharge of the officer's duties; and the good faith suspicion that justifies the detention for investigation "is necessarily of a lesser standard than that required to effect an arrest." (*Dawkins v. Los Angeles* (1978) 22 C.3d 126, 133, 148 C.R. 857, 583 P.2d 711.)

This privilege does not extend, however, to a mere witness. In *Baines v. Brady* (1953) 122 C.A.2d Supp. 957, 265 P.2d 194, defendant police officers saw what appeared to be an assault in a poolroom. They questioned onlookers, including plaintiff, a friend of A, and arrested A. Then they ordered plaintiff into the patrol wagon, searched him, and released him. *Held*, judgment for damages affirmed. It is the duty of a good citizen to give all information to law officers concerning a crime (and plaintiff maintained that he did). "If a person does not willingly talk with an investigator, there is no law that permits his arrest or detention by the police on that ground. A citizen who is not charged with, or suspected of, a crime, cannot be arrested or detained by a policeman in the course of his duties, and any alleged inconvenience caused to the investigating authorities by this principle is far outweighed by the rights of citizens to be protected in their personal liberty." (122 C.A.2d Supp. 960.) (But see P.C. 849, *infra*, §447, on effect of release.)

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(1) *Detention by Property Owner*. See 32 Am.Jur.2d (2007 ed.), *False Imprisonment* §64 et seq.



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2. Statutory Privileges.

5 Witkin Sum. Cal. Law Torts § 432

[§ 432] Statutory Privileges.

Detention privileges of several types of property owners have been codified:

(1) *Detention by Merchant.* A merchant may detain a person for a reasonable time in order to conduct an investigation in a reasonable manner, on probable cause to believe that the person is attempting to unlawfully take, or has unlawfully taken, merchandise from the merchant's premises. (P.C. 490.5(f)(1); see 47 A.L.R.3d 998 [statutes authorizing detention of suspected shoplifters].)

(2) *Detention by Librarian.* A library employee may detain a person for a reasonable time in order to conduct an investigation in a reasonable manner, when the employee has probable cause to believe that the person is attempting to unlawfully remove, or has unlawfully removed, books or library materials from the library facility premises. (P.C. 490.5(f)(1); see P.C. 490.5(g)(4), (g)(5) [defining "library facility" to include library, museum, and public records repository, and "library materials" to include materials in custody of such a facility].)

(3) *Detention by Theater Owner.* A theater owner may detain a person for a reasonable time to conduct a reasonable investigation if the owner has probable cause to believe that the person is attempting to operate a video recording device in the theater without the owner's permission. (P.C. 490.5(f)(1).)

(4) *Search During Detention.* During the period of detention any items that the merchant, librarian, or theater owner has probable cause to believe are unlawfully taken from the premises or recorded on theater premises, and that are in plain view, may be examined to determine their ownership. (P.C. 490.5(f)(3).) If the person detained refuses to voluntarily surrender an item, the merchant, librarian, or theater owner, or an agent, may conduct a limited and reasonable search of property in the immediate possession of the detainee, such as packages, shopping bags, and handbags, but not including clothing worn by the person. (P.C. 490.5(f)(4).) (See 13 Pacific L. J. 666.)

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3. Distinction: Detention of Patient.

5 *Witkin Sum. Cal. Law Torts* § 433

[§ 433] Distinction: Detention of Patient.

No patient may be intentionally confined in a health facility without consent of the patient or an authorized person, "solely for the nonpayment of a bill." (*Health & Saf.C. 1285(a), (b).*) (See 11 *Pacific L. J.* 671; 4 *A.L.R.4th* 449 [false imprisonment in connection with confinement in nursing home or hospital].)

The detention is a misdemeanor (*Health & Saf.C. 1285(d)*), and gives the wrongfully detained person a cause of action for damages, as follows:

(1) The action may be brought by the person detained or by the patient's parent, guardian, conservator, or other legal representative. (*Health & Saf.C. 1285(c).*)

(2) The action may be brought against the health facility, its proprietor, its lessee, or their agents. (*Health & Saf.C. 1285(c).*)

(3) The plaintiff may recover general and punitive damages, costs, and attorneys' fees. (*Health & Saf.C. 1285(c).*)

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1. In General.

5 *Witkin Sum. Cal. Law Torts* § 434

[§ 434] In General.

An arrest is made by taking a person into custody, in a case and in the manner authorized by law. (See P.C. 834 et seq.) It may be made by a peace officer or by a private person. (P.C. 834, 836, 837; on citizen's arrest, see *infra*, §439; on authority of magistrate to order arrest of anyone committing offense in magistrate's presence, see P.C. 838.) If made by a peace officer, it may be either with or without a warrant. (P.C. 836; see *infra*, §§435 et seq., 438, 441 et seq.) The grounds for an arrest (and therefore the basis for the defense of justification or privilege) differ depending on whether the crime is a misdemeanor or felony, and whether it was or was not committed in the presence of the arresting officer. (P.C. 836; see *infra*, §435 et seq.) (See Dobbs, *The Law of Torts* §82 et seq.; 32 *Am.Jur.2d* (1995 ed.), *False Imprisonment* §§24 et seq., 81 et seq.; BAJI, Nos. 7.63, 7.64, 7.66 [requisites of arrest].)

The mechanics and procedure of arrest and subsequent steps are properly part of the subject of *criminal procedure*. (For a survey, see *Rest.2d, Torts* §112 et seq.; 39 *Cal. L. Rev.* 96; 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §1 et seq.; and *infra*, §§435 et seq., 444.) However, the impact of the legal principles is mainly found in two other fields: (1) *Evidence*: The admissibility or exclusion of evidence found by a search incident to a lawful or unlawful arrest. (See 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §1 et seq.) (2) *Torts*: The defense of privilege in an action for false arrest or imprisonment, based on a lawful arrest. (See P.C. 835, 847; *infra*, §435 et seq.)

The courts, in discussing "reasonable" or "probable" cause for an arrest, ordinarily use the terms interchangeably. (See *People v. Talley* (1967) 65 *C.2d* 830, 835, 56 *C.R.* 492, 423 *P.2d* 564.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 32 *Am.Jur.2d* (2007 ed.), *False Imprisonment* §24 et seq.



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2. Felony Arrest Without Warrant.

aa. When Arrest Is Authorized.

5 *Witkin Sum. Cal. Law Torts* § 435

[§ 435] When Arrest Is Authorized.

(1) *Private Person*. A private person may arrest another:

(a) "When the person arrested has committed a felony." (P.C. 837(2).)

(b) "When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it." (P.C. 837(3).) (See BAJI, No. 7.64 [arrest by private person]; CACI, No. 1403 [same].)

(2) *Police Officer*. While a private person may not arrest unless a felony was in fact committed (see P.C. 837), a peace officer is not so restricted. A peace officer may arrest when:

(a) "The person arrested has committed a felony, although not in the officer's presence." (P.C. 836(a)(2).)

(b) "The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed." (P.C. 836(a)(3).) (See P.C. 847 [peace officer is not liable for false arrest or false imprisonment arising out of authorized arrest]; *Hamilton v. San Diego* (1990) 217 C.A.3d 838, 843, 266 C.R. 215 [arrest on probable cause, officer and city immune from liability under P.C. 847 and 836]; BAJI, No. 7.63 [arrest by peace officer without warrant]; CACI, No. 1401 [same].)

P.C. 836(a)(2) makes no reference to probable or reasonable cause, and the question whether this qualification is read into it has not been decided in California. (See *Beauregard v. Wingard* (1965) 237 C.A.2d 760, 765, 47 C.R. 279, *infra*, §437.)

Warrantless felony arrests are also permitted by peace officers in prescribed circumstances for specified offenses:

(a) A peace officer responding to a call alleging violation of a domestic violence protective or restraining order *must*, consistent with existing policies for responding to domestic violence calls (see P.C. 13701), arrest the person against whom the order is issued, without a warrant and regardless of whether the violation occurred in the officer's

presence, if the officer has probable cause to believe that the person has notice of the order and has committed the violation. (P.C. 836(c)(1).) Where mutual protective orders have been issued, the officer may arrest the primary (not necessarily the first) aggressor. (P.C. 836(c)(3).)

(b) A peace officer may make a warrantless arrest of a suspect who commits an assault or battery on the suspect's current or former spouse, fiancé, fiancée, or current or former cohabitant, a person with whom the suspect currently is having or has previously had an engagement or dating relationship, a person with whom the suspect has or is presumed to have parented a child, a child of the suspect or of a person in one of the above categories, or a relative of the suspect who is 65 or older if the peace officer (1) has probable cause to believe that the suspect has committed the assault or battery, whether or not it has in fact been committed, and (2) makes the arrest as soon as probable cause arises. (P.C. 836(d); see 32 *McGeorge L. Rev.* 579 [expansion of warrantless arrest exception to dating relationships].)

(c) A peace officer may make a warrantless arrest for carrying a concealed firearm (P.C. 12025) if (1) the officer has reasonable cause to believe that the suspect has committed the violation, (2) the violation occurred within an airport, and (3) the officer makes the arrest as soon as reasonable cause arises to believe that the suspect committed the violation. (P.C. 836(e).)

(3) *Police Officer of Another State.* Under the Uniform Act on Fresh Pursuit (P.C. 852 et seq.), a peace officer of another state, "in fresh pursuit" of a person for a felony committed in the other state, has the same authority to arrest as local peace officers would have for a felony committed here. (P.C. 852.2.)

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(2) *Police Officer.* See *O'Toole v. Superior Court* (2006) 140 C.A.4th 488, 511, 44 C.R.3d 531 [reasonable cause to arrest exists when facts known to arresting officer would lead reasonable person to have strong suspicion of arrestee's guilt; this is objective standard].



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bb. Reasonable Cause.

5 *Witkin Sum. Cal. Law Torts* § 436

[§ 436] Reasonable Cause.

(1) *Nature of Requirement.* "Reasonable" or "probable" cause to believe that the arrested person committed a felony means more than mere suspicion. But if the circumstances and information at the time of the act, including matters technically hearsay or inadmissible as legal evidence, induced a reasonable belief, it is immaterial how the case ultimately turns out. (*Murphy v. Murray* (1925) 74 C.A. 726, 730, 241 P. 938; *Cook v. Singer Sewing Machine Co.* (1934) 138 C.A. 418, 420, 32 P.2d 430; *Van Fleet v. West Amer. Ins. Co.* (1935) 5 C.A.2d 125, 128, 42 P.2d 378, 43 P.2d 557; *Wilson v. Loustalot* (1948) 85 C.A.2d 316, 322, 193 P.2d 127; *Wilson v. Los Angeles* (1971) 21 C.A.3d 308, 314, 98 C.R. 525; see *Gorlack v. Ferrari* (1960) 184 C.A.2d 702, 709, 7 C.R. 699 [held sufficient where victim of grand theft related circumstances and identified perpetrator]; *White v. Martin* (1963) 215 C.A.2d 641, 651, 30 C.R. 367 [sufficient]; 9 So. Cal. L. Rev. 17; 81 A.L.R.4th 1031 [effect of officer's suppression of, or failure to disclose or investigate, exculpatory evidence]; *Salazar v. Upland Police Dept.* (2004) 116 C.A.4th 934, 941, 11 C.R.3d 22 [plaintiff's stipulation that police had probable cause to stop and arrest her was defense to false arrest claim, even though stipulation referred to probable cause respecting "crimes as charged" and plaintiff was arrested for felony assault with car but was charged with misdemeanors of reckless driving and hit-and-run]; *Johnson v. Lewis* (2004) 120 C.A.4th 443, 453, 15 C.R.3d 507 [where facts known to officer are sufficient to constitute probable cause, neither possibility of innocent explanation nor ultimate acquittal or dismissal renders arrest unlawful]; BAJI, No. 7.66 [reasonable cause for arrest]; CACI, Nos. 1402, 1404, 1408 [same].)

(2) *Question of Law.* Whether there was reasonable cause is a question of law. It should not be submitted to the jury, and the trial judge's determination is not binding. (*Allen v. McCoy* (1933) 135 C.A. 500, 507, 27 P.2d 423; *Aitken v. White* (1949) 93 C.A.2d 134, 141, 208 P.2d 788.)

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(1) *Nature of Requirement.* See *Schmidlin v. Palo Alto* (2007) 157 C.A.4th 728, 776, 69 C.R.3d 365 [instruction on "reasonable cause to arrest" in false arrest action, while diverging from BAJI, No. 7.66 and CACI, No. 1402, was not

prejudicial; instruction stated that probable cause consisted of certain state of facts to be determined by jury, and did not ask jury to determine legal requirements for probable cause]; *Levin v. United Air Lines* (2008) 158 C.A.4th 1002, 1015, 70 C.R.3d 535 [reasonable cause existed to arrest airline passenger for false report of bomb (P.C. 148.1; 2 Cal. Crim. Law (3d), *Crimes Against Governmental Authority*, §27), where she referred to "bomb" in her luggage during contentious encounters with airline employees, security personnel, and police, even if references were made in frustration and not to be taken seriously].



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cc. Arrest Based on Entrapment.

5 *Witkin Sum. Cal. Law Torts* § 437

[§ 437] Arrest Based on Entrapment.

In *Beauregard v. Wingard* (1965) 237 C.A.2d 760, 47 C.R. 279, plaintiff incurred the enmity of defendant chief of police. Defendant arranged for a deputy sheriff, posing as an employee of plaintiff's friend, to urge plaintiff to place a racetrack bet for him. Plaintiff first demurred, then agreed, and a hidden officer immediately arrested him. He was charged with a felony, but at the criminal trial without a jury, the judge found him not guilty on the ground of entrapment. In this action for false arrest, defendant contended that the criminal defense of entrapment is irrelevant in a civil action, that the felony remains as a fact, and that the officers therefore had the privilege to arrest for actual commission of that felony (see *supra*, §435). *Held*, this was too superficial a view; a criminal act committed as a result of entrapment cannot justify an arrest. (237 C.A.2d 765.) (See 15 A.L.R.3d 963 [entrapment as precluding justification of arrest].)

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3. Misdemeanor Arrest Without Warrant.

aa. Arrest by Peace Officer or Authorized Public Employee.

5 *Witkin Sum. Cal. Law Torts* § 438

[§ 438] Arrest by Peace Officer or Authorized Public Employee.

(1) *Presence Rule*. Former P.C. 836, 837(1) originally required actual commission of a misdemeanor *in the presence* of the peace officer making the arrest; and some cases strictly applied the requirement. (See *Ware v. Dunn* (1947) 80 C.A.2d 936, 943, 183 P.2d 182; *Collins v. Owens* (1947) 77 C.A.2d 713, 718, 176 P.2d 372; *People v. Perry* (1947) 79 C.A.2d Supp. 906, 909, 180 P.2d 465; *Miller v. Glass* (1955) 44 C.2d 359, 362, 282 P.2d 501.) Accordingly, arrest on mere suspicion or on information of others was wholly unauthorized. (See *In re Milstead* (1919) 44 C.A. 239, 242, 186 P. 170; *Oppenheimer v. Los Angeles* (1951) 104 C.A.2d 545, 549, 232 P.2d 26.)

(2) *Judicial Relaxation of Presence Rule*. The unqualified statutory requirement of actual commission of the misdemeanor in the peace officer's presence was modified by cases establishing a test of reasonable or probable cause in one situation: where a misdemeanor was apparently being committed in the presence of the officer, but there was some uncertainty as to the parties participating in that crime.

Thus, in *Coverstone v. Davies* (1952) 38 C.2d 315, 239 P.2d 876, plaintiffs C and M, assembled with other students to view a hot rod race, were arrested with the group for unlawful assembly. *Held*, the officers could act on reasonable appearances in making the arrest. The court took the position that P.C. 836(1) should be read in conformity with the general rule of probable cause, in order that peace officers might be allowed to act without fear of being held liable for reasonable mistakes. (38 C.2d 321.) (Cf. *Miller v. Glass* (1955) 44 C.2d 359, 362, 282 P.2d 501 [*Coverstone* rule was inapplicable where there was no apparent commission of misdemeanor in presence].)

(3) *Statutory Rule of Reasonable Cause*. As amended in 1957, P.C. 836(a)(1) provides that an officer may arrest whenever "the officer has reasonable cause to believe that the person to be arrested has committed a public offense in the officer's presence." Presumably this was intended to state the effect of the *Coverstone* case as interpreted in the *Miller* case. (See *Whaley v. Jansen* (1962) 208 C.A.2d 222, 227, 25 C.R. 184; *Whaley v. Kirby* (1962) 208 C.A.2d 232, 237, 25 C.R. 50.)

P.C. 836.5 analogously permits a *public officer or employee* who is *authorized by ordinance* to arrest a person

without a warrant when the officer or employee has reasonable cause to believe that the person has committed a misdemeanor in his or her presence "which is a violation of a statute or ordinance which the officer or employee has the duty to enforce." (P.C. 836.5(a); see P.C. 836.5(b) [no liability in these circumstances for false arrest or false imprisonment].)

In the *Whaley* cases, *supra*, plaintiff was going from house to house soliciting the use of homes and contributions for his campaign exposing governmental wrongdoing, carrying with him literature making extravagant charges against government officials. An officer took him into custody, he was given a psychiatric examination, and he was then released without charge of crime. *Held*, under *Coverstone* principles the officer had reasonable cause to believe a misdemeanor was being committed (vagrancy or soliciting money without a permit); but the arrest was actually made and justified under the terms of a statute authorizing a peace or health officer to take into custody a person so mentally ill as to require care or restraint for the protection of himself and others. This statute did not require that the acts justifying such restraint be committed in the presence of the others. (208 C.A.2d 237.) (See 92 A.L.R.2d 570 [right to arrest and detain person who is or is suspected of being mentally deranged].)

(4) *Arrest by Off-Duty Officer.* In

Cervantez v. J.C. Penney Co. (1979) 24 C.3d 579, 156 C.R. 198, 595 P.2d 975, plaintiff and a companion were in defendant's store when D, an off-duty police officer working as a security guard, observed what he thought were thefts of merchandise. After continued surveillance, he arrested them as they left the store. Theft charges were dismissed after the allegedly stolen items were lost, and plaintiff brought this action for damages against D and defendant company for false arrest and other torts. A nonsuit was granted on the cause of action for intentional infliction of emotional distress, and the jury returned a verdict for defendants on the other counts. *Held*, reversed for prejudicial error in instructions. The trial judge instructed the jury on the standards applicable to arrests by peace officers, rather than on the more limited authority of a private person (only where offense actually committed or attempted in the person's presence; see *infra*, §439). This was erroneous. The fact of private employment prevents a peace officer from acting in what would otherwise be the officer's official capacity. (24 C.3d 587, 588.)

Under amendments to P.C. 70 subsequent to the *Cervantez* case, however, a police officer who works part-time as a security guard acts as a peace officer during that time so long as the officer meets specified requirements relating generally to wearing a police uniform and observing agency rules and regulations. (See P.C. 70(c), (d); *Melendez v. Los Angeles* (1998) 63 C.A.4th 1, 6, 73 C.R.2d 469 [because part-time security guards did not comply with requirements of P.C. 70, they were not acting as peace officers, and there was no respondeat superior basis for defendant city's liability]; 65 A.L.R.5th 623 [performance of public duty by off-duty police officer acting as security guard].)

(5) *Burden of Proof.* The burden of proof of showing justification for a warrantless arrest is on the defendant officer. (*Cervantez v. J.C. Penney Co.*, *supra*, 24 C.3d 592.)

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bb. Arrest by Private Person.

5 *Witkin Sum. Cal. Law Torts* § 439

[§ 439] Arrest by Private Person.

(1) *Citizen's Arrest*. A private person may make a "citizen's arrest" for a public offense committed in his or her presence. (P.C. 837(1).) Thus, the presence rule (*supra*, §438) continues to apply to arrests by private persons. A public offense must actually be committed or attempted; the mere fact that the arresting person has probable cause to believe that a public offense has been committed or attempted is insufficient. (See *Hamburg v. Wal-Mart Stores* (2004) 116 C.A.4th 497, 512, 10 C.R.3d 568 [arrest on premises of defendant store was not privileged where its manager acted on basis of discussions with police officers and customer complaints rather than personal observation].)

The cooperation of police officers is necessary to make the arrest effective. The citizen calls the police, who are unable to make an arrest because the offense was previously committed outside their presence, but the citizen may make the arrest and the officers will then take the arrested person into custody. (See *Hill v. Levy* (1953) 117 C.A.2d 667, 670, 256 P.2d 622; *Ogulin v. Jeffries* (1953) 121 C.A.2d 211, 213, 263 P.2d 75; 39 Cal. L. Rev. 103; 44 Cal. L. Rev. 595; 16 A.L.R.3d 535 [arrest under invalid statute or ordinance].) Neither the police officer nor the officer's governmental employer is liable for false arrest as a result of taking custody of a person at the request of one who makes a citizen's arrest; the remedy, if any, is against the citizen who makes the arrest. (*Kinney v. Contra Costa* (1970) 8 C.A.3d 761, 768, 769, 87 C.R. 638.)

The situation becomes more complicated if the officers, to avoid responsibility, prevail on the victim of the crime to make an arrest that should have been made by the officers. Thus, in *Peterson v. Robison* (1954) 43 C.2d 690, 695, 277 P.2d 19, plaintiff, driving while intoxicated in Burlingame, knocked defendant's unattended car onto the sidewalk, breaking a parking meter. He left his name, address, and phone number, and drove off. Defendant reported this to the Burlingame police, who induced him to sign a "Citizen's Arrest Form" requesting their aid. Meanwhile South San Francisco police arrested plaintiff for driving while intoxicated, and held him until Burlingame police picked him up. Thereupon defendant, at the direction of a Burlingame officer, made the arrest (placing his hand on plaintiff's shoulder and saying, "I arrest you in the name of the law"). No charge was made, no warrant was issued, and plaintiff was released the next morning when defendant refused to sign a complaint. *Held*, judgment for damages reversed. The court relied on P.C. 150, making it a misdemeanor for a able-bodied person over 18 to refuse an officer's lawful request for

aid in an arrest. "It would be manifestly unfair to impose civil liability upon the private person for doing that which the law declares it a misdemeanor for him to refuse to do." (43 C.2d 697.)

Although the court undoubtedly reached the proper result in the *Peterson* case, the theory of the opinion seems unrealistic. Plaintiff was properly arrested by the South San Francisco police for drunken driving, and could have been arrested again in Burlingame on a warrant for hit-and-run; the officers needed no help from defendant in this respect. It would seem more reasonable to give full significance to the fact of the original arrest in South San Francisco. Plaintiff, already in custody, could not be *arrested* by defendant, nor was any act of defendant a confinement amounting to *false imprisonment*. (See 44 Cal. L. Rev. 595.)

In *Floro v. Lawton* (1960) 187 C.A.2d 657, 10 C.R. 98, the court, setting forth the entire form, criticized the practice: "She did sign the form of the police department which was obviously designed to attempt to remove the police from any responsibility in performing their duty. Such an effort on the part of the police to detach or insulate themselves from the burdens of their office ought to be carefully scrutinized whenever the question arises as to who it was who made an arrest." (187 C.A.2d 668.)

In *Gomez v. Garcia* (1980) 112 C.A.3d 392, 169 C.R. 350, plaintiff violated former P.C. 602(n) (now P.C. 602(o)) by refusing to leave premises when requested to do so by defendant. The police were called and mistakenly instructed defendant to make a citizen's arrest for violation of P.C. 415 (disturbing the peace). *Held*, verdict and judgment for compensatory and punitive damages reversed; plaintiff's own testimony, in denying that he used loud and abusive language in violation of P.C. 415, disclosed his violation of P.C. 602(n) and therefore established reasonable cause for his arrest. (112 C.A.3d 398.)

A peace officer called out on a domestic violence call is required to make a good faith effort to inform the victim of his or her right to make a citizen's arrest. The information must include advice on how to safely execute the arrest. (P.C. 836(b).)

(2) *Arrest by Merchant, Librarian, or Theater Owner*. In *Cervantez v. J.C. Penney Co.* (1979) 24 C.3d 579, 156 C.R. 198, 595 P.2d 975, *supra*, §438, the court declared that the judicially created privilege of a merchant to *detain* (*supra*, §431), codified in P.C. 490.5, does not extend to an *arrest*. (24 C.3d 589, 590, 591.) This is no longer true; the statute, as amended, provides that, in any civil action brought by a person resulting from a detention *or arrest* by a merchant or library employee, it is a defense that the merchant or library employee had probable cause to believe that the person had stolen or attempted to steal merchandise, or books or library materials, and that the merchant or library employee acted reasonably under all the circumstances. A theater owner is given the same defense where the owner, with probable cause, arrests a person suspected of attempting to operate a video recording device in the theater without the owner's permission. (P.C. 490.5(f)(7).) (See 13 Pacific L. J. 666.)

West's Key Number Digest, False Imprisonment k.7(3), 7(4), 11, 15(1)

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3. Misdemeanor Arrest Without Warrant.

ee. Delayed Arrest.

5 *Witkin Sum. Cal. Law Torts* § 440

[§ 440] Delayed Arrest.

Either a police officer or a private person may arrest for an offense committed in his or her presence (1) at the time of the offense, (2) within a reasonable time afterwards, or (3) on fresh and immediate pursuit of the offender. What is a reasonable time is not determined mechanically but rather by the circumstances. An officer may delay the actual arrest while attempting to accomplish it, e.g., by calling for help of other officers in apprehending or subduing the offender. But an officer who delays for any purpose unconnected with its accomplishment loses the right to arrest without a warrant. (See *Ogulin v. Jeffries* (1953) 121 C.A.2d 211, 213, 263 P.2d 75; 58 A.L.R.2d 1056 [peace officer's delay in making arrest without warrant for misdemeanor or breach of peace].)

Thus, in *Jackson v. Superior Court* (1950) 98 C.A.2d 183, 219 P.2d 879, the officers observed boys shooting at a light bulb in a public building, warned them, but did not attempt an arrest until the next day at their home. *Held*, the delay was unwarranted and the right was lost. (98 C.A.2d 187.)

On the other hand, in *Hill v. Levy* (1953) 117 C.A.2d 667, 256 P.2d 622, plaintiff, in a hotel, made loud scurrilous and profane remarks in the presence of women. Defendant, after asking him to desist, notified the police. The police arrived about one-half hour after the remarks, defendant made a citizen's arrest for disturbing the peace, and the officers took plaintiff into custody. *Held*, the arrest was made within a reasonable time and was legal. Defendant, who could not easily have arrested a quarrelsome person by himself, made an unsuccessful attempt to get help from the hotel manager, then immediately called the officers; and he did nothing unconnected with the arrest during the short interval. (117 C.A.2d 671.)

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4. Arrest With Warrant.

aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 441

[§ 441] In General.

An arrest pursuant to a warrant regular on its face is privileged; i.e., the officer is protected though the arrest turns out to be invalid for reasons not apparent. The peace officer in making the arrest must act without malice and in the reasonable belief that the person arrested is the one referred to in the warrant. (C.C. 43.55.) (See *Rest.2d, Torts* §122 et seq. [arrest under warrant]; on meaning of "regular on its face," see *infra*, §442; on mistaken arrest of wrong person, see *infra*, §443; on immunity for acts in reliance on court process or order generally, see *supra*, §161; on nature and form of warrant, and conditions of issuance, see P.C. 813 et seq., 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §15 et seq.) Under this privilege, an officer, acting in good faith, who executes a warrant regular on its face is not subject to tort liability, even if the arrest turns out to be unlawful. (*People v. Brite* (1937) 9 C.2d 666, 682, 72 P.2d 122; *Donati v. Righetti* (1908) 9 C.A. 45, 48, 97 P. 1128; *Kalish v. White* (1918) 36 C.A. 604, 606, 173 P. 494; *Malone v. Carey* (1936) 17 C.A.2d 505, 506, 62 P.2d 166; *Barrier v. Alexander* (1950) 100 C.A.2d 497, 499, 224 P.2d 436; *Jackson v. Osborn* (1953) 116 C.A.2d 875, 882, 254 P.2d 871.)

In *Herndon v. Marin* (1972) 25 C.A.3d 933, 102 C.R. 221, plaintiff had been cited for two misdemeanor traffic violations. After trial, he was acquitted of one charge but found guilty of the other and assessed a fine, which he paid. Subsequently, through the negligence of a clerk or the district attorney, a warrant was issued on the basis of the same traffic violations, and plaintiff was arrested. In this action for damages against the county, the sheriff, and a deputy sheriff, judgment for defendants on demurrer was affirmed. Plaintiff's theory was that the deputy sheriff who made the arrest had knowledge of the fact that the warrant had been improperly issued. But this alleged knowledge of extrinsic facts would not support a cause of action for false arrest, for C.C. 43.5(a) (now C.C. 45.55) exempts the officer from liability where the warrant is regular on its face. "It is not his duty to investigate the procedure which led to the issuance of the warrant, nor is there any obligation on his part to pass judgment upon the judicial act of issuing the warrant or to reflect upon the legal effect of the adjudication. On the contrary, it is his duty to make the arrest." (25 C.A.3d 936.) A peace officer "is not to be held responsible for complying with his precept." (25 C.A.3d 938, citing the text.) This is so even though the arresting officer refuses to make a requested inquiry about a mistaken issuance of the warrant. (25 C.A.3d 939.)

West's Key Number Digest, False Imprisonment k.7(3), 11

SUPPLEMENT: [This section is current through the latest supplement]

C.C. 43.55 was subdivided in 2005. The material discussed in the text is now in C.C. 43.55(a).



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bb. Warrant Defective on Face.

5 *Witkin Sum. Cal. Law Torts* § 442

[§ 442] Warrant Defective on Face.

An arrest under a warrant that is defective on its face is actionable. The requisites of "regularity" on the fact of a warrant were discussed in *Allison v. Ventura* (1977) 68 C.A.3d 689, 137 C.R. 542. Plaintiff alleged that a bench warrant had been issued as a result of her failure to appear in a domestic relations case; that the warrant was outstanding for over 3 years when she was arrested and imprisoned for many hours; and that she suffered emotional distress. The case file revealed that the warrant had been issued for the purpose of setting bail, that she eventually appeared, and that the warrant was recalled. *Held*, a cause of action for false imprisonment was stated against defendant county. Under *Sullivan v. Los Angeles* (1974) 12 C.3d 710, 117 C.R. 241, 527 P.2d 865, *supra*, §§246, 369, the general immunity of Govt.C. 821.6 (institution or prosecution of judicial proceeding within scope of employment; *supra*, §368) does not bar actions for false arrest, and imprisonment, and C.C. 43.5(a) (now C.C. 43.55) was not a defense under the facts alleged.

(a) The contention of plaintiff that the warrant was irregular on its face because served after more than 3 years cannot be accepted; and the "reasonableness" standard of the statute is stated only in connection with the officer's belief that he is arresting the right person. (68 C.A.3d 699.) But timeliness of service may be relevant. "It appears to us that the employment by an officer of a long-outstanding warrant of arrest to effect an arrest may, by taking into account all of the circumstances, including the lack of timeliness, establish 'malice.'" (68 C.A.3d 700.) Hence, plaintiff should be permitted to amend her complaint to allege malice. (68 C.A.3d 700.)

(b) The California Constitution and statutes place severe limitations on the authority of police officers to arrest on a warrant issued in a civil action. (68 C.A.3d 701.) A bench warrant, calling for a body attachment, may issue to compel answer to a charge of contempt, or for failure of a witness to obey a subpoena; but it must specify the nature of the contempt or the reason for the attachment. (68 C.A.3d 702.)

(c) The warrant in the instant case did not set bail or specify the basis for the arrest, and permitted arrest during day or night, with potentially long hours of incarceration before bail could be set. (68 C.A.3d 703.) It did not, therefore, meet legally imposed requirements, and was not regular on its face. (68 C.A.3d 703.)

(d) "The case law supporting the immunity of peace officers ... has interpreted 'regularity' on the face of the warrant as encompassing everything but the most blatant of errors, presumably on the ground that it takes a legally trained mind to ascertain the legal adequacy of a particular warrant. Peace officers are not required to investigate the supportive legal proceedings from which a warrant issues. However, they are required to exercise the judgment of an 'ordinarily intelligent and informed layman's to observe the blatant and patent inadequacy of a warrant emanating from a civil action which directs arrest and neither sets bail nor informs the arrestee of the offense charged for which arrest is ordered." (68 C.A.3d 703.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Definition of warrant regular on face:* C.C. 43.55(b), added in 2005, defines a "warrant of arrest regular upon its face" to include either (1) a paper arrest warrant issued pursuant to a judicial order or (2) a judicial order entered into an automated warrant system by law enforcement or court personnel authorized to make those entries at or near the time the judicial order is made.



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cc. Arrest of Wrong Person.

5 Witkin Sum. Cal. Law Torts § 443

[§ 443] Arrest of Wrong Person.

(1) *Former Law.* Formerly, the officer was ordinarily required to exercise care to ascertain the identity of the party named in the warrant, and if the officer negligently arrested the wrong person, he or she was liable. In *Walton v. Will* (1944) 66 C.A.2d 509, 152 P.2d 639, plaintiff, who bore the same name as the person charged with the crime, but did not entirely fit the description furnished, was arrested by defendant, who disregarded plaintiff's offer to prove his nonidentity by driving a short distance to the home of his former wife. *Held*, the arrest was not privileged, because the simple investigation urged would have shown plaintiff's innocence. (66 C.A.2d 513.) (See 18 So. Cal. L. Rev. 162.)

(2) *Statutory Rule.* The rule of the foregoing decision, however, was changed in 1945, by the enactment of C.C. 43.5(a) (now C.C. 43.55). The statute renders the peace officer immune from liability for an arrest pursuant to a warrant regular on its face if the officer "acts *without malice* and in the *reasonable belief* that the person arrested is the one referred to in the warrant." This is substantially the language of the Torts Restatement (*Rest.2d, Torts §125(a)*), and doubtless makes applicable the liberal Restatement theory (*Rest.2d, Torts §125(a)*, Comment f) that the officer under a duty to serve the warrant is entitled to rely on the name given in the warrant, unless convinced beyond a reasonable doubt that a mistake has been made. (See 39 A.L.R.4th 705 [liability for false arrest under warrant as affected by mistake as to identity].)

(3) *Absence of Malice.* "Where the arrest is made with malice ... no immunity attaches, whether or not the arrest was made pursuant to warrant or legal process." (*Harden v. San Francisco Bay Area Rapid Transit Dist.* (1989) 215 C.A.3d 7, 15, 263 C.R. 549 [officer provided false information forming basis for warrant under which plaintiff was arrested].)

(4) *Reasonableness of Belief in Identity.* Reasonableness of the arresting officer's belief in the arrested person's identity is a question of fact. (*Robinson v. San Francisco* (1974) 41 C.A.3d 334, 337, 116 C.R. 125 [summary judgment for defendants reversed]; *Milliken v. South Pasadena* (1979) 96 C.A.3d 834, 840, 158 C.R. 409; *Laible v. Superior Court* (1984) 157 C.A.3d 44, 52, 203 C.R. 513; see *Bell v. California* (1998) 63 C.A.4th 919, 927, 74 C.R.2d 541 [denial of defense motions for nonsuit and directed verdict was proper; evidence that plaintiff's description did not match photo

in arresting officers' possession and that he was over 10 years older than person named in warrant was sufficient to show unreasonableness].)

In *Lopez v. Oxnard* (1989) 207 C.A.3d 1, 254 C.R. 556, a person arrested for drunk driving gave plaintiff's name, address, and date of birth as his own, and when the person failed to appear in court, a warrant was issued for his arrest. After plaintiff was arrested on this warrant, the court provided him with a "disposition sheet" to carry with him, stating that he was not the person described in the warrant. Nevertheless, plaintiff was arrested two more times by officers who refused to investigate the validity of the disposition sheet, and he sued for false imprisonment. *Held*, judgment for defendants on demurrer affirmed.

(a) Because the warrant accurately described plaintiff, defendants had a reasonable belief that the arrest was lawful. (207 C.A.3d 8.) There is no factual question whether the officers had a reasonable belief that plaintiff was the person named in the warrant; hence, the judgment on demurrer was proper. (207 C.A.3d 9.)

(b) Although the personnel at the jail are not in the same situation as officers on the street, they were also justified in ignoring the disposition sheet. Jail personnel are entitled to rely on process and orders apparently valid on their face. (207 C.A.3d 9.) Here they simply refused to look behind a valid warrant to investigate the validity of a piece of paper handed to them by plaintiff. (207 C.A.3d 11.)

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5 *Witkin Sum. Cal. Law Torts* § 444

[§ 444] Mechanics of Arrest.

(1) *Informing Arrested Person.* Ordinarily, "[t]he person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it." Exceptions are recognized when "the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense" and when "the person to be arrested is pursued immediately after its commission, or after an escape." (P.C. 841; see *Rest.2d, Torts* §128 [manifestation of intention to arrest].) (On use of force to overcome resistance to arrest, see P.C. 835a; *Rest.2d, Torts* §131 et seq.; and *supra*, §424.)

(2) *Showing Warrant.* "An arrest by a peace officer acting under a warrant is lawful even though the officer does not have the warrant in his possession at the time of the arrest, but if the person arrested so requests it, the warrant shall be shown to him as soon as practicable." (P.C. 842.) (Cf. *Rest.2d, Torts* §126 [officer must show warrant on demand].)

(3) *Search of Arrested Person.* The authority of a police officer to make a reasonable search of the arrested person and the area where the person is found, as an incident to the arrest, has long been established, but the concept of reasonableness has caused much controversy. The issue generally arises in connection with the admissibility in evidence of material taken during the search. (For full discussion of search incident to arrest, see 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §143 et seq.)

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c. Conduct After Arrest.

1. Delayed Taking Before Magistrate.

5 Witkin Sum. Cal. Law Torts § 445

[§ 445] Delayed Taking Before Magistrate.

It is a general rule, recognized in several statutes, that a police officer or private person making an arrest, with or without a warrant, must *without unnecessary delay* take the arrested person before a committing magistrate, to be charged with the offense and have bail set. (See P.C. 145 [wilful delay is misdemeanor]; P.C. 821 et seq. [arrest with warrant]; P.C. 847, 849 [arrest without warrant]; on requirement of timely taking before magistrate generally, see 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §§47, 65 et seq.) Any unnecessary delay, even for a few hours, may amount to false imprisonment. (*Vernon v. Plumas Lumber Co.* (1925) 71 C.A. 112, 117, 234 P. 869; *Williams v. Zelzah Warehouse Co.* (1932) 126 C.A. 28, 30, 14 P.2d 177; *Kaufman v. Brown* (1949) 93 C.A.2d 508, 511, 209 P.2d 156; see *Dragna v. White* (1955) 45 C.2d 469, 472, 289 P.2d 428 [2-day limit of P.C. 825 for taking before magistrate "in any event" is not an authorization; lesser delay may be unreasonable]; 21 Cal. L. Rev. 175; 39 Cal. L. Rev. 113; 26 Proof of Facts 2d 617 [false imprisonment where delayed taking before magistrate]; cf. *Ogulin v. Jeffries* (1953) 121 C.A.2d 211, 217, 263 P.2d 75 [detention overnight and morning, where magistrate was 25 miles from jail and plaintiff did not protest, was reasonable].)

The right may be waived. In *Gorlack v. Ferrari* (1960) 184 C.A.2d 702, 7 C.R. 699, plaintiff, a woman charged with stealing a ring, was held in jail for more than 36 hours. However, it appeared that the detective in charge told her she could call an attorney and be released on bail, but also offered to speed up the investigation, which might effect her release without a formal charge and save her the cost of bail bond and attorney's fee. She assented. *Held*, the trial court could find that she acquiesced in the delay and was not entitled to complain. (184 C.A.2d 710.)

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2. Trespass Ab Initio Doctrine Repudiated.

5 Witkin Sum. Cal. Law Torts § 446

[§ 446] Trespass Ab Initio Doctrine Repudiated.

If unreasonable detention or any other unprivileged conduct, such as physical violence, occurs after a lawful arrest, the arresting person is of course liable. Under the ancient doctrine of *trespass ab initio*, the subsequent misconduct relates back so as to make the original act wrongful as well, and to impose liability and additional damages for false imprisonment, despite the fact that the arrest itself was privileged. This doctrine was applied in *Peckham v. Warner Bros. Pictures* (1939) 36 C.A.2d 214, 218, 97 P.2d 472, and its statement was quoted without disapproval in *Kaufman v. Brown* (1949) 93 C.A.2d 508, 513, 209 P.2d 156. (See 28 Cal. L. Rev. 647; 13 So. Cal. L. Rev. 266.)

The modern view, set forth in the Torts Restatement (see *Rest.2d, Torts* §136) is contra. The defendant is liable only for the harm caused by the excessive confinement or other subsequent misconduct. And this position was taken by the Supreme Court, citing the Restatement and disapproving the treatment of this issue in the *Peckham* and *Kaufman* cases: "We are satisfied that the better rule is that where the arrest is lawful, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay." (*Dragna v. White* (1955) 45 C.2d 469, 473, 289 P.2d 428.)

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- 3. Release of Arrested Person.

5 Witkin Sum. Cal. Law Torts § 447

[§ 447] Release of Arrested Person.

When, despite reasonable cause, the arrest turns out to be mistaken or criminal proceedings are undesirable, the arresting officer is provided a statutory means of escaping liability for failure to take the arrested person before a magistrate. "Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever: (1) He or she is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested. (2) The person arrested was arrested for intoxication only, and no further proceedings are desirable. (3) The person was arrested only for being under the influence of a controlled substance or drug and such person is delivered to a facility or hospital for treatment and no further proceedings are desirable." (P.C. 849(b).) After the person's release, the arrest "shall not be deemed an arrest, but a detention only." (P.C. 849(c).)

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d. Furnishing Information Leading to Arrest.

5 *Witkin Sum. Cal. Law Torts* § 448

[§ 448] Furnishing Information Leading to Arrest.

One who maliciously instigates or participates in an unlawful arrest or imprisonment may be liable. (*Collins v. Owens* (1947) 77 C.A.2d 713, 176 P.2d 372; see 44 Cal. L. Rev. 595; 98 A.L.R.3d 542 [liability of private citizen calling on police for false arrest by officer]; 99 A.L.R.3d 1113 [liability for negligently causing arrest or prosecution of another]; on negligent infliction of emotional distress from report causing arrest, see *infra*, §1033.)

However, any person has a right or privilege to make a complaint or furnish information to police officers (for arrest without a warrant) or to a magistrate (for issuance of a warrant), and is not liable for false arrest or imprisonment if an arrest is made on a mistaken identification or insufficient grounds. (*Gogue v. MacDonald* (1950) 35 C.2d 482, 484, 218 P.2d 542; *Hughes v. Oreb* (1951) 36 C.2d 854, 859, 228 P.2d 550; *Turner v. Mellon* (1953) 41 C.2d 45, 48, 257 P.2d 15; *Peterson v. Robison* (1954) 43 C.2d 690, 695, 277 P.2d 19, *supra*, §439; *Wilson v. Los Angeles* (1971) 21 C.A.3d 308, 316, 98 C.R. 525; see 44 Cal. L. Rev. 595; 27 So. Cal. L. Rev. 483; 1 U.C.L.A. L. Rev. 396; 39 A.L.R.4th 705 [liability for false arrest under warrant as affected by mistake as to identity].) Such a communication is absolutely privileged. (*Hagberg v. California Federal Bank FSB* (2004) 32 C.4th 350, 355, 360, 7 C.R.3d 803, 81 P.3d 244, *infra*, §582; *Mulder v. Pilot Air Freight* (2004) 32 C.4th 384, 387, 7 C.R.3d 828, 81 P.3d 264.) On the other hand, a citizen's arrest is conduct, not communication, and thus not protected by the privilege. (*Wang v. Hartunian* (2003) 111 C.A.4th 744, 747, 3 C.R.3d 909; *Kesmodel v. Rand* (2004) 119 C.A.4th 1128, 1137, 15 C.R.3d 118.)

West's Key Number Digest, False Imprisonment k.7(4)

SUPPLEMENT: [This section is current through the latest supplement]

Citizen's arrest is not privileged: See *Buchanan v. Maxfield Enterprises* (2005) 130 C.A.4th 418, 423, 29 C.R.3d 909 [citizen's arrest performed by store employee to remove customer from premises was conduct, not communication, and thus not privileged; following *Wang v. Hartunian* (2003) 111 C.A.4th 744, 3 C.R.3d 909, text, p. 667].



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CHAPTER IX - Torts

Witkin Summary of California Law III. INTENTIONAL INVASIONS OF INTERESTS IN PERSONALITY C. Intentional Infliction of Emotional Distress.

1. Independent Tort.

a. Classification and Development.

5 *Witkin Sum. Cal. Law Torts* § 449

[§ 449] Classification and Development.

(1) *Classification of Situations Where Emotional Distress Compensable.* The subject of emotional distress falls under these headings:

(a) An element of damages suffered from a conventional tort with or without physical injury. (See *infra*, §1671 et seq.)

(b) A basis for the tort of negligence. (See *infra*, §1004 et seq.)

(c) A basis for an *independent intentional tort*. (See *infra*, §450 et seq.)

(2) *Early Law.* The courts were long reluctant to allow damages for "fright and shock" or other emotional upset without accompanying physical injury, unless the defendant's act constituted an established tort such as assault, battery, false imprisonment, trespass, defamation, or invasion of privacy. (See *Deevy v. Tassi* (1942) 21 C.2d 109, 120, 130 P.2d 389; *State Rubbish Collectors Assn. v. Siliznoff* (1952) 38 C.2d 330, 336, 240 P.2d 282, *infra*, §461; Dobbs, *The Law of Torts* §303; 2 Harper, James & Gray 2d §9.1; 28 Cal. L. Rev. 242; 44 Cal. L. Rev. 41; 13 So. Cal. L. Rev. 530; 25 So. Cal. L. Rev. 440.) However, liability for humiliation resulting from improper conduct amounting to extreme outrage was imposed on carriers and innkeepers, as a result of their special obligations assumed toward members of the public. (See *Sloane v. Southern Calif. Ry. Co.* (1896) 111 C. 668, 683, 44 P. 320 [wrongful ejection from train]; *Rest.2d, Torts* §48; 44 Cal. L. Rev. 59; 25 So. Cal. L. Rev. 443.)

West's Key Number Digest, Damages k.48 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Early Law.* See 2 Harper, James & Gray 3d §9.1.



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C. Intentional Infliction of Emotional Distress.

1. Independent Tort.
- b. Protected Interest in Peace of Mind.

5 *Witkin Sum. Cal. Law Torts* § 450

[§ 450] Protected Interest in Peace of Mind.

Peace of mind is now recognized as a legally protected interest, the intentional invasion of which is an independent wrong, giving rise to liability without the necessity of showing the elements of any of the traditional torts. The Torts Restatement, which formerly contained the older rule (*supra*, §449), was amended in 1947 to state the liability of one who, without a privilege, intentionally or recklessly causes "severe emotional distress" to another by "extreme and outrageous conduct." (*Rest.2d, Torts* §46; see *C.E.B.*, 2 Business Litigation, §11.61; *Dobbs*, The Law of Torts §303 et seq.; 2 *Harper, James & Gray* 2d §9.1; *Cal. Civil Practice*, 1 Torts, Intentional Infliction of Emotional Distress, Chap. 14; 44 *Cal. L. Rev.* 40; 49 *Harv. L. Rev.* 1033; 25 *So. Cal. L. Rev.* 440; 13 *Pepperdine L. Rev.* 1; 15 *A.L.R.2d* 108 [civil liability for insulting or abusive language not amounting to defamation]; 38 *A.L.R.4th* 998 [intentional infliction of emotional distress as independent tort]; 38 *Am.Jur.2d* (1999 ed.), *Fright, Shock, and Mental Disturbance* §1; 43 *Proof of Facts* 2d 1 [intentional infliction of emotional distress]; *BAJI*, No. 12.70 et seq.; *CACI*, No. 1600 et seq.)

California has fully accepted the modern doctrine. (See *State Rubbish Collectors Assn. v. Siliznoff* (1952) 38 *C.2d* 330, 336, 240 *P.2d* 282, *infra*, §461 ["cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault"]; *Alcorn v. Anbro Engineering* (1970) 2 *C.3d* 493, 497, 86 *C.R.* 88, 468 *P.2d* 216, *infra*, §461; *Bowden v. Spiegel* (1950) 96 *C.A.2d* 793, 795, 216 *P.2d* 571 ["The important elements are that the act is intentional, that it is unreasonable, and that the actor should recognize it as likely to result in illness"]; *Richardson v. Pridmore* (1950) 97 *C.A.2d* 124, 129, 217 *P.2d* 113; *Guillory v. Godfrey* (1955) 134 *C.A.2d* 628, 633, 286 *P.2d* 474 ["It is now well settled in this state that damages may be awarded for mental suffering caused by intentional and outrageous conduct"]; *Tate v. Canonica* (1960) 180 *C.A.2d* 898, 904, 5 *C.R.* 28, *infra*, §461; *Taylor v. Vallelunga* (1959) 171 *C.A.2d* 107, 108, 339 *P.2d* 910, 5 *Cal. Proc.* (4th), *Pleading*, §726 [however, pleading insufficient]; *Vargas v. Ruggiero* (1961) 197 *C.A.2d* 709, 718, 17 *C.R.* 568; *Leavy v. Cooney* (1963) 214 *C.A.2d* 496, 502, 29 *C.R.* 580; *Spackman v. Good* (1966) 245 *C.A.2d* 518, 528, 54 *C.R.* 78, *infra*, §453; *Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 *C.A.3d* 376, 394, 89 *C.R.* 78, *infra*, §459; *Golden v. Dungan* (1971) 20 *C.A.3d* 295, 302, 97 *C.R.* 577, *infra*, §461; *KOVR-TV v. Superior Court* (1995) 31 *C.A.4th* 1023, 1030, 37 *C.R.2d* 431; *Angie M. v. Superior Court* (1995) 37 *C.A.4th* 1217, 1226, 44 *C.R.2d* 197; 44 *Cal. L. Rev.* 40 [boundaries of liability for "insult and outrage"]; *BAJI*, No. 12.70 et seq. [intentional infliction of emotional distress].)

West's Key Number Digest, Damages k.49.10

SUPPLEMENT: [This section is current through the latest supplement]

See 2 Harper, James & Gray 3d §9.1.

Taylor case:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §770.

"[T]o state a cause of action for intentional infliction of emotional distress a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 C.A.4th 1228, 1259, 29 C.R.3d 521, quoting *Trerice v. Blue Cross of Calif.* (1989) 209 C.A.3d 878, 883, 257 C.R. 338.)

(New) Plaintiff must be individual: A business entity lacks standing to pursue a claim for intentional infliction of emotional distress. (*Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA*, *supra*, 129 C.A.4th 1259.)



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5 Witkin Sum. Cal. Law Torts § 451

[§ 451] Outrageous Conduct.

The conduct must be outrageous, i.e., beyond all bounds of decency; ordinary rude or insulting behavior is not enough to justify an award of damages. (*Cervantez v. J.C. Penney Co.* (1979) 24 C.3d 579, 593, 156 C.R. 198, 595 P.2d 975; *Bogard v. Employers Cas. Co.* (1985) 164 C.A.3d 602, 616, 617, 210 C.R. 578; *Rest.2d, Torts* §46, Comment d ["[t]here is no occasion for the law to intervene in every case where some one's feelings are hurt"]; 44 Cal. L. Rev. 43, 48, 52; 43 Proof of Facts 2d 1 [intentional infliction of emotional distress]; 20 A.L.R.4th 733 [civil liability for insulting and abusive language--modern status]; 16 Proof of Facts 2d 493 [liability for abusive language]; BAJI, No. 12.72 ["emotional distress" defined]; BAJI, No. 12.73 ["severe" defined]; BAJI, No. 12.74 ["extreme and outrageous conduct" defined]; BAJI, No. 12.75 [effect of relationship of parties]; BAJI, No. 12.76 [susceptibility of plaintiff].)

The following illustrate circumstances in which a defendant's conduct has been found outrageous:

Miller v. National Broadcasting Co. (1986) 187 C.A.3d 1463, 1487, 232 C.R. 668, *infra*, §659 [entering private home with little or no thought to its consequences].

KOVR-TV v. Superior Court (1995) 31 C.A.4th 1023, 1030, 37 C.R.2d 431 [television reporter's interviewing three young children on camera, with no adult present, concerning murder of two playmates who lived next door, about which children were then unaware].

Angie M. v. Superior Court (1995) 37 C.A.4th 1217, 1226, 44 C.R.2d 197 [allegations of 8-month sexual relationship initiated by physician with minor, including mutual oral copulation and use of alcohol and controlled substances, showed sufficiently outrageous conduct to send case to jury; minor was not required to allege facts showing special relationship with physician or his knowledge of her special susceptibility to emotional distress].

Numerous other cases have found the defendant's conduct not outrageous. The following are illustrative:

Trerice v. Blue Cross of Calif. (1989) 209 C.A.3d 878, 883, 257 C.R. 338 [replacing plaintiff's termination package with one less favorable and requiring her to perform menial tasks].

Yurick v. Superior Court (1989) 209 C.A.3d 1116, 1129, 257 C.R. 665 [supervisor's telling plaintiff in presence of

others that anyone over 40 was senile and that plaintiff was senile and a liar].

Masters v. San Bernardino County Employees Retirement Assn. (1995) 32 C.A.4th 30, 49, 37 C.R.2d 860 [on receipt of additional evidence, failure of administrative agency to summarily reverse itself, without hearing, with respect to claim for disability retirement benefits].

Janken v. GM Hughes Electronics (1996) 46 C.A.4th 55, 80, 53 C.R.2d 741 [personnel management activity, even if wrongful motivation is alleged].

Kraslawsky v. Upper Deck Co. (1997) 56 C.A.4th 179, 194, 65 C.R.2d 297 [requirement that employee provide urine sample for drug test, even if employee was not suspected of drug use].

Cochran v. Cochran (1998) 65 C.A.4th 488, 493, 76 C.R.2d 540 [father's threatening to deliver airline ticket to daughter for airline that had recently suffered well publicized fatal crash, even though father and plaintiff mother had had long and bitter relationship, and mother had recently sued him for breach of palimony agreement].

Davidson v. Westminster (1982) 32 C.3d 197, 209, 210, 185 C.R. 252, 649 P.2d 894, supra, §291 [conduct of defendant police officers that was, at most, poor police procedure].

In *Fuentes v. Perez* (1977) 66 C.A.3d 163, 136 C.R. 275, defendant contractor undertook construction work on plaintiffs' home that necessitated removal of a portion of the roof. Despite weather reports indicating rain, and phone calls after the rain started, he failed to take protective measures and the building, furniture, and personal effects were damaged. Plaintiffs received a verdict for this damage to property and also for emotional distress. *Held*, judgment modified to eliminate the emotional distress award. The testimony of plaintiffs that they were "upset" and "disturbed" and "furious" did not meet the test of "extreme and outrageous" intentional or reckless infliction of emotional distress. (66 C.A.3d 170, 172, citing the text.) (See *Cortez v. Macias* (1980) 110 C.A.3d 640, 652, 167 C.R. 905 [following *Fuentes*].)

In *Melovich Builders v. Superior Court* (1984) 160 C.A.3d 931, 207 C.R. 47, defendant contractor was involved in a dispute with plaintiff owner, and defendant, on advice of counsel, filed an unbonded stop notice with the financing agency. *Held*, defendant's conduct could not be considered extreme or outrageous even though the attorney's advice proved to be legally unsound. "[I]t is a complete defense to a claim of extreme and outrageous conduct when the evidence shows (1) the defendant acted on the opinion and advice of counsel; (2) counsel's advice was based on full disclosure of all the facts by defendant or the advice was initiated by counsel based on counsel's familiarity with the case; (3) the defendant's reliance on the advice of counsel was in good faith." (160 C.A.3d 936.)

West's Key Number Digest, Damages k.54

SUPPLEMENT: [This section is current through the latest supplement]

See *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 C.A.4th 1228, 1259, 29 C.R.3d 521 [cause of action for intentional infliction of emotional distress requires showing of conduct by defendant "so extreme as to exceed all bounds of that usually tolerated in a civilized society"]; *Berkley v. Dowds* (2007) 152 C.A.4th 518, 534, 61 C.R.3d 304 [whether defendant's conduct can reasonably be found to be outrageous is question of law that must initially be determined by court; if reasonable persons may differ, it is for jury to determine whether conduct was, in fact, outrageous].

Conduct found outrageous:

Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA, supra, 129 C.A.4th 1260 [defendant's website entries targeting employee of animal testing lab for illegal activity and threatening her safety could support cause of action for intentional infliction of emotional distress].

Conduct found not outrageous:

Garamendi v. Golden Eagle Ins. Co. (2005) 128 C.A.4th 452, 480, 27 C.R.3d 239 [telling employee to keep quiet about employer's fraud was type of personnel activity by employer insufficient to support intentional infliction of emotional distress claim; citing *Janken v. GM Hughes Electronics* (1996) 46 C.A.4th 55, 53 C.R.2d 741, text, p. 670].

Berkley v. Dowds, *supra*, 152 C.A.4th 533 [widow's complaint against husband's attending physician failed to allege facts constituting outrageous conduct; there was no allegation that physician's alleged cost-saving motive in recommending termination of life support was communicated to widow or that his prognosis that husband would never recover was incorrect; medical diagnosis and treatment advice ordinarily will not be considered outrageous unless false and given in bad faith].

Unterberger v. Red Bull North America (2008) 162 C.A.4th 414, 423, 75 C.R.3d 368, citing the text [energy drink manufacturer's termination of business relationship with beverage distributor was not outrageous conduct].



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C. Intentional Infliction of Emotional Distress.

2. Elements.

b. Severe Emotional Distress.

5 Witkin Sum. Cal. Law Torts § 452

[§ 452] Severe Emotional Distress.

The conduct must result in severe emotional distress. (*Agarwal v. Johnson* (1979) 25 C.3d 932, 946, 160 C.R. 141, 603 P.2d 58; *Angie M. v. Superior Court* (1995) 37 C.A.4th 1217, 1227, 44 C.R.2d 197; see C.E.B., 2 Business Litigation, §11.65; BAJI, Nos. 12.72, 12.73, 12.74, 12.75, 12.76; CACI, Nos. 1600, 1602, 1604.) Severe means "substantial or enduring as distinguished from trivial or transitory." (*Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 C.A.3d 376, 397, 89 C.R. 78, *infra*, §459.) In the words of the Restatement, the distress must be so severe that "no reasonable man could be expected to endure it." (*Rest.2d, Torts* §46, Comment j.) However, the "recent trend has been to require less severe distress in pleadings and proof than is required in the Restatement." (*Newby v. Alto Riviera Apartments* (1976) 60 C.A.3d 288, 298, 131 C.R. 547, *infra*, §457; see *Fuentes v. Perez* (1977) 66 C.A.3d 163, 169, 170, 136 C.R. 275, *supra*, §451, citing the text and reviewing cases; Dobbs, *The Law of Torts* §306.)

Severe emotional distress was found to exist in *Fletcher v. Western Nat. Life Ins. Co.*, *supra*. Plaintiff's testimony showed that he suffered no shock, horror, or similar physical effects, and that most of his distress resulted from his unfortunate economic situation. The court said, paraphrasing the Restatement Comment: "Severe emotional distress means ... emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." (10 C.A.3d 397.) However, it "may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry." (10 C.A.3d 397.) Hence, plaintiff's worry about losing his home, about his family lacking food and clothing, about his wife having to go to work, all continuing for many months, supported the jury's determination. (10 C.A.3d 397, 398.)

"[I]n many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." (*Rest.2d, Torts* §46, Comment j.)

West's Key Number Digest, Damages k.50

SUPPLEMENT: [This section is current through the latest supplement]

See *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 C.A.4th 1228, 1259, 29 C.R.3d 521 [cause of action for intentional infliction of emotional distress requires showing that plaintiff suffered "severe or extreme" emotional distress].



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2. Elements.

c. Intentional or Reckless Conduct.

5 Witkin Sum. Cal. Law Torts § 453

[§ 453] Intentional or Reckless Conduct.

(1) *In General.* The tort calls for intentional, or at least reckless, conduct. (See *Miller v. National Broadcasting Co.* (1986) 187 C.A.3d 1463, 1487, 232 C.R. 668, *infra*, §659 [entering private home, unauthorized broadcast of private matters]; *Coon v. Joseph* (1987) 192 C.A.3d 1269, 1273, 237 C.R. 873, *infra*, §1020 [intentional infliction of emotional distress requires conduct that "is especially calculated to cause" severe emotional distress]; *Rest.2d*, Torts §46; Dobbs, *The Law of Torts* §303; 2 Harper, James & Gray 2d §9.1; C.E.B., 2 Business Litigation, §§11.63, 11.64; 44 Cal. L. Rev. 43, 54, 55; BAJI, No. 12.77 [intentional and reckless--defined]; CACI, No. 1603 [same].)

In *Spackman v. Good* (1966) 245 C.A.2d 518, 54 C.R. 78, Suzanne and Paul, children of a disturbed household, lived with defendant after their parents' divorce. This action for damages, brought on their behalf, alleged misconduct of defendant when the children were 15 and 13 years old, respectively, consisting of furnishing them with liquor and allowing intimacies between Suzanne and boys. *Held*, judgment for Suzanne reversed; the showing was insufficient to establish either intentional or negligent causing of emotional distress. This was not a case of threats, abusive words, or acts or conduct that the actor should realize would result in emotional distress. The allegations were largely of omissions--permitting things to happen--without activity on defendant's part intended to inflict injury or with the realization that injury would result. (245 C.A.2d 530.)

(2) *Conduct Must Be Primarily Directed at Plaintiff.* The defendant's conduct must be directed primarily at the plaintiff. The only exception is where the defendant is aware of, but acts in reckless disregard of, the plaintiff and the probability that the conduct will cause severe emotional distress to the plaintiff. (*Christensen v. Superior Court* (1991) 54 C.3d 868, 903, 2 C.R.2d 79, 820 P.2d 181, *infra*, §460; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 C.4th 965, 1001, 25 C.R.2d 550, 863 P.2d 795, *infra*, §1036.)

In *Smith v. Pust* (1993) 19 C.A.4th 263, 23 C.R.2d 364, defendant therapist had a sexual relationship with plaintiff's wife while she was his patient, and plaintiff sued for intentional infliction of emotional distress. *Held*, summary judgment for defendant affirmed. "Intentional" means more than nonaccidental conduct. The wrongful act must also be directed at the plaintiff or be in the plaintiff's presence. Here, the declarations established that the sexual encounter in question was an "accident," and was in no way "directed" at plaintiff. (19 C.A.4th 274, citing *Christensen*, *supra*.) Furthermore, with respect to plaintiff's claim that defendant bragged about it, the declarations showed that it was

plaintiff who approached defendant and pressed him for details as to exactly what happened. (19 C.A.4th 274.) (See *Shin v. Kong* (2000) 80 C.A.4th 498, 512, 95 C.R.2d 304 [no cause of action for intentional infliction of emotional distress against defendant doctor could be based on allegations that defendant artificially inseminated plaintiff's wife without his consent and was natural father of resulting child; there was no allegation that defendant's action was directed against plaintiff in any way]; *Ess v. Eskaton Properties* (2002) 97 C.A.4th 120, 129, 118 C.R.2d 240 [plaintiff whose sister was raped by unknown intruder while in defendant nursing home could not recover for reckless infliction of emotional distress; defendant's nonfeasance was not directed at plaintiff, who was not present at time of event, and was not calculated to cause plaintiff emotional distress].)

(3) *Malice Is Not Essential*. A malicious or evil purpose is not essential to liability. It is sufficient that the defendant devoted little or no thought to the probable consequences of defendant's conduct. (*KOVR-TV v. Superior Court* (1995) 31 C.A.4th 1023, 1031, 37 C.R.2d 431.)

West's Key Number Digest, Damages k.50.10

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 C.A.4th 1228, 1259, 29 C.R.3d 521 [cause of action for intentional infliction of emotional distress requires showing that defendant intended to cause, or recklessly disregarded probability of causing, emotional distress]; 2 Harper, James & Gray 3d §9.1.



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2. Elements.
d. Causation.

5 Witkin Sum. Cal. Law Torts § 454

[§ 454] Causation.

The emotional distress must be actually and proximately caused by the defendant's outrageous conduct. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 C.4th 965, 1001, 25 C.R.2d 550, 863 P.2d 795, *infra*, §1036.)

In *Spackman v. Good* (1966) 245 C.A.2d 518, 54 C.R. 78, *supra*, §453, a basis for reversal was that no causal connection between the alleged acts and the harmful results was established by the evidence. Testimony of a psychiatrist and a psychologist to the effect that the children were psychopaths, as a result of "sex trauma" from the "environment" created by defendant's misconduct rather than the bad home life with their own parents, was unsupported by any substantial evidence. (245 C.A.2d 533.) (See *Vargas v. Ruggiero* (1961) 197 C.A.2d 709, 719, 17 C.R. 568 [noting conflict of medical and legal opinion on whether emotional shock can cause miscarriage].)

In *Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 C.A.3d 376, 89 C.R. 78, *infra*, §459, defendant insurer contended that the emotional distress suffered by plaintiff insured was not caused by the tortious false charges in its letters to plaintiff, but only by the discontinuance of disability payments, which was at most a breach of contract. The court pointed out, however, that an insurer's bad faith refusal to settle a claim is also a tort (see 3 *Cal. Proc.* (4th), *Actions*, §143; 2 *Summary* (10th), *Insurance*, §257 et seq.), and applied that rule by analogy to the facts of the instant case: "We hold, therefore, that defendants' threatened and actual bad faith refusals to make payments under the policy, maliciously employed by defendants in concert with false and threatening communications directed to plaintiff for the purpose of causing him to surrender his policy or disadvantageously settle a nonexistent dispute is essentially tortious in nature and is conduct that may legally be the basis for an action for damages for intentional infliction of emotional distress." (10 C.A.3d 401.)

West's Key Number Digest, Damages k.49.10

SUPPLEMENT: [This section is current through the latest supplement]

See *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 C.A.4th 1228, 1259, 29 C.R.3d 521 [cause of action for intentional infliction of emotional distress requires showing of actual and proximate causation of the emotional distress by defendant's outrageous conduct]. *Insurer's refusal to settle claim:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §148.



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5 Witkin Sum. Cal. Law Torts § 455

[§ 455] Privilege.

(1) *Privilege To Assert Own Economic Interests.* A person is privileged, in pursuing his or her own economic interests, to assert in a permissible way the person's claimed legal rights and communicate his or her position in good faith, even though emotional distress may result. (*Fletcher v. Western Nat. Life Ins. Co. (1970) 10 C.A.3d 376, 395, 89 C.R. 78, infra, §459; see Rest.2d, Torts §46, Comment g, Illustration 4; BAJI, No. 12.78 [privilege to insist on legal rights]; CACI, No. 1605 [same].*) However, exercise of this privilege must be done with a good faith belief in the existence of the rights asserted and in a permissible way. The court in *Fletcher* noted that, even though rights are asserted in good faith, if the defendant acts in an outrageous manner, he or she will be liable. (*10 C.A.3d 395.*) Here there was both bad faith and outrageous conduct by defendant insurer. The evidence indicated "that there was no good faith dispute concerning liability under the policy and that defendants invented the alleged dispute as a part of their scheme to deprive plaintiff of the benefits of his policy." (*10 C.A.3d 396.*)

(2) *Communications Privileged by Statute.* The statutory privileges provided by C.C. 47 to certain communications (see *infra, §561 et seq.*) have been applied in intentional infliction of emotional distress cases as well as defamation cases. (*Silberg v. California Life Ins. Co. (1974) 11 C.3d 452, 113 C.R. 711, 521 P.2d 1103, 2 Summary (10th), Insurance, §64 [litigation privilege].*)

In *Deaile v. General Tel. Co. of Calif. (1974) 40 C.A.3d 841, 115 C.R. 582, infra, §594*, an employer's executives told employees the reasons why plaintiff employee had been forced to retire, reciting instances of her misconduct. *Held*, the statements were within the "interest" privilege of C.C. 47(c), both for defamation (*infra, §594*) and intentional infliction of emotional distress. "Clearly, an employer is privileged in pursuing his own economic interests and that of its employees to ascertain whether an employee has breached his responsibilities of employment and if so, to communicate, in good faith, that fact to others within its employ so that (a) appropriate action may be taken against the employee; (b) the danger of such breaches occurring in the future may be minimized; and (c) present employees may not develop misconceptions that affect their employment with respect to certain conduct that was undertaken in the past. Where an employer seeks to protect his own self-interest and that of his employees in good faith and without abusing the privilege afforded him, the privilege obtains even though it is substantially certain that emotional distress may result from uttered statements." (*40 C.A.3d 849.*)

In *Begier v. Strom* (1996) 46 C.A.4th 877, 54 C.R.2d 158, plaintiff filed suit against his former wife for intentional infliction of emotional distress in (a) filing a false police report accusing plaintiff of molesting the couple's young daughter and (b) repeating the charge in the couple's dissolution action. The trial judge sustained defendant's demurrer. *Held*, reversed; taken as a whole, defendant's remarks were not privileged.

(a) C.C. 47(b) confers an unqualified privilege on a publication made in any legislative, judicial, or other official proceeding authorized by law (see *infra*, §561 et seq.). Although the statute is most commonly asserted in defamation actions, it applies to virtually all other causes of action, except malicious prosecution, based on publication of assertedly offensive material. Insofar as plaintiff alleges that defendant made false accusations within the dissolution action, defendant's statements are clearly privileged and cannot give rise to a cause of action for intentional infliction of emotional distress. (46 C.A.4th 881.)

(b) The complaint also alleges that defendant filed a false police report. The privilege for statements made in a judicial proceeding does not apply to statements made outside the courtroom to persons unconnected to the proceedings. There is nothing on the face of the complaint to suggest that the police or the police report were connected to the pending dissolution litigation. Accordingly, the "judicial proceeding" privilege does not bar plaintiff's cause of action for intentional infliction of emotional distress insofar as it is based on filing a false police report. (46 C.A.4th 882.)

(c) The question whether defendant's report to the police was nonetheless privileged as a statement made in "any other official proceeding authorized by law" remains. Assuming that filing a false police report is privileged, the Child Abuse and Neglect Reporting Act (P.C. 11164 et seq.; see *supra*, §140 et seq.) creates a limited exception. P.C. 11172(a), while granting absolute immunity to certain classes of workers statutorily required to make child abuse reports, provides only qualified immunity to other persons making abuse reports, who are subject to liability for knowingly false reports. The Act demonstrates a legislative effort to balance the public interest in ferreting out cases of child abuse so that child victims can be protected from harm and the policy of protecting the reputations of those who might be falsely accused. The Legislature has struck that balance by withholding immunity from those who knowingly make false reports of child abuse. To hold that the same conduct is privileged under C.C. 47(b) would essentially nullify the Legislature's determination that liability should attach. Thus, the "official proceeding" privilege cannot be held to immunize a party who would otherwise be liable under P.C. 11172(a). (46 C.A.4th 882.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Communications Privileged by Statute.* See *Siam v. Kizilbash* (2005) 130 C.A.4th 1563, 1577, 31 C.R.3d 368 [P.C. 11172(a), imposing liability on voluntary reporters for knowingly filing false child abuse reports, overrides litigation privilege of C.C. 47(b); citing *Begier v. Strom* (1996) 46 C.A.4th 877, 54 C.R.2d 158, text, p. 675]; *Foothill Fed. Credit Union v. Superior Court* (2007) 155 C.A.4th 632, 635, 66 C.R.3d 249 [litigation privilege of C.C. 47(b) barred action for intentional infliction of emotional distress based on credit union's disclosure of personal financial records beyond those sought in probate proceeding; privilege applied even though credit union failed to comply with notice requirements of C.C.P. 1985.3 (governing discovery of personal records of consumers; see 2 Cal. Evidence (4th), Discovery, §228 et seq.)]. (New) *Immunity under Communications Decency Act:* The immunity from tort liability provided by the federal Communications Decency Act to interactive computer service providers or users for communications of others (see 47 U.S.C., §230(c)(1)) may apply in actions for intentional infliction of emotional distress and related torts. Thus, an employer was immune from liability for an employee's use of its computer system to send threatening Internet messages to plaintiffs. The three statutory prerequisites to immunity were met: (a) the defendant was a provider or user of an interactive computer service, (b) the cause of action treated the defendant as a publisher or speaker of information, and (c) the information at issue was provided by another information content provider. (*Delfino v. Agilent Technologies* (2006) 145 C.A.4th 790, 804, 52 C.R.3d 376.) (See 30 A.L.R.6th 241 [liability for infliction of emotional distress derived from use of Internet and electronic communications].)



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C. Intentional Infliction of Emotional Distress.
3. Defenses.
b. Constitutionally Protected Speech or Conduct.

5 *Witkin Sum. Cal. Law Torts* § 456

[§ 456] Constitutionally Protected Speech or Conduct.

An intentional infliction of emotional distress claim may not be based on constitutionally protected speech or conduct. (*Reader' Digest Assn. v. Superior Court* (1984) 37 C.3d 244, 265, 208 C.R. 137, 690 P.2d 610; see *Lam v. Ngo* (2001) 91 C.A.4th 832, 848, 111 C.R.2d 582 [public figure picketed for failing to support demonstrations against store displaying North Vietnamese insignia could not recover for intentional infliction of emotional distress; picketing, rather than containing false statement of fact, only expressed opinion that figure was Communist sympathizer, and was constitutionally protected peaceful political activity].)

Thus, liability cannot be imposed, either in an action for defamation or in one based on intentional infliction of emotional distress or any other theory, for what has been determined to be a constitutionally protected publication. (*Reader' Digest Assn. v. Superior Court*, *supra*; on constitutional limitations in defamation actions, see *infra*, §601 et seq.) In *Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41, 7 Summary (10th), *Constitutional Law*, §432, plaintiff, a nationally known commentator on public affairs, was the subject of a parody advertisement in defendant's magazine, which described acts of an outrageous nature. *Held*, plaintiff's claim based on intentional infliction of emotional distress was barred by the First Amendment protection of free speech. "We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a 'blind application' of the *New York Times* standard ... it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." (108 S.Ct. 882, 99 L.Ed.2d 52.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 676, line 2 of section, "*Reader' Digest Assn. v. Superior Court*" should be "*Reader's Digest Assn. v. Superior Court*".



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5 *Witkin Sum. Cal. Law Torts* § 457

[§ 457] Acts of Landlords.

In *Emden v. Vitz* (1948) 88 C.A.2d 313, 198 P.2d 696, plaintiff, a tenant in defendants' apartment house, was wrongfully excluded. When she attempted to complain, defendants "yelled and screamed" at her, and she suffered a serious glandular imbalance. An award of damages for personal injuries was affirmed. "[O]nce the wrongful quality is established, it matters not whether that conduct consisted of acts alone, or of acts accompanied by words, or of mere spoken words alone." (88 C.A.2d 318.) (See *Aweeka v. Bonds* (1971) 20 C.A.3d 278, 281, 97 C.R. 650, 12 Summary (10th), *Real Property*, §707 [emotional distress damages recoverable for retaliatory eviction of tenant]; *Stoiber v. Honeychuck* (1980) 101 C.A.3d 903, 162 C.R. 194, 12 Summary (10th), *Real Property*, §627 [tenant could sue landlord in tort for mental distress from failure to maintain premises and was not limited to relief for breach of implied warranty of habitability]; 17 A.L.R.2d 936 [recovery by tenant of damages for physical injury or mental anguish occasioned by wrongful eviction]; 6 A.L.R.4th 528 [tenant's recovery of damages for emotional distress under Uniform Residential Landlord and Tenant Act].)

The *Emden* case was followed in *Richardson v. Pridmore* (1950) 97 C.A.2d 124, 217 P.2d 113. While plaintiff tenants were absent, defendant landlord removed their belongings and rented to another. Plaintiff wife suffered emotional upset and had a miscarriage. Although no threats or abusive language were employed, the court characterized the eviction as deliberate and the conduct as "outrageous." (97 C.A.2d 130.) The opinion adds: "We do not have to decide in this case whether recovery could be had solely for mental anguish caused by words alone, because here the plaintiff also suffered physical injury. The better and more modern rule is that, even where there is no physical injury, recovery may be had for mental anguish caused by intentional and outrageous conduct." (97 C.A.2d 130.)

In *Newby v. Alto Riviera Apartments* (1976) 60 C.A.3d 288, 131 C.R. 547, plaintiff, a tenant in an apartment complex, organized a meeting of tenants to discuss rent increases announced by the owners, and delivered a tenants' petition to the manager. Defendant owners and manager came to plaintiff's apartment, called her names, directed her to vacate the premises, and later delivered an eviction notice. No court proceeding to vacate was brought, and plaintiff stayed on, but she brought this action for declaratory relief, injunction, and damages. The trial judge granted a nonsuit on the jury causes of action and judgment under C.C.P. 631.8 on the others. *Held*, reversed. No cause of action for retaliatory eviction or interference with constitutional rights was stated (see 12 Summary (10th), *Real Property*, §706 et seq.), and no showing of arbitrary discrimination was made to justify an award of statutory damages under the Unruh

Civil Rights Act (see 8 *Summary* (10th), *Constitutional Law*, §914); but the evidence was sufficient to go to the jury on the cause of action for intentional infliction of emotional distress.

(a) Defendants' behavior met the test of outrageous behavior laid down in *Alcorn v. Anbro Engineering* (1970) 2 C.3d 493, 86 C.R. 88, 458 P.2d 216, and *Golden v. Dungan* (1971) 20 C.A.3d 295, 97 C.R. 577, *infra*, §461. Defendant G shouted at plaintiff, ordered her out of the apartment in 3 days, and said he would throw her out personally if she did not leave. Defendant R said, "We are going to handle this the way we do down South," and when she said she would not leave he answered, "Do you want to bet your life." This was not "mere insult or annoyance," but intimidation intended to cause fear and worry. (60 C.A.3d 298.)

(b) The modern liberal test of "severe emotional distress" was also met. Plaintiff presented evidence that she was afraid that she and her belongings would be removed and that she would be locked out, and that she was unable to sleep after the threat referring to "down South." (60 C.A.3d 298.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Particular Conduct.

b. Collectors' Tactics.

5 *Witkin Sum. Cal. Law Torts* § 458

[§ 458] Collectors' Tactics.

(1) *Emotional Distress to Debtor*. High-pressure collection tactics gave rise to one of the first California cases to recognize liability in this field. In *Bowden v. Spiegel* (1950) 96 C.A.2d 793, 216 P.2d 571, plaintiff, a woman, had no telephone. Defendant collection agent phoned her neighbor at 11 p.m. and asked that plaintiff be found for an "emergency call." When plaintiff arrived, the neighbor family listened while defendant told her to prepare for a shock, demanded payment, and threatened to take her to court. *Held*, on demurrer, a cause of action was stated. (96 C.A.2d 794.) (See *Vargas v. Ruggiero* (1961) 197 C.A.2d 709, 718, 17 C.R. 568 [collector of money due screamed at pregnant woman, allegedly causing miscarriage]; 17 *Hastings L. J.* 369; 87 A.L.R.3d 201 [emotional distress on debtor resulting from collection methods]; 16 Am.Jur. Trials 619 [actions for harassment of debtor]; 18 Proof of Facts 59 [actionable debt collection practices]; 41 Proof of Facts 3d 159 [intentional infliction of emotional distress in debt collection]; cf. 6 U.C.L.A. L. Rev. 343 [letter to alleged debtor' employer; libel or invasion of privacy].)

In *Bundren v. Superior Court* (1983) 145 C.A.3d 784, 193 C.R. 671, plaintiff, admitted to defendant hospital for surgery, was recuperating from the operation. Defendant's agent telephoned her, and in a "rude and offensive" manner, persisted for a 20- to 30-minute period in demanding payment, despite plaintiff's request that the caller contact her attorney to arrange payment. The court, reversing summary judgment for defendant, cited *Rest.2d, Torts* §46, Comment f, for the point that the extreme and outrageous character of the conduct may arise from the defendant's knowledge that the plaintiff is peculiarly susceptible to emotional distress by reason of some physical or mental condition. (145 C.A.3d 790, and footnote 6.) The opinion adds: "[L]iability has been found in instances in which the collector has been aware of a debtor's bad heart ... ; physical hypertension ... ; advanced pregnancy ... ; heart condition ... ; blindness ... ; epilepsy ... ; or nervous disorder." (145 C.A.3d 790.)

In *Kinnamon v. Staitman & Snyder* (1977) 66 C.A.3d 893, 136 C.R. 321, plaintiff gave a check to O, which was dishonored for insufficient funds. O engaged defendant attorneys to collect the money, and they wrote plaintiff a letter advising her of their representation of O for this purpose. The letter included the following statement: "As you may be aware to issue a check with insufficient funds to cover said check is a misdemeanor. In addition to any civil remedies my client may have, we also plan to exercise our rights to file a criminal complaint against you for your action herein." Plaintiff brought this action, seeking compensatory and punitive damages. She alleged that defendants failed to inform her in the letter that fraudulent intent was an element of the crime, that the threats were illegal and unethical, and were

intended to and did cause emotional distress. *Held*, judgment for defendants on demurrer reversed. The complaint stated a cause of action. Rule 7-104 (now 5-100) of the Rules of Professional Conduct (see 1 *Cal. Proc.* (4th), *Attorneys*, §603) proscribes threats of criminal, administrative, or disciplinary charges to obtain an advantage in a civil action; hence the conduct charged is "outrageous." (66 *C.A.3d* 896.) The letter was not absolutely privileged, under C.C. 47(b) (*infra*, §561 et seq.), as a communication made in the course of a judicial proceeding: Its threat was a cause for discipline of the attorney, could not lawfully serve the purpose of litigation, and could not therefore be privileged. (66 *C.A.3d* 897.) (However, the *Kinnamon* case was disapproved in *Silberg v. Anderson* (1990) 50 *C.3d* 205, 266 *C.R.* 638, 786 *P.2d* 365, *infra*, §570, to the extent that it required publications to be made in the "interest of justice" in order to be privileged under C.C. 47(b); and in *Ross v. Creel Printing & Publishing Co.* (2002) 100 *C.A.4th* 736, 744, 122 *C.R.2d* 787, to the extent that it held that a violation of the Rules of Professional Conduct, by itself, is sufficient to constitute the outrageous conduct needed for intentional infliction of emotional distress.)

(2) *Emotional Distress to Creditor*. In *Cross v. Bonded Adjustment Bureau* (1996) 48 *C.A.4th* 266, 282, 55 *C.R.2d* 801, defendant collection agency misrepresented to plaintiff judgment creditors that renewal of the judgment application had been recorded, failed to inform plaintiffs that the judgment debtor had transferred certain property to his wife, and settled the \$ 250,000 judgment in exchange for \$ 40,000. In view of the fiduciary relationship between the collection agency and the judgment creditor, this constituted outrageous conduct. (See 46 *A.L.R.3d* 722 [mental distress inflicted on person other than debtor].)

(3) *Related Legislation*. The Rosenthal Fair Debt Collection Practices Act prohibits unfair or deceptive acts or practices in the collection of consumer debts, and provides for recovery of *actual damages* for violations and *penalties* for wilful violations. (C.C. 1788 et seq.; see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §4 et seq.) And *Health & Saf.C. 1285* creates a statutory cause of action for general and punitive damages where a patient in a health facility has been detained solely for nonpayment of a bill. (See *supra*, §433.) (See 87 *A.L.R.3d* 786 [validity, construction, and application of state statutes prohibiting abusive or coercive debt collection practices].)

West's Key Number Digest, Damages k.50.20

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Emotional Distress to Debtor*. *Rules of Professional Conduct*:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §541.(3) *Related Legislation*.

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §5 et seq.



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4. Particular Conduct.

c. Insurers' Tactics.

5 *Witkin Sum. Cal. Law Torts* § 459

[§ 459] Insurers' Tactics.

Claims for intentional infliction of emotional distress may arise in an insurance context. (See *Magpali v. Farmers Group* (1996) 48 C.A.4th 471, 485, 55 C.R.2d 225 [insurer's instructions to write more insurance policies for nonminorities and to avoid writing policies for members of ethnic group of which plaintiff insurance agent was member could constitute extreme and outrageous conduct]; 6 A.L.R.5th 297 [liability of insurer, insurance agent, or insurance adjuster for infliction of emotional distress]; on recovery for bad faith conduct of insurers generally, see 2 *Summary* (10th), *Insurance*, §239 et seq.)

In *Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 C.A.3d 376, 89 C.R. 78, plaintiff, father of eight minor children, was employed at heavy manual labor for long hours. He purchased a disability insurance policy from defendant company, and paid premiums regularly. He was injured and became disabled. His policy called for payments of a specified amount per week up to 30 years for injury, or the same amount up to 2 years for sickness. He made his proof to defendant, and defendant received numerous medical reports fully establishing his right to disability payments for injury. But defendant A, defendant company's claims supervisor, commenced a program of minimizing plaintiff's claim by asserting that he had a congenital back injury that he had concealed from the company. In addition to accusing him of misrepresentation, the company advised him that it was paying only under the 2-year limit sickness provision, and later it discontinued payments, denying liability and demanding return of payments made less premiums, but suggesting a compromise and full release for the payments received, to avoid litigation. All of the acts of A were done with the knowledge and approval of defendant company's executive officers, and continued after plaintiff consulted an attorney and until defendants were served in the present suit. Plaintiff testified in detail as to his mental disturbance and discouragement (10 C.A.3d 393, 394), and defendants stipulated for entry of a declaratory judgment on the first cause of action, that plaintiff was entitled to the specified monthly payment for the 30-year maximum. The case was tried before a jury on the cause of action for intentional infliction of emotional distress, and a verdict was returned for substantial compensatory and punitive damages. *Held*, affirmed. "[D]efendants, without probable cause for believing that plaintiff had made an intentional material misrepresentation or that his disability was due to anything other than his injury ... , embarked upon a concerted course of conduct to induce plaintiff to surrender his insurance policy or enter into a disadvantageous 'settlement' of a nonexistent dispute by means of false and threatening letters and the employment of economic pressure based upon his disabled and, therefore impecunious, condition, (the very thing insured against)

exacerbated by [defendant company's] malicious and bad faith refusal to pay plaintiff's legitimate claim." (10 C.A.3d 392.)

West's Key Number Digest, Damages k.56.10

SUPPLEMENT: [This section is current through the latest supplement]

See *Coleman v. Republic Indem. Ins. Co. of Calif.* (2005) 132 C.A.4th 403, 417, 33 C.R.3d 744 [failure to accept offer of settlement or violation of statutory duties concerning unfair or deceptive practices does not in itself constitute types of outrageous conduct that will support action for intentional infliction of emotional distress]; *Hailey v. California Physicians' Service* (2007) 158 C.A.4th 452, 473, 476, 69 C.R.3d 789 [claim that health care plan delayed asserting right to rescind contract until after subscriber sustained serious injury sufficiently alleged extreme and outrageous conduct; claim that subscriber's emotional distress resulted in specified physical symptoms for significant time sufficiently alleged severe emotional distress].



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5 Witkin Sum. Cal. Law Torts § 460

[§ 460] Interference With Dead Body.

(1) *In General.* Unwarranted interference with a dead body, as by an unlawful autopsy, is a frequent basis of liability for emotional distress. (See *Huntly v. Zurich General Acc. & Liab. Ins. Co.* (1929) 100 C.A. 201, 209, 280 P. 163; 44 Cal. L. Rev. 51; 15 *Hastings L. J.* 464, 473; 26 *Loyola L.A. L. Rev.* 909; 20 *Pepperdine L. Rev.* 878; 25 *So. Cal. L. Rev.* 68; 18 *A.L.R.4th* 858 [liability for wrongful autopsy]; 15 *Proof of Facts* 3d 53 [funeral director's liability]; 28 *Proof of Facts* 3d 319 [proof of cemetery's liability in interring body].)

Sinai Temple v. Kaplan (1976) 54 C.A.3d 1103, 127 C.R. 80, recognizes a cause of action against anyone who interferes with the right to dispose of a decedent's remains. On decedent's death, he was survived by his 6-year-old child and his father. The father made funeral arrangements with the cemetery without consulting the child or her guardian, who was decedent's divorced wife and administrator of the estate. In the cemetery's action against the estate and decedent's father for funeral expenses, decedent's former wife filed a cross-complaint against the father for interference with the disposition of the remains. *Held*, although the pleading was defective, such an action could be brought.

(a) There is no property right in a dead body, but there is a quasi-property right to its possession for the limited purpose of determining who shall have its custody for burial; and this legal right in the next of kin will, in the absence of testamentary disposition, be protected by the courts. (54 C.A.3d 1110; see 13 *Summary* (10th), *Personal Property*, §5.)

(b) California has recognized a tort action against *undertakers* who wrongfully interfere with this right of the next of kin. (54 C.A.3d 1111, footnote 14, citing *Cohen v. Groman Mortuary* (1964) 231 C.A.2d 1, 41 C.R. 481.) *Rest.2d, Torts* §868 extends the rule to permit actions against others, to permit recovery for negligent and reckless as well as intentional conduct, and to add liability for prevention of proper interment or cremation. (54 C.A.3d 1111, footnotes 13, 14.)

(c) *Rest.2d, Torts* §868, Comment a analyzes the tort as follows: "The technical basis of the cause of action is the interference with the exclusive right of control of the body, which frequently has been called by the courts a 'property' or a 'quasi-property' right. This does not, however, fit very well into the category of property, since the body ordinarily cannot be sold or transferred, has no utility, and can be used only for the one purpose of interment or cremation. In

practice the technical right has served as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor, and in reality the cause of action has been exclusively one for such mental distress." (54 C.A.3d 1111, footnote 13.)

(d) Thus, the former wife's action was proper. However, the complaint failed to allege facts showing that the funeral procedure was contrary to the beliefs of decedent and his child, and also failed to allege either mental or physical injuries resulting from the alleged tort. (54 C.A.3d 1113.)

(2) *Standing. Christensen v. Superior Court* (1991) 54 C.3d 868, 2 C.R.2d 79, 820 P.2d 181, was a class action brought by relatives and representatives of decedents against mortuaries and crematoria for mistreatment of the decedents' remains. The issue was stated by the court as follows: "We are asked to decide whether persons other than those who contract for the services of mortuaries and crematoria or have the statutory right to direct the disposition of the body of a decedent may recover damages for emotional distress engendered by knowledge of the negligent or intentional mishandling of the decedent's remains when they did not observe the misconduct or its consequences. The Court of Appeal held that close family members may recover damages for the emotional distress they suffer if remains are negligently or intentionally mishandled, and that if the mishandling is intentional all family members and close friends of the deceased may do so." (54 C.3d 876.) The Supreme Court modified the judgment of the Court of Appeal as follows:

(a) *Limited standing to recover for negligent infliction of emotional distress.* "[T]he class of persons who may recover for emotional distress negligently caused by the defendants is not limited to those who have the statutory right to control disposition of the remains and those who contract for disposition. The class is not, however, as expansive as that identified by the Court of Appeal. As in all recovery for negligence, the potential plaintiff must be a person to whom the defendant owes a duty recognized by the law. In this context, the duty is owed only to close family members who were aware that funeral and/or crematory services were being performed, and on whose behalf or for whose benefit the services were rendered." (54 C.3d 876.)

(b) *No standing to recover for intentional infliction of emotional distress.* To recover on this theory it is not enough that the conduct be intentional and outrageous; it must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware. (54 C.3d 903.) Here the complaint does not allege that any plaintiff was present when the misconduct occurred, or that defendants or any of them acted with the intent of causing emotional distress to the plaintiffs or knowledge that the conduct was substantially certain to cause distress to any particular plaintiff. (54 C.3d 903.) "The requirement that the defendant's conduct be directed primarily at the plaintiff is a factor which distinguishes intentional infliction of emotional distress from the negligent infliction of such injury." (54 C.3d 904.) "The only exception to this rule is that recognized when the defendant is aware of, but acts with reckless disregard of the plaintiff and the probability that his conduct will cause severe emotional distress to that plaintiff." (54 C.3d 905.) (See *Saari v. Jongordon Corp.* (1992) 5 C.A.4th 797, 805, 7 C.R.2d 82 [under *Christensen*, although decedent's friend made the arrangements and was to receive the ashes, his mother and sister were "close family members" entitled to recover for emotional distress]; *Aguirre-Alvarez v. Regents of Univ. of Calif.* (1998) 67 C.A.4th 1058, 1066, 79 C.R.2d 580 [hospital had no special relationship with any of decedent's family members; hospital owed duty only to decedent and to police, who had constructive custody while decedent remained in the hospital]; BAJI, No. 12.80, Comment [noting *Christiansen* case]; on negligent infliction of emotional distress generally, see *infra*, §1004 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Standing.* See *Melican v. Regents of Univ. of Calif.* (2007) 151 C.A.4th 168, 179, 59 C.R.3d 672 [university conducting willed body research program did not owe decedent's family members duties of mortuary or crematory and was not liable for emotional distress from alleged negligent mishandling of remains; distinguishing *Christensen v. Superior Court* (1991) 54 C.3d 868, 2 C.R.2d 79, 820 P.2d 181, text, p. 683].



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5 Witkin Sum. Cal. Law Torts § 461

[§ 461] Other Situations.

Causes of action for intentional infliction of emotional distress may arise in other circumstances as well. The following situations are illustrative:

(1) *Fear of illness*. See *Potter v. Firestone Tire & Rubber Co.* (1993) 6 C.4th 965, 1000, 25 C.R.2d 550, 863 P.2d 795, *infra*, §1036 [dumping of hazardous wastes, causing fear of cancer]; *Kerins v. Hartley* (1994) 27 C.A.4th 1062, 1075, 33 C.R.2d 172 [fear of AIDS; surgeon operated without disclosing he was infected with human immunodeficiency virus]; 41 *Santa Clara L. Rev.* 661 [emotional distress issues raised by release of toxic and other hazardous materials]; 25 *Southwestern U. L. Rev.* 205 [*Kerins*]; 6 *A.L.R.5th* 162 [emotional distress by toxic exposure]; *BAJI*, No. 12.71 [intentional infliction of emotional distress--fear of cancer/AIDS]; *CACI*, No. 1601 [intentional infliction of emotional distress--fear of cancer, HIV, or AIDS].

(2) *Conduct toward employee*. See *Rulon-Miller v. International Business Machines Corp.* (1984) 162 C.A.3d 241, 255, 208 C.R. 524 [statements and conduct tending to humiliate employee]; 52 *A.L.R.4th* 853 [liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress].

(3) *Sexual harassment or discrimination*. In *McDaniel v. Gile* (1991) 230 C.A.3d 363, 281 C.R. 242, plaintiff attorney represented defendant in her marital dissolution, and filed a complaint for payment of legal fees and costs. Defendant filed a cross-complaint for intentional infliction of emotional distress and legal malpractice, based on allegations of sexual harassment. In her answers to plaintiff's interrogatories in support of his motion for summary adjudication, defendant described various suggestive sexual remarks, sexual assaults, and requests for sexual relations; and she asserted that on her refusal he ceased to give her effective representation. As a result she suffered emotionally and continued to receive psychological counseling. *Held*, judgment for plaintiff attorney reversed. Defendant was in a special fiduciary relationship with plaintiff, and peculiarly susceptible to emotional distress because of her pending marital dissolution. "The withholding by a retained attorney of legal services when sexual favors are not granted by a client and engaging in sexual harassment of the client are outrageous conduct under these circumstances." (230 C.A.3d 373.) On the issue of legal malpractice, the record shows that plaintiff not only delayed rendering legal services, but also withheld them and gave substandard services when defendant did not grant him sexual favors: "This conduct necessarily falls below the standard of care and skill of members of the legal profession." (230 C.A.3d 375; on attorney

malpractice generally, see 2 *Cal. Proc.* (4th), *Attorneys*, §311 et seq.) (See 10 *Golden Gate L. Rev.* 879, 929 [job-related sexual harassment]; 61 *A.L.R.3d* 944 [emotional distress resulting from discrimination because of sex or marital status].)

(4) *Racial bias*. In *Guillory v. Godfrey* (1955) 134 *C.A.2d* 628, 286 *P.2d* 474, defendants, objecting to plaintiffs' hiring of a black cook for their restaurant, engaged in insults and intimidation of customers, ruining the business and causing mental perturbation aggravating an existing gall bladder problem and finally resulting in a nervous breakdown of one plaintiff. An award of compensatory and punitive damages was affirmed. (134 *C.A.2d* 633.)

In *Alcorn v. Anbro Engineering* (1970) 2 *C.3d* 493, 86 *C.R.* 88, 458 *P.2d* 216, plaintiff, a black truck driver for defendant corporation, was also a union shop steward. In the latter capacity he advised another employee who was not a teamster to refrain from driving a truck. Defendant P, the job superintendent, shouted: "You goddam 'niggers' are not going to tell me about the rules. I don't want any 'niggers' working for me ... you're fired." The discharge was ratified by defendant A, the corporation's secretary. Plaintiff was later reinstated with back pay, but sued for damages for alleged shock, nausea, and insomnia. *Held*, judgment on demurrer reversed.

(a) The relationship between the parties was significant; plaintiff's status as an employee entitled him to a greater degree of protection from insult than if he were a stranger. (2 *C.3d* 498, footnote 2.)

(b) Plaintiff's susceptibility to emotional distress from an insult to his race and the ignoring of his union position was likewise significant. (2 *C.3d* 498, footnote 3; see 2 *C.3d* 499, footnote 6 [listing similar out-of-state cases].) (See *Agarwal v. Johnson* (1979) 25 *C.3d* 932, 946, 947, 160 *C.R.* 141, 603 *P.2d* 58 [racial insult directed at employee]; *Robinson v. Hewlett-Packard Corp.* (1986) 183 *C.A.3d* 1108, 1128, 228 *C.R.* 591 [following *Alcorn* and *Agarwal*]; *Rest.2d*, *Torts* §46, Comments e and f; *Dobbs*, *The Law of Torts* §304; 2 *Harper, James & Gray* 2d §9.1 et seq.; 17 *Hastings L. J.* 189, 201; 15 *A.L.R.2d* 108 [civil liability for insulting or abusive language not amounting to defamation]; 40 *A.L.R.3d* 1290 [recovery of damages for emotional distress resulting from racial, ethnic, or religious abuse or discrimination].)

(5) *Business or collection practices*. In *State Rubbish Collectors Assn. v. Siliznoff* (1952) 38 *C.2d* 330, 240 *P.2d* 282, defendant S obtained a rubbish collection account without a payoff to A, the member of plaintiff association who previously had the account and whose work was unsatisfactory. S later signed promissory notes to A under threats of physical violence from association members. In this action on the notes, defendant was awarded general, special, and exemplary damages for fright and resulting illness. Plaintiff intentionally caused defendant's emotional distress in order to compel him to give up the account or pay for it, and such methods of competing for business are not privileged. (38 *C.2d* 336.) (See 44 *Cal. L. Rev.* 47; 13 *So. Cal. L. Rev.* 530; 25 *So. Cal. L. Rev.* 440.)

In *Golden v. Dungan* (1971) 20 *C.A.3d* 295, 97 *C.R.* 577, plaintiffs, husband and wife, alleged that defendants filed a civil action against them; that, with intent to inflict extreme mental suffering, they caused a process server to call at their home at 12 midnight when the lights were out; that he did not use the doorbell, but pounded on the front door in a loud and boisterous manner, awakening plaintiffs, their family, and the neighborhood; and that plaintiffs were frightened and upset. Substantial compensatory and punitive damages were sought. *Held*, judgment for defendants on demurrer reversed. Defendants' contention that the conduct alleged was only an indignity or annoyance, and not the extreme or outrageous conduct required for the tort, was rejected: "[T]here may be reasonable men who consider it outrageous to serve civil process by pounding on the door of a darkened home at midnight in a loud and boisterous manner which awakens the occupants and the neighborhood, all with the express intent of inflicting extreme mental suffering and duress upon the occupants, and without any attempt to serve, or any reason to believe that process could not be served, on the plaintiff husband at a reasonable time in a reasonable manner." (20 *C.A.3d* 310.)

(6) *Conduct resulting in suicide*. In *Tate v. Canonica* (1960) 180 *C.A.2d* 898, 5 *C.R.* 28, plaintiffs, widow and children of T, alleged in Count 1 that defendants intentionally made threats and accusations against T for the purpose of harassing, embarrassing, and humiliating him in the presence of others, and that "due thereto" he became "physically and mentally disturbed" and as a direct result committed suicide. Count 2 charged the negligent making of the same

statements. *Held*, judgment on demurrer reversed. The court rejected, as inapplicable to intentional torts, the defenses of superseding cause (see *supra*, §18) and contributory negligence (see *infra*, §1302). The conditions of liability were set forth as follows: "[I]n a case where the defendant intended, by his conduct, to cause serious mental distress or serious physical suffering, and does so, and such mental distress is shown by the evidence to be 'a substantial factor in bringing about' ... the suicide, a cause of action for wrongful death results, whether the suicide was committed in a state of insanity, or in response to an irresistible impulse, or not. This rule would not apply where the *act* of the defendant was intentionally done, but there was no intent to cause injury. It is applicable only where the actor *intended to cause injury*, and the injury is a substantial factor in bringing about the suicide, i.e., is really a cause, in fact, of the suicide. This does not mean that, in every case where the actor intentionally causes serious mental distress or physical suffering, and this is followed by suicide, the actor is necessarily liable for the suicide. The mental distress or physical suffering may not be, in the particular case, as a matter of fact, a substantial factor in bringing about the suicide. But all recorded history testifies that there are cases in which serious mental or physical suffering is in fact a cause of suicide." (180 C.A.2d 909.) (See 12 *Loyola L.A. L. Rev.* 967 [liability for causing or failing to prevent suicide].)

(7) *Miscellaneous*. See *Delia S. v. Torres* (1982) 134 C.A.3d 471, 484, 184 C.R. 787 [husband's action based on rape of wife by family friend]; *KOVR-TV v. Superior Court* (1995) 31 C.A.4th 1023, 1030, 37 C.R.2d 431 [interview by television reporter of three young children on camera with no adult present concerning murder of two playmates who lived next door, about which children were then unaware]; 33 *Loyola L.A. L. Rev.* 449 [emotional distress claims based on domestic deceit that interferes with parent-child relationship]; 34 *A.L.R.4th* 688 [statement of medical practitioner or official as outrageous conduct]; 91 *A.L.R.5th* 545 [recovery for emotional distress due to treatment of pets and animals]; 99 *A.L.R. 5th* 445 [action against paramour for intentional infliction of emotional distress]; 101 *A.L.R.5th* 515 [recovery for emotional distress resulting from actions of law enforcement officers]; 110 *A.L.R.5th* 371 [intentional infliction of emotional distress in marital context]; 18 Proof of Facts 3d 103 [recovery for emotional distress resulting from actions by school teacher or administrator]; 68 Proof of Facts 3d 179 [liability for psychological harm from story or picture in media].

In *Kiseskey v. Carpenters' Trust for Southern Calif.* (1983) 144 C.A.3d 222, 192 C.R. 492, plaintiff employer alleged that defendant agents of defendant labor union telephoned and threatened him and his family if he did not sign another agreement with the union. Examples set forth in the complaint included the following: "You are a no good son of a bitch and if you don't resign the agreement and get in set with the union, you'll be put in the hospital." "Rejoin the union or you might not live to regret it." "Since you do not seem to be concerned about your safety and well-being, maybe you will be concerned about the well-being of your wife and children." *Held*, a cause of action was stated. (144 C.A.3d 230.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Conduct toward employee*. See 125 *A.L.R.5th* 457 [employer's, supervisor's, or manager's intentional infliction of emotional distress on employee by failure to provide pension or disability benefits]; 7 *A.L.R.6th* 563 [employer's, supervisor's, or manager's intentional infliction of emotional distress on employee by discharge or forced resignation]; 10 *A.L.R.6th* 375 [employer's, supervisor's, or manager's intentional infliction of emotional distress on employee by disability discrimination]; 11 *A.L.R.6th* 447 [employer's, supervisor's, or manager's intentional infliction of emotional distress on employee by age discrimination]; 19 *A.L.R.6th* 1 [employer's, supervisor's, or manager's intentional infliction of emotional distress on employee by ethnic, racial, or religious harassment or discrimination]; 20 *A.L.R.6th* 1 [employer's, supervisor's, or manager's intentional infliction of emotional distress on employee by sexual harassment, sexual discrimination, or accusations concerning sexual conduct or orientation]; 21 *A.L.R.6th* 671 [employer's, supervisor's, or manager's intentional infliction of emotional distress on employee by accusation or implication of dishonesty]; 38 *A.L.R.6th* 541 [employer's, supervisor's, or manager's intentional infliction of emotional distress on employee by defamation, invasion of privacy, or misuse of company procedures].

(3) *Sexual harassment or discrimination. Attorney malpractice:*

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §285 et seq.

(4) *Racial bias*. See 2 Harper, James & Gray 3d §9.1 et seq.(7) *Miscellaneous*. See 8 *A.L.R.6th* 399 [vicarious or imputed liability for intentional infliction of emotional distress on nonemployee]; 30 *A.L.R.6th* 241 [liability for infliction of emotional distress derived from use of Internet and electronic communications].



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CHAPTER IX - Torts

Witkin Summary of California Law III. INTENTIONAL INVASIONS OF INTERESTS IN PERSONALITY D. Interference With Access. 1. Commercial Blockade.

5 Witkin Sum. Cal. Law Torts § 462

[§ 462] Commercial Blockade.

(1) *In General.* C.C. 3427 et seq., entitled "Interference With Access to Health Care," sets forth the tort of "commercial blockade." These provisions are not to be construed to impair any constitutionally protected activity or any activities protected by the labor laws of California or the United States. (C.C. 3427.4.)

(2) *Nature of Tort.* "It is unlawful, and constitutes the tort of commercial blockade for a person, alone or in concert with others, to intentionally prevent an individual from entering or exiting a health care facility by physically obstructing the individual's passage or by disrupting the normal functioning of a health care facility." (C.C. 3427.1.)

"Disrupting the normal functioning of a health care facility" refers to intentionally rendering or attempting to render the facility temporarily or permanently unavailable or unusable by licensed health practitioners, the facility's staff, or its patients. It does not include acts of the owner of the facility, the owner's agent, or governmental officers or employees designed to protect public health or safety. (C.C. 3427(c).)

A "health care facility" is defined as a facility providing health care services directly to patients, and includes hospitals, clinics, licensed health practitioners' offices, health maintenance organizations, diagnostic or treatment centers, neuropsychiatric or mental health facilities, hospices, and nursing homes. (C.C. 3427(d).)

(3) *Civil Action.* Persons or health care facilities aggrieved by the tort of commercial blockade may seek civil damages from those who committed the tort and those acting in concert with them. (C.C. 3427.2.) Persons and facilities "aggrieved" means (a) persons present at a health care facility when a commercial blockade occurs and whose access is obstructed or impeded or whose health care is disrupted; (b) the health care facility where a commercial blockade occurs and its employees, contractors, or volunteers; and (c) the owner either of a health care facility where a commercial blockade occurs or of the building or property on which the facility is located. (C.C. 3427(a).)

(4) *Protection of Privacy and Prevention of Harassment.* The court having jurisdiction over a commercial blockade action must take all steps reasonably necessary, including granting protective orders, to safeguard the individual privacy and prevent harassment of health care patients, licensed health practitioners, and employees, clients, and customers of health care facilities who are parties or witnesses in the proceeding. These persons may use pseudonyms to protect their privacy. (C.C. 3427.3.)

West's Key Number Digest, Hospitals k.8; Torts k.6

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law III. INTENTIONAL INVASIONS OF INTERESTS IN PERSONALITY D. Interference With Access. 2. Interference With Access to Clinic or Church.

5 Witkin Sum. Cal. Law Torts § 463

[§ 463] Interference With Access to Clinic or Church.

(1) *Nature of Legislation.* The California Freedom of Access to Clinic and Church Entrances Act (P.C. 423 et seq.) provides civil remedies for the commission of specified activities that interfere with a person's access to reproductive health services facilities or participation in religious services or that damage or destroy property of a reproductive health facility or a place of worship. (P.C. 423.2, 423.4; see P.C. 423 [Act may also be cited as California FACE Act]; P.C. 423.1 [definitions of terms]; for federal Freedom of Access to Clinic Entrances Act, see 18 U.S.C., §248.) Violations are also subject to criminal punishment. (P.C. 423.2, 423.3; on crimes under Act, see 2 Cal. Crim. Law (3d), and *Crimes Against Property*, Supp., §2612 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, Supp., §409.)

(2) *Violations of Act.* The Act is violated when a person, other than a parent or guardian acting towards a minor child or ward, does any of the following:

(a) By force, threat of force, or physical obstruction that is a crime of violence, intentionally injures, intimidates, interferes with, or attempts to injure, intimidate, or interfere with, a person or entity (1) because that person or entity is a reproductive health services client, provider, or assistant, or (2) in order to intimidate a person or entity, or a class of persons or entities, from becoming or remaining a reproductive health services client, provider, or assistant. (P.C. 423.2(a).)

(b) By force, threat of force, or physical obstruction that is a crime of violence, intentionally injures, intimidates, interferes with, or attempts to injure, intimidate, or interfere with a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship. (P.C. 423.2(b).)

(c) By nonviolent physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with, a person or entity (1) because that person or entity is a reproductive health services client, provider, or assistant, or (2) in order to intimidate a person or entity, or a class of persons or entities, from becoming or remaining a reproductive health services client, provider, or assistant. (P.C. 423.2(c).)

(d) By nonviolent physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with, a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship. (P.C. 423.2(d).)

(e) Intentionally damages or destroys the property of a person, entity, or facility, or attempts to do so, because the person, entity, or facility is a reproductive health services client, provider, assistant, or facility. (P.C. 423.2(e).)

(f) Intentionally damages or destroys the property of a place of religious worship. (P.C. 423.2(f).)

(3) *Civil Remedies.* Generally, any person aggrieved by a violation of the Act may bring a civil action to enjoin the violation, for compensatory and punitive damages, and for the costs of suit and reasonable fees for attorneys and expert witnesses. However, only a reproductive health services client, provider, or assistant may bring an action under P.C. 423.2(a), (c), or (e), and only a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom in a place of religious worship, or the entity that owns or operates a place of religious worship, may bring an action under P.C. 423.2(b), (d), or (f). With respect to compensatory damages, the plaintiff may elect, at any time prior to final judgment, to recover, in lieu of actual damages, an award of statutory damages of \$ 1,000 per exclusively nonviolent violation, and \$ 5,000 per any other violation, for each violation committed. (P.C. 423.4(a).)

The Attorney General, a district attorney, or a city attorney may bring a civil action to enjoin a violation, for compensatory damages to persons aggrieved by a violation, and for the assessment of a civil penalty against each respondent. The civil penalty may not exceed \$ 2,000 for an exclusively nonviolent first violation, and \$ 15,000 for any other first violation, and may not exceed \$ 5,000 for an exclusively nonviolent subsequent violation, and \$ 25,000 for any other subsequent violation. In imposing civil penalties, the court must consider a prior violation of the federal Freedom of Access to Clinic Entrances Act or a prior violation of a statute of another jurisdiction that would constitute a violation of either this Act or the federal Freedom of Access to Clinic Entrances Act to be a prior violation of this Act. (P.C. 423.4(b).)

No person may be found liable for conduct in violation of this Act done on a particular occasion where the identical conduct on that occasion was the basis for a finding of liability by that person under the federal Freedom of Access to Clinic Entrances Act. (P.C. 423.4(c).)

(4) *Protective Measures in Court.* The court in which a proceeding is filed for a violation of P.C. 423.2(a), (c), or (e) must take all action reasonably required, including granting restraining orders, to safeguard the health, safety, or privacy of either a reproductive health services client, provider, or assistant who is a party or witness in the proceeding or a person who is a victim of, or at risk of becoming a victim of, the prohibited conduct. (P.C. 423.5(a)(1).) Similarly, the court in which a proceeding is filed for a violation of P.C. 423.2(b), (d), or (f) must take all action reasonably required, including granting restraining orders, to safeguard the health, safety, or privacy of either a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or an entity that owns or operates a place of religious worship. (P.C. 423.5(a)(2).) Restraining orders may include provisions prohibiting or restricting the photographing of these persons when reasonably required to safeguard their health, safety, or privacy. (P.C. 423.5(b).) The court may, in its discretion, permit these persons to use pseudonyms when reasonably required to safeguard their health, safety, or privacy. (P.C. 423.5(c) [excepting criminal proceedings].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

Witkin Summary of California Law III. INTENTIONAL INVASIONS OF INTERESTS IN PERSONALITY E. Marketing of Illegal Drugs. 1. In General.

5 Witkin Sum. Cal. Law Torts § 464

[§ 464] In General.

(1) *Enactment and Purpose of Statute.* The Drug Dealer Liability Act (*Health & Saf.C. 11700 et seq.*) establishes a cause of action in persons injured as a result of the marketing of illegal controlled substances. The Legislature found that the civil justice system should be joined with the criminal justice system in an effort to deter these activities. (*Health & Saf.C. 11702(a).*) (See 28 *Pacific L. J.* 681 [Drug Dealer Liability Act].)

(2) *Cause of Action.* A person may recover damages for injury resulting from an individual's use of an illegal controlled substance. Recovery may be had from persons who knowingly participate in the marketing of illegal controlled substances within California. (*Health & Saf.C. 11704(a).*) (On statute of limitations, see *Health & Saf.C. 11714.*)

(3) *Definitions.* "Participate in the marketing of illegal controlled substances" means to transport, import into the state, sell, possess with intent to sell, furnish, administer, or give away, or offer to transport, import into the state, sell, furnish, administer, or give away a specified illegal controlled substance. (*Health & Saf.C. 11703(g).*) "Marketing of illegal controlled substances" means the possession for sale, sale, or distribution of a specified illegal controlled substance. (*Health & Saf.C. 11703(a)*; see *Health & Saf.C. 11703(l)* [designating substances included in term "specified illegal controlled substance"].)

(4) *Proof.* Proof of liability must be shown by clear and convincing evidence. Other elements of the cause may be shown by a preponderance of the evidence. (*Health & Saf.C. 11712(a)*; see *Health & Saf.C. 11712(b)* [evidentiary effect of criminal conviction].)

(5) *Damages.* Damages recoverable are prescribed by the Act. (See *infra*, §1689.)

West's Key Number Digest, Drugs and Narcotics k.42, 50; Torts k.7

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Definitions.*

"Participate in the marketing of illegal controlled substances": *Health & Saf.C. 11703(g)*, as amended in 2005,

includes in the definition "the manufacturing of an illegal controlled substance." (See Stats. 2005, Chap. 88, §3 [amendment serves only to clarify that manufacturing of illegal controlled substance is included in definition and does not constitute change in existing law].)"*Marketing of illegal controlled substances*": *Health & Saf.C. 11703(a)*, as amended in 2005, includes in the definition "all aspects of making such a controlled substance available, including, but not limited to, its manufacture." (See Stats. 2005, Chap. 88, §3 [amendment serves only to clarify that manufacturing of illegal controlled substance is included in definition and does not constitute change in existing law].)



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5 Witkin Sum. Cal. Law Torts § 465

[§ 465] Who May Recover.

Any one or more of the following may sue for relief under the Drug Dealer Liability Act:

- (1) A parent, legal guardian, child, spouse, or sibling of the individual controlled substance user. (*Health & Saf.C. 11705(a)(1).*)
- (2) An individual who was exposed to an illegal controlled substance in utero. (*Health & Saf.C. 11705(a)(2).*)
- (3) An employer of the individual user. (*Health & Saf.C. 11705(a)(3).*)
- (4) A medical facility, insurer, employer, or other nongovernmental entity, or a public agency medical facility, that funds a drug treatment program or employee assistance program for the individual user or that otherwise expended money on his or her behalf. (*Health & Saf.C. 11705(a)(4).*)
- (5) A person injured as a result of the wilful, reckless, or negligent actions of an individual user. (*Health & Saf.C. 11705(a)(5).*) (On joinder of plaintiffs, see *Health & Saf.C. 11709(a), (c).*)

The individual user also has a cause of action, but only in prescribed conditions (including disclosure of sources of the controlled substance and avoidance of use of the substance for 30 days before the action as well as during its pendency) and subject to limitations on who may be sued (*infra*, §466) and on the damages recoverable (*infra*, §1689). (*Health & Saf.C. 11706.*) Moreover, an action by an individual user is governed by the principles of comparative responsibility, with the award diminished proportionally according to the measure of responsibility attributable to the user. (*Health & Saf.C. 11710(a)*; see *Health & Saf.C. 11710(b)* [burden on defendant of proving plaintiff's comparative responsibility by clear and convincing evidence].)

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E. Marketing of Illegal Drugs.
3. Who Is Liable.

5 Witkin Sum. Cal. Law Torts § 466

[§ 466] Who Is Liable.

Damages are recoverable under the Drug Dealer Liability Act from one or more of the following:

(1) A person who sold, administered, or furnished an illegal controlled substance to the individual user of the substance. (*Health & Saf.C. 11705(b)(1).*)

(2) A person who knowingly participated in the marketing of illegal controlled substances, if (a) the place of illegal activity by the individual user is within the city, city and county, or unincorporated area of the county in which the defendant's place of participation is situated, (b) the defendant's participation in the marketing was connected with the same type of specified illegal controlled substance used by the individual user, and the defendant has been convicted of an offense for that type of controlled substance, (c) the defendant participated in the marketing at any time during the period the individual user illegally used the controlled substance, and (d) the underlying offense for the conviction of the specified illegal controlled substance occurred in the same county as the individual user's place of use. (*Health & Saf.C. 11705(b)(2)*; on definition of "knowingly participated in the marketing of illegal controlled substances," see *Health & Saf.C. 11705(c).*)

An individual user plaintiff (*supra*, §465) may seek damages only from a person who transported, imported into this state, sold, possessed with intent to sell, furnished, administered, or gave away the specified illegal controlled substance actually used by the individual user. (*Health & Saf.C. 11706(b).*)

Two or more persons may be joined as defendants if they are liable to at least one plaintiff. (*Health & Saf.C. 11709(b)*; on presumed proportion of responsibility of persons participating in marketing of illegal controlled substances, see *Health & Saf.C. 11708.*)

SUPPLEMENT: [This section is current through the latest supplement]

Individual user suits: *Health & Saf.C. 11706(b)*, as amended in 2005, also authorizes an individual user's recovery of damages from a person who "manufactured" the illegal controlled substance. (See Stats. 2005, Chap. 88, §3 [amendment does not constitute change in existing law].)



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CHAPTER IX - Torts

Witkin Summary of California Law III. INTENTIONAL INVASIONS OF INTERESTS IN PERSONALITY F. Domestic Violence.

5 Witkin Sum. Cal. Law Torts § 467

[§ 467] Domestic Violence.

(1) *In General.* C.C. 1708.6 creates the tort of domestic violence. The Legislature in adopting the statute finds and declares that acts of violence occurring in a domestic context are increasingly widespread; that these acts merit special consideration as torts, because the elements of trust, physical proximity, and emotional intimacy necessary to domestic relationships in a healthy society make participants in those relationships particularly vulnerable to physical attack by their partners; and that "it is the purpose of this act to enhance the civil remedies available to victims of domestic violence in order to underscore society's condemnation of these acts, to ensure complete recovery to victims, and to impose significant financial consequences upon perpetrators." (Stats. 2002, Chap. 193, §1.) The rights and remedies provided are in addition to any other rights and remedies provided by law. (C.C. 1708.6(d).) (See BAJI, No. 7.96 [tort of domestic violence].)

(2) *Elements.* A person is liable for the tort if the plaintiff proves both of the following elements:

(a) Infliction of injury on the plaintiff resulting from abuse, as defined in P.C. 13700(a), i.e., "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (C.C. 1708.6(a)(1).)

(b) Commission of the abuse by the defendant, a person having a relationship with the plaintiff as defined in P.C. 13700(b), i.e., "abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom" the defendant "has had a child or is having or has had a dating or engagement relationship." (C.C. 1708.6(a)(2).)

(3) *Remedies.* A person who commits an act of domestic violence is liable for damages, including general damages, special damages, and punitive damages. (C.C. 1708.6(b).) The plaintiff may also be granted injunctive and other equitable relief, costs, attorneys' fees, and any other relief that the court deems proper. (C.C. 1708.6(c).)

In a pending dissolution or separation proceeding, the court may enforce a domestic violence damages judgment against the abusive spouse's share of community property. (*Family C.* 2603.5.)

(4) *Time of Suit.* The time for commencement of the action is governed by the 3-year statute provided in C.C.P. 340.15 (see 3 Cal. Procedure (4th), Actions, §450). (C.C. 1708.6(e).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Remedies.* See *Pugliese v. Superior Court* (2007) 146 C.A.4th 1444, 1451, 53 C.R.3d 681 [domestic violence under C.C. 1708.6 is continuing tort for purposes of statute of limitations; victim may recover damages for all acts of domestic abuse occurring during domestic relationship, so long as victim proves continuing course of abusive conduct and files action within 3 years of last act]; 36 *McGeorge L. Rev.* 922 [background and effect of *Family C.* 2603.5].



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CHAPTER IX - Torts

Witkin Summary of California Law III. INTENTIONAL INVASIONS OF INTERESTS IN PERSONALITY G. Gender-Related Violence.

5 Witkin Sum. Cal. Law Torts § 468

[§ 468] Gender-Related Violence.

(1) *In General.* C.C. 52.4 permits a person injured by a crime of violence motivated by gender to bring a civil action for relief against the responsible party. In enacting the statute, the Legislature finds and declares that existing state and federal laws do not adequately prevent and remedy gender-related violence, such as domestic violence; that this violence disproportionately occurs against women; that sexual abuse harms many women, children, and families, and is often not reported to the authorities or prosecuted; that acts of domestic violence and sexual abuse on the basis of gender constitute a form of sexual discrimination; and that all persons within the state have the right to be free from crimes of violence motivated by gender. (Stats. 2002, Chap. 842, §1.)

(2) *Definition of Offense.* "Gender violence" is a form of sex discrimination and means either of the following:

(a) One or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction. (C.C. 52.4(c)(1).)

(b) A physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction. (C.C. 52.4(c)(2).)

(3) *Cause of Action.* Any person who has been subjected to gender violence may bring a civil action for damages against the responsible party or parties. (C.C. 52.4(a).) However, notwithstanding any other laws that may establish the liability of an employer for the acts of an employee, this statute does not establish any civil liability of a person because of his or her status as an employer, unless the employer personally committed an act of gender violence. (C.C. 52.4(d).)

(4) *Remedies.* The plaintiff may seek actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. A prevailing plaintiff may also be awarded attorneys' fees and costs. (C.C. 52.4(a).)

(5) *Time of Suit.* The action must be commenced within 3 years of the act, or if the victim was a minor when the act occurred, within 8 years after the date the plaintiff attains the age of majority or within 3 years after the date the plaintiff discovers or reasonably should have discovered a psychological injury or illness occurring after the age of majority that

was caused by the act, whichever date occurs later. (C.C. 52.4(b).)

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Witkin Summary of California Law III. INTENTIONAL INVASIONS OF INTERESTS IN PERSONALITY H. (New) Human Trafficking.

5 Witkin Sum. Cal. Law Torts § 468A

[§ 468A] (New) Human Trafficking.

(1) *Cause of Action.* C.C. 52.5, added in 2005, authorizes a civil action by a victim of human trafficking, as defined in P.C. 236.1. (C.C. 52.5(a).) A person who deprives another of personal liberty or violates that person's liberty with the intent to effect or maintain a felony violation of specified statutes, or to obtain forced labor or services, is guilty of human trafficking. The applicable felonies are seduction for prostitution (P.C. 266), pimping (P.C. 266h), pandering (P.C. 266i), abduction for prostitution (P.C. 267), employment or use of a minor to perform obscene acts (P.C. 311.4), and extortion (P.C. 518). (P.C. 236.1(a).) (See 119 Harv. L. Rev. 2574 [remedying human trafficking through tort law].) (On crime of human trafficking, see 1 Cal. Crim. Law (3d), Crimes Against the Person, Supp., §78A.)

(2) *Remedies.* Remedies include "actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief." (C.C. 52.5(a).) In addition to these remedies, the plaintiff may be awarded up to three times his or her actual damages or \$ 10,000, whichever is greater. Punitive damages may be awarded on proof of the defendant's malice, oppression, fraud, or duress. (C.C. 52.5(b).)

The plaintiff may also be awarded reasonable attorneys' fees and litigation costs, including, but not limited to, expert witness fees and expenses. (C.C. 52.5(a), (f).)

Any restitution paid by the defendant must be credited against a judgment, award, or settlement obtained by the victim. The recovery is also subject to reimbursement of overpayments of restitution. (C.C. 52.5(g).)

(3) *Time of Suit.* The action must be commenced within 5 years of the date on which the trafficking victim was freed from the trafficking situation, or, if the victim was a minor when the act of human trafficking against the victim occurred, within 8 years after the date the plaintiff attains the age of majority. (C.C. 52.5(c).)

If a person entitled to sue is under a disability at the time the cause of action accrues, so that it is impossible or impracticable to bring an action, the disability will toll the running of the statute of limitations. (C.C. 52.5(d).) Disability includes minority, insanity, imprisonment, or other incapacity or incompetence. (C.C. 52.5(d)(1).) The statute will not run against an incompetent or minor plaintiff simply because a guardian ad litem has been appointed; the guardian ad litem's failure to bring the action within the applicable limitation period does not prejudice the plaintiff's right to do so after his or her disability ceases. (C.C. 52.5(d)(2).)

A defendant is estopped to assert the limitations defense when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay filing the action, or due to threats made by the defendant causing duress on the plaintiff. (C.C. 52.5(d)(3).)

Suspension of the statute due to disability, lack of knowledge, or estoppel applies to all other related claims arising out of the trafficking situation. (C.C. 52.5(d)(4).)

The running of the statute is postponed during the pendency of any criminal proceedings against the victim. (C.C. 52.5(d)(5).)

The running of the statute may be suspended where a person entitled to sue could not have reasonably discovered the cause of action due to circumstances resulting from the trafficking situation, such as psychological trauma, cultural and linguistic isolation, and inability to access services. (C.C. 52.5(e).)

(4) *Stay of Action.* A civil action filed under these provisions must be stayed during the pendency of a criminal action arising out of the same occurrence. For these purposes, a "criminal action" includes investigation and prosecution, and is pending until a final adjudication in the trial court, or dismissal. (C.C. 52.5(h).)

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Witkin Summary of California Law III. INTENTIONAL INVASIONS OF INTERESTS IN PERSONALITY I. (New) Implantation of Identification Device.

5 Witkin Sum. Cal. Law Torts § 468B

[§ 468B] (New) Implantation of Identification Device.

(1) *Cause of Action.* C.C. 52.7, added in 2007, generally prohibits a person from requiring, coercing, or compelling an individual to undergo the subcutaneous implanting of an identification device. (C.C. 52.7(a).) "Person" includes an individual, business association, partnership, limited partnership, corporation, limited liability company, trust, estate, cooperative association, or other entity. (C.C. 52.7(h)(2).) "Identification device" means any item, application, or product that is passively or actively capable of transmitting personal information, including, but not limited to, devices using radio frequency technology. (C.C. 52.7(h)(1).) "Personal information" includes any of specified data elements to the extent they are used alone or in conjunction with any other information to identify an individual. These include, among other items, name, date of birth, photographs, fingerprints, personal and financial identification numbers, and e-mail addresses and other electronic identifiers. (C.C. 52.7(h)(3).)

(2) *Remedies.*

(a) *Civil penalty.* A person who violates the statute may be assessed an initial civil penalty of no more than \$ 10,000, and no more than \$ 1,000 for each day the violation continues until the deficiency is corrected. The civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction. (C.C. 52.7(b)(1).)

(b) *Damages.* The person implanted with the device may bring a civil action for "actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief." (C.C. 52.7(b)(2).) Punitive damages may be awarded upon proof of the defendant's "malice, oppression, fraud, or duress in requiring, coercing, or compelling the plaintiff to undergo" the implantation. (C.C. 52.7(b)(3).)

(c) *Fees and costs.* The court may grant a prevailing plaintiff reasonable attorneys' fees and costs, including, but not limited to, expert witness fees and expenses. (C.C. 52.7(b)(1).)

(d) *Effect of restitution by defendant.* Any restitution paid by the defendant to the victim must be credited against a judgment, award, or settlement obtained pursuant to the statute. The judgment, award, or settlement is subject to Govt.C. 13963 (crime victim's claims with California Victim Compensation and Government Claims Board; see 1 Cal. Crim. Law (3d), Introduction to Crimes, §99). (C.C. 52.7(d).)

(3) *Statute of Limitations.* Generally, an action brought under the statute must be commenced within 3 years of the

date on which the identification device was implanted. (C.C. 52.7(c)(1).) If the victim was a dependent adult or minor when the implantation occurred, the action must be commenced within 3 years after the date the plaintiff, or his or her guardian or parent, discovered or reasonably should have discovered the implant, or 8 years after the plaintiff attains the age of majority, whichever date occurs later. (C.C. 52.7(c)(2).)

The statute of limitations does not run against a dependent adult or minor plaintiff simply because a guardian ad litem has been appointed. A guardian ad litem's failure to bring a plaintiff's action within the applicable limitations period will not prejudice the plaintiff's right to do so. (C.C. 52.7(c)(3).)

A defendant is estopped to assert the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay the filing of the action, or due to threats made by the defendant causing duress on the plaintiff. (C.C. 52.7(c)(4).)

(4) *Scope and Construction of Statute.* Actions brought pursuant to this statute are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law. (C.C. 52.7(f).)

The statute does not modify existing statutory or case law regarding the rights of parents or guardians, the rights of children or minors, or the rights of dependent adults. (C.C. 52.7(g).)

The statute "shall be liberally construed so as to protect privacy and bodily integrity." (C.C. 52.7(e).)

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5 *Witkin Sum. Cal. Law Torts* § 469

[§ 469] Nature of Tort.

(1) *Definition and Scope.* Malicious prosecution consists of the initiation and maintenance of legal proceedings against another with malice and without probable cause. (*Hardy v. Vial* (1957) 48 C.2d 577, 580, 311 P.2d 577, *infra*, §513; *Andrus v. Estrada* (1995) 39 C.A.4th 1030, 1039, 46 C.R.2d 300.) The proceedings on which the tort is based may be criminal (see *infra*, §475 et seq.), civil (see *infra*, §486 et seq.), or administrative (see *infra*, §513 et seq.) in nature. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 C.3d 863, 871, 254 C.R. 336, 765 P.2d 498, *infra*, §510; see *Rest.2d, Torts* §§653 et seq., 674 et seq.; Dobbs, *The Law of Torts* §429 et seq.; 1 Harper, James & Gray 3d §4.1 et seq.; Cal. Civil Practice, 1 Torts, Malicious Prosecution and Abuse of Process, Chap. 19; 5 *Cal. Proc.* (4th), *Pleading*, §706 et seq.; 20 California Lawyer 69 (August 2000) [nature and elements of malicious prosecution claim]; 152 *A.L.R. Fed* 605 [Federal Tort Claims Act exemption of malicious prosecution claims]; 52 *Am.Jur.2d* (2000 ed.), *Malicious Prosecution* §1 et seq.; 16 *Am.Jur.* Trials 205 [malicious prosecution]; 7 *Proof of Facts* 2d 181 [malicious prosecution].) (On insurance covering malicious prosecution, see 2 *Summary* (10th), *Insurance*, §104.)

(2) *Elements.* The elements of the tort, which must be established by a preponderance of the evidence, are (a) the institution of an action at the direction of the defendant in the malicious prosecution suit (b) without probable cause and (c) with malice, (d) termination of the initial action favorably to the plaintiff in the malicious prosecution suit, and (e) resulting damage. (*Long Beach v. Bozek* (1982) 31 C.3d 527, 531, 183 C.R. 86, 645 P.2d 137, *infra*, §487; *Jacques Interiors v. Petrak* (1987) 188 C.A.3d 1363, 1369, 234 C.R. 44; *Nicholson v. Fazeli* (2003) 113 C.A.4th 1091, 1098, 6 C.R.3d 881; *Slaney v. Ranger Ins. Co.* (2004) 115 C.A.4th 306, 318, 8 C.R.3d 915; see BAJI, No. 7.30 [stating these elements]; CACI, No. 1500 et seq. [same]; on damages recoverable, see *infra*, §1699.)

West's Key Number Digest, Malicious Prosecution k.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Definition and Scope.*

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §750 et seq.

(3) (New) *SLAPPback Actions.* C.C.P. 425.18, added in 2005, exempts a "SLAPPback" from specified provisions

of the anti-SLAPP statute (see 5 *Cal. Proc. (5th), Pleading*, §1017 et seq.) and establishes separate procedures for these actions. A SLAPPback is a cause of action for malicious prosecution or abuse of process (text, §517 et seq.) arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under the anti-SLAPP statute. (*C.C.P. 425.18(b)(1)*.) The Legislature "finds and declares that a SLAPPback ... action should be treated differently ... from an ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP (strategic lawsuit against public participation) litigation and by its restoration of public confidence in participatory democracy." (*C.C.P. 425.18(a)*.)

The provisions of the anti-SLAPP statute relating to recovery of attorneys' fees and costs (see *C.C.P. 425.16(c)*), time of filing and hearing (see *C.C.P. 425.16(f)*), stay of discovery (see *C.C.P. 425.16(g)*), and appeal (see *C.C.P. 425.16(i), 904.1(a)(13)*) are expressly inapplicable to a special motion to strike a SLAPPback. (*C.C.P. 425.18(c)*.)

A special motion to strike a SLAPPback may be filed within 120 days after the service of the complaint or, at the court's discretion, within 6 months after the service of the complaint or at a later time in extraordinary cases. (*C.C.P. 425.18(d)*.) A party opposing a special motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary discovery. (*C.C.P. 425.18(e)*.) The court must award costs and reasonable attorneys' fees to a plaintiff prevailing on a special motion to strike a SLAPPback if the court finds that the motion is frivolous or solely intended to cause unnecessary delay. (*C.C.P. 425.18(f)*.)

C.C.P. 425.18 does not apply to a SLAPPback filed by a public entity. (*C.C.P. 425.18(i)*.)



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A. Malicious Prosecution.

1. In General.

b. Other Torts Distinguished.

5 *Witkin Sum. Cal. Law Torts* § 470

[§ 470] Other Torts Distinguished.

(1) *False Imprisonment.* Malicious prosecution differs from false imprisonment as follows:

(a) False imprisonment is unlawful confinement (see *supra*, §426); malicious prosecution is based on lawful prosecution. (*Bulkley v. Klein* (1962) 206 C.A.2d 742, 746, 23 C.R. 855.)

(b) Malice and lack of probable cause are essential elements of malicious prosecution, while provocation, motive, or good faith of the defendant are ordinarily immaterial in an action for false imprisonment, save where punitive damages are sought, and then are only relevant on the measure of damages. (*Collins v. Owens* (1947) 77 C.A.2d 713, 716, 176 P.2d 372; *Miller v. Glass* (1955) 44 C.2d 359, 362, 282 P.2d 501; *Collins v. San Francisco* (1975) 50 C.A.3d 671, 676, 123 C.R. 525.)

(c) The unlawful confinement, as by illegal arrest, immediately gives the right of action for false imprisonment, regardless of the subsequent outcome of a trial, but malicious prosecution requires favorable termination of the proceeding. (*Neves v. Costa* (1907) 5 C.A. 111, 117, 89 P. 860; *Singleton v. Perry* (1955) 45 C.2d 489, 494, 289 P.2d 794.)

(d) Although the weight of authority is *contra*, California has held that, where the charge on which a person is arrested does not constitute a crime, the court has no jurisdiction and the plaintiff cannot recover for malicious prosecution; false imprisonment is that person's only remedy. (*Krause v. Spiegel* (1892) 94 C. 370, 373, 29 P. 707; see criticism, 24 *So. Cal. L. Rev.* 130.)

(2) *Defamation.* A statement made in judicial proceeding is generally privileged from liability for defamation. (See C.C. 47(b); *infra*, §567 et seq.) However, such a statement may be used, in a proper case, as a basis for liability in a malicious prosecution action. (See *infra*, §473.)

(3) *Abuse of Process.* The gist of malicious prosecution is commencing an action without justification, while that of abuse of process (see *infra*, §517) is misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish. (*Tellefsen v. Key System Transit Lines* (1961) 198 C.A.2d 611, 615, 17 C.R. 919; *Bidna*

v. Rosen (1993) 19 C.A.4th 27, 40, 23 C.R. 215, *infra*, §496.) Thus, it is unnecessary in an abuse of process action for the plaintiff to prove that the proceeding has terminated in his or her favor, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause. (*Tellefsen v. Key System Transit Lines*, *supra*.)

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5 Witkin Sum. Cal. Law Torts § 471

[§ 471] Action as Disfavored.

It has often been said that actions for malicious prosecution are "not favored." (See *Ball v. Rawles* (1892) 93 C. 222, 228, 28 P. 937; *Haydel v. Morton* (1935) 8 C.A.2d 730, 732, 48 P.2d 709; *Sebastian v. Crowley* (1940) 38 C.A.2d 194, 202, 101 P.2d 120; 29 West L.A. L. Rev. 179 [eliminating tort of malicious prosecution]; 20 California Lawyer 69 (August 2000) [malicious prosecution as disfavored action].)

The basis for this traditional view is the potentially chilling effect of these actions on the public's willingness to resort to the courts for the settlement of disputes. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 C.3d 863, 872, 254 C.R. 336, 765 P.2d 498, *infra*, §510.) The court in the *Sheldon Appel* case observes: "After reviewing the competing policy considerations, we agree with those decisions and commentaries which have concluded that the most promising remedy for excessive litigation does not lie in an expansion of malicious prosecution liability. ... While the filing of frivolous lawsuits is certainly improper and cannot in any way be condoned, in our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded." (47 C.3d 873, citing, e.g., *C.C.P.* 437c, 1038, 128.5.) "Because these avenues appear to provide the most promising remedies of frivolous litigation, we do not believe it is advisable to abandon or relax the traditional limitations on malicious prosecution recovery." (47 C.3d 873.)

The "disfavored action" theory was invoked in *Babb v. Superior Court* (1971) 3 C.3d 841, 92 C.R. 179, 479 P.2d 379, in support of its holding that a cause of action for malicious prosecution of a civil action could not be set up by cross-complaint in that main action. "Since malicious prosecution is a cause of action not favored by the law ... , it would be anomalous to sanction a procedural change which not only would encourage more frequent resort to malicious prosecution actions, but would facilitate their use as dilatory and harassing devices." (3 C.3d 847.)

However, this convenient phrase should not be employed to defeat a legitimate cause of action. (*Bertero v. National General Corp.* (1974) 13 C.3d 43, 53, 118 C.R. 184, 529 P.2d 608, *infra*, §491; *Crowley v. Katleman* (1994) 8 C.4th 666, 680, 34 C.R.2d 386, 881 P.2d 1083; *Schubkegel v. Gordino* (1943) 56 C.A.2d 667, 672, 133 P.2d 475; *Pulvermacher v. Los Angeles Co-ordinating Committee for Aid to Jewish Refugees* (1943) 61 C.A.2d 704, 709, 143

P.2d 974; Grove v. Purity Stores, Ltd. (1957) 153 C.A.2d 234, 242, 314 P.2d 543; Sierra Club Foundation v. Graham (1999) 72 C.A.4th 1135, 1148, 85 C.R.2d 726.) As applied to a malicious *criminal prosecution*, the statement means only that public policy favors the apprehension and punishment of criminals, and to that end imposes a heavy burden of proof on the plaintiff. The policy "should not be pressed further to the extreme of practical nullification of the tort and consequent defeat of the other important policy which underlies it of protecting the individual from the damage caused by unjustifiable criminal prosecution." (*Jaffe v. Stone (1941) 18 C.2d 146, 159, 114 P.2d 335, infra, §479.*)

SUPPLEMENT: [This section is current through the latest supplement]

View that action is disfavored does not defeat legitimate claim: See *Siebel v. Mittlesteadt (2007) 41 C.4th 735, 740, 62 C.R.3d 155, 161 P.3d 527, Supp., infra, §498* [although malicious prosecution actions are disfavored, when underlying litigation is groundless and motivated by malice, balance tips in favor of redressing harm inflicted by that litigation].



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A. Malicious Prosecution.

1. In General.

d. Defense of Plaintiff's Guilt or Liability.

5 *Witkin Sum. Cal. Law Torts* § 472

[§ 472] Defense of Plaintiff's Guilt or Liability.

The success of the plaintiff in a prior criminal trial may mean only that the evidence against plaintiff did not measure up to the requirement of proof beyond a reasonable doubt. (See *infra*, §484.) Hence, in the subsequent civil action for malicious prosecution, the defendant is entitled to judgment on proof by a preponderance of the evidence that plaintiff was really guilty of the crime. (See *Verdier v. Verdier* (1957) 152 C.A.2d 348, 352, 313 P.2d 123; *Rest.2d, Torts* §657; 52 *Am.Jur.2d* (2000 ed.), *Malicious Prosecution* §99.) *Clary v. Hale* (1959) 175 C.A.2d 880, 1 C.R. 91, quotes Prosser's explanation as follows: "A further limitation upon the action of malicious prosecution is that it is always open to the defendant to show that the plaintiff was in fact guilty of the offense with which he was charged. This defense, which is closely analogous to that of truth in actions for defamation, is supported by a similar policy in favor of encouraging exposure of the guilty. As in defamation, the burden of proof of the issue is upon the defendant, and the guilt proved must be substantially equivalent to the charge made. The defense is available notwithstanding an acquittal in the criminal proceeding, and the question of guilt may be retried in the malicious prosecution action. The reason for this is that a verdict of not guilty does not necessarily establish innocence, but merely a failure of the prosecution to prove guilt beyond a reasonable doubt; and in the subsequent civil action, where all that is required is a preponderance of the evidence on the issue, a further inquiry may be made before a new jury as to whether the lesser burden of proof can be sustained. Thus, while an unreversed conviction is conclusive as to guilt and bars malicious prosecution, an acquittal is not conclusive as to the plaintiff's innocence." (175 C.A.2d 889.)

Similarly where the original suit was a civil action, the fact that legal grounds existed on which to base it is a complete defense to a malicious prosecution action. (*Paskle v. Williams* (1931) 214 C. 482, 484, 6 P.2d 505.)

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A. Malicious Prosecution.

1. In General.

e. No Defense of Absolute Privilege.

5 Witkin Sum. Cal. Law Torts § 473

[§ 473] No Defense of Absolute Privilege.

Generally, a statement made in a judicial proceeding is absolutely privileged from liability for defamation. (See C.C. 47(b); *infra*, §567 et seq.) Although this privilege applies in a number of tort actions (see *infra*, §563), an exception is consistently made for malicious prosecution suits. (*Silberg v. Anderson* (1990) 50 C.3d 205, 216, 266 C.R. 638, 786 P.2d 365, *infra*, §570; *Kimmel v. Goland* (1990) 51 C.3d 202, 209, 271 C.R. 191, 793 P.2d 524, *infra*, §661; *Mattco Forge v. Arthur Young & Co.* (1992) 5 C.A.4th 392, 406, 6 C.R. 781, *infra*, §568; *Fremont Comp. Ins. Co. v. Superior Court* (1996) 44 C.A.4th 867, 877, 52 C.R.2d 211.) "The policy of encouraging free access to the courts ... is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied." (*Albertson v. Raboff* (1956) 46 C.2d 375, 382, 295 P.2d 405, *infra*, §511.)

In *Rutherford v. Johnson* (1967) 250 C.A.2d 316, 58 C.R. 546, J sued for divorce, and filed an affidavit alleging unfitness of his wife for child custody because of a meretricious relationship with R. R then sued for damages, alleging falsity and malice. *Held*, judgment on demurrer sustained. (a) A cause of action for defamation could have been stated, because the affidavit, directed against a person from whom no relief was sought, was not within the judicial proceeding privilege (see *infra*, §569). This cause, however, was barred by the 1-year limitation period, which ran from the time of publication of the statement. (250 C.A.2d 318.) (b) No cause of action for malicious prosecution was stated. Plaintiff, not a party to the child custody proceedings, could not allege the necessary element of termination in his favor. (250 C.A.2d 320.)

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A. Malicious Prosecution.

1. In General.

f. Preemption by Federal Remedies.

5 *Witkin Sum. Cal. Law Torts* § 474

[§ 474] Preemption by Federal Remedies.

(1) *Civil Rights Actions*. In *Del Rio v. Jetton* (1997) 55 C.A.4th 30, 63 C.R.2d 712, 7 Cal. Proc. (4th), Judgment, Supp., §206, plaintiffs, as the prevailing defendants in a civil rights action under 42 U.S.C., §1983, had been awarded attorneys' fees under 42 U.S.C., §1988. They then brought this malicious prosecution action, but defendants argued that plaintiffs were preempted from doing so by 42 U.S.C., §1988. *Held*, judgment for defendants on demurrer reversed; there was no indication that Congress intended to limit those unjustly charged with civil rights violations to the remedy of attorneys' fees.

(a) Federal decisions have held that, in a 42 U.S.C., §1983 action, the prevailing defendant may recover attorneys' fees by establishing that the suit had been brought without foundation. However, a successful malicious prosecution action under California law requires that the suit not only be without foundation, but that it have been brought in bad faith. Accordingly, nothing in the legislative history of 42 U.S.C., §1988 indicates an intent to prevent a more seriously damaged defendant from obtaining a greater remedy under state law. (55 C.A.4th 33.)

(b) Similar reasoning applies with respect to recovery for pain and suffering, which is permitted in a malicious prosecution action, but not as part of the attorneys' fees recoverable under 42 U.S.C., §1988. (55 C.A.4th 36.)

(c) Also, a malicious prosecution action is not preempted by *F.R. Civ. P., Rule 11*, which allows a sanction against a person who signs a paper without a reasonable belief that its contents are well grounded. The main objective of the rule, rather than to reward parties who are victimized by litigation, is to deter baseless filings. Thus, there is no conflict between this rule and a malicious prosecution action. (55 C.A.4th 37, not following a federal district court case to the contrary.)

(2) *Bankruptcy Proceedings*. No authorized bankruptcy proceeding can support a state law claim for malicious prosecution. (*Idell v. Goodman* (1990) 224 C.A.3d 262, 269, 273 C.R. 605; *Saks v. Parilla, Hubbard & Militzok* (1998) 67 C.A.4th 565, 573, 79 C.R.2d 120.) In the *Saks* case, plaintiff was sued unsuccessfully in a bankruptcy court adversary proceeding by defendants undergoing involuntary bankruptcy. He then instituted this malicious prosecution action in state court. The trial court granted defendants' motion for judgment on the pleadings, dismissing the malicious prosecution action for lack of subject matter jurisdiction. *Held*, affirmed. The gist of plaintiff's complaint was that

defendants misused the bankruptcy process when they filed an action against him. Although plaintiff had remedies available in the bankruptcy court, he did not use them, choosing instead to file a state court action for malicious prosecution. "Parties may not avail themselves of state court tort remedies to circumvent federal remedies for their opponents' alleged misuse of the bankruptcy process." (67 C.A.4th 573.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Civil Rights Actions.*

Del Rio case:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §242.



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A. Malicious Prosecution.
2. Malicious Prosecution of Criminal Proceeding.
a. In General.

5 *Witkin Sum. Cal. Law Torts* § 475

[§ 475] In General.

In a criminal context, the tort of malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause, where the prosecution is terminated in favor of the accused. (*Centers v. Dollar Markets* (1950) 99 C.A.2d 534, 540, 222 P.2d 136.) The Restatement uses the term "malicious prosecution" restrictively to refer to that of criminal proceedings (see *Rest.2d, Torts* §653 et seq.), rather than civil (see *Rest.2d, Torts* §674 et seq.; *infra*, §486).

Where the prosecution was on two charges, one justified and another not, the plaintiff is not required to show that his or her damages are specifically attributable to the malicious charge and prosecution. (*Singleton v. Perry* (1955) 45 C.2d 489, 498, 289 P.2d 794.)

West's Key Number Digest, Malicious Prosecution k.1 et seq.

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- b. Institution of Proceeding.

5 Witkin Sum. Cal. Law Torts § 476

[§ 476] Institution of Proceeding.

One who procures a third person to institute a malicious criminal prosecution is liable, to the same extent as if he or she instituted it. The test is whether the defendant was actively instrumental in causing the prosecution. (*Blancett v. Burr* (1929) 100 C.A. 61, 62, 279 P. 668; *Centers v. Dollar Markets* (1950) 99 C.A.2d 534, 544, 222 P.2d 136; *Bernstein v. Maimes* (1954) 126 C.A.2d 468, 475, 272 P.2d 529; *Rupp v. Summerfield* (1958) 161 C.A.2d 657, 663, 326 P.2d 912; *Williams v. Hartford Ins. Co.* (1983) 147 C.A.3d 893, 898, 195 C.R. 448; cf. *Cedars-Sinai Med. Center v. Superior Court* (1988) 206 C.A.3d 414, 418, 253 C.R. 561, citing the text [defendants who did not initiate arson investigation, but merely testified at preliminary examination, were not instrumental in causing subsequent prosecution].)

In *Sandoval v. Southern Calif. Enterprises* (1950) 98 C.A.2d 240, 219 P.2d 928, plaintiff, ejected from defendant dance hall, returned to demand a refund of the price of his ticket. Defendant's special officers beat him, and defendant M, assistant manager, called the police and had him arrested. A verdict against M for compensatory and exemplary damages was upheld. In answer to M's defense, that a criminal complaint was issued by the city attorney (based on the presumption that an official duty is regularly done), the court held that the evidence supported the jury's implied finding that M instigated the prosecution to discourage plaintiff from bringing a civil action for battery. M called the police after his employees had attacked plaintiff; he told them that plaintiff was drunk and had created a disturbance; and he was friendly with the police officers, asking for them by name when he phoned. (98 C.A.2d 248.) (See 52 Am.Jur.2d (2000 ed.), *Malicious Prosecution* §25; 40 A.L.R.3d 1005 [liability of perpetrator of crime to person wrongly accused and prosecuted].)

Similarly, a person who had no part in the commencement of a prior civil action, but who participated in it at a later time, may be held liable for malicious prosecution. (*Lujan v. Gordon* (1977) 70 C.A.3d 260, 263, 138 C.R. 654.) Also, one who did not file a complaint may nevertheless be liable if he or she instigated or was actively instrumental in "putting the law in motion." (*Jacques Interiors v. Petrak* (1987) 188 C.A.3d 1363, 1371, 234 C.R. 44.) (See *Rest.2d, Torts* §674, Comment c ["one who continues a civil proceeding that has properly been begun or one who takes an active part in its continuation for an improper purpose after he has learned that there is no probable cause for the proceeding becomes liable as if he had then initiated the proceeding"].)

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 - c. Favorable Termination.
 - 1. Nature of Requirement.

5 Witkin Sum. Cal. Law Torts § 477

[§ 477] Nature of Requirement.

A plaintiff suing for malicious prosecution of a criminal proceeding must allege and prove that it has *terminated in plaintiff's favor*, either by plaintiff's *acquittal* in the trial, or *dismissal* of the case, for lack of evidence, by the committing magistrate at the preliminary hearing. (See *Jaffe v. Stone* (1941) 18 C.2d 146, 150, 114 P.2d 335, *infra*, §479; *De La Riva v. Owl Drug Co.* (1967) 253 C.A.2d 593, 595, 61 C.R. 291, *infra*, §478; *Kachig v. Boothe* (1971) 22 C.A.3d 626, 636, 638, 99 C.R. 393, *supra*, §21; *Rest.2d, Torts* §658 et seq.; 52 *Am.Jur.2d* (2000 ed.), *Malicious Prosecution* §28 et seq.; 30 *A.L.R.2d* 1128 [discharge in habeas corpus proceedings as constituting favorable termination of criminal proceedings requisite to maintenance of malicious prosecution action]; 59 *A.L.R.2d* 1413 [acquittal, discharge, or discontinuance of criminal charge as evidence of want of probable cause in malicious prosecution action]; BAJI, No. 7.30 [requirement of favorable termination], BAJI, No. 7.32 [what constitutes favorable termination]; CACI, No. 1504 [favorable termination].)

The reason for the requirement is thus expressed in *Jaffe v. Stone*, *supra*. "[I]t tends to indicate the innocence of the accused. ... If the accused were actually convicted, the presumption of his guilt or of probable cause for the charge would be so strong as to render wholly improper any action against the instigator of the charge." (18 C.2d 150.)

A dismissal because of a *grant of immunity from prosecution* is a favorable termination, despite the fact that immunity is usually granted to a person who is guilty. "An innocent person may be aware of facts which, while they might tend to be incriminatory, are nevertheless insufficient to establish guilt. Such a person might well seek immunity in exchange for information in the hope of avoiding arrest and possible prosecution. But even if the person be guilty, it must not be forgotten that the grant of immunity was given in exchange for the surrender of his or her constitutional privilege against self-incrimination." (*Scannell v. Riverside* (1984) 152 C.A.3d 596, 611, 199 C.R. 644.)

West's Key Number Digest, Malicious Prosecution k.34, 37

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- 2. Termination Consistent With Guilt.

5 Witkin Sum. Cal. Law Torts § 478

[§ 478] Termination Consistent With Guilt.

A termination consistent with guilt is not sufficient; e.g., where the proceeding is dismissed on technical, procedural grounds, or as an act of grace, or because of impossibility of bringing the accused to trial. (*Jaffe v. Stone* (1941) 18 C.2d 146, 150, 114 P.2d 335, infra, §479; *Eustace v. Dechter* (1942) 53 C.A.2d 726, 732, 128 P.2d 367; *Oppenheimer v. Tamblyn* (1958) 162 C.A.2d 293, 296, 327 P.2d 574; cf. *Cote v. Henderson* (1990) 218 C.A.3d 796, 803, 267 C.R. 274 [in prosecution for sexual crimes, plea of nolo contendere to one count in return for dismissal of remaining eight counts was termination consistent with guilt].) (See *Rest.2d, Torts* §§660, 661; 23 So. Cal. L. Rev. 622 [effect of dismissal after money payment in settlement]; 26 A.L.R.4th 245 [accused's release of liability, or stipulation that there was probable cause for criminal charge, in consideration of termination of prosecution]; 26 A.L.R.4th 565 [termination as result of compromise or settlement of accused' civil liability].)

In *De La Riva v. Owl Drug Co.* (1967) 253 C.A.2d 593, 61 C.R. 291, D was charged with conspiracy to steal merchandise. A preliminary hearing was had and he was held to answer. The following year, in the superior court, the prosecution requested that he stipulate to probable cause, but he refused. The district attorney then moved to dismiss "in the interests of justice," and the dismissal was ordered. D brought this action for malicious prosecution. The affirmative defense was that, after being held to answer, D moved unsuccessfully to quash the information under P.C. 995, but on denial did not seek prohibition, and that the final order of denial was a collateral estoppel on the issue of probable cause. On a trial of this special defense, the judge agreed and gave judgment for defendants. *Held*, reversed.

(a) The magistrate's order was only prima facie evidence of probable cause, for the preliminary hearing is not a trial on the merits, and the quantum of evidence necessary to sustain a conviction is not required. (253 C.A.2d 595; see 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §147.) Similarly, the denial of the motion under P.C. 995, and the failure to seek prohibition, were not conclusive, for the scope of review on the motion and on prohibition are limited: An information or indictment will not be set aside merely because the evidence is insufficient to support a conviction. (253 C.A.2d 596; see 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §243.)

(b) The important question was whether the dismissal was a favorable termination. As pointed out in *Jaffe v. Stone*, *supra*, a termination caused by acts of the accused or by impracticability to bring him to trial is final, but not favorable.

(253 C.A.2d 598.) The reasons for the dismissal in the instant case did not clearly appear in the record, and evidence should be taken to determine whether it tended to show innocence of the accused. (253 C.A.2d 599.) Accordingly, the reversal was for further proceedings on this issue.

West's Key Number Digest, Malicious Prosecution k.35, 37

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c. Favorable Termination.

3. Final Termination Unnecessary.

5 *Witkin Sum. Cal. Law Torts* § 479

[§ 479] Final Termination Unnecessary.

A number of early California decisions, mistakenly interpreting the requirement of favorable termination as one of *final* termination, refused to allow recovery after a dismissal by the magistrate, on the ground that the prosecution was not completely barred and incapable of revival. (See, e.g., *Wilson v. Troy* (1937) 19 C.A.2d 156, 157, 64 P.2d 1141.) These decisions were disapproved in *Jaffe v. Stone* (1941) 18 C.2d 146, 114 P.2d 335. The court held that the action for malicious prosecution may be brought when the *particular proceeding* is thus terminated, regardless of whether the dismissal is a bar to further prosecution for the same offense, except where a new prosecution has already commenced at the time the action is brought. (18 C.2d 158.) (See *De La Riva v. Owl Drug Co.* (1967) 253 C.A.2d 593, 598, 61 C.R. 291, *supra*, §478 [following *Jaffe*]; 15 *So. Cal. L. Rev.* 279; but see 5 *Stanf. L. Rev.* 560 [discharge in extradition hearing no basis for malicious prosecution suit].)

West's Key Number Digest, Malicious Prosecution k.36

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 - d. Lack of Probable Cause.
 - 1. Nature of Requirement.

5 *Witkin Sum. Cal. Law Torts* § 480

[§ 480] Nature of Requirement.

The defendant in a malicious prosecution action must be shown to have acted without probable cause in instituting the criminal prosecution. There can be no recovery if the defendant honestly and reasonably believed in the truth of the charge. (See *Pulvermacher v. Los Angeles Co-ordinating Committee for Aid to Jewish Refugees* (1943) 61 C.A.2d 704, 707, 143 P.2d 974 [method of pleading]; *Ecker v. Raging Waters Group* (2001) 87 C.A.4th 1320, 1329, 105 C.R.2d 320 [where amusement park security personnel received complaints from several boys that plaintiff was videotaping them in surreptitious manner and that he had done so on previous visits, there was probable cause for plaintiff's arrest, and park could not be successfully sued for malicious prosecution after plaintiff was acquitted]; *Rest.2d, Torts* §662; 52 *Am.Jur.2d* (2000 ed.), *Malicious Prosecution* §§52 et seq., 71 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §711; 66 *A.L.R.3d* 10 [prosecution instigated against person mistakenly identified]; 66 *A.L.R.3d* 95 [effect of confession by person prosecuted]; *BAJI*, No. 7.33 [probable cause for prosecution]; *CACI*, No. 1503 [same].)

Reasonable belief alone is no defense if it is not in *good faith*; i.e., even though the defendant had knowledge of facts sufficient to cause a reasonable person to believe the plaintiff guilty, the defendant is not protected if he or she did not actually hold that belief. (See *Franzen v. Shenk* (1923) 192 C. 572, 578, 221 P. 932; *Green v. Stewart* (1930) 106 C.A. 518, 527, 289 P. 940; *Gooding v. McAlister* (1931) 114 C.A. 284, 292, 299 P. 774; *Rest.2d, Torts* §662, Comment c; on element of malice, see *infra*, §485; cf. *Sheldon Appel Co. v. Albert & Olier* (1989) 47 C.3d 863, 881, 254 C.R. 336, 765 P.2d 498, *infra*, §510 [in action against attorneys for malicious prosecution of civil action, probable cause issue was properly determined under objective standard, without requirement that attorneys subjectively believed that prior claim was legally tenable].)

West's Key Number Digest, Malicious Prosecution k.15

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §755.



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 - d. Lack of Probable Cause.
 - 2. Proof and Determination of Issue.

5 Witkin Sum. Cal. Law Torts § 481

[§ 481] Proof and Determination of Issue.

Lack of probable cause must be independently proved; it cannot be inferred from proof of malice (see *infra*, §485) for, despite malice, one may have knowledge of facts that give rise to a reasonable and honest belief of guilt. (*Randleman v. Boeres* (1928) 93 C.A. 745, 752, 270 P. 374; *Jensen v. Leonard* (1947) 82 C.A.2d 340, 351, 186 P.2d 206; see *Rest.2d, Torts* §673.)

Whether probable cause existed for a criminal prosecution is a question of law. If the facts are not in dispute, the question is decided by the court alone. If the evidence is conflicting, the jury decides the issue on the basis of instructions as to what facts, if established, constitute probable cause. Only the question of the existence of the facts should be submitted. (*Ball v. Rawles* (1892) 93 C. 222, 226, 28 P. 937; *Franzen v. Shenk* (1923) 192 C. 572, 578, 221 P. 932; *Vernon v. Plumas Lumber Co.* (1925) 71 C.A. 112, 118, 234 P. 869; *Haydel v. Morton* (1935) 8 C.A.2d 730, 733, 48 P.2d 709; *Sebastian v. Crowley* (1940) 38 C.A.2d 194, 202, 101 P.2d 120; *Centers v. Dollar Markets* (1950) 99 C.A.2d 534, 540, 543, 222 P.2d 136; *Bernstein v. Maimes* (1954) 126 C.A.2d 468, 477, 272 P.2d 529; *Grove v. Purity Stores, Ltd.* (1957) 153 C.A.2d 234, 240, 314 P.2d 543; *Klotz v. Alexander* (1962) 203 C.A.2d 238, 242, 21 C.R. 305; *Cummings v. Fire Ins. Exchange* (1988) 202 C.A.3d 1407, 1419, 249 C.R. 568, citing the text; 87 A.L.R.2d 183 [probable cause in malicious prosecution action as question of law for court or fact for jury].)

In *Weber v. Leuschner* (1966) 240 C.A.2d 829, 50 C.R. 86, plaintiff rancher stored fruit with defendant. After a quarrel over alleged mishandling of the goods, plaintiff stopped payment on his check for the balance of storage fees. Defendant signed a felony complaint for issuing a check without funds, which was dismissed at the preliminary hearing. Plaintiff then sued for malicious prosecution. *Held*, judgment for plaintiff affirmed; the manager knew that payment was stopped, not for insufficient funds, but, because of the controversy over fruit damage. (240 C.A.2d 836.)

West's Key Number Digest, Malicious Prosecution k.49, 59, 64(2), 71(2), 72(2)

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 - 3. Advice of Counsel.

5 Witkin Sum. Cal. Law Torts § 482

[§ 482] Advice of Counsel.

Reliance on the advice of counsel may be a good defense, provided there was a full disclosure of the facts to the attorney, and a resulting honest belief in the guilt of the injured party. (*Gustason v. Speak* (1931) 113 C.A. 247, 251, 298 P. 40; *Sebastian v. Crowley* (1940) 38 C.A.2d 194, 203, 101 P.2d 120; see *Rest.2d, Torts* §666; 12 Cal. L. Rev. 310; 52 Am.Jur.2d (2000 ed.), *Malicious Prosecution* §100 et seq.; BAJI, No. 7.36 [probable cause for prosecution--advice of counsel].)

The defendant must have disclosed all pertinent and material facts within his or her knowledge. (*Schubkegel v. Gordino* (1943) 56 C.A.2d 667, 672, 133 P.2d 475; *Walker v. Jensen* (1949) 95 C.A.2d 269, 274, 212 P.2d 569; see *Perry v. Washington Nat. Ins. Co.* (1936) 14 C.A.2d 609, 618, 58 P.2d 701 [full disclosure to prosecuting attorney]; *Clary v. Hale* (1959) 175 C.A.2d 880, 886, 1 C.R. 91 [full disclosure to own attorney and to deputy district attorney]; *Weber v. Leuschner* (1966) 240 C.A.2d 829, 837, 50 C.R. 86 [failure to disclose essential facts]; *Rest.2d, Torts* §666, Comment f; 10 So. Cal. L. Rev. 218; 10 A.L.R.2d 1215 [reliance on advice of prosecuting attorney as defense to malicious prosecution action].)

In some jurisdictions, the defense of reliance on advice of counsel extends to the advice of a justice of the peace, magistrate, or lay person, and several California cases support this view. (See *Ball v. Rawles* (1892) 93 C. 222, 235, 28 P. 937; *Williams v. Casebeer* (1899) 126 C. 77, 88, 58 P. 380; *Portman v. Keegan* (1939) 31 C.A.2d 30, 36, 87 P.2d 400; 48 A.L.R.4th 250 [defense in malicious prosecution suit of acting on advice of justice of the peace, magistrate, or lay person].)

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 - d. Lack of Probable Cause.
- 4. Action by Magistrate, Grand Jury, or Court.
 - aa. Action Unfavorable to Accused.

5 *Witkin Sum. Cal. Law Torts* § 483

[§ 483] Action Unfavorable to Accused.

(1) *Commitment or Indictment*. If the plaintiff was held to answer by the committing magistrate, this is prima facie evidence of probable cause. (*Randleman v. Boeres* (1928) 93 C.A. 745, 752, 270 P. 374; see *Rest.2d, Torts* §663(2); 68 A.L.R.2d 1168 [commitment by examining magistrate as evidence of probable cause in malicious prosecution action].) The same rule would apply where a grand jury indicts. (See *Rest.2d, Torts* §664(2); 28 A.L.R.3d 748 [effect of grand jury indictment on issue of probable cause in malicious prosecution action].)

(2) *Conviction*. If the plaintiff was convicted in a criminal trial, and the judgment of conviction was affirmed, or became final by lapse of the time for appeal, this is conclusive as to the existence of probable cause. (*Roos v. Harris* (1928) 203 C. 201, 202, 263 P. 225; *Plum v. Becket* (1932) 120 C.A. 507, 509, 7 P.2d 1111; *Norton v. John M.C. Marble Co.* (1939) 30 C.A.2d 451, 454, 86 P.2d 892; see *Rest.2d, Torts* §667(1).) The same effect has also been given to a prior civil judgment involving the same issues. In *Bullock v. Morrison* (1931) 118 C.A. 112, 4 P.2d 812, the defendant previously recovered a civil judgment against plaintiff for damages to property, and then charged him with malicious mischief, but failed to obtain a criminal conviction against him. *Held*, the civil judgment conclusively established probable cause for the criminal charge. (118 C.A. 114.)

Where the plaintiff was convicted, probable cause is conclusively established even though the conviction was ultimately *reversed*, for, if a jury or trial judge were satisfied of guilt beyond a reasonable doubt, it can hardly be denied that the accuser had reasonable grounds for making the charges. (*Bealmear v. Southern Calif. Edison Co.* (1943) 22 C.2d 337, 340, 139 P.2d 20; see *Rest.2d, Torts* §667(1); 86 A.L.R.2d 1090 [conclusiveness, as evidence of probable cause in malicious prosecution action, of conviction as affected by fact that it was reversed or set aside].) The only exception is where it is shown that the conviction was obtained by fraud, either extrinsic or intrinsic, or other corrupt practice; in that case the presumption of probable cause is rebutted. (*Carpenter v. Sibley* (1908) 153 C. 215, 217, 94 P. 879; see *Rest.2d, Torts* §666(1).)

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4. Action by Magistrate, Grand Jury, or Court.

bb. Action Favorable to Accused.

5 *Witkin Sum. Cal. Law Torts* § 484

[§ 484] Action Favorable to Accused.

(1) *Discharge by Magistrate or Refusal by Grand Jury To Indict.* The Torts Restatement takes the position that the refusal of the grand jury to indict, or the discharge of the accused by the magistrate, unless explained by some sufficient counter showing, is conclusive of lack of probable cause. (See *Rest.2d, Torts* §§663(1), 664(1).) However, the rule on discharge by a magistrate is subject to exceptions, and one is where the magistrate refuses to rule on the merits and the charge is dismissed on motion of the prosecutor. (*Williams v. Taylor* (1982) 129 C.A.3d 745, 755, 181 C.R. 423, *infra*, §582.)

In *Cummings v. Fire Ins. Exchange* (1988) 202 C.A.3d 1407, 1419, 249 C.R. 568, plaintiff was arrested for filing a false insurance claim. The charges were later dismissed on unclear grounds, and plaintiff filed a malicious prosecution action against defendant insurer on the theory that the dismissal was conclusive of lack of probable cause. In affirming a summary judgment for the insurer, the court pointed out that the record demonstrated that plaintiff knowingly filed a false claim, and that defendant had a reasonable basis for believing that plaintiff had violated the law. (202 C.A.3d 1412, 1417, 1421.)

(2) *Acquittal.* Mere acquittal at the trial is not even *prima facie* evidence of lack of probable cause, for the accuser might have an honest and reasonable belief in the accused's guilt, though, for one or more reasons, the jury might not have been satisfied by the proof produced at the trial. (*Randleman v. Boeres* (1928) 93 C.A. 745, 753, 270 P. 374; *Johnson v. Southern Pac. Co.* (1910) 157 C. 333, 338, 107 P. 611; see *Rest.2d, Torts* §667(2); on special defense of guilt, see *supra*, §472.)

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5 Witkin Sum. Cal. Law Torts § 485

[§ 485] Malice.

(1) *Nature of Requirement.* It is usually said that "malice" is an essential element of the cause of action. (*Richter v. Neilson* (1936) 11 C.A.2d 503, 507, 54 P.2d 54.) However, this merely means that the motive of the defendant must have been something other than that of bringing a guilty person to justice. Hence, malice may consist either of actual ill will or some improper motive. (See *Centers v. Dollar Markets* (1950) 99 C.A.2d 534, 541, 222 P.2d 136; see *Rest.2d, Torts* §668; 52 *Am.Jur.2d* (2000 ed.), *Malicious Prosecution* §45 et seq.; BAJI, No. 7.34 ["malice" and "malicious" defined]; on pleading, see 5 *Cal. Proc.* (4th), *Pleading*, §870.)

(2) *Proof.* Malice is usually proved by circumstantial evidence, e.g., acts or declarations of the defendant indicating prejudice, or ill will, or attempt to gain private advantage. (See *Burke v. Watts* (1922) 188 C. 118, 126, 204 P. 578 [defendant told plaintiff he would "fix him" and told officers he would send him to penitentiary]; *Williams v. California Milk Producers Assn.* (1934) 136 C.A. 172, 176, 28 P.2d 59 [arrest and prosecution instigated by business competitor]; 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §123.)

Malice is also a permissible inference by the jury or court (not a presumption) from lack of probable cause. In other words, if the defendant had no substantial grounds for believing in the plaintiff's guilt, but, nevertheless, instigated proceedings against the plaintiff, it is logical to infer that the defendant's motive was improper. (*Burke v. Watts*, *supra*; *Redgate v. Southern Pac. Co.* (1914) 24 C.A. 573, 584, 141 P. 1191; *Centers v. Dollar Markets*, *supra*, 99 C.A.2d 542, 543; *Grove v. Purity Stores* (1957) 153 C.A.2d 234, 241, 314 P.2d 543; *Klotz v. Alexander* (1962) 203 C.A.2d 238, 245, 21 C.R. 305; see *Weber v. Leuschner* (1966) 240 C.A.2d 829, 836, 50 C.R. 86 [malice inferred from lack of probable cause and from defendant's failure to disclose facts to his attorney or to district attorney]; *Rest.2d, Torts* §669.) "[T]he want of probable cause does not raise a legal presumption of malice. ... The jury may, however, if they find that there was no probable cause for the prosecution infer malice therefrom, although malice is not a necessary inference to be deduced therefrom. But in whatever way ... it must be proven as a fact." (*Runo v. Williams* (1912) 162 C. 444, 450, 122 P. 1082.)

(3) *Rebuttal.* In rebutting the charge of malice, the defendant may testify directly as to his or her own motive. (*Runo v. Williams*, *supra*; *Schubkegel v. Gordino* (1943) 56 C.A.2d 667, 674, 133 P.2d 475; 1 *Cal. Evidence* (4th), *Opinion Evidence*, §8.) The defendant may also show reliance on the advice of reputable persons in whom he or she confided.

Though this does not in itself establish probable cause, as in the case of *advice of counsel* (see *supra*, §482), it tends to disprove malice. (*Richter v. Neilson, supra*, 11 C.A.2d 514.) (See 48 A.L.R.4th 280 [defense in malicious prosecution action of acting on advice of justice of the peace, magistrate, or lay person].)

West's Key Number Digest, Malicious Prosecution k.26 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Requirement*. Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §916.



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CHAPTER IX - Torts

Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

A. Malicious Prosecution.

3. Malicious Institution of Civil Proceeding.

a. In General.

1. Nature of Tort.

5 Witkin Sum. Cal. Law Torts § 486

[§ 486] Nature of Tort.

(1) *In General.* The malicious institution of a civil proceeding, like that of a criminal proceeding (*supra*, §469), is a tort. (*Eastin v. Bank of Stockton* (1884) 66 C. 123, 126, 4 P. 1106; *Stevens v. Chisholm* (1919) 179 C. 557, 563, 178 P. 128; *Albertson v. Raboff* (1956) 46 C.2d 375, 382, 295 P.2d 405, *infra*, §511; *White Lighting Co. v. Wolfson* (1968) 68 C.2d 336, 350, 66 C.R. 697, 438 P.2d 345, *infra*, §523; *Sheldon Appel Co. v. Albert & Olier* (1989) 47 C.3d 863, 871, 254 C.R. 336, 765 P.2d 498, *infra*, §510; *Black v. Knight* (1919) 44 C.A. 756, 766, 187 P. 89; *Metzenbaum v. Metzenbaum* (1953) 121 C.A.2d 64, 68, 262 P.2d 596; *Albertson v. Raboff* (1960) 185 C.A.2d 372, 8 C.R. 398; *Kennedy v. Byrum* (1962) 201 C.A.2d 474, 480, 20 C.R. 98; *Norton v. Hines* (1975) 49 C.A.3d 917, 922, 123 C.R. 237; *Sierra Club Foundation v. Graham* (1999) 72 C.A.4th 1135, 1148, 85 C.R.2d 726; see *Rest.2d, Torts* §674 *et seq.*; *Dobbs, The Law of Torts* §436; 1 *Harper, James & Gray* 3d §4.8; 28 *Santa Clara L. Rev.* 105 [intimidation suits filed against public interest litigants as retaliation]; 20 *So. Cal. L. Rev.* 115; 52 *Am.Jur.2d* (2000 *ed.*), *Malicious Prosecution* §§2, 9; 7 *Proof of Facts* 2d 181 [malicious prosecution].)

In *Bertero v. National General Corp.* (1974) 13 C.3d 43, 118 C.R. 184, 529 P.2d 608, *infra*, §491, citing the text, the court said: "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. In recognition of the wrong done the victim of such a tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees ... , compensation for injury to his reputation or impairment of his social and business standing in the community ... , and for mental or emotional distress." (13 C.3d 50.) And "[t]he judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of already crowded dockets, but by the unscrupulous use of the courts by individuals ' ... as instruments with which to maliciously injure their fellow men.' " (13 C.3d 51.) (See *Eastin v. Bank of Stockton*, *supra* [chief basis for remedy is that costs awarded to successful party in prior proceeding do not include attorneys' fees].)

Although the tort is usually called "malicious prosecution," the word "prosecution" is not a particularly apt

description of the underlying civil action. The Restatement uses the term "wrongful use of civil proceedings" to refer to the tort. (See *Rest.2d, Torts* §674.)

(2) *Elements*. There are some differences in the rules governing actions based on prior criminal and civil proceedings but the basic elements are the same. (*Hudson v. Zumwalt* (1944) 64 C.A.2d 866, 872, 149 P.2d 457; *Williams v. Coombs* (1986) 179 C.A.3d 626, 636, 224 C.R. 865; *Slaney v. Ranger Ins. Co.* (2004) 115 C.A.4th 306, 318, 8 C.R.3d 915.) Thus, (1) initiation of a prior proceeding (see *infra*, §497), (2) favorable termination of that proceeding (see *infra*, §498 et seq.), (3) lack of probable cause (see *infra*, §506 et seq.), and (4) malice (see *infra*, §511) must be shown. (On burden of proof, see *Rest.2d, Torts* §681A; on functions of court and jury, see *Rest.2d, Torts* §681B.)

(3) *Waiver*. The right of action is waived where the defendant, in a Tort Claims Act proceeding or an indemnity or contribution action, requests recovery of defense costs on motion for summary judgment or nonsuit on the ground that the proceeding was not brought in good faith and with reasonable cause. (*C.C.P.* 1038; 7 *Cal. Proc.* (4th), *Judgment*, §203; see 12 *Pacific L. J.* 306.)

(4) *Unclean Hands*. The unclean hands of the plaintiff may preclude relief. (See *Pond v. Insurance Co. of North America* (1984) 151 C.A.3d 280, 289, 198 C.R. 517; *DeRosa v. Transamerica Title Ins. Co.* (1989) 213 C.A.3d 1390, 1395, 262 C.R. 370; *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 C.A.4th 970, 977, 90 C.R.2d 743 [unclean hands defense is not limited to plaintiff's misconduct that relates to defendant's decision to file prior action].)

West's Key Number Digest, Malicious Prosecution k.9 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Waiver*.

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §235 et seq.



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A. Malicious Prosecution.

3. Malicious Institution of Civil Proceeding.

a. In General.

2. Public Entity Cannot Sue.

5 Witkin Sum. Cal. Law Torts § 487

[§ 487] Public Entity Cannot Sue.

Public entities may not maintain actions for malicious prosecution. In *Long Beach v. Bozek* (1982) 31 C.3d 527, 183 C.R. 86, 645 P.2d 137, defendant filed an action against a city and two of its police officers for false imprisonment, false arrest, negligent hiring, assault, and battery. The jury trial resulted in a verdict for the city and the officers. They then filed the present action against defendant for malicious prosecution, alleging that the previous suit was brought without probable cause and with knowledge that the allegations of the complaint were false. The city sought only reimbursement for expenses. The trial judge sustained a general demurrer *as to the city*. *Held*, judgment on demurrer affirmed; bringing of suits against the government is absolutely privileged.

(a) *No general rule limiting recovery to individuals.* Although the opinion in *Bertero v. National General Corp.* (1974) 13 C.3d 43, 118 C.R. 184, 529 P.2d 608, *infra*, §491, refers to harm suffered by an "individual," there are valid policies that would be furthered by allowing *nonindividuals* to sue for malicious prosecution; e.g., recovery of compensation for expenses of defending a suit and the public interest in promoting the efficient administration of justice by discouraging baseless suits. "We thus decline to formulate a general rule allowing malicious prosecution actions only for individual plaintiffs." (31 C.3d 531.)

(b) *Suits against public entities are protected under constitutional right to petition for grievances.* The right to petition the government for redress of grievances is set forth in both U.S. Const., First Amendment, and Cal. Const., Art. I, §3. Federal cases interpreting antitrust laws have held that the right protects the freedom to seek redress from all three branches of government, and thus includes attempts to obtain redress through the institution of administrative and judicial proceedings. (31 C.3d 532, 533.) Other courts, by analogy to these cases, have created privileges from civil liability for actions constituting the exercise of the right of petition. And a different group of cases has invoked the rights of petition and assembly to ensure that members of private organizations may take collective action to obtain legal representation and thus access to the courts. (31 C.3d 533.) "These authorities make it clear that the right of petition protects attempts to obtain redress through the institution of judicial proceedings as well as through importuning executive officials and the Legislature. It is equally apparent that the right encompasses the act of filing a lawsuit solely to obtain monetary compensation for individualized wrongs, as well as filing suit to draw attention to issues of broader public interest or political significance. ... Hence, the act of filing suit against a governmental entity represents an

exercise of the right of petition and thus invokes constitutional protection." (31 C.3d 534.)

(c) *Free speech analogy.* Many cases have held that the right of free speech prevents the government from suing for defamation: "The policy supporting an absolute privilege for criticism of the government is to allow the free communication of ideas, a concept at the core of First Amendment liberties. If the courts were to condone the imposition of civil sanctions, even if only for statements purportedly made with actual malice, a severe chilling effect would result on the legitimate exercise of the right to express beliefs freely when those beliefs appear to be derogatory of the governing authorities." (31 C.3d 535.)

(d) *Legislative remedies of public entities.* The Legislature has authorized trial courts to award attorneys' fees for the purpose of discouraging frivolous litigation. (See C.C.P. 128.5(a), 1021.7; 7 Cal. Proc. (4th), Trial, §240; 7 Cal. Proc. (4th), Judgment, §201.) These measures undercut the city's argument that a malicious prosecution suit should be permitted in order to compensate cities for expenses incurred in defending against baseless suits and in order to deter the proliferation of such suits: "From a constitutional standpoint, an award of expenses upon a finding that monetary sanctions are appropriate under the standards set out in the above statutes is a clearly preferable remedy to an independent action for malicious prosecution with its cost in terms of additional attorney fees and imposition upon judicial resources. It is not uncommon for a party suing for torts arising out of official misconduct to be represented by an attorney retained under a contingency fee arrangement. Such a party will not be required to retain new counsel to oppose in that same proceeding a motion for statutory sanctions. In contrast, an unsuccessful plaintiff who is subsequently sued for malicious prosecution would in all probability be required to hire new counsel to defend the second suit, potentially incurring considerable expense before obtaining a resolution of the issue whether the initial action was brought with malicious intent." (31 C.3d 538.)

(e) *Conclusion.* Hence, to avoid the chilling effect on the constitutional right of petition, the best course is to defer to the statutory remedy. This, in combination with the criminal sanctions for filing of false claims with the government (see P.C. 72; 2 Cal. Crim. Law (3d), Crimes Against Property, §177), and the possibility of malicious prosecution actions by individual city employees, "provide an adequate deterrent to unwarranted lawsuits without unduly infringing upon the right of petition." (31 C.3d 538.) (See *Long Beach v. Bozek* (1983) 33 C.3d 727, 728, 190 C.R. 918, 661 P.2d 1072 [certifying, on remand from the United States Supreme Court, that judgment in action was based on both federal and California Constitutions, and therefore California provision furnished independent ground of decision].)

In *Curtis v. Los Angeles* (1985) 172 C.A.3d 1243, 218 C.R. 772, the court said: "[W]e are asked to honor the promise impliedly offered by our Supreme Court" in *Bozek*, that public entities denied the right to sue for malicious prosecution may, nevertheless, recover expenses incurred in defending the lawsuit. (172 C.A.3d 1247.) The legislative remedy is in C.C.P. 1038 (see 7 Cal. Proc. (4th), Judgment, §203) (172 C.A.3d 1247), which provides a means of redress for acts similar to those for which damages are sought in a malicious prosecution action. (172 C.A.3d 1251.) And the reference in the statute to a proceeding "not brought in good faith and with reasonable cause" covers both the filing and *continued maintenance* of the action. (172 C.A.3d 1252.) Hence, on remand, the trial court was directed to determine whether the plaintiff continued to maintain the action in "good faith and with reasonable cause," and if not, the amount of defense costs "reasonably and necessarily incurred" by the county. (172 C.A.3d 1252.)

In *Padres L.P. v. Henderson* (2003) 114 C.A.4th 495, 8 C.R.3d 584, the owner of professional baseball team sued an attorney for malicious prosecution arising out of a series of lawsuits the attorney had filed to challenge actions taken by the city in which the team was located, together with the owner, to develop a new baseball park. *Held*, the attorney was not absolutely privileged to file the lawsuits. *Bozek* does not stand for the proposition that private parties sued in an action that is also brought against a governmental agency are constitutionally precluded from bringing a malicious prosecution action. In fact, the *Bozek* court recognized that the possibility of malicious prosecution actions by named parties other than the agency (in that case, the individual police officers) may have a properly deterrent effect on unwarranted lawsuits that also name a governmental agency. (114 C.A.4th 509.) The availability of the anti-SLAPP procedure (see 5 Cal. Proc. (4th), Pleading, §962 et seq.) provides adequate protection to persons who legitimately pursue reverse validation claims, such as these, against nonmeritorious malicious prosecution claims. This balances the

policies of discouraging frivolous litigation and protecting the rights of citizens to challenge governmental actions. (114 C.A.4th 512.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Ramona Unified School Dist. v. Tsiknas* (2005) 135 C.A.4th 510, 522, 37 C.R.3d 381 [school district could not maintain malicious prosecution action; following *Long Beach v. Bozek* (1982) 31 C.3d 527, 183 C.R. 86, 645 P.2d 137, text, p. 712]. *Attorneys' fees to discourage frivolous litigation:*

Cross-References: 7 Cal. Proc. (5th), *Trial*, §227; 7 Cal. Proc. (5th), *Judgment*, §222 et seq.

C.C.P. 1038:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §235 et seq. *Anti-SLAPP procedure:*

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1017 et seq.



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A. Malicious Prosecution.

3. Malicious Institution of Civil Proceeding.

b. Proceedings That May Give Rise to Liability.

1. Action or Special Proceeding.

5 Witkin Sum. Cal. Law Torts § 488

[§ 488] Action or Special Proceeding.

(1) *In General.* The tort action lies not only for institution of an ordinary civil action, but also for institution of a special proceeding. (See *Brock v. Southern Pac. Co.* (1948) 86 C.A.2d 182, 185, 195 P.2d 66 [quoting Restatement, but denying recovery]; *Sutherland v. Palme* (1949) 93 C.A.2d 307, 312, 208 P.2d 1035 [insanity proceeding]; *Rest.2d, Torts* §678; 14 U.S.F. L. Rev. 203 [physician countersuits]; 30 A.L.R.3d 455 [insanity proceedings]; 40 A.L.R.3d 296 [involuntary bankruptcy, insolvency, or receivership proceedings]; 87 A.L.R.3d 580 [action for breach of contract]; 87 A.L.R.3d 554 [confessed judgment proceedings]; 61 A.L.R.5th 307 [medical-malpractice countersuits]; on order to show cause, see *infra*, §490; on action for declaratory relief, see *infra*, §492.)

(2) *Will Contest.* In *MacDonald v. Joslyn* (1969) 275 C.A.2d 282, 79 C.R. 707, defendant, himself a lawyer though not in active practice, had a large income from trusts set up by his father. His father died leaving a large estate mainly in trust for grandchildren. Defendant filed a will contest, using three successive sets of lawyers, and finally dismissed it without prejudice. Plaintiff, the testator's attorney for many years and the named executor in the will, filed this action for malicious prosecution. After defendant wilfully refused to comply with discovery orders, default judgment was rendered for plaintiff. *Held*, affirmed. Ordinarily, the person who brings a malicious prosecution suit was the defendant in a prior proceeding which injured him. The prior proceeding here was not directly against plaintiff; it was a contest of a will in which plaintiff had been named executor. But under *Prob.C. 371* (now *Prob.C. 8252*), the petitioner for probate is the defendant, and his action was properly filed for injuries sustained by defendant's malicious contest. (275 C.A.2d 287.) (See 35 A.L.R.3d 651 [liability for malicious prosecution based on contest or caveat to will].)

(3) *Offering Forged Will for Probate.* In *Steiner v. Eikerling* (1986) 181 C.A.3d 639, 226 C.R. 694, plaintiffs, the heirs of decedent S, brought an action for civil conspiracy and malicious institution of a civil proceeding against defendants, German relatives of S. The complaint set forth the following facts: S died while on vacation in Germany; defendants kept his death secret, came to his California home and took possession of his personal property and handwriting exemplars, forged a handwritten will naming themselves as beneficiaries, and offered it for probate; and plaintiffs filed a will contest, and the court found that the will was a forgery and denied probate. The trial judge sustained a general demurrer on the grounds that the submission of the will was a privileged publication under C.C. 47(2) (now C.C. 47(b); see *infra*, §567 et seq.), and that the submission of a will for probate is not a "malicious

prosecution" of anyone. *Held*, reversed. The proponents of a will who offer it for probate have initiated civil proceedings, under the Restatement test. "The person who initiates civil proceedings is the person who sets the machinery of the law in motion." (181 C.A.3d 644, quoting Comment a to Rest.2d, Torts §674.) Hence, "those persons who successfully contest a forged will submitted to probate may maintain an action for malicious institution of civil proceedings against those who offered the forged document with knowledge of its falsity." (181 C.A.3d 645.)

SUPPLEMENT: [This section is current through the latest supplement]



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- A. Malicious Prosecution.
 - 3. Malicious Institution of Civil Proceeding.
 - b. Proceedings That May Give Rise to Liability.
 - 2. Ancillary Proceeding.

5 *Witkin Sum. Cal. Law Torts* § 489

[§ 489] Ancillary Proceeding.

The Restatement classifies the wrongful institution of an "ancillary proceeding" as the malicious institution of a civil proceeding. (See *Rest.2d, Torts* §674, Comment f; §676, Comment d.) Thus, the action may be based on a suit wrongfully interfering with property by recordation of a notice of lis pendens, even though the notice itself would be absolutely privileged in a libel suit. "The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied." (*Albertson v. Raboff* (1956) 46 C.2d 375, 382, 295 P.2d 405, *infra*, §511.)

Other ancillary proceedings on which a malicious prosecution action has been based include attachment (*Vesper v. Crane Co.* (1913) 165 C. 36, 41, 130 P. 876), injunction (*Asevado v. Orr* (1893) 100 C. 293, 296, 34 P. 777), and receivership (*Jones v. Richardson* (1935) 9 C.A.2d 657, 659, 50 P.2d 810) proceedings.

SUPPLEMENT: [This section is current through the latest supplement]



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- A. Malicious Prosecution.
 - 3. Malicious Institution of Civil Proceeding.
 - b. Proceedings That May Give Rise to Liability.
 - 3. Order To Show Cause.

5 *Witkin Sum. Cal. Law Torts* § 490

[§ 490] Order To Show Cause.

In *Chauncey v. Niems* (1986) 182 C.A.3d 967, 227 C.R. 718, the court suggested that a proceeding on an order to show cause may be sufficiently independent to serve as the basis of a malicious prosecution action. Here, a year after the marriage of Jeffrey and Judith was dissolved, Judith applied for an order to show cause re contempt, and an order to show cause for modification of child and spousal support awards. All claims involving contempt were settled, and the trial judge, after a hearing, denied Judith's request for increased child support. The statement of decision found that Jeffrey was the prevailing party, and ordered Judith to pay attorneys' fees. Thereafter, Jeffrey filed this action for malicious prosecution against Judith and her attorney. Judgment for defendants was affirmed on the grounds of no favorable termination (see *infra*, §498) and insufficient showing of malice (see *infra*, §511). However, before reaching these issues, the court determined that the orders to show cause were "actions" on which a later suit for malicious prosecution could be based.

(a) The order to show cause re contempt exposed plaintiff Jeffrey to criminal sanctions, and required him to retain counsel, appear in court, and respond to lengthy interrogatories. "While the order may or may not have had an 'independent existence,' it nonetheless bore the indisputable earmarks of an adversarial proceeding. Most significantly, it incurred expenses, provoked psychological trauma, and required expenditures of time and effort to defend." (182 C.A.3d 975.)

(b) The order to show cause re modification did not threaten plaintiff with criminal penalties. But it did require him to appear in court to give any legal reason for denial of the relief sought by Judith; and that relief involved modification of his parental rights and affected the support he would be required to pay. (182 C.A.3d 976.)

However, the court in *Lossing v. Superior Court* (1989) 207 C.A.3d 635, 255 C.R. 18, also involving an order to show cause re contempt, disagreed with *Chauncey v. Niems* and reached a different result. L, attorney for the defendants in a personal injury action, obtained an order for plaintiffs in that action to appear for a deposition, and later filed an order to show cause re contempt alleging wilful failure to comply with the discovery order. The lower court, after a hearing, discharged the order to show cause, and plaintiffs then brought an action against L for malicious institution of a civil proceeding, alleging that he did not in good faith believe that plaintiffs were guilty of contempt, and acted

maliciously to coerce them to settle the underlying case. L demurred, the trial judge overruled his demurrer, and he petitioned for mandamus to compel sustaining of his demurrer without leave to amend. *Held*, writ issued; a malicious prosecution action against an attorney will not lie for failing to prevail on an order to show cause re contempt brought to enforce a discovery order in ongoing litigation.

(a) "Viewing a contempt proceeding in the context of the discovery statutes, we disagree with the dicta in *Chauncey* ... for several reasons. Contempt is one of five sanctions which may be imposed for misuse of the discovery process. ... Although all five sanctions are ancillary to the ongoing action, only contempt bears the indicia of 'independence' which real parties contend render it a sufficiently separate proceeding. To permit a malicious prosecution action when a party has chosen contempt over one of the other sanctions would inject into the choice of sanctions an element unrelated to the appropriateness of the sanction. Furthermore, the statutory discovery scheme itself provides a sanction if contempt is chosen without justification. Monetary and contempt sanctions against an attorney are authorized if the attorney engages in conduct that is a misuse of the discovery process. ... Monetary sanctions may also be awarded against 'one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both.' ... If the contempt proceeding was a bad faith action brought without merit or for harassment, sanctions are also available under *Code of Civil Procedure section 128.5*. ... Thus the Legislature has provided a specific sanction for the precise misuse of discovery or bad faith alleged here." (207 C.A.3d 638.)

(b) "Perhaps even more significant is the effect a malicious prosecution action would have on the ongoing underlying action. It would create a possible conflict of interest between attorney and client probably necessitating a substitution of counsel in the underlying action. It might require the attorney in the underlying action to disclose the contents of his or her file as a result of discovery in the malicious prosecution action. ... Given that a statutory remedy is available and malicious prosecution is a disfavored cause of action, we conclude contempt proceedings to sanction discovery abuse are ancillary proceedings without sufficient independence to support a cause of action for malicious prosecution." (207 C.A.3d 639.)

(c) "Attorneys face an impossible dilemma if they are subject to claims of malicious prosecution by opponents in litigation because they vigorously represent their client, yet they are also subject to claim of legal malpractice by their client if they fail to provide the vigorous representation to which the client is entitled. Public policy favors the principle of zealous representation and freedom of access to the courts. ... Vigorous representation is to be distinguished from inappropriate conduct, i.e., bad faith, harassment, etc., and we are fully satisfied that trial judges of this state can make that distinction in responding to requests for sanctions." (207 C.A.3d 640.)

In *Green v. Uccelli* (1989) 207 C.A.3d 1112, 1121, 255 C.R. 315, the court held that it would "extend our decision in *Lossing* to hold that bringing orders to show cause re contempt which are taken off calendar before hearing cannot constitute the basis for a malicious prosecution action against the attorney for the moving party."

SUPPLEMENT: [This section is current through the latest supplement]



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4. Cross-Complaint.

5 Witkin Sum. Cal. Law Torts § 491

[§ 491] Cross-Complaint.

In *Bertero v. National General Corp.* (1974) 13 C.3d 43, 118 C.R. 184, 529 P.2d 608, the court held that a cause of action for malicious prosecution could be based on a cross-complaint asserted in a prior action. Plaintiff, president of defendant corporation and an executive of its predecessor, became involved in a dispute with defendant K, a major shareholder. As a result, plaintiff resigned his office, but remained as a director and consultant under an employment contract. Later, K sought to induce him to terminate the contract and surrender stock options, and on plaintiff's refusal K informed him that the agreement was invalid, and then terminated his salary and other benefits. Plaintiff sued for declaratory relief and for damages for unpaid salary. Defendants filed an answer and cross-complaint (seeking recovery of amounts previously paid under the contract), alleging that the contract had been obtained without consideration and through duress and undue influence. Plaintiff prevailed in the suit and his judgment was affirmed on appeal. He then brought the present action for damages for malicious prosecution of the cross-complaint. Judgment was rendered in his favor, following a jury verdict, for compensatory and punitive damages. *Held*, affirmed except as to the amount of attorneys' fees awarded.

(a) On the basic issue, whether a maliciously prosecuted cross-complaint could give rise to tort liability, the court said: "The harm to society and to the individual cross-defendant caused by the filing of a cross-pleading without probable cause and with malice is substantially similar to that occasioned by the filing of a complaint or other initial pleading known to be false or meritless. The malicious cross-plaintiff, like the malicious plaintiff, uses the judicial process as a vehicle for harassing or vexing his adversary or as a means of coercing the settlement of a collateral matter. The cross-defendant, like the defendant in an original cause maliciously prosecuted, is compelled to expend attorney's fees in defending against the false charge and may suffer the same mental or emotional distress and possible loss of reputation and standing in the community." (13 C.3d 51.)

(b) The court then examined and rejected a number of arguments made by defendants:

First, that a cross-complaint is not the initiation of a judicial proceeding. Under prior decisions, and the 1971 legislation abolishing counterclaims, a cross-complaint creates an independent action, distinct and separate from the action instituted by the complaint. (13 C.3d 51, and 52, footnote 2; see 5 Cal. Proc. (4th), Pleading, §1095.)

Second, that defendants pleaded a "transaction" cross-claim, which had to be set up or be waived (see 5 *Cal. Proc.* (4th), *Pleading*, §1103). This is not an excuse. "A litigant is never compelled to file a malicious and fabricated action. It is not the assertion of a claim that is actionable but rather the malicious character of the assertion." (13 *C.3d* 52.)

Third, that the cross-pleading was merely defensive, and that no penalty should be imposed for "aggressively defending against the charges asserted in a complaint. ... By seeking affirmative relief, however, defendants in the instant case did more than attempt to repel [plaintiff's] attack; they took the offensive in attempting to prosecute a cause of action of their own. When such action is prompted by malice and is not based on probable cause, it is actionable as in the case of other affirmative, malicious prosecutions." (13 *C.3d* 52.)

Fourth, that the tort of malicious prosecution is disfavored and should not be extended. "This convenient phrase should not be employed to defeat a legitimate cause of action." (13 *C.3d* 53.) The disfavored action concept stems from the public policy on enforcement of criminal laws; and this policy does not limit the right to seek redress for malicious abuse of the judicial process. (13 *C.3d* 53.) (See *Minasian v. Sapse* (1978) 80 *C.A.3d* 823, 826, 145 *C.R.* 829 [following *Bertero*]; 4 *Hastings Const. L. Q.* 739; 65 *A.L.R.3d* 901 [malicious prosecution of civil suit based on defense or counterclaim].)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-complaint as independent action:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §1169.

Failure to plead as waiver:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §1177.



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 - 5. Declaratory Judgment.

5 Witkin Sum. Cal. Law Torts § 492

[§ 492] Declaratory Judgment.

In *Camarena v. Sequoia Ins. Co.* (1987) 190 C.A.3d 1089, 235 C.R. 820, the court held that a prior action for declaratory relief may support a malicious prosecution action. C sought damages for injuries suffered in an automobile accident involving J. Prior to trial, S, J's insurer, claimed that J refused to cooperate and brought a declaratory relief action against J and C, seeking a judgment relieving it of any further duty to defend or indemnify J on that ground. The trial court found no failure to cooperate, and rendered judgment requiring S to defend and indemnify J. After affirmance of this judgment on appeal, C brought the present action for malicious prosecution against S. The trial judge granted S's motion for summary judgment. *Held*, reversed.

(a) *Institution of prior separate proceeding.* There was a separate adversary proceeding requiring a response. S filed a complaint, served C with a summons, took him to trial, appealed to the Court of Appeal, and sought review in the Supreme Court. In the meantime C's personal injury lawsuit was tried, the judgment was reversed on appeal, and it is again pending in the superior court. Although related to the personal injury lawsuit, S's declaratory relief action "assumed a procedural life of its own." (190 C.A.3d 1094.) S argued that the policies supporting freedom to contest contractual liability and determination of contractual obligations before breach called for a holding that declaratory relief proceedings do not give rise to a cause of action for malicious prosecution. But the freedom to contest liability is subservient to the interest in preventing wilful and unwarranted conduct (190 C.A.3d 1089); and it is more appropriate to protect access to judicial proceedings by focusing on the requirement that plaintiffs plead and prove malice (190 C.A.3d 1097). (On requirement of institution of prior proceeding generally, see *infra*, §497.)

(b) *Malice.* C was not a party to the insurance contract and neither his conduct nor his obligations were the subject of dispute in the declaratory relief action; hence, evidence that might support a finding of malice toward J (allegations of his noncooperation were without probable cause and malice could be inferred) was of no help to C, who must show malice toward himself. (190 C.A.3d 1098.) But it was improper to render summary judgment, for a trier of fact might infer malice from the conduct of the attorney: "Counsel was retained by [S] to defeat [C's] personal injury claim. From the scope of his retention it may be argued that his conduct was aimed toward reducing [C's] recovery instead of or in addition to depriving [J] of the benefits of the [S] policy." (190 C.A.3d 1098; on requirement of malice generally, see *infra*, §§511, 512.)

(c) *Favorable termination.* S contended that because it prayed for a determination of its duties and in fact received a determination, the action was terminated in its favor. "A similar attempt to place the form of termination over its substance" was rejected in *Sierra Club v. Superior Court* (1985) 168 C.A.3d 1138, 1144, 214 C.R. 740, *infra*, §505. Here, the suit sought a declaration that S was relieved of its obligations under the policy, C's answer sought the opposite, and the court ruled in C's favor. (190 C.A.3d 1100; on requirement of favorable termination generally, see *infra*, §498 et seq.) (See *George F. Hillenbrand v. Insurance Co. of North America* (2002) 104 C.A.4th 784, 801, 128 C.R.2d 586 [insurer defended insured in third-party action under reservation of rights and, while this action was pending filed declaratory relief action to determine its duty to defend; declaratory relief judgment for insurer supported malicious prosecution action; following *Camarena*].)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Proceedings That Do Not Give Rise to Liability.

1. Subsidiary or Defensive Procedures Within Action.

5 Witkin Sum. Cal. Law Torts § 493

[§ 493] Subsidiary or Defensive Procedures Within Action.

(1) *In General.* A malicious prosecution action must be based on an independent action or proceeding seeking affirmative relief. It cannot be grounded on subsidiary procedural or purely defensive actions within a pending lawsuit. (*Coleman v. Gulf Ins. Group* (1986) 41 C.3d 782, 794, 226 C.R. 90, 718 P.2d 77, 9 Cal. Proc. (4th), Appeal, §848; *Idell v. Goodman* (1990) 224 C.A.3d 262, 273, 273 C.R. 605.) Thus, a *request for admissions* will not support the tort action. (*Twyford v. Twyford* (1976) 63 C.A.3d 916, 922, 134 C.R. 145.)

(2) *Motion for Reconsideration.* The same is true with respect to a motion for reconsideration. In *Adams v. Superior Court* (1992) 2 C.A.4th 521, 3 C.R.2d 49, plaintiff was the defendant in a civil action in Monterey County initiated by the Ws. Defendants were the Ws' attorneys in that action. Simultaneously, plaintiff was involved in criminal actions in San Mateo and Santa Clara counties in which he succeeded in having prior felony convictions either reduced or expunged. Thereafter, defendants filed motions for reconsideration in both criminal actions, allegedly to preserve the felony convictions for impeachment of plaintiff in the Monterey County civil action. When the motions for reconsideration were denied, plaintiff instituted the present action for malicious prosecution and abuse of process. With respect to the malicious prosecution action, the trial judge overruled defendants' demurrer, and they sought mandamus to compel him to sustain it. *Held*, writ granted. (For discussion of the abuse of process action, see *infra*, §528.)

(a) The tort of malicious prosecution requires the initiation of a full-blown action; subsidiary procedural actions within a lawsuit, such as an application for a restraining order or for a lien, will not support a claim of malicious prosecution. Grounding malicious prosecution actions on such subsidiary procedural steps would disrupt the ongoing lawsuit by injecting tort claims against the parties' lawyers. Also, the appropriate remedy for actions taken within a lawsuit is to invoke the court's broad powers to control judicial proceedings. (2 C.A.4th 528.)

(b) Although defendants' motions for reconsideration were not made in the ongoing lawsuit between plaintiff and the Ws, thereby lessening the direct interference in the attorney-client relationships in that lawsuit, the motions were clearly made in pursuit of the Ws' interests in the Monterey lawsuit. Hence, to ground a malicious prosecution action upon those motions would disrupt, if not destroy, defendants' ability to represent their clients. Furthermore, in view of the inherent power of the San Mateo and Santa Clara courts over the proceedings before them, plaintiff had a remedy

for any filings made by defendants, as illustrated by the fact that the Santa Clara court based its denial of the motion for reconsideration on defendants' lack of standing. (2 C.A.4th 528.) (See 26 *Pacific L. J.* 1, 20 [Adams]; on malicious initiation of criminal procedures generally, see *supra*, §469 et seq.)

(3) *Motion To Disqualify Attorney.* *Silver v. Gold* (1989) 211 C.A.3d 17, 259 C.R. 185, held that an unsuccessful motion to disqualify an attorney from further representation of a party to a civil suit may not be the basis for a malicious prosecution action. "[T]he filing of a motion to disqualify counsel is merely one of numerous procedures that may be invoked during the course of litigation; it does not constitute a separate action or proceeding upon which a suit for malicious prosecution can be premised." (211 C.A.3d 23; on whether unsuccessful attempt to disqualify attorney supports an abuse of process action, see *infra*, §518.)

(4) *Enforcement of Judgment.* In *Merlet v. Rizzo* (1998) 64 C.A.4th 53, 75 C.R.2d 833, defendants in a malicious prosecution action had earlier represented A in a suit against C, and had obtained judgment. However, when the sale of C's one-half interest in her home proved insufficient to satisfy the judgment, defendants moved for issuance of a writ of sale against plaintiff, C's husband, for sale of his one-half interest in property owned with C. This motion was denied. Plaintiff then sued defendants for malicious prosecution, and they successfully demurred without leave to amend. *Held*, affirmed.

(a) Subsidiary procedural or purely defensive actions cannot be the basis for malicious prosecution actions. Examples are a request for admissions; filing an appeal; a motion to disqualify an attorney; filing an action in bankruptcy to prevent the discharge of a debt; and an application to the Federal Communications Commission. On the other hand, the following actions have been held to be ancillary or independent, and proper bases for a malicious prosecution action: institution of a special insanity proceeding; an adversarial administrative proceeding; wrongful attachment of property; cross-complaints; and judicial arbitration. (64 C.A.4th 59.)

(b) Malicious prosecution actions based on a prior proceeding that is a continuation of an existing proceeding are untenable. The crucial point, as seen in the will contest cases (see *supra*, §488), is not whether the prior proceeding had injected new factual and legal issues or whether it placed on the proponent the burden of mounting a defense to those issues, but whether two distinct proceedings were involved and the prior proceeding created the contentious litigation. Here, unlike will contests, a motion for a writ of sale occurs after liability and damages have been determined, and does not result in a separate and distinct proceeding. It is simply a remedial measure that would not exist without the judgment. (64 C.A.4th 61.)

(c) Writs of attachment have been held to support a malicious prosecution action. However, in that situation, the defendant's interest in the property is harmed, while here no *lis pendens* was filed, but instead the least oppressive procedure was used. Also, a writ of attachment occurs when the complaint is filed, while a court may not issue a writ of sale until liability has been determined and a judgment entered, making it the continuation, or the enforcement, of the existing action, and not a separate proceeding. (64 C.A.4th 62.)

(d) Plaintiffs incorrectly emphasized the extent to which the new remedy has increased the adversarial nature of the proceeding and the resources expended by the malicious prosecution plaintiff in dealing with the remedy. "Since all improper proceedings create unjustifiable litigation and tax one's emotional well-being, the question is the degree to which they burden the 'innocent' party. A motion to execute a sale provides a relatively inexpensive and expeditious means to enforce a judgment. Defending against an improper application entails some hardship, especially when the motion is followed by a motion for reconsideration and an appeal, but the hardship does not approach that suffered by litigants in a will contest or a full-blown lawsuit. Moving for sanctions is the best and most efficient method for thwarting and punishing improper requests for postjudgment remedies." (64 C.A.4th 63.)

(5) *Appeal.* In *Coleman v. Gulf Ins. Group*, *supra*, plaintiffs brought a wrongful death action against defendant city, based on the drowning of the decedent. They received judgment on a jury award, the city appealed, and its insurance carrier made an offer of settlement for less than half the judgment, which plaintiffs rejected. Subsequently, the insurer

tendered a greater amount, plaintiffs accepted, and the appeal was dismissed. Six months later, plaintiffs filed this action against the insurer, alleging that it had filed the appeal with no reasonable belief in a reversal but simply to postpone payment of the judgment; that the insurer, not required to post an appeal bond because of the city's status as a public entity, could invest the amount of the unpaid judgment at a higher return than the statutory interest; and that the insurer acted with "malicious" and "oppressive" intent. *Held*, judgment for defendant on demurrer affirmed. A defendant's appeal cannot be considered a separate action "seeking affirmative relief," but rather is merely the continuation of an attempt "to repel" plaintiff's attack. (41 C.3d 794; see footnote 9, pointing out that courts have long refused to recognize a tort of malicious defense.) (On similar rejection of cause of action for abuse of process in filing appeal, see *infra*, §520.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Coleman case:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §1001.



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 - 2. Small Claims Proceeding.

5 Witkin Sum. Cal. Law Torts § 494

[§ 494] Small Claims Proceeding.

No action for malicious prosecution can be grounded on institution of a small claims proceeding. To permit the action "would frustrate the intent of the Legislature in adopting an expeditious and informal means of resolving small disputes, would inject into a simple and accessible proceeding elements of time, expense, and complexity which the small claims process was established to avoid, and would require a prudent claimant to consult with an attorney before making use of this supposedly attorney-free method for settling disputes over small amounts." (*Pace v. Hillcrest Motor Co. (1980) 101 C.A.3d 476, 479, 161 C.R. 662*; see *Cooper v. Pirelli Cable Corp. (1984) 160 C.A.3d 294, 298, 206 C.R. 581* [following *Pace*]; 23 Western State L. Rev. 457 [Malicious Prosecution in Small Claims Court: Why Is This Tort Different From All Other Torts?].)

In 1981, former C.C.P. 117.18 (now *C.C.P. 116.260, 116.940*) was amended to require each county to provide a small claims advisory service for small claims litigants and potential litigants. (See 2 *Cal. Proc. (4th), Courts, §277.*) In *Black v. Hepner (1984) 156 C.A.3d 656, 202 C.R. 799*, plaintiff contended that the amendment undermined the reasoning of *Pace* and justified a malicious prosecution action based on a small claims court proceeding. The court disagreed.

(a) Plaintiff argued that the mandatory availability of an advisory service satisfied the *Pace* court's concern over the need to consult with an attorney. But these statutory provisions do not require a litigant to avail himself or herself of the advisory service; and to sanction a subsequent malicious prosecution action would have the effect of requiring a potential litigant to seek assistance, thus making the provisions inconsistent with the small claims court objective of inexpensive and expeditious means to settle disputes informally. (*156 C.A.3d 659.*)

(b) Plaintiff further contended that a small claims litigant may suffer as much as a litigant in a formal proceeding. But the small claims process considerably diminishes the extent of harm to a litigant from its malicious commencement, and any deviation from the summary nature of the court's process because some defendants may be recipients of this abuse would countervail the reason for its existence. (*156 C.A.3d 659, 660.*)

(c) A litigant seeking damages within the small jurisdictional limit of the small claims court could elect to file in

the municipal (now superior) court, and in that event, a subsequent malicious prosecution action would lie. But this does not mean that a defendant in an action filed in the latter court would receive more favorable treatment than a defendant in the small claims proceeding; the small claims court defendant benefits from the expeditious and summary nature of that proceeding. "Neither the services of a lawyer nor substantial time to defend are required. The same action brought in [the latter] court could subject a defendant to protracted litigation resulting in substantially more abuse over a longer period of time. Attorney fees and costs of defense may also be incurred." (156 C.A.3d 660.)

SUPPLEMENT: [This section is current through the latest supplement]

Small claims advisory service:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §271.



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 - 3. Contractual Arbitration.

5 Witkin Sum. Cal. Law Torts § 495

[§ 495] Contractual Arbitration.

A malicious prosecution action may be based on a proceeding terminated by *judicial* arbitration. (*Stanley v. Superior Court* (1982) 130 C.A.3d 460, 466, 181 C.R. 878, *infra*, §504.) However, the contrary has been held with respect to *contractual* arbitration.

In *Sagonowsky v. More* (1998) 64 C.A.4th 122, 75 C.R.2d 118, S commenced the underlying action against plaintiffs, his fellow tenants in common. The matter was submitted to private, contractual arbitration, and the arbitrator denied all claims. Plaintiffs then instituted the malicious prosecution action against defendant, who was the attorney for S in the underlying action. *Held*, judgment for defendant on demurrer affirmed; contractual arbitration cannot be the basis for a malicious prosecution action.

(a) Although *Moore v. Conliffe* (1994) 7 C.4th 634, 29 C.R.2d 152, 871 P.2d 204, *infra*, §573, held that the litigation privilege of C.C. 47(b) (*infra*, §567 et seq.) applies to contractual arbitration, it is incorrect to conclude, on the basis of *Moore*, that contractual arbitration is a judicial proceeding which, on favorable termination, can be the basis for malicious prosecution. (64 C.A.4th 130.)

(b) The rule that permits judicial arbitration to be the basis for a malicious prosecution claim does not require the same result in a contractual arbitration. Although judicial arbitration is mandated by the Legislature in prescribed cases, contractual arbitration arises from the parties' *agreement* to arbitrate. (64 C.A.4th 131.)

(c) While contractual arbitration involves considerable fees and costs, these fees and costs were implicitly recognized by the parties when they entered into the agreement requiring arbitration. (64 C.A.4th 133.)

(d) The parties could have agreed to subject themselves to liability in the courts for malicious prosecution of an arbitration, or they were free to provide for a sanctions award by the arbitrator for a baseless claim. They did not choose to do so here, and that choice was not the product of unequal bargaining power. Plaintiffs argued that the agreement should be rewritten to require arbitration only when there is a colorable claim. However, the agreement cannot be rewritten in this manner. Having chosen not to foreclose the risk that they might have to bear the costs of an arbitration

that terminated in their favor and that involved a baseless claim, plaintiffs cannot now expect the court to rewrite their agreement. (64 C.A.4th 134.) (See *Rogers v. Peinado* (2000) 85 C.A.4th 1, 6, 101 C.R.2d 817 [following *Sagonowsky v. Moore* insofar as it held that plaintiff could not sue party for malicious prosecution of action previously terminated by contractual arbitration]; on contractual arbitration, see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §484 et seq.; on judicial arbitration, see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §524 et seq.)

Sagonowski was approved in *Brennan v. Tremco* (2001) 25 C.4th 310, 105 C.R.2d 790, 20 P.3d 1086, a malicious prosecution action based on a prior unfair competition action that had been terminated by contractual arbitration. The court quoted extensively from the earlier decision and made the following points:

(a) Two legal trends support the conclusion that a person may not sue for malicious prosecution of an action that the parties resolved through contractual arbitration: (1) the trend against creating or expanding derivative tort remedies, including malicious prosecution; and (2) the trend in favor of allowing the parties voluntarily to choose binding, private arbitration to end the entire dispute. (25 C.4th 314.)

(b) Whether the underlying action started in court, as here, or in arbitration, as in *Sagonowsky*, if it ends in contractual arbitration, that determination will not support a malicious prosecution action. (25 C.4th 314.)

(c) Because an arbitration award is not generally reviewable and because the arbitrator usually need not explain the basis of the award, private arbitration does not always allow for a ready determination of whether the prior action actually terminated in the malicious prosecution plaintiff's favor. (25 C.4th 317.)

(d) *Rogers v. Peinado*, *supra*, is disapproved to the extent it held that the termination of the previous action by contractual arbitration did not preclude the successful defendant from bringing a malicious prosecution action against the plaintiff's attorney. It is the *nature* of the termination that matters, not exactly how it comes about or who agrees to it. (25 C.4th 317.)

(e) The Court of Appeal erred in concluding that the intent of the parties determines whether they agreed that contractual arbitration would preclude a successful defendant from pursuing a claim of malicious prosecution. This procedure is impracticable, because in most cases the parties will claim opposite intents. (25 C.4th 318.)

SUPPLEMENT: [This section is current through the latest supplement]

Contractual arbitration:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §499 et seq.

Judicial arbitration:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §579 et seq.



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- 4. Family Law Proceedings.

5 *Witkin Sum. Cal. Law Torts* § 496

[§ 496] Family Law Proceedings.

Family law proceedings have been held to be an improper basis for malicious prosecution claims. In *Bidna v. Rosen* (1993) 19 C.A.4th 27, 23 C.R.2d 251, the marriage between plaintiff and defendant was dissolved and physical custody of their daughter was awarded to plaintiff husband. Defendant's mother told plaintiff that she would use her superior financial resources to keep reopening custody issues until plaintiff finally agreed to give up custody of the child. Over a period of less than a year, defendant (allegedly funded by her mother) brought a series of six meritless ex parte applications and orders to show cause to change custody. These proceedings cost plaintiff extensive attorneys' fees. Plaintiff then instituted the present malicious prosecution action. *Held*, judgment on demurrer for defendant affirmed.

(a) *Direction of the law.* "The trajectory of the case law now governing malicious prosecution claims arising out of family law proceedings arcs toward one destination: a bright line barring any such claims, no matter how egregious the defendant's conduct in the family law action. The present case (at least as pled) is egregious indeed, and forces us to ponder whether the arc should be completed." (19 C.A.4th 29, citing numerous Court of Appeal cases.)

(b) *Arguments for bright-line rule.* There are numerous substantial arguments in favor of a bright-line rule barring all malicious prosecution actions based on family law proceedings.

First, family law cases have a unique propensity for bitterness. This bitterness and emotional distress often form a kind of background noise that makes it extremely difficult to distinguish truly malicious motions and orders to show cause from ordinary ones. (19 C.A.4th 35.)

Second, family law courts have the unique ability to swiftly discourage litigious nonsense at its source by means of attorneys' fees awards intended as a sanction against a party's conduct. These fee awards are common considerations in family law orders to show cause. (19 C.A.4th 35.)

Third, because family law remedies require a special sensitivity and flexibility, allowing separate malicious prosecution actions in the wake of unsuccessful attempts to obtain certain remedies may have a chilling effect on the ability to obtain those remedies by increasing the risk of asking for them. This chill may be particularly bitter in child

custody cases where one party believes (even if without probable cause) that he or she is acting in a child's best interest. (19 C.A.4th 35.)

Fourth, allowing separate malicious prosecution actions (as distinct from imposing sanctions in the underlying case) arising out of family law proceedings may have an impact on lawyers' malpractice insurance premiums. This, in turn, will make the practice of law and the access of clients to lawyers more expensive. (19 C.A.4th 35.)

(c) *Arguments against bright-line rule.* The argument in favor of allowing malicious prosecution actions arising out of family law proceedings is the inadequacy of internal family law remedies. These remedies consist of sanctions under C.C.P. 128.5 or Family C. 271. Both are limited in scope:

(1) C.C.P. 128.5 sanctions are limited to parties and their attorneys and to "expenses" incurred by another party. Hence, damages for emotional distress are not allowed. And punitive damages are allowed only in certain situations involving felonies. (19 C.A.4th 36.)

(2) Family C. 271 is also limited in its reach. Sanctions imposed are limited to property or income of the party against whom the sanction is imposed. Thus, in a case such as this one, the statute has no force against a nonparty to the family law action who is the behind-the-scenes mastermind and financier of the malicious proceedings. Moreover, Family C. 271 is limited by its requirement that no sanction may impose an unreasonable financial burden against a party. (19 C.A.4th 36.)

(d) *Resolution.* Despite the inadequacy of family law remedies, "we hold that no malicious prosecution action may arise out of unsuccessful family law motions or OSC's."; The tie breaker is *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 C.3d 863, 254 C.R. 336, 765 P.2d 498, *infra*, §510, which, in concluding that the better remedy for unjustified litigation is the imposition of sanctions, stated that the traditional limitations on malicious prosecution should not be relaxed. Given the fact that no California decision has as yet extended the tort of malicious prosecution to family law actions, to do so now would be contrary to the directive expressed in *Sheldon Appel*. (19 C.A.4th 37.)

(e) *Recommendation.* It is recommended that single-judge calendaring be extended to family law courts as soon as resources permit so that sanctions may be awarded immediately after each meritless proceeding. (19 C.A.4th 38.) (See *Begier v. Strom* (1996) 46 C.A.4th 877, 885, 54 C.R.2d 158, *supra*, §455 [citing *Bidna*; malicious prosecution claim did not extend to false accusations of child abuse in custody proceedings]; cf. *Chauncey v. Niems* (1986) 182 C.A.3d 967, 979, 227 C.R. 718, *supra*, §490 [stricter showing of malice is required in cases arising from family law proceedings than those arising from other proceedings].)

Bidna was distinguished in *Nicholson v. Fazeli* (2003) 113 C.A.4th 1091, 6 C.R.3d 881, where plaintiff's action was based on the cross-complaint of a trust joined in a dissolution proceeding that did not involve family law issues but was simply a civil action for possession of property alleged to be trust property and damages for its loss. The court declined to extend the suggested absolute bar against malicious prosecution actions originating in family law proceedings "to otherwise ordinary civil proceedings alleging ordinary civil causes of action that, for whatever reason, 'originate in family law proceedings.'" (113 C.A.4th 1098.)

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5. (New) Petition To Enjoin Harassment.

5 Witkin Sum. Cal. Law Torts § 496A

[§ 496A] (New) Petition To Enjoin Harassment.

In *Siam v. Kizilbash* (2005) 130 C.A.4th 1563, 31 C.R.3d 368, plaintiff sued defendant on numerous causes of action, including a malicious prosecution claim based on defendant's unsuccessful filing of a C.C.P. 527.6 petition to enjoin harassment (see 6 Cal. Proc. (5th), *Provisional Remedies*, §316 et seq.). *Held*, a C.C.P. 527.6 proceeding is not a proper basis for a malicious prosecution action.

(a) The reasoning of *Bidna v. Rosen* (1993) 19 C.A.4th 27, 23 C.R.2d 251, text, §496, with respect to family law proceedings, and of *Pace v. Hillcrest Motor Co.* (1980) 101 C.A.3d 476, 161 C.R. 662, text, §494, with respect to small claims proceedings, is applicable here. C.C.P. 527.6 is used where the victim has been stalked, threatened, or otherwise seriously harassed, and there are many cases that exemplify the bitter and even irrational disputes that arise under the statute. In these highly charged circumstances, a successful defendant may be inclined to counter with a civil action against the unsuccessful plaintiff. As in family law disputes, however, the background of bitterness would make it difficult to distinguish between a malicious petition and one that is not malicious. Also, just as in family law matters, C.C.P. 527.6 provides for attorneys' fees as sanctions for a frivolous petition. (130 C.A.4th 1572.)

(b) Declining to extend the malicious prosecution tort to unsuccessful C.C.P. 527.6 petitions deprives an aggrieved defendant of a remedy for some of the harm suffered as a result of a malicious petition. However, the harm should be fairly minimal. C.C.P. 527.6 was passed to provide quick relief to harassment victims threatened with great or irreparable injury. Like a small claims action, the petition is designed to be processed simply and expeditiously, and a defendant is not usually likely to incur substantial legal fees. There is no risk of incarceration or financial ruin; at worst, the defendant will simply be ordered to stop doing something. Also, to the extent the defendant has grievances of his or her own, C.C.P. 527.6 expressly permits a cross-complaint. (130 C.A.4th 1573.)

(c) A C.C.P. 527.6 petition is not an ordinary civil action. The statute provides for the proceeding to be completed in a matter of weeks and incorporates an expectation that victims may often seek relief without the benefit of a lawyer. Permitting a malicious prosecution claim to follow an unsuccessful C.C.P. 527.6 petition would frustrate this streamlined procedure. A prudent plaintiff would seek legal advice before filing a petition, and the risk of subsequent litigation might dissuade victims of serious harassment from seeking the remedy at all. (130 C.A.4th 1573.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Malicious Prosecution.

3. Malicious Institution of Civil Proceeding.

c. Proceedings That Do Not Give Rise to Liability.

6. (New) Petition To Enjoin Workplace Violence or Threats.

5 *Witkin Sum. Cal. Law Torts* § 496B

[§ 496B] (New) Petition To Enjoin Workplace Violence or Threats.

In *Robinzine v. Vicory* (2006) 143 C.A.4th 1416, 50 C.R.3d 65, plaintiff and her husband sued her former employer for malicious prosecution based on the unsuccessful filing of a C.C.P. 527.8 petition to enjoin workplace violence or threats of violence (see 6 Cal. Proc. (5th), *Provisional Remedies*, §326 et seq.). *Held*, a malicious prosecution action may not be grounded on a C.C.P. 527.8 proceeding. Given the substantial similarity between petitions under C.C.P. 527.6 and C.C.P. 527.8, the reasoning of *Siam v. Kizilbash* (2005) 130 C.A.4th 1563, 31 C.R.3d 368, Supp., supra, §496A, applies here. C.C.P. 527.8 was enacted to allow employers to seek protections comparable to those offered under C.C.P. 527.6. Both statutory schemes describe a streamlined process for obtaining a temporary restraining order and preliminary injunction. Both envision self-representation by parties without the benefit of counsel, and exempt the process from filing fees. They contain similar provisions concerning notification, enforcement, and the consequences of an order obtained in the proceedings. To the extent that a defendant may have grievances of his or her own, both statutes permit a cross-complaint. Moreover, a prevailing defendant in an action filed under C.C.P. 527.8 has available sanctions that can be obtained within the proceeding to redress baseless or harassing allegations. (143 C.A.4th 1423.)

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- A. Malicious Prosecution.
- 3. Malicious Institution of Civil Proceeding.
- d. Institution or Continuation of Prior Proceeding.

5 *Witkin Sum. Cal. Law Torts* § 497

[§ 497] Institution or Continuation of Prior Proceeding.

The tort requires the institution by the malicious prosecution defendant of a prior separate proceeding. (*Camarena v. Sequoia Ins. Co.* (1987) 190 C.A.3d 1089, 1094, 235 C.R. 820, supra, §492; *HMS Capital v. Lawyers Title Co.* (2004) 118 C.A.4th 204, 213, 12 C.R.3d 786.)

One who did not file a complaint may nevertheless be liable for malicious prosecution if he or she instigated or was actively instrumental in "putting the law in motion." (*Jacques Interiors v. Petrak* (1987) 188 C.A.3d 1363, 1371, 234 C.R. 44.)

Also, a person who had no part in the commencement of an action, but who participated in it at a later time, may be held liable. (*Lujan v. Gordon* (1977) 70 C.A.3d 260, 263, 138 C.R. 654.) The same is true of a person who commenced an action for a proper purpose but continued to prosecute it after discovering that it lacked probable cause. (See *infra*, §506.)

SUPPLEMENT: [This section is current through the latest supplement]



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- A. Malicious Prosecution.
- 3. Malicious Institution of Civil Proceeding.
- e. Favorable Termination.
- 1. In General.

5 Witkin Sum. Cal. Law Torts § 498

[§ 498] In General.

The prior civil action or proceeding must have terminated in favor of the present plaintiff. (*Hurgren v. Union Mut. Life Ins. Co.* (1904) 141 C. 585, 587, 75 P. 168; *Babb v. Superior Court* (1971) 3 C.3d 841, 845, 92 C.R. 179, 479 P.2d 379; *Merron v. Title Guarantee & Trust Co.* (1938) 27 C.A.2d 119, 121, 80 P.2d 740; *Munson v. Linnick* (1967) 255 C.A.2d 589, 594, 63 C.R. 340; *Rich v. Siegel* (1970) 7 C.A.3d 465, 469, 86 C.R. 665; *Kachig v. Boothe* (1971) 22 C.A.3d 626, 638, 99 C.R. 393, *supra*, §21; *Sierra Club v. Superior Court* (1985) 168 C.A.3d 1138, 1144, 214 C.R. 740, *infra*, §505; *Berman v. RCA Auto Corp.* (1986) 177 C.A.3d 321, 323, 222 C.R. 877, *infra*, §501; *Chauncey v. Niems* (1986) 182 C.A.3d 967, 976, 227 C.R. 718, *supra*, §490; *Camarena v. Sequoia Ins. Co.* (1987) 190 C.A.3d 1089, 1110, 235 C.R. 820, *supra*, §492; *Mattel v. Luce, Forward, Hamilton & Scripps* (2002) 99 C.A.4th 1179, 1190, 121 C.R.2d 794; *Padres L.P. v. Henderson* (2003) 114 C.A.4th 495, 514, 8 C.R.3d 584, *supra*, §487; see *Sutherland v. Palme* (1949) 93 C.A.2d 307, 313, 208 P.2d 1035 [showing that insanity proceeding was dismissed is sufficient]; *Webb v. Youmans* (1967) 248 C.A.2d 851, 853, 57 C.R. 11 [complaint was fatally uncertain in this element]; *Sagonowsky v. More* (1998) 64 C.A.4th 122, 128, 75 C.R.2d 118, *supra*, §495 [in underlying arbitration proceeding, plaintiff was denied all relief, although arbitrator found that defendants in that action had failed to make a complete accounting; *held*, favorable termination]; *Rest.2d, Torts* §674, Comment k [noting exception where prior proceeding was *ex parte*]; 15 Southwestern U. L. Rev. 65; on similar requirement in action for malicious prosecution of criminal proceeding, see *supra*, §477 et seq.)

The favorable termination in the underlying action must "reflect on the merits" of the action. Whether a proceeding terminated in a defendant's favor is not based on whether defendant won, but whether termination tended to indicate his or her innocence of or lack of responsibility for the alleged misconduct. (*Lackner v. LaCroix* (1979) 25 C.3d 747, 750, 159 C.R. 693, 602 P.2d 393, *infra*, §502; *Pender v. Radin* (1994) 23 C.A.4th 1807, 1814, 29 C.R.2d 36.) Thus, a technical or procedural termination, as distinguished from a substantive one, is not favorable for purposes of a malicious prosecution claim. (*Lackner v. LaCroix*, *supra*, 25 C.3d 751.) Examples include dismissals (1) on statute of limitations grounds (*Warren v. Wasserman, Comden & Casselman* (1990) 220 C.A.3d 1297, 1303, 271 C.R. 579), (2) pursuant to a settlement (see *Dalany v. American Pac. Holding Corp.* (1996) 42 C.A.4th 822, 826, 50 C.R.2d 13), and (3) on grounds of laches (*Asia Investment Co. v. Borowski* (1982) 133 C.A.3d 832, 838, 184 C.R. 317). However, a termination based

on the parole evidence rule, which in effect is a rule of substantive law rather than of evidence, satisfies the favorable termination requirement. (*Casa Herrera v. Beydoun* (2004) 32 C.4th 336, 342, 9 C.R.3d 97, 83 P.3d 497, citing the text.)

In *Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 C.A.4th 409, 412, 104 C.R.2d 683, there was no favorable termination, even though a verdict was rendered for the malicious prosecution plaintiff, where judgment was entered pursuant to a negotiated settlement. Although plaintiff at one point received a favorable verdict, the proceeding *terminated* as a result of a settlement in which both parties gave up something to resolve the matter. In *Sierra Club Foundation v. Graham* (1999) 72 C.A.4th 1135, 1150, 85 C.R.2d 726, on the other hand, the underlying action was favorably terminated even though a related, but independent, action against the plaintiff was settled. Also, *HMS Capital v. Lawyers Title Co.* (2004) 118 C.A.4th 204, 215, 12 C.R.3d 786, found a favorable termination even though the parties, after a trial on the merits in which nothing was awarded on the complaint and damages were awarded on the cross-complaint, entered into a compromise and stipulation dealing only with the ancillary issue of the amount of costs.

In *Ray v. First Fed. Bank* (1998) 61 C.A.4th 315, 71 C.R.2d 436, the trial court awarded summary judgment on statute of limitations grounds for the malicious prosecution of plaintiff in the underlying legal malpractice action. On appeal from that judgment, the appellate court affirmed, but on the merits, instead of on the basis of the statute of limitations. Thus, in the subsequent malicious prosecution action, the primary issue was whether the favorable termination was made on the basis of the trial court's decision (not sufficient) or the appellate court opinion (sufficient). *Held*, the determination is made on the basis of the appellate disposition. (61 C.A.4th 318.)

West's Key Number Digest, Malicious Prosecution k.34 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Settlement positions before final termination are irrelevant:* The favorable termination element requires that the complained-of action be pursued to termination in the present plaintiff's favor. No exception is recognized for a final termination that, though not in the present plaintiff's favor, is more favorable than an earlier settlement proposal by the present plaintiff. (*StaffPro v. Elite Show Services* (2006) 136 C.A.4th 1392, 1400, 39 C.R.3d 682.)

(*New*) *No blanket rule that postjudgment settlement bars subsequent malicious prosecution action:* In *Siebel v. Mittlesteadt* (2007) 41 C.4th 735, 62 C.R.3d 155, 161 P.3d 527, a discharged sales director sued her former employer and its chief executive officer (CEO) in the underlying litigation, alleging that they discriminated against her because of gender, falsely promised to compensate her with lucrative commissions and stock options, and fired her to avoid paying this compensation. The jury specifically found that the employer had fired the employee because it honestly believed that her job performance was deficient, but that it had failed to pay her agreed commissions. All parties appealed, but later agreed to settle. Under the settlement, the employer agreed to pay most of the damages and costs awarded to the employee, but the agreement specifically provided that it did not modify the final termination of the action entered in favor of the CEO. The settlement released the employee from further liability in the case, but excepted her attorneys. The CEO subsequently brought the present malicious prosecution action against the attorneys. The trial court granted summary judgment to the attorneys. *Held*, this was error; "a postjudgment settlement constitutes a favorable termination when the malicious prosecution plaintiff received a favorable judgment in the underlying action, and settled without giving up any portion of the judgment in his favor." (41 C.4th 737.)

(a) The present defendants contend that what they term the "settlement rule" set forth in *Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 C.A.4th 409, 104 C.R.2d 683, text, p. 732, broadly bars bringing a malicious prosecution action after a postjudgment settlement. Their reliance on *Ferreira* is misplaced. The parties in that case agreed to a new disposition and an *amended* judgment. Ultimately, that amended judgment, not the jury verdict, ended the litigation. In contrast, the parties in the underlying action here, while accepting different rights and obligations between themselves, did not stipulate to a new judgment. The agreement to abandon their appeals allowed the *existing* judgment to become final. Although the settlement agreement compromised certain awarded amounts, the judgment itself, favoring the CEO (the present plaintiff), remained intact. (41 C.4th 741.)

(b) *Ferreira* should not be extended to the circumstances of this case. Adopting the present defendants' position would foreclose a malicious prosecution action whenever a case is resolved by agreement. This would run counter to the policy favoring negotiated dispositions. A blanket rule could also bar legitimate malicious prosecution actions, allowing unscrupulous parties and/or their attorneys to hide behind its shield. (41 C.4th 741.) Here, after a jury trial, the present plaintiff received a favorable judgment on the merits of the claims against him. If the parties had not appealed, he would have secured a favorable termination because the judgment reflected the merits of the action and his innocence of the misconduct alleged in the lawsuit. During the pendency of their appeals, the parties reached a settlement that did not amend the judgment on the merits as it related to the present plaintiff. Although the dollar amount the employee received from her employer was compromised, this amount related to the merits of the action between her and the employer. The underlying judgment for the present plaintiff on the merits was not affected. Because he received a favorable judgment in the underlying proceeding and settled without giving up any portion of the judgment in his favor, the parties' settlement constitutes a favorable termination. (41 C.4th 742.)



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 - e. Favorable Termination.
- 2. Requirement That Proceeding Have Terminated.

5 Witkin Sum. Cal. Law Torts § 499

[§ 499] Requirement That Proceeding Have Terminated.

(1) *In General.* The civil proceeding underlying the malicious prosecution action must in fact have terminated. (*Babb v. Superior Court* (1971) 3 C.3d 841, 850, 92 C.R. 179, 479 P.2d 379, citing the text; see *Rich v. Siegel* (1970) 7 C.A.3d 465, 469, 86 C.R. 665 [order for partial summary judgment and severance of remaining issues for trial; action still pending and no favorable termination]; 30 A.L.R.4th 572 [nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution]; on pleading of factual termination, see 5 Cal. Proc. (4th), Pleading, §713.)

(2) *No Malicious Prosecution Cross-Complaint in Underlying Action.* A defendant cannot set up an anticipated cause of action for malicious prosecution by way of cross-complaint in the main action. (*Babb v. Superior Court*, *supra*, 3 C.3d 841, 846.)

In *Jenkins v. Pope* (1990) 217 C.A.3d 1292, 266 C.R. 557, the cross-complainant sought to avoid the application of the *Babb* ruling by claiming that filing of a first amended complaint that deleted one of the causes of action alleged in the original complaint was equivalent to voluntary dismissal of an action, which would support an action for malicious prosecution (see *infra*, §501). The court held, however, that when the action as a whole is still pending, it is of no consequence whether a single cause of action has been determined in favor of the cross-complainant. (217 C.A.3d 1298, 1299.) "To allow a malicious prosecution suit to be based on a cause of action dropped from an amended complaint would discourage amendment of pleadings to delete theories which come to appear untenable." (217 C.A.3d 1301; on effect of partially favorable termination generally, see *infra*, §500.)

A cross-complaint may be proper, however, where a favorable termination has already occurred. In *Loomis v. Murphy* (1990) 217 C.A.3d 589, 266 C.R. 82, the court discussed the reasoning and conclusion of *Babb* (217 C.A.3d 593), and held that none of the objections to a cross-complaint for malicious prosecution were involved because the entire complaint had already been dismissed. "While we recognize the general disfavor in the law for claims of malicious prosecution, the public policy concerns underlying the *Babb* rule are not raised by the amended cross-complaint here as favorable termination of the prior action has already occurred. Where, as here, the elements of malicious prosecution are capable of sufficient statement by cross-complaint, we find no reason for permitting the

separate filing of such an action and yet prohibiting it as a cross-complaint. The concern for an increased number of malicious prosecution actions is unfounded in the instant scenario. Second, as the underlying complaint has already been resolved, the possibility of prejudice to the plaintiff or a compromise verdict does not exist. Neither is a conflict of interest situation presented here." (217 C.A.3d 594.)

(3) *Effect of Appeal*. A malicious prosecution action will not lie while an appeal from the judgment in the underlying action is pending. (*Friedman v. Stadum* (1985) 171 C.A.3d 775, 778, 217 C.R. 585; *Gibbs v. Haight, Dickson, Brown & Bonesteel* (1986) 183 C.A.3d 716, 721, 228 C.R. 398; see *Rest.2d, Torts* §674, Comment j; 41 A.L.R.2d 863 [pending appeal in civil action as precluding malicious prosecution action based on successful termination in trial court]; 52 Am.Jur.2d (2000 ed.), *Malicious Prosecution* §30.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §757.



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 - e. Favorable Termination.
 - 3. Partially Favorable Result.

5 *Witkin Sum. Cal. Law Torts* § 500

[§ 500] Partially Favorable Result.

Whether a termination partially in favor of the plaintiff is sufficient depends on whether the causes of action in the underlying action were separate or severable. (*Jenkins v. Pope* (1990) 217 C.A.3d 1292, 1301, 266 C.R. 557, supra, §499; see *Tabaz v. Cal Fed Finance* (1994) 27 C.A.4th 789, 792, 33 C.R.2d 134 [defendant in underlying action who prevailed on all causes of action relating to sale of note could institute malicious prosecution action, even though he lost on claim relating to conversion of note payment; conversion claim was separate and severable from others].)

In *Freidberg v. Cox* (1987) 197 C.A.3d 381, 242 C.R. 851, plaintiff F and defendant I, both attorneys, were involved in a previous action in which I sued F to recover a share of attorneys' fees based on the following theories: (a) joint venture; (b) tortious interference with contract; (c) reasonable value of services rendered. The trial judge dismissed the claims on the first two theories, but the jury rendered a verdict for I on the third. F then brought the present action, alleging that the joint venture and tortious interference claims theories were prosecuted maliciously. *Held*, summary judgment for defendant affirmed. In the underlying suit, there was but one injury, i.e., the loss of a share of attorneys' fees, and hence but one cause of action, regardless of the different theories of recovery. Because that cause of action did not terminate in favor of plaintiff, the action for malicious prosecution cannot be maintained. (197 C.A.3d 388.)

Freidberg was distinguished in *Paramount General Hosp. Co. v. Jay* (1989) 213 C.A.3d 360, 261 C.R. 723, in which J's underlying action against P involved multiple causes of action, most of which (but not all) resulted in termination favorable to P. Based on this favorable partial termination, P instituted the present malicious prosecution action, but the trial judge sustained J's demurrer, reasoning that there had been no favorable termination because P had not prevailed on all of the causes of action in the underlying action. *Held*, reversed.

(a) The underlying action alleged multiple causes of action which were severable and could have been the subject of separate proceedings. Thus, the fact that J joined severable causes of action in one trial and that P was not successful in defending the entire underlying action does not preclude P from properly pleading a favorable termination as to the causes of action on which it prevailed. (213 C.A.3d 363.)

(b) *Freidberg* is distinguishable. In that case, the various claims that were alleged in the underlying action were not

severable, thereby precluding the partially successful defendant in the underlying action from maintaining an action for malicious prosecution. (213 C.A.3d 369.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Severability analysis is not appropriate in determining favorable termination: In *StaffPro v. Elite Show Services* (2006) 136 C.A.4th 1392, 39 C.R.3d 682, the malicious prosecution defendant was successful on only one of several claims alleged in the underlying action. *Held*, judgment for defendant affirmed. Severability analysis is improper in determining whether a malicious prosecution plaintiff has demonstrated favorable termination of the underlying action.

(a) The Supreme Court in *Crowley v. Katleman* (1994) 8 C.4th 666, 34 C.R.2d 386, 881 P.2d 1083, text, §508, has stated that, for purposes of determining probable cause, each theory asserted in the underlying action must be separately considered, but separate consideration of prior claims is not appropriate with respect to the element of favorable termination. For purposes of determining favorable termination, the court should not make a separate investigation and retry each separate allegation without reference to the result of the previous suit. Instead, consideration should be given to the judgment as a whole; the judgment itself is the criterion by which to determine who was the successful party in the underlying action. (136 C.A.4th 1403.) Supreme Court dictum, like the favorable termination analysis in *Crowley*, carries persuasive weight, even though not controlling. (136 C.A.4th 1403, footnote 9.)

(b) Thus, a malicious prosecution plaintiff must establish a favorable termination of the entire underlying action. Other elements of the tort, such as probable cause, will only be reached after judgment has been rendered in that plaintiff's favor in the prior action as a whole. (136 C.A.4th 1406.) The judgment in the underlying action here was partly in the malicious prosecution defendant's favor, precluding the requisite favorable termination of the entire action. (136 C.A.4th 1407.)



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- 4. Dismissal Reflecting on Merits.

5 *Witkin Sum. Cal. Law Torts* § 501

[§ 501] Dismissal Reflecting on Merits.

A dismissal of the underlying action constitutes a favorable termination when it reflects on the merits of the action.

(1) *Failure To Bring Action to Trial*. A dismissal for failure to bring an action to trial within the statutory period for discretionary dismissal (see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §438) "does reflect on the merits of the action, and that reflection is favorable to the defendant in the action. The reflection arises from the natural assumption that one does not simply abandon a meritorious action once instituted." (*Minasian v. Sapse* (1978) 80 *C.A.3d* 823, 827, 145 *C.R.* 829.)

(2) *Voluntary Dismissal*. A voluntary dismissal, even one without prejudice, reflects on the merits. Although not res judicata, it is generally a favorable termination. (*MacDonald v. Joslyn* (1969) 275 *C.A.2d* 282, 289, 79 *C.R.* 707, supra, §488; *Weaver v. Superior Court* (1979) 95 *C.A.3d* 166, 185, 156 *C.R.* 745, infra, §511; cf. *Webb v. Youmans* (1967) 248 *C.A.2d* 851, 854, 57 *C.R.* 11 [plaintiff must plead and prove circumstances indicating that circumstances of voluntary dismissal showed favorable termination]; *Chauncey v. Niems* (1986) 182 *C.A.3d* 967, 968, 227 *C.R.* 718, supra, §490 [same].)

(3) *Absolute Privilege*. A dismissal based on the assertion of absolute privilege is on the merits. In *Berman v. RCA Auto Corp.* (1986) 177 *C.A.3d* 321, 222 *C.R.* 877, plaintiff B had been made a defendant in a prior federal court action by R on allegations that he had made false representations to the court which were damaging to R. B moved to dismiss the action on the ground that the statements were absolutely privileged under C.C. 47(2) (now C.C. 47(b); see infra, §567 et seq.), and the motion was granted. B then filed the present action for malicious prosecution against R. *Held*, a cause of action was stated.

(a) The defense of absolute privilege is unlike ordinary procedural defenses such as statute of limitations and laches; it is a substantive defense that creates immunity from liability. (177 *C.A.3d* 324, 325.) A termination of the proceeding for this reason "reflects the opinion of the Legislature that the action lacks merit because the protection of the right of an individual's access to the courts outweighs an individual's right to a civil remedy for harm resulting from misrepresentations made at a judicial proceeding." (177 *C.A.3d* 325.)

(b) Public policy also supports this conclusion. "Those who speak at judicial proceedings could be harassed by having to defend against suits based on their privileged publications, at least to the extent that they would have to hire an attorney to raise the privilege by answer or demurrer until the case was dismissed, with no way of being compensated and no means of dissuading plaintiffs from bringing unmeritorious suits." (177 C.A.3d 325.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Failure To Bring Action to Trial.*

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §451.

(2) *Voluntary Dismissal.* See *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 C.A.4th 1385, 1399, 69 C.R.3d 561 [in hearing on malicious prosecution defendant's SLAPP motion (see 5 Cal. Proc. (5th), *Pleading*, §1017 et seq.) evidence that defendant agreed to dismiss underlying action with prejudice for waiver of costs after she earlier dismissed without prejudice indicated probability that plaintiff would prevail on issue of favorable termination].(4) *(New) Dismissal as Discovery Sanction.* Dismissal for failure to comply with discovery orders reflects on the merits of the action where the circumstances indicate that noncompliance is a concession that the claim lacks merit. Thus, dismissal of an action for the plaintiff's refusal to be deposed constituted a favorable termination, on the natural assumption that one does not simply abandon a meritorious action once instituted. (*Ross v. Kish* (2006) 145 C.A.4th 188, 198, 197, 51 C.R.3d 484; citing *Minasian v. Sapse* (1978) 80 C.A.3d 823, 145 C.R. 829, text, p. 735.)



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- 5. Dismissal Not Reflecting on Merits.

5 Witkin Sum. Cal. Law Torts § 502

[§ 502] Dismissal Not Reflecting on Merits.

(1) *In General.* A dismissal that does not relate to the merits is not a favorable termination. (See *Robbins v. Blecher* (1997) 52 C.A.4th 886, 891, 60 C.R.2d 815 [dismissal of alter ego action against plaintiff on grounds of mootness did not constitute favorable termination where dismissal, rather than going to plaintiff's innocence, was due to reversal of antitrust judgment, rendering alter ego action superfluous]; *Eells v. Rosenblum* (1995) 36 C.A.4th 1848, 1854, 43 C.R.2d 323 [dismissal because of technical defect, pending appeal of related lawsuit].)

(2) *Dismissal Based on Statute of Limitations.* A dismissal based on the statute of limitations is not a favorable termination. In *Lackner v. LaCroix* (1979) 25 C.3d 747, 159 C.R. 693, 602 P.2d 393, B brought a medical malpractice action against Dr. L; the jury found that the complaint had not been filed within the applicable limitation period, and the judge dismissed the action. Dr. L then filed the present action for malicious prosecution against B and his attorneys. *Held*, summary judgment for defendants affirmed. Under the applicable rule, the termination "must reflect on the merits of the underlying action." (25 C.3d 750.) Termination by a statute of limitations defense is technical or procedural, and in no way reflects on the merits. (25 C.3d 751.) Moreover, it has repeatedly been declared that the statute of limitations is a "shield," not a "sword" (25 C.3d 752); and in basing his suit for malicious prosecution on the malpractice action barred by the statute, plaintiff was attempting to use the statute as a "sword." (25 C.3d 752.) (See *Drasin v. Jacoby & Meyers* (1984) 150 C.A.3d 481, 483, 197 C.R. 768 [following *Lackner*].)

Warren v. Wasserman, Comden & Casselman (1990) 220 C.A.3d 1297, 271 C.R. 579, raised an issue not addressed in *Lackner*: the effect of the malicious prosecution defendant's knowledge that the underlying action was barred by the statute of limitations. The plaintiff argued that an underlying action clearly barred by a limitations defense is not a legally tenable claim and thus that the underlying action was favorably terminated. *Held*, this contention confuses the elements of probable cause (*infra*, §506 et seq.) and favorable termination.

(a) "Whether a prior action was legally tenable goes to the issue of probable cause, that is, did the defendant have an honest and reasonable belief in the truth of the allegations. ... Whether a prior action was terminated favorably tends to show the innocence of the defendant in the prior action ... , and is not affected by the objective tenability of the claim. In short, these two elements of the malicious prosecution tort serve different purposes, and the legal tenability of the

underlying action is not the standard by which to judge whether the action was terminated in [plaintiff's] favor. The standard, as *Lackner* teaches, is simply whether the termination bears on the merits of the underlying action." (220 C.A.3d 1303.)

(b) "While filing a lawsuit knowing the limitations period has run is a petty act which wastes judicial resources, if a litigant wants to pursue a malicious prosecution action under those circumstances, he must eschew the procedural defense, forgo the easy termination, and obtain a favorable judgment on the merits. Otherwise, the policy reasons behind requiring a favorable termination would be thwarted if a litigant could meet the favorable termination requirement simply by alleging defendants knew the action was barred by the statute of limitations." (220 C.A.3d 1303.)

(3) *Dismissal Based on Laches*. A dismissal based on laches is not a favorable termination. (See *Asia Inv. Co. v. Borowski* (1982) 133 C.A.3d 832, 838, 184 C.R. 317 [following *Lackner*].)

(4) *Dismissal Based on Settlement*. Dismissal based on settlement of the underlying action generally does not reflect on the merits. (See *Villa v. Cole* (1992) 4 C.A.4th 1327, 1336, 6 C.R.2d 644 [in action based on police misconduct, settlement requiring dismissal of all defendants in exchange for their waiver of costs and fees was not termination in favor of officer who rejected the settlement but accepted its benefits]; *Pender v. Radin* (1994) 23 C.A.4th 1807, 1814, 29 C.R.2d 36 [parties to settlement agreement in underlying action could not successfully claim that the action terminated in their favor merely because a third defendant paid entire settlement amount]; *Ludwig v. Superior Court* (1995) 37 C.A.4th 8, 24, 43 C.R.2d 350 [city that settled two underlying lawsuits challenging proposed city project could not claim that settlements were in its favor because it agreed to them only under duress]; *Hurvitz v. St. Paul Fire & Marine Ins. Co.* (2003) 109 C.A.4th 918, 926, 135 C.R.2d 703 [insurer's settlement of suit by third party against insureds despite insureds' opposition deprived them of favorable termination needed to pursue later malicious prosecution action against third party; relying on *Villa*].)

In *Haight v. Handweiler* (1988) 199 C.A.3d 85, 244 C.R. 488, a patient filed a medical malpractice action against a physician, which resulted in a verdict for the physician. The physician then filed a malicious prosecution action against the patient, the patient's attorney in the malpractice action, and the patient's expert witness in the malpractice action. The expert settled for \$ 37,500. Subsequently, the attorney agreed to settle the physician's claim against him for \$ 37,500 in exchange for the dismissal of the claims against *both* the attorney and the patient. The patient did not participate in either settlement. The physician voluntarily dismissed all three defendants in his malicious prosecution action. The patient then instituted his own malicious prosecution action against the physician. *Held*, judgment for the physician affirmed; the patient failed to establish that the underlying action had terminated in his favor.

(a) A dismissal based on a settlement generally does not constitute a favorable termination, because it reflects ambiguously on the merits of the action. (199 C.A.3d 88.) To avoid this rule, the patient contended that, because he did not agree to the settlement, the termination was a voluntary dismissal that should allow him to sue the physician for bringing an allegedly groundless action against him. However, the focus is not on the patient's opinion of his own innocence; it is on that of physician, the dismissing party. (199 C.A.3d 89.)

(b) The evidence established that because the physician considered the total sum offered to him by the patient's codefendants (\$ 75,000) to be fair compensation, he had no reason to pursue the action against the patient, and that the patient's dismissal was a condition of the settlement with the attorney (to protect the attorney from future cross-complaints). Because such a termination does not necessarily reflect the physician's opinion that his action against the patient lacked merit, it does not qualify as a favorable termination in the context of a malicious prosecution suit. (199 C.A.3d 89.)

(5) *Dismissal To Avoid Litigation Expenses*. In *Oprian v. Goldrich, Kest & Associates* (1990) 220 C.A.3d 337, 269 C.R. 429, the underlying action in the malicious prosecution suit involved an option contract between plaintiff landowner, and defendants developer and its attorneys. The defendants sued plaintiff for breach of contract, and the plaintiff cross-complained for fraud. The jury returned a verdict for plaintiff on both the complaint and cross-complaint,

but the Court of Appeal reversed the judgment on the cross-complaint, directed the trial judge to enter judgment for defendants, and then dismissed the complaint on the basis of a representation by defendants' counsel at oral argument that if the judgment for plaintiff on the cross-complaint were reversed, defendants probably would be willing to forgo further prosecution of their complaint to avoid incurring additional attorneys' fees and the inconvenience of a second trial. *Held*, the requirement of a favorable termination was not met. "It would be a sad day indeed if a litigant and his or her attorney could not dismiss an action to avoid further fees and costs, simply because they were fearful such a dismissal would result in a malicious prosecution action. It is common knowledge that costs of litigation, such as attorney's fees, costs of expert witnesses, and other expenses, have become staggering. The law favors the resolution of disputes. 'This policy would be ill-served by a rule which would virtually compel the plaintiff to continue his litigation in order to place himself in the best posture for defense of a malicious prosecution action.' " (220 C.A.3d 344, quoting *Leonardini v. Shell Oil Co.* (1989) 216 C.A.3d 547, 264 C.R. 883.)

(6) *Dismissal of Interpleader Action.* In *Cantu v. Resolution Trust Corp.* (1992) 4 C.A.4th 857, 6 C.R.2d 151, 4 Cal. Proc. (4th), Pleading, §237, an action was filed against the malicious prosecution defendant, a savings and loan association, for allegedly mishandling funds deposited with it. Defendant filed an interpleader action (see 4 Cal. Proc. (4th), Pleading, §216 et seq.), naming plaintiff as one of the potential claimants to the fund. The trial judge issued a preliminary injunction staying the action against defendant, and released the disputed funds from its jurisdiction as a result of a settlement among all the claimants in the interpleader action, except for plaintiff. Defendant then dismissed the interpleader action with prejudice against all claimants, and plaintiff instituted the present action against defendant for malicious prosecution of the interpleader action. *Held*, judgment for defendant on demurrer affirmed; the interpleader action did not terminate in plaintiff's favor.

(a) An interpleader action is not adversarial, i.e., the interpleader plaintiff attempts to offer money to the claimants, not take it away. Hence, because plaintiff could not have been either a winner or loser with respect to defendant, the mere fact that defendant dismissed plaintiff from the interpleader action did not constitute a termination of that action in plaintiff's favor. (4 C.A.4th 881.)

(b) The trial court lost subject matter jurisdiction after it had disbursed the disputed funds in accordance with the settlement between defendant and the other named claimants. At that point defendant had to dismiss the interpleader action, or the trial court could have done so itself. Because a dismissal for lack of jurisdiction does not involve the merits, it cannot constitute a favorable termination. (4 C.A.4th 882.)

(c) Defendant's dismissal of plaintiff was a consequence of a settlement between itself and all of the other claimants. And a settlement does not constitute favorable termination of an action, even as to a party, such as plaintiff, who refused to participate in the settlement. (4 C.A.4th 882.) Hence, because plaintiff cannot dispute the fact that defendant dismissed him as a result of the settlement, he cannot allege that the dismissal resulted in a favorable termination. (4 C.A.4th 883.)

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SUPPLEMENT: [This section is current through the latest supplement]

(5) *Dismissal To Avoid Litigation Expenses.* See *Contemporary Services Corp. v. Staff Pro* (2007) 152 C.A.4th 1043, 1052, 61 C.R.3d 434 [voluntary dismissal in underlying action by malicious prosecution defendants did not constitute termination in malicious prosecution plaintiff's favor where record showed that dismissing defendants could not afford to pursue matter, not that they lost faith in merits of claims; citing *Oprian v. Goldrich, Kest & Associates* (1990) 220 C.A.3d 337, 269 C.R. 429, text, p. 738]. (6) *Dismissal of Interpleader Action.*

Cantu case:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §258.

Interpleader action:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §237 et seq.(7) (New) *Dismissal for Lack of Standing*. In *Hudis v. Crawford* (2005) 125 C.A.4th 1586, 24 C.R.3d 50, an action brought by nieces and a nephew for the elder abuse of their deceased aunt was dismissed for lack of standing because they were not her successors in interest. The defendants in the underlying action then sued for malicious prosecution, and that action was also dismissed. *Held*, affirmed; termination of the underlying action was not a favorable termination on the merits for malicious prosecution purposes.

(a) It is not essential to maintenance of an action for malicious prosecution that the prior proceeding was favorably terminated following trial on the merits. However, it is essential that the termination reflect the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit. A favorable termination does not occur merely because the party complained against has prevailed in the underlying action. Thus, a technical or procedural termination, as distinguished from a substantive termination, is not favorable for purposes of a malicious prosecution claim. (125 C.A.4th 1590.)

(b) A lack of standing is a jurisdictional defect. A dismissal for lack of jurisdiction does not involve the merits and cannot constitute a favorable termination. Here, the judgment in the underlying action was based solely on the fact that plaintiffs had not been appointed as the personal representatives of their aunt and had not established that they were her successors in interest. The merits of their elder abuse allegations were never considered by the court and were unrelated to the basis for the dismissal of the action. (125 C.A.4th 1592.)



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- A. Malicious Prosecution.
- 3. Malicious Institution of Civil Proceeding.
 - e. Favorable Termination.
- 6. Failure To Make Discovery.

5 Witkin Sum. Cal. Law Torts § 503

[§ 503] Failure To Make Discovery.

The courts have arrived at different results on whether noncompliance with discovery orders or requests in the underlying action constitutes a favorable termination.

In *Lumpkin v. Friedman* (1982) 131 C.A.3d 450, 182 C.R. 378, L engaged attorney F to bring a dental malpractice action, which was unsuccessful. F then sued L for money he had advanced as costs in the action. F failed to comply with the "Witness and Evidence Statement" required by the economical litigation project (as a substitute for pretrial discovery), and the judge gave judgment for L. L then brought the present malicious prosecution suit against F. *Held*, judgment on demurrer for F reversed. Even if the sanction imposed by the judge barred essential testimony that F sought to produce, it was a termination that reflected on the merits, in the same manner as a dismissal for refusal of a party to depose or respond to interrogatories. (131 C.A.3d 455.) In other words, failure to comply with discovery procedures, like failure to appear or press a case or to prosecute an action within the requisite time period, permits an inference that evidence not produced would be unfavorable. (131 C.A.3d 456, citing *Ev.C.* 412, 413; see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §102.)

Zeavin v. Lee (1982) 136 C.A.3d 766, 186 C.R. 545, disagreed with any blanket rule that might be suggested in *Lumpkin* that noncompliance with discovery equates with a favorable termination, and reached a different result. Here, attorney L filed a medical malpractice action against Dr. Z and Dr. K on behalf of Mrs. C. Then Mrs. C directed that the suit be dropped, refused to cooperate with her attorney, and refused to answer interrogatories. The judge dismissed the action with prejudice. Dr. Z and Dr. K then filed this malicious prosecution action against attorney L. *Held*, judgment for defendant on demurrer affirmed. At most, the dismissal of Mrs. C's malpractice action as a result of her conduct could be treated as a concession on her part that her action lacked merit; but her attorney made no such concession, the client was not his agent, and he was not the insurer of her conduct. (136 C.A.3d 771, 772, 773.) "It would be beyond law or reason to conclude that an attorney who in good faith files and diligently prosecutes an action could later be held liable for malicious prosecution solely because that attorney's client later unilaterally, and for reasons known only to herself, refuses to make discovery." (136 C.A.3d 772.) (See *De La Pena v. Wolfe* (1986) 177 C.A.3d 481, 484, 223 C.R. 325 [following *Zeavin v. Lee*; any concession by client from failure to make discovery was not binding on attorney].)

Pattiz v. Minye (1998) 61 C.A.4th 822, 826, 71 C.R.2d 802, distinguishing *Lumpkin*, held that dismissal of a cross-complaint as a discovery sanction did not reflect on the merits where the factual showing made by the cross-complainant of attempts at compliance negated any inference of her concession that the cross-complaint lacked merit.

SUPPLEMENT: [This section is current through the latest supplement]



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- 7. Judicial Arbitration Award.

5 Witkin Sum. Cal. Law Torts § 504

[§ 504] Judicial Arbitration Award.

In *Stanley v. Superior Court* (1982) 130 C.A.3d 460, 181 C.R. 878, attorney S filed suit for certain clients that ended with an award against them in a judicial arbitration proceeding, without costs to either party. The defendant in that suit then filed a malicious prosecution action against the former plaintiffs and S. After an unsuccessful motion for summary judgment, S sought mandamus to compel granting of the motion. *Held*, writ denied; the main action had been finally and favorably terminated.

(a) *Award as final and favorable termination.* The former plaintiffs had requested judicial arbitration, and did not exercise their statutory power to reject the award and seek a trial de novo. The decision of the arbitrator became final with the same effect as a judgment (see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §563). Hence, it reflects the opinion of the arbitrator that the former plaintiffs' claim was without merit, and the lack of a request for a trial de novo, like a voluntary dismissal (see supra, §501), reflects the opinion of the former plaintiffs that further prosecution was not wise or useful. (130 C.A.3d 465.)

(b) *No policy exception for judicial arbitration award.* S urged that the policy factors discussed in *Pace v. Hillcrest Motor Co.* (1980) 101 C.A.3d 476, 161 C.R. 662, holding that a small claims court proceeding will not support an action for malicious prosecution (see supra, §494), should be controlling here. But *Pace* was concerned with the *type of former proceeding* that would justify a malicious prosecution suit; here the proceeding was a normal civil action with attorneys and extensive discovery, and the usual damages caused by a malicious and baseless legal action were assertedly suffered. "To deny the injured party a chance to recover because the arbitration award in his favor was accepted by the other side (which acceptance had no effect in eliminating the damages that had already occurred) on the basis of an analogy to *Pace* where the filing of the small claims action caused none of these damages, is against logic, common sense and justice." (130 C.A.3d 468.)

(c) *Analogy of malicious prosecution of administrative proceeding.* The reasoning of *Hardy v. Vial* (1957) 48 C.2d 577, 311 P.2d 494, *infra*, §513, is persuasive. If the damages for which malicious prosecution actions are intended to provide recompense are suffered, the right to redress should not depend on whether the injured party prevailed by a judgment after an administrative or arbitration award or a judgment after trial. (130 C.A.3d 469.)

(d) *No adverse effect on judicial arbitration.* The contention that this decision will interfere with the functioning of judicial arbitration is unsupportable:

(1) If the plaintiff has brought a meritless case, he or she is already exposed to a malicious prosecution suit after trial or voluntary dismissal. Hence, the plaintiff loses nothing by requesting judicial arbitration: The plaintiff might win, or, in the event of a loss, can reject the award and ask for a trial. (130 C.A.3d 470.)

(2) The argument that no losing party will accept an award because of fear of a malicious prosecution suit is unsound. The same argument would logically apply to actions after trials; i.e., the losing party might not accept the judgment and appeal in order to avoid or delay a malicious prosecution suit. "The courts have not considered it good policy to bar the injured party's right to institute a malicious prosecution action in order to encourage the losing party to accept the unfavorable judgment without appeal." (130 C.A.3d 470.)

(3) Judicial arbitration procedure "is in effect a continuation of the settlement negotiation process"; i.e., unfavorable arbitration awards are usually rejected, but before the requested trial de novo most cases are settled. (130 C.A.3d 471.)

(4) If judgment on an award did not constitute favorable termination, the attorney for the winning party would have to advise his or her client to reject the award in order to preserve the right to sue for malicious prosecution. (130 C.A.3d 472.)

(e) *Arbitrator's denial of costs is no bar to malicious prosecution action.* The arbitrator has power to award costs "if appropriate" (see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §560); hence, the arbitrator has some discretion. (130 C.A.3d 472.) "The only conclusions that could be drawn from the arbitrator's award denying costs are either that [the defendant in the underlying action] waived costs, or the arbitrator erred, or the arbitrator decided not to award costs because he wished to encourage the losing plaintiff to accept the award (or settle the case along similar lines), not that the failure to award costs indicated a belief by the arbitrator that he erred in his decision on the merits." (130 C.A.3d 474.) (On contractual arbitration as basis for malicious prosecution suit, see *supra*, §495.)

SUPPLEMENT: [This section is current through the latest supplement]

Effect of final award:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §610. *Power to award costs:*

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §607.



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 - 8. Determination After Remand.

5 Witkin Sum. Cal. Law Torts § 505

[§ 505] Determination After Remand.

In *Sierra Club v. Superior Court* (1985) 168 C.A.3d 1138, 214 C.R. 740, plaintiff, an environmental organization, sought administrative mandamus (see 8 Cal. Proc. (4th), *Extraordinary Writs*, §257 et seq.) to challenge the California Coastal Commission's approval of the Rs' property development permit. The superior court determined that the Commission had applied an incorrect legal standard and remanded the matter to the Commission for reconsideration. The Commission, applying the standard required by the court, nevertheless concluded that the permit should be approved, and the court denied plaintiff's new petition for administrative mandamus. The Rs then filed an action for malicious prosecution. *Held*, summary judgment for plaintiff should be granted.

(a) The Rs' argument, that the proceeding had terminated in their favor, was based on the fact that they ultimately prevailed in the proceeding challenging approval of their permit. But plaintiff, by successfully attacking the Commission's act and obtaining a remand for reconsideration, prevailed in the administrative mandamus proceeding. "The petitioner ... may be considered successful if the agency is compelled to reconsider its action, even if the agency eventually reaches the same result." (168 C.A.3d 1146.)

(b) This conclusion is consistent with policy: "To allow an action for malicious prosecution in light of the Club's successful attempt to make the Commission follow the law would be a wholly unwarranted departure from the accepted policies underlying malicious prosecution actions, and would seriously chill the rights of anyone seeking to enforce procedural purity in administrative proceedings." (168 C.A.3d 1147.)

SUPPLEMENT: [This section is current through the latest supplement]
Administrative mandamus:

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §258 et seq.



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 - 3. Malicious Institution of Civil Proceeding.
 - f. Lack of Probable Cause.
 - 1. In General.

5 Witkin Sum. Cal. Law Torts § 506

[§ 506] In General.

(1) *Reasonable Belief in Success of Action.* The defendant in a malicious prosecution suit is protected if he or she acted with probable cause in bringing the prior proceeding, i.e., with a reasonable belief in the possibility of the suit being successful. (*MacGruer v. Deniville* (1931) 113 C.A. 49, 52, 297 P. 633; *Moore v. Durrer* (1932) 127 C.A. 759, 763, 16 P.2d 676; *Gause v. McClelland* (1951) 102 C.A.2d 762, 764, 228 P.2d 91; *Sutherland v. Palme* (1949) 93 C.A.2d 307, 313, 208 P.2d 1035; *Walsh v. Bronson* (1988) 200 C.A.3d 259, 270, 245 C.R. 888; *Copenbarger v. International Ins. Co.* (1996) 46 C.A.4th 961, 964, 54 C.R.2d 1, *infra*, §510; *HMS Capital v. Lawyers Title Co.* (2004) 118 C.A.4th 204, 216, 12 C.R.3d 786; see *Sangster v. Paetkau* (1998) 68 C.A.4th 151, 166, 80 C.R.2d 66 [malicious prosecution could not be based on cross-complaint for fraud where, from undisputed evidence, attorney could reasonably have concluded that plaintiff intended to and did defraud defendants]; *Rest.2d, Torts* §675; cf. *Masterson v. Pig'n Whistle Corp.* (1958) 161 C.A.2d 323, 336, 326 P.2d 918 [lack of probable cause shown by undisputed evidence]; *Puryear v. Golden Bear Ins. Co.* (1998) 66 C.A.4th 1188, 78 C.R.2d 507 [lack of probable cause]; *Arcaro v. Silva & Silva Enterprises Corp.* (1999) 77 C.A.4th 152, 156, 91 C.R.2d 433 [no probable cause to sue where validity of underlying action depended on authentic signature and ample evidence, known to suing party, suggested that forgery defense had merit].)

(2) *Objective Test.* The existence of probable cause is determined by an objective test: "a suspicion founded upon circumstances warranting a reasonable man's belief" that grounds exist for initiating proceedings. (*Bertero v. National General Corp.* (1974) 13 C.3d 43, 55, 118 C.R. 184, 529 P.2d 608, *supra*, §491; on reliance on advice of counsel, see *infra*, §509.) The question is whether, as an objective matter, "any reasonable attorney would have thought the claim tenable." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 C.3d 863, 882, 254 C.R. 336, 765 P.2d 498, *infra*, §510.) "If the court determines that there was probable cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated." (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 C.3d 875; on element of malice, see *infra*, §§511, 512.)

(3) *Role of Court and Jury.* The issue of probable cause is a question of law for the court. If the facts are not in dispute, the issue is decided by the court without any submission to the jury. If the evidence is conflicting, the jury decides the preliminary factual questions on which the determination is made. (*Sheldon Appel Co. v. Albert & Oliker*,

supra, 47 C.3d 874; *Swat-Fame v. Goldstein* (2002) 101 C.A.4th 613, 624, 124 C.R.2d 556.) "[C]ourts and not juries set the legal standard for malicious prosecution by determining whether the conduct at issue measures up to probable cause." (*Williams v. Coombs* (1986) 179 C.A.3d 626, 636, 637, 224 C.R. 865; see *Klein v. Oakland Raiders, Ltd.* (1989) 211 C.A.3d 67, 75, 82, 259 C.R. 149 [probable cause issue that was not based on any reasonable factual issue, but rather rested on interpretation of substantive antitrust and tort law, was determinable by court as matter of law under objective standard].)

(4) *Availability of Anti-SLAPP Motion*. A malicious prosecution action may be subject to an anti-SLAPP motion. (*Jarrow Formulas v. LaMarche* (2003) 31 C.4th 728, 734, 3 C.R.3d 636, 74 P.3d 737; *Chavez v. Mendoza* (2001) 94 C.A.4th 1083, 1087, 114 C.R.2d 825; on denial of anti-SLAPP motion in prior proceeding as showing probable cause, see *infra*, §507; on anti-SLAPP motions generally, see 5 *Cal. Proc.* (4th), *Pleading*, §962 et seq.)

(5) *Continuation of Action Without Probable Cause*. A person who continues a civil proceeding that was properly begun, or takes an active part in continuing it, for an improper purpose after learning that there is no probable cause for the proceeding becomes liable for malicious prosecution as if he or she had initiated the proceeding. (*Zamos v. Stroud* (2004) 32 C.4th 958, 973, 12 C.R.3d 54, 87 P.3d 802, *infra*, §510; *HMS Capital v. Lawyers Title Co.* (2004) 118 C.A.4th 204, 216, 12 C.R.3d 786; *Rest.2d, Torts* § 674, Comment c.)

West's Key Number Digest, Malicious Prosecution k.15

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Availability of Anti-SLAPP Motion*. See *Ross v. Kish* (2006) 145 C.A.4th 188, 197, 51 C.R.3d 484 ["It is settled" that malicious prosecution claim is subject to anti-SLAPP motion]; on malicious prosecution actions arising from prior action dismissed pursuant to anti-SLAPP motion (SLAPPback actions), see *Supp.*, *supra*, §469.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §1017 et seq.

(5) *Continuation of Action Without Probable Cause*. See *Bergman v. Drum* (2005) 129 C.A.4th 11, 23, 28 C.R.3d 112, *Supp.*, *infra*, §507 [rule of liability for continuation of action without probable cause, declared in *Zamos v. Stroud* (2004) 32 C.4th 958, 973, 12 C.R.3d 54, 87 P.3d 802, text, §510, applies retroactively].



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 - 2. Judgment or Ruling in Prior Proceeding.

5 Witkin Sum. Cal. Law Torts § 507

[§ 507] Judgment or Ruling in Prior Proceeding.

(1) *Judgment*. A judgment in the prior proceeding against the present plaintiff, although reversed on appeal, is, in the absence of other proof, conclusive of probable cause. (*Gause v. McClelland* (1951) 102 C.A.2d 762, 764, 228 P.2d 91; see *Mattel v. Luce, Forward, Hamilton & Scripps* (2002) 99 C.A.4th 1179, 1190, 121 C.R.2d 794 [finding in underlying federal copyright suit that defendant law firm filed meritless claim constituted evidence in malicious prosecution action that underlying suit was filed without probable cause]; *White v. Lieberman* (2002) 103 C.A.4th 210, 218, 126 C.R.2d 608 [judgment in underlying action that malicious prosecution plaintiff had slandered homeowners' title established probable cause despite irregularities affecting damages portion of judgment and despite judgment's reversal]; 58 A.L.R.2d 1422 [judgment in prior civil proceedings adverse to instant plaintiff in malicious prosecution as evidence of probable cause].)

The same is true where the judgment was subsequently set aside in the trial court. In *Cowles v. Carter* (1981) 115 C.A.3d 350, 171 C.R. 269, the trial in the prior civil action for damages by Carter against Cowles resulted in denial of a nonsuit and a jury verdict and judgment against Cowles; Cowles then successfully moved for judgment notwithstanding the verdict, and the judgment against him was vacated. In the present malicious prosecution suit by Cowles against Carter, plaintiff Cowles contended that the original verdict and judgment against him did not conclusively establish probable cause because it was set aside. *Held*, judgment on demurrer affirmed. If a trier of fact after a fair adversary hearing reached a determination on the merits against the defendant in the prior action, probable cause is conclusively established, even though the determination is reversed on appeal or set aside by the trial judge. (115 C.A.3d 358.) "We see no substantial reason for distinguishing between the action of the trial judge and the action of an appellate court in upsetting a jury verdict." (115 C.A.3d 359.)

(2) *Interim Ruling*. A different situation arises where the initial victory against the present plaintiff was merely an interim ruling, e.g., on a motion for summary judgment or nonsuit. *Lucchesi v. Giannini & Uniack* (1984) 158 C.A.3d 777, 786, 205 C.R. 62, held such a ruling not conclusive of probable cause:

(a) The judgment cases are distinguishable in that the initial victory of the plaintiff in the underlying action followed a full adversary hearing and a determination reached on the merits of that action. (158 C.A.3d 786.)

(b) In criminal proceedings, not even a holding order and denial of a motion under P.C. 995 amount to such a determination as to bar the acquitted defendant from pursuing a civil remedy for malicious prosecution. (158 C.A.3d 787; see supra, §478.) Even less significance attaches to the denial of a motion for summary judgment or for nonsuit in a civil proceeding. A motion for summary judgment may be denied for reasons not determinative of the merits (158 C.A.3d 787), and the denial of a motion for nonsuit is clearly not such a determination, for the motion will be denied on the minimal showing that there is some substantial evidence to prove the plaintiff's case (158 C.A.3d 787). (Cf. *Roberts v. Sentry Life Ins.* (1999) 76 C.A.4th 375, 383, 90 C.R.2d 408 [declining to follow *Lucchesi*].)

However, *Lucchesi* was disapproved in *Wilson v. Parker, Covert & Chidester* (2002) 28 C.4th 811, 123 C.R.2d 19, 50 P.3d 733. Here, the underlying action involved a suit for harassment and defamation brought by the teachers and administrators of a school against organizers of, and participants in, a protest at the school. Some of the protesters moved to strike the suit under C.C.P. 425.16, the anti-SLAPP statute (motion to strike lawsuit against public participation; see 5 Cal. Proc. (4th), *Pleading*, §962 et seq.) The trial judge denied the motion, partly on the ground that the teachers and administrators had shown a probability that they could prevail on the merits, i.e., they established a sufficient prima facie showing of facts necessary to sustain a favorable judgment. However, as to two of the protestors, the Court of Appeal vacated the order denying the motion to strike, and on remand the trial judge granted the motion as to them. The successful protesters then filed the present malicious prosecution action against the teachers and administrators and their attorneys. The trial judge sustained the demurrers of some of defendants and dismissed the action as to them. The Court of Appeal affirmed. *Held*, affirmed.

(a) A trial judge's denial of a motion to strike brought under C.C.P. 425.16, on the ground that plaintiff has established the requisite probability of success, establishes probable cause to bring the underlying action, and precludes the maintenance of a subsequent malicious prosecution action, unless the ruling in the underlying action is shown to have been obtained by fraud or perjury. The right to bring nonfrivolous civil actions, even if the chances of winning are extremely low, would be unduly burdened if the parties were exposed to tort liability for malicious prosecution for underlying actions that had been found potentially meritorious under C.C.P. 425.16. (28 C.4th 820.)

(b) In order to show a probability of prevailing in the underlying action, a plaintiff responding to an anti-SLAPP motion must state and substantiate a legally sufficient claim. In other words, the responding plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (28 C.4th 821.)

(c) That the trial court does not weigh the evidence or decide disputed questions of fact does not undermine the conclusion that an underlying claim found to have a probability of success under C.C.P. 425.16 was brought with probable cause. A party who has competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, even if also aware of evidence that will weigh against the claim. In other words, parties have the right to bring a claim that they think unlikely to succeed, so long as it is arguably meritorious. (28 C.4th 822.)

(d) The Court of Appeal in the underlying action held that the evidence of liability of two of the protestors was insufficient to proceed, but it did not hold or imply that a reasonable attorney could not have believed that the case had potential merit. Hence, the Court of Appeal's partial vacation of the trial court's order denying the anti-SLAPP motion did not vitiate the order's effect. (28 C.4th 822.)

(e) In the malicious prosecution action, plaintiff protestors contended that the determination of probable cause from a ruling in the underlying case is actually an aspect of collateral estoppel, so that no such determination may be made in circumstances where no collateral estoppel would arise, as where the prior decision was neither final nor on the merits. This contention is without merit. Probable cause, for purposes of a malicious prosecution action, is a legal issue; collateral estoppel, on the other hand, operates to preclude relitigation of an issue of fact. In other words, the determination of probable cause arises not because the same issue was litigated in the prior case, but because the result in the prior case establishes the existence of probable cause as a matter of law. (28 C.4th 825.)

(f) Plaintiffs contended that a rule equating denial of a *C.C.P.* 425.16 motion to strike with probable cause will deter SLAPP defendants from taking advantage of that statute for fear that denial will bar any malicious prosecution action, thus defeating the legislative intent that the anti-SLAPP procedures be employed to quickly end abusive litigation against public participation. However, given the low standard of probable cause under *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 C.3d 863, 871, 254 C.R. 336, 765 P.2d 498, *infra*, §510, defendants in the underlying suit are already aware that they have little chance of successfully maintaining a malicious prosecution action, regardless whether they bring an anti-SLAPP motion to strike or if they forgo the motion and defeat a SLAPP suit at trial. On the other hand, successfully employing the motion to strike remains a way of obtaining a speedy and low-cost termination of abusive litigation. These considerations should provide adequate incentive for an underlying action defendant who is confident that the litigation is truly meritless to employ the statutory procedures, even at some risk of losing the opportunity for a subsequent malicious prosecution suit. (28 C.4th 826.)

(h) The holding in *Lucchesi*, that denial of a summary judgment or nonsuit motion does not establish probable cause (because it is not a decision on the merits, but means only there is substantial evidence tending to prove all of the controverted facts necessary to establish the plaintiff's case) has been undermined by *Sheldon Appel*. In other words, probable cause to bring an action does not depend on it being meritorious, as such, but only on it being arguably tenable. A claimant in possession of evidence that, if believed, would justify a favorable verdict has the right to bring the claim, even where it is very doubtful that the claim will ultimately prevail. (28 C.4th 822.) (See *Jarrow Formulas v. LaMarche* (2003) 31 C.4th 728, 742, 3 C.R.3d 636, 74 P.3d 737 [fact that plaintiff obtained summary judgment on cross-complaint in underlying action does not establish lack of probable cause as matter of law; litigants have right to present issues that are arguably correct, even if it is extremely unlikely that they will win]; *Vanzant v. DaimlerChrysler Corp.* (2002) 96 C.A.4th 1283, 1288, 1291, 118 C.R.2d 48 [in underlying action by trademark owner, probable cause was established by interim orders granting plaintiff's motion for summary judgment, issuing a permanent injunction against defendant, and denying defendant's motion for summary judgment, even though orders were reversed; probable cause also existed for continuation of case after reversal]; *Fleishman v. Superior Court* (2002) 102 C.A.4th 350, 354, 125 C.R.2d 383 [issuance of preliminary injunction in underlying action relating to present plaintiff's use of trade secrets conclusively established probable cause, where trial judge in underlying action, although making procedural errors, credited verified complaint and declaration that substantiated legally cognizable claim]; *Slaney v. Ranger Ins. Co.* (2004) 115 C.A.4th 306, 318, 8 C.R.3d 915 [ultimate grant of summary judgment in favor of present plaintiff in underlying action was sufficient to offset original denial of motion for summary judgment and to support inference of lack of probable cause].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Judgment*. See *Plumley v. Mockett* (2008) 164 C.A.4th 1031, 1048, 1053, 79 C.R.3d 822 [fraud exception to interim adverse judgment rule may not be based on claim of fraud or perjury rejected by trier of fact; in malicious prosecution action arising out of defendants' action before federal Board of Patents after state court had ruled in plaintiff's favor in patent dispute, board's finding in favor of defendants on merits and its rejection of claims of fraudulent testimony established probable cause to bring patent action, even though board's decision was reversed by district court]. (2) *Interim Ruling*. See *Hutton v. Hafif* (2007) 150 C.A.4th 527, 550, 59 C.R.3d 109 [rule is "well-established" that denial of defense motion for summary judgment in underlying action establishes probable cause to file that action; citing *Wilson v. Parker, Covert & Chidester* (2002) 28 C.4th 811, 123 C.R.2d 19, 50 P.3d 733, text, p. 746.]. SLAPP suits:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1017 et seq. (3) (*New*) *Entry of Default Judgment*. *Bergman v. Drum* (2005) 129 C.A.4th 11, 28 C.R.3d 112, involved entry of a default judgment against the defendant in the underlying action. *Held*, entry of the default was not conclusive of probable cause.

(a) A plaintiff's victory at trial in the underlying action (unless obtained by means of fraud or perjury) is conclusive proof that there was probable cause for the suit, and precludes an action by the defendant for malicious prosecution. This is so even if the victory is reversed by a trial court (such as by entry of a judgment notwithstanding the verdict) or an appellate court. The rationale is that approval by the trier of fact, after a full adversary hearing, sufficiently

demonstrates that the underlying action was legally tenable. This conclusive presumption is not limited to a judgment in the plaintiff's favor following a trial in that action. Under *Wilson v. Parker, Covert & Chidester* (2002) 28 C.4th 811, 123 C.R.2d 19, 50 P.3d 733, text, p. 746, an interim determination in the underlying action also has the effect of establishing probable cause, provided that the interim ruling demonstrates that a suit is not totally and completely without merit. (129 C.A.4th 21.)

(b) This principle is not applicable here, however. In deciding whether to grant a default judgment to the plaintiff in the underlying action, the trial court did not have the benefit of a presentation by both sides on the merits. It lacked the full adversary hearing present in the cases finding a ruling to be conclusive of probable cause. It is the very fact that the trial court reviews the presentations of both sides in a particular interim ruling that justifies the recognition of a conclusive effect on the issue of probable cause. (129 C.A.4th 22.)



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CHAPTER IX - Torts

Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

A. Malicious Prosecution.

3. Malicious Institution of Civil Proceeding.

f. Lack of Probable Cause.

3. Some, But Not All, Claims or Amounts Supported by Probable Cause.

5 Witkin Sum. Cal. Law Torts § 508

[§ 508] Some, But Not All, Claims or Amounts Supported by Probable Cause.

(1) *One or More of Claims Not Supported by Probable Cause.* Where several claims are advanced in the underlying action, each must be based on probable cause. "We see no reason for permitting plaintiffs and cross-complainants to pursue shotgun tactics by proceeding on counts and theories which they know or should know to be groundless." (*Bertero v. National General Corp.* (1974) 13 C.3d 43, 57, 118 C.R. 184, 529 P.2d 608, supra, §491.)

This rule was reaffirmed in *Crowley v. Katleman* (1994) 8 C.4th 666, 34 C.R.2d 386, 881 P.2d 1083. Decedent's wife contested his will, which left the bulk of the estate to his own attorney. The will contest asserted six separate grounds to set aside the will, but the action terminated in favor of decedent's attorney, and the will was admitted to probate. Decedent's attorney then brought a malicious prosecution action against the wife and her attorneys, alleging that defendants had acted without probable cause in asserting five of the six grounds in the will contest. Defendants demurred generally to the complaint, asserting that probable cause existed for the sixth ground for contesting the will, thus barring the malicious prosecution action. The trial judge sustained the demurrer and dismissed the action. Acting under compulsion of the *Bertero* rule, which it strongly criticized, the Court of Appeal reversed. *Held*, judgment of the Court of Appeal affirmed.

(a) *Applicability of Bertero rule.* *Bertero* approved an instruction allowing the jury to find for the plaintiff in a malicious prosecution action even if only one of the three theories of liability pleaded in the underlying action lacked probable cause. The court reasoned that while a person may safely sue on alternative theories when he or she has a reasonable belief in the validity of each of those theories, that person should not be permitted to proceed on any theory that he or she knows or should know to be groundless. (8 C.4th 678.) The Court of Appeal was correct in holding that *Bertero* is controlling here. (8 C.4th 679.)

(b) *Bertero should not be overruled.* Unable to distinguish *Bertero*, defendants present several reasons why it should be overruled. None is sufficient.

(1) Defendant's main objection to the *Bertero* rule is that it is incompatible with the fundamental interest that the tort of malicious prosecution is designed to protect, i.e., the interest in freedom from unjustifiable and unreasonable

litigation. Defendants argue that when there is probable cause for at least one of the theories of liability asserted in the prior action, the defendant therein has to defend against that theory, and thus the "litigation" is not unjustifiable and unreasonable. This argument is unsound. "By defining the 'litigation' in issue as the prior action per se rather than each theory of liability litigated, defendants assume the point to be proved. It is true that such a defendant must in any event defend against the one valid theory of liability; but the defendant's obligation also to defend against the invalid theories of liability may well be so burdensome--as the complaint alleges in the case at bar--that it amounts to an impairment of the defendant's interest in freedom from unjustifiable and unreasonable litigation. Whether this is so is a question to be answered, again, not by the primary right theory but by the substantive law of malicious prosecution." (8 C.4th 687.)

(2) Defendants argue that the *Bertero* rule is no longer necessary because of the subsequent enactment of C.C.P. 128.5 (see 7 Cal. Proc. (4th), Trial, §240 et seq.) empowering the court to impose sanctions for frivolous conduct. This argument fails because the legislative history and subsequent amendments of the statute show that (a) the reason for enacting the statute was to increase the power of trial courts to manage their calendar and expeditiously process civil actions by authorizing monetary sanctions, i.e., attorneys' fees, not previously authorized; and (b) the statute was not intended as a substitute for substantive causes of action arising out of the underlying facts, such as an action for malicious prosecution. In addition, the remedies are not coextensive. C.C.P. 128.5 allows compensation only for out-of-pocket litigation costs, while in a malicious prosecution action, recovery can include consequential damages. (8 C.4th 688.)

(3) Defendants argue that under the *Bertero* rule the apportionment of damages between the theories of liability that are and are not supported by probable cause is difficult and highly speculative. However, defendants made no showing that properly instructed juries cannot perform this task fairly and consistently. Moreover, any difficulty in this regard is chargeable to the defendant. In other words, the defendant, by uniting groundless accusations with those for which probable cause might exist, cannot escape liability because of the plaintiff's inability to divide his damages between the two. (8 C.4th 690.)

(4) The *Bertero* rule is not, as argued by defendants, inconsistent with the modern practice of pleading inconsistent counts when the pleader is in doubt as to which theory most accurately reflects the events and can be established by the evidence. "The concern is unfounded. *Bertero* was not meant to discourage that practice, and we are not aware that it has had any such effect during the past 20 years. Certainly defendants make no such showing. As noted above, the *Bertero* rule requires only that the plaintiff refrain from asserting or pursuing such theories if they lack probable cause and are motivated by malice. The plaintiff remains free to allege any and all 'inconsistent counts' that a reasonable attorney would find legally tenable on the basis of the facts known to the plaintiff at the time." (8 C.4th 691.)

(c) *Policy considerations favor retention of Bertero rule.*

(1) A person maliciously sued has two remedies: the sanctions remedy under C.C. 128.5 and the tort remedy of malicious prosecution. The policies furthered by the sanctions remedy are (a) encouraging free access to the courts for the settlement of disputes, and (b) avoiding the burdening of the judicial system by additional litigation. The tort remedy also furthers two policies: (a) affording a remedy to the individual who is harmed by being forced to defend against a fabricated claim, and (b) preventing the judicial process from being adversely affected by unjust litigation. Both of these remedies seek to avoid burdening the judicial system by additional litigation, and the issue is whether one burden outweighs the other. (8 C.4th 693.) It is therefore necessary to compare the first pair of policies stated above to determine which policy, in the present context, is entitled to greater weight: the policy of encouraging free access to the courts, served by the sanctions remedy, or the policy of redressing the harm suffered by individuals compelled to defend against unjustifiable litigation, served by the tort remedy. (8 C.4th 694.)

(2) The policy of encouraging untrammelled access to the courts promotes social peace, but it also burdens already overcrowded dockets; and all litigation exacts both public and private costs. Society is willing to incur those burdens and costs when the litigation is well founded or, if unsuccessful, at least initiated with probable cause and without malice. However, the policy of encouraging judicial access becomes counterproductive when it operates to promote

litigation that is groundless and motivated by malice; such litigation has no place in our judicial system. "After careful consideration, we see no reason to reach a different result when the litigation in question is the assertion of baseless and malicious grounds of liability in a single lawsuit: in both instances the balance tips in favor of the policy of making whole the individuals harmed by such abuse of our courts." (8 C.4th 694.)

(3) A persuasive analogy can be drawn from the cases involving the litigation privilege of C.C. 47(b) (*infra*, §567 et seq.), which serves the policy of judicial access by protecting any publication made in the course of a judicial proceeding. Although the policy of encouraging judicial access served by this privilege is strong, the cases nevertheless uniformly hold that it does not apply to the tort of malicious prosecution because when litigation is groundless and motivated by malice, the balance tips in favor of the policy of redressing the individual harm inflicted by that litigation. And because the policy of judicial access in the present case is essentially identical to the policy underlying the litigation privilege, the cases interpreting that privilege are persuasive here. (8 C.4th 695.) (See *Mabie v. Hyatt* (1998) 61 C.A.4th 581, 589, 71 C.R.2d 657 [malicious prosecution action could be based on the one count not supported by probable cause, even though additional count was supported by probable cause]; *Videotape Plus v. Lyons* (2001) 89 C.A.4th 156, 161, 107 C.R.2d 1 [reversal of summary judgment on conversion count in underlying action only established triable issue of fact on that cause of action; it did not establish probable cause on negligence or fraud counts as required by *Crowley*]; *Hindin v. Rust* (2004) 118 C.A.4th 1247, 1259, 13 C.R.3d 668 [malicious prosecution defendant cannot escape liability by showing "partial probable cause" for underlying action; following *Crowley*]; 23 *Pepperdine L. Rev.* 1073 [*Crowley*].)

(2) *Most of Amount Sought Is Not Supported by Probable Cause.* Just as a malicious prosecution suit may be maintained where only one of several claims in the underlying action lacked probable cause, so too may a malicious prosecution action be maintained where most but not all of the amount sought in the underlying action was claimed without probable cause. The mere fact that some small amount of money may have been owed by the defendant in the underlying action does not lessen the adverse effect of that action on defendant or on the judicial process. (*Citi-Wide Preferred Couriers v. Golden Eagle Ins. Corp.* (2003) 114 C.A.4th 906, 913, 8 C.R.3d 199.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *One or More of Claims Not Supported by Probable Cause.* Sanctions for frivolous conduct:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §227 et seq.



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 - f. Lack of Probable Cause.
 - 4. Advice of Attorney.

5 Witkin Sum. Cal. Law Torts § 509

[§ 509] Advice of Attorney.

(1) *Good Faith and Full Disclosure of Facts.* As in malicious prosecution of a criminal case (see *supra*, §482), proof of reliance on the advice of counsel in good faith after full disclosure of the facts establishes probable cause. (*Citizens State Bank v. Hoffman* (1941) 44 C.A.2d 854, 857, 113 P.2d 221; *Murdock v. Gerth* (1944) 65 C.A.2d 170, 178, 150 P.2d 489; *Brinkley v. Appleby* (1969) 276 C.A.2d 244, 247, 80 C.R. 734, quoting the text; *Pond v. Insurance Co. of North America* (1984) 151 C.A.3d 280, 288, 198 C.R. 517; *DeRosa v. Transamerica Title Ins. Co.* (1989) 213 C.A.3d 1390, 1397, 262 C.R. 370; *Sosinsky v. Grant* (1992) 6 C.A.4th 1548, 1558, 8 C.R.2d 552; *Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 C.A.4th 55, 68, 49 C.R.2d 551; see *Palmer v. Zaklama* (2003) 109 C.A.4th 1367, 1383, 1 C.R.3d 116 [burden of showing good faith reliance on attorney's advice rests on defendant]; *Rest.2d, Torts* §675(b); 26 Proof of Facts 2d 275 [reliance on advice of counsel in bringing suit].)

(2) *Bad Faith or Withholding of Facts.* This defense is unavailable where there is bad faith or withholding of facts from counsel. (*Baker v. Gawthorne* (1947) 82 C.A.2d 496, 500, 186 P.2d 981; *Albertson v. Raboff* (1960) 185 C.A.2d 372, 386, 8 C.R. 398, *Swat-Fame v. Goldstein* (2002) 101 C.A.4th 613, 629, 124 C.R.2d 556; *Palmer v. Zaklama*, *supra*; see *Hudson v. Zumwalt* (1944) 64 C.A.2d 866, 875, 149 P.2d 457 [defense rejected where defendant was himself a practicing attorney, and did not disclose all facts to his lawyer].)

In *Bertero v. National General Corp.* (1974) 13 C.3d 43, 118 C.R. 184, 529 P.2d 608, *supra*, §491: (a) Bad faith was shown by ample evidence, including a letter from the attorney to his client during the pendency of the appeal in the prior action, admitting that he argued a weak point in his brief "not because of any high hopes of now winning it, but because I wanted to show the Appellate Court what a bastard Bertero was." (b) Insufficient disclosure was shown by the testimony of the client and attorney that all books and records of the client had been made available to the attorney. This "failed to meet the burden that counsel must be provided with specific facts and not merely unleashed on a hunting expedition." (13 C.3d 55.)

West's Key Number Digest, Malicious Prosecution k.25(2)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Bad Faith or Withholding of Facts.* See *Ross v. Kish* (2006) 145 C.A.4th 188, 202, 51 C.R.3d 484 [defendant's claimed reliance on advice of two attorneys in instituting prior action did not, as matter of law, defeat plaintiff's prima facie showing of lack of probable cause; defendant had personal relationship with one attorney that demonstrated bias and had business relationship with other attorney, and trier of fact could reasonably conclude that defendant did not seek opinion of either in good faith].



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- 5. Action Against Attorney.

5 Witkin Sum. Cal. Law Torts § 510

[§ 510] Action Against Attorney.

(1) *In General.* In an action against an attorney alleging malicious prosecution of a prior civil proceeding, the standard for determining probable cause is objective, i.e., whether a reasonable attorney would have thought the claim legally tenable. This was the holding in *Sheldon Appel Co. v. Albert & Olier (1989) 47 C.3d 863, 254 C.R. 336, 765 P.2d 498*, analyzing and disapproving a number of prior Court of Appeal decisions. The trial court submitted the probable cause issue to the jury with instructions that the evidence must establish that the members of defendant law firm, after a reasonable investigation and industrious search of legal authority, had an honest belief that the claims of their clients in the underlying action were tenable, and that the firm prosecuted claims that a reasonable lawyer would regard as tenable, or did not unreasonably neglect to investigate the facts and law in making the determination to proceed with the prior action. As so instructed, the jury found in favor of plaintiffs, and the Court of Appeal affirmed. *Held*, reversed.

(a) *Role of court and jury.*

(1) The "malice" element of malicious prosecution (see *infra*, §511, 512) relates to the subjective intent or purpose with which the defendant acted in initiating the prior action, and this motivation is a question of fact for the jury. In contrast, the existence or absence of "probable cause" has traditionally been viewed as a question of law for the court. (47 C.3d 874, 875; see *supra*, §506.) An important policy consideration underlies the common law rule. "The question whether, on a given set of facts, there was probable cause to institute an action requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors, and courts have recognized that there is a significant danger that jurors may not sufficiently appreciate the distinction between a merely unsuccessful and a legally untenable claim. To avoid improperly deterring individuals from resorting to the courts for the resolution of disputes, the common law affords litigants the assurance that tort liability will not be imposed for filing a lawsuit unless a court subsequently determines that the institution of the action was without probable cause." (47 C.3d 875.)

(2) Here, though there were no disputed questions of fact, the judge submitted the issue to the jury under an elaborate instruction, including a determination whether the firm had "prosecuted claims which a reasonable lawyer would regard as tenable"; this instruction "clearly operated to delegate the probable cause determination to the jury and deprived defendant of the protection afforded by the independent resolution of this element by the court." (47 C.3d

876.) This error was committed in reliance on a number of Court of Appeal decisions which are now to be reassessed. (47 C.3d 877.)

(b) *Objective or subjective test.*

(1) A broad dictum in *Tool Research & Engineering Corp. v. Henigson* (1975) 46 C.A.3d 675, 120 C.R. 291, stated a twofold test in these cases: "The attorney must entertain a subjective belief in that the claim merits litigation and that belief must satisfy an objective standard." (47 C.3d 877, 878.) This subjective belief language, repeated and applied uncritically in numerous Court of Appeal decisions, alters the probable cause element in a fundamental respect. "[E]ven if a trial court finds, on the basis of the facts known to the defendant attorney, the prior lawsuit was objectively reasonable--and thus that the malicious prosecution plaintiff was *not* subjected to an unjustified lawsuit--the court cannot properly terminate the action in favor of the defendant so long as the plaintiff presented any evidence raising a question as to whether the defendant attorney subjectively believed in the tenability of the claim. And because the issue of the attorney's subjective belief or nonbelief in legal tenability would rarely be susceptible of clear proof and, when controverted, would always pose a factual question, the dictum would in many cases effectively leave the ultimate resolution of the probable cause element to the jury, rather than to the court." (47 C.3d 878.)

(2) Although Supreme Court decisions are not as clear as they might be on this issue (see *Franzen v. Shenk* (1923) 192 C. 572, 221 P. 932, *Bertero v. National General Corp.* (1974) 13 C.3d 43, 118 C.R. 184, 529 P.2d 608, supra, §491, and *Albertson v. Raboff* (1956) 46 C.2d 375, 295 P.2d 405, infra, §511), when properly understood they do not support the *Tool Research* dictum. Although they indicate that in some cases the defendant's subjective belief may be relevant, "in all cases the 'belief' in question related to the defendant's belief in, or knowledge of, a *given state of facts*, and not to the defendant's belief in, or evaluation of, *the legal merits of the claim*." (47 C.3d 879.)

(3) "Accordingly, when, as in this case, the facts known by the attorney are not in dispute, the probable cause issue is properly determined by the trial court under an objective standard; it does not include a determination whether the attorney subjectively believed that the prior claim was legally tenable." (47 C.3d 881.)

(4) "Lest there be any confusion, however, we strongly emphasize that our conclusion in this regard does not by any means suggest that an attorney who institutes an action which he does not believe is legally tenable is free from the risk of liability for malicious prosecution. If the trial court concludes that the prior action was not objectively tenable, evidence that the defendant's attorney did not subjectively believe that the action was tenable would clearly be relevant to the question of malice." Thus, "the malicious prosecution tort will continue to deter attorneys from filing actions which they do not believe are legally tenable." (47 C.3d 881.)

(c) *Irrelevance of attorney research.* The additional suggestion in *Tool Research*, that a plaintiff might prove lack of probable cause by showing that the attorney failed to conduct "a reasonable investigation and industrious search of legal authority," was relied on in subsequent Court of Appeal cases, but this dictum is also unsound in shifting the focus of the probable cause inquiry from the objective tenability of the prior claim to the adequacy of the defendant's performance as an attorney. (47 C.3d 883.) "Furthermore, this component ... is also at odds with a consistent line of California decisions which have made clear that an attorney's duty of care runs primarily to his own client rather than to the client's adversary. ... Allowing inadequate research to serve as an independent basis for proving the absence of probable cause on the part of an attorney would tend to create a conflict of interest between the attorney and client, tempting a cautious attorney to create a record of diligence by performing extensive legal research, not for the benefit of his client, but simply to protect himself from his client's adversaries in the event the initial suit fails." (47 C.3d 883.)

(d) *Expert testimony inadmissible.* It was error to permit an attorney to be called as an expert witness to give his opinion whether a reasonable attorney would conclude that the claims advanced in the prior action were tenable. This was a matter within the province of the court to decide. (47 C.3d 884.)

(e) *Proper standard of probable cause.* In *re Marriage of Flaherty* (1982) 31 C.3d 637, 183 C.R. 508, 646 P.2d

179, 9 Cal. Proc. (4th), *Appeal*, §837, concluded that an appeal could be found frivolous for purposes of imposing sanctions only if "any reasonable attorney would agree that the appeal is totally and completely without merit." (47 C.3d 885.) *Williams v. Coombs* (1986) 179 C.A.3d 626, 224 C.R. 865, suggested a more stringent standard ("the prudent attorney test"), in malicious prosecution actions against attorneys, but there is no reason to afford litigants and their attorneys less protection from subsequent tort liability than they receive from court-imposed sanctions within the initial action. (47 C.3d 885.) Thus, the *Flaherty* standard modified to fit the context, i.e., "whether any reasonable attorney would have thought the claim tenable"--may make it clearer that, in evaluating the issue of probable cause, "a court must properly take into account the evolutionary potential of legal principles." (47 C.3d 886.) (See *Leonardini v. Shell Oil Co.* (1989) 216 C.A.3d 547, 564, 264 C.R. 883 [discussing probable cause in the light of *Sheldon Appel*]; *Hufstедler, Kaus & Ettinger v. Superior Court* (1996) 42 C.A.4th 55, 63, 49 C.R.2d 551 [under objective test of *Sheldon Appel*, defendant attorney had probable cause to prosecute libel action, despite subjective knowledge suggesting contrary]; *Bixler v. Goulding* (1996) 45 C.A.4th 1179, 1189, 53 C.R.2d 246 [listing Court of Appeal decisions applying *Sheldon Appel* probable cause standard]; *Puryear v. Golden Bear Ins. Co.* (1998) 66 C.A.4th 1188, 1194, 78 C.R.2d 507 [applying standard]; *Swat-Fame v. Goldstein* (2002) 101 C.A.4th 613, 624, 124 C.R.2d 556 [malicious prosecution action against lawyer for instituting fraud action could not be maintained where complaint simply reflected what his client relayed to him; that lawyer did not know that allegations would not support fraud action was established by order overruling demurrer; letter to lawyer stating that "[you] are substantially misinformed" did not put him on notice]; *Morrison v. Rudolph* (2002) 103 C.A.4th 506, 512, 126 C.R.2d 747 [malicious prosecution action could not be maintained against lawyer who, based on his client's account of events, instituted underlying action tenable as routine claim of misrepresentation in real estate case]; 30 Proof of Facts 2d 197 [attorney's malicious prosecution of client's action].)

In *Copenbarger v. International Ins. Co.* (1996) 46 C.A.4th 961, 54 C.R.2d 1, plaintiff attorneys represented a client in a divorce proceeding. Defendants, other attorneys, later represented her in a malpractice action against plaintiffs. Defendants then filed, and later dismissed, an indemnity claim against plaintiffs, alleging that they contributed to the client's losses. Based on the indemnity action, plaintiffs filed the present malicious prosecution action. *Held*, judgment for defendants affirmed. Prior to the dismissal of the indemnity action, the law was confused regarding whether an attorney could seek indemnity against successor attorneys. Judging the matter objectively, it could not be said that a reasonable attorney would not have thought the indemnity claim was tenable. Defendants thus had probable cause. (46 C.A.4th 964.)

(2) *Continuation of Action Without Probable Cause.* In *Zamos v. Stroud* (2004) 32 C.4th 958, 12 C.R.3d 54, 87 P.3d 802, plaintiff attorneys had represented B in an action related to the foreclosure of her house. That action was settled. Nearly 2 years later, B, represented by S, sued plaintiffs for fraud, alleging that plaintiffs, to induce B to settle the foreclosure action, made but did not keep the following promises: (a) they would continue to represent her to judgment against the nonsettling defendants; (b) they would represent B in her malpractice lawsuit against her former attorneys; and (c) they would have her house returned to her. Shortly after the fraud complaint was served, plaintiffs sent S the reporter's transcripts of three hearings in the foreclosure action that allegedly proved that the foregoing promises were never made. Based on these transcripts, plaintiffs filed a summary judgment motion, but the motion was denied in view of B's declaration that the promises had indeed been made. The fraud action then proceeded to trial, and the trial judge granted plaintiffs' motion for nonsuit, finding that no reasonable jury could have ruled in B's favor. Alleging that the fraud action had been filed to extort an unwarranted settlement, plaintiffs then filed the present malicious prosecution action against S. S responded with an anti-SLAPP motion under C.C.P. 425.16, arguing that, because his decision to file the fraud action was based on B's statements regarding the alleged promises, plaintiffs could not show a reasonable probability of success in the malicious prosecution action. The trial court dismissed the action. The Court of Appeal reversed. *Held*, judgment of the Court of Appeal affirmed.

(a) One of the elements of malicious prosecution is *commencing, bringing, or initiating* an action without probable cause. S contends that *continuing* to prosecute a lawsuit discovered to lack probable cause does not constitute the tort of malicious prosecution. In making this argument S relies heavily on the idea that the tort of malicious prosecution is a

disfavored cause of action. It is true that the tort is disfavored, both because of its potential to impose an undue chilling effect on the ordinary citizen's willingness to report criminal conduct or to bring a civil dispute to court and because, as a means of deterring excessive and frivolous lawsuits, it has the disadvantage of constituting a new round of litigation itself. (32 C.4th 965, citing *Sheldon Appel*, *supra*, and *Wilson v. Parker, Covert & Chidester* (2002) 28 C.4th 811, 123 C.R.2d 19, 50 P.3d 733, *supra*, §507.) On the other hand, the characterization of malicious prosecution as a disfavored cause of action should not be employed to defeat a legitimate cause of action, or to invent new limitations on the substantive right, without support in authority or principle. Here, confining the tort to the *initiation* of an action without probable cause would not be supported by authority or principle. (32 C.4th 966.)

(b) Although this is a question of first impression for this court, over 25 years ago, the Second Restatement of Torts stated that one who continues a civil proceeding that was properly begun, or one who takes an active part in continuing it, for an improper purpose after learning that there is no probable cause for the proceeding becomes liable as if he or she had initiated the proceeding. The Restatement's position has been adopted in numerous states and research has not revealed a single state that has declined to adopt the Restatement's view in this regard. (32 C.4th 966.)

(c) Defendant relies on *Vanzant v. DaimlerChrysler Corp.* (2002) 96 C.A.4th 1283, 118 C.R.2d 48, *supra*, §507, and *Swat-Fame*, *supra*. Both decisions relied on *Coleman v. Gulf Ins. Group* (1986) 41 C.3d 782, 226 C.R. 90, 718 P.2d 77, *supra*, §493, and *Coleman* is distinguishable. In *Coleman*, the defendant in a malicious prosecution action had merely continued its defense of the underlying wrongful death action by filing an appeal. Here, defendant in the malicious prosecution action continued the prosecution of the underlying fraud action after learning that it was baseless. (32 C.4th 968.)

(d) The limitation that defendant urges is also without support in principle. Malicious prosecution is actionable because it harms the individual against whom the claim is made, and because it threatens the efficient administration of justice. Continuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset. (32 C.4th 969, citing *Bertero*, *supra*.) Furthermore, holding an attorney liable for damages that result from prosecuting a civil claim after he or she learns that the claim has no merit encourages voluntary dismissals of meritless claims at the earliest stage possible, assists the efficient administration of justice, and reduces harm to individuals targeted by meritless claims. Moreover, by advising a client to dismiss a meritless case, the attorney will help the client avoid the cost of fruitless litigation and limit the client's exposure to liability for malicious prosecution. (32 C.4th 969.)

(e) Defendant contended that holding that malicious prosecution includes continuing to prosecute a lawsuit discovered to lack probable cause would, contrary to public policy, divert an attorney's attention away from the zealous representation of his or her client by causing the attorney (1) to second-guess the merits of the litigation, and (2) to fear retaliation for malicious prosecution if the attorney argued for an extension of the law. This contention is without merit. Only those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution action, and the same standard will apply to the continuation of the action. Applying the standard may be difficult, but applying it to the decision to continue to prosecute the action should be no more or less difficult than applying it to the decision to initiate the action. (32 C.4th 970.)

(f) "Malicious prosecution ... includes continuing to prosecute a lawsuit discovered to lack probable cause." (32 C.4th 973, disapproving *Swat-Fame*, *Vanzant*, and *Morrison v. Rudolph*, *supra*, to the extent inconsistent with the views expressed in the opinion.)

West's Key Number Digest, Malicious Prosecution k.10, 42

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Marriage of Flaherty case:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §989.(2) *Continuation of Action Without Probable Cause*. See *Bergman v. Drum* (2005) 129 C.A.4th 11, 23, 28 C.R.3d 112, Supp., supra, §507 [holding of *Zamos v. Stroud* (2004) 32 C.4th 958, 973, 12 C.R.3d 54, 87 P.3d 802, text, p. 757, that attorney who continues to prosecute action discovered to be meritless may be liable for malicious prosecution, applies retroactively]; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 C.A.4th 1385, 1402, 69 C.R.3d 561 [on defendant attorneys' SLAPP motion (see 5 Cal. Proc. (5th), *Pleading*, §1017 et seq.), malicious prosecution plaintiff showed probability of prevailing on issue that defendants, including those who associated into underlying case shortly before dismissal, lacked probable cause to continue action; defendants had alleged 18 causes of action, most of which did not relate to client's concerns, and pursued action for months after client denied most types of damages].



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A. Malicious Prosecution.

3. Malicious Institution of Civil Proceeding.

g. Malice.

1. In General.

5 Witkin Sum. Cal. Law Torts § 511

[§ 511] In General.

(1) *Requirement of Ill Will or Improper Motive.* Recovery for malicious prosecution of a civil action, like that of a criminal proceeding (see *supra*, §485), requires that the underlying action have been instituted with malice. It is not improper to bring a civil suit for personal ends, and consequently it is necessary to plead and prove either actual ill will or some ulterior purpose distinct from that of enforcement of the alleged cause of action. (*Rest.2d, Torts* §676; see *Downey Venture v. LMI Ins. Co.* (1998) 66 C.A.4th 478, 494, 78 C.R.2d 142, 2 Summary (10th), *Insurance*, §272 [malice imports wilfulness; citing the text].)

In *Albertson v. Raboff* (1956) 46 C.2d 375, 295 P.2d 405, the court observed that the malice required "is not limited to actual hostility or ill will toward plaintiff but exists when the proceedings are instituted primarily for an improper purpose." (46 C.2d 383; see *Jacques Interiors v. Petrak* (1987) 188 C.A.3d 1363, 1371, 234 C.R. 44 [quoting *Albertson*].) Suits brought with improper purposes include the following: "[T]hose in which (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." (46 C.2d 383; see *Rest.2d, Torts* §676, Comment c.)

Thus, in *Hudson v. Zumwalt* (1944) 64 C.A.2d 866, 149 P.2d 457, defendant, successor to a lessor, seeking to terminate plaintiff lessee's tenancy, told plaintiff that he did not care what the agreement with the former lessor was or what the law provided, and that he would keep him in court until he would be "glad to sell." "It is sufficient if it appears that the former suit was commenced in bad faith to vex, annoy or wrong the adverse party." (64 C.A.2d 872.)

In *Baker v. Gawthorne* (1947) 82 C.A.2d 496, 186 P.2d 981, an apartment house owner sued a tenant for unlawful detainer, alleging use of the apartment for immoral purposes. He was nonsuited. In this malicious prosecution action by the plaintiff tenant, it appeared that the defendant owner's agents had investigated the tenant's actions, but that the owner had made no attempt to ascertain the facts. *Held*, this indifference justified the inference of malice. (82 C.A.2d 500.) (See *Peebler v. Danziger* (1951) 104 C.A.2d 614, 619, 232 P.2d 301 [malice shown by circumstantial evidence]; on circumstantial evidence of malice, see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §123.)

In *Albertson v. Raboff*, *supra*, where defendant brought a prior suit for money against plaintiff and wrongfully filed a lis pendens on her property, the court upheld the sufficiency of the pleading in A's present action on the theory that "a person who attempts to establish a claim to property knowing of its falsity can only be motivated by an improper purpose." But the court found it unnecessary to decide whether the purpose of making a lis pendens serve as the equivalent of an attachment to secure his money claim was improper. (46 C.2d 383.)

Because parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence. (*HMS Capital v. Lawyers Title Co.* (2004) 118 C.A.4th 204, 218, 12 C.R.3d 786.)

(2) *Inference of Malice From Lack of Probable Cause.* *Weaver v. Superior Court* (1979) 95 C.A.3d 166, 156 C.R. 745, noted that malice is often inferred from the factual predicate underlying a finding of lack of probable cause (see *supra*, §506 et seq.). "However, this result is *not* automatic. To complete proof of malicious prosecution, the presence of malice must be found as a matter of fact. ... Thus, in a given case, unreasonable behavior which could lead to a determination that there was a lack of probable cause to file, might not provide a sufficient basis to infer malice." (95 C.A.3d 192.) (See *Jarrow Formulas v. LaMarche* (2003) 31 C.4th 728, 743, 3 C.R.3d 636, 74 P.3d 737 [even though, after discovery, no competent evidence was adduced to support cross-complaint in underlying action, summary judgment did not establish malice; lack of probable cause does not prove that action was brought with malicious state of mind]; *Grindle v. Lorbeer* (1987) 196 C.A.3d 1461, 1466, 242 C.R. 562 [to infer malice from evidence supporting lack of probable cause, parties' pre-filing behavior must have been clearly unreasonable; citing *Weaver*].)

(3) *Effect of Prior Sanctions Finding.* In *Wright v. Ripley* (1998) 65 C.A.4th 1189, 77 C.R.2d 334, plaintiff lawyer prevailed in a suit against him for malpractice, but his request for sanctions was summarily denied on the ground that "bad faith" had not been established. He then instituted the present malicious prosecution action, in which defendant successfully moved for judgment on the pleadings on the ground that the refusal to award sanctions in the underlying action for absence of bad faith collaterally estopped plaintiff from proving the malice element of the current action. *Held*, reversed; the issues resolved on a routine sanction motion are not entitled to preclusive effect in a later malicious prosecution action. The majority of sanction motions can be resolved summarily, and, to promote judicial economy, the party seeking sanctions should be encouraged to pursue that option rather than pushed into seeking a full evidentiary hearing. Because a routine sanction proceeding is of a summary nature, it is not particularly burdensome, and the party denied sanctions, where permitted to sue for malicious prosecution, will still be entitled to only one opportunity to fully litigate the claim. (65 C.A.4th 1193.) Also, allowing the malicious prosecution action will not lead to inconsistent results, because sanction liability is in addition to other liability imposed by law and is influenced by factors extrinsic to a malicious prosecution case. (65 C.A.4th 1195.)

West's Key Number Digest, Malicious Prosecution k.26 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Inference of Malice From Lack of Probable Cause.* See *Ross v. Kish* (2006) 145 C.A.4th 188, 204, 51 C.R.3d 484 [trier of fact could reasonably infer that former client's action against attorney for breach of contract and malpractice was filed with malice where evidence suggested that client knew that claims lacked factual and legal support and that he filed action in retaliation for attorney's attempt to recover unpaid fees]; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 C.A.4th 1385, 1407, 69 C.R.3d 561 [on defendant attorneys' SLAPP motion (see 5 Cal. Proc. (5th), Pleading, §1017 et seq.), malicious prosecution plaintiff showed probability of prevailing on issue that defendants, including those who associated into underlying case shortly before dismissal, harbored malice in pursuing underlying action; defendants had alleged 18 causes of action, most of which did not relate to client's concerns, and pursued action for months after client denied most types of damages].



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g. Malice.

2. Family Law Proceedings.

5 Witkin Sum. Cal. Law Torts § 512

[§ 512] Family Law Proceedings.

A stricter showing of malice has been required in cases arising from family law proceedings. In *Chauncey v. Niems* (1986) 182 C.A.3d 967, 227 C.R. 718, the court held that the complaint failed to show favorable termination (see supra, §490), and also that the pleading of malice was insufficient.

(a) The theory that malicious prosecution is a disfavored action (see supra, §471) is particularly appropriate in proceedings following a decree of marital dissolution. "[A] strong policy favors access to the court in family law matters; the courts must remain open to claims seeking to modify or enforce spousal support or similar awards. On the other hand, the courts must scrutinize carefully a malicious prosecution action based on such a claim. If they did not, some parties with legitimate claims would be discouraged from coming into court." (182 C.A.3d 979.)

(b) "To hear malicious prosecution claims in any but the most egregious cases would unduly encourage litigation of this sort. Unlimited access to a forum in which to litigate malicious prosecution claims based on marital dissolutions would clog the courts, and exacerbate and prolong what is ordinarily an acutely unhappy state of affairs. In the family law and marital dissolution context, malice requires a more convincing and more precise showing than a mere inference. In short, in our view, the element of malice should be assessed according to a high, strict standard." (182 C.A.3d 979.) Here, plaintiff merely relied on the rule that malice may be inferred, in proper circumstances, from the facts underlying a finding of lack of probable cause (see supra, §511). (182 C.A.3d 979.)

(c) "We perceive a vital distinction between the ill will, agitation, and indignation that may occur during or after dissolution, and the malice essential to a malicious prosecution action. In the marital dissolution context, the showing of malice in a malicious prosecution action must be convincing as to its egregiousness, and the scrutiny devoted to it by the courts minute." (182 C.A.3d 980.)

A later decision in another Court of Appeal has held, in fact, that malicious prosecution actions *cannot be based on* family law proceedings. (See *Bidna v. Rosen* (1993) 19 C.A.4th 27, 37, 23 C.R. 215, supra, §496.)

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4. Malicious Institution of Administrative Proceeding.

a. General Rule.

5 Witkin Sum. Cal. Law Torts § 513

[§ 513] General Rule.

California cases formerly held that an action lies only for malicious prosecution of a criminal or civil *judicial* proceeding before a judicial officer or tribunal. Accordingly, recovery was consistently denied where the cause of action was for malicious institution of an administrative proceeding. (See *Cosulich v. Stempel* (1927) 81 C.A. 278, 280, 253 P. 344 [false charges of dishonesty lodged with Real Estate Commissioner against applicant for broker's license]; *Lorber v. Storrow* (1937) 22 C.A.2d 25, 27, 70 P.2d 513 [proceeding before Real Estate Commissioner]; *Hayashida v. Kakimoto* (1933) 132 C.A. 743, 746, 23 P.2d 311 [false statements to immigration authorities, resulting in plaintiff's detention for investigation]; *Vargas v. Giacosa* (1953) 121 C.A.2d 521, 527, 263 P.2d 840 [petitions to evict tenant filed with Housing Expediter]; 15 Cal. L. Rev. 518.)

The Torts Restatement took the contrary position that an action will lie for initiation of proceedings against another before an administrative board that has the power to take action adversely affecting legally protected interests of the other. (See *Rest.2d, Torts* §680.) The Restatement rule was adopted as the California rule in *Hardy v. Vial* (1957) 48 C.2d 577, 311 P.2d 494, disapproving conflicting statements in the four cases cited above. Plaintiff alleged that, as a result of defendant individual's false charges of immorality and unprofessional conduct made before defendant officials of a state college and the state Department of Education, he was dismissed from his professorship, and later cleared by the state Personnel Board and restored to his position. *Held*, a cause of action was stated against V, a private individual (the officials being immune, *supra*, §176). Quoting from a leading federal decision, the court said: "The administrative process is also a legal process, and its abuse in the same way with the same injury should receive the same penalty. ... When private as well as public rights more and more are coming to be determined by administrative proceedings, it would be anomalous to have one rule for them and another for the courts in respect to redress for abuse of their powers and processes." (48 C.2d 581.)

The opinion states a rule of sweeping scope which seemingly is not open to exceptions or qualifications, based on the type of administrative agency: "[N]o distinction should be made between proceedings commenced before agencies having adjudicatory powers and those commenced before agencies whose findings of fact are subject to trial de novo in a judicial proceeding. Such a distinction is unsound in principle and if adopted would result in unnecessary complexity and confusion." (48 C.2d 581.) (See 75 Harv. L. Rev. 629; 31 So. Cal. L. Rev. 105; 5 Stanf. L. Rev. 151 [privilege defense where pleadings in administrative proceeding are defamatory]; Dobbs, *The Law of Torts* §436; 1 Harper, James

& Gray 3d §4.10; 52 *A.L.R.2d* 1217 [malicious prosecution action predicated on disciplinary proceeding against member of medical or allied profession]; 66 *A.L.R.2d* 749 [civil liability of school officials for malicious prosecution]; 39 *A.L.R.3d* 473 [malicious prosecution action predicated on disciplinary proceeding against member of medical or allied profession]; 52 *Am.Jur.2d* (2000 ed.), *Malicious Prosecution* §15.)

The elements to be pleaded and proved are the same as in other malicious prosecution actions. (*Hardy v. Vial, supra*, 48 *C.2d* 580; see *Nicholson v. Lucas* (1994) 21 *C.A.4th* 1657, 1666, footnote 4, 26 *C.R.2d* 778 [applying rules developed in cases involving maliciously instituted civil and criminal cases to determine whether administrative proceeding had been instituted with probable cause]; *Axline v. St. John's Hosp. & Health Center* (1998) 63 *C.A.4th* 907, 917, 74 *C.R.2d* 385 [in action against hospital after it denied plaintiff's application to become member of staff, allegation that hospital knew that information on which it acted was inaccurate was sufficient allegation of malice].)

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b. Distinctions.

1. Proceeding Not Instituted Against Another.

5 Witkin Sum. Cal. Law Torts § 514

[§ 514] Proceeding Not Instituted Against Another.

In *Stolz v. Wong Communications Ltd. Partnership* (1994) 25 C.A.4th 1811, 31 C.R.2d 229, plaintiff radio station owner filed an application for renewal of its license with the Federal Communications Commission (FCC). Defendants filed a competing application with the FCC for the same frequency. Plaintiff prevailed, and then instituted the present action for malicious prosecution. *Held*, summary judgment for defendants affirmed. The Restatement rule (*Rest.2d, Torts §680*; see *supra*, §455) requires that in order for an administrative proceeding to be the basis of a malicious prosecution action, it must have been brought "against another." Here, defendants' filing of an application for an FCC license was not an action against plaintiff. "[A]n application for an FCC license--though it may have the effect of defeating a competitor's application--is not comparable to an accusatory or adversarial action against another. Even where the application leads to a comparative hearing, the hearing is not an action by one party against another but rather a weighing of the relative merits of two competitors." (25 C.A.4th 1820.)

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b. Distinctions.

2. Investigation Without Hearing.

5 *Witkin Sum. Cal. Law Torts* § 515

[§ 515] Investigation Without Hearing.

Malicious prosecution liability generally cannot be based on investigative proceedings designed to determine whether further, formal administrative proceedings should be instituted. In *Imig v. Ferrar* (1977) 70 C.A.3d 48, 138 C.R. 540, plaintiff police officer alleged that defendant filed charges against him with the Police Department, causing an investigation that terminated by a finding that the accusations were groundless. *Held*, no cause of action was stated, for it was not alleged that any formal proceedings (e.g., complaint, hearing, and decision) were instituted as a result of the investigation. (70 C.A.3d 58.) The court added, however, that sometimes a plaintiff's legally protected interest is invaded without a formal hearing, e.g., by a suspension from duty, and the plaintiff himself or herself initiates the formal proceedings seeking reinstatement. Accordingly, a judgment of dismissal on demurrer sustained was reversed to permit plaintiff to allege that this occurred, if it did occur. (70 C.A.3d 60.) (See *Brody v. Montalbano* (1978) 87 C.A.3d 725, 736, 151 C.R. 206 [investigation by city board of education without formal proceedings; following *Imig*].)

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 - b. Distinctions.
3. Proceeding Initiated After Independent Investigation.

5 Witkin Sum. Cal. Law Torts § 516

[§ 516] Proceeding Initiated After Independent Investigation.

(1) *In General.* A malicious prosecution action does not lie where the underlying proceeding was initiated only after an independent investigation of the defendant's charges by the agency. The proceeding is then deemed not to have been instituted by the defendant. (*Werner v. Hearst Publications* (1944) 65 C.A.2d 667, 673, 151 P.2d 308.)

(2) *State Bar Disciplinary Proceedings.* In *Stanwyck v. Horne* (1983) 146 C.A.3d 450, 194 C.R. 228, the court held that when the State Bar initiates an investigation following a complaint against an attorney, and conducts a formal hearing, no action for malicious prosecution will lie, even if the proceedings are terminated in favor of the attorney.

(a) *Initiation of proceeding is by State Bar.* In *Werner v. Hearst Publications*, *supra*, the court pointed out that under the State Bar Rules on disciplinary matters, the preliminary investigation is made by the officers of the State Bar, and the order to show cause is issued by these officers. Hence, the court concluded that no action could be maintained against the defendants who had made the original complaint to the *State Bar*. (146 C.A.3d 457.) The *Werner* decision is correct and controlling. "Absent an allegation in appellant's complaint that an investigation did not in fact occur, we must presume as did *Werner*, that one did occur. As a consequence, we hold that the State Bar, not respondents, initiated, procured or continued the disciplinary proceedings of *Stanwyck*. Therefore, *Stanwyck* failed to allege the elements required for a malicious prosecution of an administrative proceeding against respondents." (146 C.A.3d 459.)

(b) *Public policy considerations.* The *Werner* holding was reaffirmed in *Chronicle Publishing Co. v. Superior Court* (1960) 54 C.2d 548, 7 C.R. 109, 354 P.2d 637, and it is in accord with the view of a number of other jurisdictions establishing an absolute privilege for attorney disciplinary proceedings. (146 C.A.3d 461.) "We realize that some members of the bar may be occasionally subject to fraudulent and false complaints; however, these may be best handled by referral of such matters to the appropriate prosecuting agencies with a recommendation that perjury charges be filed." (146 C.A.3d 462.) "[I]f a person who is considering the filing of a complaint with the State Bar against an attorney knows that he or she may be subject to a subsequent malicious prosecution action by the accused attorney, it is reasonable to infer that such knowledge would have an effect on the desire to lodge a complaint in the first instance, regardless of how legitimate the complaint may be. This result clearly would not be in the public interest or in the interest of the bar." (146 C.A.3d 462.)

(3) *Other Disciplinary Proceedings.* In *Stanwyck v. Horne*, *supra*, the court said: "We specifically decline to decide whether the proceedings applicable to other licensees such as medical practitioners, accountants, and real estate brokers are 'independent' investigations and thus governed by the rationale of this decision." (146 C.A.3d 462, footnote 12.) The rationale has, in fact, been applied to proceedings before other licensing boards. (See *Rodas v. Spiegel* (2001) 87 C.A.4th 513, 520, 104 C.R.2d 439 [no liability where allegedly false report was filed with Contractors' State License Board]; 39 A.L.R.3d 473 [malicious prosecution predicated upon prosecution, institution, or instigation of disciplinary proceeding against member of medical or allied profession].)

In *Hogen v. Valley Hosp.* (1983) 147 C.A.3d 119, 195 C.R. 5, the court applied the *Stanwyck* reasoning to a proceeding before the Board of Medical Quality Assurance (BMQA). Defendant hospitals and a doctor filed a report with the BMQA that resulted in charges against plaintiff doctor, and the Board found that no cause existed for suspension or revocation of plaintiff's medical license. Plaintiff then sued the hospitals and doctor for malicious prosecution. *Held*, judgment for defendants on demurrer affirmed. "The BMQA is similar to the State Bar Association. Each is empowered and directed to conduct an independent investigation of all complaints from the public prior to the filing of an accusation. ... As a consequence, we are persuaded by the reasoning of *Stanwyck* and *Werner* that inasmuch as the BMQA conducted an independent investigation and determination prior to proceeding on the complaint, it was the BMQA, not respondents, who initiated or procured the disciplinary proceedings against appellant." (147 C.A.3d 125.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

Witkin Summary of California Law
 IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS
 B. Abuse of Process.
 1. Nature of Tort.

5 Witkin Sum. Cal. Law Torts § 517

[§ 517] Nature of Tort.

The tort of abuse of process is committed by the misuse of process, such as attachment or injunction; i.e., its use for a purpose other than that for which the process is designed. (See *Spellens v. Spellens* (1957) 49 C.2d 210, 230, 317 P.2d 613; *White Lighting Co. v. Wolfson* (1968) 68 C.2d 336, 347, 66 C.R. 697, 438 P.2d 345, *infra*, §523; *Tranchina v. Arcinas* (1947) 78 C.A.2d 522, 524, 178 P.2d 65; *Pimentel v. Houk* (1951) 101 C.A.2d 884, 886, 226 P.2d 739; *Tellefsen v. Key System Transit Lines* (1961) 198 C.A.2d 611, 615, 17 C.R. 919 [quoting Prosser]; *Kyne v. Eustice* (1963) 215 C.A.2d 627, 632, 30 C.R. 391 [no cause of action]; *Meadows v. Bakersfield Savings & Loan Assn.* (1967) 250 C.A.2d 749, 753, 59 C.R. 34 [no cause of action]; *Czap v. Credit Bureau of Santa Clara Valley* (1970) 7 C.A.3d 1, 5, 86 C.R. 417; *Golden v. Dungan* (1971) 20 C.A.3d 295, 300, 97 C.R. 577 [quoting Restatement; evil motive did not render midnight service of summons and complaint actionable as abuse of process]; *Barquis v. Merchants Collection Assn.* (1972) 7 C.3d 94, 103, 101 C.R. 745, 496 P.2d 817, *infra*, §525; *Younger v. Solomon* (1974) 38 C.A.3d 289, 296, 113 C.R. 113, *infra*, §§526, 528; *Christensen v. Younger* (1975) 47 C.A.3d 613, 617, 120 C.R. 923; *Clark Equipment Co. v. Wheat* (1979) 92 C.A.3d 503, 524, 154 C.R. 874; *Adams v. Superior Court* (1992) 2 C.A.4th 521, 530, 3 C.R.2d 49, *infra*, §528; *Rest.2d, Torts* §682; Dobbs, *The Law of Torts* §438 et seq.; 1 Harper, James & Gray 3d §4.9; Cal. Civil Practice, 1 Torts, Malicious Prosecution and Abuse of Process, §19:35 et seq.; 40 *Harv. L. Rev.* 502; 1 *Am.Jur.2d* (1994 ed.), *Abuse of Process* §1 et seq.; 27 *A.L.R.3d* 1202 [use of criminal process to collect debt]; 87 *A.L.R.3d* 554 [use of confession of judgment procedure]; 87 *A.L.R.3d* 580 [action for breach of contract]; 97 *A.L.R.3d* 688 [liability of attorney for abuse of process]; 82 *A.L.R.4th* 1115 [raising claim for abuse of process in same proceeding in which abuse occurred]; 152 *A.L.R. Fed* 605 [Federal Tort Claims Act exemption of abuse of process claims]; 7 *Proof of Facts* 2d 413 [abuse of process in debt collection]; BAJI, No. 7.71 [abuse of process--defined]; CACI, No. 1520 [abuse of process--essential factual elements]; on pleading of abuse of process, see 5 *Cal. Proc.* (4th), *Pleading*, §715 et seq.)

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See *Booker v. Rountree* (2007) 155 C.A.4th 1366, 1372, 66 C.R.3d 733 [evidence that cross-defendant knowingly delayed serving complaint or revealing its existence until identical action was settled in order to obtain higher settlement than if two cases were joined was sufficient to establish abuse of process]; 1 *Am.Jur.2d*. (2005 ed.), *Abuse of Process* §1 et seq.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §759 et seq.

(New) *SLAPPback actions*: *C.C.P.* 425.18, added in 2005, exempts a "SLAPPback" from specified provisions of the anti-SLAPP statute (see 5 *Cal. Proc.* (5th), *Pleading*, §1017 et seq.) and establishes separate procedures for these actions. A SLAPPback is a cause of action for abuse of process or malicious prosecution arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under the anti-SLAPP statute. (See *Supp.*, *supra*, §469.)



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B. Abuse of Process.

2. Scope of "Process."

a. Any Judicial Procedure.

5 *Witkin Sum. Cal. Law Torts* § 518

[§ 518] Any Judicial Procedure.

" 'Process,' as used in the tort of 'abuse of process,' has never been limited to the strict sense of the term, but instead has been interpreted broadly to encompass the entire range of 'procedures' incident to litigation. ... This broad reach of the 'abuse of process' tort can be explained historically, since the tort evolved as a 'catch-all' category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution." (*Barquis v. Merchants Collection Assn.* (1972) 7 C.3d 94, 104, footnote 4, 101 C.R. 745, 496 P.2d 817, *infra*, §525.) (See *Younger v. Solomon* (1974) 38 C.A.3d 289, 296, 113 C.R. 113, *infra*, §§526, 528 [request for written interrogatories]; *Clark Equipment Co. v. Wheat* (1979) 92 C.A.3d 503, 526, 154 C.R. 874 [order to show cause re contempt]; *Silver v. Gold* (1989) 211 C.A.3d 17, 24, 259 C.R. 185, *supra*, §493 [motion to disqualify attorney]; 1 *Am.Jur.2d* (1994 ed.), *Abuse of Process* §§2, 11 *et seq.*)

Obviously, the mere filing of a lawsuit is not an abuse of process. (*Seidner v. 1551 Greenfield Owners Assn.* (1980) 108 C.A.3d 895, 904, 166 C.R. 803; *Drasin v. Jacoby & Meyers* (1984) 150 C.A.3d 481, 485, 197 C.R. 768; *Loomis v. Murphy* (1990) 217 C.A.3d 589, 594, 266 C.R. 82; *Warren v. Wasserman, Comden & Casselman* (1990) 220 C.A.3d 1297, 1301, 271 C.R. 579, *supra*, §502.)

As the court said in *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma* (1986) 42 C.3d 1157, 1169, 232 C.R. 567, 728 P.2d 1202: "The rationale underlying these decisions is not difficult to ascertain. The elements of the common law malicious-prosecution cause of action have evolved over time as an appropriate accommodation between the freedom of an individual to seek redress in the courts and the interest of a potential defendant in being free from unjustified litigation. ... If ... the filing of an action for an improper 'ulterior' purpose were itself sufficient to give rise to an abuse of process action, the 'lack-of-probable-cause' element of the malicious prosecution tort would be completely negated; even if an individual could demonstrate that he had reasonable cause to believe that his initial lawsuit had merit when he filed the action, he would still face potential liability under an abuse of process theory. Because the lack-of-probable-cause requirement in the malicious prosecution tort plays a crucial role in protecting the right to seek judicial relief (see *Rest.2d, Torts* §675, *coms. c-j*), we agree with the prior decisions which have concluded that this element may not be circumvented through expansion of the abuse of process tort to encompass the alleged improper filing of a lawsuit." (42 C.3d 1169.) (See 35 *U.C.L.A. L. Rev.* 99.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Booker v. Rountree* (2007) 155 C.A.4th 1366, 1371, 66 C.R.3d 733 [abuse of process claim could be based on deliberate failure to join in identical action, or to sue, until that action was settled]; 1 *Am.Jur.2d*. (2005 ed.), *Abuse of Process* §§2, 11 et seq.

Mere filing of lawsuit is not abuse of process: See *Ramona Unified School Dist. v. Tsiknas* (2005) 135 C.A.4th 510, 521, 37 C.R.3d 381 [continued pursuit of meritless litigation for improper collateral purpose, even though actionable under malicious prosecution principles in proper circumstances, is not separately actionable under abuse of process theory; following *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma* (1986) 42 C.3d 1157, 232 C.R. 567, 728 P.2d 1202, text, p. 769]; *Contemporary Services Corp. v. Staff Pro* (2007) 152 C.A.4th 1043, 1058, 61 C.R.3d 434 [filing or maintaining lawsuit, even for improper purpose, is not in itself basis for abuse of process action; citing *Oren Royal Oaks Venture*].



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B. Abuse of Process.

2. Scope of "Process."

b. Distinction: Court Action Not Involved.

5 Witkin Sum. Cal. Law Torts § 519

[§ 519] Distinction: Court Action Not Involved.

The essence of the tort is "misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice." The court action may be the direct initiation of a legal proceeding by a summons or writ, or the initiation of ancillary proceedings such as attachment. (*Meadows v. Bakersfield Savings & Loan Assn.* (1967) 250 C.A.2d 749, 753, 59 C.R. 34.) And in *Thornton v. Rhoden* (1966) 245 C.A.2d 80, 93, 53 C.R. 706, the court suggested that, although a notice of taking a deposition is not strictly "process," in a proper case the action for abuse of process may arise. The court in *Meadows* explains the *Thornton* dictum by observing that a deposition is ancillary to the filing of a legal proceeding, hence is "an act inherent in the judicial process." (250 C.A.2d 754.) (See 33 A.L.R.4th 650 [abuse of process by misuse of discovery or deposition procedures after commencement of civil action without seizure of person or property].)

In the *Meadows* case, the wrongful act charged was the *recording* by defendant, trustee under a deed of trust, of a *notice* of breach and election to sell plaintiffs' home. The complaint alleged that defendant did this after plaintiffs' refusal to meet "extortionate demands" for money not owed. *Held*, judgment of nonsuit affirmed. Plaintiffs' theory was that the trustee's sale proceeding was analogous to a foreclosure action, and that, if a court order for foreclosure sale can be the basis of the tort action, a trustee's notice of sale should likewise be. But the court found no authority to support this application of the concept of "process" to a proceeding that "in nowise emanates from or rests upon the authority or jurisdiction of a court." (250 C.A.2d 753.) The court pointed out that, if plaintiffs' allegations were true, they would still have a remedy, though not an action for abuse of process. The intentional breach of contract may be the basis of a tort action, with both general and punitive damages recoverable. (250 C.A.2d 755, citing the text.) (See *Woodcourt II Ltd. v. McDonald Co.* (1981) 119 C.A.3d 245, 251, 173 C.R. 836 [recording of lis pendens--a notice, not process]; *Palmer v. Zaklama* (2003) 109 C.A.4th 1367, 1381, 1 C.R.3d 116 [recordation of notice of lis pendens, even if done for improper purpose, is not valid basis for cause of action for abuse of process; citing *Woodcourt II*].)

Because abuse of process requires misuse of a judicial process, the tort does not apply to the misuse of *administrative* process. (*Stolz v. Wong Communications Ltd. Partnership* (1994) 25 C.A.4th 1811, 1822, 31 C.R.2d 229, *supra*, §514 [alleged misuse of administrative process of Federal Communications Commission].)

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B. Abuse of Process.

2. Scope of "Process."

c. Distinction: Malicious Appeal.

5 *Witkin Sum. Cal. Law Torts* § 520

[§ 520] Distinction: Malicious Appeal.

In *Tellefsen v. Key System Transit Lines* (1961) 198 C.A.2d 611, 613, 17 C.R. 919, the court held that filing an allegedly frivolous appeal, with malicious intent, to take advantage of the successful party's need, was not a *misuse* of the process.

Tellefsen was followed in *Coleman v. Gulf Ins. Group* (1986) 41 C.3d 782, 792, 226 C.R. 90, 718 P.2d 77, supra, §493: "As in *Tellefsen*, plaintiffs in the present case allege nothing more than the taking of an appeal to which the city was entitled. They assert no facts to support a finding that the use of process was done in an unauthorized manner, but only that Gulf's motive was improper." (41 C.3d 792.) The "threat," which plaintiffs can be said to have alleged, is implicit in every appeal, i.e., that it will be pursued to finality unless settlement is reached. (41 C.3d 793.) "And in view of the strong state interest in encouraging the settlement of litigation, it would clearly be improper to hold that *the making of an offer to settle* is itself sufficient to supply the missing element in an abuse of process action. Such a holding would inevitably have a devastating effect on the settlement process which many of our appellate courts have struggled hard to encourage, for no appellate counsel could properly advise his client to propose a settlement on appeal if that very proposal would itself provide the essential ingredient to subject the client to a second lawsuit for abuse of process." (41 C.3d 793.)

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5 Witkin Sum. Cal. Law Torts § 521

[§ 521] Ulterior Purpose.

The tort requires an ulterior purpose by the person causing the process to issue. (See *Kappel v. Bartlett* (1988) 200 C.A.3d 1457, 1465, 246 C.R. 815, citing the text [allegation that process server executed false declaration of service with knowledge of its falsity satisfied element of ulterior purpose]; 1 Am.Jur.2d (1994 ed.), *Abuse of Process* §6; BAJI, Nos. 7.70, 7.73; CACI, No. 1520.) The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself. (*Spellens v. Spellens* (1957) 49 C.2d 210, 232, 317 P.2d 613.)

Like malicious prosecution, the tort of abuse of process has been said to require "malice," and for this reason is sometimes termed "malicious abuse of process." But there is no need to show actual ill will, and there is no abuse of process if it is used for its proper purpose even though the person uses it for wrongful and malicious motives. (*Pimentel v. Houk* (1951) 101 C.A.2d 884, 887, 226 P.2d 739; *Younger v. Solomon* (1974) 38 C.A.3d 289, 298, 113 C.R. 113, *infra*, §§526, 528; see *Cantu v. Resolution Trust Corp.* (1992) 4 C.A.4th 857, 886, 6 C.R.2d 151, quoting the text [interpleader action used for proper purpose].) "Whether *malice* is a necessary element of this tort has been questioned ... but if malice is a necessary element it is settled that it may be *inferred from the wilful abuse of the process*." (*Tranchina v. Arcinas* (1947) 78 C.A.2d 522, 526, 178 P.2d 65.)

In *Drum v. Bleau, Fox & Associates* (2003) 107 C.A.4th 1009, 132 C.R.2d 602, defendant law firm represented a client in the underlying action who sued plaintiff attorney for legal malpractice. Defendant's client won, but the judgment was stayed pending a motion for new trial *and* filing of a notice of appeal. After the motion for new trial was denied, but before the time for filing an appeal had expired, defendant caused a writ of execution to be submitted to the county sheriff, and the sheriff subsequently levied on the writ with the result that certain funds of plaintiff's were frozen and some checks were dishonored. Plaintiff then filed this action for abuse of process, and defendant filed a special motion to strike under C.C.P. 425.16, the anti-SLAPP statute (see 5 Cal. Proc. (4th), *Pleading*, §962 et seq.), on the ground that plaintiff could not satisfy the "ulterior motive" element of an abuse of process action. Defendant presented evidence that it thought the judgment was stayed only until action was taken on a new trial motion. Plaintiff, besides introducing the record, which clearly showed that the stay lasted until expiration of the time for filing a notice of appeal and that defendant was present when the judgment was stayed, stated that defendant's motive for violating the stay was to ensure that plaintiff would not have sufficient funds to appeal the judgment in the underlying action. Although acknowledging the sufficiency of the evidence to establish a wilful improper use of process, the trial judge granted the

special motion to strike on the ground that plaintiff had failed to show that defendant had acted with an ulterior motive. *Held*, reversed.

(a) *Charles J. Vacanti, M.D. v. State Comp. Ins. Fund* (2001) 24 C.4th 800, 102 C.R.2d 562, 14 P.3d 234, 2 Summary (10th), *Workers' Compensation*, §106, held that ulterior motive may be inferred from a wilful abuse of process. Here, the facts showed that defendant was present in court when the judgment was stayed, that it refused to cancel the writ of execution when reminded by plaintiff's counsel, that the judgment was stayed until expiration of the time for filing a notice of appeal, and that defendant nevertheless caused the writ to be executed. This evidence of a wilful abuse of process, plus evidence of its timing and financial implications, was sufficient to allow a reasonable finder of fact to infer that the requisite ulterior motive was as suggested by plaintiff in his complaint, i.e., to hinder his ability to appeal. (107 C.A.4th 1017.)

(b) The fact that *Vacanti* involved a demurrer, rather than a C.C.P. 425.16 motion, is irrelevant. Ulterior motive is a state of mind, which, like other states of mind, can seldom be proved by direct evidence but must be inferred from objective or external circumstantial evidence. In *Vacanti*, the issue was whether the plaintiff *pleaded* sufficient facts from which ulterior motive could be inferred. In the context of a C.C.P. 425.16 motion, the issue is whether the plaintiff proffers sufficient *evidence* for such an inference. Under *Vacanti*, an allegation of an egregious wilful abuse of process is sufficient. The same rule applies to plaintiff's proffered evidence. (107 C.A.4th 1021.)

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See *Rusheen v. Cohen* (2006) 37 C.4th 1048, 1057, 39 C.R.3d 516, 128 P.3d 713, Supp., *infra*, §567 [stating ulterior purpose element and disapproving *Drum v. Bleau, Fox & Associates* (2003) 107 C.A.4th 1009, 132 C.R.2d 602, text, p. 771, on other grounds]; 1 *Am.Jur.2d*. (2005 ed.), *Abuse of Process* §6.

Anti-SLAPP statute:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §1017 et seq.



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B. Abuse of Process.

3. Elements.

b. Wilful Act in Use of Process.

5 Witkin Sum. Cal. Law Torts § 522

[§ 522] Wilful Act in Use of Process.

The second element of the tort is "a wilful act in the use of the process not proper in the regular conduct of the proceeding." (*Templeton Feed & Grain v. Ralston Purina Co.* (1968) 69 C.2d 461, 466, 72 C.R. 344, 446 P.2d 152; see *Weisenburg v. Molina* (1976) 58 C.A.3d 478, 489, 129 C.R. 813 [conspiracy of defendant judgment debtor and another to have a judgment entered and execution levied on his assets for purpose of hindering collection by plaintiff of his prior judgment against defendant]; *Ion Equipment Corp. v. Nelson* (1980) 110 C.A.3d 868, 876, 168 C.R. 361 [attempt to collect unsatisfied judgment by execution when enforcement was stayed on appeal; although issuance of writ was improper, there was no sufficient pleading of intent]; *Kappel v. Bartlett* (1988) 200 C.A.3d 1457, 1466, 246 C.R. 815, citing the text [process server's knowing execution of false declaration of service; wilful act shown]; 1 *Am.Jur.2d* (1994 ed.), *Abuse of Process* §5.)

Some definite act or threat that is not authorized by the process, or that is aimed at some collateral objective not legitimate in the use of the process, is required. The defendant is not liable for abuse of process where he or she has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. (*Spellens v. Spellens* (1957) 49 C.2d 210, 231, 317 P.2d 613; *Barquis v. Merchants Collection Assn.* (1972) 7 C.3d 94, 103, 101 C.R. 745, 496 P.2d 817, *infra*, §525; *Golden v. Dungan* (1971) 20 C.A.3d 295, 300, 97 C.R. 577; *Younger v. Solomon* (1974) 38 C.A.3d 289, 297, 113 C.R. 113, *infra*, §§526, 528; *Friedman v. Stadum* (1985) 171 C.A.3d 775, 779, 217 C.R. 585, citing the text; see *Silver v. Gold* (1989) 211 C.A.3d 17, 24, 259 C.R. 185, *supra*, §493 [merely filing motion to disqualify attorney, even if done for improper purpose, is not type of wrongful act needed to establish abuse of process].)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Rusheen v. Cohen* (2006) 37 C.4th 1048, 1057, 39 C.R.3d 516, 128 P.3d 713, *Supp.*, *infra*, §567 [stating improper use element]; *Siam v. Kizilbash* (2005) 130 C.A.4th 1563, 1579, 31 C.R.3d 368 [element of improper use was satisfied by allegation that defendant improperly employed temporary restraining order issued against plaintiff to corroborate false representations of plaintiff's alleged child abuse]; 1 *Am.Jur.2d*. (2005 ed.), *Abuse of Process* §5.



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B. Abuse of Process.

4. Particular Abuses.

a. Attachment.

1. Improper or Excessive Attachment.

5 Witkin Sum. Cal. Law Torts § 523

[§ 523] Improper or Excessive Attachment.

(1) *In General*. The most common writ giving rise to claims of abuse of process has been attachment. The opinion in *Pimentel v. Houk* (1951) 101 C.A.2d 884, 226 P.2d 739, holding the complaint defective, nevertheless suggests the basis for a successful action where it is "alleged that said attachment covered property exempt from execution, that it covered an excessive amount of defendant's property, that the debt alleged to be owed by defendant was otherwise secured, or that defendant requested that the levy be made upon other property." (101 C.A.2d 886.)

(2) *Exempt Property*. Successive seizures of exempt property on attachment or execution may give rise to an action. (See *White Lighting Co. v. Wolfson* (1968) 68 C.2d 336, 349, 66 C.R. 697, 438 P.2d 345; *Arc Inv. Co. v. Tiffith* (1958) 164 C.A.2d Supp. 853, 856, 330 P.2d 305; *Czap v. Credit Bureau of Santa Clara Valley* (1970) 7 C.A.3d 1, 5, 86 C.R. 417.)

(3) *Wrong Type of Action*. Maliciously procured attachment in an action in which the creditor is not entitled to the writ (e.g., a tort action) will support an action for abuse of process. (*White Lighting Co. v. Wolfson*, *supra*, 68 C.2d 348.)

(4) *Excessive Attachment*. In *White Lighting Co. v. Wolfson*, plaintiff sued to recover \$ 850 allegedly owed by defendant. Defendant cross-complained, alleging that plaintiff had attached shares of stock worth \$ 15,000 and an automobile worth \$ 4,500, and was threatening to garnish wages and a bank account. Damage was also alleged, consisting of loss of use of the car and consequent diminution of income as a salesman, impairment of credit at the bank resulting in acceleration of a loan, and expenses in procuring release of the assets. *Held*, the cross-complaint stated a cause of action for abuse of process. The principal obstacle was the theory that the cause of action for excessive attachment is one for malicious prosecution, and cannot be maintained by cross-complaint in the primary action on the debt because the defendant cannot yet allege favorable termination (see *supra*, §498). Some California cases support this theory (68 C.2d 348, footnote 5), but it is unsound, and other cases correctly treat the action as one for abuse of process (68 C.2d 348, footnote 6). The court pointed out that malicious prosecution would seldom lie because the attaching creditor usually prevails on the claim. And the wrongfulness of excessive attachment does not lie in the suit itself (good) or the levy of attachment (proper), but only in tying up more property than is necessary. For this reason, the defendant should not be required to wait until final termination of the primary action, but should be able to assert his or her claim

for damages in that action. (68 C.2d 350.) (See 9 Santa Clara Lawyer 132; 6 *San Diego L. Rev.* 139; 30 *U.C.L.A. L. Rev.* 1218; 56 *A.L.R.3d* 493 [liability of creditor for excessive attachment or garnishment].)

(5) *Alternative Statutory Remedy*. C.C.P. 490.010 et seq. provide a nonexclusive statutory remedy for wrongful attachment in specified situations. (See 6 *Cal. Proc.* (4th), *Provisional Remedies*, §234 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
(5) *Alternative Statutory Remedy*.

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §232 et seq.



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CHAPTER IX - Torts

Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

B. Abuse of Process.

4. Particular Abuses.

a. Attachment.

2. Distinctions.

5 Witkin Sum. Cal. Law Torts § 524

[§ 524] Distinctions.

(1) *Proper Attachment in Maliciously Motivated Action.* An action may have been brought and an attachment levied, with the malicious motive of injuring the person sued. But (a) if the claim is valid, there was probable cause and no cause of action for malicious prosecution; and (b) the use of attachment for its proper purpose of securing the anticipated judgment was not an abuse of process. (See *Pimentel v. Houk* (1951) 101 C.A.2d 884, 226 P.2d 739.)

(2) *Proper Attachment in Unsuccessful Action.* An action may have been brought, with probable cause and without malice, and an attachment levied. After trial and judgment in favor of the person sued, he or she has a remedy, but not in tort. There was no malicious prosecution of a civil action, and there was no abuse of process. The harm done by the attachment pending the trial is redressed by a recovery against the *sureties* on the attachment bond, limited to the sum specified in the bond. And there is no additional tort remedy against the unsuccessful plaintiff if the damages suffered exceed the amount stated in the bond; to protect against that eventuality, the person sued could have moved the court to increase the amount of the bond. (*Finn v. Witherbee* (1954) 126 C.A.2d 45, 49, 271 P.2d 606; 6 Cal. Proc. (4th), *Provisional Remedies*, §226.)

(3) *Action Maliciously Prosecuted.* An action may have been brought without probable cause and with malice, e.g., on a fictitious claim, and an attachment levied. After trial and judgment in favor of the person sued, he or she has a remedy. The attachment may have caused serious harm, but there was nothing wrongful in it, for it was used for its proper statutory purpose--security for an anticipated judgment. The wrongful act was the malicious filing of a groundless suit. Hence, the tort was not abuse of process but *malicious prosecution of a civil action*, the attachment being merely an act aggravating the damages. (*Goland v. Peter Nolan & Co.* (1934) 2 C.2d 96, 98, 38 P.2d 783.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Proper Attachment in Unsuccessful Action.*

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §224.



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IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

B. Abuse of Process.

4. Particular Abuses.

b. Action Disregarding Venue Statutes.

5 *Witkin Sum. Cal. Law Torts* § 525

[§ 525] Action Disregarding Venue Statutes.

In *Barquis v. Merchants Collection Assn.* (1972) 7 C.3d 94, 101 C.R. 745, 496 P.2d 817, the court, after describing the broad reach of the tort (see *supra*, §518), held that a cause of action was pleaded by individual retail buyers against defendant collection agency. Defendant had filed numerous suits on overdue accounts, and there was no allegation of anything wrong in these suits commenced in an appropriate court. But C.C.P. 395 and C.C. 1812.10 require a statement in the complaint of facts to enable the court to determine the proper venue, and defendant allegedly made a practice of omitting these statements and wilfully and knowingly filing actions in improper courts "for the ulterior purpose of making the action more difficult to defend and thereby forcing its adversary to *default or to settle* on terms favorable to the agency." (7 C.3d 105.) This practice, if proved, would constitute an abuse of process.

In *Yu v. Signet Bank/Virginia* (1999) 69 C.A.4th 1377, 82 C.R.2d 304, Virginia banks collected credit card debts by improperly filing suits in Virginia against California residents. This practice was deemed even worse than that in *Barquis v. Merchants Collection Assn.*, because the suits were brought in the wrong state, rather than the wrong venue within *California*. (69 C.A.4th 1389.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Abuse of Process.

4. Particular Abuses.

c. Improper Use of Discovery.

5 *Witkin Sum. Cal. Law Torts* § 526

[§ 526] Improper Use of Discovery.

In *Younger v. Solomon* (1974) 38 C.A.3d 289, 113 C.R. 113, *infra*, §528, S and nine other attorneys filed a letter with the State Bar accusing Y of organized county-wide ambulance chasing. The letter described six incidents of unlawful solicitation, with the names, dates, and description of the alleged activities; and it stated on information and belief that there were other cases and other attorneys in the county who could furnish the State Bar with the relevant facts for disciplinary action. Four days later, S filed a complaint against Y on behalf of J, one of the listed victims of Y's solicitation, seeking damages for intentional infliction of emotional distress and punitive damages for fraudulent acts of solicitation and wrongful interference with her settlement negotiations. The complaint contained allegations of Y's long-continued widespread ambulance chasing, and was followed 2 weeks later by a set of interrogatories, one of which attached a copy of the letter to the State Bar and called for Y's response to the charges of ambulance chasing. Y refused to answer the interrogatory, and filed a cross-complaint against S for abuse of process, alleging that S persuaded J to file her suit in order to enable S to make public the confidential letter to the State Bar and thereby to injure Y in his law practice. S moved for summary judgment, and in his declaration admitted that his purpose was to bring an end to Y's alleged ambulance chasing, and that he intended, through the suit of J, to attempt to inflict a substantial money loss on Y and to present to the State Bar any evidence of ambulance chasing developed through his interrogatory. *Held*, order granting summary judgment reversed.

(a) *Interrogatory as process*. Written interrogatories specifically authorized by the Civil Discovery Act, and enforced with sanctions, are "procedures incident to litigation," i.e., "process." (38 C.A.3d 296; on what constitutes "process" generally, see *supra*, §518.)

(b) *Abuse of process*. There was a triable issue of fact whether the process was abused. Insofar as the interrogatory was directed to discovery of matters relating to Y's defense to J's charges, it was a proper use of discovery. (38 C.A.3d 298.) It was reasonably inferable, however, that S had an additional purpose in mind: the disclosure and publication of the fact that a complaint for professional misconduct had been filed with the State Bar by ten attorneys in the county, in order to damage Y's reputation as an attorney and impede his activities as a professional competitor. The timing of the interrogatory assured publication of the fact of the charges long before the State Bar investigation would determine their truth or falsity. (38 C.A.3d 298.) (See 33 A.L.R.4th 650 [abuse of process in misuse of discovery and deposition procedures after commencement of civil action without seizure of person or property].)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Abuse of Process.
4. Particular Abuses.
d. Filing or Recording To Harass or Influence Public Employee.

5 Witkin Sum. Cal. Law Torts § 527

[§ 527] Filing or Recording To Harass or Influence Public Employee.

By statute, no person may record or file a lawsuit, lien, or other encumbrance against a public officer or employee, knowing it to be false, with the intent to harass the officer or employee or to influence or hinder discharge of his or her official duties. The lawsuit, lien, or other encumbrance must pertain to actions that arise in the course and scope of the officer's or employee's duties. This prohibition includes, but is not limited to, a notice of lis pendens. One violating, or directing another to violate, the prohibition is liable to the officer or employee or to the owner of the affected property for a specified civil penalty. (*Govt.C. 6223.*)

A public officer or employee whose property is subject to a lien or encumbrance violating the prohibition may bring an expedited proceeding for an order striking or releasing the lien or encumbrance and assessing the penalty. (*C.C.P. 765.010 et seq.*)

These provisions do not apply to claims of encumbrance by financial institutions or public entities. (*C.C.P. 765.050.*)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Abuse of Process.
5. Defense of Absolute Privilege.

5 Witkin Sum. Cal. Law Torts § 528

[§ 528] Defense of Absolute Privilege.

(1) *In General.* An abuse of process action may be barred by the absolute privilege for statements in judicial proceedings that is set forth C.C. 47(b) and usually arises in defamation actions (see *infra*, §567). (See *Abraham v. Lancaster Community Hosp.* (1990) 217 C.A.3d 796, 266 C.R. 360 [exhaustive review of Supreme Court and Court of Appeal decisions relating of application of privilege to abuse of process].) The absolute immunity attaches so long as the challenged process involves "a publication [that] (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law." (*Loomis v. Superior Court* (1987) 195 C.A.3d 1026, 1029, 241 C.R. 236 [quoting *Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 C.A.3d 818, 825, 106 C.R. 718].)

(2) *Defense Found Applicable.* The defense was sustained in *Twyford v. Twyford* (1976) 63 C.A.3d 916, 925, 134 C.R. 145. After a dissolution, the wife instituted a contempt proceeding against the husband for failure to pay attorneys' fees and spousal support, and filed a request for admissions in which she accused him of forging her name on a joint income tax refund check and absconding with her half of the proceeds. *Held:* (a) A request for admissions is capable of abuse in the same way as interrogatories and depositions, and therefore can give rise to an action for abuse of process. (63 C.A.3d 923.) (b) However, the resulting harm, in this case, was minimal. (63 C.A.3d 924.) (c) Moreover, the request was made to achieve the objects of the contempt proceeding, and had a direct bearing on the potential issue--whether the husband had sufficient funds with which to purge himself of a possible contempt; hence, it had the necessary relation to the litigation to make the absolute privilege available. (63 C.A.3d 925, 926.) (On abuse of process in improper use of discovery, see *supra*, §526.)

The defense was again sustained in *Umansky v. Urquhart* (1978) 84 C.A.3d 368, 148 C.R. 547. Attorneys for heirs of decedent H brought a wrongful death action against Dr. U, alleging that by malicious acts, he caused the death of H, and seeking compensatory and punitive damages. By stipulation, an amended complaint was filed deleting the cause of action for punitive damages. Dr. U then brought the present action for abuse of process against the attorneys for the heirs, alleging that the cause of action for punitive damages did not lie as a matter of law, and that the allegations of malicious acts were made for the purpose of injuring his professional reputation, subjecting him to interrogation as to his finances, and pressuring him into a settlement with the heirs. *Held*, judgment on demurrer for defendants affirmed.

(a) Dr. U argued that the pleading of elements for recovery of punitive damages did not meet the test of achieving

the objects of the litigation, because punitive damages are not recoverable in a wrongful death action by heirs. (84 C.A.3d 371, 372; see *infra*, §1578.) But to curtail the privilege on this ground would have a chilling effect on lawyers desiring to challenge the validity of statutes, and two federal trial judges have found this statutory limitation unconstitutional. Hence, the cause of action "is consistent with the objects" of the litigation. (84 C.A.3d 372.)

(b) No decision is made as to whether Dr. U has a cause of action for malicious prosecution. (84 C.A.3d 373, footnote 1.)

In *Loomis v. Superior Court*, *supra*, attorney L represented K in an action against a corporation represented by attorney M. During a 30-day suspension from practicing law, M filed a motion for change of venue, and L countered with a motion to strike on the ground that the corporation could not be represented by a suspended attorney. After L served the motion to strike and the relevant State Bar documents on the corporation and two of its officers, M filed the present abuse of process action, arguing that the service of the State Bar documents was taken in retaliation for M's failure to reply to a request for production of documents. The trial judge denied L's motion for summary judgment, and he sought mandamus. *Held*, mandamus granted; the service was privileged.

(a) The denial of L's motion to strike did not establish that the publication of the State Bar documents was unrelated to the action. "The privilege would have little value if attorneys could not make colorable, but unsuccessful, arguments without fear of engendering litigation over publication of materials to support their arguments." (195 C.A.3d 1030.) Here, the documents were directly related to the motion to strike, which was not a palpably improper challenge to the change of venue motion. (195 C.A.3d 1030.) And because the corporation and its officers were "involved litigants or other participants authorized by law," service on them was proper. (195 C.A.3d 1030.)

(b) M contended that under C.C.P. 286 (see 1 Cal. Proc. (4th), Attorneys, §93), L should have requested the corporation to appoint another attorney. However, this procedure would also have involved informing the corporation of M's suspension. It cannot be the law that what counsel should have done under C.C.P. 286 is not privileged if done in connection with a motion to strike papers filed by the office of a suspended counsel. (195 C.A.3d 1031.)

(c) Although the point of the motion to strike could have been made without the documents showing the cause of M's suspension, the documents provided evidence that a suspension had occurred. Hence, it was not patently improper for L to have included them in the motion to strike. (195 C.A.3d 1031.)

In *Adams v. Superior Court* (1992) 2 C.A.4th 521, 3 C.R.2d 49, plaintiff was the defendant in a civil action in Monterey County initiated by the Ws and involving an allegedly fraudulent real estate transaction. Defendants were the Ws' attorneys in that action. Simultaneously, plaintiff was involved in criminal actions in San Mateo and Santa Clara counties in which he succeeded in having prior felony convictions either reduced or expunged. Thereafter, in order to preserve these convictions for impeachment of plaintiff in the civil action, defendants filed motions for reconsideration in both criminal actions, seeking to bring to the attention of the respective courts plaintiff's conduct in the fraudulent real estate transaction. The motions were denied, and plaintiff instituted the present action for abuse of process and malicious prosecution. Ruling on the abuse of process cause of action, the trial judge sustained defendants' demurrer, but with leave to amend; and they sought mandamus to compel him to sustain it without leave to amend. *Held*, writ granted; the motions for reconsideration were absolutely privileged, and in any event did not constitute an abuse of process. (For discussion of the malicious prosecution action, see *supra*, §493.)

(a) *Motions were privileged.*

(1) Defendants may rely on the defense of judicial privilege under C.C. 47(b) provided that there is some reasonable connection between the act claimed to be privileged, i.e., the motions for reconsideration, and the legitimate objects of the proceeding in which that act took place, i.e., reduction or expungement of criminal convictions. Because there is obviously a relationship between the criminal courts' decisions on reduction or expungement and plaintiff's behavior from the time of the convictions, there is a reasonable connection between the evidence of plaintiff's fraudulent

behavior in the real estate transaction and the criminal proceedings. Hence, the use of motions for reconsideration to introduce that evidence is privileged. (2 C.A.4th 529.)

(2) Relying on the fact that the Santa Clara court denied defendants' motion for reconsideration on the ground of lack of standing (the San Mateo court denied the motion, but did not mention standing), plaintiff argued that this lack of standing destroyed defendants' claim of judicial privilege. Even assuming that defendants lacked standing, this argument is without merit. It is true that lack of standing might constitute such a lack of connection with the lawsuit as to make a motion tortious, but in that event it would be the lack of connection, not the lack of standing, that would be the reason for denying the privilege, and there was no such lack of connection here. (2 C.A.4th 530.)

(3) The tort of abuse of process depends partly on the fact that the court is not aware of the facts constituting the abuse and hence cannot control the misuse of its process. However, when a person without standing intervenes in a lawsuit, the court can readily exert control either by denying standing entirely or by allowing intervention but controlling its scope. Accordingly, attempts to intervene without standing need not give rise to tort remedies. (2 C.A.4th 532.)

(b) *No abuse of process.* Regardless of privilege, defendants' demurrer should have been granted because no misuse of process was alleged. Abuse of process requires more than merely obtaining or seeking process; there must be subsequent abuse by misusing the judicial process for a purpose other than that for which it was intended. (2 C.A.4th 530.) Here, defendants' motions for reconsideration were unsuccessful; hence, their efforts did not result in the issuance of any process of the court that was then abused. (2 C.A.4th 531.) (See 26 *Pacific L. J.* 1, 20 [Adams].)

The following cases are also illustrative: *Asia Inv. Co. v. Borowski* (1982) 133 C.A.3d 832, 842, 184 C.R. 317 [alleged "threat" to use CEQA action to coerce settlement of case was statement made between counsel during judicial proceeding and privileged]; *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma* (1986) 42 C.3d 1157, 1165, 232 C.R. 567, 728 P.2d 1202 [citing *Twyford*, *Younger*, *Umansky* and other cases]; *Profile Structures v. Long Beach Bldg. Material Co.* (1986) 181 C.A.3d 437, 441, 226 C.R. 192 [service of protective order on bank and creditor of plaintiffs, both of which had property covered by the order, informed them of prohibition against plaintiff's transferring the property, hence, was privileged]; *Merlet v. Rizzo* (1998) 64 C.A.4th 53, 64, 75 C.R.2d 83, supra, §493 [motion for writ of sale and motion for reconsideration, meeting criteria for litigation privilege, did not support abuse of process action].

(3) *Defense Found Inapplicable.* In *Younger v. Solomon* (1974) 38 C.A.3d 289, 113 C.R. 113, supra, §526, S contended that his conduct was protected by absolute privilege, and that any improper motive on his part was therefore immaterial. *Held*, the defense was unavailable under the facts.

(a) The judicial proceedings privilege usually arises in defamation actions (see *infra*, §567 et seq.), but it has a broader application (see *Albertson v. Raboff* (1956) 46 C.2d 375, 295 P.2d 405, *infra*, §648; *Kachig v. Boothe* (1971) 22 C.A.3d 626, 99 C.R. 393, *infra*, §21). Hence, the privilege may be asserted in this action for abuse of process. (38 C.A.3d 300.)

(b) However, the relevancy limitation applies; i.e., the publication must have some connection with or logical relation to the judicial proceeding. (38 C.A.3d 301; citing *Bradley v. Hartford Acc. & Indem. Co.*, *supra*.) Here, S's interrogatory published the fact that a complaint had been made by 10 attorneys calling for disciplinary proceedings against appellant; and this matter had no logical relation to the underlying action. (38 C.A.3d 301, 302, citing the text.)

West's Key Number Digest, Process k.168-

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Defense Found Applicable.* *Cross-Reference:* 1 *Cal. Proc.* (5th), *Attorneys*, §66.(3) *Defense Found Inapplicable.* See *Booker v. Rountree* (2007) 155 C.A.4th 1366, 1372, 66 C.R.3d 733 [litigation privilege of C.C. 47(b) did not apply to

abuse of process claim based on cross-defendant's knowing failure to institute underlying action until after prior suit was settled; cross-complaint was not based on communicative act].



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CHAPTER IX - Torts

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C. Defamation.

1. In General.

a. Nature of Tort.

5 Witkin Sum. Cal. Law Torts § 529

[§ 529] Nature of Tort.

(1) *Definition and Types.* Defamation is an invasion of the interest in *reputation*. It may be *libel* or *slander*. (C.C. 44; on Restatement coverage, see *Rest.2d, Torts* §558 et seq.; on pleading, see 5 *Cal. Proc.* (4th), *Pleading*, §690 et seq.; on damages, see *infra*, §§1701, 1702; on alternative remedy of action for inducing breach of contract, see *infra*, §740.)

(2) *Elements.* The tort involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage. (C.C. 45, 46; *Rest.2d, Torts* §§558, 559; see *Smith v. Maldonado* (1999) 72 C.A.4th 637, 645, 85 C.R.2d 397, *infra*, §558, citing the text; *Seelig v. Infinity Broadcasting Corp.* (2002) 97 C.A.4th 798, 809, 119 C.R.2d 108 [there can be no defamation recover without a falsehood]; on elements of defamation, see *infra*, §§535 et seq., 539 et seq.) Some kinds of disparagement, such as the charge of a serious crime, would be damaging in the minds of everyone. But other types of disparagement may be defamatory if they have a tendency to injure the reputation among members of some substantial group of persons. (*Rest.2d, Torts*, Comment e.)

Because libel and slander are intentional torts, the defendant must have intended the publication. But *malice* or actual ill will is not an element of defamation. It is relevant in only two situations: (a) It must, as in other tort actions, be shown in order to obtain punitive damages (*infra*, §1572); (b) lack of malice must be shown by a defendant whose defense is qualified privilege (*infra*, §592). (See 16 Southwestern U. L. Rev. 577 [malice in defamation cases].)

(3) *Constitutional Issues.* The tort has constitutional ramifications. Liability for defamation of a public official or public figure, or concerning matters of public concern, is subject to First Amendment limitations. (See *infra*, §601 et seq.)

An elected official is constitutionally subject to disqualification for defamation during a political campaign that is a major contributing cause of an opposing candidate's defeat. (Cal. Const., Art. VII, §10.)

West's Key Number Digest, Libel and Slander k.471

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Definition and Types.*

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §734 et seq. *West's Key Number Digest*, Libel and Slander k. 1, 1.5



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C. Defamation.

1. In General.

b. Libel and Slander Distinguished.

5 *Witkin Sum. Cal. Law Torts* § 530

[§ 530] Libel and Slander Distinguished.

(1) *General Principles.* *Libel* includes the more permanent forms of defamatory matter; in California, it consists of a "writing, printing, picture, effigy, or other fixed representation to the eye." (C.C. 45, *infra*, §539.) *Slander* is the more transitory form, generally restricted to oral statements and gestures. (See C.C. 46, *infra*, §551; *Rest.2d, Torts* §568; 69 *Harv. L. Rev.* 887; 33 *So. Cal. L. Rev.* 104 [arguing for abolition of distinction between libel and slander].) The Restatement stresses the importance of the type of dissemination and the premeditated character of the publication in applying this distinction. (See *Rest.2d, Torts* §568(3).) Thus, the Restatement considers defamatory words spoken over radio or television as a libel, regardless of whether read from a prepared script. (*Rest.2d, Torts* §568A.) (See 64 *Harv. L. Rev.* 730; 66 *Harv. L. Rev.* 476; 69 *Harv. L. Rev.* 887; 71 *Harv. L. Rev.* 384; 33 *So. Cal. L. Rev.* 104; 46 *A.L.R.4th* 403 [defamation by gestures or acts]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §9 et seq.; 50 *A.L.R.3d* 1311 [defamation by radio or television].)

(2) *Broadcasting as Slander in California.* The general principles governing broadcasts are rejected in California by a statutory definition designed to limit tort liability: Slander includes "communications by radio or any mechanical or other means" (C.C. 46), and "radio" includes "both visual and sound radio broadcasting" (C.C. 48.5(4)). (See *White v. Valenta* (1965) 234 *C.A.2d* 243, 247, 44 *C.R.* 241; *Arno v. Stewart* (1966) 245 *C.A.2d* 955, 961, 54 *C.R.* 392; 19 *So. Cal. L. Rev.* 121; 23 *So. Cal. L. Rev.* 44; *BAJI*, No. 7.00.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Principles.* See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §9 et seq.



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C. Defamation.
1. In General.
c. Who May Be Defamed.
1. Class of Persons.

5 *Witkin Sum. Cal. Law Torts* § 531

[§ 531] Class of Persons.

An individual may have an action where the defamatory matter is directed against a class of persons to which he or she belongs, provided the class is not too large, and it can be shown that those to whom the matter is communicated reasonably understand that it is intended to apply to the plaintiff. (See *Rest.2d, Torts* §564A; *Dobbs, The Law of Torts* §406; 2 *Harper, James & Gray* 2d §5.7; 29 *Cal. L. Rev.* 83; 41 *Cal. L. Rev.* 144; 71 *Cal. L. Rev.* 1532 [Group Defamation and Individual Actions: A New Look at an Old Rule]; 69 *Harv. L. Rev.* 894, 898; 101 *Harv. L. Rev.* 682 [group libel laws]; 24 *So. Cal. L. Rev.* 213; 1 *U.C.L.A. L. Rev.* 176; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §349; 52 *A.L.R.4th* 618 [defamation of class or group as actionable by individual member]; 1 *Proof of Facts* 2d 513 [identification of individual allegedly defamed].)

The propriety of such an action has been recognized in two California cases in which recovery was denied. In *Noral v. Hearst Publications* (1940) 40 *C.A.2d* 348, 104 *P.2d* 860, the libelous statement was directed at the "officials" of the Workers' Alliance, a labor union. Plaintiff contended that this referred to him as one of the three paid officials, but the court pointed out that the 162 locals of the organization indicated that there were at least 162 officials besides state officers, and held that the group was too large. (40 *C.A.2d* 350.) *Noral* was followed in *Los Angeles Fire & Police Protective League v. Rodgers* (1970) 7 *C.A.3d* 419, 425, 86 *C.R.* 623, which involved an alleged defamation of the Los Angeles police, a class at that time of 5,000 persons.

West's Key Number Digest, Libel and Slander k.21, 73, 77, 82

SUPPLEMENT: [This section is current through the latest supplement]
See 2 *Harper, James & Gray* 3d §5.7; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §332.



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CHAPTER IX - Torts

Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

C. Defamation.

1. In General.

c. Who May Be Defamed.

2. Corporation, Partnership, or Association.

5 Witkin Sum. Cal. Law Torts § 532

[§ 532] Corporation, Partnership, or Association.

(1) *Business Corporation or Partnership.* A corporation may be defamed by matter that has a tendency to injure its *business reputation*, as by deterring persons from dealing with it. (*Vegod Corp. v. American Broadcasting Cos.* (1979) 25 C.3d 763, 770, 160 C.R. 97, 603 P.2d 14; *Di Giorgio Fruit Corp. v. American Federation of Labor & Congress of Industrial Organizations* (1963) 215 C.A.2d 560, 570, 30 C.R. 350; *Barnes-Hind v. Superior Court* (1986) 181 C.A.3d 377, 381, 226 C.R. 354; *Rest.2d, Torts* §561.) The same rule applies to a partnership. (*Rest.2d, Torts* §562.) The publication "must have a tendency to directly affect the credit or property" of the enterprise "or occasion it pecuniary injury. The mere fact that a publication is unpleasant or hostile does not make it defamatory." (*Western Broadcast Co. v. Times-Mirror Co.* (1936) 14 C.A.2d 120, 124, 57 P.2d 977 [suit by corporation].) (See Dobbs, *The Law of Torts* §407; 69 *Harv. L. Rev.* 892; 30 *Loyola L.A. L. Rev.* 139 [tobacco industry as subject of defamation]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §§351, 354.)

(2) *Nonprofit Corporation.* A nonprofit corporation that relies on financial support from the public may likewise be defamed by something that prejudices it in the estimation of the public. (*Rest.2d, Torts* §561, Comment on Clause (b).)

(3) *Unincorporated Labor Union.* An unincorporated labor union is regarded as an entity that may be defamed and may sue for defamation. (*Daniels v. Sanitarium Assn.* (1963) 59 C.2d 602, 609, 30 C.R. 828, 381 P.2d 652; see *Rest.2d, Torts* §562 [defamation of associations]; 4 *Cal. Proc.* (4th), *Pleading*, §82; 94 *A.L.R.5th* 149 [defamation regarding labor relations or disputes].)

(4) *Other Unincorporated Associations.* An unincorporated association has a cause of action for defamation under circumstances in which a corporation would have one. (*Washburn v. Wright* (1968) 261 C.A.2d 789, 793, 68 C.R. 224; *Rest.2d, Torts* §562; cf. *Mullins v. Brando* (1970) 13 C.A.3d 409, 422, 91 C.R. 796 [rule recognized but pleading insufficient].)

(5) *Distinction: Municipal Corporation.* California has held that a municipal corporation cannot sue an individual for libel, on the ground that criticism of the government is protected by the constitutional guarantee of free speech. (*Albany v. Meyer* (1929) 99 C.A. 651, 655, 279 P. 213 [circular during bond election campaign charging that city was

facing bankruptcy].) The Restatement takes no position on the issue. (See *Rest.2d, Torts* §561, Caveats.) (See 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §350; 45 *A.L.R.3d* 1315 [right of governmental entity to maintain defamation action].)

(6) *Distinction: Publication Directed Against Employee or Board Member.* A corporation or other entity may not maintain a defamation action if the allegedly defamatory material is reasonably interpreted as directed against an employee or board member, rather than against the entity itself. (See *Palm Springs Tennis Club v. Rangel* (1999) 73 *C.A.4th* 1, 4, 86 *C.R.2d* 73 [statements on why board chairman should not be reelected were made regarding his capacity as candidate and did not pertain to plaintiff nonprofit corporation; thus, statements could not form basis for its defamation suit].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Business Corporation or Partnership.* See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §334 et seq.

(3) *Unincorporated Labor Union.*

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §94.(5) *Distinction: Municipal Corporation.* See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §333.



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C. Defamation.

1. In General.

c. Who May Be Defamed.

3. Distinction: Deceased Person.

5 *Witkin Sum. Cal. Law Torts* § 533

[§ 533] Distinction: Deceased Person.

Publication of a statement "tending to blacken the memory of one who is dead" was originally a *crime* in California under former P.C. 248, 249. But no civil action lies to protect the interest of the estate or surviving relatives in the good name of the deceased. (*Saucer v. Giroux* (1929) 54 C.A. 732, 733, 202 P. 887; *Kelly v. Johnson Publishing Co.* (1958) 160 C.A.2d 718, 723, 325 P.2d 659; *Rest.2d, Torts* §560; see Dobbs, *The Law of Torts* §407; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §356.)

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §339.



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d. Commentary and Practice Works.

5 *Witkin Sum. Cal. Law Torts* § 534

[§ 534] Commentary and Practice Works.

The commentary on defamation is extensive. The following are illustrative:

(1) *Texts*. 2 Harper, James & Gray 2d §5.0 et seq.; Dobbs, *The Law of Torts* §399 et seq.; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §1 et seq.

(2) *Law Reviews*. 66 *Harv. L. Rev.* 476 [English reform proposals]; 74 *Cal. L. Rev.* 677 [symposium]; 69 *Harv. L. Rev.* 875 [exhaustive discussion of modern law]; 112 *Harv. L. Rev.* 1599, 1612 [defamation in cyberspace]; 35 *McGeorge L. Rev.* 1 [libel laws as ineffective safeguard against media abuses]; 26 *Pacific L. J.* 933 [evaluating harm to reputation]; 29 *Pepperdine L. Rev.* 533 [corporate criticism on Internet]; 24 *Santa Clara L. Rev.* 449 [need for new test of defamation in fiction]; 20 *Stanf. L. Rev.* 504 [criticism of existing law and proposal of retraction-reply statute]; 18 *U.S.F. L. Rev.* 1 [critique]; 98 *Harv. L. Rev.* 1909 ["libel-proof" plaintiffs].

(3) *Annotations*. 50 *A.L.R.4th* 1257 [who is "libel-proof"]; 53 *A.L.R.4th* 450 [defamation by question]; 45 *A.L.R.5th* 739 [defamation by charging breach or nonperformance of contract]; 54 *A.L.R.5th* 443 [defamation by newspaper's publication of letter to editor]; 69 *A.L.R.5th* 645 [defamation by charging cruelty to animals]; 84 *A.L.R.5th* 169 [liability of Internet service provider for Internet or e-mail defamation]; 94 *A.L.R.5th* 149 [defamation regarding labor relations or disputes]; 104 *A.L.R.5th* 523 [defamation of manufacturer regarding product, other than through statement charging breach or nonperformance of contract]; 109 *A.L.R.5th* 541 [defamation of church member by church or church official].

(4) *Practice Works*. *Cal. Civil Practice*, 1 Torts, Defamation, Chap. 21; C.E.B., 2 *California Business Litigation*, §11.111 et seq.; 5 *Proof of Facts* 3d 493 [defamation by employer]; 30 *Proof of Facts* 3d 53 [libel and slander actions by or against attorneys or physicians]; 45 *Proof of Facts* 3d 221 [defamation by supplying false information to credit reporting agency]; 68 *Proof of Facts* 3d 179 [liability for psychological harm from story or picture in media]; 19 *Am.Jur. Trials* 499 [defamation suits].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Texts*. See 2 Harper, James & Gray 3d §5.0 et seq.; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §1 et seq.(3)

Annotations. See 3 *A.L.R.6th* 153 [liability for defamatory statements sent or created electronically]; 7 *A.L.R.6th* 135

[imputation of homosexuality as defamation]; 22 *A.L.R.6th* 553 [liability of newspaper for defamation--21st century cases].

(4) *Practice Works*. See 105 Am.Jur. Trials 1 [employer liability for employee misuse of Internet].



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C. Defamation.

2. Publication of Statement.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 535

[§ 535] In General.

(1) *Meaning of Publication.* The defamatory matter must be "published," i.e., communicated to some third person who understands its defamatory meaning and application to the plaintiff. (*Ringler Associates v. Maryland Cas. Co.* (2000) 80 C.A.4th 1165, 1179, 96 C.R.2d 136, citing the text.) A statement made to the defamed person alone is not published. (*Rest.2d, Torts* §§558, 577; see *Farr v. Bramblett* (1955) 132 C.A.2d 36, 44, 281 P.2d 372, *infra*, §635 [exhibition of advertising copy to newspaper employees]; *Cabesuela v. Browning-Ferris Industries of Calif.* (1998) 68 C.A.4th 101, 111, 80 C.R.2d 60 [oral and written accusations that plaintiff threatened violence, communicated only to him, were not actionable]; Dobbs, *The Law of Torts* §402; C.E.B., 2 California Business Litigation, §11.113 et seq.; 69 *Harv. L. Rev.* 881; 19 *So. Cal. L. Rev.* 287 [publication in magazine]; 1 *U.C.L.A. L. Rev.* 575 [libel in will]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §235 et seq.; BAJI, Nos. 7.02, 7.03; CACI, Nos. 1706, 1708.)

To be actionable, the publication must be in fact made by the defendant. Only one who "takes a responsible part" in the publication is liable for the defamation. Thus, in *Matson v. Dvorak* (1995) 40 C.A.4th 539, 549, 46 C.R.2d 880, a person did not "publish" a defamatory campaign mailer when he merely contributed money to the organization that did so, and when there was no allegation that he participated in preparing the mailer, knew of its contents in advance of publication, knew that the charges made in the mailer were false, or held any position in the organization from which his oversight of campaign literature could be inferred.

(2) *Communication to Single Person.* The publication need not be to the "public" or to any large group; communication to a single person is enough. (*Smith v. Maldonado* (1999) 72 C.A.4th 637, 645, 85 C.R.2d 397, *infra*, §558, citing the text; see *Cunningham v. Simpson* (1969) 1 C.3d 301, 306, 81 C.R. 855, 461 P.2d 39 [bank finance officer said to seller of car in presence of prospective buyer, "you've got a hot title"]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §243.)

(3) *Communication for Transmission or to Agent.* Delivery of a message for transmission is a publication to the recipient. (See *Rest.2d, Torts* §577, Comment g [delivery to telegraph company].) Likewise, communication to the defendant's own agent is a publication, but it may be *privileged*. (*Rest.2d, Torts* §577, Comments e, h; see *Kelly v. General Tel. Co.* (1982) 136 C.A.3d 278, 284, 186 C.R. 184 [statement by one of defendant's employees to other employees]; 4 *Hastings L. J.* 202; 27 *So. Cal. L. Rev.* 229; 62 *A.L.R.3d* 1207 [dictation to stenographer]; 16 *A.L.R.4th*

1372 [delivery to commercial printer]; 47 A.L.R.4th 674 [intracorporate communication of employee's evaluation].)

(4) *Communication Between Husband and Wife*. An early California case held that a communication by a husband to his wife in the privacy of their home, and overheard by the plaintiff who was eavesdropping, was not a publication. (See *Sesler v. Montgomery* (1889) 78 C. 486, 489, 21 P. 185.) The better view seems to be that there is a publication, but that it is *absolutely privileged*. (*Rest.2d, Torts* §577, Comment j.)

West's Key Number Digest, Libel and Slander k.2 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Meaning of Publication*. See *Ruiz v. Harbor View Community Assn.* (2005) 134 C.A.4th 1456, 1474, 37 C.R.3d 133 [allegedly defamatory letters from defendant's attorney to plaintiff were not actionable in absence of evidence of their publication, i.e., communication to third person who understood their defamatory meaning]; 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §220 et seq. *Liability of one taking responsible part in publication*: See *Overstock.com v. Gradient Analytics* (2007) 151 C.A.4th 688, 712, 61 C.R.3d 29 [investor-subscribers who directed publisher of analytic reports on public companies to publish false, negative reports on corporation in order to manipulate its share prices took responsible part in publication of defamatory material and were liable to corporation for defamation].

(*New*) *Communication transmitted by fax and read by third party*: In *Martinelli v. International House USA* (2008) 161 C.A.4th 1332, 75 C.R.3d 186, plaintiff, a lawyer, sued defendant school for libel and slander. Plaintiff's niece was an Italian national enrolled at the school, and the school terminated her enrollment for accepting employment in violation of her visa. The school transmitted by fax two documents falsely accusing plaintiff of asking the school to ignore immigration regulations. The first was sent to the family's insurance business, addressed to the attention of plaintiff's daughter, and the other to plaintiff's law office. Plaintiff's daughter read each document. The trial court granted defendant's motion for summary adjudication. *Held*, affirmed.

(a) *Transmission to plaintiff's office*. The communication to plaintiff's office fax machine was not a publication. The school used the fax number on the letterhead of a letter plaintiff had sent the school protesting the school's allegation of her wrongdoing. By sending the letter with her office fax number, plaintiff invited return correspondence from the school. Plaintiff undertook the burden to protect her confidentiality, and the school had no duty to determine who had access to the fax machine (161 C.A.4th 1337.)

(b) *Transmission to family business*. The communication to the family business poses a closer question, but it also was not a publication. The niece had given the school that fax number as a means of communicating with plaintiff on issues concerning the niece and her immigration status. The school sent the fax to plaintiff's daughter because the niece had advised the school that the daughter worked closely with plaintiff and that plaintiff was not in the office on the day of the transmission. Under these facts, the school could reasonably believe that sending the fax to the daughter's attention was equivalent to sending it to plaintiff. (161 C.A.4th 1338.)

(2) *Communication to Single Person*. See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §228.



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C. Defamation.

2. Publication of Statement.

b. Unintended Publication.

5 *Witkin Sum. Cal. Law Torts* § 536

[§ 536] Unintended Publication.

Publication may be negligent as well as intentional. (*Hellar v. Bianco* (1952) 111 C.A.2d 424, 426, 244 P.2d 757, *infra*, §537; *Rest.2d, Torts* §577.) There may be a publication even though none was intended, e.g., where a defamatory personal letter is sent, knowing that the addressee is frequently absent and that others may read his mail. But no publication occurs where a letter is stolen and read, or opened despite a "personal" mark. (See *Rest.2d, Torts* §577, Comments k et seq.; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §§237, 251; 92 *A.L.R.2d* 219 [publication by accidental communication, or communication only to plaintiff].)

West's Key Number Digest, Libel and Slander k.2

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §223.

In *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 C.A.4th 863, 63 C.R.3d 514, plaintiff introduced evidence of defamatory remarks made to her by defendant that were overheard by a third person who was in another room and out of defendant's view. *Held*, nonsuit affirmed. If a reasonable person would recognize that an act creates an unreasonable risk that defamatory matter will be communicated to a third person, the conduct becomes a negligent communication and is actionable. (153 C.A.4th 878; citing *Rest.2d, Torts* §577, Comment k.) Here, however, the evidence does not indicate that defendant had any reason to believe that the third person would overhear her comments. (153 C.A.4th 879.)



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C. Defamation.

2. Publication of Statement.

c. Republication.

5 Witkin Sum. Cal. Law Torts § 537

[§ 537] Republication.

(1) *In General.* If the defendant reprints or circulates a libelous writing, this has the same effect as an original publication. The same is true where the defendant repeats a slanderous charge, even though the defendant states the source of it, or indicates that he or she is merely repeating a rumor. (See *Gilman v. McClatchy* (1896) 111 C. 606, 612, 44 P. 241 [libel]; *Ringler Associates v. Maryland Cas. Co.* (2000) 80 C.A.4th 1165, 1179, 96 C.R.2d 136, citing the text [libel]; *Shively v. Bozanich* (2003) 31 C.4th 1230, 1243, 7 C.R.3d 576, 80 P.3d 676, citing the text [rule that each publication of defamatory statement gives rise to new cause of action applies not only when original defamer repeats or recirculates original remarks to new audience, but also when person who heard, read, or saw original remarks repeats them to others]; *Rest.2d, Torts* §§576, 578; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §260 et seq.; BAJI, No. 7.02.1.) And the original defamer may be liable for the repetition of it by a third person, if he or she had reason to expect the repetition. (See *Schneider v. United Airlines* (1989) 208 C.A.3d 71, 75, 256 C.R. 71 [airline that sent false information to credit reporting agency was liable for agency's republication to two banks]; *Rest.2d, Torts* §576(c); 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §263; 96 A.L.R.2d 373 [liability of publisher of defamatory statement for its repetition or republication by others]; cf. *Spitler v. Children's Institute Int.* (1992) 11 C.A.4th 432, 440, 14 C.R.2d 197 [defendant who gave privileged testimony before Congressional hearing was not liable for its republication in absence of evidence that defendant authorized republication].)

An unusual coupling of the doctrines of negligent publication and republication was made in *Hellar v. Bianco* (1952) 111 C.A.2d 424, 244 P.2d 757. Defendants were proprietors of a public tavern. An unknown person wrote plaintiff's first name and telephone number on the toilet wall, with the suggestion that she was available for illicit relations. Learning of this from a caller, her husband phoned defendants' bartender demanding removal of the writing. Shortly afterwards, plaintiff's husband and others came to the bar and found the libelous matter still there. A judgment of nonsuit was reversed: (a) Persons who invite the public to their premises owe a duty not to knowingly permit their walls to contain defamatory matter; and (b) a republication occurs when the proprietor has knowledge of the matter and allows it to remain after a reasonable opportunity to remove it. Here, defendants had imputed knowledge (through their agent, the bartender), and the period for which the matter must remain in order to establish republication is a question of fact for the jury. (111 C.A.2d 426.) (See 40 *Cal. L. Rev.* 625 [*Hellar*]; 4 *Hastings L. J.* 68 [same]; *Stanf. L. Rev.* 363 [same]; 28 A.L.R.2d 1454 [liability for permitting walls or other portions of place of public resort to be occupied with

defamatory matter].)

(2) *Foreseeable Republication by Person Defamed.* The general rule is that where the person defamed voluntarily discloses the contents of a libelous communication to others, the originator of the libel is not responsible for the resulting damage. But an exception has been recognized where the originator has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after the defamed person has read it or been informed of its contents. (*Beroiz v. Wahl* (2000) 84 C.A.4th 485, 497, 100 C.R.2d 905.) The exception was applied to uphold a pleading in *McKinney v. Santa Clara* (1980) 110 C.A.3d 787, 168 C.R. 89, in which a job seeker needed to tell a prospective employer what was in his personnel file in order to explain away a negative job reference. "The rationale for making the originator of a defamatory statement liable for its foreseeable republication is the strong causal link between the actions of the originator and the damage caused by the republication. This causal link is no less strong where the foreseeable republication is made by the person defamed operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed." (110 C.A.3d 797.)

McKinney was distinguished in *Live Oak Publishing Co. v. Cohagan* (1991) 234 C.A.3d 1277, 286 C.R. 198. Plaintiffs' newspaper published articles about each candidate for a local election, and garbled the article about the candidate supported by defendant. Defendant wrote a letter to the newspaper accusing it of intentional garbling, presumably to influence the outcome of the election. Defendant included a check to cover the cost of printing her letter as a full-page advertisement, and the paper printed it. The publisher and officers of the paper then sued defendant for libel. *Held*, judgment for defendant on demurrer affirmed.

(a) Although it is typically the newspaper that seeks protection from liability for printing a letter to the editor, a newspaper or its agents may sue for defamation. (234 C.A.3d 1283.) However, a plaintiff cannot manufacture a defamation cause of action by publishing statements to third persons; the publication must ordinarily be done by the defendant. (234 C.A.3d 1284.)

(b) An exception has been recognized where it is foreseeable that a defendant's act will result in publication to a third person. (234 C.A.3d 1284, citing *Schneider v. United Airlines*, *supra*.) This necessity exception has been applied in two different contexts. The first is where the originator of the defamatory statement has reason to believe that the statement will fall into the hands of a third party *before* the defamed person reads it or is informed of its contents. (234 C.A.3d 1284.) The necessity exception may also apply where there is a threat amounting to coercion; e.g., where the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person *after* the defamed person has read it or been informed of its contents. (234 C.A.3d 1284.) But this aspect of the exception has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them. (234 C.A.3d 1285.)

(c) Here plaintiff argued that it acted reasonably in publishing the letter. However, the evidence did not establish coerced publication, for the statement would not go un rebutted if plaintiff refused to publish. Plaintiffs could print an article contesting the accuracy of defendant's assertions if she made them from another forum. In stark contrast is the sort of situation presented by *McKinney*. In that situation there is no alternative but for the plaintiff to republish the defamation. (234 C.A.3d 1287.)

(3) *Unauthorized Changes in Original Material.* In *Montandon v. Cox Broadcasting Corp.* (1975) 45 C.A.3d 932, 120 C.R. 196, defendant, producer of a TV show, sent an unobjectionable press release to TV Guide. TV Guide changed it into a libelous statement. *Held*, although TV Guide's publisher was liable (see *Montandon v. Triangle Publications* (1975) 45 C.A.3d 938, 120 C.R. 196, *infra*, §611), defendant producer was not. There was no agency relationship between the two; and "[a]n author cannot be held liable for republication unless the original statement is defamatory." (45 C.A.3d 935.)

West's Key Number Digest, Libel and Slander k.26 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §241 et seq.(4) *(New) Immunity of Internet Service Providers and Users.* Internet service providers and users are immune by federal statute from defamation liability for republication. (See 47 U.S.C., §230.) In *Barrett v. Rosenthal* (2006) 40 C.4th 33, 51 C.R.3d 55, 146 P.3d 510, plaintiffs sued defendant, an individual, for libel, alleging that she maliciously republished messages and postings on the Internet after being warned that they were defamatory. The trial court granted defendant's motion to strike the complaint under the anti-SLAPP statute (see 5 *Cal. Proc.* (5th), *Pleading*, §1017 et seq.), but the Court of Appeal reversed. *Held*, reversed.

(a) *Statutory immunity and common law background.* Under the Communications Decency Act of 1996, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" (47 U.S.C., §230(c)(1)), and "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section" (47 U.S.C., §230(e)(3)). These provisions have been widely and consistently interpreted to confer broad immunity against defamation liability for persons using the Internet to publish information that originates from another source. This immunity has been applied regardless of the traditional distinction between "publishers" and "distributors." Distributors (e.g., newspaper vendors and book sellers) are liable at common law only if they have notice of the defamatory nature of the statement. However, the publisher of the newspaper or book where the statement originally appears may be held liable at common law even without notice. Here, the Court of Appeal diverged from the prevailing interpretation of 47 U.S.C., §230 by holding that common law "distributor" liability survived the congressional grant of immunity, so that Internet service providers and users are exposed to liability if they republish a statement with notice of its defamatory character. This construction of the statute is incorrect. (40 C.4th 41.)

(b) *Application of immunity to distributors.* This federal statutory immunity provision applies to distributors as well as publishers. (40 C.4th 41.)

(1) The leading case on 47 U.S.C., §230 immunity, *Zeran v. America Online* (4th Cir. 1997) 129 F.3d 327, rejected the distributor liability theory that was adopted here by the Court of Appeal. (40 C.4th 43.) The *Zeran* court's views have been broadly accepted in both federal and state courts, including two other *California Courts of Appeal*. (40 C.4th 45, citing *Kathleen R. v. Livermore* (2001) 87 C.A.4th 684, 104 C.R.2d 772, and *Gentry v. eBay* (2002) 99 C.A.4th 816, 121 C.R.2d 703.)

(2) The *Zeran* court's construction of the term "publisher" in 47 U.S.C., §230(c)(1) to include "distributor" is sound. Given that distributors are also known as "secondary publishers," there is little reason to believe that Congress felt it necessary to address them separately. There is even less reason to suppose that Congress intended to immunize "publishers" but leave "distributors" open to liability, because the responsibility of publishers for offensive content is greater than that of mere distributors. (40 C.4th 48.) The legislative history reflects a congressional intent to broadly shield from liability all providers of online content provided by others, and not to maintain the common law distinction between publishers and distributors. (40 C.4th 50.)

(3) The *Zeran* court identified three deleterious effects that would flow from reading 47 U.S.C., §230 to permit liability of Internet distributors where there is notice. First, providers of information on the Internet who received notification of a defamatory message would be subject to liability only for maintaining the message, not for removing it. This fact, together with the burdens involved in evaluating the defamatory character of messages, would provide a natural incentive to simply remove messages on notification, chilling the freedom of Internet speech. Second, notice-based liability would deter providers from actively screening the content of material received, because discovering potentially defamatory material would only increase the provider's liability. Finally, notice-based liability would give third parties a cost-free means of manufacturing claims. (40 C.4th 54.) The volume and range of Internet communications make the "heckler's veto" a real threat to free speech under the Court of Appeal's holding. (40 C.4th

57.)

(c) *Application of immunity to individual users.* The immunity provision immunizes individual "users" of interactive computer services, such as defendant here, as well as the providers of these services. "User" is not defined in the statute, and the limited legislative record does not indicate why Congress included users as well as service providers under the umbrella of immunity. However, "user" plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service. (40 C.4th 58.)

(d) *Application of immunity to active use.* The immunity applies whether the use is active or passive. The term "user" is not limited to those who simply receive offensive information or who screen and remove that information from an Internet site, but extends to persons who actively post or republish information. A user who merely receives information on a computer without making it available to anyone else would be neither a "publisher" nor a "speaker" under 47 U.S.C., §230(c)(1). Congress obviously had a broader meaning in mind. (40 C.4th 59.)

(e) *Conclusion.* "The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications. Nevertheless, by its terms section 230 exempts Internet intermediaries from defamation liability for republication. The statutory immunity serves to protect online freedom of expression and to encourage self-regulation, as Congress intended. Section 230 has been interpreted literally. It does not permit Internet service providers or users to be sued as 'distributors,' nor does it expose 'active users' to liability. Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await Congressional action." (40 C.4th 62.)

A concurring opinion suggests that an Internet publisher who conspires with the author of a defamatory statement would not be immune under the statute. However, there was no prima facie showing of conspiracy here. (40 C.4th 63.)



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C. Defamation.

2. Publication of Statement.

d. Single Publication Rule.

5 *Witkin Sum. Cal. Law Torts* § 538

[§ 538] Single Publication Rule.

(1) *Common Law and Restatement Background.* The early common law rule, treating any defamatory publication as a tort, would permit separate actions to be brought for each sale or delivery of a newspaper or magazine containing libelous matter. This unreasonable approach was abandoned by a number of jurisdictions in favor of the single publication rule, which treats one edition of a newspaper or magazine or one radio or television broadcast as a unit, giving rise to but one cause of action. (On problems of multiple defamation actions and multi state defamation, see 44 *Cal. L. Rev.* 146; 59 *Harv. L. Rev.* 136 [multiple printings of book]; 60 *Harv. L. Rev.* 941; 62 *Harv. L. Rev.* 1041; 63 *Harv. L. Rev.* 1272; 69 *Harv. L. Rev.* 946; 23 *So. Cal. L. Rev.* 51; 24 *So. Cal. L. Rev.* 104; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §264 et seq.; 58 *A.L.R.2d* 650 [conflict of laws with respect to the single publication].) The single publication rule is adopted by the Restatement. (See *Rest.2d, Torts* §577.)

(2) *Uniform Single Publication Act.* The single publication rule has been incorporated into the Uniform Single Publication Act, promulgated in 1952 (see 14 U.L.A. (Master Ed.), p. 375), and adopted in California in 1955 (see C.C. 3425.1 et seq.). C.C. 3425.3, the main section, states: "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions." (For discussions of Act, see 44 *Cal. L. Rev.* 146; 32 *Golden Gate L. Rev.* 325 [why single publication rule should not apply to defamatory Internet publications]; 69 *Harv. L. Rev.* 950; 41 *A.L.R.4th* 541 [what constitutes "single publication" within meaning of single publication rule]; on effect of Act on statute of limitations, see 3 *Cal. Proc.* (4th), *Actions*, §513.)

One cause of action arises, and the statute of limitations commences to run, on the first general publication or broadcast of a defamatory statement, notwithstanding how many copies of the publication are ultimately distributed or how many people ultimately hear or see the broadcast and regardless of when the plaintiff first becomes aware of the publication or broadcast. Any subsequent republication or rebroadcast gives rise to a new single cause of action. (See *Traditional Cat Assn. v. Gilbreath* (2004) 118 *C.A.4th* 392, 395, 399, 13 *C.R.3d* 353 [1-year statute of limitations barred defamation claim based on publication of Internet website where site had not been altered, and statements on site had not been republished in other formats, in year preceding filing of action].)

"The Act is not intended to have any application to the causes of action of two or more separate plaintiffs who are defamed in the same publication, or to the causes of action of one plaintiff against two or more separate defendants, each of whom has published the same statement or taken part in the same publication." (Commissioners' Note, 14 U.L.A. (Master Ed.), p. 376; see *Shively v. Bozanich* (2003) 31 C.4th 1230, 1245, 7 C.R.3d 576, 80 P.3d 676 [even under single publication rule, multiple causes of action may be brought in one proceeding against several defendants for single defamatory statement; each person who takes responsible part in publication is liable].) Thus, the Act does not apply when the defamation on republication reaches a new person or entity. (See *Schneider v. United Airlines* (1989) 208 C.A.3d 71, 76, 256 C.R. 71 [republications of damaging credit report to separate entities that denied credit to plaintiff].)

The Uniform Act refers to an "edition" of a newspaper; the California statute changed this to "issue," a more comprehensive term. This difference may affect the timeliness of filing an action. (See *Belli v. Roberts Bros. Furs* (1966) 240 C.A.2d 284, 287, 289, 49 C.R. 625; 3 Cal. Proc. (4th), Actions, §513.) Further, when a hardcover book is republished in a paperback edition, there is a new "issue" giving rise to a new cause of action. (*Kanarek v. Bugliosi* (1980) 108 C.A.3d 327, 332, 166 C.R. 526.)

Plaintiffs may not circumvent the statutory limitation by proceeding on theories other than defamation. The statutory phrase "or any other tort" means exactly that. (*Long v. Walt Disney Co.* (2004) 116 C.A.4th 868, 873, 10 C.R.3d 836 [causes of action alleging violation of right of publicity, appropriation of likenesses, and intentional infliction of emotional distress by defendant's use of plaintiffs' computer-altered childhood likenesses in television programming and on Internet were within scope of Act].)

McGuire v. Brightman (1978) 79 C.A.3d 776, 145 C.R. 256, answered the question whether the Act's restriction to a single action applies where a libel is published in one state but has an effect in another state. Defendant, an officer and reporter of a small California newspaper, visited South Dakota, and while there, gathered material for an article libeling plaintiff, a South Dakota resident. The article was published and distributed to subscribers, a few of whom were in South Dakota. Held: (a) South Dakota had jurisdiction of a libel action based on the commission of the tort there (injury to plaintiff's reputation at his domicile). (79 C.A.3d 784, 788; see 2 Cal. Proc. (4th), Jurisdiction, §139.) (b) The Uniform Act was concerned with preventing multiplicity of suits and lengthy tolling of the statute of limitations; it was not intended to nullify the established rules of jurisdiction. (79 C.A.3d 786.) (See *Keeton v. Hustler Magazine* (1984) 465 U.S. 770, 104 S.Ct. 1473, 1480, 79 L.Ed.2d 790, 799 [interest in cooperating with other states in application of single publication rule was factor giving forum state jurisdiction over out-of-state publisher].)

West's Key Number Digest, Libel and Slander k.5

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Common Law and Restatement Background.* See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §245 et seq.(2) *Uniform Single Publication Act.* Volume 14 of the Uniform Laws Annotated was revised in 2005. The Uniform Single Publication Act is now at 14 U.L.A. (Master Ed.), p. 469.

Effect of Act on statute of limitations:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §551.*Belli case:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §551.

Tortious act at domicile:

Cross-Reference: 2 Cal. Proc. (5th), Jurisdiction, §145.

(3) *(New) Publication With Limited Distribution.* *Hebrew Academy of San Francisco v. Goldman* (2007) 42 C.4th 883, 70 C.R.3d 178, 173 P.3d 1004, addressed the application of the single publication rule to a publication with limited

distribution. A private school and its dean brought a defamation action against a religious federation, its past president, and related defendants, alleging that the past president had made defamatory statements about the dean in an interview published 10 years earlier in an oral history with fewer than 10 copies distributed to academic libraries and without distribution to the general public. The trial court granted defendants' motion for summary judgment made on statute of limitations grounds. The Court of Appeal reversed. *Held*, judgment of the Court of Appeal reversed. The rule applies to a publication with only limited distribution, regardless of the date on which the plaintiff actually learns of the existence of the publication and reads its contents. This furthers the rule's purposes of avoiding potential multiplicity of actions from one edition of a book or newspaper and avoiding the creation of a new limitations period for each purported republication. Therefore, this action was time-barred. (42 C.4th 887, 890.)



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a. Libel.

1. In General.

aa. Statutory Definition.

5 *Witkin Sum. Cal. Law Torts* § 539

[§ 539] Statutory Definition.

C.C. 45 defines libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (See *Savage v. Pacific Gas & Elec. Co.* (1993) 21 C.A.4th 434, 447, 26 C.R.2d 305 [statement that journalist was participating in legal action involving a utility while employed by trade journal covering that utility had tendency to injure her in her profession within meaning of C.C. 45]; *Rest.2d, Torts* §568(1) [defining libel as "publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words"]; Dobbs, *The Law of Torts* §403 et seq.; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §118 et seq.; 95 *A.L.R.3d* 660 [libel by newspaper headlines].)

Despite its broad language, C.C. 45 is limited to statements that either directly or implicitly disparage plaintiff personally, and does not encompass trade libel (*infra*, §645). (*Polygram Records v. Superior Court* (1985) 170 C.A.3d 543, 550, 216 C.R. 252.)

West's Key Number Digest, Libel and Slander k.6.1, 11 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §118 et seq.



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5 Witkin Sum. Cal. Law Torts § 540

[§ 540] Common Law Rule: All Libel Is Actionable Without Proof of Special Damage.

Under the general common law rule, libel and slander have different effects. Libel is more permanent in form (see *supra*, §530), and is considered more serious and harmful. If the matter is defamatory, and is in written or other permanent form so as to amount to a libel, it is considered *actionable per se*; i.e., injury is presumed to follow from the act, and the plaintiff is not required to plead or prove special damages. The plaintiff is always entitled, in the absence of a good defense, to a judgment for at least nominal damages, to expose the false charges and vindicate his or her reputation. Under this view, *any libel* is actionable *per se*, and the use of the expression "libel *per se*" (see *infra*, §541) is meaningless. (See *Rest.2d, Torts* §569 [stating common law rule]; 79 *Harv. L. Rev.* 733; 17 *So. Cal. L. Rev.* 347.)

SUPPLEMENT: [This section is current through the latest supplement]



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cc. California Doctrine of Libel Per Se.

5 Witkin Sum. Cal. Law Torts § 541

[§ 541] California Doctrine of Libel Per Se.

A special meaning has been given to the term "libel per se" in California and some other states. Where the statement is defamatory *on its face*, it is said to be libelous per se, and actionable without proof of special damage. But if it is defamation *per quod*, i.e., if the defamatory character is not apparent on its face and requires an explanation of the surrounding circumstances (the "innuendo") to make its meaning clear, it is not libelous per se, and is not actionable without pleading and proof of special damages. (See *infra*, §555.) Although greatly criticized as an illogical and undesirable innovation (see 79 *Harv. L. Rev.* 740; 17 *So. Cal. L. Rev.* 347), this doctrine of libel per se has long been established in California. (*Tonini v. Cevasco* (1896) 114 C. 266, 271, 46 P. 103; *MacLeod v. Tribune Publishing Co.* (1959) 52 C.2d 536, 549, 343 P.2d 36, *infra*, §550; *Peabody v. Barham* (1942) 52 C.A.2d 581, 584, 126 P.2d 668; *Smith v. Los Angeles Bookbinders Union No. 63* (1955) 133 C.A.2d 486, 494, 284 P.2d 194; *Menefee v. Codman* (1957) 155 C.A.2d 396, 401, 317 P.2d 1032; *White v. Valenta* (1965) 234 C.A.2d 243, 255, 44 C.R. 241; *Williams v. Daily Review* (1965) 236 C.A.2d 405, 409, 46 C.R. 135, *infra*, §544; *Smith v. Maldonado* (1999) 72 C.A.4th 637, 645, 85 C.R.2d 397, *infra*, §558; *Walker v. Kiousis* (2001) 93 C.A.4th 1432, 1441, 114 C.R.2d 69; see *Triton Ins. Underwriters v. National Chiropractic Ins. Co.* (1965) 232 C.A.2d 829, 833, 43 C.R. 504, citing the text [libel per se permits recovery of nominal damages; judgment proper for \$ 1 and costs]; 69 *Harv. L. Rev.* 889; 19 *So. Cal. L. Rev.* 119 [under doctrine of libel per se, there is little difference between libel and slander in the requirement of proof of special damages]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §144 et seq.)

The doctrine has been codified. "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." (C.C. 45a.) (See *Babcock v. McClatchy Newspapers* (1947) 82 C.A.2d 528, 539, 186 P.2d 737 [1945 adoption of C.C. 45a "merely enacts, in code form, the rule which has long been in force in this state"].)

In *Barnes-Hind v. Superior Court* (1986) 181 C.A.3d 377, 381, 385, 226 C.R. 354, citing the text, the court said: "If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a

defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then ... there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then ... the libel cannot be libel per se but will be libel *per quod*," requiring pleading and proof of special damages. (181 C.A.3d 386.)

West's Key Number Digest, Libel and Slander k.6.1

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §145 et seq.



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5 *Witkin Sum. Cal. Law Torts* § 542

[§ 542] Charges of Criminal Conduct.

The charge of commission of some kind of crime is obviously libel per se. (See 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §166; 52 *A.L.R.2d* 1178 [statement or publication that plaintiff has been indicted or is under indictment as libelous]; 32 *A.L.R.3d* 1427 [actionability of accusation or imputation of tax evasion]; 38 *A.L.R.2d* 161 [imputation of perjury or false swearing as actionable per se]; 93 *A.L.R.3d* 625 [actionability of false newspaper report that plaintiff has been arrested].)

In *Edwards v. San Jose Printing & Publishing Soc.* (1893) 99 C. 431, 34 P. 128, a newspaper article stating that it was understood that a certain corporation was putting up money to corrupt voters, and that it was "reported that Edwards is to have charge of the sack" was held libelous per se. The term "sack" in this connection had an established meaning and plaintiff was not required to prove the sense in which it was used and understood. (99 C. 435.)

In *Boyich v. Howell* (1963) 221 C.A.2d 801, 34 C.R. 794, a circular charged that plaintiff, a city councilman and candidate for election, "was convicted, fined and barred from holding union office for five years ... because he stuffed the ballot box in a union election." *Held*, this was defamatory on its face; the average lay reader could well view this as a conviction of a crime. (221 C.A.2d 802.)

West's Key Number Digest, Libel and Slander k.7

SUPPLEMENT: [This section is current through the latest supplement]

See *Christian Research Institute v. Alnor* (2007) 148 C.A.4th 71, 80, 55 C.R.3d 600, Supp., *infra*, §611 [statement on defendant's website that "Federal Criminal Mail Fraud Investigation" had been launched against plaintiffs constituted libel under C.C. 45]; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §161.



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5 Witkin Sum. Cal. Law Torts § 543

[§ 543] Charges of Other Misconduct or Character Defect.

The charge may be that the plaintiff has been guilty of an act of dishonesty, or that plaintiff has some particular defect of character. It is not necessary that the publication charge the commission of a crime; it is sufficient if it so reflects on the person's integrity as to bring him or her into disrepute. (*Maher v. Devlin* (1928) 203 C. 270, 275, 263 P. 812; *Stevens v. Snow* (1923) 191 C. 58, 63, 214 P. 968; *Slaughter v. Friedman* (1982) 32 C.3d 149, 153, 154, 185 C.R. 244, 649 P.2d 886, *infra*, §564; 15 So. Cal. L. Rev. 274 [charge that public official had religious and racial prejudice]; 33 So. Cal. L. Rev. 88 [charge of Communist Party membership]; 50 Am.Jur.2d (1995 ed.), *Libel and Slander* §§192 et seq., 216 et seq.; 6 A.L.R.2d 1008 [imputing unfitness to employee]; 99 A.L.R.2d 700 [imputing credit unworthiness to nontrader]; 40 A.L.R.3d 490 [imputing inefficiency to schoolteacher]; 51 A.L.R.3d 1300 [imputing business misconduct in single transaction or occurrence]; 62 A.L.R.4th 314 [imputation of allegedly objectionable political or social beliefs or principles]; on character disparagement of particular professionals, see 37 A.L.R.4th 1088 [candidates for public office]; 38 A.L.R.4th 836 [doctors and dentists]; 38 A.L.R.4th 874 [psychiatrists, psychologists, and counselors]; 46 A.L.R.4th 326 [attorneys].)

Thus, falsely charging a person with "a violation of confidence reposed in him or with treachery to his associates" is actionable per se. (*Dethlefsen v. Stull* (1948) 86 C.A.2d 499, 502, 195 P.2d 56.) Here, a former partner's published letter stating that plaintiff received partnership funds that he failed to deposit to the firm's account was held libelous on its face, even though plaintiff, technically, was not guilty of larceny or embezzlement.

A statement that plaintiff, a publicity agent, after discharge from her employment, continued to use the employer's stationery without notifying newspapers of her change of status, thus misleading various persons, charged a breach of confidence and trust, and tended to injure plaintiff in her occupation. As such it was libelous per se. (*Bates v. Campbell* (1931) 213 C. 438, 443, 2 P.2d 383.)

The following cases are also illustrative:

Washer v. Bank of America (1943) 21 C.2d 822, 828, 136 P.2d 297 [charge that employee had been guilty of

"flagrant insubordination"].

Pridonoff v. Balokovich (1951) 36 C.2d 788, 790, 228 P.2d 6 [charge that plaintiff, member of American Embassy in Belgrade, engaged in such flagrant espionage that he was recalled].

MacLeod v. Tribune Publishing Co. (1959) 52 C.2d 536, 546, 343 P.2d 36 ["charge of membership in the Communist Party or communist affiliation or sympathy is libelous on its face"].

Peterson v. Rasmussen (1920) 47 C.A. 694, 698, 191 P. 30 [imputation of want of chastity in woman].

Kramer v. Ferguson (1964) 230 C.A.2d 237, 242, 41 C.R. 61, citing the text [statements urging recall of city councilmen as tools of an "undesirable element" and as acting in matters in which they had personal interest; but reversal for failure to instruct properly on privilege].

Fairfield v. Hagan (1967) 248 C.A.2d 194, 201, 56 C.R. 402 [letters sent to creditors of bankrupt estate implying that plaintiff, attorney for trustee, was receiving fees for little work done, and that his continued handling of the estate would produce little or nothing for creditors].

However, a charge of misconduct that tends to injure plaintiff in his or her occupation is not actionable where the occupation is *unlawful*. (*Glenn v. Gibson* (1946) 75 C.A.2d 649, 662, 171 P.2d 118.)

West's Key Number Digest, Libel and Slander k.6, 8 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §§184 et seq., 206 et seq.; 120 *A.L.R.5th* 483 [character disparagement of dentist as defamation] and 16 *A.L.R.6th* 1 [character disparagement of doctor as defamation], together superseding 38 *A.L.R.4th* 836, text, p. 796.



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5 *Witkin Sum. Cal. Law Torts* § 544

[§ 544] Epithets and Derogatory Suggestions.

There need not be a direct accusation or charge of misconduct; epithets or descriptive words or opinions that carry with them the implication of acts of misconduct are actionable. (See *Newby v. Times-Mirror Co.* (1916) 173 C. 387, 395, 160 P. 233 [statement that person is "hypocrite"]; *Rosenberg v. J.C. Penney Co.* (1939) 30 C.A.2d 609, 620, 87 P.2d 696, *infra*, §645 [display of rival merchant's goods, with placards containing comments imputing dishonest business methods, is both libel per se and trade libel]; *Freeman v. Mills* (1950) 97 C.A.2d 161, 166, 217 P.2d 687 [communication by investigating agency reporting several derogatory statements made about plaintiff employee]; *Morris v. National Federation of the Blind* (1961) 192 C.A.2d 162, 164, 13 C.R. 336 [charge that plaintiff is "racketeer"]; *Montandon v. Triangle Publications* (1975) 45 C.A.3d 938, 943, 120 C.R. 196, *infra*, §611; *Rest.2d, Torts* §566 [statement of opinion is actionable where it implies allegation of undisclosed defamatory facts]; 2 Harper, James & Gray 2d §5.2; 69 Harv. L. Rev. 883, 885; 29 So. Cal. L. Rev. 306; 50 Am.Jur.2d (1995 ed.), *Libel and Slander* §200 *et seq.*; 1 A.L.R.3d 844 [charge of being "crook"]; 11 A.L.R.3d 884 [statement of charging excessive or exorbitant prices or fees]; 13 A.L.R.3d 1286 [statement that plaintiff is "slut," "bitch," or "son of a bitch"]; 23 A.L.R.3d 652 [charge of mental disorder]; 49 A.L.R.3d 163 [charge of insolvency]; 49 A.L.R.3d 1074 [charge of being "slumlord"]; 57 A.L.R.4th 404 [charge of offensive sexual attitude or conduct]; 62 A.L.R.4th 314 [charge of having objectionable political or social beliefs]; 65 A.L.R.4th 1000 [designation as "scab"]; 85 A.L.R.4th 813 [false obituary or news report of death]; 87 A.L.R.2d 453 [attack on religious beliefs].)

In *Megarry v. Norton* (1955) 137 C.A.2d 581, 290 P.2d 571, defendant, warned by plaintiff women to stop illegal parking of his car in front of their business establishment, hung a sign on his car: "NUTS TO YOU--YOU OLD WITCH." *Held*, the words were clearly used in a derogatory sense, with the intent to expose plaintiffs to contempt and ridicule. (137 C.A.2d 583.)

In *Menefee v. Codman* (1957) 155 C.A.2d 396, 317 P.2d 1032, defendant published the following concerning plaintiff, a housewife, mother, teacher, and newspaper writer, who had taken a European trip: (a) "Some of us here think that [plaintiff] should have been named 'Narcissus.' Hunt up your psychology textbooks for that one." (b) "Who covered Audrey while Audrey covered the water front?" (c) Plaintiff on her trip "wore an old blouse and dirndl," and her

husband should open a charge account so his wife "won't have to slink along the waterfront in an outdated dirndl," etc., accompanied with an advertisement for nightclothes. *Held*, all were libelous per se. (1) The innocent meaning suggestive of the Greek myth was negated by the reference to psychology textbooks; the statement, according to expert testimony, ascribed to her the sexual deviation known as narcissism, which had a tendency to expose her to contempt and obloquy, etc., and to injure her in her occupation of teacher and writer. (2) The reference to "cover," in its context, referred to the sexual act and clearly exposed her to ridicule. (c) The third publication similarly exposed her to ridicule, etc., and had a clear tendency to injure her in her occupation as a teacher and writer. (155 C.A.2d 402.) (See *Shumate v. Johnson Publishing Co.* (1956) 139 C.A.2d 121, 131, 293 P.2d 531 [false suggestions that plaintiff was sexual deviate and untrue to her husband].)

In *Maidman v. Jewish Publications* (1960) 54 C.2d 643, 7 C.R. 617, 355 P.2d 265, plaintiff was a practicing attorney in Los Angeles, an active leader in the Jewish community, and chairman of the board of the official local B'nai B'rith paper. While representing a non-Jewish plaintiff in a trial, in response to the non-Jewish defense counsel's request for a continuance for the holiday of Rosh Hashanah, plaintiff stated that it was a "joyous holiday" on which the litigation could appropriately proceed, and the continuance was denied. Defendants, publishers of a rival Jewish community newspaper, had knowledge of the incident within 2 weeks. Some 13 months later, they published an editorial sarcastically deriding plaintiff's statements. Plaintiff alleged these facts and malice. *Held*, the complaint stated a cause of action for libel per se. "[C]omments and opinions claimed to be libelous need not reach the extremity of vituperation before they become libelous. Maidman, who was allegedly a prominent leader in Jewish affairs, was accused of being unworthy of his high position in B'nai B'rith, of knowing less about his religion than an adolescent child and of causing all Jewry to look ridiculous. The charges made by defendant were aptly chosen to expose Maidman to the contempt and ridicule of the other members of B'nai B'rith as well as of his coreligionists generally." (54 C.2d 650.) The editorial also tended to injure plaintiff in his occupation as an attorney, by implying that he deliberately misled the court in order to obtain an advantage for his client and a disadvantage to the other parties. (54 C.2d 651.)

In *Williams v. Daily Review* (1965) 236 C.A.2d 405, 46 C.R. 135, plaintiffs, doing a public paving job, received some time extensions. At a city council meeting, the public works director said that the work was not progressing satisfactorily and that the contractor had been notified that he was subject to liquidated damages. Defendant, a local newspaper, published a report of the director's remarks, adding that the city's problems "are reminiscent of an earlier situation ... where a cheaply bid job dragged on for months past the original target date." *Held*, this was libelous per se, impliedly charging plaintiffs "with conduct inconsistent with the due fulfillment of what they, by virtue of their employment, had undertaken." (236 C.A.2d 411.)

In *Patton v. Royal Industries* (1968) 263 C.A.2d 760, 70 C.R. 44, plaintiffs, skilled workmen, quit defendant's employ to go into business for themselves. Defendant sent a letter to many potential customers of plaintiffs stating that they had been "terminated" and "replaced with personnel having more experience and knowledge." *Held*, this was a serious reflection on their abilities, and libelous per se. (263 C.A.2d 767.)

SUPPLEMENT: [This section is current through the latest supplement]

See 2 Harper, James & Gray 3d §5.2; 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §192 et seq.



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2. Illustrations of Libel Per Se.

dd. Ascribing Damaging Statements to Plaintiff.

5 *Witkin Sum. Cal. Law Torts* § 545

[§ 545] Ascribing Damaging Statements to Plaintiff.

Falsely ascribing statements to the plaintiff which would have the same damaging effect as a defamatory statement about him or her may be libel. (See *Kerby v. Hal Roach Studios* (1942) 53 C.A.2d 207, 213, 127 P.2d 577 [studio advertising scheme involved sending suggestive letters purportedly signed by plaintiff]; 27 *San Diego L. Rev.* 247 [fabricated quotations].)

In *Cameron v. Wernick* (1967) 251 C.A.2d 890, 60 C.R. 102, plaintiff and defendant W collaborated as authors of a book. Defendant W and defendant C Co., publisher of a magazine of large circulation, published an article in which plaintiff was quoted as urging haste in publication and saying: "I can't be the only man in this country with an eye for a fast buck." The article also stated that while reporting to his collaborators a sales figure of about 4,000, he was quoted in a local newspaper as giving a figure of half a million. *Held*, both statements were libelous per se. The first indicated questionable business ethics; the second could be reasonably construed as a falsehood either to the press or to collaborators. (251 C.A.2d 894.)

In *Selleck v. Globe Int.* (1985) 166 C.A.3d 1123, 212 C.R. 838, plaintiff, father of TV celebrity Tom Selleck, brought an action against defendant, publisher of a magazine featuring items about celebrities in the entertainment world. The article complained of was headlined "Tom Selleck's Love Secrets--By His Father," and contained a number of statements attributed to plaintiff which disparaged and downgraded the romantic character and capacity of his son. Plaintiff alleged that he never gave an interview to any of defendant's reporters and never made any statements to anyone concerning his son's "love secrets." *Held*, a cause of action was stated; the publication was libelous on its face. The content of the article, viewed in conjunction with the headline, clearly conveyed the impression that plaintiff had granted an interview to defendant in which he divulged for public dissemination matters that his son had revealed to him in confidence. Although some of the statements attributed to plaintiff were innocuous, others were not; e.g., Tom Selleck is "ill at ease with women," and "he' just not the person they think he should be." Some readers could consider these matters to be of the type that Tom Selleck expected his father not to divulge, because they damaged Tom Selleck's image as "TV" sexiest leading man." Because plaintiff himself was not a celebrity who would benefit by publicity, the article was subject to the inference that he was paid to divulge his son's secrets to defendant, "imputing to plaintiff a

Judas-like betrayal of his son." (166 C.A.3d 1132.)

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3. Statements Not Susceptible of Defamatory Meaning.

aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 546

[§ 546] In General.

Statements not susceptible on their face of defamatory meaning are not actionable without a showing of special damage. (See *supra*, §541.)

In *Sullivan v. Warner Bros. Theatres* (1941) 42 C.A.2d 660, 109 P.2d 760, defendant, manager of a neighborhood theatre, urged employees and their friends to boycott an ice cream store that advertised a rival theatre, and called the store "disloyal ... to the neighborhood." *Held*, the ordinary meaning of the charge, where no special duty of loyalty was owed, was merely "uncooperative," and it was not libelous. (42 C.A.2d 663.)

In *Harris v. Curtis Publishing Co.* (1942) 49 C.A.2d 340, 121 P.2d 761, an article stated that plaintiff, a school board member, had opposed a students' savings bank system because they "should spend their money and let the Government take care of them when they are old." *Held*, this was not libelous per se; it was the expression of a widely prevalent political or economic theory, and injury would have to be specially shown. (49 C.A.2d 346.)

In *Howard v. Southern Calif. Associated Newspapers* (1950) 95 C.A.2d 580, 213 P.2d 399, defendant's newspaper published a letter from a reader attacking plaintiff, who was leading a movement to recall city officers. The letter (a) asserted that the recall sponsors made no specific charges or proof, (b) denounced the movement as "illegitimate," a "mala fide attempt" to discredit officials, a "sinister movement," and (c) described the recall committee as "a disgrace to Glendale" and a "dangerous and unjust element." *Held*, on demurrer, there was no libel per se. "The justness and good faith of the recall were questioned without any words casting doubt upon the character of the members of the recall committee or the integrity of their actions apart from their active support of the recall." (95 C.A.2d 585.) "Mere expressions of opinion or severe criticism are not libelous if they clearly go only to the merits or demerits of a condition, cause or controversy which is under public scrutiny, even though they may adversely reflect upon the public activities or fitness for office of individuals who are intimately connected with the principal object of the attack." (95 C.A.2d 584.)

In *Smith v. Los Angeles Bookbinders Union* (1955) 133 C.A.2d 486, 284 P.2d 194, defendant labor union wrote

existing and potential customers of plaintiffs referring to their wage level (below union scale) and asserting that unlike other binders, plaintiffs were not bidding on equipment, quality, and service, but on their wage scale. *Held*, the language was capable of the innocent meaning that plaintiffs were running a nonunion shop and based their bids on a low cost of production; in other words, the letter was an appeal to customers to direct their business to a union shop. (133 C.A.2d 492.)

In *Miller v. Bakersfield News-Bulletin* (1975) 44 C.A.3d 899, 119 C.R. 92, defendant newspaper was opposing plaintiff's candidacy for reelection to the county board of supervisors. It published a statement attributed to Will Rogers, that he had never met a person he did not like, and added: "Will Rogers never met our supervisor." *Held*, judgment for defendant on demurrer affirmed. "The entire thrust of the alleged libel is that the plaintiff is a disagreeable person and that the voters should consider this in voting. No crime is thereby attributed to plaintiff, no attribution of lack of integrity, no loathsome disease nor even any serious character defect. ... It is also an expression of opinion in an area in which individuals are prone to make their own judgments. Someone who is disagreeable to one person is a 'free spirit' to another. In fact, history is replete with examples of persons who have made capital of doing things which make them unloved and therefore noticed." (44 C.A.3d 902.) Moreover, in view of plaintiff's aspiration for public office, it is even more clear that no libel was committed by an opinion concerning a personality trait. (44 C.A.3d 902, citing *Yorty v. Chandler* (1970) 13 C.A.3d 467, 91 C.R. 709, *infra*, §548.)

The following cases are also illustrative:

Corman v. Blanchard (1962) 211 C.A.2d 126, 132, 27 C.R. 327 [pamphlet, attacking plaintiff Congressional candidate by stating allegedly subversive views of organizations endorsing him, was not libelous per se because it did not suggest that he had subversive views].

Washburn v. Wright (1968) 261 C.A.2d 789, 796, 799, 68 C.R. 224 [in the "mental climate of 1964," it was not defamatory per se to call person in California an "extremist," or to falsely ascribe membership in John Birch Society].

Okun v. Superior Court (1981) 29 C.3d 442, 450, 451, 454, 459, 175 C.R. 157, 629 P.2d 1369 ["rhetorical hyperbole" in public debate on proposed referendum].

Carr v. Warden (1984) 159 C.A.3d 1166, 1170, 206 C.R. 162 [statement of opinion in heat of a political controversy].

Alszev v. Home Box Office (1998) 67 C.A.4th 1456, 1460, 80 C.R.2d 16 [reasonable person could not believe that plaintiff and person depicted in unfavorable light in documentary were one and the same, despite fact that other person was allegedly connected with business having name similar to plaintiff's business].

Rosenaur v. Scherer (2001) 88 C.A.4th 260, 280, 105 C.R.2d 674 [in heated exchange during initiative campaign, opponent of measure called its drafter "thief" and "liar"; no liability, because anyone overhearing remarks would have regarded them as campaign hyperbole, rather than as accusation that drafter had criminal past].

West's Key Number Digest, Libel and Slander k.6 et seq.

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3. Statements Not Susceptible of Defamatory Meaning.

bb. Humor or Parody.

5 Witkin Sum. Cal. Law Torts § 547

[§ 547] Humor or Parody.

Statements intended as humor or parody may in certain circumstances convey a defamatory meaning and be actionable even if the words used could not be understood in their literal sense or believed to be true. However, if the reasonable reader or hearer of the statements would understand that they could not have been intended to convey a provable false assertion of fact, but were clearly a mere joke or parody, there is no defamation as a matter of law. As in other defamation actions, the statements must be considered in their original context with respect to the totality of the circumstances. (*Couch v. San Juan Unified School Dist. (1995) 33 C.A.4th 1491, 1500, 1501, 39 C.R.2d 848* [high school student newspaper article allegedly identifying campus security officer as murderer and drug dealer was not actionable, where average reader would have recognized it as parody of multiple choice test]; see *San Francisco Bay Guardian v. Superior Court (1993) 17 C.A.4th 655, 658, 21 C.R.2d 464* [fake letter suggesting that plaintiff was happy with electroshock because it made his tenants more cooperative was not actionable where it appeared in edition of newspaper clearly marked as a parody of itself]; *57 A.L.R.4th 520* [libel by statement made in jest].)

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cc. Political Cartoons.

5 *Witkin Sum. Cal. Law Torts* § 548

[§ 548] Political Cartoons.

Political caricature has a long journalistic history: "From Daumier and Tenniel to Low and Herblock the political cartoon has occupied a central position in the presentation of critical comment on events and personages of the times." (*Yorty v. Chandler* (1970) 13 C.A.3d 467, 471, 91 C.R. 709.) A cartoon is nevertheless subject to the law of libel if it maliciously presents as fact defamatory material that is false. "For example, a political cartoon which falsely depicts a public official selling franchises for personal gain, or a judge taking a bribe, or an attorney altering a public record, or a police officer shooting a defenseless prisoner, will not be exempt from redress under the laws of libel merely because the charge is depicted graphically in linear form rather than verbally in written statement." (*Yorty v. Chandler, supra*, 13 C.A.3d 472; see *Snively v. Record Publishing Co.* (1921) 185 C. 565, 580, 198 P. 1 [newspaper cartoon attacking chief of police; "common interest" privilege of C.C. 47(c) applied in absence of malice]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §152; 52 *A.L.R.4th* 424 [defamation by cartoon].)

In the *Yorty* case, plaintiff, mayor of Los Angeles, held a press conference in which he expressed interest in the cabinet post of Secretary of Defense. Defendant Los Angeles Times then printed a cartoon showing the mayor at his desk telephone, with white-coated medical orderlies standing beside him, one holding a straightjacket and the other beckoning with his finger. The caption was, "I've got to go now ... I've been appointed Secretary of Defense and the Secret Service men are here!" Plaintiff alleged that the cartoon was intended to convey the meaning that he suffered from the delusion that he had been appointed to the post, and that he was therefore insane. *Held*, judgment for defendants on demurrer affirmed.

(a) The cartoon was not libelous in implying that the Mayor was unqualified for high national office. This was admittedly the opinion expressed in the cartoon, i.e., that the Mayor's aspirations so outran his qualifications as to be popularly described as "insane, mad, or crazy." But it was a proper comment, though presented in rhetorical hyperbole. (13 C.A.3d 473.)

(b) The meaning ascribed by plaintiff, that the cartoon depicted him as in fact insane, would have been libelous, but it was not susceptible of that meaning. Popular usage of words such as insane, mad, or crazy "to express the idea of

excessive optimism, extravagant expectation, overweening ambition, foolish hope, distraction with eager desire," goes back to *Milton and Shakespeare*. (13 C.A.3d 474.)

(c) Hence, the lower court properly concluded that the publication was not defamatory: "It is simply impossible to believe that a viewer of the cartoon would not have understood exactly what was meant: it was Mayor Yorty's public aspiration for appointment as Secretary of Defense which was being ridiculed. No reader could have thought that either the cartoonist or the editor of the Los Angeles Times was charging Mayor Yorty with mental derangement or mental incompetency. On the contrary, even the most careless reader must have perceived that the cartoon was no more than rhetorical hyperbole, a vigorous expression of opinion by those who considered Mayor Yorty's aspiration for high national office preposterous. To penalize defendants for publishing this political cartoon would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." (13 C.A.3d 476.)

SUPPLEMENT: [This section is current through the latest supplement]
See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §151.



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3. Statements Not Susceptible of Defamatory Meaning.

dd. Employee Evaluation.

5 Witkin Sum. Cal. Law Torts § 549

[§ 549] Employee Evaluation.

In *Jensen v. Hewlett-Packard Co.* (1993) 14 C.A.4th 958, 18 C.R.2d 83, plaintiff, an employee of defendant corporation, received an unfavorable written performance evaluation from his supervisor. The evaluation stated that plaintiff had been the subject of some third-party complaints, was not carrying his weight, had a negative attitude in dealing with others, evidenced a lack of direction in his project activities, and was unwilling to take responsibility for the projects he oversaw. After defendant's internal investigation affirmed the evaluation, plaintiff instituted the present defamation action. *Held*, judgment of nonsuit for defendant affirmed; the evaluation could not reasonably have been understood to have a libelous meaning.

(a) With regard to its context, the evaluation was a management tool used for the legitimate business purpose of judging and documenting employee performance. There was nothing in plaintiff's case suggesting that his evaluation was anything other than business as usual. With regard to its content, the evaluation contained nothing suggesting that plaintiff lacked honesty, integrity, or the inherent ability to do his job, or that he had reprehensible personal characteristics. (14 C.A.4th 970.) And even if the content consisted of comments that were objectively unjustified or made in bad faith, those comments could not provide a basis for defamation, because they would be statements of opinion, instead of false statements of fact. (14 C.A.4th 971.)

(b) "Based on the facts here, we hold that unless an employer's performance evaluation falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior ... , it cannot support a cause of action for libel. This is true even when the employer's perceptions about the employee's efforts, attitude, performance, potential or worth to the enterprise are objectively wrong and cannot be supported by reference to concrete, provable facts." (14 C.A.4th 965.) (On qualified privilege for communications concerning qualifications of applicant for employment, see *infra*, §596.)

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3. Defamatory Character of Statement.

a. Libel.

4. Statements Susceptible of Multiple Meanings.

5 Witkin Sum. Cal. Law Torts § 550

[§ 550] Statements Susceptible of Multiple Meanings.

At one time, it was held that language is not libelous per se if the implied defamatory charge or insinuation leaves room for some innocent interpretation. (See *Peabody v. Barham* (1942) 52 C.A.2d 581, 584, 126 P.2d 668 [statement in defendant's newspaper that "Peabody's divorcing wife ... is also his aunt" was not libelous per se, for it might imply, instead of incestuous marriage, valid marriage to aunt by affinity (widow of deceased uncle)].) This rule was repudiated in *MacLeod v. Tribune Publishing Co.* (1959) 52 C.2d 536, 343 P.2d 36. Language may be libelous per se despite the possibility of an innocent interpretation. In *McLeod*, a dentist who ran for a local city council alleged that defendant printed a front page article in an election extra stating that the "People's World," a communist paper, had recommended his election; that the intended meaning was that he was a communist sympathizer or fellow traveler; and that this was false. Defendant asserted the possible innocent interpretation that support by communists might have been given to a person opposed to their views in order to taint him and aid in his defeat, rather than to one sympathetic to their views. "Such hair-splitting analysis of language has no place in the law of defamation, dealing as it does with the impact of communications between ordinary human beings. ... It protects, not the innocent defamer whose words are libelous only because of facts unknown to him, but the clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language. It not only finds no support in, but is contrary to, the provisions of section 45a, which define, not language susceptible of only one meaning, but language that carries a defamatory meaning on its face. It would be a reproach to the law to hold that a defendant intent on destroying the reputation of a political opponent ... could achieve his purpose without liability by casting his defamatory language in the form of an insinuation that left room for an unintended innocent meaning." (52 C.2d 550.) (See *Forsher v. Bugliosi* (1980) 26 C.3d 792, 805, 163 C.R. 628, 608 P.2d 716 ["In determining the defamatory nature of written material, the fact that some person might, with extra sensitive perception, understand such a meaning cannot compel the court to establish liability at so low a threshold"]; *Williams v. Daily Review* (1965) 236 C.A.2d 405, 410, 46 C.R. 135, supra, §544 [language may be libelous on face even though susceptible of innocent meaning]; *Mullins v. Brando* (1970) 13 C.A.3d 409, 414, 91 C.R. 796 [defamatory impact measured by natural and probable effect on mind of average reader]; 33 So. Cal. L. Rev. 88; 7 U.C.L.A. L. Rev. 560.)

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a. Libel.

5. (New) No Defamation by Omission.

5 Witkin Sum. Cal. Law Torts § 550A

[§ 550A] (New) No Defamation by Omission.

Paterno v. Superior Court (2008) 163 C.A.4th 1342, 78 C.R.3d 244, involved a novel theory of liability characterized by one party as "defamation by omissions." A newspaper publisher brought a defamation action against a university journalist for statements in a magazine article about the newspaper. The article stated that the newspaper had decided to "kill" a story about a drunk driving sentence imposed on its editorial page editor and that the newspaper pursued, and subsequently dropped, a workplace restraining order against a former employee, incurring legal costs and fees. Plaintiff did not challenge the truth of these statements, but asserted that the statements should be deemed false for defendant's failure to include available material facts explaining the reasons for plaintiff's decisions, thereby falsely implying improper motives. *Held*, there was no actionable defamation.

(a) Defendant had no constitutional obligation to include plaintiff's explanation for deciding not to publish the drunk driving story. The First Amendment allows nonobjective writing intended to expose wrongdoing and arouse righteous anger. (*163 C.A.4th 1351*.)

(b) Defendant had no obligation to include plaintiff's explanation of the context of the legal proceedings. Defendant's report of the court proceeding was absolutely privileged as fair report of a statement made in a legal proceeding (see text, §585 et seq.), and therefore there was no basis to explore whether defendant's statement was misleading. (*163 C.A.4th 1353*.)

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3. Defamatory Character of Statement.

b. Slander.

1. Statutory Definition.

5 Witkin Sum. Cal. Law Torts § 551

[§ 551] Statutory Definition.

Slander is "a false and unprivileged publication, orally uttered," that does one or more of the following:

- (1) "Charges any person with crime, or having been indicted, convicted, or punished for crime." (C.C. 46(1).)
- (2) "Imputes in him the present existence of an infectious, contagious, or loathsome disease." (C.C. 46(2).)
- (3) "Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits." (C.C. 46(3).)
- (4) "Imputes to him impotence or a want of chastity." (C.C. 46(4).)
- (5) "[B]y natural consequence, causes actual damage." (C.C. 46(5).)

Contrasting this definition with that of *libel* (C.C. 45, *supra*, §539), the limited nature of the tort of slander becomes apparent. Only certain types of oral statements are presumed injurious; to recover for any other utterances, actual damage must be pleaded and proved. (See *Rest.2d, Torts* §570 et seq.; Dobbs, *The Law of Torts* §408; 14 *Cal. L. Rev.* 61; 6 *So. Cal. L. Rev.* 253; 17 *So. Cal. L. Rev.* 347, 349.) If damage can be proved, e.g., discharge from employment, loss of opportunity for employment, loss of business customers or professional clients, etc., the action can be maintained. (See *Rest.2d, Torts* §575.)

Despite its broad language, C.C. 46 is limited to statements that either directly or implicitly disparage plaintiff personally, and does not encompass trade libel (*infra*, §645). (*Polygram Records v. Superior Court* (1985) 170 C.A.3d 543, 550, 216 C.R. 252.)

West's Key Number Digest, Libel and Slander k.6.1, 11 et seq.

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b. Slander.

2. Slander Per Se.

5 *Witkin Sum. Cal. Law Torts* § 552

[§ 552] Slander Per Se.

In the statutory definition (C.C. 46, *supra*, §551), the first four classes of statements are *slanderous per se*. With respect to the charge of *crime*, it is usually held that the offense must be one involving moral turpitude, indictable or punishable by death or imprisonment; lesser offenses harmful to reputation may be the basis of a libel, but are not slander per se. (See *Clay v. Lagiss* (1956) 143 C.A.2d 441, 448, 299 P.2d 1025 [charge of theft is slander per se]; *Cunningham v. Simpson* (1969) 1 C.3d 301, 307, 81 C.R. 855, 461 P.2d 39 [charge of possession of "hot" title to car was slander per se]; 5 *So. Cal. L. Rev.* 65.)

The general rule makes it slander per se to charge a woman with unchastity. (See *Rest.2d, Torts* §574.) The California statute goes further and includes a charge of unchastity against a man or woman, or a charge of impotence. (C.C. 46, *supra*; *Schessler v. Keck* (1954) 125 C.A.2d 827, 832, 271 P.2d 588 [charge that plaintiff, a woman cook and caterer, had syphilis was slander per se under C.C. 46(2), (3), (4)]; but cf. *Martin v. Sutter* (1922) 60 C.A. 8, 12, 212 P. 60 [calling woman a "bitch" does not impute unchastity and is not slander per se].) (See 3 *A.L.R.4th* 752 [imputation of homosexuality as defamation].)

West's Key Number Digest, Libel and Slander k.6.1, 11 et seq.

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Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

C. Defamation.

3. Defamatory Character of Statement.

b. Slander.

3. Injury to Business or Professional Reputation.

5 Witkin Sum. Cal. Law Torts § 553

[§ 553] Injury to Business or Professional Reputation.

An oral statement that tends directly to injure a person in respect to his or her office, profession, trade, or business may be slander per se. (See C.C. 46(3), *supra*, §551; *Rest.2d, Torts* §573; *50 Am.Jur.2d* (1995 ed.), *Libel and Slander* §212 et seq.; 30 *Proof of Facts* 3d 53 [slander actions by or against attorneys or physicians]; 5 *So. Cal. L. Rev.* 655; 3 *A.L.R.2d* 8 [imputation of incapacity, inefficiency, misconduct, fraud, dishonesty, or the like by public officer or employee]; 1 *A.L.R.3d* 844 [charge of being a "crook"]; 13 *A.L.R.3d* 1286 [charge that "slut," "bitch," or "son of a bitch"]; 23 *A.L.R.3d* 652 [charge of mental disorder]; 29 *A.L.R.3d* 961 [charge of shoplifting]; 106 *A.L.R.5th* 475 [defamation of building contractor or subcontractor other than through statement charging breach or nonperformance of contract]; 108 *A.L.R.5th* 495 [defamation of member of clergy]; 120 *A.L.R.5th* 483 [criticism or disparagement of dentist's character, competence, or conduct as defamation].)

A general charge of dishonesty or immorality not amounting to a charge of crime, and not tending directly to injure the plaintiff in any business, profession, office, or occupation, is not actionable per se, and plaintiff must prove special damage in order to recover. But an attack on the honesty of an employee or business person endangers his or her position, and is actionable per se. Thus, a statement that a jeweler was a "crook" and "got away" with a ring entrusted to him reflected on his integrity as a bailee, and directly injured him in his business and constituted slander per se. (*Williams v. Seiglitz* (1921) 186 C. 767, 772, 200 P. 635.)

A statement that plaintiff, a school principal, was about to be dropped because his superior considered him "a weak spot" in the school system, was slanderous per se, imputing to the plaintiff a "general disqualification" in those respects that his profession "peculiarly requires," within the meaning of C.C. 46. (*Oberkotter v. Woolman* (1921) 187 C. 500, 503, 202 P. 669.)

Imputation of a want of integrity in one holding a private office of confidence or trust is slander per se; i.e., C.C. 46(3) is not restricted to public office. (*Correia v. Santos* (1961) 191 C.A.2d 844, 854, 13 C.R. 132 [plaintiff president of nonprofit corporation called liar, insane in command, etc.])

In *Stoneking v. Briggs* (1967) 254 C.A.2d 563, 62 C.R. 249, plaintiff was president of a local union. Difficulties of

control arose and the international held a hearing and placed it under trusteeship. Defendant B, appointed by the international for this purpose, made a number of statements to newspaper reporters that were the subject of articles in newspapers of wide circulation in the locality. This action was brought for slander on the basis of the oral statements made to the reporters, and damages were sought on the basis of foreseeable republication of the slander in the articles. (No libel suit was brought against the newspaper, doubtless because of the retraction statute and privilege.) *Held*, judgment for plaintiff affirmed. B's statements that the local union had been taken over, that plaintiff and another had been removed from office, and that the two officers had been under long investigation, carried with it the insinuation of plaintiff's incompetence as a union officer, directly injuring him in that capacity. (254 C.A.2d 573.)

The following cases are also illustrative:

Swan v. Thompson (1899) 124 C. 193, 199, 56 P. 878 [charge that a master mariner "was in the habit of getting drunk"].

Schessler v. Keck (1954) 125 C.A.2d 827, 832, 271 P.2d 588 [charge that cook and caterer had syphilis].

Larive v. Willitt (1957) 154 C.A.2d 140, 142, 315 P.2d 732 [charge that high school principal permitted pupils to "pet" in hallways without being disciplined].

Lipman v. Brisbane Elementary School Dist. (1961) 55 C.2d 224, 234, 11 C.R. 97, 359 P.2d 465 [charge that school superintendent received "kickbacks" and engaged in "shady dealings"].

Cunningham v. Simpson (1969) 1 C.3d 301, 306, 81 C.R. 855, 461 P.2d 39 [car dealer accused of having "hot" title].

Mercado v. Hoefler (1961) 190 C.A.2d 12, 22, 11 C.R. 787, *infra*, §636 [statements impugning plaintiff's vocational capacity].

Hanley v. Lund (1963) 218 C.A.2d 633, 644, 32 C.R. 733 [statements accusing doctor of malpractice].

White v. Valenta (1965) 234 C.A.2d 243, 250, 44 C.R. 241 [car dealer called "son of a bitch"].

Douglas v. Janis (1974) 43 C.A.3d 931, 938, 118 C.R. 280 [charges that plaintiff, producer of unsuccessful TV show from which he had made \$ 100,000, had "taken" the money and "stolen" it from investors].

Albertini v. Schaefer (1979) 97 C.A.3d 822, 829, 159 C.R. 98 [calling attorney "crook"].

Kelly v. General Tel. Co. (1982) 136 C.A.3d 278, 285, 186 C.R. 184 [statement that plaintiff employee falsified invoices].

Palm Springs Tennis Club v. Rangel (1999) 73 C.A.4th 1, 5, 86 C.R.2d 73 [tennis club did not plead cause of action for libel, where it failed to plead that allegedly libelous statements about club officer had direct relation to club's trade or business].

Mann v. Quality Old Time Service (2004) 120 C.A.4th 90, 106, 15 C.R.3d 215 [informing customer of business maintaining industrial water systems that it used illegal chemicals and dumped them into city and storm drains].

West's Key Number Digest, Libel and Slander k.9, 10

SUPPLEMENT: [This section is current through the latest supplement]

See 2 A.L.R.6th 657 [criticism and disparagement of veterinarian's or animal trainer's competence or conduct as defamation]; 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §202 et seq.



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C. Defamation.

3. Defamatory Character of Statement.

b. Slander.

4. Statement Made in Jest.

5 Witkin Sum. Cal. Law Torts § 554

[§ 554] Statement Made in Jest.

The mere fact that the defendant intended his or her defamatory language only as a joke is not controlling unless it would be so understood by a reasonable person. But if a reasonable or "fair-minded" person would understand it as a joke, it is not actionable. (See *Arno v. Stewart* (1966) 245 C.A.2d 955, 965, 54 C.R. 392 [television announcer referred to invited vocalist as an "iron-clad singing member of the Mafia"; statement greeted with laughter from all present]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §157; 57 *A.L.R.4th* 520 [slander by statement made in jest].)

In *Polygram Records v. Superior Court* (1985) 170 C.A.3d 543, 216 C.R. 252, plaintiff Rege, who distributed wines under his own name, claimed that he had been defamed by a joke told by a performer during a comedy performance at a night club and republished in audio and video form. ("There are White wines, there are Red wines, but why are there no Black wines like: REGE, a MOTHERFUCKER. It goes with fish, meat, any damn thing it wants to.") *Held*, the statements were not defamatory as a matter of law.

(a) The statements, made in jest and a very small part of a comedy performance, were a spoof or parody of advertising practices and wine snobbery based on the fantasy of a black wine, and were "obvious figments of a comic imagination impossible for any sensible person to take seriously." Also, "in light of the occasion at which the joke was delivered and the attending circumstances, ... as a matter of law, it was not defamatory." (170 C.A.3d 556, 557.)

(b) Plaintiff's argument that the joke associated his wines with blacks, allegedly "a socio-economic group commonly considered to be the antithesis of wine connoisseurs," who "harbor obviously unsophisticated tastes in wines," was untenable. Even if it is assumed that the joke conveyed the alleged meanings, plaintiff could not recover on the theory that his wine had been disparaged by its association with a particular racial group. "Courts will not condone theories of recovery which promote or effectuate discriminatory conduct." (170 C.A.3d 557.)

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §155.



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3. Defamatory Character of Statement.

c. Pleading and Proof of Defamatory Meaning.

5 Witkin Sum. Cal. Law Torts § 555

[§ 555] Pleading and Proof of Defamatory Meaning.

(1) *Use of Statement in Defamatory Sense.* Where words or other matters are of ambiguous meaning, or are innocent on their face but defamatory in light of extrinsic circumstances (i.e., not defamatory "per se"), the plaintiff must plead and prove that they were used in a particular meaning that makes them defamatory (the "innuendo"). (See *Washer v. Bank of America* (1943) 21 C.2d 822, 829, 136 P.2d 297; *Smith v. Maldonado* (1999) 72 C.A.4th 637, 645, 85 C.R.2d 397, *infra*, §558, citing the text; *Rest.2d, Torts* §563, Comment f; Dobbs, *The Law of Torts* §409; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §442; on pleading innuendo, see 5 *Cal. Proc.* (4th), *Pleading*, §§698, 699.)

In *Washer v. Bank of America*, *supra*, the complaint alleged that plaintiff had been discharged from defendant's employ, and that defendant's officer declared that defendant could not reinstate anyone who "had admitted he had falsified his expense account" and had been guilty of "flagrant insubordination"; that the statements were intended to convey the idea that plaintiff was guilty of the crime of embezzlement and was an unsatisfactory worker; and that as a result, plaintiff was unable to secure employment in any bank. *Held*, a cause of action was stated. (a) The word "falsify" could imply either an intentional or unintentional act, and, because the charge might have an innocent meaning, it was necessary to plead by way of *innuendo* that the defamatory meaning was intended; and this was done. (21 C.2d 828.) (b) The other statement related to his qualifications as an employee, was defamatory on its face, and no innuendo was necessary. (21 C.2d 828.)

However, the innuendo cannot be used to ascribe a meaning of which the words are not fairly susceptible in the light of the extrinsic facts alleged. (*Chavez v. Times-Mirror Co.* (1921) 185 C. 20, 25, 195 P. 666; *Mellen v. Times-Mirror Co.* (1914) 167 C. 587, 590, 140 P. 277; *Vedovi v. Watson & Taylor* (1930) 104 C.A. 80, 85, 285 P. 418; *Corman v. Blanchard* (1962) 211 C.A.2d 126, 138, 37 C.R. 327; *Yorty v. Chandler* (1970) 13 C.A.3d 467, 474, 91 C.R. 709, *supra*, §548; 12 *So. Cal. L. Rev.* 230.)

(2) *Statement Reasonably Understood as Defamatory.* Where the language is ambiguous, the extrinsic circumstances that show that the third person to whom the statement was published reasonably understood it in its derogatory sense must also be alleged (the "inducement"). (*Grand v. Dreyfus* (1898) 122 C. 58, 62, 54 P. 389; *Vedovi v. Watson & Taylor*, *supra*; *Peabody v. Barham* (1942) 52 C.A.2d 581, 585, 126 P.2d 668; see *Palm Springs Tennis Club v. Rangel* (1999) 73 C.A.4th 1, 5, 86 C.R.2d 73 [tennis club did not plead cause of action for libel, where it failed to

plead that readers of documents published by defendants had special knowledge of facts from which they could discern that allegedly libelous comments about club officer defamed club]; *Rest.2d, Torts* §563, Comment f; Dobbs, *The Law of Torts* §409; 5 *Cal. Proc.* (4th), *Pleading*, §697; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §441.) (On proof of inducement, see 69 *Harv. L. Rev.* 893; 24 *So. Cal. L. Rev.* 339; 1 *U.C.L.A. L. Rev.* 163.)

(3) *Application of Statement to Plaintiff.* If the statements do not mention the plaintiff by name, it must be alleged that they were published or spoken concerning him or her (the "colloquium"). (See *Washer v. Bank of America*, *supra*, 21 *C.2d* 829; *Semple v. Andrews* (1938) 27 *C.A.2d* 228, 233, 81 *P.2d* 203; *Ringler Associates v. Maryland Cas. Co.* (2000) 80 *C.A.4th* 1165, 1179, 96 *C.R.2d* 136, citing the text; *Rest.2d, Torts* §563, Comment f; Dobbs, *The Law of Torts* §409; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §444; 54 *A.L.R.4th* 746 [sufficiency of identification of plaintiff]; 5 *Cal. Proc.* (4th), *Pleading*, §700.)

(4) *Questions of Law and Fact.* When the effect of the language can be determined on its face, the question whether it is defamatory is one of law for the court. If the matter could have two meanings, one harmless and the other defamatory, the court must determine whether, in the light of the extrinsic facts shown, the language was *capable of the defamatory meaning* claimed by the plaintiff. If it does so determine, then the jury determines whether it was used in that defamatory sense. (See *Yorty v. Chandler*, *supra*, 13 *C.A.3d* 475; *Kahn v. Bower* (1991) 232 *C.A.3d* 1599, 1609, 284 *C.R.* 244, *infra*, §624; *Gallagher v. Connell* (2004) 123 *C.A.4th* 1260, 1270, 20 *C.R.3d* 673; *Rest.2d, Torts* §§614, 615; 24 *So. Cal. L. Rev.* 372; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §119 et seq.)

(5) *Fictional Character Based on Plaintiff.* The claim that a fictional character in a book or motion picture is a libel (or invasion of privacy) on a real plaintiff has been the subject of a number of cases. (See *Bindrim v. Mitchell* (1979) 92 *C.A.3d* 61, 75, 155 *C.R.* 29 [defamatory statements in novel; plaintiff identifiable as character in novel]; 16 *Loyola L.A. L. Rev.* 99 [Defamation in Fiction: With Malice Toward None and Punitive Damages for All]; 14 *U.C. Davis L. Rev.* 1029 [Fiction Based on Fact: Writers' Liability for Libel or Invasion of Privacy].)

In *Aguilar v. Universal City Studios* (1985) 174 *C.A.3d* 384, 219 *C.R.* 891, defendant produced a motion picture ("Zoot Suit") based on the 1942 Sleepy Lagoon murder case and the ensuing "zoot suit" riots (see *People v. Zammora* (1944) 66 *C.A.2d* 166, 152 *P.2d* 180). Plaintiff claimed that she and a minor character in the movie named "Bertha" were the same person. On the basis of a scene implying that Bertha had intercourse in the back seat of a car, plaintiff alleged that she was falsely portrayed as a woman of loose morals. In contesting a summary judgment for defendant, plaintiff presented evidence that her name was also "Bertha," that she participated in the Sleepy Lagoon incident, and that others concluded that she was the Bertha in the picture. *Held*, summary judgment for defendant affirmed.

(a) Plaintiff had to show that a reasonable person viewing the film would believe that "Bertha" was in fact plaintiff conducting herself as portrayed. (174 *C.A.3d* 387.) Merely showing a similarity or even identity of names does not satisfy this test. (174 *C.A.3d* 388.)

(b) There were no similarities between the two in terms of age or physical appearance. At the time of the Sleepy Lagoon incident, plaintiff was 13, while "Bertha" appeared to be substantially older; and plaintiff admitted that she did not look or dress like "Bertha." (174 *C.A.3d* 389.)

(c) Plaintiff's involvement in the incident bore no resemblance to "Bertha's." Plaintiff was not a member of the street gang involved in the incident and never attended their parties, while "Bertha" behaved in ways clearly suggesting that she was a gang member. (174 *C.A.3d* 390.) Plaintiff never dated the gang leader; "Bertha" was depicted as his ex-girlfriend. (174 *C.A.3d* 380.) Plaintiff was at the scene of the incident, but was neither a witness to the murder nor a defendant; she testified at the trial and later was placed in a state school for girls as a result of her conduct. "Bertha" was not shown as present during the incident, and there was no reference to any criminal or juvenile proceeding involving her. (174 *C.A.3d* 390.)

(d) The author of the play on which the movie was based testified that he did not know plaintiff and that he chose

the name "Bertha" because it was associated with someone big and strong, the characteristics he desired for the role. An author must be given some latitude in choosing names for his characters, since in a country of this size, it would be remarkable if he chose a name used by no one. (174 C.A.3d 391.)

(e) A cause of action is not established merely because someone believed that plaintiff and "Bertha" were the same person; the belief must be reasonable. Here, plaintiff's only witness on this point based her belief solely on the coincidence of first names. She never saw plaintiff as a teenager and did not believe that plaintiff ever resembled "Bertha." (174 C.A.3d 391.)

West's Key Number Digest, Libel and Slander k.79.1, 81, 82, 89, 105, 108

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Use of Statement in Defamatory Sense*. See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §425.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §§742, 743.(2) *Statement Reasonably Understood as Defamatory*.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §741.

(3) *Application of Statement to Plaintiff*. See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §427.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §744.

(4) *Questions of Law and Fact*. See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §119 et seq.



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C. Defamation.

4. Defenses.

a. Truth.

1. Nature of Defense.

5 Witkin Sum. Cal. Law Torts § 556

[§ 556] Nature of Defense.

(1) *Truth Is Complete Defense.* Truth of the statements made is a complete defense against liability for defamation, regardless of bad faith or malicious purpose. (*Washer v. Bank of America* (1948) 87 C.A.2d 501, 509, 197 P.2d 202; *Nova v. Flaherty* (1956) 145 C.A.2d 761, 763, 303 P.2d 382; *Swaffield v. Universal Ecscro Corp.* (1969) 271 C.A.2d 147, 164, 76 C.R. 680; *Campanelli v. Regents of Univ. of Calif.* (1996) 44 C.A.4th 572, 581, 51 C.R.2d 891; *Rest.2d, Torts* §581A; see *Gill v. Hughes* (1991) 227 C.A.3d 1299, 1309, 278 C.R. 306 [statement that plaintiff was incompetent surgeon was not actionable where issue of truth had been decided against him in writ proceeding]; *Francis v. Dun & Bradstreet* (1992) 3 C.A.4th 535, 540, 4 C.R.2d 361, citing the text [credit report, even one causing harm, is not defamatory if true]; *Ellenberger v. Espinosa* (1994) 30 C.A.4th 943, 953, 36 C.R.2d 360, citing the text [statements as to dentist's misconduct were true given Board of Dental Examiners' determination that dentist had been grossly negligent and in violation of provisions of Business and Professions Code]; *Schmidt v. Foundation Health* (1995) 35 C.A.4th 1702, 1715, 42 C.R.2d 172 [statements that rebate scheme of health care plan broker was "illegal," "violated" regulations, and was "shady and unethical" were not actionable, where rebate scheme was, in fact, illegal]; *Jackson v. Paramount Pictures Corp.* (1998) 68 C.A.4th 10, 30, 80 C.R.2d 1 [use of "racy" language did not change fact that defendants truthfully reported that police were looking for tape showing plaintiff having sex with minor]; 2 California Affirmative Defenses, §51:1 et seq.; 16 *Stanf. L. Rev.* 789 [constitutionality of limitations on truth defense]; C.E.B., 2 California Business Litigation, §11.136 et seq.; 2 Harper, James & Gray 2d §5.20; Dobbs, *The Law of Torts* §§410, 411; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §§268, 269; 22 *Proof of Facts* 3d 305; BAJI, 7.07; CACI, No. 1720.) Also, privacy principles do not impact the effect of truth as a defense in a defamation action. (*Hughes v. Hughes* (2004) 122 C.A.4th 931, 939, footnote 17, 19 C.R.3d 247.)

Raising this defense may sometimes have adverse effects. In *Shumate v. Johnson Publishing Co.* (1956) 139 C.A.2d 121, 293 P.2d 531, the court quoted the following from a federal decision: "There is always a certain risk involved in the pleading of truth as a defense, since in proper cases and under proper instructions the jury may infer malice from the fact that a defendant repeats the defamatory matter, which is later found to be false." Accordingly, where defendant magazine publisher verified an answer alleging that the statements were true, and their falsity was established at the trial, an inference of malice was properly drawn by the jury and supported an award of exemplary damages. (139 C.A.2d

138, footnote 6.)

(2) *Truth and Privilege Are Distinct Defenses*. Although certain earlier California cases took a contrary position (see *Dauphiny v. Buhne* (1908) 153 C. 757, 761, 96 P. 880), it is now settled that the defenses of truth and of privilege (see *infra*, §561 et seq.) are distinct. If privileged, the publication may be false, and the words defamatory per se. (*Snively v. Record Publishing Co.* (1921) 185 C. 565, 574, 198 P. 1; *Maher v. Devlin* (1928) 203 C. 270, 275, 263 P. 812; *Freeman v. Mills* (1950) 97 C.A.2d 161, 166, 217 P.2d 687; *Gantry Const. Co. v. American Pipe & Const. Co.* (1975) 49 C.A.3d 186, 197, 122 C.R. 834, citing the text; Dobbs, *The Law of Torts* §413; 10 *Cal. L. Rev.* 84; 17 *Cal. L. Rev.* 693; 26 *Cal. L. Rev.* 226.)

West's Key Number Digest, Libel and Slander k.41, 52 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Truth Is Complete Defense*. See *Terry v. Davis Community Church* (2005) 131 C.A.4th 1534, 1553, 33 C.R.3d 145 [when plaintiff cannot negate defense of truth with admissible evidence, dismissal is compelled]; *Gilbert v. Sykes* (2007) 147 C.A.4th 13, 28, 53 C.R.3d 752 [as matter of law, before-and-after photographs on website of defendant patient that were substantially accurate representations of results of plastic surgery by plaintiff were not defamatory]; 2 Harper, James & Gray 3d §5.20; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §249 et seq.; 99 *Proof of Facts* 3d 393 [establishing affirmative defense against defamation claim].



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4. Defenses.

a. Truth.

2. Truth of Substance of Charge Is Sufficient.

5 Witkin Sum. Cal. Law Torts § 557

[§ 557] Truth of Substance of Charge Is Sufficient.

The defendant must "justify," i.e., show the truth of the statements, in the sense in which the plaintiff's innuendo explains their defamatory character, provided, of course, that they are capable of the meaning imputed by the innuendo. (*Pyper v. Jennings* (1920) 47 C.A. 623, 628, 191 P. 565; see 66 Harv. L. Rev. 484; 69 Harv. L. Rev. 932; 24 So. Cal. L. Rev. 370; 29 So. Cal. L. Rev. 314; on innuendo, see supra, §555.) But the defendant need not justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details. (*Heuer v. Kee* (1936) 15 C.A.2d 710, 714, 50 P.2d 1063; *Glenn v. Gibson* (1946) 75 C.A.2d 649, 658, 171 P.2d 118; *Swaffield v. Universal Ecsco Corp.* (1969) 271 C.A.2d 147, 164, 76 C.R. 680; *Gantry Const. Co. v. American Pipe & Const. Co.* (1975) 49 C.A.3d 186, 194, 122 C.R. 834, citing the text.) "The concept that it is the gist or sting of the alleged defamatory statements that must be false rather than the specific details of the charge is deeply rooted in our common law." (*Weller v. American Broadcasting Cos.* (1991) 232 C.A.3d 991, 1009, footnote 17, 283 C.R. 644.) (See *Campanelli v. Regents of Univ. of Calif.* (1996) 44 C.A.4th 572, 581, 51 C.R.2d 891 [admission that plaintiff basketball coach engaged in tirades so bad that seven players were thinking of quitting established truth of defendant's assertion that players "were in trouble psychologically"]; *Hughes v. Hughes* (2004) 122 C.A.4th 931, 936, 19 C.R.3d 247 [evidence of father's past activity was relevant and sufficient to establish truth of sons' statement "Our Dad's a pimp"; fact finder could reasonably conclude that gist or sting of remark did not depend on when father was pimp]; *Rest.2d, Torts* §581A, Comment f.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Carver v. Bonds* (2005) 135 C.A.4th 328, 345, 37 C.R.3d 480 [professional baseball player's statement in newspaper article about podiatrist ("He's a liar") was not substantially false and thus did not constitute actionable slander; term "liar" was broad enough to encompass podiatrist's dishonest acts, which athlete described and podiatrist did not deny, of threatening to lie to press about him and reneging on offer to supply him with free orthotics].



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4. Defenses.

a. Truth.

3. Effect of Emphasizing Truthful Statement.

5 Witkin Sum. Cal. Law Torts § 558

[§ 558] Effect of Emphasizing Truthful Statement.

In *Smith v. Maldonado* (1999) 72 C.A.4th 637, 85 C.R.2d 397, plaintiffs applied for a permit to operate a card room. Defendants, a local citizens group, supported another applicant. The attorney for plaintiffs was indicted on the criminal charge of attempting to influence a legislator on plaintiffs' behalf by preventing the opposing applicant from obtaining the requisite state gaming registration. These facts were accurately printed in a newspaper article, which defendants reproduced in full and sent to 35 other persons. No changes were made to the article and no comment was added, but defendants highlighted the one paragraph mentioning that the attorney represented plaintiffs in their attempt to obtain a permit. Claiming that this act implied that plaintiffs themselves were involved in the allegedly illegal activities of the attorney, they sued for defamation. *Held*, summary judgment for defendants affirmed.

(a) Plaintiffs conceded that the article as printed was true, and they did not claim that defendants in any way edited, altered, or rearranged its content. Instead, they contended that by emphasizing a truthful statement of fact, a person may expose himself or herself to liability for defamation if some third person may conceivably understand that emphasis as having a defamatory innuendo. "We are not prepared to extend the reach of the tort of defamation to such an extent. Truth is, of course, an absolute defense to any libel action. ... The truth of a fact is not altered by stating it forcefully. By the same token, a truthful and accurate statement of fact is not rendered defamatory simply by repeating it with greater emphasis. ... In short, no matter how emphatically it is stated or repeated, the truth is still the truth." (72 C.A.4th 648.)

(b) If plaintiffs' position were accepted, the effect would be to discourage the dissemination of accurate news reports, thereby raising obvious First Amendment concerns. In fact, writers and public speakers in general would have to ensure that they did not place the "wrong" emphasis on truthful, accurate statements of fact. In that event, the chilling effect on the free flow of ideas would be substantial. (72 C.A.4th 649.) Moreover, accepting plaintiffs' position would require the courts to make subjective considerations of what constitutes undue emphasis. Thus, courts in libel actions would have to consider the effect of underlining, italicization, and print size and style; courts in slander cases would be forced to analyze such matter as tone, inflection, and pitch. In short, the highlighter could be held liable if a person to whom the highlighted material was communicated misinterpreted it by giving the highlighted matter a falsely defamatory meaning, even if the highlighter had no such intent. (72 C.A.4th 649.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Defamation.

4. Defenses.

a. Truth.

4. Accurate Repetition Is No Defense.

5 Witkin Sum. Cal. Law Torts § 559

[§ 559] Accurate Repetition Is No Defense.

Where one person purports to repeat another's defamatory statement, he or she is merely republishing the same libel or slander (see *supra*, §537). Proof that the first person actually made the statement is therefore immaterial; to constitute a defense, the defamatory charge itself must be shown to be true. (*Arditto v. Putnam* (1963) 214 C.A.2d 633, 639, footnote 2, 29 C.R. 700, quoting the text; *Rest.2d, Torts §581A*, Comment e.) "If A says B is a thief, and C publishes the statement that A said B was a thief, in a certain sense this would be the truth, but not in the sense that the law means. ... [I]t would be but a repetition by him of a slanderous charge. His defense must consist in showing that in fact B is a thief." (*Gilman v. McClatchy* (1896) 111 C. 606, 612, 44 P. 241; see *Ray v. Citizen-News Co.* (1936) 14 C.A.2d 6, 8, 57 P.2d 527 ["[a] false statement is not less libelous because it is the repetition of rumor or gossip or of statements or allegations that others have made concerning the matter"].)

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- 5. Burden of Proof.

5 Witkin Sum. Cal. Law Torts § 560

[§ 560] Burden of Proof.

It was formerly held in California that the plaintiff was required to allege falsity of the statements, but it is now recognized that the burdens of pleading and of proof of truth are both generally on the defendant. (See *Lipman v. Brisbane Elementary School Dist.* (1961) 55 C.2d 224, 233, 11 C.R. 97, 359 P.2d 465, 5 Cal. Proc. (4th), Pleading, §694, disapproving prior cases; BAJI, No. 7.07.)

However, in an action initiated against a news media defendant by a public official or public figure, or an action by a private person relating to statements on a matter of public concern, the First Amendment requires that the plaintiff bear the burden of proving falsity. (See *infra*, §§611, 614; *Rest.2d, Torts* §613, Comment j.)

West's Key Number Digest, Libel and Slander k.101(5)

SUPPLEMENT: [This section is current through the latest supplement]
Lipman case:

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §738. *Statements concerning public official or figure:* See *Vogel v. Felice* (2005) 127 C.A.4th 1006, 1021, 26 C.R.3d 350 [plaintiff subject to *New York Times* rule (text, §601 et seq.) bears burden of proving falsity; statement must be capable of conveying provably false factual implication].



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b. Absolute Privilege.
1. In General.
aa. Nature of Defense.

5 Witkin Sum. Cal. Law Torts § 561

[§ 561] Nature of Defense.

Absolute privilege is based on the necessity of complete protection from the threat of a civil action. When a publication is absolutely privileged, there is no liability even though it is made with actual malice; malice is not a proper subject of inquiry in such a case. (*Gosewisch v. Doran* (1911) 161 C. 511, 514, 119 P. 656; *Financial Corp. of America v. Wilburn* (1987) 189 C.A.3d 764, 771, 234 C.R. 653, *infra*, §757; see *Rest.2d, Torts* §585 et seq.; Dobbs, *The Law of Torts* §412; C.E.B., 2 California Business Litigation, §11.139 et seq.; 69 *Harv. L. Rev.* 917; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §274; on absolute privilege or immunity of public officer from other tort liabilities, see *supra*, §165 et seq.; on truth and privilege as distinct defenses, see *supra*, §556.)

The privilege cannot be defeated by framing a complaint on the theory that the privileged communication constituted an intentional infliction of emotional distress (see *supra*, §449). (*Kachig v. Boothe* (1971) 22 C.A.3d 626, 636, 638, 99 C.R. 393, *supra*, §21; *Lerette v. Dean Witter Organization* (1976) 60 C.A.3d 573, 579, 131 C.R. 592, *infra*, §577.)

Absolute privilege, unlike evidentiary privileges, which function by exclusion of evidence, operates as a limitation on liability rather than on the admission of evidence. (*Shade Foods v. Innovative Products Sales & Marketing* (2000) 78 C.A.4th 847, 915, 93 C.R.2d 364 [litigation privilege does not bar *evidentiary* use of statements protected by the litigation privilege, and thus did not bar introduction of evidence involving settlement offers or answers to interrogatories to prove bad faith in action against insurer].)

West's Key Number Digest, Libel and Slander k.34, 36

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §§256, 257.



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1. In General.

bb. Statutory Framework.

5 *Witkin Sum. Cal. Law Torts* § 562

[§ 562] Statutory Framework.

The Civil Code lists *publications* that are absolutely privileged. They include those made:

(1) "In the proper discharge of an official duty." (C.C. 47(a), *infra*, §564 et seq.)

(2) "In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable" by mandamus. (C.C. 47(b), *infra*, §567 et seq.; see 14 *Pacific L. J.* 105 [absolute privilege and C.C. 47(b)].) Certain communications in these proceedings are expressly excluded from the privilege. (See *infra*, §563.)

(3) "By a fair and true report in, or a communication to, a public journal of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued." (C.C. 47(d), *infra*, §585 et seq.)

(4) "By a fair and true report of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit." (C.C. 47(e), *infra*, §589.)

The Restatement lists the *persons* absolutely privileged, including judicial, legislative, and executive officers, persons involved in judicial proceedings, grand jurors, and husband and wife. (See *Rest.2d, Torts* §585 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

cc. Scope of Privilege.

5 Witkin Sum. Cal. Law Torts § 563

[§ 563] Scope of Privilege.

(1) *In General.* Although the absolute privilege set forth in C.C. 47(b) (supra, §562 and infra, §567 et seq.) originally was understood as applicable only to the tort of defamation, the California Supreme Court has extended the privilege to other tort claims. The only tort claim that the court has identified as falling outside the privilege is malicious prosecution. (*Hagberg v. California Fed. Bank FSB* (2004) 32 C.4th 350, 361, 7 C.R.3d 803, 81 P.3d 244, infra, §582; on malicious prosecution, see supra, §469 et seq.)

Rosenthal v. Irell & Manella (1982) 135 C.A.3d 121, 185 C.R. 92, examined the broad scope of the privilege.

(a) It developed as part of the law of defamation; but in *Albertson v. Raboff* (1956) 46 C.2d 375, 295 P.2d 405, infra, §648, it was held to constitute a defense in an action for disparagement of title based on filing a lis pendens. Then it was applied to defeat tort actions for abuse of process, intentional infliction of mental distress, inducing breach of contract, interference with prospective economic advantage, fraud, and negligence. (135 C.A.3d 125, citing many cases.)

(b) In *Block v. Sacramento Clinical Labs* (1982) 131 C.A.3d 386, 182 C.R. 438, infra, §568, the court said that the privilege will defeat a tort action which, however labeled and whatever its theory of liability, is predicated on publication of an injurious falsehood. But the reference to "falsehood" was not intended as a limitation. It is the conduct of publishing rather than the publication itself that is protected. (135 C.A.3d 127, 128.) Thus, a settlement proposal made in a threatening manner was held privileged in *Asia Inv. Co. v. Borowski* (1982) 133 C.A.3d 832, 184 C.R. 317. Hence, the acts of defendants in the instant case, allegedly inducing plaintiff's professional liability insurers to settle a malpractice action against him without his consent, were similarly privileged. The acts consisted of publications by parties to litigation made to persons vitally interested in the litigation and closely related to it. (135 C.A.3d 128.) (See *Fuhrman v. California Satellite Systems* (1986) 179 C.A.3d 408, 419, 231 C.R. 113 [reviewing cases on communications preliminary to a proposed judicial proceeding].)

Statutes outside C.C. 47 may provide that certain matters are absolutely privileged under that provision. Thus, the

mailing, publication, and delivery of notices of default or of sale under a deed of trust or mortgage, and the performance of related procedures, are deemed privileged communications within C.C. 47. (C.C. 2924.) Similarly, testimony provided by a pupil witness in a school expulsion hearing is deemed a communication protected by C.C. 47(b). (*Educ.C. 48918.6.*)

(2) *Communications Expressly Excluded From C.C. 47(b).* C.C. 47(b), providing an absolute privilege for participants in legislative, judicial, other official proceedings, and proceedings authorized by law and reviewable by mandamus (see *infra*, §567 et seq.) expressly excludes certain communications from the privilege:

(a) An allegation or averment contained in a pleading or affidavit filed in a dissolution or separation action concerning a person by or against whom no affirmative relief is prayed in the action is not privileged unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment, and unless the allegation or averment is material and relevant to the issues in the action. (C.C. 47(b)(1).)

(b) A communication made in furtherance of an act of intentional destruction or alteration of physical evidence (as specified in *Ev.C. 250* or *C.C.P. 2031.010* et seq.), and made for the purpose of depriving a litigant of the use of that evidence, is not privileged, regardless of whether the communication's content is the subject of a subsequent, privileged publication or broadcast. (C.C. 47(b)(2).) (See 23 *Pacific L. J.* 779.)

(c) A communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies is not privileged. (C.C. 47(b)(3).) (See *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 C.A.4th 17, 22, 116 C.R.2d 583 [insurance exception of C.C. 47(b)(3) applies to existence of insurance policy, not its terms].)

(d) A recorded *lis pendens* is not privileged unless it identifies an action that was previously filed with a court of competent jurisdiction and that affects title or right of possession of real property, as authorized or required by law. (C.C. 47(b)(4).) (On statutory framework generally, see *supra*, §562.)

(3) *No Absolute Privilege for Noncommunicative Conduct.* C.C. 47 does not apply to noncommunicative conduct. Thus, it cannot make a tortious course of conduct privileged. (*Kupiec v. American Int. Adjustment Co.* (1991) 235 C.A.3d 1326, 1331, 1 C.R.2d 371; *Stacy & Witbeck v. San Francisco* (1996) 47 C.A.4th 1, 9, 54 C.R.2d 530; see *Mero v. Sadoff* (1995) 31 C.A.4th 1466, 1479, 37 C.R.2d 769 [physician's negligence in examining workers' compensation patient, although committed in actions preparatory to judicial proceedings, was noncommunicative conduct, not privileged under C.C. 47(b)(2)].)

(4) *No Absolute Privilege for Publication Required by Law.* *Rest.2d, Torts* §592A states an absolute privilege for one who is required by law to publish material. In *Slaughter v. Friedman* (1982) 32 C.3d 149, 185 C.R. 244, 649 P.2d 886, *infra*, §564, the court refused to recognize this privilege.

(a) *Albertson v. Raboff*, *supra*, held that C.C. 47 completely covers the law of privilege in libel actions; and, "[d]eferred to legislative judgment, we decline to impose either our own or the Restatement's views of policy, especially in an area in which the Legislature has spoken so extensively." (32 C.3d 158.)

(b) Even if this were not so, the Restatement privilege should not apply to the present case: (1) Its chief present application is to radio and television broadcasters, which are required by the Federal Communications Act to give political candidates equal opportunity to be heard, with no power of censorship. The station, unable to control what a candidate says, is absolutely privileged, under statutes in a number of jurisdictions and under the Restatement. (2) Here, defendants do control the content of their communication and fall in a different category. The qualified privilege is sufficient to protect persons who, though required by law to communicate with others, nonetheless maintain control over the contents of the communications. (32 C.3d 159.) (On qualified privilege, see *infra*, §591 et seq.)

(5) *No Absolute Privilege Under First Amendment Petition Clause.* In *McDonald v. Smith* (1985) 472 U.S. 479, 105

S.Ct. 2787, 86 L.Ed.2d 384, defendant wrote letters to the President making charges of criminal and unethical activity on the part of plaintiff, an applicant for the position of United States Attorney. In plaintiff's action for libel, defendant claimed that the First Amendment right "to petition the Government for a redress of grievances" made his communication immune from a libel suit. *Held*, there is no such absolute privilege. Defendant's contention "would elevate the Petition Clause to special First Amendment status." But the clause was inspired by the same ideals of liberty and democracy that produced the freedoms of speech, publication and assembly, and there is no reason to grant greater constitutional protection to statements made in a petition to the President than other First Amendment expressions. "The right to petition is guaranteed; the right to commit libel with impunity is not." (*105 S.Ct. 2791, 86 L.Ed.2d 390.*)

(6) *No Absolute Privilege for Disclosure of Trade Secrets.* C.C. 47(b) does not apply to the disclosure of trade secret information to a competitor or potential competitor of the owner of the information or to the agent of the competitor or potential competitor, where the disclosure is voluntary, intentional, and unauthorized by the owner. (C.C. 3426.11; see *24 Pacific L. J. 676*; on protection of trade secrets, see *13 Summary (10th), Equity, §81 et seq.*)

(7) *No Absolute Privilege for False Claims.* C.C. 47(b) does not apply to claims subject to *Govt.C. 12650 et seq.*, relating to civil liability for presenting false claims to public entities (see *infra, §767*). (*Govt.C. 12654(e).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Fontani v. Wells Fargo Inv., LLC (2005) 129 C.A.4th 719, 735, 28 C.R.3d 833* [C.C. 47(b) applied to claims for interference with prospective business advantage; absolute privilege, while on face relating to defamation actions, has long been interpreted to bar other causes of action based on defamatory nature of communication that is itself privileged under defamation laws]; *Ramona Unified School Dist. v. Tsiknas (2005) 135 C.A.4th 510, 522*, footnote 7, *37 C.R.3d 381* [litigation privilege under C.C. 47(b) bars abuse of process claim insofar as claim is premised on conduct within privilege]; *Foothill Fed. Credit Union v. Superior Court (2007) 155 C.A.4th 632, 635, 66 C.R.3d 249* [C.C. 47(b) applied to causes of action for intentional infliction of emotional distress and invasion of privacy]; *Booker v. Rountree (2007) 155 C.A.4th 1366, 1373, 66 C.R.3d 733* [same as *Ramona*]. *Statutes outside C.C. 47:* C.C. 2924 was subdivided and amended in 2006. C.C. 2924(d) now provides that the mailing, publication, and delivery of notices of default or of sale under a deed of trust or mortgage, the performance of related procedures, and the performance of these functions and procedures to carry out statutory duties regarding sale of separate interests in common interest developments are deemed privileged communications within C.C. 47.(3) *No Absolute Privilege for Noncommunicative Conduct.* See *Buchanan v. Maxfield Enterprises (2005) 130 C.A.4th 418, 423, 29 C.R.3d 909* [privilege did not apply to citizen's arrest performed by store employee who, accompanied by sheriff's deputies, took customer in handcuffs into parking lot where media had gathered]; *Booker v. Rountree, supra* [for conduct to be communicative, there must be allegation of statement, of representation, or of assertive conduct that was speech substitute].



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2. Discharge of Official Duty.

aa. In General.

5 Witkin Sum. Cal. Law Torts § 564

[§ 564] In General.

(1) *Statutory Privilege*. A publication made "[i]n the proper discharge of an official duty" is absolutely privileged. (C.C. 47(a).) (See *Ingram v. Flippo* (1999) 74 C.A.4th 1280, 1293, 89 C.R.2d 60, 9 Cal. Proc. (4th), *Administrative Proceedings, Supp.*, §25 [district attorney was discharging official duty in issuing press release concerning alleged violations of Brown Act; fact that ultimate decision was neither to prosecute nor to file civil action did not affect application of privilege]; 50 Am.Jur.2d (1995 ed.). Libel and Slander §286.)

(2) *Communication Must Be by Public Official*. The official duty privilege is restricted to communications by public officials; it does not apply to private individuals. In *Slaughter v. Friedman* (1982) 32 C.3d 149, 185 C.R. 244, 649 P.2d 886, plaintiff dentist had patients who were insured by defendant insurance company. Defendant dental director of the insurance company wrote letters to some of plaintiff's patients, stating that the insurance company would no longer process claims from plaintiff because of "overcharging," that some of his work was unnecessary, that it would report him to the regulatory body for disciplinary proceedings, and that the patients should make no further payments to him pending resolution of the dispute. Plaintiff sued for libel and interference with prospective advantage. Defendants demurred on the grounds that the statements were mere opinions, and were privileged. *Held*, judgment for defendants on demurrer reversed.

(a) The publication was defamatory, both as libel per se (on its face) and libel per quod (on proof of extrinsic facts showing damage). (32 C.3d 153, 154.) Plaintiff's patients reasonably may have understood that the letters accused him of charging excessive fees or performing unnecessary dental work; these accusations would tend to injure him professionally. Although the accusations made by laypersons might constitute mere opinion, when made by professional dental plan administrators, they reasonably might be understood as being based on fact. (32 C.3d 154.)

(b) The publication was not privileged. The official duty privilege protects only governmental officials. Here, though defendants were required by both federal and state law to provide an explanation of the reason for denying reimbursement of patients' claims, they were neither officials nor acting in an official capacity. (32 C.3d 155.) (See *Prevost v. First Western Bank* (1987) 193 C.A.3d 1492, 1499, 239 C.R. 161 [following *Slaughter*].)

(3) *Communication Must Be Made in Official Capacity.* The communication must be made by the public official in an official capacity. (*Neary v. Regents of Univ. of Calif.* (1986) 185 C.A.3d 1136, 1141, 230 C.R. 281 [whether vice chancellor of U.C. Davis, in determining that investigation report was required to be disclosed, was exercising official, policymaking function, as required under official duty privilege, was question of fact requiring reversal of summary judgment].)

West's Key Number Digest, Libel and Slander k.36

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Privilege.*

Ingram case:

Cross-Reference: 9 Cal. Proc. (5th), *Administrative Proceedings*, §31.



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2. Discharge of Official Duty.

bb. High Ranking Officials.

5 *Witkin Sum. Cal. Law Torts* § 565

[§ 565] High Ranking Officials.

The First Torts Restatement declared that executive officers of "high rank" were absolutely privileged to publish defamatory matter in the exercise of an executive function. In the Second Restatement, the privilege is stated for "any executive or administrative officer of the United States" or "a governor or other superior executive officer of a state." (*Rest.2d, Torts* §591.) (See 2 Harper, James & Gray 2d §5.23; 74 *Harv. L. Rev.* 44; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §288; 26 *A.L.R.3d* 492 [public officer's privilege as to statements made in connection with hiring and discharge]; 33 *A.L.R.3d* 1330 [public officer's privilege in connection with accusations that another has been guilty of sedition, subversion, espionage, or similar behavior].)

In *Saroyan v. Burkett* (1962) 57 *C.2d* 706, 21 *C.R.* 557, 371 *P.2d* 293, the court followed the general law recognizing an absolute privilege for executive officials of "high rank," citing the First Restatement and cases dealing with the Postmaster General, a cabinet officer, a governor, and an attorney general. The holding was that defendant, State Superintendent of Banks, was absolutely privileged, while defending the policy of the State Banking Department, in making derogatory statements concerning plaintiff, the department's former attorney. (57 *C.2d* 710.)

In *Kilgore v. Younger* (1982) 30 *C.3d* 770, 180 *C.R.* 657, 640 *P.2d* 793, defendant Attorney General of California established The Organized Crime Control Commission to study organized criminal conspiracies and to assess the effectiveness of existing controls. The commission's report listed the names of 92 persons suspected of involvement in a wide variety of organized criminal activity, and listed plaintiff as the operator of a wire service to bookmakers and as having been convicted of bookmaking and conspiracy to commit wire fraud. Defendant Attorney General then held a press conference during which he distributed copies of the report to members of the news media, and defendant newspapers identified plaintiff as being among the 92 persons included in the report. *Held*, demurrers to the complaints were properly granted.

(a) The Attorney General's release of the report to the media and his statement at the press conference that he adopted it were absolutely privileged under former C.C. 47(1) (now C.C. 47(a)). "[Y]ounger called his press conference in his capacity as Attorney General, purported to act in such role throughout its duration and, at least as is here relevant,

dealt exclusively with law enforcement issues. As such, it may not be said that his actions were outside the scope of his official duties, or that his motives were in fact improper." (30 C.3d 779.)

(b) The news media statements were privileged under former C.C. 47(5) (now C.C. 47(e); see *infra*, §589), protecting reports of public meetings. (30 C.3d 777.) (See 23 *Santa Clara L. Rev.* 319.)

West's Key Number Digest, Libel and Slander k.39-

SUPPLEMENT: [This section is current through the latest supplement]

See *Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation* (2008) 158 C.A.4th 1075, 1086, 70 C.R.3d 614 [public dissemination of letter by Director of Department of Corrections, terminating prison contract for contractor's misappropriation of state funds, was absolutely privileged under official duty privilege of C.C. 47(a)]; 2 Harper, James & Gray 3d §5.23; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §270.



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2. Discharge of Official Duty.

cc. Lower Ranking Officials.

5 *Witkin Sum. Cal. Law Torts* § 566

[§ 566] Lower Ranking Officials.

(1) *Early Cases Denying Privilege.* The first cases decided after *Saroyan v. Burkett* (1962) 57 C.2d 706, 21 C.R. 557, 371 P.2d 293, supra, §565, relied on it in holding that the official duty privilege did not apply to officers of lesser rank. (See *White v. California* (1971) 17 C.A.3d 621, 627, 95 C.R. 175 [Bureau of Criminal Identification and Investigation]; *Frisk v. Merrihew* (1974) 42 C.A.3d 319, 323, 116 C.R. 781, infra, §583 [school superintendent, secretary of school board]; *Rest.2d, Torts* §591, Comment c; 2 Harper, James & Gray 2d §5.23; on conflict of authority elsewhere, see 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §289.)

(2) *Extension of Privilege to Policymaking Officials.* In *Sanborn v. Chronicle Publishing Co.* (1976) 18 C.3d 406, 134 C.R. 402, 556 P.2d 764, the Supreme Court suggested that the determining factor was *the nature of an official's duties*, rather than his or her title. "It has been noted by recognized authorities that the purpose of the so-called absolute 'official duty' privilege is to insure efficiency in government by encouraging *policy-making* officials to exercise their best judgment in the performance of their duties free from fear of general tort liability. ... [W]e have concluded that defendant Mongan was not exercising policy-making functions when he defamed plaintiff, and thus he is not protected by the absolute privilege." (18 C.3d 413.)

This statement was the basis of the holding in *Royer v. Steinberg* (1979) 90 C.A.3d 490, 501, 153 C.R. 499, extending the privilege to members of a school district board of trustees. The board had demoted the school superintendent for his alleged participation in preparing false election campaign literature. On being publicly challenged by the superintendent to prove the charges, the board passed a motion at a duly scheduled public meeting, stating that it was a fact that the superintendent had typed and distributed the material in question. *Held*, the board's act was privileged.

(a) "The clear import of this language is that the policy of protecting the free exercise of governmental decision-making mandates that [the official duty privilege] must be granted not only to 'high-level' state executive officers, but also to all state and local officials who engage in the policy-making process. We therefore hold that the privilege ... protects any statement by a public official, so long as it is made (1) while exercising policy-making

functions, and (2) within the scope of his official duties." (90 C.A.3d 501.)

(b) The board's motion clearly meets these requirements. The trustees, as duly elected members of the governing body of the school district, were vested with policymaking powers. And the motion, having been made at a meeting authorized by law and dealing with the disciplining of an employee, was unquestionably within the scope of the trustees' official duties. (90 C.A.3d 501.)

In *Copp v. Paxton* (1996) 45 C.A.4th 829, 52 C.R.2d 831, defendant, the county official in charge of earthquake preparedness, wrote a memorandum to his staff criticizing the views of plaintiff. This memo was republished by his inclusion of the memo in a letter to a private citizen. *Held*, the memo pertained to the exercise of an executive function, and was absolutely privileged, but the republication was the sort of routine, ministerial task that might have been performed by any member of defendant's staff, and was not privileged. (45 C.A.4th 844.)

West's Key Number Digest, Libel and Slander k.39

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Early Cases Denying Privilege*. See 2 Harper, James & Gray 3d §5.23; 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §270.

(2) *Extension of Privilege to Policymaking Officials*. See *Morrow v. Los Angeles Unified School Dist.* (2007) 149 C.A.4th 1424, 1440, 57 C.R.3d 885 [statements to press by school district superintendent and local superintendent criticizing high school principal's handling of student violence, and explaining why he was replaced by district, were protected by executive officer privilege of C.C. 47(a); privilege extends to lower ranking officials, and statements here related to legitimate policy-making function]; 2 Harper, James & Gray 3d §5.23; 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §271.



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CHAPTER IX - Torts

Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

C. Defamation.

4. Defenses.

b. Absolute Privilege.

3. Judicial Proceedings.

aa. In General.

5 Witkin Sum. Cal. Law Torts § 567

[§ 567] In General.

(1) *Statutory Privilege*. Generally, a publication made in a "judicial proceeding" is absolutely privileged. (C.C. 47(b).) (See 50 Am.Jur.2d (1995 ed.) *Libel and Slander* §299 et seq.)

(2) *Scope*. "The usual formulation" of the scope of the so-called "litigation privilege" is that it "applies to any communication made (a) in judicial or quasi-judicial proceedings; (b) by litigants or other participants authorized by law; (c) to achieve the objects of the litigation; and (d) having some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 C.3d 205, 212, 266 C.R. 638, 786 P.2d 365, *infra*, §570; see *Olszewski v. Scripps Health* (2003) 30 C.4th 798, 831, 135 C.R.2d 1, 69 P.3d 927 [litigation privilege applies to assertion of statutory liens]; *Schoendorf v. U.D. Registry* (2002) 97 C.A.4th 227, 241, 118 C.R.2d 313 [suit by tenant against consumer reporting agency that gathered information about unlawful detainer cases and sold it to landlords; agency's communication was not made in preparation for or in anticipation of trial, and was not covered by litigation privilege]; *Kashian v. Harriman* (2002) 98 C.A.4th 892, 917, 120 C.R.2d 576 [litigation privilege covers communicative conduct, including filing meritless lawsuits on behalf of sham plaintiffs]; *Navellier v. Sletten* (2003) 106 C.A.4th 763, 770, 131 C.R.2d 201 [acts falling within protection of anti-SLAPP statute (C.C.P. 425.16) because of their connection with judicial proceedings do not inevitably fall within litigation privilege].)

Specified types of communications are excluded from the privileges set forth in C.C. 47(b). (See *supra*, §563.)

While the litigation privilege is called "absolute" (*supra*, §562), this characterization somewhat overstates the matter. (*Mattco Forge v. Arthur Young & Co.* (1992) 5 C.A.4th 392, 406, 6 C.R. 781, *infra*, §568.) Nevertheless, although C.C. 47 appears in the chapter on defamation, "it applies to virtually all other causes of action, with the exception of an action for malicious prosecution. ... Underlying the privilege is the vital public policy of affording free access to the courts and facilitating the crucial functions of the finder of fact. ... This policy is equally compelling in the context of common law and statutory claims." (*Ribas v. Clark* (1985) 38 C.3d 355, 364, 212 C.R. 143, 696 P.2d 637, *supra*, §14 [action for damages for violation of P.C. 631 (Invasion of Privacy Act) by eavesdropping on private telephone conversation].)

(3) *Purpose*. Its principal purpose is to afford litigants and witnesses freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. A further purpose is to assure freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing. The privilege also promotes the effectiveness of judicial proceedings by encouraging attorneys to zealously protect their clients' interests. (*Silberg v. Anderson*, *supra*, 50 C.3d 213; *Mattco Forge v. Arthur Young & Co.*, *supra*, 5 C.A.4th 413.) In immunizing participants from tort liability arising from communications made during judicial proceedings, the law places on litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, "thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result." (*Silberg v. Anderson*, *supra*, 50 C.3d 214, citing *Kachig v. Boothe* (1971) 22 C.A.3d 626, 99 C.R. 393, *supra*, §21.)

(4) *Distinction Between Communication and Conduct*. In *Drum v. Bleau, Fox & Associates* (2003) 107 C.A.4th 1009, 132 C.R.2d 602, defendant law firm caused a writ of execution to be issued and levied on a judgment against plaintiff even though the judgment was stayed. Plaintiff sued for abuse of process (see *supra*, §517 et seq.), and defendant contended that, even if its action constituted an abuse of process, plaintiff's suit was barred by the litigation privilege. *Held*, defendant's conduct with respect to the writ of execution was not within the litigation privilege.

(a) The genesis of the litigation privilege resides in defamatory *publications*, but it is beyond dispute that it now applies to any *communication*, whether or not it amounts to a publication. *Thornton v. Rhoden* (1966) 245 C.A.2d 80, 53 C.R. 706, *infra*, §569, first applied the privilege to an abuse of process suit. Also, the litigation privilege has now been affixed to matters beyond the courtroom. However, one limitation on the privilege that still survives is that the event claimed to be protected must be communication not conduct. If this limitation is not retained, such conduct as a criminal act would be privileged if it is done in anticipation of litigation. (107 C.A.4th 1021.)

(b) Under *Rubin v. Green* (1993) 4 C.4th 1187, 17 C.R.2d 828, 847 P.2d 1044, *infra*, §577, the appropriate inquiry is whether an activity is communicative "in its essential nature." With respect to the enforcement of judgments, preparing the judgment, applying for a writ of execution, issuing the writ, and instructing the levying officer are communicative, at least from the perspective of the judgment creditor and its lawyer. However, the actual levying on the property is conduct, and any communication is tangential and not essential. (107 C.A.4th 1025.)

(c) "Finally, we note that the failure to distinguish between conduct and communication runs the risk of essentially eliminating the tort of abuse of process, something we do not believe the Legislature intended when it amended the litigation privilege in the 1873-1874 session to include publications made in judicial proceedings. ... Given the expansion of the privilege to matters not only inside but outside the courtroom, and not only during trial but before and after trial, to sweep conduct within the privilege' ambit would in all likelihood nullify the tort. If that is the inevitable next step, it should be undertaken by the Legislature, not by the judiciary' expansive reading of a statute that itself was limited in its origins." (107 C.A.4th 1028.) (See *Mansell v. Otto* (2003) 108 C.A.4th 265, 271, 133 C.R.2d 276 [reading plaintiff's confidential psychiatric records was noncommunicative conduct not immunized by litigation privilege; plaintiff did not allege that any information in records was testified to or otherwise used in judicial proceeding]; *Navellier v. Sletten*, *supra* [where plaintiff challenged defendant's counterclaims on ground that they sought recovery for claims that defendant released, counterclaims were protected by litigation privilege, because challenge went to their content, rather than act or manner]; *Pollock v. University of Southern Calif.* (2003) 112 C.A.4th 1416, 1430, 6 C.R.3d 122 [allegedly false declaration functioned as written testimony, and thus constituted communication, not conduct].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Privilege*. See *Action Apartment Assn. v. Santa Monica* (2007) 41 C.4th 1232, 1243, 63 C.R.3d 398, 163 P.3d 89 [provision in municipal "tenant harassment" ordinance authorizing action against landlord who sues to recover possession of rental housing unit without reasonable factual or legal basis was preempted by statutory litigation privilege; provision was inimical to function of privilege to afford freedom of access to courts].

(2) *Scope*. See *Jacob B. v. Shasta* (2007) 40 C.4th 948, 959, 56 C.R.3d 477, 154 P.3d 1003, *Supp.*, *infra*, §686

[litigation privilege may apply to constitutional claims, as well as those based on common law or statute; also, privilege extends to communications that might be deemed perjurious or confidential]; *Siam v. Kizilbash* (2005) 130 C.A.4th 1563, 1577, 31 C.R.3d 368 [P.C. 11172(a) (text, §141), imposing liability on voluntary reporters for knowingly false child abuse reports, overrides litigation privilege of C.C. 47(b)]; *Foothill Fed. Credit Union v. Superior Court* (2007) 155 C.A.4th 632, 635, 66 C.R.3d 249 [litigation privilege barred action for invasion of privacy and intentional infliction of emotional distress based on credit union's disclosure of personal financial records beyond those sought in probate proceeding, even though credit union failed to comply with notice requirements of C.C.P. 1985.3 (governing discovery of personal records of consumers; see 2 Cal. Evidence (4th), Discovery, §228 et seq.); applying privilege did not frustrate purpose of C.C.P. 1985.3, which was not intended to create legal remedy against custodians of these records]; *People v. The Pac. Lumber Co.* (2008) 158 C.A.4th 950, 962, 70 C.R.3d 501, 13 Summary (10th), Equity, Supp., §128 [no exception to privilege for governmental enforcement actions under Unfair Competition Law (see 13 Summary (10th), Equity, §105 et seq.)].

(New) *Applicability of privilege in breach of contract actions:* In *Wentland v. Wass* (2005) 126 C.A.4th 1484, 25 C.R.3d 109, a managing partner filed a cross-complaint against his partners in their accounting action against him, alleging breach of an agreement not to make accusations or comments that asserted wrongdoing by him concerning a particular investment. The breach allegedly occurred in statements made by cross-defendants' attorney and CPA in the course of the action. The trial court sustained cross-defendants' demurrers without leave to amend. *Held*, reversed; the cross-complaint was not barred by the litigation privilege.

(a) Whether the litigation privilege applies in the context of breach of contract litigation turns on whether its application furthers the policies underlying the privilege. (126 C.A.4th 1492.) Considering those policies, the privilege should not apply in this breach of contract case. (126 C.A.4th 1494.) One who validly contracts not to speak waives the protection of the litigation privilege. (126 C.A.4th 1494.)

(b) Unlike the usual derivative tort action, application of the privilege here does not serve to promote access to the courts, truthful testimony, or zealous advocacy. This cause of action is not based on allegedly wrongful conduct during litigation, but on breach of a separate promise independent of the litigation. This breach was not simply a communication, but also wrongful conduct or performance under the contract, and application of the privilege would frustrate the purpose of that contract. (126 C.A.4th 1494.)

(c) Cross-defendants contend that, even if the litigation privilege applies only to tort actions, it should apply here because the gravamen of the cross-complaint is that they tortiously damaged cross-complainant through their alleged false statements. Where the gravamen of a cause of action sounds in tort, not contract, the litigation privilege applies. (126 C.A.4th 1494.) If the cause of action arises from breach of a promise set forth in the contract, the action is *ex contractu*, but if it arises from a breach of duty growing out of the contract, it is *ex delicto*. The cross-complaint here alleged that cross-defendants breached the agreement by authorizing negative comments made about cross-complainant's management not because the comments were false, but because they had promised not to continue to make the comments. The cross-complaint sounds in contract, not tort. (126 C.A.4th 1495.)

See *Performance Plastering v. Richmond Amer. Homes of Calif.* (2007) 153 C.A.4th 659, 673, 63 C.R.3d 537 [litigation privilege did not apply to bar subcontractor and its liability insurer from suing general contractor that allegedly breached of settlement agreements by suing subcontractor for construction defects; general contractor was not being sued in tort based on publication made in connection with judicial proceeding, but rather in contract for breaching settlement agreements].

Feldman v. 1100 Park Lane Associates (2008) 160 C.A.4th 1467, 1494, 74 C.R.3d 1, distinguished *Wentland* and held that the litigation privilege barred subtenants' breach of contract claim, along with their tort claims, in their cross-complaint to an unlawful detainer complaint. The subtenants alleged that, by illegally evicting them, the landlord breached a lease addendum entitling them to occupy the apartment under the terms of the original tenant's lease. As with the tort causes of action, the core of their contract claim was that they were in lawful possession of the apartment and

the landlord and its agent harassed them with threats of eviction, initiated the unlawful detainer action, and forced them to leave. This communicative conduct was preparatory to litigation and therefore covered by the privilege. (160 C.A.4th 1494, 1497.) (3) *Purpose*. See *Wentland v. Wass*, *supra*, 126 C.A.4th 1492 [quoting *Silberg v. Anderson* (1990) 50 C.3d 205, 213, 266 C.R. 638, 786 P.2d 365, text, p. 826].

(4) *Distinction Between Communication and Conduct*. *Drum v. Bleau, Fox & Associates* (2003) 107 C.A.4th 1009, 132 C.R.2d 602, text, p. 827, was disapproved in *Rusheen v. Cohen* (2006) 37 C.4th 1048, 39 C.R.3d 516, 128 P.3d 713. After defendant judgment debtor filed a cross-complaint against plaintiff's attorney for abuse of process, the attorney filed a special motion to strike the cross-complaint as a SLAPP suit (see 5 Cal. Proc. (5th), *Pleading*, §1017 et seq.), asserting that his actions were protected by the litigation privilege. The trial court granted the motion, and entered judgment for the attorney, but the Court of Appeal reversed on the ground that, while the attorney's filing allegedly false declarations of service to obtain a default judgment against defendant fell within the litigation privilege as communicative conduct, his execution on that judgment was unprivileged, noncommunicative conduct. *Held*, reversed. "[W]here the cause of action is based on a communicative act, the litigation privilege extends to those noncommunicative actions which are necessarily related to that communicative act" (37 C.4th 1052), and these actions may include those necessary to enforce the judgment.

(a) Because the litigation privilege protects only publications and communications, a threshold issue in determining the applicability of the privilege is whether conduct is communicative or noncommunicative. The distinction between communicative and noncommunicative conduct hinges on the gravamen of the action. In other words, the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature. (37 C.4th 1058.)

(b) Here, because the gravamen of the complaint is a privileged communication (i.e., the allegedly perjured declarations of service), the privilege should extend to necessarily related noncommunicative acts (i.e., the act of levying on the judgment). Otherwise, application of the litigation privilege would be thwarted. (37 C.4th 1062.) Extending the litigation privilege to postjudgment enforcement activities that are necessarily related to the allegedly wrongful communicative act is consistent with public policy considerations. This extension would conform to the purposes of the litigation privilege, that is, to afford litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative tort actions, to encourage open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation. Despite the concern voiced in *Drum* for the potential abolishment of the common law tort of abuse of process, modern public policy seeks to encourage free access to the courts and finality of judgments by limiting derivative tort claims arising out of litigation-related misconduct and by favoring sanctions within the original lawsuit. (37 C.4th 1063.) Given the alternative remedies for improper service and the procedural protections against improper enforcement, the litigation privilege should be applied "to limit the availability of the tort of abuse of process in the judgment enforcement context." (37 C.4th 1065.)

(c) If the gravamen of an action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct, which in this case included acts necessary to enforce the judgment and carry out the directive of the writ of execution. Stated another way, unless it is demonstrated that an independent, noncommunicative, wrongful act is the gravamen of the action, the litigation privilege applies. Here, because the execution of the judgment did not provide an independent basis for liability separate and apart from filing the false declarations of service, the gravamen of the action was the procurement of the judgment, not its enforcement. Thus, the enforcement of the judgment in reliance on the filing of privileged declarations of service was itself privileged. (37 C.4th 1065.)

See *Jacob B. v. Shasta*, *supra*, 40 C.4th 957 [litigation privilege applied where gravamen of invasion of privacy claim was not defendant's noncommunicative conduct in accessing information for party to judicial proceeding, but rather publication of information in proceeding, exposing it to public view; following *Rusheen*]; *Ramalingam v. Thompson* (2007) 151 C.A.4th 491, 502, 60 C.R.3d 11 [litigation privilege barred accounting malpractice claim,

gravamen of which was accountant's communication of opinion as neutral expert in underlying marital dissolution proceeding; privilege extended to related noncommunicative conduct, including preparation for testifying; citing *Rusheen* and *Jacob B.*; *Gallanis-Politis v. Medina* (2007) 152 C.A.4th 600, 616, 61 C.R.3d 701 [litigation privilege barred county employee's retaliation action against supervisors, gravamen of which was their investigation and report in response to employee's discovery requests in her related discrimination action; investigation and report were quintessentially communicative acts; citing *Rusheen*].



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CHAPTER IX - Torts

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- C. Defamation.
 - 4. Defenses.
 - b. Absolute Privilege.
- 3. Judicial Proceedings.
 - bb. Persons Protected.

5 Witkin Sum. Cal. Law Torts § 568

[§ 568] Persons Protected.

(1) *In General.* The statements of judges, attorneys, parties, witnesses, jurors, and other participants in judicial proceedings, made in relation to those proceedings, are generally held to be absolutely privileged. (*Smith v. Hatch* (1969) 271 C.A.2d 39, 46, 76 C.R. 350, *infra*, §569.) Nonlitigants and nonparticipants are not protected by the privilege. (*Wise v. Thrifty Payless* (2000) 83 C.A.4th 1296, 1303, 100 C.R.2d 437.) (See *Obos v. Scripps Psychological Associates* (1997) 59 C.A.4th 103, 108, 69 C.R.2d 30 [statements in custody battle by court-appointed psychologist concerning mother's boyfriend were privileged, even though boyfriend was nonparty]; *Mission Oaks Ranch, Ltd. v. Santa Barbara* (1998) 65 C.A.4th 713, 726, 77 C.R.2d 1 [consultant's Environmental Impact Report submitted to county considering development project was absolutely privileged under litigation privilege]; *Laborde v. Aronson* (2001) 92 C.A.4th 459, 463, 112 C.R.2d 119 [psychiatrist who was jointly retained to make custody evaluation and whose report was received into evidence in dissolution proceeding was protected by litigation privilege]; *Rest.2d, Torts* §585 [judicial officers], §586 [attorneys], §587 [parties], §588 [witnesses], §589 [jurors]; 69 *Harv. L. Rev.* 920; 14 *Pacific L. J.* 105; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §§299, 300; 32 *A.L.R.2d* 423 [statements in briefs as privileged]; 42 *A.L.R.2d* 825 [findings or report of judge or person acting in judicial capacity as privileged]; 54 *A.L.R.2d* 1298 [testimony of witness as basis for civil damages action]; 61 *A.L.R.2d* 1300 [statements in counsel's argument to jury as privileged].)

In *Block v. Sacramento Clinical Labs* (1982) 131 C.A.3d 386, 182 C.R. 438, plaintiff's infant daughter died, an autopsy was performed, and defendant toxicologist performed a blood analysis for the coroner. He found that the child's blood had a high concentration of salicylate, and the district attorney sought further information from him that was used as grounds for filing criminal murder and child neglect charges against plaintiff. At the preliminary hearing, defendant's calculations were found to be erroneous and the charges were dismissed. Plaintiff then filed this action against defendant for "professional negligence." *Held*, the communication was absolutely privileged. The litigation privilege is applied to a wide variety of tort actions, however labeled and whatever the theory of liability, which are predicated upon the publication of an injurious falsehood in protected proceedings. (131 C.A.3d 390, 391.) Plaintiff's theory of liability is based on defendant's communication to the district attorney and defendant's testimony as a witness in the criminal proceeding. These were related to and connected with a judicial proceeding. (131 C.A.3d 392, 393, 394.)

(2) *Party's Own Expert Witness Is Not Protected.* In *Mattco Forge v. Arthur Young & Co.* (1992) 5 C.A.4th 392, 6 C.R. 781, the court held that while the litigation privilege "has at times seemed to protect virtually anyone participating in litigation from subsequent suit, ... California precedent does not authorize, and the policies underlying the privilege do not support, its use to protect a negligent expert witness from liability to the party who hired that witness." (5 C.A.4th 395.) Here, plaintiff had engaged defendant to perform litigation support accounting work. After dismissal of its complaints in the federal and California trial courts, plaintiff filed a complaint against defendant alleging causes of action for professional malpractice, fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, tortious breach of the implied covenant of good faith and fair dealing, constructive trust, and fraudulent concealment. The trial judge granted defendants' motions for summary judgment, mainly on the ground that the litigation privilege barred the complaint as a matter of law. *Held*, reversed.

(a) This appeal involves causes of action sounding in contract and in tort against an expert witness hired by plaintiffs themselves to support their case in the underlying lawsuit. (5 C.A.4th 403.) Application of the privilege in these cases would not further the underlying policies of the privilege. (5 C.A.4th 403.) Several cases have applied the litigation privilege to protect statements by an expert witness; but they involve suits against expert witnesses who function adversely to the plaintiff. (5 C.A.4th 405, citing *Carden v. Getzoff* (1987) 190 C.A.3d 907, 235 C.R. 698, *supra*, §21.) The distinction is important, as *Carden* points out: "Otherwise, adverse witnesses would always be fearful of subsequent civil suits and would be extremely hesitant or unwilling to testify. ... As this reasoning suggests, the litigation privilege does not exist to protect one's own expert witnesses, but to protect adverse witnesses from suit by opposing parties after the lawsuit ends." (5 C.A.4th 405.)

(b) "The analogy between a party bringing a suit against its own expert witness and the party bringing a suit against its own attorney has some relevance." (5 C.A.4th 406.) If the privilege protected an attorney from any suit by a former client, no malpractice suit could be brought. (5 C.A.4th 406.)

West's Key Number Digest, Libel and Slander k.38

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *American Products Co. v. Law Offices of Geller, Stewart & Foley, LLP* (2005) 134 C.A.4th 1332, 1346, 37 C.R.3d 93 [litigation privilege did not foreclose unfair competition claim founded on attorney's misconduct in earlier litigation where claimant was not party to earlier litigation]; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §279 et seq. (2) *Party's Own Expert Witness Is Not Protected.* See *Lambert v. Carneghi* (2008) 158 C.A.4th 1120, 1137, 1144, 70 C.R.3d 626, Supp., *infra*, §573 [litigation privilege does not prevent party from suing his or her own expert witness for negligence in testifying; citing *Mattco Forge v. Arthur Young & Co.* (1992) 5 C.A.4th 392, 406, 6 C.R. 781, text, p. 829]. (3) *(New) Party's Attorney Is Not Protected.* *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 C.A.4th 1532, 52 C.R.3d 712, involved an action by clients alleging their attorneys' malpractice in representing them in earlier litigation. *Held*, the litigation privilege did not apply. The privilege has been held to shield litigants, attorneys, and witnesses from liability for virtually all torts except malicious prosecution. However, no cases can be found holding that the privilege bars malpractice actions based on an attorney's litigation-related acts or omissions. This is understandable. If the privilege protected an attorney from suit by a former client, no malpractice action could ever be brought. "We perceive no sound reason why litigators should be exempted from malpractice liability, and therefore decline to extend the litigation privilege's protection to the present case." (145 C.A.4th 1541; citing *Mattco Forge v. Arthur Young & Co.*)



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3. Judicial Proceedings.

cc. Relevancy Limitation.

5 *Witkin Sum. Cal. Law Torts* § 569

[§ 569] Relevancy Limitation.

(1) *Background.* The general American rule appears to be that a statement made in a judicial proceeding is not absolutely privileged unless it has some *reasonable relevancy to the subject matter of the action*. It need not be pertinent to an issue actually before the court, but must have some relation to the proceeding. (See *Rest.2d, Torts* §585, Comment e; §587, Comments c, e; 27 *Cal. L. Rev.* 618; 69 *Harv. L. Rev.* 922; 4 *U.C.L.A. L. Rev.* 161; 7 *U.S.F. L. Rev.* 176; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §301; 38 *A.L.R.3d* 272 [relevancy of matter contained in pleading as affecting privilege within law of libel].)

The early California decisions were conflicting. Some recognized the general rule requiring relevancy. (See *Carpenter v. Ashley* (1906) 148 C. 422, 426, 83 P. 444; *Washer v. Bank of America* (1943) 21 C.2d 822, 832, 136 P.2d 297; *Albertson v. Raboff* (1956) 46 C.2d 375, 381, 295 P.2d 405, *infra*, §648; *Irwin v. Newby* (1929) 102 C.A. 110, 116, 282 P. 370; 4 *U.C.L.A. L. Rev.* 161.) Other cases took the position that the California statute declares the privilege in unqualified terms, and that the relevancy exception cannot be made a part of it. (See *Moore v. United States Fidelity & Guaranty Co.* (1932) 122 C.A. 205, 210, 9 P.2d 562; *Donnell v. Linforth* (1935) 11 C.A.2d 25, 28, 52 P.2d 937; *Lewis v. Linn* (1962) 209 C.A.2d 394, 398, 399, 26 C.R. 6; *Jordan v. Lemaire* (1963) 222 C.A.2d 622, 625, 35 C.R. 337; 10 *So. Cal. L. Rev.* 105.)

(2) *Limitation Established.* The conflict was resolved in *Thornton v. Rhoden* (1966) 245 C.A.2d 80, 53 C.R. 706. The alleged defamation occurred in the taking of a deposition, and consisted of questions by the attorney and answers by the witness derogatory to plaintiff. The court, upholding the privilege, reviewed the prior cases and followed the approach of earlier cases recognizing the relevancy limitation and the Torts Restatement. The test "requires the demonstration of some connection with the proceedings, yet dispenses with the requirement of relevancy, materiality or pertinency in their technical sense. ... On the one hand it does not protect attorneys, witnesses and litigants who use the mere fact that they are talking in the course of a judicial proceeding as a pretext to defame persons with respect to matters which have nothing whatever to do with the question under consideration, yet it does shield counsel, his client and witnesses from having their motives questioned and being subjected to litigation if some connection between the utterance of the judicial inquiry can be established." (245 C.A.2d 90.) (See *Rader v. Thrasher* (1972) 22 C.A.3d 883,

887, 99 C.R. 670 [quoting *Thornton*]; *Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 C.A.3d 818, 824, 106 C.R. 718 [citing *Thornton*]; *Earp v. Nobmann* (1981) 122 C.A.3d 270, 284, 175 C.R. 767 [recognizing relevancy limitation]; *Barbary Coast Furniture Co. v. Sjolie* (1985) 167 C.A.3d 319, 332, 213 C.R. 168 [same].)

(3) *Relevancy Test Met*. A number of decisions have held the relevancy requirement to have been met. The following are illustrative:

Passman v. Torkan (1995) 34 C.A.4th 607, 615, 40 C.R.2d 291 [letter by party in civil action to his attorney concerning counsel representing opposing party had some relation to action and was absolutely privileged, where purpose of letter was to prompt attorney to conclude lawsuit before opposing party could dissipate funds at issue].

Obos v. Scripps Psychological Associates (1997) 59 C.A.4th 103, 106, 69 C.R.2d 30 [in custody battle, statements made by court-appointed psychologist to mother's attorney and therapist that mother's boyfriend had been dishonorably discharged from service and fired from his job for dishonesty met relevancy test].

Sacramento Brewing Co. v. Desmond, Miller & Desmond (1999) 75 C.A.4th 1082, 1085, 89 C.R.2d 760 [in bankruptcy proceeding, notice of motion to sell debtor's property that named wrong party as debtor was reasonably related to that proceeding and thus within litigation privilege].

Knoell v. Petrovich (1999) 76 C.A.4th 164, 169, 90 C.R.2d 162 [landowner's attorney's demand letter stating that easement might or might not be forgery was reasonably related to action against landowner by easement holder and, as privileged statement, could not be basis of action against attorney].

In *Friedman v. Knecht* (1967) 248 C.A.2d 455, 56 C.R. 540, defendant, while a deputy district attorney, was prosecuting a woman for prostitution. Plaintiff was the woman's attorney. At the time of trial, defendant moved for a continuance because of illness of the officer witness, and defendant and plaintiff exchanged words at some length. Plaintiff sued for slander on the theory that defendant had suggested improper conduct on his part. *Held*, a demurrer, on the ground of the litigation privilege, was properly sustained. If plaintiff can prove the allegations of defendant's false statements and malicious motives, defendant will be subject to discipline as an attorney, and this kind of sanction takes care of nearly all the cases. The absolute privilege of C.C. 47(b) is necessary to protect attorneys in their primary function of representation of clients, an interest deemed more important than an attorney's personal interest in not being slandered. (248 C.A.2d 462.)

In *Smith v. Hatch* (1969) 271 C.A.2d 39, 76 C.R. 350, a local contractors' association (GG) paid money for promotion to trustees of an area association (MCA). H, attorney for GG, obtained an order to show cause, directed against MCA and certain officers, to enjoin them from collecting and paying out money of the promotional trust funds. H then made two defamatory publications. The first was a letter to his client GG, stating that discovery proceedings showed that officers of MCA had engaged in litigation with the national association in order to appropriate money to themselves in the guise of fees and traveling expenses of attorneys, and that this "grab of funds" was without "a vestige of morality or legality." The second was a letter directed to the trial court judge from whom the order to show cause had issued, asking for a continuance of the hearing, and then proceeding to discuss the merits of the case, with a series of similar attacks on the same individuals. The defamed persons brought this action against H, who originally published the defamatory charges, and S, a director of GG, who republished them by reading the letter aloud at a meeting of MCA. *Held*, summary judgment for defendants affirmed.

(a) *Letter by attorney to client*. H's letter to GG, though not directed to the court and not a part of any official court record, was protected. It had some relation to the judicial proceeding in pending litigation between GG and MCA. (271 C.A.2d 46.) Hence H, the attorney, was protected by the litigation privilege. S, the party who republished, was also absolutely privileged for the same reason; he was actively engaged in efforts to settle the differences between the two associations. (271 C.A.2d 47.)

(b) *Letter by attorney to judge*. Insofar as H's letter to the judge concerned the request for a continuance, it was

clearly protected by absolute privilege. And the defamatory parts were concerned with the litigation, and hence bore some relation to its subject matter. (271 C.A.2d 48.)

(c) *Availability of sanctions.* As observed in *Friedman v. Knecht*, *supra*, attorneys who make false statements shielded by privilege can be sanctioned through disciplinary channels or by way of contempt proceedings. (271 C.A.2d 50.)

In *Costa v. Superior Court* (1984) 157 C.A.3d 673, 204 C.R. 1, defendant, chairman of the board of directors of the supreme council of a fraternal association, sent a letter to members explaining the purpose of pending litigation initiated by the supreme council against its subsidiary lodge, and seeking support and guidance from the membership. *Held*, the communication was privileged. Although made outside the courtroom, it was reasonably related to the pending action and designed to aid in accomplishing its objectives. (157 C.A.3d 678.)

(4) *Relevancy Test Not Met.* In *Rothman v. Jackson* (1996) 49 C.A.4th 1134, 1145, 57 C.R.2d 284, statements were made by defendants to the press, in which they accused plaintiff of leaking information for extortion purposes. *Held*, the statements were not made to achieve the objects of the litigation, and thus were not privileged.

In *Nguyen v. Proton Technology Corp.* (1999) 69 C.A.4th 140, 145, 81 C.R.2d 392, plaintiff's former employer, in a demand letter to his current employer threatened to bring an unfair competition action if plaintiff did not cease his wrongful solicitation of prior customers. In the letter, the former employer falsely accused plaintiff of having done prison time for wife beating. *Held*, this statement was not protected by the privilege; it was made to be vindictive, rather than to promote the threatened litigation.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Background.* See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §281.



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dd. No Interest of Justice Exception.

5 *Witkin Sum. Cal. Law Torts* § 570

[§ 570] No Interest of Justice Exception.

In *Silberg v. Anderson* (1990) 50 C.3d 205, 266 C.R. 638, 786 P.2d 365, plaintiff husband sued defendant attorney, who represented plaintiff's wife in a prior marital dissolution proceeding. In that proceeding, plaintiff's attorney and defendant stipulated to submission of family members to an evaluation and counseling by a "mutually agreeable and independent" psychologist for determining visitation and custody arrangements, and on defendant's recommendation a psychologist was selected. The psychologist's recommendation was adverse to plaintiff, who subsequently brought this action against defendant claiming damages for an "intentional tort" (apparently intentional infliction of emotional distress). The complaint alleged that, contrary to defendant's representation that the psychologist was independent and neutral, the psychologist and defendant had a preexisting personal relationship that caused him to make a report that was "biased, wholly inaccurate and defamatory"; and that defendant's "intentional tort" caused him the loss of reasonable visitation arrangements, damage to his reputation, and emotional distress. The trial judge sustained defendant's demurrer, which was based on the litigation privilege, and entered judgment of dismissal. The Court of Appeal reversed, concluding that defendant's representations were not privileged because they were made to achieve personal advantages and not to promote the "interest of justice." *Held*, Court of Appeal judgment reversed; the privilege is absolute and is not subject to an "interest of justice" exception.

(a) To effectuate its vital purposes, the litigation privilege is held to be absolute in nature and to apply to a number of torts additional to defamation, including intentional infliction of emotional distress. (50 C.3d 215, citing *Albertson v. Raboff* (1956) 46 C.2d 375, 295 P.2d 405, *infra*, §648, and other cases.)

(b) The "interest of justice" test appears to have originated with *Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 C.A.3d 818, 106 C.R. 718, which read into the requirement that the communication be made "to achieve the objects of the litigation" the additional requirement that it must also have been made for the purpose of promoting the "interest of justice." This additional moral consideration was a drastic departure from precedent, and would permit derivative tort suits in many, if not most, cases on the ground that an otherwise privileged communication was not made for the purpose of promoting justice. (50 C.3d 217.) Further, this test, though embraced by a number of Court of Appeal decisions, has been rejected by others. (50 C.3d 217.) In addition, in some of the cases purporting to use the test, the

same result could have been reached on the basis of the absence of one of the traditionally recognized factors. (50 C.3d 217.)

(c) "We conclude that the well-intentioned addition of the 'interest of justice' test must be rejected. A rule that an otherwise privileged communication is not privileged ... unless made for the purpose of promoting the 'interest of justice' is wholly inconsistent with the numerous cases in which fraudulent communications or perjured testimony have nevertheless been held privileged. ... Obviously, such a test would also be contrary to the decisions in which liability for abuse of process is held precluded by the privilege. ... One of the two necessary elements of that tort is an ulterior purpose. ... Finally, endorsement of the 'interest of justice' requirement would be tantamount to the exclusion of *all* tortious publications from the privilege, because tortious conduct is invariably inimical to the 'interest of justice.' Thus, the exception would subsume the rule." (50 C.3d 218.) (See 18 *Pepperdine L. Rev.* 645 [Silberg].)

Howard v. Drapkin (1990) 222 C.A.3d 843, 271 C.R. 893, supra, §174, arose out of a dissolution proceeding involving child custody and visitation rights of the husband. Defendant psychologist had been engaged, under a stipulation signed by the husband and wife, to evaluate the facts and make nonbinding findings and recommendations. Plaintiff brought this action against defendant for intentional and negligent infliction of emotional distress, alleging various kinds of misconduct in performance of her task. *Held*, judgment for defendant on demurrer affirmed. The court, on an elaborate analysis of *Silberg v. Anderson*, held it controlling. "Defendant's alleged wrongful communications (whether express or implied and whether screamed or simply stated) were 'not ... extraneous to the action' but rather had a 'logical relation' to it. ... Defendant's acts were part of a process undertaken by the husband and wife to aid the court in its decision on an important matter in the dissolution. Defendant's 'motives, morals, ethics or intent' are not in issue when asking whether her acts were in furtherance of the objects of the dissolution proceedings." (222 C.A.3d 863.) (See *Gootee v. Lightner* (1990) 224 C.A.3d 587, 596, 274 C.R. 697 [following *Howard v. Drapkin* on similar facts].)

SUPPLEMENT: [This section is current through the latest supplement]



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ee. Steps Before and After Trial.

5 Witkin Sum. Cal. Law Torts § 571

[§ 571] Steps Before and After Trial.

(1) *In General.* The litigation privilege is not limited to statements made *during* a trial or other proceeding, but may extend to steps taken before or after the proceeding, provided they have some relation to it. (See *Albertson v. Raboff* (1956) 46 C.2d 375, 379, 295 P.2d 405, *infra*, §648 [notice of lis pendens]; *Donnell v. Linforth* (1935) 11 C.A.2d 25, 28, 52 P.2d 937 [allegations in complaint]; *Spirac v. Superior Court* (1976) 62 C.A.3d 33, 35, 133 C.R. 24 [same]; *ITT Telecom Products Corp. v. Dooley* (1989) 214 C.A.3d 307, 313, 262 C.R. 773 [statements made as consultant to aid potential litigant]; *California Physicians' Service v. Superior Court* (1992) 9 C.A.4th 1321, 1330, 12 C.R.2d 95 [allegations in answer]; *O'Keefe v. Kompa* (2000) 84 C.A.4th 130, 133, 100 C.R.2d 602 [judgment collection efforts]; *Brown v. Kennard* (2001) 94 C.A.4th 40, 44, 113 C.R.2d 891 [same]; *Blanchard v. DIRECTV* (2004) 123 C.A.4th 903, 918, 20 C.R.3d 385 [demand letter]; *Rest.2d, Torts* §586 and Comments a, e; §587 and Comment e; §588; 14 *Pacific L. J.* 105; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §302 et seq.; 23 *A.L.R.3d* 1172 [pretrial dispositions and discovery proceedings]; 23 *A.L.R.4th* 932 [attorney's statements during extrajudicial investigation or preparation].)

(2) *Prospective Litigation Must Be Contemplated Seriously and in Good Faith.* The privilege relating to statements regarding prospective litigation "is qualified rather than absolute; the prospective litigation must be contemplated in good faith and under serious consideration." (*Laffer v. Levinson, Miller, Jacobs & Phillips* (1995) 34 C.A.4th 117, 124, 40 C.R.2d 233 [action for intentional interference with economic relations; threat by defendants to sue plaintiff, allegedly causing third party to withdraw from settlement negotiations with plaintiff in another action].)

Aronson v. Kinsella (1997) 58 C.A.4th 254, 68 C.R.2d 305, clarified the *Laffer* holding, observing that the court there used the term "qualified" in the colloquial sense, rather than in the legal sense that there is no prelitigation privilege unless the statement was made without malice. The correct rule is that if the statement is made with a good faith belief in a legally viable claim and in serious contemplation of litigation, the statement is sufficiently connected to the litigation, and it will be protected by the litigation privilege. *Then*, the privilege is absolute. (58 C.A.4th 264, 266.) The fact that, in this case, defendant did not actually file a complaint (because plaintiff had taken action to remove the main basis of a suit) did not change the fact that the statements, when made, complied with this test. (58 C.A.4th 271.) (See *Eisenberg v. Alameda Newspapers* (1999) 74 C.A.4th 1359, 1377, 88 C.R.2d 802 [in defamation action based on

defendant newspaper's retraction of plaintiff reporter's earlier article, fact that retraction was in response to C.C. 48a demand letter did not invoke litigation privilege, where purpose of demand letter was to avoid, rather than initiate, litigation and where litigation was mere possibility, rather than reality].)

When the privilege attaches prior to suit was addressed in *Edwards v. Centex Real Estate Corp.* (1997) 53 C.A.4th 15, 61 C.R.2d 518. Plaintiff homeowners in a development built on former saltwater marshland sued defendants, the developer and its engineers, for fraud and misrepresentation in the design and construction of their homes' concrete foundation, and for rescission of releases made in connection with their initial claims for repair of those foundations. When plaintiffs first complained of cracking and other problems with the foundations, they had signed general releases in exchange for repairs recommended by defendants. Several years thereafter, the homes suffered further foundation damage and plaintiffs filed suit, contending that defendants had fraudulently failed to disclose that the foundation problems were caused by a fundamental design defect not curable by the earlier repairs. The trial judge granted motions in limine by defendants, under the litigation privilege and the parol evidence rule, to exclude all communications made by defendants in response to plaintiffs' reports of foundation damage as evidence that defendants had fraudulently induced plaintiffs to execute the releases. Plaintiffs entered into a stipulated judgment in favor of defendants in order to obtain immediate appellate review of the issues raised by the trial judge's decision. *Held*, reversed.

(a) *Judicial extension of litigation privilege in prelitigation context.* C.C. 47(b) expressly applies only to communications made in any "judicial proceeding." The statute includes nothing about communications made *before* suit is filed. Nevertheless, the courts have applied the judicial privilege to various categories of communications made in advance of actual litigation. The result has been to transform the relatively simple statutory privilege for communications made *in* a judicial proceeding into an amorphous immunity encompassing all kinds of communications related to an *anticipated* lawsuit. (53 C.A.4th 30.)

(b) *Need for limits on scope of privilege.* Defendants argued that the privilege extends to all communications by any person involved in discussions or negotiations in connection with virtually any kind of dispute, whether or not litigation has actually been threatened, proposed, or seriously contemplated, as long as there is a *possibility* that a lawsuit may be filed in the future. This interpretation is overbroad and incorrect. In practice, this extension of the privilege would effectively permit a person to lie or make fraudulent miscommunications any time a claim is made, on the theory that the claim *might* ripen into an actual lawsuit. This extension of the privilege would swallow up much of the law of torts. (53 C.A.4th 32.) At some point there must be a limit to this judicial expansion of the prelitigation scope of the privilege. "It is not too late in the day to establish appropriate standards for extending the litigation privilege to communications made in anticipation of litigation." (53 C.A.4th 33.)

(c) *Standards for applying privilege to prelitigation communications.* The question that must be addressed is, at what point on the continuum between the mere possibility of an action and the reality of a filed lawsuit, does the privilege attach? In the present litigious society, there is always at least the *potential* for a lawsuit any time a dispute arises between individuals or entities. More than a mere possibility or vague anticipation of litigation must be required for the privilege to attach, or else the privilege may be misused in ways for which there is no public policy justification or purpose. (53 C.A.4th 33.) From the justifications for the privilege stated in *Silberg v. Anderson* (1990) 50 C.3d 205, 214, 266 C.R. 638, 786 P.2d 365, supra, §570, and in the *Rest.2d, Torts* §§586, 587, 588, the following four closely related yet distinct considerations may be derived for distinguishing the point at which the litigation privilege may attach to statements in advance of litigation:

(1) The communication must have been made preliminary to a *proposed* judicial or quasi-judicial proceeding. That is, a lawsuit or some other form of proceeding must actually have been suggested or proposed, orally or in writing. Without some actual verbalization of the danger that a given controversy may turn into a lawsuit, there is no unmistakably objective way to detect at what point on the continuum between the onset of a dispute and the filing of a lawsuit the threat of litigation has advanced from mere possibility or subjective anticipation to contemplated reality. (53 C.A.4th 34.)

(2) The verbal proposal of litigation must be made *in good faith*. It is not necessary that a party make an actual "threat" of litigation, as long as there is a serious, good faith proposal. Conversely, even a threat to file a lawsuit is insufficient to activate the privilege if the threat is merely a negotiating tactic and not a serious proposal made in good faith contemplation of going to court. (53 C.A.4th 35.)

(3) The contemplated litigation must be *imminent*. An offhand suggestion that a given claim or dispute *might* result in a lawsuit is insufficient to invoke the privilege. Unless and until the parties are negotiating under the actual threat of impending litigation, the justification for the litigation privilege of encouraging access to the courts can have no relevance to their communications. (53 C.A.4th 35.)

(4) The litigation must be proposed in order to obtain access to the courts for *the purpose of resolving the dispute*. Access to the courts is not an end in itself. Clearly, there is no public policy favoring litigation for its own sake. (53 C.A.4th 35.)

The critical point of each of these four elements is that the mere potential or bare possibility that judicial proceedings might be instituted in the future is insufficient to invoke the litigation privilege. In every case, the privileged communication must have some relation to an imminent lawsuit or judicial proceeding that is *actually* contemplated seriously and in good faith to resolve a dispute, and not simply as a tactical ploy to negotiate a bargain. (53 C.A.4th 36.)

(d) *Privilege is inapplicable here*. For purposes of their motions in limine based on the affirmative defense of the litigation privilege, defendants had the burden of establishing the preliminary facts, based on these standards. This they failed to do, and the trial judge erred in granting their motions on this basis. There is no evidence that either plaintiffs or defendants were actually contemplating commencing legal proceedings, seriously and in good faith, at the time of the communications. Nor is the preliminary factual basis established, as contended by defendants, by the allegations of plaintiffs' complaints. Plaintiffs merely alleged that *defendants* intended, by means of the communications, to protect themselves from *potential* liability by inducing appellants not to pursue their rightful judicial remedies. Plaintiffs never alleged or admitted that at the time they informed defendants of the cracks in their foundations, plaintiffs themselves were actually contemplating litigation, seriously and in good faith. Moreover, even if plaintiffs had made an allegation to that effect in their complaints, this still would not satisfy the requirements of the privilege in this prelitigation context. For defendants to take advantage of the privilege by applying it to their *own* communications, they were required to establish that at the time they made the subject communications, they *themselves* actually contemplated prospective litigation, seriously and in good faith. (53 C.A.4th 37.) (See *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 C.A.4th 17, 22, 116 C.R.2d 583 [in action by one insurer against another based on alleged misrepresentation of policy limits of defendant's insured, misrepresentation was made to induce settlement of underlying suit and was thus within litigation privilege; citing *Edwards*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Action Apartment Assn. v. Santa Monica* (2007) 41 C.4th 1232, 1250, 63 C.R.3d 398, 163 P.3d 89 [provision in municipal "tenant harassment" ordinance authorizing action against landlord serving eviction notice without reasonable factual or legal basis was preempted by statutory litigation privilege to extent, but only to extent, that provision prohibited notice relating to litigation contemplated in good faith and under serious consideration]; *Navarro v. IHOP Properties* (2005) 134 C.A.4th 834, 843, 36 C.R.3d 385 [statements made during settlement negotiations fall within litigation privilege]; *American Products Co. v. Law Offices of Geller, Stewart & Foley, LLP* (2005) 134 C.A.4th 1332, 1341, 37 C.R.3d 93 [in proper circumstances, litigation privilege applies to demand letters and other prelitigation communications by attorneys]; *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 C.A.4th 1, 5, 39 C.R.3d 547 [allegedly defamatory letter from attorneys for homeowners association to association members, expressly referring to litigation arising from homeowner's refusal to permit association's access to property for weed abatement and to enclosed litigation disclosure letter, came within litigation privilege]; *Rohde v. Wolf* (2007) 154 C.A.4th 28, 37, 64 C.R.3d 348 [where dispute between sister and brother concerning distribution of deceased father's assets resulted in threats of litigation, voicemail messages of brother's attorney to listing agent for decedent's

real property, accusing agent of conspiring with sister to defraud brother and threatening to take "appropriate action," fell within litigation privilege]; *Chabak v. Monroy* (2007) 154 C.A.4th 1502, 1519, 65 C.R.3d 641 [minor victim's allegedly false comments to parents and paralegal concerning child abuse were protected by litigation privilege as communications made in anticipation of litigation].(2) *Prospective Litigation Must Be Contemplated Seriously and in Good Faith*. See *Ruiz v. Harbor View Community Assn.* (2005) 134 C.A.4th 1456, 1473, 37 C.R.3d 133 [litigation privilege did not apply to letter from defendant's attorney to plaintiff concerning dispute when, at time of writing, neither party had written demand letter or otherwise seriously proposed litigation]; *A.F. Brown Electrical Contractor v. Rhino Elec. Supply* (2006) 137 C.A.4th 1118, 1128, 41 C.R.3d 1 [suppliers' actions in filing stop notices and undertaking other collection efforts against electrical contractor that cancelled purchase orders were not protected by litigation privilege in absence of showing that actions occurred when litigation was seriously contemplated; mere threat to pursue available legal remedies if contractor failed to make timely payment did not demonstrate serious consideration of lawsuit]; *Haneline Pac. Properties, LLC v. May* (2008) 167 C.A.4th 311, 318, 83 C.R.3d 919 [communications from one co-owner of real property to another concerning termination of lease and sale of property, which lessee claimed interfered with contract and prospective economic relations, were not protected by litigation privilege; overall tone of communications related to persuasion and negotiations regarding achievement of mutual goals without serious threats of litigation, despite references to "pursuing remedies"].



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ff. Quasi-Judicial Proceedings.

5 *Witkin Sum. Cal. Law Torts* § 572

[§ 572] Quasi-Judicial Proceedings.

(1) *Communications Within Privilege*. The litigation privilege extends to quasi-judicial proceedings. (See *Ascherman v. Natanson* (1972) 23 C.A.3d 861, 867, 100 C.R. 656 [hearing by hospital district concerning hospital's denial of physician's application for staff privileges]; *Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 C.A.3d 985, 994, footnote 2, 225 C.R. 852, *infra*, §595 [two factors indicative of quasi-judicial proceeding are holding of hearing and making of findings of fact]; *Pollock v. University of Southern Calif.* (2003) 112 C.A.4th 1416, 1429, 6 C.R.3d 122 [litigation privilege applied to allegedly false declaration made in proceeding to terminate employment of tenured professor].) Thus, a doctor's report submitted to a workers' compensation carrier as part of a workers' compensation proceeding is absolutely privileged. (*Harris v. King* (1998) 60 C.A.4th 1185, 1187, 70 C.R.2d 790.) (On application of litigation privilege to arbitration proceedings, see *infra*, §573.)

The proceedings must be such as involve the agency's decisionmaking process. In *Pettus v. Cole* (1996) 49 C.A.4th 402, 57 C.R.2d 46, one of defendant psychiatrists disclosed the details of his psychiatric evaluation of plaintiff employee who had requested stress-related disability leave to plaintiff's on-line supervisor. When plaintiff refused to enter an alcohol treatment program as a condition to continued employment, he was fired. Plaintiff's complaint against defendants alleged violation of the Confidentiality of Medical Information Act (C.C. 56 et seq.; see 2 *Cal. Evidence* (4th), *Witnesses*, §518). The trial judge granted defendants' motion for judgment at the close of plaintiff's case-in-chief. *Held*, reversed; the disclosure was not within the litigation privilege. Although the litigation privilege has been extended to quasi-judicial proceedings that involve an administrative body or agency's decisionmaking process, plaintiff's request for leave and the subsequent disability verification procedure involved no dispute resolution mechanism and no hearings, and the only decisionmakers involved were a private employer and its employees and agents. (49 C.A.4th 436.)

A complaint to the State Bar is as privileged as statements made during the course of formal disciplinary proceedings. (*Chen v. Fleming* (1983) 147 C.A.3d 36, 40, 194 C.R. 913; see 77 A.L.R.2d 493 [privilege in connection with proceedings to disbar or discipline attorney].)

(2) *Distinction: Imposition of Professional Discipline for Making Communications.* In *Budwin v. American Psychological Assn.* (1994) 24 C.A.4th 875, 29 C.R.2d 453, plaintiff psychologist served as a neutral expert in a child custody proceeding, and his recommendation, i.e., that the mother retain custody of one child but relinquish custody of the other, was followed by the court. The mother then filed a complaint against plaintiff with the American Psychological Association (APA), which sustained the complaint, finding that plaintiff had made false representations and wrongfully refused to produce certain documents. As a result, plaintiff was censured, i.e., he retained all rights and privileges of membership in the APA, but was required to complete further training. Plaintiff petitioned for mandamus, seeking to overturn the APA's censure on the ground that his conduct, his report to the court, and his testimony in the custody proceeding were protected by the litigation privilege. *Held*, summary judgment for plaintiff reversed.

(a) Plaintiff argued that the APA's censure of him violated the public policies supporting the litigation privilege. However, a clear line has been drawn in the litigation privilege decisions between tort liability on the one hand and criminal and disciplinary liability on the other. And whatever the reach of C.C. 47(b), it has not been extended to preclude professional disciplinary liability. (24 C.A.4th 881.) Hence, "[i]n the context of the false representations assumed to exist in this case for summary judgment purposes, we conclude a private, voluntary, professional association is not precluded by the litigation privilege of section 47(b) from disciplining one of its members for making such representations in a judicial proceeding." (24 C.A.4th 883.)

(b) *Bernstein v. Alameda-Contra Costa Med. Assn.* (1956) 139 C.A.2d 241, 293 P.2d 862, does not require a different result. In that case, a physician was expelled from a local medical association for violating an American Medical Association rule prohibiting a physician from disparaging, by comment or insinuation, his predecessor on a case. "The *Bernstein* court focused on the width of this ethical broad brush, and concluded that its application to disparaging statements made in the course of legal proceedings violated the public policy articulated in section 47(b). ... The court did not hold that section 47(b) precludes a voluntary, professional association from disciplining a member for misrepresentations made in the course of an official proceeding; no California court in the nearly 40 years of *Bernstein's* existence has read the decision that way." (24 C.A.4th 882, citing cases.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Communications Within Privilege.* See *People v. The Pac. Lumber Co.* (2008) 158 C.A.4th 950, 957, 70 C.R.3d 501, 13 Summary (10th), *Equity*, Supp., §128 [privilege barred state's fraud action under Unfair Competition Law against lumber company for alleged misrepresentations and concealments during administrative proceedings under California Environmental Quality Act regarding agreement to sell land to state and federal governments].



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4. Defenses.

b. Absolute Privilege.

3. Judicial Proceedings.

gg. Arbitration Proceedings.

5 Witkin Sum. Cal. Law Torts § 573

[§ 573] Arbitration Proceedings.

Because of its similarity to a judicial proceeding, an arbitration proceeding is within the scope of the privilege, and causes of action based on injury stemming from arbitration testimony are barred. (*Ribas v. Clark* (1985) 38 C.3d 355, 364, 212 C.R. 143, 696 P.2d 637, supra, §14.)

The privilege extends not only to judicial arbitration proceedings, but also to private, contractual arbitrations. (*Moore v. Conliffe* (1994) 7 C.4th 634, 643, 29 C.R.2d 152, 871 P.2d 204; on contractual arbitration, see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §484 et seq.; on judicial arbitration, see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §524 et seq.) In *Moore*, plaintiffs had claimed in the underlying wrongful death action that decedent had contracted hepatitis as a side effect of a drug, Isoniazid, that defendant health plan had prescribed because of her exposure to tuberculosis. Under contract, the matter was submitted to arbitration. Defendant health plan retained defendant C as a medical expert, who testified on deposition that decedent's death was caused by a form of viral hepatitis and was not drug-induced. He also testified that he was unaware of any medical literature attributing hepatitis to the use of Isoniazid. However, after the arbitrators had rendered their decision in favor of defendant health plan, plaintiffs discovered that C had contributed information concerning decedent's death, allegedly as an example of Isoniazid-induced death, to an article reviewing a number of hepatitis deaths in California. Claiming that C had intentionally provided false testimony at his deposition, plaintiffs instituted the present action against him on numerous causes of action. Defendant's demurrer on the ground that his testimony was within the litigation privilege was sustained, and the action dismissed. The Court of Appeal reversed, concluding that the statute did not apply to a private, contractual arbitration proceeding. *Held*, judgment of the Court of Appeal reversed.

(a) *Policies favoring application of privilege.* Numerous policy considerations favor applying the litigation privilege in this setting:

(1) Because a private, contractual arbitration proceeding is designed to serve a function analogous to--and typically to eliminate the need to resort to--the court system, the need for an absolute privilege to foster complete and truthful testimony is as vital in the private contractual arbitration setting as it is in a court proceeding. (7 C.4th 643.)

(2) The risk that a witness' fear of potential liability either will deter him or her from testifying voluntarily at all, or as candidly and completely as desirable, is as great in the arbitration setting as in a court proceeding. (7 C.4th 643.)

(3) Because a witness may be compelled to testify in an arbitration proceeding as well as in a court proceeding, the unfairness of subjecting the witness to a potentially burdensome tort action on the basis of testimony he or she legally is obligated to provide is as significant a problem in the arbitration setting as in a court proceeding. (7 C.4th 644.)

(4) The fundamental objective of the litigation privilege in protecting the integrity and finality of dispute resolution from "an unending roundelay of litigation" applies with special force in the arbitration context. Because the importance of ensuring the finality of the arbitrator's decision is often a principal impetus for the parties' choice of an arbitral forum over a judicial one, the arbitrator's decision should be the end, not the beginning, of the dispute. And because a party's right to appeal an arbitration award is extremely limited, there is an especially strong risk that a losing party will seek to circumvent such limitations by filing a subsequent tort action against one or more of the participants in the arbitration proceeding on the basis of statements made in that proceeding. (7 C.4th 644.)

(b) *Statute's language does not preclude its application.*

(1) Plaintiffs argued that the phrase "judicial proceeding," as used in C.C. 47(b), does not encompass private contractual arbitration proceedings and that it is, therefore, the job of the Legislature, not the courts, to amend the statute to include such proceedings. This argument is refuted by both the governing precedent and the history of the privilege. (7 C.4th 644.)

(2) As is clear in this court's summary of the essential components of the litigation privilege in *Silberg v. Anderson* (1990) 50 C.3d 205, 266 C.R. 638, 786 P.2d 365, supra, §570, the reference to "any judicial proceeding" has been interpreted to include "quasi-judicial" proceedings, such as private arbitration proceedings, that are functionally equivalent to court proceedings. And although *Silberg's* reference to "quasi-judicial proceedings" is dictum, *Ribas v. Clark, supra*, contains the following statement that is an essential element of the holding in that case: "Plaintiff concedes, as he must, that an arbitration hearing falls within the scope of this privilege because of its analogy to a judicial proceeding." (7 C.4th 645.)

(3) The *Ribas* decision did not disclose whether the arbitration in question was contractual or judicial in nature. However, its reasoning indicates that the statutory judicial proceedings privilege applies to *any* arbitration hearing that is functionally equivalent to a court proceeding, because of the analogy of such a hearing to a judicial proceeding. And the understanding that the *Ribas* decision is not limited to judicial arbitration proceedings is confirmed by subsequent Court of Appeal decisions, and by the fact that the Legislature has amended C.C. 47 several times since the *Ribas* case was decided without ever indicating disagreement or disapproval of its holding. (7 C.4th 648.)

(4) Even if viewed as a matter of first impression, the conclusion that the litigation privilege of C.C. 47(b) applies to statements made in contractual arbitration proceedings is correct, because the history of the statute supports such an application. The various privileges embodied in C.C. 47 are derived from the common law. And at common law, as revealed in *Rest.2d, Torts* §§585 and 588, the absolute privileges accorded both witnesses and officers performing a judicial function were parallel privileges, i.e., the scope of the term "judicial proceeding," to which the witness privilege applies, was understood to include proceedings in which an officer exercises judicial functions. Hence, because it has long been recognized that, in private arbitration proceedings an arbitrator enjoys the benefit of an arbitral privilege because his role is analogous to that of a judge, the conclusion in *Ribas* that a private arbitration proceeding is a "judicial proceeding" for purposes of C.C. 47(b) follows logically from the parallel treatment accorded witnesses and officers who exercise a judicial function under the common law. (7 C.4th 650.)

(c) *Privilege is not limited to formal courtroom proceedings.* Plaintiffs argued that the litigation privilege should not be applied to private arbitration proceedings because such proceedings lack the solemnity and formal trappings of court proceedings, thereby increasing the risk of perjury. However, the litigation privilege has never been confined to

statements made before a judge in the confines of a formal public courtroom. (7 C.4th 653.) Furthermore, plaintiffs' argument is refuted by the language in C.C. 47(b), applying an absolute privilege to "any other official proceeding authorized by law and reviewable" by mandamus; accepting the argument would create the anomalous situation where a witness who testified in a private peer review proceeding would be entirely protected from a subsequent tort action, while a witness who testified in a private arbitration proceeding, which bears a much greater similarity to a traditional court proceeding, would enjoy no such protection. (7 C.4th 654.)

(d) *Consumer protection argument is not tenable.* On behalf of several consumer protection organizations, amicus curiae argued against applying the litigation privilege to contractual arbitration proceedings because arbitration clauses are frequently inserted into consumer contracts on a unilateral basis without voluntarily agreement by consumers. This argument is flawed in two separate respects:

(1) To the extent that the argument rests on the alleged unfairness of requiring a consumer to be bound by an arbitration thrust on the consumer in a contract of adhesion, the appropriate remedy would be a direct challenge to the validity of the arbitration proceeding itself, instead of a novel rule that would subject a witness testifying in such a proceeding to potential tort liability. (7 C.4th 657.)

(2) To the extent that the argument rests on an assumption that withholding the litigation privilege from arbitration proceedings will benefit consumers, it is based on a questionable premise. In an arbitration proceeding, which consumers often favor because of its relatively low costs, the consumer is just as likely to require the assistance of witnesses as his or her adversary. However, "in view of the disparity in resources between an individual consumer and an institutional adversary, it appears reasonable to suspect that, were this court to adopt a rule permitting a witness who testifies at an arbitration proceeding to be subjected to a collateral tort action, an individual consumer probably would be at a relative disadvantage in securing the testimony of witnesses, because such witnesses presumably would recognize that the consumer's institutional adversary has the financial resources to pursue just such a retaliatory action against them. Thus, we believe that consumers are, at the very least, as likely as other participants to benefit from application of the litigation privilege to arbitration proceedings." (7 C.4th 657.) (See 22 *Pepperdine L. Rev.* 1322 [Moore]; 30 *U.S.F. L. Rev.* 861 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

Contractual arbitration:

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §499 et seq.

Judicial arbitration:

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §579 et seq.

(*New*) *Insurance appraisal proceeding:* In *Lambert v. Carneghi* (2008) 158 C.A.4th 1120, 70 C.R.3d 626, an insured homeowner whose house had been destroyed in a fire invoked the appraisal process under the fire insurance policy to resolve a dispute about the replacement cost. After the process was completed, the dissatisfied homeowner brought a negligence action against the disinterested appraiser selected by the insurer. The trial court sustained the appraiser's demurrer and dismissed the action. *Held*, affirmed. The appraisal process, required to be included in fire insurance policies by *Ins.C. 2071*, is an arbitration subject to the law governing arbitrations, even though the appraiser's duties are somewhat different from those of a traditional arbitrator (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §516). (158 C.A.4th 1129.) Like an arbitrator, the disinterested appraiser in this proceeding enjoys judicial immunity. (158 C.A.4th 1133.)



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hh. Grand Jury Proceedings.

5 *Witkin Sum. Cal. Law Torts* § 574

[§ 574] Grand Jury Proceedings.

The litigation privilege extends to statements made in the course of a grand jury proceeding concerning the matter under investigation. (*Irwin v. Murphy* (1933) 129 C.A. 713, 716, 19 P.2d 292; see Rest.2d, §589; 48 A.L.R.2d 716 [proceedings, presentments, investigations, and reports of grand jury as privileged].) However, comments in grand jury reports with respect to persons not indicted are not privileged. (P.C. 930; see *Brooks v. Binderup* (1995) 39 C.A.4th 1287, 1293, 46 C.R.2d 501 [P.C. 930 does not violate constitutional rights of grand jurors].)

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5 *Witkin Sum. Cal. Law Torts* § 575

[§ 575] Petition for Probate.

There is a conflict whether an action lies for testamentary libel against the estate of a testator, but it seems clear that the *executor* in offering the will for probate is protected by absolute privilege. (See 2 Harper, James & Gray 2d §5.15, 5.22; 7 Cal. Western L. Rev. 91; 12 Cal. Western L. Rev. 491; 48 *Harv. L. Rev.* 1028; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §254; 21 *A.L.R.3d* 754 [libel by will].) Thus, in *Steiner v. Eikerling* (1986) 181 *C.A.3d* 639, 642, 226 *C.R.* 694, *supra*, §488, executors who attempted to probate a forged will making themselves beneficiaries were immune, under the litigation privilege, from liability for civil conspiracy.

SUPPLEMENT: [This section is current through the latest supplement]
See 2 Harper, James & Gray 3d §§5.15, 5.22; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §280.



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5 *Witkin Sum. Cal. Law Torts* § 576

[§ 576] Proceedings in Foreign Country.

The litigation privilege may apply to proceedings in foreign countries. Thus, in *Beroiz v. Wahl* (2000) 84 C.A.4th 485, 100 C.R.2d 905, the privilege was applied to complaints of dispossession filed in a Mexican condominium dispute. This position finds support in the policies underlying C.C. 47 privileges. "Although foreign judicial systems differ from California's judicial system, applying the privileges to proceedings and communications in foreign countries tends to promote these policies." (84 C.A.4th 494.)

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kk. Attorney Communications.

5 Witkin Sum. Cal. Law Torts § 577

[§ 577] Attorney Communications.

The litigation privilege has been examined in several contexts involving communications by or among attorneys:

(1) *Asserting Claim and Urging Settlement.* In *Lerette v. Dean Witter Organization* (1976) 60 C.A.3d 573, 131 C.R. 592, defendant assistant general counsel of defendant corporation sent a letter to the chairman of the board of a bank of which plaintiff was president. The letter accused plaintiff of fraudulent misrepresentations inducing defendant corporation to extend credit to a debtor who defaulted, and indicated that unless a settlement could be reached, defendant corporation planned to sue. *Held*, the letter was absolutely privileged. The litigation privilege extends to communications preliminary to a proposed judicial proceeding. (60 C.A.3d 577, citing the text; see *supra*, §571.) The privilege protects an attorney employed with reference to an impending judicial proceeding or the controversy underlying it, even though he or she does not become trial counsel in the action ultimately filed. (60 C.A.3d 578.) And if satisfaction of a claim can be obtained without a lawsuit, it is incumbent on an ethical attorney to pursue this course of action. "It is equally well established legal practice to communicate promptly with a potential adversary, setting out the claims made upon him, urging settlement, and warning of the alternative of judicial action." (60 C.A.3d 577.) (See *Larmour v. Campanale* (1979) 96 C.A.3d 566, 158 C.R. 143 [attorney's demand letter stating that he had advised his clients of their right to sue for specific performance and "possibly for punitive damages based upon fraud," with copy sent to escrow company handling sale]; *Izzi v. Rellas* (1980) 104 C.A.3d 254, 261, 264, 163 C.R. 689 [defendant attorney's response to plaintiff attorney's letter offering to set aside default against defendant's client; *Lerette* followed]; *Blanchard v. DIRECTV* (2004) 123 C.A.4th 903, 918, 20 C.R.3d 385 [prelitigation demand letter that plaintiff stop pirating television programming; following *Lerette*]; 36 A.L.R.3d 1328 [communications between attorneys as privileged].)

(2) *Defaming Own Client.* In *O'Neil v. Cunningham* (1981) 118 C.A.3d 466, 173 C.R. 422, the complaint alleged that plaintiff anesthesiologist and others were sued for malpractice; defendant P was insurer for the county hospital, and defendant C was its retained attorney; defendant C, in an effort to settle the case and minimize P's losses, wrote a letter to P stating that plaintiff had a severe sight problem affecting his performance of the surgery that gave rise to the suit; and this letter was sent to the county hospital, and eventually resulted in termination of plaintiff's contract. Plaintiff's

theory was that although C's letter had the necessary connection with the underlying lawsuit and would normally be privileged, the privilege does not apply unless the publication is made "to promote the interest of justice," and that C had sought to protect P's interests by defaming plaintiff, in violation of his fiduciary obligation as an attorney. *Held*, judgment for defendants on demurrer affirmed.

(a) The asserted "interest of justice" limitation on the privilege was based on a statement in *Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 C.A.3d 818, 106 C.R. 718, but the phrase of uncertain meaning cannot justify an exception to the clear statutory language. (118 C.A.3d 475.) Thus, forgery and perjury have been protected as privileged publications. (118 C.A.3d 475, citing *Pettitt v. Levy* (1972) 28 C.A.3d 484, 104 C.R. 650, *supra*, §186, and *Kachig v. Boothe* (1971) 22 C.A.3d 626, 99 C.R. 393, *supra*, §21; on abrogation of "interest of justice" limitation, see *supra*, §570.)

(b) The analysis in *Kinnamon v. Staitman & Snyder* (1977) 66 C.A.3d 893, 136 C.R. 321, *supra*, §458, is erroneous. "If filing a forged building permit or giving perjured testimony are each privileged publications, it is difficult to rationalize why a publication that otherwise would be privileged is not privileged because the attorney uttering the publication violated a Rule of Professional Conduct." (118 C.A.3d 476.)

(3) *Fraudulent Representation to Judgment Debtor*. In *Carney v. Rotkin, Schmerin & McIntyre* (1988) 206 C.A.3d 1513, 254 C.R. 478, the complaint alleged the following: Plaintiff, a 74-year-old widow, owed \$ 2,720.80 on a money judgment obtained by defendant creditor. The creditor retained defendant law firm to collect, and the firm served plaintiff with a court order to appear at a judgment-debtor examination on Friday. Plaintiff was unable to obtain transportation, and called defendant law firm on Monday to explain her absence from the hearing. Defendant firm's secretary told her that a bench warrant had been issued and would remain in effect until plaintiff paid \$ 1,000 on the debt; and an attorney of the firm sent plaintiff a letter confirming this statement. Plaintiff had no funds to comply with the demand, and stayed at her apartment for the balance of the week awaiting arrest, and suffering emotional distress at the prospect of incarceration. She later discovered that the statement was false; there was no bench warrant and neither defendant creditor nor any member of defendant law firm had appeared at the hearing. The trial judge gave judgment on demurrer, applying the litigation privilege. *Held*, reversed.

(a) The absolute privilege, originally limited to defamation proceedings, now applies to virtually all other causes of action except malicious prosecution. (206 C.A.3d 1520.) But to come within the privilege, the communication must be made to achieve the purpose of the litigation. (206 C.A.3d 1521.) The purpose of the hearing was to have the court determine whether the debtor had any assets to satisfy the judgment, and "it cannot be said that it was to 'serve the purpose of litigation' that defendant attorney falsely told plaintiff that the court had issued a bench warrant as a result of her failure to appear." (206 C.A.3d 1522.)

(b) *O'Neil v. Cunningham*, *supra*, is distinguishable. There the statements were made to settle a malpractice suit; here no attempt to settle was made, for the attorneys specifically set forth the entire amount still owed. (206 C.A.3d 1522.)

(4) *Fraudulent Representation to Judgment Creditor*. In *Shafer v. Berger, Kahn, Shafon, Moss, Figler, Simon & Gladstone* (2003) 107 C.A.4th 54, 131 C.R.2d 777, 1 Cal. Proc. (4th), *Attorneys*, Supp., §328, plaintiffs obtained an arbitration judgment against an insured and then filed an action against the insurer and its attorney, based on false statements about coverage made by the attorney. The attorney argued that the action was barred by the litigation privilege. *Held*, the litigation privilege was not applicable. Because the misrepresentation was made to a party standing in the shoes of the insured (the judgment creditor), application of the litigation privilege would be inconsistent with *Ins.C. 11580*, a more specific statute, which makes the judgment creditor of an insured a third-party beneficiary of the insurance contract. (107 C.A.4th 77.)

(5) *Solicitation of Litigation*. In *Rubin v. Green* (1993) 4 C.4th 1187, 17 C.R.2d 828, 847 P.2d 1044, the court granted review "to consider whether a defendant in an impending civil action may sue the attorneys for the opposing party on the ground that they wrongfully 'solicited' the litigation against them," concluding that such a proceeding

"undermines the established policy of allowing access to the courts" and that "given the availability of other remedies for the redress of attorney solicitation, this retaliatory suit is not maintainable." (4 C.4th 1190.) Green was a resident of Cedar Village Mobilehome Park, which was coowned by plaintiff. Green sent a notice of intention to sue plaintiff on behalf of the 450 residents of the park, enumerating alleged defects in the operation of the park, and seeking a variety of remedies. Plaintiff then filed an action against Green and the law firm for which she acted as agent, on the theory that these defendants had solicited mobilehome park residents as clients in anticipated litigation against plaintiff over park conditions, thereby interfering in plaintiff's contractual relations with them. The trial court sustained a general demurrer to the complaint on the ground that defendants' conduct was protected by the litigation privilege. The Court of Appeal reversed, holding that the privilege did not apply to the act of defendants. The Supreme Court reversed the judgment of the Court of Appeal.

(a) *Defendants' acts are within scope of privilege.*

(1) For well over a century, communications with "some relation" to judicial proceedings have been absolutely immune from tort liability by the privilege codified in C.C. 47(b). California courts have given the privilege an expansive reach; the principal exception to its application has been for malicious prosecution actions. (4 C.4th 1193.) And most recent cases have emphasized the policy of assuring litigants of virtually unhindered access to the courts. (4 C.4th 1194, and footnote 3, listing many decisions.)

(2) Numerous decisions have applied the privilege to prelitigation communications with "some relation" to an anticipated lawsuit, and these decisions are controlling here. "[W]e can imagine few communicated acts more clearly within the scope of the privilege than those alleged in the amended complaint, that is, meeting and discussing with Cedar Village residents park conditions and the merits of the proposed failure-to-maintain lawsuit, and filing the complaint and subsequent pleadings in the litigation." (4 C.4th 1195.)

(3) The fact that defendants' communications with the mobilehome park residents necessarily involved related acts does not destroy the privilege. While the privilege does not apply to courses of conduct, as opposed to communications, to the extent that the complaint rests on communicative acts the privilege is operative. (4 C.4th 1195.) Here, "[p]laintiff's claims, however styled, are founded essentially upon alleged misrepresentations made by the law firm (and Green) to Cedar Village residents in the course of discussions over park conditions and the possibility of being retained to prosecute the failure-to-maintain action, and the subsequent filing of pleadings in the lawsuit itself. Whether these acts amounted to wrongful attorney solicitation or not, they were communicative in their essential nature and therefore within the privilege of section 47(b)." (4 C.4th 1196.)

(b) *Claim may not be maintained as malicious prosecution action.*

(1) "[T]he gravamen of plaintiff's complaint is not that the claims of the Cedar Village litigants are themselves groundless, but that the methods employed by the law firm (through the use of Green) in being retained as counsel for the residents amounted to solicitation, conduct the Legislature has made criminal. Because the alleged wrong which plaintiff seeks to redress is not the filing of an unjustified lawsuit but of *soliciting* others to file what are, to all appearances, potentially *meritorious* claims, the question is not whether the solicitation claim should be subject to conditions analogous to those governing malicious prosecution actions, but whether such a derivative claim should be maintainable at all. A consideration of the administrative and criminal sanctions established by the Legislature for attorney solicitation, together with the remedies available to plaintiff within the scope of the failure-to-maintain suit itself, lead us to conclude that this action should be dismissed." (4 C.4th 1196.)

(2) "It is not difficult to imagine the consequences likely to follow in the wake of a rule permitting the defendant in a civil action to institute parallel litigation seeking to impose liability on the attorney for the adverse party based on the circumstances surrounding the formation of the attorney-client relationship that led to the filing of the original suit. Apart from provoking yet another round of litigation, all of the evils identified in our prior cases as accompanying retaliatory suits based on litigation-related communications would be promoted by such a tactic. The impairment of

colorable claims by disrupting access to counsel, the intimidating effect on attorneys of facing an almost certain retaliatory proceeding, the distractions inherent in requiring counsel to deal with defending a personal countersuit as well as the predicate action and, in general, the dampening effect on the unobstructed presentation of claims which we have identified as the central value supporting limitations on other derivative tort actions, apply with equal force to this suit." (4 C.4th 1197.)

(3) The regulatory and prosecutorial sanctions available to remedy attorney solicitation, together with those available to litigants within the scope of the predicate action itself, are sufficient. For plaintiff in this case, potential remedies include the recovery of attorneys' fees and costs should he be the prevailing party in the failure-to-maintain litigation, and reasonable expenses including attorneys' fees if the residents are determined to have employed frivolous or delaying tactics in their suit. (4 C.4th 1199.) (See *Stacy & Witbeck v. San Francisco* (1995) 36 C.A.4th 1074, 1090, 44 C.R.2d 472 [Rubin rule is that litigation privilege bars injunctive relief if based on same communicative act respecting which privilege would bar tort action; privilege applies only to litigation, not to administrative procedures pursued for nonlitigation purposes]; *Dove Audio v. Rosenfeld, Meyer & Susman* (1996) 47 C.A.4th 777, 781, 54 C.R.2d 830 [following *Rubin*]; *LiMandri v. Judkins* (1997) 52 C.A.4th 326, 347, 60 C.R.2d 539 [distinguishing *Rubin* where communication was unrelated to any anticipated litigation]; 21 *Pepperdine L. Rev.* 681 [Rubin].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Fraudulent Representation to Judgment Creditor.*

Shafer case:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §304.



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5 *Witkin Sum. Cal. Law Torts* § 578

[§ 578] (ll) Statements to Media.

In *Susan A. v. Sonoma* (1991) 2 C.A.4th 88, 3 C.R.2d 27, defendant psychologist complied with a public defender's request to interview a 14-year-old minor who had been arrested on suspicion of attempted murder. On the request of a reporter, and with the permission of the chief deputy public defender, defendant spoke to the reporter about his impressions of the minor, and the conversation was subsequently published. The minor and his parents filed an action against the psychologist and the county, and the trial judge entered summary judgment for defendants on grounds of the litigation privilege. *Held*, reversed; the communications were not made in a judicial or quasi-judicial proceeding.

(a) The privilege may be available even though a publication is made outside the courtroom and involves no function of the court or its officers. But a republication to nonparticipants in the action, such as persons in no way connected with the proceeding, is generally not privileged; and here the press was not sufficiently connected with the proceeding. (2 C.A.4th 93.)

(b) The scope of C.C. 47(b) has been judicially expanded to include publication to nonparties with a substantial interest in the proceeding. (2 C.A.4th 94, citing *Costa v. Superior Court* (1984) 157 C.A.3d 673, 204 C.R. 1, *supra*, §569.) But to apply the statute to publication to the general public through the press would swallow up the general rule that the privilege is not available to nonparticipants in the action. (2 C.A.4th 94.)

(c) Defendant psychologist's contention that C.C. 47(b) applies because he spoke to the press to obtain a litigation advantage for plaintiff minor is untenable. Accepting this claim would open the door to the universally condemned trial by press, and would be contrary to the rule that application of C.C. 47(b) does not depend on the speaker's motives, morals, or intent. (2 C.A.4th 95.)

In *Shahvar v. Superior Court* (1994) 25 C.A.4th 653, 657, 30 C.R.2d 597, transmission of a facsimile copy of a complaint to a newspaper, which published an article based on false allegations in it, was held not privileged, citing *Susan A. v. Sonoma*. However, C.C. 47(d) was subsequently amended to provide that a communication to a public journal of a judicial or other public official proceeding, of anything said in the course of the proceeding, or of a verified

charge or complaint to a public official on which a warrant has been issued is privileged, except as provided. (See *infra*, §588.) The intent of the amendment was to abrogate *Shahvar v. Superior Court*. (Stats. 1996, Chap. 1055, §1.)

Statements made to a reporter for the purpose of rehearsing before testifying at a preliminary hearing were held privileged in *Spitler v. Children's Institute Int.* (1992) 11 C.A.4th 432, 14 C.R.2d 197. These statements met all the requirements for application of the litigation privilege. (11 C.A.4th 438.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

- C. Defamation.
 - 4. Defenses.
 - b. Absolute Privilege.
 - 4. Legislative Proceedings.

5 Witkin Sum. Cal. Law Torts § 579

[§ 579] Legislative Proceedings.

(1) *Congress*. Under the federal Constitution, senators and representatives "shall not be questioned in any other place" for "any Speech or Debate in either house." (U.S. Const., Art. I, §6; see *Rest.2d, Torts* §590; on Speech and Debate Clause, see 7 *Summary* (10th), *Constitutional Law*, §150.)

(2) *State and Local Legislative Bodies*. Statements by participants in legislative proceedings are absolutely privileged under C.C. 47(b), except as provided. (On communications excluded from the privileges set forth in C.C. 47(b), see *supra*, §563.)

The privilege extends to publications made during the course of proceedings before either state or local bodies. (See *Harnish v. Smith* (1956) 138 C.A.2d 307, 310, 291 P.2d 532 [member of city council]; *Scott v. McDonnell Douglas Corp.* (1974) 37 C.A.3d 277, 285, 112 C.R. 609 [same]; *Rest.2d, Torts* §590; 2 Harper, James & Gray 2d §5.23; Dobbs, *The Law of Torts* §412; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §§294, 295; 41 *A.L.R.4th* 1116 [statements made outside of formal proceedings].)

The privilege extends to legal steps taken prior to the proceeding that have some logical connection with it. (1-800 *Contacts v. Steinberg* (2003) 107 C.A.4th 568, 587, 132 C.R.2d 789.) Thus, in *Cayley v. Nunn* (1987) 190 C.A.3d 300, 235 C.R. 385, N and C, property owners, were engaged in a dispute over a height variance sought by N. Plaintiff C alleged that N, in preparation for an appeal to the city council, circulated a petition for neighborhood support for his height variance, and in doing so, made slanderous remarks about C. *Held*, the communications were privileged. (190 C.A.3d 303.)

Any communication to a public journal of a legislative or other public official proceeding or of anything said in the course of the proceeding is privileged, except as provided. (C.C. 47(d), *infra*, §588.)

(3) *Legislative Committees*. The statements of a witness before a legislative investigating committee are also absolutely privileged, on the same theory as those of a witness in a judicial proceeding, namely, he or she must reply to proper questions and is therefore entitled to protection. (*Kelly v. Daro* (1941) 47 C.A.2d 418, 423, 118 P.2d 37; see 15

So. Cal. L. Rev. 276; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §296.)

(4) *No Relevancy Requirement.* Dictum in *Scott v. McDonnell Douglas Corp.*, *supra*, suggests that the relevancy doctrine (see *supra*, §569 and *infra*, §583) is inapplicable to proceedings before a legislative body. The court first declared that the publication in question was adequately related to the matter before the city council, but then made the following statement: "Moreover, we recognize that the immunity historically afforded to legislators does not impose a restriction that the statements made by a member of a legislative body are protected only if they are directed toward achieving the object of legislation. Rather, the rule appears well settled that the general immunity afforded legislators extends to all that is spoken or done in the course of legislative proceedings." (37 *C.A.3d* 288.) The Restatement is in accord. (See *Rest.2d, Torts* §590.)

West's Key Number Digest, Libel and Slander k.37

SUPPLEMENT: [This section is current through the latest supplement]

(2) *State and Local Legislative Bodies.* See 2 Harper, James & Gray 3d §5.23; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §§276, 277.

(3) *Legislative Committees.* See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §278.



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4. Defenses.

b. Absolute Privilege.

5. Other Official Proceedings.

aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 580

[§ 580] In General.

Communications made "in any other official proceeding authorized by law" are absolutely privileged, except as provided. (C.C. 47(b); see *Rest.2d, Torts* §591; Dobbs, *The Law of Torts* §412; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §303; 40 *A.L.R.2d* 941 [statements or utterances by member of municipal council, or of governing body of other political subdivision, in course of official proceedings, as privileged]; 45 *A.L.R.2d* 1296 [privilege applicable to judicial proceedings as extending to administrative proceedings]; 85 *A.L.R.3d* 1137 [privileged nature of statements or utterances by member of school board in course of official proceedings]; 33 *A.L.R.4th* 632 [privileged nature of statements or utterances by members of governing body of public institution of higher learning in course of official proceedings].)

Specified communications are excluded from the privileges set forth in C.C. 47(b). (See *supra*, §563.)

West's Key Number Digest, *Libel and Slander* k.36

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §§283, 284.



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bb. Scope of Privilege.

5 *Witkin Sum. Cal. Law Torts* § 581

[§ 581] Scope of Privilege.

(1) *In General.* The official proceedings privilege covers proceedings of administrative boards and quasi-judicial and quasi-legislative bodies. (See *Whelan v. Welford* (1958) 164 C.A.2d 689, 693, 331 P.2d 86 [property owners' written protest before city planning commission against plaintiff's application for use variance]; *Ascherman v. Natanson* (1972) 23 C.A.3d 861, 865, 100 C.R. 656 [statements by defendant doctor to attorney for hospital obtained for hearing by hospital district on plaintiff's application for staff privileges]; *Pettitt v. Levy* (1972) 28 C.A.3d 484, 488, 104 C.R. 650, supra, §186 [submission to city of forged building permit, omitting address contained in original, in order to deny plaintiffs nonconforming use]; *Martin v. Kearney* (1975) 51 C.A.3d 309, 311, 124 C.R. 281 [letters of parents of school pupils to principal, pursuant to school board rules, asserting misconduct of teacher]; *Royer v. Steinberg* (1979) 90 C.A.3d 490, 503, 153 C.R. 499, citing the text [school board proceedings]; *Lebbos v. State Bar* (1985) 165 C.A.3d 656, 667, 211 C.R. 847 [bar association forwarded complaints by clients of plaintiff attorney to State Bar, which conducted investigation]; *O'Shea v. General Tel. Co.* (1987) 193 C.A.3d 1040, 1048, 238 C.R. 715 [statements by employer about former employee made during California Highway Patrol employment background investigation]; *Rosenthal v. Vogt* (1991) 229 C.A.3d 69, 280 C.R. 1 [State Bar proceedings]; *Ellenberger v. Espinosa* (1994) 30 C.A.4th 943, 952, 36 C.R.2d 360 [statements at disciplinary hearing of Board of Dental Examiners as to dentist's misconduct were privileged under C.C. 47(b) and C.C. 43.8 (immunity as to communication in aid of evaluation of healing arts practitioner); see supra, §155]; *Picton v. Anderson Union High School Dist.* (1996) 50 C.A.4th 726, 736, 57 C.R.2d 829 [statements made before school district credentialing commission]; *Cruey v. Gannett Co.* (1998) 64 C.A.4th 356, 368, 76 C.R.2d 670 [statement to Equal Employment Opportunity Commission was absolutely privileged even if maliciously made]; *Braun v. Bureau of State Audits* (1998) 67 C.A.4th 1382, 1388, 79 C.R.2d 791 [investigative audit under Govt.C. 8547 et seq. is "official proceeding authorized by law," and all statements made in furtherance of audit are absolutely privileged]; *Joel v. Valley Surgical Center* (1998) 68 C.A.4th 360, 372, 80 C.R.2d 247 [hospital report involving suspended physician that was sent to National Practitioner Data Bank, as required by law, was privileged even if plaintiff physician was able to prove that report was improperly motivated]; *Rodas v. Spiegel* (2001) 87 C.A.4th 513, 517, 104 C.R.2d 439 [expert's testimony at hearing before Contractors' State License Board]; *Shaddox v. Bertani* (2003) 110 C.A.4th 1406, 1415, 2 C.R.3d 808 [dentist, fearing that police officer was addicted to prescription drugs, reported alleged addiction to

officer's superiors; communication was part of official proceeding and was privileged under C.C. 47(b), even though officer was off duty when visiting dentist[.]

Bardin v. Lockheed Aeronautical Systems Co. (1999) 70 C.A.4th 494, 82 C.R.2d 726, presented the question whether statements made by the former employer of an applicant for a position with the police department during the required background investigation are absolutely privileged under the "other official proceedings" provision of C.C. 47(b) or are subject to the conditional privilege of *Govt.C. 1031.1* (employer immune if he or she acted without malice or fraud). Here, defendant, plaintiff's former employer, stated that she had had a drinking problem. Plaintiff claimed that this statement was false, that it was made without a good faith belief that it was true, and that it was made in retaliation for complaining about wrongful conduct. Claiming that the statement was absolutely privileged, defendant obtained summary judgment. *Held*, affirmed.

(a) Under *Govt.C. 1031(d)*, police department applicants must be of good moral character, as determined by a background investigation. *O'Shea v. General Tel. Co.* (1987) 193 C.A.3d 1040, 238 C.R. 715, held that, under C.C. 47(b), statements made by a former employer during the authorized background check are absolutely privileged. However, after the date of the *O'Shea* case, *Govt.C. 1031.1* was adopted, dealing specifically with the requirement that former employers supply police departments with background information on former employees seeking employment. *Govt.C. 1031.1(b)* grants a conditional privilege to employers for statements made without fraud or malice, but also provides that it was not intended to abrogate or lessen the employers' existing common law or statutory immunities. (70 C.A.4th 499.)

(b) Plaintiff argues that the specific statute, *Govt.C. 1031.1*, applied over the general, C.C. 47. However, this approach applies only if the statutes in question cannot be reconciled, and the statutes here can. According to the plain language of *Govt.C. 1031.1*, if an employer enjoyed a privilege to provide background information (even in bad faith) prior to the enactment of that statute, *Govt.C. 1031.1(b)* means that the employer retains this privilege afterwards. (70 C.A.4th 502.)

(2) *Communications Made Before Institution of Formal Proceedings.* The privilege extends to communications to or from officials or agencies that precede institution of formal proceedings. (See *King v. Borges* (1972) 28 C.A.3d 27, 32, 104 C.R. 414 [letter of attorney for buyer to Division of Real Estate accusing broker of wrongfully withholding funds]; *Brody v. Montalbano* (1978) 87 C.A.3d 725, 732, 151 C.R. 206 [communications by parents to city board of education asserting misconduct of junior high school vice principal in handling problem of student discipline]; *Dorn v. Mendelzon* (1987) 196 C.A.3d 933, 942, 242 C.R. 259 [hospital administrator's letter to Board of Medical Quality Assurance concerning restrictions on doctor's privileges]; *Passman v. Torkan* (1995) 34 C.A.4th 607, 616, 40 C.R.2d 291, citing the text [letter by party in civil action to district attorney urging that opposing party be prosecuted and characterizing opposing party's attorneys as "crooked"]; *Kashian v. Harriman* (2002) 98 C.A.4th 892, 926, 120 C.R.2d 576 [attorney's delivery of letter to Attorney General requesting investigation of plaintiff's business activities].)

An official investigative and enforcement branch of the Internal Revenue Service, with authority to investigate tax liability, summon witnesses, subpoena records, take testimony, serve process, and perform arrests and seizures is a quasi-judicial body regularly engaged in an "official proceeding authorized by law" for purposes of C.C. 47(b). Hence, an informer's communication that a businessman is guilty of tax fraud, designed to prompt regulatory enforcement action, is a part of an official proceeding. (*Tiedemann v. Superior Court* (1978) 83 C.A.3d 918, 926, 148 C.R. 242.)

(3) *Where Privilege Rejected.* The official proceedings privilege does not apply unless the statement has, in fact, been made in an official proceeding. (See *Hale Co. v. Lea* (1923) 191 C. 202, 205, 215 P. 900 [defamatory letter by California agricultural official to agriculture department of another state was not in proper discharge of official duty nor in official proceeding]; *Gunsul v. Ray* (1935) 6 C.A.2d 528, 530, 45 P.2d 248 [statement in notice given to electors in recall proceeding was not made in official proceeding]; *McMann v. Wadler* (1961) 189 C.A.2d 124, 128, 11 C.R. 37 [meeting of board of directors of nonprofit corporation]; *Katz v. Rosen* (1975) 48 C.A.3d 1032, 1037, 121 C.R. 853, *infra*, §594 [local bar association has no power to impose sanctions against unethical conduct, and complaint made to

that body is protected only by qualified privilege of C.C. 47(c) (infra, §591) for communications between interested parties]; *Eisenberg v. Alameda Newspapers* (1999) 74 C.A.4th 1359, 1377, 88 C.R.2d 802 [in defamation action based on defendant newspaper's retraction of plaintiff's earlier article, fact that retraction was in response to C.C. 48a demand letter (see infra, §630 et seq.) did not make it part of "other official proceeding"]; on extension of absolute privilege to private proceedings reviewable by mandamus, see infra, §584.)

Generally, the privilege does not extend to communications between private parties who are not acting in an official capacity. (*Slaughter v. Friedman* (1982) 32 C.3d 149, 156, 185 C.R. 244, 649 P.2d 886, supra, §564.) However, the rule is different where the communications are preparatory to official proceedings. (*Rubin v. Green* (1993) 4 C.4th 1187, 1194, 17 C.R.2d 828, 847 P.2d 1044, supra, §577.)

The privilege does not arise merely because a proceeding is subject to regulation. In *Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 C.A.3d 985, 225 C.R. 852, infra, §595, the court refused to apply the official proceeding privilege to an investigation by the supervisory committee of a federally regulated credit union. The official proceeding privilege applies only to governmental proceedings or quasi-judicial proceedings otherwise reviewable by mandamus. (180 C.A.3d 994, citing *Slaughter v. Friedman* (1982) 32 C.3d 149, 185 C.R. 244, 649 P.2d 886, supra, §564, and *Wallin v. Vienna Sausage Mfg. Co.* (1984) 156 C.A.3d 1051, 203 C.R. 375, infra, §584.) The federal credit unions are highly regulated by the federal statute; but none of the statutorily created duties makes the investigation or report of the supervisory committee an "official proceeding." (180 C.A.3d 995.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Garamendi v. Golden Eagle Ins. Co.* (2005) 128 C.A.4th 452, 477, 27 C.R.3d 239 [allegedly defamatory letter written to Insurance Commissioner's office by outside counsel for insurer in liquidation satisfied requirements of official proceeding privilege; communication was made in course of proceeding authorized by law by participant with some connection or logical relation to proceeding]. (2) *Communications Made Before Institution of Formal Proceedings.* See *Garamendi v. Golden Eagle Ins. Co.*, supra, 128 C.A.4th 478 [official proceeding privilege extends to investigatory activities by public agencies; privilege is not restricted to statements made once proceeding has been commenced, but may apply to statements made in advance]; *Fontani v. Wells Fargo Inv., LLC* (2005) 129 C.A.4th 719, 728, 734, 28 C.R.3d 833 [official form required to be filed by employer of securities dealer with National Association of Securities Dealers, describing reasons for dealer's termination, was within official proceeding privilege; form could be precursor to investigation leading to later proceeding]; *Brown v. Department of Corrections* (2005) 132 C.A.4th 520, 527, 33 C.R.3d 754 [correctional officer's whistleblower action against Office of Inspector General, employer prison, and officer's supervisors, based on retaliation after he reported misconduct by supervisors, was barred by official proceedings privilege where his reports allegedly contained threats of criminal violence against supervisors, which prompted official investigation into suspected criminal wrongdoing by officer]; *Lee v. Fick* (2005) 135 C.A.4th 89, 96, 37 C.R.3d 375 [complaints to school authorities about coach, which were intended to prompt official action, were privileged; communications to official agency intended to induce action are part of "official proceeding" and protected under C.C. 47(b)].



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cc. Report to Police.

5 Witkin Sum. Cal. Law Torts § 582

[§ 582] Report to Police.

(1) *Communications Concerning Officer Misconduct*. In *Imig v. Ferrar* (1977) 70 C.A.3d 48, 138 C.R. 540, a communication to the Los Angeles Police Department concerning misconduct of one of its officers was held to be within the official proceedings privilege.

C.C. 47.5, added in 1982, nullified the *Imig* holding. Under that statute, a peace officer may bring an action for defamation against a person who has filed a complaint with the officer's employing agency alleging misconduct, criminal conduct or incompetence where (a) the complaint was false, (b) the complainant knew it was false, and (c) it was made with spite, hatred, or ill will, and the officer may prove knowledge that the complaint was false by showing that the complainant "had no reasonable grounds to believe the statement was true and that the complainant exhibited a reckless disregard for ascertaining the truth." (See 14 *Pacific L. J.* 747.)

However, *Walker v. Kiousis* (2001) 93 C.A.4th 1432, 1439, 114 C.R.2d 69, held C.C. 47.5 unconstitutional. Treating complaints against police officers differently from complaints against all other government officers was deemed an impermissible content-based restriction on speech that is not supported by a compelling governmental interest. (93 C.A.4th 1446.) (See *People v. Stanistreet* (2002) 29 C.4th 497, 512, 127 C.R.2d 633, 58 P.3d 465, 2 Cal. Crim. Law (3d), *Crimes Against Governmental Authority*, Supp., §28 [stating that court would "express no opinion" on validity of C.C. 47.5, because issue was not before it].)

Loshonkohl v. Kinder (2003) 109 C.A.4th 510, 135 C.R.2d 114, disagreed with *Walker* and held C.C. 47.5 constitutional for the following reasons:

(a) *Walker* ruled that C.C. 47.5 was unconstitutional on the ground that it was improper content-based discrimination. However, the discrimination is not improper; the potential for defamation under this statute creates no realistic possibility of the official suppression of ideas. C.C. 47.5 makes actionable only formal complaints against police officers based on *knowingly false* statements of fact and speech that is constitutionally unprotected, and the scienter requirement protects an individual who honestly misperceives the facts. In addition, the statute exceeds

constitutional requirements by requiring that the statement be made with actual malice. (109 C.A.4th 517, applying reasoning of *People v. Stanistreet* (2002) 29 C.4th 497, 127 C.R.2d 633, 58 P.3d 465, 7 Summary (10th), *Constitutional Law*, §411, upholding P.C. 148.6 [misdemeanor to make false allegations of misconduct against a police officer].)

(b) C.C. 47.5 does give peace officers a right to sue for defamation that is not afforded to other public officials. However, where, as here, there is no possibility of the official suppression of ideas, underinclusiveness of a statute restricting totally proscribable speech need not be justified by reference to a neutral basis. (109 C.A.4th 517, citing *R.A.V. v. St. Paul, Minnesota* (1992) 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305, 7 Summary (10th), *Constitutional Law*, §459.)

(c) While citizen complainants have not received the reciprocal right to sue peace officers for defamation arising from an official investigation, this lack of reciprocity does not render the statute unconstitutional, because there is no indication that peace officer defamation of citizen complainants poses a problem. The First Amendment does not require states to regulate problems that do not exist. Moreover, C.C. 47.5 does not absolve peace officers from liability that does not fall under the C.C. 47 privilege. (109 C.A.4th 518.)

(2) *Reports of Criminal Misconduct.* *Williams v. Taylor* (1982) 129 C.A.3d 745, 753, 181 C.R. 423, held a report to a police department concerning suspected criminal activity to be within the absolute privilege accorded official proceedings. *Williams* was disapproved in *Fenelon v. Superior Court* (1990) 223 C.A.3d 1476, 1479, 273 C.R. 367, holding that such a report was protected only by the qualified privilege given communications made without malice to interested persons (see *infra*, §591 et seq.). A number of subsequent Court of Appeal decisions followed *Williams*, rather than *Fenelon*. (See *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 C.A.4th 1498, 1502, 28 C.R.2d 722 [motel owner's report to police that woman with gun was seen in plaintiff's room was absolutely privileged]; *Passman v. Torkan* (1995) 34 C.A.4th 607, 616, 40 C.R.2d 291 [communications designed to prompt criminal prosecution directed to official governmental agency empowered to commence criminal prosecutions are absolutely privileged]; *Fremont Comp. Ins. Co. v. Superior Court* (1996) 44 C.A.4th 867, 875, 52 C.R.2d 211 [defendant insurers were absolutely privileged to report plaintiff's overbilling to Insurance Department and local district attorney's office; *Fenelon* not followed].) (See *Beroiz v. Wahl* (2000) 84 C.A.4th 485, 495, 100 C.R.2d 905 [although "California courts have split about whether communications that initiate or prompt criminal investigation are subject to the absolute privilege," a "majority of cases that have addressed this issue follow *Williams*"].) *Williams* was followed, for example, in *Devis v. Bank of America* (1998) 65 C.A.4th 1002, 1008, 77 C.R.2d 238, which also extended the official reports privilege to investigations leading to police reports.

In *Hagberg v. California Federal Bank FSB* (2004) 32 C.4th 350, 7 C.R.3d 803, 81 P.3d 244, the California Supreme Court adopted the *Williams* rule. A customer filed suit against defendant bank for falsely reporting to police that she had attempted to cash an invalid check, alleging a number of tort causes of action. *Held*, summary judgment for defendant affirmed. The report was absolutely privileged.

(a) The question considered is whether tort liability may be imposed for statements made when a citizen contacts law enforcement personnel to report suspected criminal activity by another person. "[W]e agree with the trial court, the Court of Appeal, and the great weight of authority in this state" that these statements are privileged under C.C. 47(b) and can be the basis for tort liability only if the plaintiff can establish the elements of the tort of malicious prosecution. (32 C.4th 355.)

(b) C.C. 47 establishes a privilege that bars liability in tort for the making of certain statements. Under C.C. 47(b), the privilege bars a civil action for damages for communications made in any (1) legislative proceeding, (2) judicial proceeding, (3) other official proceeding authorized by law, or (4) mandamus proceeding, with certain statutory exceptions that do not apply to the present case. The privilege established by this subdivision often is referred to as an "absolute" privilege, and it bars all tort causes of action except claims for malicious prosecution. (32 C.4th 360.) C.C. 47(b) does not, of course, bar a criminal prosecution that is based on a statement or communication, when the speaker's utterance encompasses the elements of a criminal offense. (32 C.4th 361.)

(c) In its application to communications made in a "judicial proceeding," C.C. 47(b) is not limited to statements made in a courtroom. Many cases have held that C.C. 47(b) encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit. (32 C.4th 361.)

(d) By the terms of C.C. 47(b), statements that are made in quasi-judicial proceedings, or "any other official proceeding authorized by law," are privileged to the same extent as statements made in the course of a judicial proceeding. By analogy to cases extending the litigation privilege to statements made outside the courtroom, many cases have held that the official proceedings privilege applies to a communication intended to prompt an administrative agency charged with enforcing the law to investigate or remedy a wrongdoing. (32 C.4th 362.)

(e) By the same token, the overwhelming majority of cases, including the leading case of *Williams v. Taylor*, conclude that when a citizen contacts law enforcement personnel to report suspected criminal activity and to instigate law enforcement personnel to respond, the communication also enjoys an unqualified privilege under C.C. 47(b). These cases explain that a statement urging law enforcement personnel to investigate another person's suspected violation of criminal law, to apprehend a suspected lawbreaker, or to report a crime to prosecutorial authorities is shielded from tort liability to the same extent as a similar statement to administrative enforcement agencies. Reasoning that these communications are at least preparatory to "any other official proceeding authorized by law," the majority of decisions in the Courts of Appeal have held such statements to be shielded by an absolute privilege. These decisions are persuasive. (32 C.4th 364.)

(f) One Court of Appeal decision, *Fenelon v. Superior Court*, disagreed with these authorities, but its analysis has been rejected in numerous subsequent decisions. *Fenelon* determined that a citizen's statement to the police concerning the suspected criminal activity of another person did not concern an "official proceeding," reasoning that the term encompasses solely proceedings resembling judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings. The primary reason advanced for this conclusion was that it is only in such proceedings that persons accused of wrongdoing possess a certain minimum level of due process protection. (32 C.4th 366.) However, the court in *Fenelon* did not explain the many decisions that extend the privilege to communications requesting the initiation of investigation that might lead to such proceedings. As these decisions recognize, statements made in preparation for or to prompt investigation that may result in the initiation of judicial, legislative, quasi-judicial, or quasi-legislative proceedings fall within the privilege. It is not required that the statement be made during the proceeding itself. A statement to the police that is designed to prompt investigation of crime is not different, in this respect, from statements designed to elicit administrative action. Although the administrative action itself, like a criminal trial should one ensue, offers procedural protections to the accused person, there is no basis for concluding that similar protections must be in place at the moment an accusation or complaint is made in order for the privilege to apply. (32 C.4th 368.) (See *Mulder v. Pilot Air Freight* (2004) 32 C.4th 384, 387, 7 C.R.3d 828, 81 P.3d 264 [companion case; *Hagberg* followed].)

A citizen's arrest is conduct, not communication, and thus not protected by the privilege stated in *Hagberg* for citizen reports of criminal activity. (*Wang v. Hartunian* (2003) 111 C.A.4th 744, 747, 3 C.R.3d 909; *Kesmodel v. Rand* (2004) 119 C.A.4th 1128, 1137, 15 C.R.3d 118.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Reports of Criminal Misconduct. Citizen's arrest is not privileged:* See *Buchanan v. Maxfield Enterprises* (2005) 130 C.A.4th 418, 423, 29 C.R.3d 909 [employee performed citizen's arrest to remove customer from store; following *Wang v. Hartunian* (2003) 111 C.A.4th 744, 3 C.R.3d 909, text, p. 861, and distinguishing *Hagberg v. California Fed. Bank FSB* (2004) 32 C.4th 350, 7 C.R.3d 803, 81 P.3d 244, text, p. 859].



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5 *Witkin Sum. Cal. Law Torts* § 583

[§ 583] Relevancy Limitation.

The relevancy limitation to the litigation privilege (see *supra*, §569) applies as well to the official proceedings privilege. In *Frisk v. Merrihew* (1974) 42 C.A.3d 319, 116 C.R. 781, plaintiff appeared at a school board budget meeting in his capacity as attorney for an interested parent and taxpayer. Defendant, superintendent of the school district and secretary of the board, called him "incompetent," "a rabble-rouser," and "an agitator." *Held*, a directed verdict for defendant was improper. The evidence was conflicting, and it was a jury question whether there was a logical connection between the defamatory statement and the objective of the meeting. (42 C.A.3d 325.) "What has been said relative to judicial proceedings is applicable with equal force to other official proceedings authorized by law, such as the school board meeting in question. Thus, the determinative issue in this case is not whether the defamation took place on a privileged occasion, but whether the defamatory statement was made to achieve the object of the meeting convened to discuss the school budget." (42 C.A.3d 324.) (See 85 A.L.R.3d 1137 [on *Frisk*: Privileged nature of statements by member of school board in course of official proceeding].)

SUPPLEMENT: [This section is current through the latest supplement]



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5 Witkin Sum. Cal. Law Torts § 584

[§ 584] Proceedings Reviewable by Mandamus.

Hackethal v. Weissbein (1979) 24 C.3d 55, 59, 154 C.R. 423, 592 P.2d 1175, held that statements made at a hearing before the judicial commission of a private medical society were not protected by absolute privilege. The statutory language in C.C. 47(b) applying the privilege to statements made in an "official proceeding authorized by law" (see *supra*, §580) was deemed not to extend to statements in proceedings before private bodies. (24 C.3d 59.)

In response, the 1979 Legislature created an absolute privilege for publications and broadcasts "in the initiation or course of any proceeding authorized by law" and reviewable by mandamus. (See C.C. 47(b)(4).) This enactment nullified the *Hackethal* holding and extended the scope of absolute privilege "to a host of quasi-judicial proceedings not deemed 'official,' and hence not previously protected." (*Wallin v. Vienna Sausage Mfg. Co.* (1984) 156 C.A.3d 1051, 1055, 203 C.R. 375; see *Long v. Pinto* (1981) 126 C.A.3d 946, 950, 179 C.R. 182 [letter to hospital board was absolutely privileged]; *Rodas v. Spiegel* (2001) 87 C.A.4th 513, 517, 104 C.R.2d 439 [report prepared by floor expert for homeowner to be forwarded to Contractors' State License Board was absolutely privileged]; 11 *Pacific L. J.* 666; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §266.)

In *Wallin, supra*, the privilege was held applicable to statements made during the course of a grievance hearing held pursuant to a collective bargaining agreement, in which the committee upheld plaintiff employee's discharge from employment.

(a) The vast majority of collective bargaining agreements contain grievance procedures that preclude discharge except for good cause; and when grievance hearings result in the loss of fundamental rights, they are subject to review by mandamus under the holding of *Anton v. San Antonio Community Hosp.* (1977) 19 C.3d 802, 140 C.R. 442, 567 P.2d 1162, 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §266. The present agreement provides that a grievance may be subject to arbitration only if not resolved by the grievance committee; hence, in many instances, the parties will be bound by the decision with no right of arbitration or judicial review other than by mandamus. (156 C.A.3d 1055, 1056.)

(b) "We do not suggest that every decision of a grievance committee operating under similar contracts is so reviewable. However, when the decision of such a tribunal affects a fundamental right such as the right to employment,

California courts have historically intervened to insure that the loss of that right was accomplished through a procedure that was fundamentally fair." (156 C.A.3d 1056.)

SUPPLEMENT: [This section is current through the latest supplement]

Review by mandamus:

Cross-Reference: 8 Cal. Proc. (5th), Extraordinary Writs, §265.

Anton case:

Cross-Reference: 8 Cal. Proc. (5th), Extraordinary Writs, §265.



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aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 585

[§ 585] In General.

A "report in, or communication to, a public journal of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued," is generally privileged, provided that it is "fair and true." (C.C. 47(d)(1); see *Rest.2d, Torts* §611 [requiring report to be "accurate and complete or a fair abridgment"]; Dobbs, *The Law of Torts* §415; 33 *Hastings L. J.* 1203; 23 *Santa Clara L. Rev.* 319; 34 *Stanf. L. Rev.* 1041 [report of dated (not contemporaneous) proceeding]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §316 et seq.; 47 *A.L.R.4th* 718 [report of criminal activities based on information from public safety officers]; on limitations respecting privilege for communications, see *infra*, §588.)

The privilege was formerly qualified, rather than absolute, being conditioned on freedom from malice. However, the elimination of that condition in 1945 (see *infra*, §592) made the privilege absolute. (See *Green v. Cortez* (1984) 151 *C.A.3d* 1068, 1074, 199 *C.R.* 221.)

The existence of a privileged occasion is a question of law for the court; fairness of the report is a question of fact for the jury. (*Handelsman v. San Francisco Chronicle* (1970) 11 *C.A.3d* 381, 386, 90 *C.R.* 188, *infra*, §587.)

West's Key Number Digest, Libel and Slander k.42(2)

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §298 et seq.



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bb. Proceedings Within Privilege.

5 Witkin Sum. Cal. Law Torts § 586

[§ 586] Proceedings Within Privilege.

(1) *In General.* A "public official proceeding," for purposes of C.C. 47(d), is broadly construed. (See *Braun v. Chronicle Publishing Co.* (1997) 52 C.A.4th 1036, 1049, 61 C.R.2d 58 [newspaper reports about state audit of medical research and training center were privileged under C.C. 47(d), even though audit itself was confidential]; *Colt v. Freedom Communications* (2003) 109 C.A.4th 1551, 1558, 1 C.R.3d 245 [despite some inaccuracies, defendants' characterization of plaintiffs' activities as "pump and dump scenario" fairly described nature of scheme detailed in SEC complaint so as to qualify for C.C. 47(d) privilege].)

In *Howard v. Oakland Tribune* (1988) 199 C.A.3d 1124, 245 C.R. 449, defendant newspaper published articles dealing with a state administrative agency investigation of misuse of public funds by a local state-subsidized child care program. The articles accurately reported the facts of the investigation and the summary of findings made, but plaintiffs contended that the findings were false and defamatory, and that the articles were not privileged because the reported proceedings were not "public official proceedings" within the meaning of the statute. *Held*, summary judgment for defendants affirmed. A dictum in *Green v. Cortez* (1984) 151 C.A.3d 1068, 199 C.R. 221, interpreted the phrase to include a police investigation into allegations of use of excessive force by police. "If a police internal affairs investigation is a 'public official proceeding' ... , then a state administrative investigation into the expenditure of public funds must also be such a proceeding." (199 C.A.3d 1128.)

(2) *Judicial Proceedings.* The privilege expressly includes judicial proceedings, and it obviously applies to a report of a court proceeding, i.e., a trial or hearing. (See *Jackson v. Underwriters' Report* (1937) 21 C.A.2d 591, 597, 69 P.2d 878; *Glenn v. Gibson* (1946) 75 C.A.2d 649, 660, 171 P.2d 118; *Jennings v. Telegram-Tribune Co.* (1985) 164 C.A.3d 119, 122, 210 C.R. 485; *McClatchy Newspapers v. Superior Court* (1987) 189 C.A.3d 961, 965, 234 C.R. 702 [report of deposition]; 69 Harv. L. Rev. 928; 50 Am.Jur.2d (1995 ed.), *Libel and Slander* §319 et seq.; 43 A.L.R.3d 634 [report of secret judicial proceedings].)

California follows the minority view that a complaint or other pleading is part of a "judicial proceeding" and a truthful report of defamatory statements made in a complaint is qualifiedly privileged. (*Mortensen v. Los Angeles*

Examiner (1931) 112 C.A. 194, 201, 296 P. 927; *Handelsman v. San Francisco Chronicle* (1970) 11 C.A.3d 381, 386, 90 C.R. 188, *infra*, §587; see *Kurata v. Los Angeles News Publishing Co.* (1935) 4 C.A.2d 224, 227, 40 P.2d 520 [husband filed suit challenging legitimacy of child, implying that plaintiff wife had illicit relations with another; newspaper article discussing allegations of complaint was privileged]; *Rest.2d, Torts* §611, Comment e [contra]; 24 *Cal. L. Rev.* 343; 9 *So. Cal. L. Rev.* 56; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §320; 20 *A.L.R.4th* 576 [reports of pleadings].)

In *Hayward v. Watsonville Register-Pajaronian & Sun* (1968) 265 C.A.2d 255, 71 C.R. 295, plaintiff, a furniture store manager, was arrested and charged with grand theft of store furniture. After acquittal, he brought an action for libel against defendant newspaper and its editor, based on an article reporting the event. The article stated that "Police records show" that plaintiff had previously served a term in a Kansas prison on a check charge. Because the actual record showed "parole," which is the Kansas equivalent of California's "probation," this was not a report of an actual judicial proceeding in the narrow sense. But the information was obtained from a police crime report with attached FBI identification record (rap sheet). *Held*, the privilege of fair and true report of a judicial proceeding is broadly interpreted to include the history of the proceedings, including this kind of information. "Thus, if the oral statements of district attorneys, sheriffs, and police officers come under the privilege immunity, then surely the crime reports of a police department and FBI identification records which are part of such reports, and upon which a criminal complaint is filed and a warrant of arrest is issued, should likewise be qualifiedly privileged." (265 C.A.2d 260.) (See *Jennings v. Telegram-Tribune Co.*, *supra*, 164 C.A.3d 126 [following *Hayward*].)

West's Key Number Digest, Libel and Slander k.42(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Carver v. Bonds* (2005) 135 C.A.4th 328, 350, 37 C.R.3d 480 [newspaper article's references to state medical board complaints filed against podiatrist were reports of public official proceeding for purposes of C.C. 47(d)].

(2) *Judicial Proceedings*. See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §301. *Pleadings are within privilege*: See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §302.



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cc. Requirement That Statement Be Fair and True.

5 *Witkin Sum. Cal. Law Torts* § 587

[§ 587] Requirement That Statement Be Fair and True.

The requirement that the report be "fair and true" is satisfied if it is substantially true and does not misstate the gist of the proceedings. (See *Sipple v. Foundation for Nat. Progress* (1999) 71 C.A.4th 226, 244, 83 C.R.2d 677 [even though magazine article altered words somewhat, it was "fair and true" report of custody proceeding within meaning of C.C. 47(d), where it was supported by court testimony of plaintiff's two former wives and by deposition of one of them, and thus did not change gist of custody proceeding].)

In *Handelsman v. San Francisco Chronicle* (1970) 11 C.A.3d 381, 90 C.R. 188, a labor union filed an action against plaintiff and other officers of the union, alleging conversion of union funds and expending money for entertainment without rendering an accounting. Defendant newspaper printed a story about the action, which included statements that the officers were sued for having "despoiled" the union treasury and that they had been charged with "outright theft." In this libel action, the jury returned a special verdict that the article was a substantially fair and true report, and judgment was given for defendant. *Held*, affirmed. A report need only be substantially in accord with the proceeding; it need not be a verbatim statement of the complaint. (11 C.A.3d 386.) The complaint charged conspiracy on the part of the officers to convert union funds to their own use with oppression, fraud, and malice. The jury could therefore find the use of the criminal term "theft" within the ambit of fair reporting. (11 C.A.3d 388.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Carver v. Bonds* (2005) 135 C.A.4th 328, 351, 37 C.R.3d 480 [newspaper article qualified as fair and true report of state Medical Board complaints filed against podiatrist, even though it overstated their number; "fair and true" requirement does not limit privilege to statements that contain no errors; news articles need only convey substance of proceedings reported, as measured by impact on average reader].



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dd. Limitations on Communications to Public Journals.

5 *Witkin Sum. Cal. Law Torts* § 588

[§ 588] Limitations on Communications to Public Journals.

As applied to communications to public journals, the privilege does not extend to a communication that does any of the following:

(1) Violates *Rules of Professional Conduct, Rule 5-120* (prejudicial publicizing of litigation; see 1 *Cal. Proc.* (4th), *Attorneys*, §520). (C.C. 47(d)(2)(A).)

(2) Breaches a court order. (C.C. 47(d)(2)(B).)

(3) Violates any requirement of confidentiality imposed by law. (C.C. 47(d)(2)(C).)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §460.



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8. Report of Public Meeting.

5 *Witkin Sum. Cal. Law Torts* § 589

[§ 589] Report of Public Meeting.

C.C. 47(e) establishes a privilege for "a fair and true report of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit." Originally, this provision was phrased in the typical language of a qualified privilege; but in 1945, the words "without malice" were deleted (see *infra*, §592). (See *Kilgore v. Younger* (1982) 30 C.3d 770, 794, 180 C.R. 657, 640 P.2d 793, *supra*, §565 [media reports of news conference called by Attorney General]; *Williams v. Daily Review* (1965) 236 C.A.2d 405, 418, 46 C.R. 135, *supra*, §544 [privilege is absolute for person within terms of statute]; *Rest.2d, Torts* §611; Dobbs, *The Law of Torts* §415; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §316; cf. *Lewis v. Hayes* (1913) 165 C. 527, 530, 132 P. 1022 [report of county health officer's remarks at social gathering of county medical society was not privileged; banquet was not "official occasion"].)

West's Key Number Digest, Libel and Slander k.42(3)

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §§298, 300.



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9. Consent.

5 Witkin Sum. Cal. Law Torts § 590

[§ 590] Consent.

(1) *Consent as Absolute Privilege.* Consent to the publication of the defamatory matter is a defense, classified by the Restatement as a form of absolute privilege. Thus, a person suspected of misconduct may agree to an investigation with knowledge of the contemplated publication of findings, or may consent in advance to such investigations authorized by the rules of an organization which he or she joins. (See *Rest.2d, Torts* §583; Dobbs, *The Law of Torts* §412; 2 Harper, James & Gray 2d §5.17; 69 *Harv. L. Rev.* 931; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §272.)

(2) *Republication of Statement by Plaintiff.* In *Royer v. Steinberg* (1979) 90 C.A.3d 490, 153 C.R. 499, plaintiff school superintendent was demoted, and he wrote the school board requesting a statement of reasons. The board responded with a confidential letter stating that he had participated in distribution of fake election flyers. Plaintiff procured the publication of the letter in a newspaper along with his answer. *Held*, this act constituted a consent to the publication, making it absolutely privileged. (90 C.A.3d 498, 499, citing the text.)

(3) *Repetition of Statement by Defendant at Plaintiff's Request.* If the defendant *privately* makes slanderous statements, and later, at the request of the plaintiff, repeats them in the presence of others, there can be no action. The original statements were not published, and the plaintiff consented to the repetition. But where the original statements are published by the defendant, and then repeated in response to the plaintiff's efforts to discover the source of the defamation, there is no consent. (See *Pouchan v. Godeau* (1914) 167 C. 692, 694, 140 P. 952 [original statement made in presence of third persons, plaintiff drew out reiteration in more explicit language]; *Moranville v. Aletto* (1957) 153 C.A.2d 667, 671, 315 P.2d 91 [similar]; *Rest.2d, Torts* §584.)

(4) *Scope of Consent.* Where the waiver or consent is ambiguous, its scope is a question of fact to be determined by the trier of fact. In *Kelly v. William Morrow & Co.* (1986) 186 C.A.3d 1625, 231 C.R. 497, plaintiff was a San Diego police officer on a special unit formed to control criminal activities in the Mexican border area. Defendant published a book about the unit, which included factual and fictional conduct of plaintiff. Plaintiff sued for invasion of privacy and libel, alleging that the book contained false statements and portrayed him as irresponsible toward his job. Defendant relied on plaintiff's signed "personal depiction waiver" for which he was paid, and the trial court gave judgment for defendant on demurrer. *Held*, reversed. Plaintiff contended that the agreement was a consent on a contingency that had

not occurred, i.e., the formation of an agreement to determine the extent and manner of defendant's depiction of him, and that he was entitled to an opportunity for pre-publication review. This contention raised a question of fact: "[W]e cannot say as a matter of law the rights given in the waiver include a license to defame, slander and libel [plaintiff]. ... The waiver does not suggest [plaintiff] was aware he waived his rights to privacy. ... We conclude the extent of the privileges conferred by the waiver must be determined in the light of the circumstances in which it was executed." (186 C.A.3d 1635.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Consent as Absolute Privilege*. See 2 Harper, James & Gray 3d §5.17; 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §254.



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1. In General.

5 Witkin Sum. Cal. Law Torts § 591

[§ 591] In General.

A communication is qualifiedly privileged when made "without malice" (see *infra*, §592) and "to a person interested therein" (see *infra*, §594) by any of the following circumstances:

(1) *Common interest*. By "one who is also interested." (C.C. 47(c)(1).)

(2) *Special relationship*. By "one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent." (C.C. 47(c)(2).)

(3) *Request for information*. By one "who is requested by the person interested to give the information." (C.C. 47(c)(3); see *infra*, §596.) (See *Kramer v. Ferguson* (1964) 230 C.A.2d 237, 244, 41 C.R. 61 [error in failing to give clear instructions on privilege, and in leaving to jury question whether occasion was qualifiedly privileged]; *Mann v. Quality Old Time Service* (2004) 120 C.A.4th 90, 108, 15 C.R.3d 215 [C.C. 47(c) did not protect disparaging statements made by plaintiff's business competitor to plaintiff's customers where competitor presented no evidence of relationship with customers or their request for information]; *Rest.2d, Torts* §594 et seq.; Dobbs, *The Law of Torts* §§413, 414; 2 Harper, James & Gray 2d §5.26; 69 Harv. L. Rev. 924; Loyola L.A. L. Rev. 1559; 29 So. Cal. L. Rev. 316; 39 Stanf. L. Rev. 1201; 20 52 A.L.R.3d 739 [employer's privilege to make communications to media concerning employees]; 50 Am.Jur.2d (1995 ed.), *Libel and Slander* §276; 98 A.L.R.3d 561 [exchange among insurers of medical information concerning insured or applicant for insurance]; BAJI, No. 7.05; CACI, No. 1723.)

In addition to the privileges set forth in C.C. 47(c), certain communications may be qualifiedly privileged by the federal Constitution. (See *infra*, §601 et seq.) Also, various statutes provided privileges relating to particular types of communications conditioned on the absence of malice. (See, e.g., C.C. 48.7, *supra*, §145 [charges of child abuse]; C.C. 48.8, *supra*, §164 [reports of threats of violence on school grounds]; C.C. 48.9, *supra*, §163 [anonymous witness programs].)

When the communication involves disclosure of an employee's medical information by a health care provider to an employer, the more specific privileges established by the Confidentiality of Medical Information Act (C.C. 56 et seq.;

see 2 *Cal. Evidence* (4th), Witnesses, §518) supersede the general privilege afforded under C.C. 47(c). (*Pettus v. Cole* (1996) 49 C.A.4th 402, 437, 57 C.R.2d 46.)

Brown v. Kelly Broadcasting Co. (1989) 48 C.3d 711, 257 C.R. 708, 771 P.2d 406, infra, §599, resolves "some minor confusion that has arisen in prior cases as to terminology ... and the relationship between malice and privilege. ... The privilege under [C.C. 47(c)] has usually been referred to as a qualified or conditional privilege, meaning that it can be overcome by a showing of malice. ... This characterization is somewhat misleading. [C.C. 47(c)] defines a privileged communication as one made without malice. Thus, if malice is shown, the privilege is not merely overcome; it never arises in the first instance. ... [T]he characterization of the privilege as qualified or conditional is incorrect to the extent that it suggests the privilege is defeasible. It is *the occasion* giving rise to the publication that is conditionally privileged, i.e., under specified conditions the occasion gives rise to a privilege. If the privilege arises, it is a complete defense." (48 C.3d 723, footnote 7.)

West's Key Number Digest, Libel and Slander k.41 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See *Taus v. Loftus* (2007) 40 C.4th 683, 721, 54 C.R.3d 775, 151 P.3d 1185, Supp., infra, §659 [defendant generally bears initial burden of establishing that statement alleged to be qualifiedly privileged was made on privileged occasion, and thereafter burden shifts to plaintiff to establish that statement was made with malice].

Circumstances of communication:

(3) *Request for information.* See 2 Harper, James & Gray 3d §5.26; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §§258, 259.



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 - 2. Freedom From Malice.
 - aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 592

[§ 592] In General.

(1) *Common-Law and Constitutional Principles.* A qualified or conditional privilege is given in certain situations where the statement is made to protect some recognized interest (see *infra*, §594 et seq.) and is made in good faith and *without malice*. (See *Rest.2d, Torts* §§600, 603; *Dobbs, The Law of Torts* §§412, 413; 2 *Harper, James & Gray* 2d §5.27; *C.E.B.*, 2 *California Business Litigation*, §11.145 et seq.; 16 *Southwestern U. L. Rev.* 577; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §§199, 279; 24 *A.L.R.4th* 144 [loss of employer's privilege to publish employee's work record through malice]; on absolute privilege, see *supra*, §561 et seq.)

A showing of malice may be required for defamation recovery, in certain circumstances, as an element of constitutional due process. (See *infra*, §601 et seq.)

(2) *Statutory Requirement.* The California statute makes the privilege available if the communication is made "without malice." (C.C. 47(c), *supra*, §591.)

Formerly, C.C. 47 specified freedom from malice as a condition to the privilege in three situations: communication to a person interested, a fair and true report of an official proceeding, and a fair and true report of a public meeting. In 1945, the section was amended to delete the reference to freedom from malice in connection with the second and third situations, making the privilege in those two situations absolute. (See *Williams v. Daily Review* (1965) 236 *C.A.2d* 405, 418, 46 *C.R.* 135, *supra*, §544; *supra*, §585 et seq.) This change greatly limited the potential defamation liability of the media. (See 19 *So. Cal. L. Rev.* 123.)

West's Key Number Digest, Libel and Slander k.4, 51, 62

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Common Law and Constitutional Principles.* See 2 *Harper, James & Gray* 3d §5.27; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §261.



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2. Freedom From Malice.
bb. What Constitutes Malice.

5 Witkin Sum. Cal. Law Torts § 593

[§ 593] What Constitutes Malice.

Certain general principles apply in determining what constitutes malice:

(1) *Malice Must Be Actual or Express*. Malice in defamation cases means "actual" or "express" malice, hatred, or ill will, and not the fictional malice "implied by law" from the intentional doing of a wrongful act without just cause. (*Frommoethelydo v. Fire Ins. Exchange* (1986) 42 C.3d 208, 228 C.R. 160, 721 P.2d 41; *Nova v. Flaherty* (1956) 145 C.A.2d 761, 764, 303 P.2d 382; *Manguso v. Oceanside Unified School Dist.* (1984) 153 C.A.3d 574, 577, 580, 200 C.R. 535; see *Noel v. River Hills Wilsons* (2003) 113 C.A.4th 1363, 1371, 7 C.R.3d 216 [mere negligence, in the sense of oversight or unintentional error, is not alone enough to constitute malice]; 50 Am.Jur.2d (1995 ed.), *Libel and Slander* §§4, 5, 26, 32; 20 A.L.R.3d 988 [actual malice towards public official]; BAJI, No. 7.05; CACI, No. 1723.)

(2) *Effect of Presence or Absence of Ill Will*. Malice must be ill will beyond the normal feeling toward a wrongdoer, i.e., a motive different from that which makes the communication privileged. (*DeMott v. Amalgamated Meat Cutters & Butcher Workmen of North America* (1958) 157 C.A.2d 13, 26, 320 P.2d 50; see *Biggins v. Hanson* (1967) 252 C.A.2d 16, 20, 59 C.R. 897 [if defendant's primary motive is advancement of interest that privilege protects and defendant speaks in good faith, "mere fact that he harbors ill will toward the plaintiff should be a neutral factor"]; *Rest.2d, Torts* §603, Comment a; 24 So. Cal. L. Rev. 350.) Although ill will may be circumstantial evidence of malice, it is not the equivalent of malice; there must be a link between the defendant's hostility and awareness of the probable falsity of the statements. (*Live Oak Publishing Co. v. Cohagan* (1991) 234 C.A.3d 1277, 1292, 286 C.R. 198, supra, §537.)

The absence of extrinsic facts showing hatred or ill will is similarly not determinative. Malice may be inferred from facts showing a lack of reasonable or probable cause to believe in the truth of a defamatory statement. The privilege remains, however, where the interest protected by the privilege makes it reasonable to report rumors or statements that the publisher has no reasonable cause to believe or may even know are false, if he or she states the defamatory matter as a rumor or suspicion and not as fact. Thus, a newspaper is privileged to print a fair report, attributed to a third party, of a claim of official misconduct denied by the official, and is under no duty to resolve conflicting claims. (*Stockton Newspapers v. Superior Court* (1988) 206 C.A.3d 966, 980, 254 C.R. 389; see *Rest.2d, Torts* §602.)

(3) *Malice May Not Be Inferred From Mere Fact of Communication.* Malice cannot be inferred from a mere communication by one person to another, where it does not appear on the face of the communication. (C.C. 48.) But actual malice may be established either by direct proof of the defendant's state of mind, or by circumstantial evidence from which the jury might infer it as a fact. (*Davis v. Hearst* (1911) 160 C. 143, 166, 116 P. 530; *Snively v. Record Publishing Co.* (1921) 185 C. 565, 577, 198 P. 1; *Maher v. Devlin* (1928) 203 C. 270, 278, 263 P. 812; *Stationers Corp. v. Dun & Bradstreet* (1965) 62 C.2d 412, 421, 42 C.R. 449, 398 P.2d 785, *infra*, §597; *Shumate v. Johnson Publishing Co.* (1956) 139 C.A.2d 121, 136, 293 P.2d 531; *Fairfield v. Hagan* (1967) 248 C.A.2d 194, 201, 56 C.R. 402, *supra*, §543; see *McMann v. Wadler* (1961) 189 C.A.2d 124, 129, 11 C.R. 37 [evidence of prior defamations of similar import]; *Larrick v. Gilloon* (1959) 176 C.A.2d 408, 416, 1 C.R. 360 [attack on officers of irrigation district by property owner; evidence of language and tenor of publications, threats of grand jury action, long continued controversy, and falsity of statements]; *Mann v. Quality Old Time Service* (2004) 120 C.A.4th 90, 108, 15 C.R.3d 215 [where parties were business competitors, it was not reasonable to assume that motive of defendant's communication of alleged defamatory statements to plaintiff's customers was innocent]; 69 *Harv. L. Rev.* 929; 24 *So. Cal. L. Rev.* 349; 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §123; 1 *Cal. Evidence* (4th), *Opinion Evidence*, §8.)

(4) *Effect of Knowledge of Falsity.* The privilege is lost if the defendant knows the statement is false or has no reasonable ground for belief in the truth of the statement. (*Sanborn v. Chronicle Publishing Co.* (1976) 18 C.3d 406, 413, 134 C.R. 402, 556 P.2d 764; *Frommoethelydo v. Fire Ins. Exchange*, *supra*, 42 C.3d 217; *Di Giorgio Fruit Corp. v. American Federation of Labor & Congress of Industrial Organizations* (1963) 215 C.A.2d 560, 569, 574, 30 C.R. 350; BAJI, No. 7.05; CACI, No. 1723.) But mere negligence in inquiring into facts, or blundering, is not enough to defeat the privilege. (*Roemer v. Retail Credit Co.* (1970) 3 C.A.3d 368, 371, 83 C.R. 540; see *Bierbower v. FHP* (1999) 70 C.A.4th 1, 4, 82 C.R.2d 393 [malice was not shown by incorrect date in employee's sexual harassment statement, where wrong date was result of mistake, three complaints were involved, complainant was upset, and there was no evidence that statement was written with malice].)

In *Brewer v. Second Baptist Church of Los Angeles* (1948) 32 C.2d 791, 197 P.2d 713, plaintiffs, a former minister and former church trustee, had instituted litigation involving the church, following which they were charged with misconduct and expelled. Defendants, officers of the church, then gave news releases of the charges and action taken, including statements that plaintiffs' suit against the church was admittedly groundless, that one plaintiff had a "vile spirit," that they were associated with "one of Satan's choicest tools," and that by their "downright falsehood" they had proven themselves unworthy of fellowship in the church. *Held*, judgment for plaintiffs affirmed. (a) The statements were clearly libelous. (b) The common interest of members of the church gave rise to a qualified privilege, which would be a defense even if the statements were false, provided that defendants were free from malice. (c) The privilege is lost if the publication is motivated by any cause other than the desire to protect the interest that is privileged; and "ordinarily the privilege is lost if defendant has no reasonable grounds for believing his statements to be true." In addition, though malice may not be inferred from the *fact* of the publication alone, "the tenor of the statement may be evidence of malice." (32 C.2d 799.) Here, the record contained sufficient evidence that defendants had made no attempt to learn the truth concerning plaintiffs' conduct, and the exaggerated tone of the charges supported the inference of malice. (32 C.2d 799.)

In *Russell v. Geis* (1967) 251 C.A.2d 560, 59 C.R. 569, plaintiffs were the bookkeeper and receptionist of defendant doctor. They testified that he had accused them of stealing money from him. The accusation had been made to law enforcement officers and the staff of the unemployment compensation department, all interested persons for purposes of C.C. 47(c). However, defendant, on the stand, denied having made any accusations and testified that he did not believe plaintiffs had taken any money from him. The trial judge then struck out the defense of privilege. *Held*, this was proper: "Every authority we find discussing the subject of conditional privilege ... is in accord that for one to assert the defense ... he must believe the defamatory matters to be true." (251 C.A.2d 566.)

West's Key Number Digest, Libel and Slander k.4, 51, 62

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Malice Must Be Actual or Express.* See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §§4, 5, 26, 32.

(2) *Effect of Presence or Absence of Ill Will.* See *King v. United Parcel Service* (2007) 152 C.A.4th 426, 440, 60 C.R.3d 359 [employer's statements to employees regarding reason for coworker's termination were not made with malice, so as to preclude application of common-interest privilege; evidence showed that employer's motive was to reassure workers, boost morale, and keep business running efficiently]; *Mamou v. Trendwest Resorts* (2008) 165 C.A.4th 686, 729, 81 C.R.3d 406 [in employee's defamation action, jury could find that senior managers' statements of Syrian employee's alleged misconduct and bad character were motivated by ill will to negate application of common interest privilege of C.C. 47(c); one manager characterized employee as member of "Syrian regime" and was reported to plan to "get" or "get even with" employee, another made extreme comments concerning employee's alleged breaches of loyalty, and managers ordered other employees to shun and avoid employee]. (3) *Malice May Not Be Inferred From Mere Fact of Communication.* See *Terry v. Davis Community Church* (2005) 131 C.A.4th 1534, 1558, 33 C.R.3d 145 [malice could not be inferred from fact that defendants' attorney advised against disclosure].



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- 3. Requirement of Interest.
 - aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 594

[§ 594] In General.

(1) *In General.* The privileges set forth in C.C. 47(c) require "interest" by the publisher of the allegedly defamatory communication or by both publisher and recipient. (See *supra*, §591.) The "interest" protected must be one of direct and immediate concern, not the general curiosity of readers of newspapers and magazines. It must be private or pecuniary, and the relationship between the parties must be close. (*Brown v. Kelly Broadcasting Co.* (1989) 48 C.3d 711, 729, 257 C.R. 708, 771 P.2d 406, *infra*, §599; see *Rancho La Costa v. Superior Court* (1980) 106 C.A.3d 646, 665, 667, 165 C.R. 347, citing the text [contention of national magazine that its readership is interested in fight against organized crime did not support claim of privilege]; *Kashian v. Harriman* (2002) 98 C.A.4th 892, 930, 120 C.R.2d 576 [common professional or business interests support application of privilege]; *Rest.2d*, Torts §594; 20 *Loyola L.A. L. Rev.* 1559; 57 *So. Cal. L. Rev.* 173; 39 *Stanf. L. Rev.* 1201; 73 *A.L.R.2d* 325 [privilege of doctor or nurse to make statements concerning patient].)

(2) *Illustrations.* The following circumstances have been found to constitute the requisite interest:

(a) An administrative agency is protected in performing a statutory duty to record and disseminate information from authorized persons. (*White v. California* (1971) 17 C.A.3d 621, 628, 95 C.R. 175 [information posted and disseminated by State Bureau of Criminal Identification and Investigation].)

(b) An employer's communications to his or her employees may be privileged. In *Deaile v. General Tel. Co. of Calif.* (1974) 40 C.A.3d 841, 115 C.R. 582, plaintiff was allowed to retire from her employment as a chief operator of defendant's facility, after being charged with unauthorized absences and falsifying records. Her superiors then met with other employees in the department to explain the reasons for plaintiff's retirement, including specific instances of misconduct. *Held*, the communications were privileged; the statements were made in an effort to preserve employee morale and job efficiency. (40 C.A.3d 846.)

(c) A bonding company of a contractor in default, and a supplier who is the contractor's creditor, are both interested in the contractor's financial condition; and inquiries as to the risk of the contractor's future defaults are privileged. (

Gantry Const. Co. v. American Pipe & Const. Co. (1975) 49 C.A.3d 186, 197, 122 C.R. 834.)

(d) A telegraph company has a duty to transmit messages expeditiously, and may presume that the sender and addressee are interested persons. Hence, unless it knows or has reason to know that the communication is not privileged, the company is not liable for transmission of defamatory communications. (*Mason v. Western Union Tel. Co.* (1975) 52 C.A.3d 429, 436, 438, 125 C.R. 53; see 91 A.L.R.3d 1015.)

(e) A complaint to a local bar association, of allegedly unethical conduct of an attorney member, is within the privilege. In *Katz v. Rosen* (1975) 48 C.A.3d 1032, 121 C.R. 853, defendant doctor, whose bill for examination of a personal injury patient was long unpaid, wrote a letter to the San Francisco Bar Association complaining of pressure brought by plaintiff attorney to reduce his fee, expressing the view that this conduct was "shabby and unethical" but requesting an explanation "If I am wrong in this." The court, upholding a summary judgment for defendant doctor, said: "As one who felt aggrieved by the conduct of a member of the San Francisco Bar Association, respondent was a party interested in the subject matter of the communication. The bar association was also an interested party within the meaning of the statute since the association's medical-legal subcommittee assists doctors and lawyers to resolve their differences." (48 C.A.3d 1037.)

(f) A complaint by parents of school pupils, addressed to the principal and asserting misconduct of a teacher, is both absolutely privileged (made in an official proceeding; see *supra*, §580), and qualifiedly privileged (made between interested persons). (*Martin v. Kearney* (1975) 51 C.A.3d 309, 311, 124 C.R. 281.)

(g) A letter by a university professor of physical education to athletic organizations and sports magazines, criticizing plaintiff's psychological tests of athletic personality traits predictive of success, may affect the manner in which coaches conducted their professional activities, and is therefore of professional interest to them. (*Institute of Athletic Motivation v. University of Illinois* (1980) 114 C.A.3d 1, 9, 12, 170 C.R. 411, citing the text.)

(h) Statements by a company president to insurance adjusters who refer business to the company, concerning improper conduct of a former employee that led to the employee's termination, are calculated to protect the common interest of both the communicator and the recipient and therefore privileged. (*Williams v. Taylor* (1982) 129 C.A.3d 745, 752, 181 C.R. 423, *supra*, §582.) (See 85 A.L.R.3d 1161 [privileged nature of communications between insurer and insured].)

(i) A letter from a hospital administrator concerning restrictions on a doctor's staff privileges, sent at the request of a hospital considering granting the doctor staff privileges, may be privileged under both C.C. 47(c) and 43.8 (immunity respecting evaluation of practitioner of healing arts; see *supra*, §155). (*Dorn v. Mendelzon* (1987) 196 C.A.3d 933, 944, 242 C.R. 259.)

(j) Sexual harassment complaints to private employers are within the scope of C.C. 47(c). (See *Cruey v. Gannett Co.* (1998) 64 C.A.4th 356, 368, 76 C.R.2d 670 [employee's letter to employer's human resources department charging her manager with sexual harassment and discrimination; issue of fact whether letter was written with malice]; *Bierbower v. FHP* (1999) 70 C.A.4th 1, 3, 82 C.R.2d 393 [defamation action by former employee against employer arising out of memo repeating another employee's claim that plaintiff sexually harassed her].)

West's Key Number Digest, Libel and Slander k.45

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations:* See *Taus v. Loftus* (2007) 40 C.4th 683, 720, 54 C.R.3d 775, 151 P.3d 1185, Supp., *infra*, §659 [statement by psychology professor criticizing prominent case study concerning plaintiff was protected by common-interest privilege; statement was made at professional conference attended by other mental health professionals, related to subject of conference, and was made without malice]; *King v. United Parcel Service* (2007) 152 C.A.4th 426, 440, 60 C.R.3d 359 [employer's statements to employees regarding reasons for coworker's termination

were privileged; employer and its employees have common interest in protecting workplace from abuse].



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bb. Communication Between Partners, Corporate Directors or Officers, or Association Members.

5 Witkin Sum. Cal. Law Torts § 595

[§ 595] Communication Between Partners, Corporate Directors or Officers, or Association Members.

Communications between partners, corporate officers or directors, and members of unincorporated associations may be justified by the common interest of the group. (See *Emde v. San Joaquin County Cen. Labor Council* (1943) 23 C.2d 146, 161, 143 P.2d 20 [statement in labor union publication]; *Brewer v. Second Baptist Church of Los Angeles* (1948) 32 C.2d 791, 796, 197 P.2d 713, supra, §593 [privilege of church members to comment on persons and matters involving church policy]; *DeMott v. Amalgamated Meat Cutters & Butcher Workmen of North America* (1958) 157 C.A.2d 13, 27, 320 P.2d 50 [statements to union members by union officers in dispute over policies and administration]; *Krause v. Bertrand* (1958) 159 C.A.2d 318, 321, 323 P.2d 784 [statements to union members by candidate for union office in response to attack by other candidate]; *Jeffers v. Screen Extras Guild* (1958) 162 C.A.2d 717, 729, 328 P.2d 1030 [union controversy]; *Rest.2d, Torts* §596; 30 So. Cal. L. Rev. 35 [privileged publications in labor disputes]; 4 *Stanf. L. Rev.* 300 [union charge that employer is unfair]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §339 et seq.; 60 *A.L.R.3d* 1080 [communication by employer of reasons for employee's discharge to other employees or to union]; 60 *A.L.R.3d* 1041 [statements made in course of grievance or arbitration proceeding provided for by collective bargaining agreement].)

In *Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 C.A.3d 985, 225 C.R. 852, plaintiff, former manager of defendant credit union was the subject of an investigation by its supervisory committee, appointed pursuant to federal regulations. The committee and its chairman made various oral statements and issued a written report outlining suspicions that plaintiff was receiving kickbacks, spending much time doing outside liquidation work, and keeping infrequent office hours and that he had made an irregular business expense claim. At a meeting of the board of directors, the committee distributed copies of the report marked "Absolutely Personal and Confidential," and after the meeting all copies were collected and locked up. The board decided to ask for plaintiff's resignation and to terminate his employment if he refused to resign. Plaintiff sued for defamation, and summary judgment was given for defendants. *Held*, affirmed.

(a) The privilege has been held to cover employers' statements to other employees of the reasons for discharge of

another employee, and statements relating to dishonesty of a former employee made to insurance adjusters. (180 C.A.3d 995; citing *Deaile v. General Tel. Co. of Calif.* (1974) 40 C.A.3d 841, 115 C.R. 582, supra, §594, and *Williams v. Taylor* (1982) 129 C.A.3d 745, 181 C.R. 423, supra, §582.)

(b) The publication here was limited to members of the supervisory committee and the board. The statements were relevant to plaintiff's fitness as manager, and hence, were matters of direct interest to them. (180 C.A.3d 996.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Terry v. Davis Community Church* (2005) 131 C.A.4th 1534, 1556, 33 C.R.3d 145 [common interest of members of church in church matters is sufficient to give rise to qualified privilege to communications between them on subjects relating to church's interest; citing *Brewer v. Second Baptist Church of Los Angeles* (1948) 32 C.2d 791, 197 P.2d 713, text, p. 874]; *Ruiz v. Harbor View Community Assn.* (2005) 134 C.A.4th 1456, 1474, 37 C.R.3d 133 [publication to community association's board members of allegedly defamatory letter, written by lawyer representing association to homeowner who was denied application for building permit, was privileged because of board member's interest in letter]; 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §322.



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4. Request for Information.

5 Witkin Sum. Cal. Law Torts § 596

[§ 596] Request for Information.

(1) *In General.* A qualified privilege extends to a communication to an interested person by one who is requested by that person to give the information. (C.C. 47(c)(3), *supra*, §591; see *Rodas v. Spiegel* (2001) 87 C.A.4th 513, 519, 104 C.R.2d 439 [where two interested parties asked expert to prepare report, report was within C.C. 47(c)(3)]; *Rest.2d, Torts* §595, Comment j; 50 Am.Jur.2d (1995 ed.), *Libel and Slander* §336.)

In *Shoemaker v. Friedberg* (1947) 80 C.A.2d 911, 183 P.2d 318, plaintiff consulted defendant physician for treatment of personal injuries, and he received a laboratory report indicating that she had a venereal disease. *Held*, a letter to her and a conversation with her while members of her household were present, disclosing these facts, were privileged. (80 C.A.2d 917.)

(2) *Information Relating to Job Application.* C.C. 47(c) expressly applies to "a communication concerning the job performance or qualifications of an applicant for employment, based on credible evidence and made without malice, by a current or former employer of the applicant to, and on request of, one whom the employer reasonably believes is a prospective employer." The current or former employer, or that employer's agent, is authorized to answer whether that employer would rehire the applicant. (C.C. 47(c); see *Freeman v. Mills* (1950) 97 C.A.2d 161, 167, 217 P.2d 687 [communication by investigating agency, under contract with employer, concerning fitness of employee]; *Lesperance v. North Amer. Aviation* (1963) 217 C.A.2d 336, 341, 31 C.R. 873 [former employer's response to inquiry from prospective employer]; *Noel v. River Hills Wilsons* (2003) 113 C.A.4th 1363, 1373, 7 C.R.3d 216 [condition that statement must be "based on credible evidence" means that privilege is lost if statement is based only on rumor; however, mere negligence in the sense of oversight or unintentional error is not alone enough to render privilege inapplicable]; 26 A.L.R.3d 492 [public officer's privilege where statement made in connection with hiring and firing].)

The privilege does not apply, however, to a communication concerning the speech or activities of the applicant if they are constitutionally protected, or are protected by C.C.P. 527.3 (concerted activity respecting labor disputes; see 2 *Summary* (10th), *Agency and Employment*, §653) "or any other provision of law." (C.C. 47(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §319.



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5. Credit Report.

5 *Witkin Sum. Cal. Law Torts* § 597

[§ 597] Credit Report.

(1) *Privilege Under C.C. 47(c)*. A credit report of a mercantile agency has been held privileged under C.C. 47(c), though not specifically mentioned in that statute. (See *Stationers Corp. v. Dun & Bradstreet* (1965) 62 C.2d 412, 418, 42 C.R. 449, 398 P.2d 785; *Roemer v. Retail Credit Co.* (1970) 3 C.A.3d 368, 370, 83 C.R. 540; 7 Cal. Western L. Rev. 216, 218.) (For the general law, see 15A Am.Jur.2d (2000 ed.), *Collection and Credit Agencies* §28 et seq.; 9 Proof of Facts 2d 1 [commercial defamation]; 30 A.L.R.2d 776 [report of mercantile agency as privileged]; 40 A.L.R.3d 1049 [sufficiency of showing of malice or lack of reasonable care to support credit agency's liability for circulating inaccurate credit report]; 50 A.L.R.4th 745 [liability of better business bureau].)

In the *Stationers Corp.* case, supra, the agency failed to make the necessary showing of good faith to bring C.C. 47(c) into operation. Plaintiff officers of plaintiff corporation were sued by another corporation on allegations that the two individuals set high salaries for themselves, which constituted fraudulent misappropriation of assets. Defendant mercantile agency, after inquiries of several credit managers of firms doing business with the corporation, issued reports to its customers on the complaint, stating that "a number of authorities are of the opinion that this suit has considerable merit." In plaintiffs' libel suit, defendant was given summary judgment. *Held*, reversed. Plaintiffs' declaration showed that they were unable to ascertain from defendants the names of the "authorities" referred to, and, on the analogy of the cases requiring disclosure of an informer relied on for probable cause to arrest, the privilege could not be supported without disclosure. "It would be grossly unjust to permit a defendant, in the pursuit of his commercial interests, to rely upon the special privilege ... without requiring him to disclose information in his possession necessary to determine whether the statements were made without malice. Defendants cannot require a court to accept their *ipse dixit* assertion of good faith, particularly on motion for summary judgment." (62 C.2d 420.) (See 3 *San Diego L. Rev.* 127.)

(2) *Privilege Under Specific Statute*. Under C.C. 1785.32, a consumer may not bring a defamation action against a consumer reporting agency or any user or reporter of information, where the action is based on information disclosed pursuant to C.C. 1785.10, 1785.15, or 1785.20 (consumer's right to disclosure of reported information), "except as to false information furnished with malice or willful intent to injure such consumer." (On Consumer Credit Reporting Agencies Act and Federal Fair Credit Reporting Act, see 4 *Summary* (10th), *Sales*, §297; 47 *So. Cal. L. Rev.* 1070; 24 *Stanf. L. Rev.* 550.)

West's Key Number Digest, Libel and Slander k.42(.5)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Answer to Defamatory Charge.

5 *Witkin Sum. Cal. Law Torts* § 598

[§ 598] Answer to Defamatory Charge.

A person is privileged to protect the person's own interests by defending himself or herself against a defamatory charge. (*Western Broadcast Co. v. Times-Mirror Co.* (1936) 14 C.A.2d 120, 124, 57 P.2d 977; see 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §33; 41 *A.L.R.3d* 1083 [qualified privilege of reply to defamatory publication].) "A conditional privilege exists ... when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment. ... Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his reputation against the defamation of another, including the statement that his accuser is an unmitigated liar." (*Rest.2d, Torts* §594, Comment k.)

West's Key Number Digest, Libel and Slander k.46

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §§33, 320.



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7. No "Public Interest" Privilege for Media.

5 Witkin Sum. Cal. Law Torts § 599

[§ 599] No "Public Interest" Privilege for Media.

Brown v. Kelly Broadcasting Co. (1989) 48 C.3d 711, 257 C.R. 708, 771 P.2d 406, holds that C.C. 47(c) does not protect the news media when they make false statements regarding a private individual, even though the communication pertains to a matter of public interest. Thus, a private-person plaintiff defamed by such a publication "is not required ... to prove malice to recover compensatory damages." (48 C.3d 719.) The case arose out of a broadcast by defendant television station on a consumer affairs program, in which statements were made indicating that plaintiff contractor's remodeling work on a home was shoddy. The trial judge granted summary judgment for defendants on the ground that the broadcasts were qualifiedly privileged under C.C. 47(3) (now C.C. 47(c)), and that plaintiff had failed to raise a triable issue of material fact as to defendant's malice. The Court of Appeal reversed, finding sufficient evidence to raise a triable issue. The Supreme Court affirmed the judgment for plaintiff, not on the ground of a triable issue of malice, but because the statutory privilege was not available.

(a) *No constitutionally mandated privilege.* Until the decision of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, *infra*, §601, the law of defamation was almost exclusively the business of state courts and legislatures. (48 C.3d 721.) In *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, *infra*, §613, the Court reaffirmed the *New York Times* constitutional standard governing liability to public figures, but declared that the standard of liability for defamatory falsehood injurious to a private individual was for the states to determine; i.e., that the public interest privilege advocated by defendants is not required by the federal *Constitution*. (48 C.3d 722, 728.)

(b) *Statutory language.* The language of the qualified privilege statute contains no reference to a "public interest" privilege or any other "special privilege for the news media." C.C. 47(4) (now C.C. 47(d)), on fair and true report in a "public journal" (see *supra*, §585), and C.C. 47(5) (now C.C. 47(e)), on fair and true report on a public meeting when the publication was for "the public benefit" (see *supra*, §589), suggest that the Legislature did not intend that the qualified privilege statute "apply to the news media as such or to communications on matters of public interest." (48 C.3d 725.)

(c) *Legislative history.* The legislative history confirms that the qualified privilege statute "is narrow in scope." It

was intended to codify the narrow common law privilege of common interest, which protected communications made in good faith on a subject in which the speaker and hearer shared an interest or duty. The interest protected was private or pecuniary, the relationship between the parties was close (e.g., a family, business or organizational interest), and the request for information must have been in the course of the relationship. (48 C.3d 727, 729.) "The interest a news publisher has in a story may or may not be shared by its audience. Even if there is a shared interest, it is not 'common' within the meaning of the common-interest privilege." (48 C.3d 729.)

(d) *Judicial construction.*

(1) *Gilman v. McClatchy* (1896) 111 C. 606, 44 P. 241, *Newby v. Times-Mirror Co.* (1916) 173 C. 387, 160 P. 233, and *Snively v. Record Publishing Co.* (1921) 185 C. 565, 198 P. 1, consistently distinguished between public and private citizens. (48 C.3d 730, 731.) The court in *Snively* spoke in terms of a public interest, "but the defense it recognized was the right of fair comment, recognized at common law, which protected 'expressions of opinion about public officials, scientists, artists, composers, performers, authors, and other persons who place themselves or their work in the public eye.' ... That defense did not protect defamation of *private* citizens." (48 C.3d 732.)

(2) "Unfortunately, the fair-comment defense has often been misunderstood in a couple of respects. First, the common-interest privilege and the right of fair comment, which were distinct defenses under the common law, have often been treated as a single defense in cases under section 47(3). ... We conclude, however, that the Legislature did not intend to include the right of fair comment within section 47(3). ... [T]he fair-comment defense had existed long before section 47(3) was enacted, and there is no indication that the Legislature intended to abrogate the defense. Thus, the *Snively* court ... was correct in relying on the defense but should have treated it as a matter of common law, not as a defense based on section 47(3). The fair-comment defense arises independently of section 47(3), which encompasses only the common-interest privilege. We disapprove of the language in *Snively* and other cases indicating that the fair-comment defense is within section 47(3)." (48 C.3d 732, footnote 18, citing illustrative cases.) And the statement by courts and commentators that fair comment on matters of public concern is "privileged" is incorrect. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. "In the case of fair comment on matters of public concern, however, *all* persons may comment equally. ... Thus it is better practice to refer to fair comment as a right rather than a privilege." (48 C.3d 733, footnote 18; on right of fair comment, see *infra*, §617 et seq.)

(e) *Policy considerations.*

(1) *Privilege would be overly broad.* The asserted privilege would be so broad as to apply to almost every defamatory communication. "Presumably, the news media generally publish and broadcast only matters that the media believe are of public interest, and the media defendant in every defamation action would therefore argue that the communication was a matter of public interest. ... Thus, the practical result sought by the news media would be that nearly everything they publish and broadcast would be privileged." (48 C.3d 725.)

(2) *Legislative prerogative.* "[T]he result implicitly sought by the media in this case is a rule that in effect would be, 'If it is published, it is privileged.' Such an expansion of C.C. 47(3) would raise serious public policy questions including the need for further restriction of a defamed person's right to recover and whether such restriction should be accompanied by other changes in the law of defamation. ... Such changes require analysis of empirical data and are better dealt with in the legislative arena." (48 C.3d 740.)

(3) *Decisions in other jurisdictions.* A public interest privilege under C.C. 47(3) (now C.C. 47(c)) would impose a malice requirement on private persons, contrary to the overwhelming weight of authority from other states. (48 C.3d 740, 741, listing cases.) The Second Torts Restatement reflects this case law by adopting a negligence standard for private plaintiffs. (48 C.3d 742, citing *Rest.2d, Torts §580B*.) "We decline to diverge from the near unanimous authority that a private person need prove only negligence (rather than malice) to recover for defamation." (48 C.3d 742.)

(4) *Importance of reputation.* "Surely a decent, open society cannot, in the name of press and speech freedom, so thoroughly undermine this remedy as to render it useless to those people who have been damaged by a defamatory falsehood negligently uttered in the mass media and have not in any way sought the public limelight." (48 C.3d 743.) And interpreting the statute to require a private person to prove malice would call for a showing of a greater degree of culpability by the defendant than in the case of a public person under the common law fair-comment defense and its constitutional-malice standard. Malice under the statute is actual malice in fact, i.e., hatred or ill will evidencing a willingness to injure; constitutional malice means only that the defendant entertained serious doubts as to the truth of his or her publication. (48 C.3d 745.) And Cal. Const., Art. I, §2(a), stating that a person is responsible for abuse of the right of free speech, makes it clear that "the right is not unfettered and reflects a considered determination that the individual's interest in reputation is worthy of a constitutional protection." The federal Constitution contains no such express provision; and this difference refutes defendant's contention that California's Constitution "weighs in favor of a standard of fault higher than that required under the federal Constitution." (48 C.3d 746.)

(5) *Constitutional protections for news media.* Defamation defendants now have a panoply of constitutional protections, ameliorating the harsh effects of the common law strict liability. First, a private figure plaintiff must prove at least negligence; and when the speech involves a matter of public concern, he or she must also prove *New York Times* malice to recover presumed or punitive damages. (48 C.3d 747, citing *Gertz, supra*, and *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593, *infra*, §615.) Second, when the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving falsity of the defamation. (48 C.3d 747, citing *Philadelphia Newspapers v. Hepps* (1986) 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783, *infra*, §614.) Third, contrary to the normal rule of review, the reviewing court must independently review all the evidence on the issue of malice. (48 C.3d 747, citing *Bose Corp. v. Consumers Union of United States* (1984) 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502, *infra*, §612, and *McCoy v. Hearst Corp.* (1986) 42 C.3d 835, 231 C.R. 518, 727 P.2d 711, *infra*, §612.) "These constitutional obstacles to recovery provide even greater protection for the news media than the common law privileges. The original reason for those privileges--strict liability for defamation--has disappeared. ... One of the foremost tort law commentators has explained that when some degree of fault is required, as is now the law, there is no need for any privilege." (48 C.3d 747, citing *Prosser & Keeton*.) "And expansion of the statutory privilege would unnecessarily complicate defamation law, which is now largely governed by constitutional doctrine." (48 C.3d 747.)

(6) *Absence of need for expanded privilege.* The media's contention that a negligence standard will subject them to such self-exacting scrutiny as to have a chilling effect on the free flow of information is not persuasive.

(a) Its implicit premise is that if the media business can be held responsible for falsehoods, it will be less likely to report the news. "This suggests that the news media's only reason to be accurate is to avoid legal liability. We are reluctant to attribute such a self-serving motive to the news media. It is equally or more likely that the great majority of journalists strive for accuracy because they are dedicated to the high standards of professional craftsmanship." (48 C.3d 748.)

(b) Defendants and amici curiae have not identified a single instance in which they have declined to report the news for fear that the qualified privilege statute is not as broad as they would like; and they have not attempted to show that the free flow of information has been restricted even in the slightest degree in the overwhelming number of states that have adopted a negligence standard for private figure plaintiffs. (48 C.3d 749.) And there is considerable evidence that the media are not unduly hampered in their reporting by defamation actions. (48 C.3d 750.)

(c) Under the *New York Times* standard of fault and related restrictions, a victim of defamation seldom recovers damages; imposing a malice requirement on private persons might therefore be of marginal benefit to increasing the free flow of information on public issues. (48 C.3d 751.)

(d) Apart from legal protections, the news media already have available to themselves the most powerful defense to a defamation action--the ability to correct the error. (48 C.3d 751.)

(e) The media themselves often select, by what they choose to publish, the subjects that become matters of public interest. This "bootstrap" extension of the privilege to everything published would largely do away with recovery for defamation, and give the media a privilege shared by no other speaker: "[W]e reject the notion that a news-media defendant should be allowed to determine for practical purposes, by virtue of what it chooses to publish or broadcast, whether its communication is privileged and thus to determine by what standard of fault it will be judged." (48 C.3d 753.)

(f) The malice standard of fault imposed by *New York Times* carries significant burdens as well as benefits to the news media. First, a plaintiff required to prove knowing falsehood or subjective awareness of probable falsity is allowed wide ranging discovery of the editorial process. (48 C.3d 753, citing *Herbert v. Lando* (1979) 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115, infra, §610.) As a result, the largest cost to the media is not large damage awards but the insurance premiums for the cost of defending litigation. "In short, it has become widely recognized that the expense of defamation suits the news media seek to avoid appears to be in large measure the result of the very privilege they insisted they must have to avoid expensive litigation." (48 C.3d 754.) Second, in another subtle way, the constitutional-malice standard works against the news media. Defamation victims, faced with a refusal to correct the record, may have little choice but to litigate in order to clear their reputations. (48 C.3d 754.) And a popular perception of journalistic arrogance may be the reason why juries often rule against libel defendants. "Excessive protection for defamation may result in popular antipathy toward the press that manifests itself in lawsuits and jury verdicts." (48 C.3d 754.)

(g) "The vast majority of news media entities operate for profit. ... It has recently been reported that 'twenty-nine corporations control most of the business in daily newspapers, magazines, television, books, and motion pictures' and predicted that 'by the 1990s a half-dozen large corporations will own all the most powerful media outlets in the United States.' ... Indeed the news media amici curiae who have appeared in this action are entities of enormous financial resources. When they negligently defame a private person, it is not unfair for them to pay for the injury." (48 C.3d 753.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

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C. Defamation.

4. Defenses.

c. Qualified Privilege.

8. Pleading and Proof.

5 Witkin Sum. Cal. Law Torts § 600

[§ 600] Pleading and Proof.

(1) *Pleading and Burden of Proof.* Generally, the defendant bears the initial burden of establishing that the statement was made on a privileged occasion. Once the defendant has met this burden, however, the burden then shifts to the plaintiff to establish that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 C.4th 1193, 2002, 31 C.R.2d 776, 875 P.2d 1279; see 22 *Pepperdine L. Rev.* 1765 [Lundquist]; BAJI, No. 7.05.1; CACI, No. 1723.)

Where the complaint shows that the statement is within a class qualifiedly privileged, it is necessary for the plaintiff to go further and plead and prove that the privilege is not available as a defense in the particular case, e.g., because of malice. (*Kapellas v. Kofman* (1969) 1 C.3d 20, 29, 81 C.R. 360, 459 P.2d 912; *Jackson v. Underwriters' Report* (1937) 21 C.A.2d 591, 593, 69 P.2d 878; *Deaile v. General Tel. Co. of Calif.* (1974) 40 C.A.3d 841, 848, 115 C.R. 582, supra, §594, citing the text; see *Locke v. Mitchell* (1936) 7 C.2d 599, 602, 61 P.2d 922 [insufficient to allege bare conclusion of law that defendant "maliciously" published the matter]; *Glenn v. Gibson* (1946) 75 C.A.2d 649, 659, 171 P.2d 118 [complaint required to allege facts of malice]; *Shoemaker v. Friedberg* (1947) 80 C.A.2d 911, 919, 183 P.2d 318 [burden of proving malice rested on plaintiff under pleadings]; *Freeman v. Mills* (1950) 97 C.A.2d 161, 167, 217 P.2d 687 [same]; *Noonan v. Rousselot* (1966) 239 C.A.2d 447, 453, 48 C.R. 817 [same]; *Mullins v. Brando* (1970) 13 C.A.3d 409, 419, 91 C.R. 796 [pleading of malice held sufficient]; 5 *Cal. Proc.* (4th), *Pleading*, §869; 26 *Cal. L. Rev.* 226, 238; 51 *Cal. L. Rev.* 1023; 12 *So. Cal. L. Rev.* 225, 248.)

(2) *Standard of Proof.* In the absence of First Amendment considerations (see *infra*, §601 et seq.), the ordinary standard of preponderance of evidence applies to proof of the issue of malice. (*Roemer v. Retail Credit Co.* (1975) 44 C.A.3d 926, 932, 119 C.R. 82.)

West's Key Number Digest, Libel and Slander k.83, 104.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Pleading and Burden of Proof.*

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §915.



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C. Defamation.

4. Defenses.

d. Constitutional Limits on Recovery.

1. In General.

5 Witkin Sum. Cal. Law Torts § 601

[§ 601] In General.

(1) *New York Times Case*. In *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 7 Summary (10th), *Constitutional Law*, §426, the United States Supreme Court invoked the First and Fourteenth Amendments to make the defense of qualified privilege in defamation an element of constitutional due process. More specifically, the *New York Times* rule, applicable in actions by public officials or figures (infra, §602 et seq.), protects false statements of fact as well as opinions where made without actual malice; i.e., the privilege exists unless the statements were made with knowledge of falsity or in reckless disregard of the truth. (See Dobbs, *The Law of Torts* §417 et seq.; 2 Harper, James, & Gray 2d §5.0; C.E.B., 2 California Business Litigation, §11.151; 63 So. Cal. L. Rev. 433 [Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation]; 34 U.C.L.A. L. Rev. 1657 [Constitutional Libel Law: The Role of Content]; 50 Am.Jur.2d (1995 ed.), *Libel and Slander* §42 et seq.; for argument that summary judgment should be liberally granted to media defendants to avoid self-censorship resulting from high litigation costs, see 52 So. Cal. L. Rev. 1783.) The statement must specifically refer to, or be "of and concerning," the plaintiff in some way. (*Rosenblatt v. Baer* (1966) 383 U.S. 75, 86 S.Ct. 669, 673, 15 L.Ed.2d 597, 603.)

(2) *Restatement Rules Concerning Impact of First Amendment*. Rest.2d, Torts, Division Five, p. 151, has a "Special Note on the Impact of the First Amendment of the Constitution on the Law of Defamation." A change in the law of torts, "so substantial as to be almost a transformation" has "come about with the holding in *New York Times Co. v. Sullivan* ... , that the law of defamation comes under the control of the First Amendment to the Constitution and its prohibition against any law abridging the freedom of speech or of the press. Applied to judicial decisions under the common law as well as to legislative provisions and extended to state law through incorporation into the Fourteenth Amendment, this clause of the First Amendment is being used by the United States Supreme Court to rewrite many aspects of the law of defamation. "

The Special Note lists the following major changes:

"(1) Section 580A provides that in case of a defamatory communication published about a person in his capacity as a public official or public figure, the plaintiff must prove, with convincing clarity, that the defendant published the

matter with knowledge or in reckless disregard of its falsity and its defamatory character; and that a finding of knowledge or reckless disregard involves the application of a constitutional standard that is subject to appellate review to determine whether the evidence is constitutionally adequate to sustaining the finding."

"(2) Section 580B provides that a private person cannot prevail in an action for defamation unless he proves that the defendant was at least negligent regarding the falsity and defamatory character of the communication."

"(3) Section 600 provides that a conditional privilege is lost through abuse, not by negligence regarding the truth or falsity of the communication, but by knowledge or reckless disregard of its falsity."

"(4) Section 621 provides that recoverable damages are limited to 'compensation for actual injury' and treats the meaning of actual injury."

"(5) Section 566 provides that there can be no recovery for a mere expression of opinion that does not carry by implication an expression of defamatory facts and explains that as a result of this rule the privilege of fair comment has become obsolete."

West's Key Number Digest, Constitutional Law k.90.1(5); Libel and Slander k.48, 51(5)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *New York Times Case*. See 2 Harper, James & Gray 3d §5.0; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §42 et seq.



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2. Statements Concerning Public Officials or Public Figures.

aa. New York Times Rule: Requirement of Actual Malice.

5 Witkin Sum. Cal. Law Torts § 602

[§ 602] New York Times Rule: Requirement of Actual Malice.

Rest.2d, Torts §580A, stating the rule of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, supra, §601, as applied to public officials and public figures reads as follows: "One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters."

The Restatement contains an extensive explanation of the nature, scope and application of the rule. (See Comment a [underlying principle]; Comment b [public officials]; Comment c [public figures]; Comment d [knowledge or reckless disregard as to falsity and defamatory character]; Comment e [burden of pleading and proving constitutional privilege]; Comment f [weight of evidence]; Comment g [constitutional standard and appellate review].) (See Dobbs, *The Law of Torts* §418; 2 Harper, James & Gray 2d §5.0.)

The required state of mind is generally referred to as "actual malice" or "*New York Times* malice." (See *Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562, 576 ["actual malice"]; *Carney v. Santa Cruz Women Against Rape* (1990) 221 C.A.3d 1009, 1013, 271 C.R. 30, infra, §615 ["*New York Times* malice"].)

SUPPLEMENT: [This section is current through the latest supplement]

See 2 Harper, James & Gray 3d §5.0; 94 Cal. L. Rev. 833 [increased access of both private and public figures to corrective speech through modern technology suggests new test for when actual malice is required].



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2. Statements Concerning Public Officials or Public Figures.

bb. Public Official Plaintiffs.

5 *Witkin Sum. Cal. Law Torts* § 603

[§ 603] Public Official Plaintiffs.

(1) *In General.* The seminal holding in the *New York Times* case (*supra*, §601), recognizing a constitutional privilege to publish without actual malice, was itself directed to statements concerning public officials relating to official conduct. (See 7 *Summary* (10th), *Constitutional Law*, §426.)

(2) *Who Are Public Officials.* From an analysis of *Rosenblatt v. Baer* (1966) 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597, *supra*, §601, and *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, *infra*, §613, the court in *Mosesian v. McClatchy Newspapers* (1988) 205 C.A.3d 597, 252 C.R. 586, concluded that "the Supreme Court's vision of a 'public official' is someone in the government's employ who: (1) has, or appears to the public to have, substantial responsibility for or control over the conduct of governmental affairs; (2) usually enjoys significantly greater access to the mass media and therefore a more realistic opportunity to contradict false statements than the private individual; (3) holds a position in government which has such apparent importance that the public has an independent interest in the person's qualifications and performance beyond the general public interest in the qualifications and performance of all government employees; and (4) holds a position which invites public scrutiny and discussion of the person holding it entirely apart from the scrutiny and discussion occasioned by the particular controversy." (205 C.A.3d 608.)

Many cases have held the plaintiffs to be public officials subject to the *New York Times* rule. (See *Rosenblatt v. Baer*, *supra*, 86 S.Ct. 676, 15 L.Ed.2d 605 [lower ranks of public employees who exercise substantial governmental power]; *Tague v. Citizens for Law & Order* (1977) 75 C.A.3d Supp. 16, 21, 24, 142 C.R. 689 [assistant public defender was public official, because of broad discretionary control over pretrial steps and trial of felony cases]; *Gomes v. Fried* (1982) 136 C.A.3d 924, 933, 186 C.R. 605 [patrolman or low-level police officer]; *McCoy v. Hearst Corp.* (1986) 42 C.3d 835, 841, footnote 3, 231 C.R. 518, 727 P.2d 711, *infra*, §612 [police inspector]; 44 A.L.R.5th 193 [who is "public official" for purposes of defamation action]; BAJI, No. 7.04; CACI, Nos. 1700, 1701.)

(3) *Who Are Not Public Officials.* *Franklin v. Benevolent & Protective Order of Elks* (1979) 97 C.A.3d 915, 159 C.R. 131, reached a contrary result, holding that a high school teacher was not a public official within the meaning of

the *New York Times* rule. "Implicit in the reasoning of *New York Times* and *Rosenblatt* is the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those who control the conduct of government. The governance or control which a public classroom teacher might be said to exercise over the conduct of government is at most remote and philosophical: Far too much so, in our view, to justify exposing each public classroom teacher to a qualifiedly privileged assault upon his or her reputation." (97 C.A.3d 924.) (Cf. *Kahn v. Bower* (1991) 232 C.A.3d 1599, 1613, 284 C.R. 244, *infra*, §624 [county social worker with power over lives of handicapped children is more akin to prosecutor or police officer than to teacher, and hence is public official]; 24 *Santa Clara L. Rev.* 431.)

In *Mosesian v. McClatchy Newspapers*, *supra*, plaintiff was a 33% shareholder and a director of a corporation whose subsidiary, a horse racing association, was licensed to conduct a horse race meet in 1980, and had applied for a license to conduct a similar meet in 1981. *Held*, as a matter of law, plaintiff was not a public official.

(a) Because it is undisputed that plaintiff was not a government employee, a condition precedent for "public official" status, i.e., someone in the government's employ, is lacking here. (205 C.A.3d 609.)

(b) Defendants' primary contention is that plaintiff is a public official because he performs a government function, i.e., controlling gambling and the collection of public revenue, and protecting the public from organized crime. Not only is this contention based on an overbroad definition of "public official," it is also untenable for the following reasons:

(1) Even assuming a horse racing association could be a public official, that circumstance would not confer that status on plaintiff. The fact that plaintiff was the "main player" in the racing association's parent corporation is not grounds for piercing the corporate veil and treating plaintiff as the licensee. (205 C.A.3d 610.)

(2) Although plaintiff admitted that he was licensed as the general manager of the 1980 racing meet, the statutory and regulatory authorities cited by defendants as establishing a delegation of governmental function deal with the responsibilities of a horse racing association, not a general manager of a horse race meet. (205 C.A.3d 610.)

(3) The fact that horse racing associations are licensed and regulated by the government does not mean that they perform a governmental function any more than that the licensing of attorneys makes lawyering a governmental function or a lawyer a public official. (205 C.A.3d 610.)

(4) The fact that the public is concerned with illegal gambling and the dangers of organized crime does not make either the association or plaintiff a public official, as that concept is applied in defamation actions. (205 C.A.3d 611.)

James v. San Jose Mercury News (1993) 17 C.A.4th 1, 20 C.R.2d 890, applying the test set forth in *Mosesian* and disagreeing with *Tague*, held that a deputy public defender is not a public official. "From a practical perspective a deputy public defender in the discharge of his or her duties differs from a private criminal defense attorney only in the happenstance of his or her employment. Such control as he or she may exercise over the management of a particular case must invariably be controlled in turn by considerations of the best interests of the individual client, tempered only by professional constraints applicable to all attorneys and not by any generalized public interest beyond the concern that indigent defendants should be competently and professionally represented. It would be a gross overstatement to say that a deputy public defender has, or would appear to the public to have, 'substantial responsibility for or control over the conduct of governmental affairs.'" (17 C.A.4th 11.)

West's Key Number Digest, Libel and Slander k.48(2)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Who Are Public Officials*. See *Vogel v. Felice* (2005) 127 C.A.4th 1006, 1017, 26 C.R.3d 350 [*New York Times* rule applies to candidates for public office, as well as persons already in office].

In *Ghafur v. Bernstein* (2005) 131 C.A.4th 1230, 32 C.R.3d 626, the superintendent of a charter school system sued

defendants for libel for statements in a letter to the Superintendent of Public Instruction urging an investigation into the plaintiff's links to a terrorist organization and suspension of funding for the system. *Held*, judgment for defendants affirmed; the alleged libel concerned plaintiff's role as a public official, and she failed to establish actual malice.

(a) Whether someone is a "public official" for purposes of the *New York Times* rule is determined according to federal standards. Under those standards, the public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. The employee's position must be one that would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy. (131 C.A.4th 1237.)

(b) There is disagreement among jurisdictions about whether public school principals and teachers are to be considered public officials. However, there is apparently universal agreement that public school superintendents and board members merit that designation. Clearly, the governance of a public school system is of the utmost importance to a community, and school board policies are often carefully scrutinized by residents. (131 C.A.4th 1238.)

(c) This reasoning is persuasive here. Plaintiff was the superintendent of what was described at the time as the fastest growing charter school system in the state. At their peak, these charter schools were educating 1,000 students. They had received over \$ 1 million in public funds for their operation, and stood to receive millions of dollars more. Plaintiff was the primary, if not sole, spokesperson for these schools, and the one in charge of their management. In that capacity she had substantial responsibility for or control over the conduct of governmental affairs, and her position was one of sufficient importance to invite public scrutiny. (131 C.A.4th 1238.)

(d) Plaintiff contends that she cannot be considered a public official under *New York Times* because she was not a governmental employee. However, California charter schools are part of this state's public school system, and charter school officials are officers of the public schools to the same extent as members of other boards of public school districts. (131 C.A.4th 1239.) Plaintiff, as the superintendent of a charter school system, was, like other public school superintendents and board members, a public official under *New York Times*, whether or not she was, strictly speaking, a governmental employee in that capacity. "A contrary conclusion would exalt form over substance." (131 C.A.4th 1240.)



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C. Defamation.
4. Defenses.
d. Constitutional Limits on Recovery.
2. Statements Concerning Public Officials or Public Figures.
cc. Public Figure Plaintiffs.

5 Witkin Sum. Cal. Law Torts § 604

[§ 604] Public Figure Plaintiffs.

(1) *New York Times Rule Applies*. In *Curtis Publishing Co v. Butts* (1967) 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, 7 Summary (10th), *Constitutional Law*, §426, the rule was applied to criticism of public figures who are not public officials. (See *Greenbelt Cooperative Publishing Assn. v. Bresler* (1970) 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 [following *Curtis*]; *Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 109 S.Ct. 2678, 2681, 105 L.Ed.2d 562, 571 [same]; *Belli v. Curtis Publishing Co.* (1972) 25 C.A.3d 384, 388, 102 C.R. 122 [same]; *Reader's Digest Assn. v. Superior Court* (1984) 37 C.3d 244, 253, 208 C.R. 137, 690 P.2d 610 [same]; *Gallagher v. Connell* (2004) 123 C.A.4th 1260, 1272, 20 C.R.3d 673 [whether plaintiff in defamation action is public figure is question of law]; *Dobbs*, *The Law of Torts* §418; 2 *Harper, James & Gray* 2d §5.0; 18 *San Diego L. Rev.* 72 [criticism of public figure--private figure test in context of corporate defamation plaintiff]; 34 *Stanf. L. Rev.* 901 [effect of passage of time on individual's status as public figure]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §67 et seq.; BAJI, No. 7.04; CACI, Nos. 1702, 1703.)

(2) *All-Purpose Public Figures*. The cases have recognized two types of public figures: The first type consists of persons who "occupy positions of such persuasive power and influence that they are deemed public figures, for all purposes." (*Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789, 808, *infra*, §613; *Reader's Digest Assn. v. Superior Court*, *supra*, 37 C.3d 253 [discussing *Gertz* classification]; 34 *Hastings L. J.* 809; 19 *A.L.R.5th* 1 [who is "public figure" for purposes of defamation action].)

(3) *Limited-Purpose Public Figures*. The second type includes those who are public figures only with respect to some particular controversy or set of events. A limited-purpose public figure "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (*Gertz v. Robert Welch*, *supra*, 94 S.Ct. 3013, 41 L.Ed.2d 812; see *Reader's Digest Assn. v. Superior Court*, *supra*, 37 C.3d 254 ["when called upon to make a determination of public figure status, courts should look for evidence of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies"].)

(4) *Illustrations*. In numerous cases, plaintiffs have been held to be public figures subject to the *New York Times*

rule. (See *Okun v. Superior Court* (1981) 29 C.3d 442, 451, 175 C.R. 157, 629 P.2d 1369, supra, §546 [developer seeking to construct condominiums contrary to protests of many residents]; *Montandon v. Triangle Publications* (1975) 45 C.A.3d 938, 120 C.R. 186, infra, §611 [author promoting sale of book by appearance on television and radio programs]; *Widener v. Pacific Gas & Elec. Co.* (1977) 75 C.A.3d 415, 433, 142 C.R. 304 [documentary film producer]; *Wiengarten v. Block* (1980) 102 C.A.3d 129, 141, 162 C.R. 701 [former city attorney and local attorney for redevelopment agency]; *Kaufman v. Fidelity Fed. Savings & Loan Assn.* (1983) 140 C.A.3d 913, 921, 189 C.R. 818 [plaintiff savings and loan association official injected himself into zoning dispute]; *Nadel v. Regents of Univ. of Calif.* (1994) 28 C.A.4th 1251, 1269, 34 C.R.2d 188, infra, §607 [persons who played leadership role in protesting university's plan to build volleyball courts in park]; *Rudnick v. McMillan* (1994) 25 C.A.4th 1183, 1189, 31 C.R.2d 193 [rancher who induced publishers to write articles concerning alleged governmental misuse of his former land]; *Denney v. Lawrence* (1994) 22 C.A.4th 927, 935, 27 C.R.2d 556 [former sheriff's deputy who gave interviews concerning murder charges against his twin brother during which he promoted version favorable to his brother]; *Copp v. Paxton* (1996) 45 C.A.4th 829, 844, 52 C.R.2d 831 [person who posed as an expert on earthquake safety measures]; *Anti-Defamation League of B'nai B'rith v. Superior Court* (1998) 67 C.A.4th 1072, 1090, 79 C.R.2d 597 [plaintiffs who had been outspoken in opposition to apartheid and Israeli policies regarding Palestine were limited public figures]; *Annette F. v. Sharon S.* (2004) 119 C.A.4th 1146, 1162, 15 C.R.3d 100 [plaintiff's purposeful activities in drawing public attention to her lesbian relationship with defendant, and to their earlier conduct of litigation on validity of second-parent adoptions, in order to promote gay marriage and second-parent adoptions, made her limited-purpose public figure on subject of that litigation]; *Sipple v. Foundation for Nat. Progress* (1999) 71 C.A.4th 226, 248, 83 C.R.2d 677 [nationally known political strategist was public figure]; 49 So. Cal. L. Rev. 1131 [relatives of public figures].)

Candidates for public office constitute public figures. (*Monitor Patriot Co. v. Roy* (1971) 401 U.S. 265, 91 S.Ct. 621, 624, 28 L.Ed.2d 35, 40; *Kapellas v. Kofman* (1969) 1 C.3d 20, 28, 81 C.R. 360, 459 P.2d 912; *Noonan v. Rousselot* (1966) 239 C.A.2d 447, 451, 48 C.R. 817.) The "need to protect a free flow of information regarding qualifications of persons applying for, as well as already holding, public office compels the application of an actual malice standard to candidates for office." (*Miller v. Nestande* (1987) 192 C.A.3d 191, 201, 237 C.R. 359, infra, §606.)

In *Reader's Digest Assn. v. Superior Court*, supra, it was held that both Synanon, a foundation established as a rehabilitation program for drug addicts, and its founder were public figures. "While any person or organization has the right to engage in publicity efforts and to attempt to influence public and media opinion regarding their cause, such significant, voluntary efforts to inject oneself into the public arena require that such person or organization be classified as a public figure in any related defamation actions. In the instant case, Synanon and its founder have sponsored massive publicity and self-promotion efforts over a period of many years and apparently *increased* these efforts with regard to the present controversy. As such, they enjoyed remarkable access to the media through which to counter any criticisms they deemed to be unwarranted and voluntarily exposed themselves to increased risk of injury from unfavorable commentary about them. Thus they have clearly met the standards for 'public figure' status for purposes of this defamation action." (37 C.3d 256.)

In *Mosesian v. McClatchy Newspapers* (1991) 233 C.A.3d 1685, 285 C.R. 430, plaintiff obtained limited public figure status by being a shareholder, officer, and director of Calfax, a corporation that, after much public controversy, was awarded a license to conduct the first spring horse racing meet in Fresno in 1980. In this defamation action against defendant newspaper based on an article published after plaintiff announced his intention to reapply for a license in 1981, plaintiff argued that his status as a public figure had ended because he had been out of the news during the 5 months from his announcement to the publication of the article. *Held*, plaintiff remained a public figure for as long as the specific issue for which public status was achieved continued.

"While plaintiff's argument has a superficial appeal, it nonetheless must be rejected. ... [H]orse racing is a matter of serious public concern because it involves gambling on a large-scale basis. Gambling attracts criminal elements who will engage in illegal wagering, bookmaking and other unlawful acts. For this reason, the personal qualifications, background, and honesty of the license applicant, his organization and his associates are subject to public scrutiny. ... Thus, when plaintiff announced at the end of the 1980 meet that Calfax would apply for a license to operate the 1981

spring meet, plaintiff's status as a public figure continued for the limited purpose of his qualifications to obtain a license for that meet. The fact that plaintiff had not formally applied for the 1981 license when defendant's allegedly defamatory article appeared is of no moment. Public statements issued by plaintiff leading up to and during Calfax's operation of the 1980 spring horse racing meet, including his announcement that Calfax would seek relicensing for the 1981 season, constituted a purposeful reinjection of plaintiff's personality into the continuing public controversy over the operation of spring horse racing in Fresno." (233 C.A.3d 1702.)

In *Live Oak Publishing Co. v. Cohagan* (1991) 234 C.A.3d 1277, 286 C.R. 198, supra, §537, plaintiffs pleaded a cause of action for slander, based on statements that defendant made to employees of plaintiffs' newspaper. On appeal, plaintiff publishing company conceded that it was itself a public figure, but sought separate treatment for the individual plaintiffs--the managerial employees of the company. However, the individual plaintiffs "are intimately involved in public political debate in their community and the community has a legitimate and substantial interest in their conduct regarding the operation of the newspaper." (234 C.A.3d 1290.) Hence, they were also public figures. (234 C.A.3d 1290.) And mere evidence of ill will was insufficient to prove malice. (234 C.A.3d 1291; see supra, §593.)

In *Stolz v. KSFM 102 FM* (1994) 30 C.A.4th 195, 35 C.R.2d 740, plaintiff, the owner, operator, and general manager of a radio station, sued defendants, another radio station, one of its employees, and a broadcasting company, for defamation. The suit was based on statements made in a program on defendant station criticizing plaintiff's station as irresponsible for broadcasting racist and antihomosexual remarks and for allowing sex with minors in the station's van. The trial judge determined that plaintiff was a public figure and that the allegedly defamatory speech involved matters of public concern, thereby imposing on plaintiff the burden to prove falsity and actual malice. *Held*, jury verdict for defendants affirmed. Plaintiff's radio station was an all-purpose public figure by virtue of occupying a position of general fame and pervasive power and influence in the community in which the allegedly defamatory speech was broadcast. (30 C.A.4th 205.) Thus, plaintiff, who brought the action in his own name, alleging that he was "an individual conducting business as" his station, was also a public figure. The offensive speech related directly to the operation and management of the station. It was unnecessary to determine if plaintiff was a public figure for all purposes; it was sufficient to conclude that, at least with respect to matters directly related to the operation and management of the station, plaintiff was a limited purpose public figure. (30 C.A.4th 206.)

West's Key Number Digest, Libel and Slander k.48(1), 48(3)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *New York Times Rule Applies*. See 2 Harper, James & Gray 3d §5.0; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §46 et seq.

(3) *Limited-Purpose Public Figures*. The "elements that must be present in order to characterize a plaintiff as a limited purpose public figure" are as follows: "First, there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. Second, the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue. In this regard it is sufficient that the plaintiff attempts to thrust him or herself into the public eye. And finally, the alleged defamation must be germane to the plaintiff's participation in the controversy." (*Ampex Corp. v. Cargle* (2005) 128 C.A.4th 1569, 1577, 27 C.R.3d 863.) (See *Gilbert v. Sykes* (2007) 147 C.A.4th 13, 24, 53 C.R.3d 752 [quoting *Ampex*].)(4)

Illustrations. See *Ampex Corp. v. Cargle*, supra [corporation that was subject of allegedly defamatory Internet postings concerning its venture into Internet television business was limited-purpose public figure; it was publicly traded company and had inserted itself into controversy regarding venture through press releases and letters made available on Internet]; *Gilbert v. Sykes*, supra, 147 C.A.4th 25 [surgeon, prominent as expert in and advocate for plastic surgery as means of personal enhancement, was limited-purpose public figure, required to show actual malice to prevail on defamation claim]; *Christian Research Institute v. Alnor* (2007) 148 C.A.4th 71, 81, 55 C.R.3d 600, Supp., infra, §611 [nonprofit organization disseminating religious information and organization's president were public figures and thus had burden in defamation action of proving both that challenged statement was false and that defendant acted with actual malice]; *Overstock.com v. Gradient Analytics* (2007) 151 C.A.4th 688, 700, 61 C.R.3d 29 [online closeout

retailer, offering customers brand name merchandise at discount while offering suppliers alternative way to distribute inventory liquidation, was limited-purpose public figure]; *McGarry v. University of San Diego* (2007) 154 C.A.4th 97, 115, 64 C.R.3d 467 [college coach was limited-purpose public figure; plaintiff voluntarily entered public arena by pursuing that career and lost certain protection for his reputation to extent that allegedly defamatory communications related to his job performance].



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2. Statements Concerning Public Officials or Public Figures.

dd. Who Are Not Public Figures.

5 *Witkin Sum. Cal. Law Torts* § 605

[§ 605] Who Are Not Public Figures.

(1) *In General.* A number of cases have rejected attempts to bring plaintiffs within the "public figure" classification. It has been held, for example, that simply being a member of the clergy does not make one a public figure required to prove actual malice in a defamation action. *Gallagher v. Connell* (2004) 123 C.A.4th 1260, 1273, 20 C.R.3d 673.)

(2) *Involuntary Involvement in Matter of Public Interest.* In *Wolston v. Reader's Digest Assn.* (1979) 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450, defendant Reader's Digest published a book entitled "KGB, The Secret Work of Soviet Agents," written by an individual defendant. It described the Soviet Union's espionage activities after World War II, and stated that plaintiff was an identified Soviet agent. Plaintiff sued in the federal district court, and, on defendants' motion for summary judgment, made the following showing: In 1957, plaintiff's aunt and uncle pleaded guilty to espionage; a federal grand jury, investigating other suspects, called plaintiff as a witness on several occasions, but he later failed to respond to a subpoena and was cited for contempt; he appeared at the hearing with an excuse based on health problems, but nevertheless pleaded guilty and received a suspended sentence and probation conditioned on cooperation in the investigation. Fifteen news stories in Washington and New York mentioned these events, but the publicity subsided after plaintiff was sentenced. The district court granted summary judgment to defendants on the ground that plaintiff was a "public figure" and that the affidavits and depositions raised no issue of actual malice. *Held*, reversed.

(a) Plaintiff led a private life prior to the grand jury inquiry and returned to a position of relative obscurity after he was sentenced. Hence, he did not come within the first class of persons who occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. (99 S.Ct. 2706, 61 L.Ed.2d 458.)

(b) Plaintiff was likewise not within the second category of "limited-purpose" public figures: those who have thrust themselves to the forefront of particular public controversies. He did not voluntarily inject himself into the controversy; he was brought into it unwillingly by the grand jury investigation, never discussed the matter with the press, and limited his involvement to defense against the contempt charge. (99 S.Ct. 2707, 61 L.Ed.2d 459.) "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." (99 S.Ct. 2708, 61 L.Ed.2d 460.)

(c) Defendants argued that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction. A similar argument was rejected in *Time v. Firestone* (1976) 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154, *infra*, §613, and the observations in that case are controlling. "To hold otherwise would create an 'open season's for all who sought to defame persons convicted of a crime." (99 S.Ct. 2708, 61 L.Ed.2d 461.) (See 13 *Loyola L.A. L. Rev.* 179.)

Similar issues arose in *Franklin v. Benevolent & Protective Order of Elks* (1979) 97 C.A.3d 915, 929, 159 C.R. 131, *supra*, §603, involving statements regarding the choice of instructional materials by plaintiff high school teacher. The court reviewed relevant United States Supreme Court decisions and stated: "In our view the definition of 'public figure' which has evolved from *Butts* through *Gertz*, *Firestone* and *Wolston* incorporate as an element a requirement that the libel plaintiff must have voluntarily and actively sought, in connection with any given matter of public interest, to influence the resolution of the issues involved. To us it seems clear that only by such voluntary and active participation could an individual be said to have 'relinquished ... his interest in the protection of his own name.' " (97 C.A.3d 929.) The court concluded that plaintiff, concededly not a public figure for all purposes, was also not a public figure for the limited purpose of the controversy over the teaching materials. She made a selection of materials for the purpose of discharging her teaching duties, and with no anticipation of controversy. She did not take her case to the public or in any other sense assume "special prominence." Hence, she maintained her status as a private individual and was not required to show that defendants had published with actual malice. (97 C.A.3d 931.) (See *Anti-Defamation League of B'nai B'rith v. Superior Court* (1998) 67 C.A.4th 1072, 1091, 79 C.R.2d 597 [teaching university class involving issues of public concern does not constitute purposeful political activity justifying classification as limited purpose public figure]; 24 *Santa Clara L. Rev.* 431.)

These issues were discussed by the California Supreme Court in *Khawar v. Globe Int.* (1998) 19 C.4th 254, 79 C.R.2d 178, 965 P.2d 696. Plaintiff photojournalist was photographed on a podium near a famous politician who was assassinated moments later. Approximately 20 years later, a book, using this photograph, promulgated the theory that plaintiff was the assassin. After defendant newspaper reviewed the book and republished the false accusation regarding plaintiff, he sued for defamation, and the initial issue was whether plaintiff was a public figure. *Held*, he was not.

(a) Defendant relied on statements in *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, *infra*, §613, that it is possible for a person to become an *involuntary* public figure by being drawn into a public controversy, even though he or she engaged in no purposeful action to attain that classification. However, the U.S. Supreme Court has never held that it would be proper to characterize an individual as a public figure in the absence of the reasons for requiring plaintiffs to prove actual malice in defamation actions, e.g., the individual has engaged in a purposeful activity inviting criticism or has acquired substantial access to the controversy at issue. "Thus, assuming a person may ever be accurately characterized as an *involuntary* public figure, we infer from the logic of *Gertz* that the high court would reserve this characterization for an individual who, despite never having voluntarily engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements." (19 C.4th 265.)

(b) Plaintiff did not acquire access to the media in connection with the controversy surrounding the assassination: he was not a suspect, he did not testify in the trial, and his own views on the assassination were never publicized. Also, he did not gain this access when the book was published. The book did not sell well, and defendant was the only newspaper that contained an article about it. (19 C.4th 265.)

(c) Defendant argued that plaintiff had become an involuntary public figure by deliberately obtaining a position next to the politician, knowing that there would be substantial media coverage of the event. This argument is unpersuasive. (1) Plaintiff's conduct took place *before* the politician was assassinated or the book was published. At most, he voluntarily associated himself with the politician's quest for the Presidential nomination, but this issue had nothing to do with the assassination. (19 C.4th 266.) (2) Even as to the public issues regarding the politician's candidacy, plaintiff's role was trivial at best. A journalist who is photographed with other journalists crowded around a

political candidate does not thereby assume any special prominence in relation to the political campaign issues. (19 C.4th 267.)

(3) *Notoriety Resulting From Defendant's Own Actions.* A defendant may not create its own defense by making the plaintiff a public figure. In *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411, plaintiff, a research scientist, received substantial federal grants for studies seeking an objective measure of aggression; his work was concentrated on the behavior patterns of certain animals when exposed to aggravating stressful stimuli. NASA and the Navy were interested in the potential of this research for resolving problems of humans confined in close quarters for extended periods. Defendant, a United States Senator, initiated the "Golden Fleece of the Month Award," to publicize what he perceived to be the most egregious examples of wasteful governmental spending. He made an award to NASA and other government agencies funding plaintiff's research, and gave a speech printed in the Congressional Record, describing plaintiff's work as "nonsense," and asserting that, in view of "the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer." Defendant then gave wide publicity to the award and speech in press releases and a newsletter, and his legislative assistant discussed the subject with the agencies that had sponsored the research. Plaintiff sued the Senator and his assistant for defamation, interference with contractual relationships, and invasion of privacy. *Held*, summary judgment for defendants reversed. Plaintiff's studies reached a small group of professionals concerned with research in human behavior; and the fact that he received public grants did not make him a public figure. His writings became a matter of controversy only in consequence of the Golden Fleece Award; and "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (99 S.Ct. 2688, 61 L.Ed.2d 431, citing *Wolston v. Reader's Digest Assn.*, *supra*.) (See 13 *Loyola L.A. L. Rev.* 179.)

(4) *Commercial Conduct.* In *Vegod Corp. v. American Broadcasting Cos.* (1979) 25 C.3d 763, 160 C.R. 97, 603 P.2d 14, plaintiffs were engaged in the business of liquidating stores that failed. A "landmark" San Francisco store advertised a "closing out sale," which plaintiffs conducted. Defendant's news reporter broadcast a story that plaintiffs were deceiving the public by bringing in inferior merchandise at inflated prices. In this defamation action, the trial judge ruled that plaintiffs were "public figures" who had to prove malice, and judgment was for defendants. *Held*, reversed. Selling advertised goods to the public did not make plaintiffs "public figures," or make them part of an existing public controversy. And criticism of commercial conduct does not deserve the special protection of the actual malice test. "[T]hose assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur." (25 C.3d 770.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Commercial Conduct.* See *Carver v. Bonds* (2005) 135 C.A.4th 328, 352, 37 C.R.3d 480 [podiatrist was not limited-purpose public figure with respect to newspaper's reports of his alleged false advertising; criticism of commercial conduct does not deserve special protection of actual malice test; following *Vegod Corp. v. American Broadcasting Cos.* (1979) 25 C.3d 763, 160 C.R. 97, 603 P.2d 14, text, p. 896].



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ee. Nonmedia Defendants.

5 *Witkin Sum. Cal. Law Torts* § 606

[§ 606] Nonmedia Defendants.

There has been much discussion of the question whether the constitutional privilege to publish without actual malice is available only to the media or may be asserted by an individual nonmedia defendant. (See *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 99 S.Ct. 2675, 2687, 61 L.Ed.2d 411, 430, footnote 16 [noting that the court has never decided whether *New York Times* standard can apply to individual defendant]; 95 Harv. L. Rev. 1876; 47 So. Cal. L. Rev. 902; 25 U.C.L.A. L. Rev. 915; 18 U.S.F. L. Rev. 253; 38 A.L.R.4th 1114 [application of *New York Times* and related standards to nonmedia defendants]; on governmental defendants, see *infra*, §607.)

Miller v. Nestande (1987) 192 C.A.3d 191, 237 C.R. 359, held that the privilege could be asserted by a nonmedia defendant, at least with respect to matters of public concern. Plaintiff, a former prisoner of war in Vietnam, was an incumbent candidate for a county board of supervisors. Defendant, also a former prisoner of war, mailed statements to the voters charging plaintiff with cooperating with the enemy while a prisoner. Plaintiff contended that neither the *New York Times* actual malice test nor the evidentiary burden of proof by clear and convincing evidence protects a nonmedia defendant. *Held*, judgment for defendant was affirmed.

(a) *The emphasis in Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 105 S.Ct. 2939, 2944, 86 L.Ed.2d 593, 601, *infra*, §615, "on the public concern content of the defamatory communication is central to our resolution of this case. In an era of increased awareness of the need for personal integrity in those to whom the public entrusts its governance, knowledge of the personal qualifications of candidate for public office is the lifeblood of an informed electorate." (192 C.A.3d 199.)

(b) Here plaintiff, in a fund solicitation, "pointedly interjected his military record and his North Vietnamese imprisonment into his campaign in a mailer portraying a Marine Corps insignia and a POW bracelet with his rank, name and date of capture." (192 C.A.3d 199.) Defendant's rebuttal mailer, describing plaintiff's conduct in captivity as unpatriotic, was the type of speech indispensable to decisionmaking in democracy. (192 C.A.3d 200.) "Whether criticism of public officials is published by the media or disseminated by individuals, we hold it is protected by the constitutional standard expressed in *New York Times*." (192 C.A.3d 200.) And to the extent that the court's earlier

decision in *Schomer v. Smidt* (1980) 113 C.A.3d 828, 834, 170 C.R. 662, "may be construed" as suggesting a contrary rule, "it is disapproved." (192 C.A.3d 200, footnote 7.) (See 18 U.S.F. L. Rev. 253 [criticism of *Schomer v. Smidt*].)

SUPPLEMENT: [This section is current through the latest supplement]



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5 Witkin Sum. Cal. Law Torts § 607

[§ 607] Governmental Defendants.

In *Nadel v. Regents of Univ. of Calif.* (1994) 28 C.A.4th 1251, 34 C.R.2d 188, plaintiffs, who were leaders in an organization dedicated to preventing defendant university from constructing volleyball courts on a piece of university property, sued defendant and four of its employees for their characterization of plaintiffs as perpetrators of violence and destruction of property. The primary issue, which was one of first impression, was whether the *New York Times* standard, requiring public officers or figures to prove actual malice in order to establish a defendant's liability for defamation, applies to governmental defendants. *Held*, the standard applies.

(a) In deciding this issue, it is necessary to confront the two competing themes underlying the *New York Times* standard, i.e., the First Amendment right of the people to the unfettered interchange of ideas versus the state interest in protecting citizens from libel, plus a third theme, the overreaching constitutional interest in protecting people from abuses of governmental power. (28 C.A.4th 1261.)

(b) Because the First Amendment focuses on the right of listeners to receive information instead of on the identity of the speaker, it would seem irrelevant whether the speaker is media or not, or government or not. Moreover, the government has a legitimate role to play in the interchange of ideas. For example, to secure cooperation in implementing its programs, government must be able to maintain a dialogue with its citizens about their needs and the extent to which government can or should meet those needs. And in some situations, government may be the only entity capable of presenting a particular side of a public issue. These considerations favor applying First Amendment protections, and hence the *New York Times* standard, to governmental defendants. (28 C.A.4th 1262.)

(c) The state interest of protecting persons from libel is especially strong when the defendant is the government, because government possesses a unique advantage over an individual citizen in a war of words. And this remains true even in the face of the general post-Watergate skepticism about anything that the government has to say. Moreover, if citizens are indeed more vulnerable to governmental defamation because of its unique power, there may be a special danger that persons will refrain from exercising their First Amendment right to criticize the government for fear of retaliatory defamation. These considerations weigh against applying the *New York Times* standard to governmental

defendants. (28 C.A.4th 1264.)

(d) Plaintiffs argue that the *New York Times* standard should not apply to governmental defendants because the First Amendment is designed to protect citizens from government, not government from its citizens. This simple argument, which has considerable merit, is a substantial counterbalance against the argument that the First Amendment purpose of assuring unfettered exchange of ideas favors application of First Amendment protections, including the *New York Times* standard, to governmental speech. (28 C.A.4th 1266.)

(e) However, on balance, "[w]e conclude that application of the *New York Times* standard of constitutional malice to government defendants in defamation cases represents an appropriate accommodation of the three competing interests implicated in this context of government speech." (28 C.A.4th 1267.)

(1) Any potential liability of government for publishing a defamatory statement is itself a check on governmental abuse of its power to defame. "Thus, even if the *New York Times* standard is applied to government speech, governments still face the threat of liability (assuming no privilege or immunity) for defamatory speech that is constitutionally malicious. This threat, though limited in practical application, provides at least a baseline level of protection to a vulnerable citizenry from abuse of government power." (28 C.A.4th 1266.)

(2) In view of the fact that government has a legitimate role to play in the interchange of ideas, government should have some measure of protection in performing that role, at least concerning matters of public interest, so that its speech will not be substantially inhibited and the citizenry less informed. Extending the *New York Times* standard to governmental defendants will further this interest as well as maintain the balance of conditional privilege between criticism *of* government and criticism *by* government in the absence of statutory privileges and immunities. (28 C.A.4th 1266.)

(3) With respect to the point that extension of First Amendment protection to government is inconsistent with the purpose of the Amendment, the best answer is that if the unfettered interchange of ideas is a central concern of the First Amendment, then application of it to government speech in the context of limited protection from liability for defamation is entirely consistent with First Amendment dogma, i.e., it will promote government's contribution to the marketplace of ideas. Moreover, in California, where a public entity's tort liability is derivative of employee liability (see *Govt.C. 815.2*), the primary concern is with the extension of First Amendment protection to the employee, who should not be treated as having relinquished this protection by virtue of government employment. (28 C.A.4th 1267.) (On nonmedia defendants generally, see *supra*, §606.)

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gg. Ambiguous Statements.

5 Witkin Sum. Cal. Law Torts § 608

[§ 608] Ambiguous Statements.

In *Good Government Group of Seal Beach v. Superior Court* (1978) 22 C.3d 672, 150 C.R. 258, 586 P.2d 572, defendant citizens' organization published derogatory statements concerning plaintiff, a former city council member. *Held*, summary judgment for defendants was properly denied.

(a) The article was ambiguous, and could not as a matter of law be characterized as either a statement of fact or opinion. Hence, it was for the jury to determine whether an ordinary reader would have understood it as a factual assertion charging plaintiff with a crime, or as an opinion about his conduct in regard to a public project. (22 C.3d 682.)

(b) The *New York Times* test of malice is not satisfied by negligence in publication; the First Amendment protects not only the expression of political opinion but the choice of words used to convey that opinion: "It is clear that honest belief of the defendant is the touchstone of the privilege enunciated in *New York Times*, and that a statement is entitled to constitutional protection if the words used are ambiguous but the defendant honestly and without recklessness believes that they constitute an opinion or idea. We hold, therefore, that in order to find the requisite malice from the publication of ambiguous words which could constitute either fact or opinion, the jury must find not only that the words were reasonably understood in their defamatory, factual sense, but also that the defendant either deliberately cast his statements in equivocal fashion in the hope of insinuating a defamatory import to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact." (22 C.3d 684.)

(c) Plaintiff made a sufficient showing to justify consideration of the issue as one of fact. "[A] jury could conclude from this evidence that at least some of the defendants were aware that the words used in the article could be interpreted as defamatory statements of fact instead of 'allegorical language ... voicing a vigorous political opinion, in strident tones,' as defendants claim." (22 C.3d 686.) (See *Fuhrman v. Risner* (1979) 92 C.A.3d 725, 731, 155 C.R. 122 [following *Good Government* in case arising out of same publication]; *O'Conner v. McGraw-Hill* (1984) 159 C.A.3d 478, 485, 206 C.R. 33 [following *Good Government*].)

West's Key Number Digest, Libel and Slander k.19, 48, 51(5)

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5 *Witkin Sum. Cal. Law Torts* § 609

[§ 609] Inaccurate Quotations.

In *Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447, plaintiff psychoanalyst was fired from his position as projects director of the Sigmund Freud Archives after attacking Freud's theories in an address to a psychoanalytical society. Thereafter, defendant author wrote an unflattering article about plaintiff's relationship with the archives that was published in the New Yorker magazine and later in book form. Plaintiff then sued the author, magazine, and book publisher for libel based primarily on six passages purporting to quote statements made by plaintiff during interviews with defendant author, although no identical statements appeared in the more than 40 hours of taped interviews. The parties agreed that plaintiff was a public figure who could escape summary judgment only if the evidence would allow a reasonable finder of fact, by clear and convincing evidence, to conclude that defendants published a defamatory statement with actual malice, i.e., with knowledge of falsity or reckless disregard as to truth or falsity. *Held*, summary judgment for defendants reversed.

(a) *Effect of using quotations.*

(1) Although writers sometimes use quotation marks in such a manner that no reasonable reader would understand them to be an actual statement of the speaker to whom they are attributed, they are most often used to indicate to the reader that the quoted passage is a verbatim reproduction of the speaker's words. (111 S.Ct. 2430, 115 L.Ed.2d 469.) Because the work in question provided the reader with no clue that quotation marks were being used as a rhetorical device or to paraphrase the speaker's actual statement, and because the work appeared in a magazine enjoying a reputation for scrupulous accuracy, a trier of fact could find that a reasonable reader would understand the quoted passages to be nearly verbatim reports of statements made by plaintiff. (111 S.Ct. 2431, 115 L.Ed.2d 470.)

(2) A fabricated quotation may injure reputation in at least two senses. First, it may attribute an untrue factual assertion to the speaker. Second, regardless of the truth of the quoted statement, it may cause injury to reputation by indicating a negative personal trait or an attitude that the speaker does not hold. And a self-condemnatory quotation, being against self-interest, may carry more force than criticism by another person. (111 S.Ct. 2430, 115 L.Ed.2d 469.)

(b) *Degree of falsity required to constitute actual malice.*

(1) In determining whether defendants acted with knowledge of falsity or reckless disregard as to truth or falsity, it is necessary to consider whether the requisite falsity inheres in the attribution of words to plaintiff that he did not speak. (111 S.Ct. 2431, 115 L.Ed.2d 470.)

(2) Writers and reporters by necessity often alter what people say, at the very least to eliminate grammatical and syntactical errors. However, something more than this mere technical falsity is required to establish falsity for purposes of proving actual malice. (111 S.Ct. 2431, 115 L.Ed.2d 470.)

(3) Plaintiff argued that any alteration, beyond correction for grammar or syntax, by itself proves falsity in the sense relevant to determining actual malice under the First Amendment. This position must be rejected for the following reasons:

First, even if a journalist has tape-recorded a public figure, the full and exact statement will only rarely be reported. "The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy." (111 S.Ct. 2432, 115 L.Ed.2d 471.)

Second, in some cases a journalist may deliberately alter the speaker's words to correct an obvious misstatement, thereby preserving the intended meaning, while in other situations he may use quotations out of context to distort meaning, even though the speaker used each reported word. (111 S.Ct. 2432, 115 L.Ed.2d 471.)

Third, technical distinctions between correcting grammar and some greater level of alteration are unworkable and constitute a departure from both First Amendment principles and the purpose of the tort of libel, i.e., redressing injury to reputation caused by a statement that is defamatory and false. "If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation." (111 S.Ct. 2432, 115 L.Ed.2d 472.)

(4) The common law of libel utilizes but one approach to the question of falsity, regardless of the form of the communication. This approach overlooks minor inaccuracies and concentrates on substantial truth. (111 S.Ct. 2432, 115 L.Ed.2d 472, quoting the text.) Accordingly, "[w]e conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity ... , unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case." (111 S.Ct. 2433, 115 L.Ed.2d 473.)

(5) The Court of Appeals went beyond protecting quotations that convey the meaning of a speaker's statement with substantial accuracy, and instead concluded that an altered quotation is protected if it is a rational interpretation of an actual statement. This rational interpretation standard, which is derived from *Time v. Pape* (1971) 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45, 7 Summary (10th), *Constitutional Law*, §427, and *Bose Corp. v. Consumers Union of United States* (1984) 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502, *infra*, §612, serves First Amendment principles by affording an author the interpretative license that is required when relying on ambiguous sources. It has no usefulness, however, where a writer uses quotation marks under circumstances indicating that he is not involved in an interpretation of the speaker's ambiguous statement, but rather is attempting to convey what the speaker said. Hence, assessing quotations under the rational interpretation standard would give journalists the freedom to place statements in their subjects' mouths without fear of liability, thereby both diminishing the trustworthiness of the printed word and discouraging public figures from speaking to reporters. (111 S.Ct. 2434, 115 L.Ed.2d 474.)

(c) *Existence of factual questions.* The evidence raises factual issues whether defendant author published the challenged statements with knowledge or reckless disregard of the alterations. (111 S.Ct. 2435, 115 L.Ed.2d 474.) And because five of the published passages differ materially in meaning from the tape-recorded statements, there is also a

question of fact as to falsity. Hence, defendants' motion for summary judgment was improperly granted. (111 S.Ct. 2436, 115 L.Ed.2d. 476.) (See 25 *Loyola L.A. L. Rev.* 1483 [*Masson* and incremental harm doctrine]; 20 *Pepperdine L. Rev.* 73 [Permission for Journalists to "Quote What I Mean, Not What I Say"].)

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ii. Discovery Concerning Defendant's State of Mind.

5 Witkin Sum. Cal. Law Torts § 610

[§ 610] Discovery Concerning Defendant's State of Mind.

In *Herbert v. Lando* (1979) 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115, plaintiff, a retired Army officer, accused his superior officers of covering up atrocities in the Vietnam war. Defendant television network broadcast a report on plaintiff and his accusations, produced and edited by defendants L and W; and L published a related article in defendant magazine. Plaintiff sued for defamation in federal district court, on diversity grounds. He alleged that the program and article falsely and maliciously portrayed him as a liar who had made the charges to explain his relief from command. To meet the *New York Times* requirement of proof of malice by a "public figure," he had to show reckless disregard for truth, i.e., that the defendant entertained serious doubts as to the truth of his publication. He therefore took extended depositions of L, seeking to compel answers to questions relating to that defendant's state of mind. Defendants claimed a constitutional privilege against inquiry into the editorial processes of those responsible for a publication. *Held*, there is no such privilege.

(a) *Proof constitutionally required in defamation cases involving public officials or figures.* Prior to *New York Times*, it was the accepted view that neither civil nor criminal liability for defamatory publications abridges freedom of speech, and a majority of jurisdictions made publishers civilly liable regardless of intent. *New York Times and Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, *supra*, §604, made major changes in the standards by requiring public officials and public figures to prove knowing or reckless falsehood; and *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, *infra*, §613, held that nonpublic figures must demonstrate some fault. (99 S.Ct. 1640, 60 L.Ed.2d 123.) "Given the required proof, however, damages liability for defamation abridges neither freedom of speech nor freedom of the press." (99 S.Ct. 1641, 60 L.Ed.2d 124.)

(b) *Inquiry concerning state of mind is appropriate.* *New York Times* and its progeny made it essential that plaintiffs focus on the conduct and state of mind of the defendant. (99 S.Ct. 1641, 60 L.Ed.2d 124.) Such an inquiry has long been appropriate as a means of proving malice in actions seeking recovery of punitive damages, and in meeting the defense of qualified privilege. (99 S.Ct. 1641, 1642, 1643, 60 L.Ed.2d 125, 126, 127.)

(c) *Tornillo case distinguished.* In *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 94 S.Ct. 2381, 41

L.Ed.2d 730, the court invalidated a governmental effort to preempt editorial decision by requiring the publication of specified material. But the opinion did not suggest that the editorial process is immune from any inquiry. (99 S.Ct. 1644, 1645, 60 *L.Ed.2d* 128.) Thus, "according an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times*, *Butts* and similar cases." (99 S.Ct. 1645, 60 *L.Ed.2d* 129.)

(d) *Constitutional protection of editorial process is unnecessary.* Defendants urged that the First Amendment should now be construed to place beyond the plaintiff's reach a range of direct evidence relevant to proof of knowing or reckless falsehood, because requiring disclosure of editorial conversations would have an intolerable chilling effect on the editorial process and editorial decisionmaking. The argument is not convincing: "Permitting plaintiffs ... to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions. If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate and does not abridge either freedom of speech or of the press." (99 S.Ct. 1647, 60 *L.Ed.2d* 131.) Moreover, creation of the suggested privilege would not cure the problem of the press; only complete immunity from liability for defamation would effect this result. (99 S.Ct. 1649, 60 *L.Ed.2d* 134.) Finally, the abuses of uncontrolled discovery are not peculiar to defamation suits, and, until there are changes in the rules of civil procedure, reliance must be placed on the powers of the district judge to prevent abuse. (99 S.Ct. 1649, 60 *L.Ed.2d* 134.) (See 66 *Cal. L. Rev.* 1127 [*Herbert v. Lando* in Court of Appeals]; 10 *Golden Gate L. Rev.* 691 [aftermath of *Herbert v. Lando*]; 93 *Harv. L. Rev.* 150; 7 *Hastings Const. L. Q.* 362; 7 *Pepperdine L. Rev.* 264; 26 *Santa Clara L. Rev.* 643 [*Herbert v. Lando*]; 31 *Stanf. L. Rev.* 1035, 1059; 13 *U.C. Davis L. Rev.* 374; on remedies for misuse of discovery procedures, see 2 *Cal. Evidence* (4th), *Discovery*, §239 et seq.)

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jj. Standard of Proof.

5 Witkin Sum. Cal. Law Torts § 611

[§ 611] Standard of Proof.

The constitutional requirement of actual malice requires "clear and convincing evidence" of knowledge of falsity or reckless disregard as to truth or falsity. (*Reader's Digest Assn. v. Superior Court* (1984) 37 C.3d 244, 252, 208 C.R. 137, 690 P.2d 610; *Widener v. Pacific Gas & Elec. Co.* (1977) 75 C.A.3d 415, 433, 142 C.R. 304; see *Anderson v. Liberty Lobby* (1986) 477 U.S. 242, 106 S.Ct. 2505, 2508, 91 L.Ed.2d 202, 209; *Good Government Group of Seal Beach v. Superior Court* (1978) 22 C.3d 672, 679, 150 C.R. 258, 586 P.2d 572, supra, §608 [ambiguous statement]; *Khawar v. Globe Int.* (1998) 19 C.4th 254, 273, 79 C.R.2d 178, 965 P.2d 696, supra, §605 [in failing to interview witnesses before republishing book's assertion that plaintiff, and not person convicted, had assassinated famous politician, defendant was making highly improbable claim that official investigation and court were mistaken; evidence was sufficient to support finding of actual malice]; *Tague v. Citizens for Law & Order* (1977) 75 C.A.3d Supp. 16, 25, 142 C.R. 689 [suggesting instructions on meaning of actual malice and requirement of proof by clear and convincing evidence]; *Bindrim v. Mitchell* (1979) 92 C.A.3d 61, 72, 155 C.R. 29 [test of clear and convincing evidence met]; *Fisher v. Larsen* (1982) 138 C.A.3d 627, 640, 188 C.R. 216 [charge of criminal conduct, based on information from source hostile to plaintiff, presented jury question as to whether there was reckless disregard of truth]; *Fletcher v. San Jose Mercury News* (1989) 216 C.A.3d 172, 184, 264 C.R. 699 [evidence of defendants' past and present hostility toward plaintiff, and lack of objectivity in reporting, did not show lack of belief in accuracy of articles and hence was not clear and convincing proof of requisite malice]; *Antonovich v. Superior Court* (1991) 234 C.A.3d 1041, 1049, 285 C.R. 863 [test of clear and convincing evidence met]; *Robertson v. Rodriguez* (1995) 36 C.A.4th 347, 358, 42 C.R.2d 464 [statement by city council member that other council member had been fined for running illegal business out of his home; actual malice was not shown by clear and convincing evidence]; *Beilenson v. Superior Court* (1996) 44 C.A.4th 944, 950, 52 C.R.2d 357 [statements made by candidate for Congress regarding another candidate; malice not established]; *Jackson v. Paramount Pictures Corp.* (1998) 68 C.A.4th 10, 33, 80 C.R.2d 1 [evidence that defendant, while having reason to believe that alleged defamatory statement was true, had some doubts as to its accuracy did not mean that she acted with "knowledge of falsity or in reckless disregard of the truth"]; 100 Harv. L. Rev. 250 [Anderson]; 57 So. Cal. L. Rev. 707 [summary judgment and actual malice]; 16 Southwestern U. L. Rev. 577; 14 Proof of Facts 2d 49 [proof of actual malice]; 71 Proof of Facts 3d 321 [proof of circumstances establishing constitutional malice in defamation case]; on

meaning of malice for purposes of statutory qualified privileges, see *supra*, §593.)

"[T]he actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term. ... Actual malice ... requires at a minimum that the statements were made with a reckless disregard for the truth. And although the concept of 'reckless disregard' cannot be fully encompassed in one infallible definition, ... we have made clear that the defendant must have made the false publication with a 'high degree of awareness of ... probable falsity,' ... or must have 'entertained serious doubts as to the truth of his publication.'" (*Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 109 S.Ct. 2678, 2681, 105 L.Ed.2d 562, 571, quoting *St. Amant v. Thompson* (1968) 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262.)

In *Montandon v. Triangle Publications* (1975) 45 C.A.3d 938, 120 C.R. 196, plaintiff wrote a book entitled "How to Be a Party Girl." To promote it, her publicity agent arranged for her to appear on television and radio programs. The producer and host of one of these programs, without the knowledge of plaintiff or her agent, arranged to have an anonymous prostitute on the show with plaintiff. The producer then wrote a press release for various media, including defendant's TV Guide, that read: "FROM PARTY-GIRL to CALL-GIRL? How far can the 'party-girl' go until she becomes a 'call-girl' is discussed with T-V personality Pat Montandon, author, ('How to be a Party-Girl') and a masked-anonymous prostitute." Defendant's programmer rewrote the press release, and, after the revised version was approved by defendant's Northern California editor (whose duties included looking for defamatory material), it was published, as follows: "'From Party Girl to Call Girl.' Scheduled Guest: TV Personality Pat Montandon and author of 'How to Be a Party Girl.'" *Held*, judgment on a jury verdict for compensatory and punitive damages affirmed.

(a) The article was libelous. Several witnesses called by plaintiff, including a professor of English, a newspaper society editor, a bank vice president, two television producers, and one of plaintiff's young fans, testified that the average reader would conclude from the article that plaintiff "had progressed from being a party girl to being a call girl, with party girl meaning a girl who likes to give and go to parties and a call girl being a prostitute." (45 C.A.3d 944.) Defendant's programmer and editor testified to the contrary; i.e., that they did not interpret nor believe that the average reader would so interpret the publication. But the deletion of the question mark after the topic-caption, making it a statement rather than a question, and deletion of any reference to the anonymous prostitute, implying that plaintiff would be the only guest to discuss the topic, was convincing proof of knowing falsity of the rewritten release. (45 C.A.3d 943.)

(b) The programmer deleted reference to the prostitute, not from space limitations, but because she didn't want to use the word in TV Guide; and the deletion of this crucial fact--that a call girl would appear with plaintiff--implied that plaintiff herself was a call girl, i.e., that "she had experienced that progress herself." (45 C.A.3d 948.) These facts met the *New York Times* test. "Anyone participating in the publication of the article did so with reckless disregard of whether Miss Montandon had had that experience or had not." (45 C.A.3d 948.) Their conduct "was more than negligence, it amounted to an indifference to the impression being given to the general public." (45 C.A.3d 949.)

West's Key Number Digest, Libel and Slander k.48(1), 51(5), 101(4)

SUPPLEMENT: [This section is current through the latest supplement]

See *Ampex Corp. v. Cargle* (2005) 128 C.A.4th 1569, 1578, 27 C.R.3d 863 [where defendant produced detailed declarations setting forth basis for his allegedly defamatory postings on Internet message board, plaintiff's declarations, simply summarizing certain of defendant's comments and stating that they were false, were insufficient to establish prima facie showing of constitutional malice]; *Christian Research Institute v. Alnor* (2007) 148 C.A.4th 71, 81, 55 C.R.3d 600 [public figure plaintiff in defamation action has burden of proving both that challenged statement is false and that defendant acted with actual malice]; *Overstock.com v. Gradient Analytics* (2007) 151 C.A.4th 688, 710, 61 C.R.3d 29 [plaintiff corporation established prima facie case that investment analysts published reports in reckless disregard of truth; evidence showed that analyst published negative reports at behest of short-selling clients in order to depress price of plaintiff's shares]. (New) *Standard of proof of falsity is preponderance of evidence: Christian Research Institute v. Alnor, supra*, involved a defamation action by public figure plaintiffs (a nonprofit organization that

disseminated religious information and its president) against an individual who maintained a website reporting on fundraising and spending practices of various Christian organizations. The action was based on a statement on the website that plaintiffs were under a federal criminal mail fraud investigation. Defendant contended that plaintiffs were required not only to prove malice by clear and convincing evidence, but also to prove falsity by the same standard. *Held*, defendant's contention was incorrect. Plaintiffs were required to prove falsity only by a preponderance of the evidence, and they met that burden in this case.

(a) CACI, No. 1700 requires falsity to be proved by a preponderance of the evidence. Pattern jury instructions, while designed to accurately reflect the law, are not the law itself. However, this instruction correctly states the law. (148 C.A.4th 82.)

(b) While some courts have interpreted United States Supreme Court precedent to require proof of falsity by clear and convincing evidence, the Supreme Court itself has never done so. Indeed, in *Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 661, footnote 2, 109 S.Ct. 2678, 2682, 105 L.Ed.2d 562, 572, the court specifically declined to express a view on this issue. (148 C.A.4th 82.)

(c) The requirement that a public figure plaintiff prove malice by clear and convincing evidence arises from First Amendment concerns that freedom of expression be provided the "breathing space" it needs to survive. (148 C.A.4th 82; quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 721, 11 L.Ed.2d 686, 701, text, §601.) Defendant provides no argument why the element of falsity requires a clear and convincing evidence standard to protect freedom of expression. "Neither the California Supreme Court nor the United States Supreme Court has expressly mandated this requirement, and we perceive no reason to do so now. Where the law specifies no higher burden of proof, the preponderance of the evidence standard applies." (148 C.A.4th 82; citing *Ev.C. 115, 1 Cal. Evidence (4th), Burden of Proof and Presumptions*, §35.)

(d) Plaintiffs introduced Freedom of Information Act letters that stated, contrary to defendant's claim, that the postal service had not investigated alleged wrongdoing by them. This evidence was sufficient to meet plaintiffs' burden of showing falsity. (148 C.A.4th 84.)



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kk. Independent Appellate Review.

5 *Witkin Sum. Cal. Law Torts* § 612

[§ 612] Independent Appellate Review.

In *Bose Corp. v. Consumers Union of United States* (1984) 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502, the court declared that the requirement of independent appellate review of the issue of actual malice is a rule of federal constitutional law. "It reflects a deeply held conviction that judges--and particularly Members of this Court--must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" (104 S.Ct. 1965, 80 L.Ed.2d 523.) (See *Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 109 S.Ct. 2678, 2694, 105 L.Ed.2d 562, 587, *supra*, §611 [following *Bose*]; *Robertson v. Rodriguez* (1995) 36 C.A.4th 347, 357, 42 C.R.2d 464 [same].)

In *McCoy v. Hearst Corp.* (1986) 42 C.3d 835, 231 C.R. 518, 727 P.2d 711, the court, following *Bose*, laid down the following rules governing Supreme Court review of a Court of Appeal opinion in such a case:

(a) "First, this court must independently review all the evidence presented on the issue of actual malice. It may not restrict itself, as the Court of Appeal did, to evidence favorable to judgment." (42 C.3d 845.)

(b) "Second, the execution of this 'constitutional responsibility ... cannot be delegated to the trier of fact' ... , and requires this court to step beyond the usual confines of appellate review. Normal principles of substantial evidence review do not apply to the appellate court's independent review of an actual malice determination in a First Amendment libel case." (42 C.3d 846.)

(c) "Finally, if warranted, the court may ... substitute its own inferences on the issue of actual malice for those drawn by the trier of fact. This court must independently determine the constitutional import of any particular witness's testimony as it relates to the question of actual malice." (42 C.3d 846.)

The court disapproved statements in earlier Court of Appeal cases suggesting that the substantial evidence rule applied and that de novo review was not required. (42 C.3d 846, footnote 9.)

West's Key Number Digest, Libel and Slander k.48, 51(5), 128

SUPPLEMENT: [This section is current through the latest supplement]

See *Christian Research Institute v. Alnor* (2007) 148 C.A.4th 71, 86, 55 C.R.3d 600, Supp., supra, §611 [court reviewing actual malice determination in First Amendment defamation case is not bound to consider evidence of malice in light most favorable to respondents or to draw all permissible inferences in favor of respondents; to do so would compromise independence of inquiry].



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CHAPTER IX - Torts

Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

C. Defamation.

4. Defenses.

d. Constitutional Limits on Recovery.

2. Statements Concerning Private Individuals.

aa. Gertz Rule.

5 *Witkin Sum. Cal. Law Torts* § 613

[§ 613] Gertz Rule.

(1) *Gertz Case: No Liability Without Fault.* Application of the *New York Times* rule (supra, §602) to a radio broadcast defaming a private individual was approved in *Rosenbloom v. Metromedia* (1971) 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296. (See 47 So. Cal. L. Rev. 917.) The *Rosenbloom* holding was repudiated in *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, which did, however, require that such a plaintiff make a showing of fault. In *Gertz*, a policeman shot and killed a youth and was convicted of second degree murder. Petitioner, a reputable attorney, then represented the youth's family in a wrongful death action against the policeman. The managing editor of a magazine commissioned an article from a regular contributing editor on the policeman's criminal trial. The article, as published, was part of the magazine's continuing program of warning against a nationwide Communist conspiracy to discredit local police, and contained false charges against petitioner of criminal acts and Communist associations and activities. Petitioner sued defendant, publisher of the magazine, in a federal diversity suit. The defense, invoking the *New York Times* test, offered the managing editor's affidavit denying knowledge of the falsity of the statements, and asserting reliance on the author's reputation and prior experience with his writings. The jury held for petitioner, but the trial judge granted judgment for defendant notwithstanding the verdict. The Court of Appeals affirmed, on the ground that petitioner had failed to show actual malice. *Held*, reversed.

(a) *The Rosenbloom plurality opinion.* The principal issue here, whether the constitutional privilege may be asserted against a private individual where an issue of public interest was involved in the publication, was considered in *Rosenbloom*; but the eight participating justices wrote five opinions, none of which commanded more than three votes, and "no majority could agree on a controlling rationale." (94 S.Ct. 3004, 41 L.Ed.2d 801.)

(b) *New York Times rule applies to public officials and public figures.* (1) To encourage free debate on public issues and avoid self-censorship that would be induced by a rule of strict liability for false statements, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." (94 S.Ct. 3007, 41 L.Ed.2d 806.) (2) But the other societal interest is compensation of individuals for the harm inflicted on them by defamation; and the court "has extended a measure of strategic protection to defamatory falsehood." (94 S.Ct. 3008, 41 L.Ed.2d 806.) (3) The *New York Times* standard, accommodating these competing interests (the need for a vigorous and uninhibited press

and the legitimate interest in redressing injury), "administers an extremely powerful antidote to the inducement to media self-censorship of the common law rule of strict liability for libel and slander." And "it exacts a correspondingly high price from the victims of defamatory falsehood." (94 S.Ct. 3008, 41 L.Ed.2d 807.) (4) The *New York Times* case and *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, supra, §604, correctly apply the standard to defamatory falsehoods concerning public officials and public figures. (94 S.Ct. 3008, 41 L.Ed.2d 807.)

(c) *Rule does not apply to private individuals.* The balance between needs of the press and the private individual's claim to compensation for wrongful injury might be struck on a case-by-case basis; but this would lead to unpredictable results and would render the Supreme Court's duty to supervise the lower courts unmanageable; hence, "we must lay down broad rules of general application." (94 S.Ct. 3009, 41 L.Ed.2d 807.) (1) Public officials and public figures have greater access to communications media and a more realistic opportunity for self-help--counteracting false statements and minimizing their adverse impact--than private individuals. "Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." (94 S.Ct. 3009, 41 L.Ed.2d 808.) (2) Public officials and public figures must accept necessary consequences of involvement in public affairs, one of which is closer public scrutiny than that accorded private individuals. (94 S.Ct. 3009, 41 L.Ed.2d 808.) The communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods. But a private individual has not done so. "Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." (94 S.Ct. 3010, 41 L.Ed.2d 808.) (3) The states, therefore, "should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." (94 S.Ct. 3010, 41 L.Ed.2d 809.)

(d) *States may generally define appropriate standard of recovery by private individual so long as there is no liability without fault.* "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. ... At least this conclusion obtains where, as here, the substance of the defamatory statement 'makes substantial danger to reputation apparent.' This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." (94 S.Ct. 3010, 41 L.Ed.2d 809.)

(e) *New York Times standard applies to presumed damages.* The state interest "extends no further than compensation for actual injury." (94 S.Ct. 3011, 41 L.Ed.2d 810.) "The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury." (94 S.Ct. 3011, 41 L.Ed.2d 810.) Therefore, to reconcile state law with the competing interest grounded in the First Amendment, state remedies for defamatory falsehood must be limited. "It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." (94 S.Ct. 3012, 41 L.Ed.2d 811.)

(f) *New York Times standard applies to punitive damages.* In most jurisdictions, jury discretion is limited only by the rule against "excessive" amounts, and juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the harm caused. In doing so, they may selectively punish expression of unpopular views and exacerbate the danger of media self-censorship. Moreover, unlike presumed damages, punitive damages are wholly irrelevant to the state interest that justifies "a negligence standard" for private defamation actions: "They are not

compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its further occurrence." (94 S.Ct. 3012, 41 L.Ed.2d 811.) "In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." (94 S.Ct. 3012, 41 L.Ed.2d 811.)

(g) *Petitioner is private figure.* Defendant's contentions that petitioner became a "de facto public official" by appearing at the coroner's inquest, and that he was a "public figure," are rejected. Although active in community and professional affairs, he had achieved no general notoriety in the community, took no part in the criminal prosecution, and never discussed either the criminal or civil litigation with the press. (94 S.Ct. 3013, 41 L.Ed.2d 812.)

(2) *Subsequent Supreme Court Decisions.* The *Gertz* holding has been subsequently reaffirmed and its tests applied. (See *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 105 S.Ct. 2939, 2944, 86 L.Ed.2d 593, 601, *infra*, §615; *Philadelphia Newspapers v. Hepps* (1986) 475 U.S. 767, 106 S.Ct. 1558, 1563, 89 L.Ed.2d 783, 792, *infra*, §614.)

In *Time v. Firestone* (1976) 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154, a wife filed a complaint for separate maintenance in Florida, and her husband counterclaimed for divorce on grounds of cruelty and adultery. The trial judge granted a divorce to the husband and alimony to the wife, in an unclear judgment mentioning evidence of the wife's marital infidelity. Despite the absence of an express finding of adultery, defendant magazine published an item reciting that the husband had been granted a divorce on the two grounds. The wife recovered a judgment for libel in the Florida courts. *Held*, reversed.

(a) The wife was not a "public figure" under the *Gertz* test; the fact that her husband was a socially prominent scion of a wealthy industrial family, and that the divorce was a matter of public interest, did not mean that she had assumed "special prominence in the resolution of public questions." (96 S.Ct. 965, 47 L.Ed.2d 163.)

(b) There is no blanket constitutional privilege for reports of judicial proceedings. *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, 7 Summary (10th), *Constitutional Law*, §430, recognized the privilege of publishing truthful information, not inaccurate and defamatory reports of facts. (96 S.Ct. 966, 47 L.Ed.2d 164.)

(c) However, *Gertz* requires some evidence of fault, and the record contains no finding of negligence in defendant's report. The judgment must therefore be reversed for further proceedings to determine this issue of fact. (96 S.Ct. 970, 47 L.Ed.2d 168.)

(3) *Restatement Rule.* *Rest.2d, Torts §580B*, states the *Gertz* rule as follows: "One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them."

(4) *California Fault Standard: Negligence.* *Gertz* leaves it to the states to determine the applicable fault standard for recovery of compensatory damages by a private-figure plaintiff in a defamation suit. In California, negligence is the applicable standard of fault for recovery of compensatory damages by such a plaintiff. Thus, the standard is no higher than the federal standard imposed in *Gertz*. When the statement involves a matter of public concern, the plaintiff must, under *Gertz*, prove *New York Times* malice to recover presumed or punitive damages. (*Brown v. Kelly Broadcasting Co.* (1989) 48 C.3d 711, 747, 748, 257 C.R. 708, 771 P.2d 406, *supra*, §599; see *Carney v. Santa Cruz Women Against Rape* (1990) 221 C.A.3d 1009, 1015, 1019, 271 C.R. 30, *infra*, §615 [in action by private plaintiff accused of attempted rape by women's group, trial judge erred in not instructing that negligence is element of libel and proof of *New York Times* malice is required for recovery of punitive damages]; *BAJI*, No. 7.04; *CACI*, Nos. 1700, 1701.)

(5) *Commentary.* The *Gertz* rule and its progeny have been the subject of considerable commentary. (See *Dobbs*, *The Law of Torts* §417; 2 *Harper, James & Gray* 2d, §5.0; 12 *Cal. Western L. Rev.* 172; 88 *Harv. L. Rev.* 139; 26

Hastings L. J. 777; 30 *Hastings L. J.* 1515 [conflict of laws problems after *Gertz*]; 34 *Hastings L. J.* 809; 3 *Hastings Const. L. Q.* 363; 6 *Pacific L. J.* 565 [effect of *Gertz* on California law]; 2 *Pepperdine L. Rev.* 383; 12 *San Diego L. Rev.* 455; 16 *Santa Clara L. Rev.* 77; 49 *So. Cal. L. Rev.* 1131 [distinction between public and private persons applied to relatives of public figures]; 30 *Stanf. L. Rev.* 157; 18 *U.C. Davis L. Rev.* 359; 25 *U.C.L.A. L. Rev.* 915; 33 *A.L.R.4th* 212 [constitutional protection of allegedly defamatory statements regarding private individual]; 36 *A.L.R.4th* 807 [proof of injury to reputation as prerequisite to recovery of damages in defamation action--post-*Gertz* cases]; 37 *A.L.R.4th* 987 [necessity of expert witness to establish negligence of media defendant].)

West's Key Number Digest, Libel and Slander k.48(1), 51(5)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Commentary*. See 2 Harper, James & Gray 3d §5.0.



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bb. Burden of Proof on Falsity.

5 *Witkin Sum. Cal. Law Torts* § 614

[§ 614] Burden of Proof on Falsity.

In *Philadelphia Newspapers v. Hepps* (1986) 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783, the Court held that "at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." (106 S.Ct. 1559, 89 L.Ed.2d 787.)

(a) The decisions in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, supra, §601; *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, supra, §613; *Time v. Firestone* (1976) 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154, supra, §613; and *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593, infra, §615, disclose "two forces" that may reshape the common law to conform to the First Amendment. "The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." (106 S.Ct. 1563, 89 L.Ed.2d 791.)

(b) The opinions have chiefly treated the necessary showings of fault rather than of falsity. Here, as in *Gertz*, plaintiff is a private figure and the newspaper articles are of public concern; and in *Gertz*, as in *New York Times*, the common law rule was superseded by a constitutional rule. "We believe that the common law's rule on falsity--that the defendant must bear the burden of proving truth--must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." (106 S.Ct. 1563, 89 L.Ed.2d 792.)

(c) "We note that our decision adds only marginally to the burdens that the plaintiff must already bear as a result of

our earlier decisions in the law of defamation. The plaintiff must show fault. A jury is obviously more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statements at issue if convinced that the relative statements were false. As a practical matter, then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted." (106 S.Ct. 1565, 89 L.Ed.2d 792.) (See *Weller v. American Broadcasting Cos.* (1991) 232 C.A.3d 991, 1010, 283 C.R. 644 [instruction properly placed on plaintiff burden of proving substantial falsity of statement by defendant television station on matter of public concern]; *Aisenson v. American Broadcasting Co.* (1990) 220 C.A.3d 146, 156, 269 C.R. 379 [plaintiff judge failed to show that results of television station's opinion poll showing him as lowest rated judge were false]; BAJI, No. 7.07; CACI, No. 1720.)

Nizam-Aldine v. Oakland (1996) 47 C.A.4th 364, 54 C.R.2d 781, similarly placed the burden proving falsity on plaintiffs in an action concerning statements on matters of public concern, this time by *nonmedia* defendants. Plaintiffs, licensed civil engineers, were accused by defendants, a city and several of its employees, of conducting inaccurate and fraudulent boundary surveys based on the earlier of two conflicting subdivision maps. When the surveys were disputed by neighboring property owners, the individual defendants and other city employees made statements that plaintiffs used improper surveying procedures. Defendant city then threatened to report plaintiffs to the California Board of Registration for Professional Engineers and Land Surveyors. After being instructed that *defendants* had the burden of proving that the allegedly defamatory statements were true, the jury returned a verdict against defendant city. *Held*, reversed; the instruction violated the city's First Amendment rights.

(a) *Plaintiffs must prove falsity of defamatory statements that relate to matters of public concern.* In *Philadelphia Newspapers v. Hepps*, *supra*, the United States Supreme Court held that a private-figure plaintiff could not recover damages from a newspaper that published allegedly defamatory statements regarding a matter of public concern without showing that the statements at issue were false. Although the *Hepps* court limited its holding to media defendants, it did not deny First Amendment protection to statements of public interest made by nonmedia defendants, but simply declined to address an issue that was not before it. (47 C.A.4th 373.) *Hepps* protection should be extended to nonmedia defendants whose statements involve matters of public interest. That extension is consistent with the reasoning in *Hepps*, other U.S. Supreme Court decisions, and decisions of other jurisdictions. While there are no direct holdings on this issue in California, the California Supreme Court has stated, in dicta, that when "speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation." (47 C.A.4th 373, citing *Brown v. Kelly Broadcasting Co.* (1989) 48 C.3d 711, 257 C.R. 708, 771 P.2d 406, *supra*, §599.) To recognize the existence of a First Amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved is incompatible with the fundamental First Amendment principle that the inherent worth of speech in terms of its capacity for informing the public does not depend on the identity of its source. (47 C.A.4th 374.)

(b) *Statements here related to matter of public concern.* Whether speech involves a matter of public concern must be determined by the content, form, and context, as revealed by the whole record. A primary goal of the First Amendment is to protect the free discussion of governmental affairs. The statements at issue were responses by city employees to direct requests for information about a matter in which the city was involved by virtue of its exercise of a governmental function. (47 C.A.4th 375.) Although not all speech relating to governmental affairs necessarily deserves First Amendment protection, the challenged statements concern a genuine public interest: First, the fact that the city (through certain of its employees) believed plaintiffs' surveys were sufficiently defective to warrant reporting them to the appropriate licensing board indicates the public nature of the survey dispute. Second, when viewed in context, the negative statements about the surveys unquestionably relate to a broader public issue--whether boundary lines in the subdivision should be drawn in accordance with the earlier or the later map. (47 C.A.4th 377.)

West's Key Number Digest, Libel and Slander k.48(1), 51(5), 101(4)

SUPPLEMENT: [This section is current through the latest supplement]

Nonmedia defendants: See *Integrated Healthcare Holdings v. Fitzgibbons* (2006) 140 C.A.4th 515, 529, 44 C.R.3d 517 [plaintiff company had burden to prove falsity where alleged defamatory statement respecting its financial position]

related to issue of public concern, even though plaintiff was not public figure and defendant was not involved in media; following *Nizam-Aldine v. Oakland* (1996) 47 C.A.4th 364, 54 C.R.2d 781, text, p. 914].



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cc. Matters of Purely Private Concern.

5 *Witkin Sum. Cal. Law Torts* § 615

[§ 615] Matters of Purely Private Concern.

In *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593, plaintiff construction contractor sued defendant credit reporting agency for libel in the Vermont courts. The action was based on a false credit report sent to five subscribers, indicating that plaintiff had filed a voluntary petition for bankruptcy. The error occurred when defendant relied on a mistaken review of bankruptcy petitioners in which a petition filed by one of plaintiff's employees had been inadvertently attributed to plaintiff. Plaintiff received judgment on a verdict that included both *presumed and punitive damages*. *Held*, affirmed. In a plurality opinion, the Court held that the requirement under *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, *supra*, §613, of proof of actual malice for recovery of such damages did not apply.

(a) *Gertz* held that, in an action brought by a private person, the state could not allow recovery of presumed and punitive damages without a showing of actual malice. However, nothing in the opinion indicated that the balancing of interests would call for the same result "regardless of the type of speech involved." (105 S.Ct. 2944, 86 L.Ed.2d 601.) "We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern." (105 S.Ct. 2944, 86 L.Ed.2d 601.)

(b) While speech on matters of purely private concern is not totally unprotected by the First Amendment, its protections are less stringent. And in such cases, "we hold that the state interest adequately supports awards of presumed and punitive damages--even absent a showing of 'actual malice.'" (105 S.Ct. 2946, 86 L.Ed.2d 604.)

(c) Defendant's credit report concerns no public issue. "It was speech solely in the individual interest of the speaker and its specific business audience. ... The particular interest warrants no special protection when--as in this case--the speech is wholly false and clearly damaging to the victim's business reputation. ... Moreover, since the credit report was made available to only five subscribers who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any 'strong interest in the free flow of commercial information.' ... In any case, the marketplace provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors." (105 S.Ct. 2947, 86 L.Ed.2d 604.) (See *Roemer v. Retail Credit Co.* (1975) 44

C.A.3d 926, 934, 119 *C.R.* 82 [anticipating *Dun & Bradstreet* holding]; 99 *Harv. L. Rev.* 213; 37 *Hastings L. J.* 1171; 20 *Loyola L.A. L. Rev.* 209; 14 *Pepperdine L. Rev.* 337; *BAJI*, No. 7.04.1; *CACI*, Nos. 1704, 1705.)

In *Carney v. Santa Cruz Women Against Rape* (1990) 221 *C.A.3d* 1009, 271 *C.R.* 30, defendant women's organization published in its newsletter the statement that plaintiff had committed attempted rape. Plaintiff sued for libel and was awarded a verdict that included punitive damages. In reversing the judgment on various grounds, the court set forth the method for determining whether the case involved a matter of public concern so as to require proof of *New York Times* malice for the recovery of punitive damages:

(a) "Carney argues that these circumstances simply represented 'three young persons voluntarily engaged in a drinking and petting party.' As such, he argues no matter of public concern was at stake. This argument frames the issue improperly. Carney is stating that there is no matter of public concern because the allegations were false. However, all libel, by definition, is false." (221 *C.A.3d* 1021.)

(b) "We think a more appropriate inquiry is whether, as *Dunn & Bradstreet* pointed out, the form, context and content of the publication as a whole demonstrate that a matter of public concern is implicated. Accordingly, we have focused on the broad topic of the newsletter in general, dealing with matters of sexual harassment and assault, rather than the specific accusation that a private individual committed a specific crime, as a basis for determining that this newsletter constitutes a matter in the public concern." (221 *C.A.3d* 1021.) (See *Stolz v. KSFM 102 FM* (1994) 30 *C.A.4th* 195, 207, 35 *C.R.2d* 740 [whether speech addresses matter of public concern must be determined by expression's content, form, and context as revealed by whole record].)

SUPPLEMENT: [This section is current through the latest supplement]



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dd. No Neutral Reportage Privilege.

5 *Witkin Sum. Cal. Law Torts* § 616

[§ 616] No Neutral Reportage Privilege.

At common law, a person who republishes a defamatory remark is held liable, along with the originator of the statement. (See *supra*, §537.) However, a neutral reportage privilege has been recognized by a federal appellate court: When a responsible, prominent organization makes serious charges against a *public figure*, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. (See *Khawar v. Globe Int. (1998)* 19 C.4th 254, 268, 79 C.R.2d 178, 965 P.2d 696, *supra*, §605 [describing statement of privilege by federal 2nd Circuit Court of Appeals].)

In the *Khawar* case, which involved defendant's republication of a book's false charge that plaintiff, a private person, had assassinated a famous politician, the California Supreme Court refused to adopt this privilege with respect to *private figures*. To recognize an absolute privilege in the private person situation would be inconsistent with the U.S. Supreme Court policy of balancing the First Amendment interest in promoting the broad dissemination of information relevant to public controversies against the reputation interests of private persons. In other words, it would emasculate the distinction made in *Gertz v. Robert Welch (1974)* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, *supra*, §613, between public and private figures. The court emphasized that it held only that there is no neutral reportage privilege in California for reports regarding private figures. Thus, left undecided were whether the First Amendment requires this privilege at all, whether it extends to public officials or public figures, and whether the party doing the republishing needs to be a public figure. (19 C.4th 270.)

SUPPLEMENT: [This section is current through the latest supplement]
See 13 A.L.R.6th 111 [construction and application of neutral reportage privilege].



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CHAPTER IX - Torts

Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

C. Defamation.

4. Defenses.

e. Fair Comment.

1. Common Law Privilege.

5 Witkin Sum. Cal. Law Torts § 617

[§ 617] Common Law Privilege.

(1) *In General.* The common law developed a privilege of "fair comment"--an honest expression of *opinion* on matters of public interest, such as the qualifications of conduct of public officers or candidates for office, the manner in which public or charitable institutions are administered, and the merits of literary or dramatic productions (See 2 Harper, James & Gray 2d, §5.8; C.E.B., 2 California Business Litigation, §11.148; 10 Cal. L. Rev. 84; 17 Cal. L. Rev. 693; 26 Cal. L. Rev. 226, 228; 69 Harv. L. Rev. 925; 10 So. Cal. L. Rev. 520; 15 So. Cal. L. Rev. 274; 50 Am.Jur.2d (1995 ed.), *Libel and Slander* §§334, 335; 90 A.L.R.2d 1279 [reliance on facts not stated or referred to in publication as support for fair comment defense]; 96 A.L.R.3d 609 [criticism of restaurant's food].)

(2) *Recognition of Privilege in California.* The fair comment privilege has been recognized and frequently applied in California. (See *Maher v. Devlin* (1928) 203 C. 270, 281, 263 P. 812; *Jones v. Express Publishing Co.* (1927) 87 C.A. 246, 256, 262 P. 78; *Eva v. Smith* (1928) 89 C.A. 324, 329, 264 P. 803; *Taylor v. Lewis* (1933) 132 C.A. 381, 384, 22 P.2d 569; *Harris v. Curtis Publishing Co.* (1942) 49 C.A.2d 340, 350, 121 P.2d 761 [article by national magazine referring to member of small town school board was privileged because the subject was matter of economic and political theory of universal interest]; *Babcock v. McClatchy Newspapers* (1947) 82 C.A.2d 528, 536, 186 P.2d 737; *Kramer v. Ferguson* (1964) 230 C.A.2d 237, 242, 244, 41 C.R. 61 [statements attacking political morality of city council members in recall election]; *Williams v. Daily Review* (1965) 236 C.A.2d 405, 416, 46 C.R. 135, supra, §544.)

The defense in California arises as a matter of common law, independently of the statutory common-interest privilege (see C.C. 47(c), supra, §591). (*Brown v. Kelly Broadcasting Co.* (1989) 48 C.3d 711, 732, footnote 18, 257 C.R. 708, 771 P.2d 406, supra, §599.)

(3) *Scope of Privilege.* In *Maidman v. Jewish Publications* (1960) 54 C.2d 643, 7 C.R. 617, 355 P.2d 265, supra, §544, the court made the following observations concerning the defense, which was revealed on the face of the complaint (criticism of a person of importance in the Jewish community):

(a) "The protection which the law affords to those who would comment or criticize extends only to comment which is 'fair,' not in the sense that it must be reasonable or moderate, but in the sense that it must be published 'in part at least,

for the bona fide purpose of giving the public the benefit of comment which it is entitled to have, rather than for any ulterior motive of causing harm to the plaintiff.' " (54 C.2d 652, quoting Prosser.) And "allegations that the comments were *not* published primarily for a bona fide purpose, but were published *because of malice*, renders the publisher liable if his comments, opinions or criticisms are defamatory." (54 C.2d 652.)

(b) "Comments, opinions and criticisms may be defamatory even though based upon true or privileged statements of fact. The publisher is liable unless the comments themselves are privileged." (54 C.2d 649.)

The privilege does not protect defamation of *private* persons. (*Brown v. Kelly Broadcasting Co.*, *supra*, 48 C.3d 732.)

(4) *Determination Whether Statement Is Comment (Opinion) or Statement of Fact.* Whether defamatory material constitutes an opinion merely or a potentially defamatory fact is a question of law. (*Gregory v. McDonnell Douglas Corp.* (1976) 17 C.3d 596, 600, 131 C.R. 641, 552 P.2d 425, *infra*, §621; see *Sierra Breeze v. Superior Court* (1978) 86 C.A.3d 102, 106, 149 C.R. 914 [newspaper headline that plaintiff county supervisor had voted to "squander" tax money was opinion; following *Gregory*]; *Blackhawk Corp. v. Ewing* (1979) 94 C.A.3d 640, 643, 156 C.R. 581 [opinions concerning effect of proposed housing development on the community; following *Gregory*]; *Moyer v. Amador Valley Joint Union High School Dist.* (1990) 225 C.A.3d 720, 724, 275 C.R. 494, *infra*, §624; cf. *Bindrim v. Mitchell* (1979) 92 C.A.3d 61, 76, 78, 155 C.R. 29 [novel dealing with character identifiable as plaintiff; jury could determine that statements were factual]; *Rollenhagen v. Orange* (1981) 116 C.A.3d 414, 420, 426, 172 C.R. 49 [reviewing cases; broadcaster's television report on auto repair practices].) The test for determining the issue is the "totality of the circumstances." (*Baker v. Los Angeles Herald Examiner* (1986) 42 C.3d 254, 260, 228 C.R. 206, 721 P.2d 87, *infra*, §625.)

West's Key Number Digest, Libel and Slander k.48(1), 51(5)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 2 Harper, James & Gray 3d §5.8; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §§317, 318.



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 - aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 618

[§ 618] In General.

The fair comment privilege was recognized in the First Torts Restatement (§606 et seq.), but the Second Restatement took the position that it was too narrow in scope in view of the following dictum in *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789, 805, supra, §613: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." (*Rest.2d, Torts* §566, Comment c.) (See 74 Cal. L. Rev. 1001.)

Accordingly, *Rest.2d, Torts* §566 provides: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."

Comment b distinguishes between two kinds of expression of opinion: (1) the *simple or pure type* occurs when the maker states the facts on which he or she bases the opinion and then expresses a comment on the plaintiff's conduct, qualifications or character; or when the maker does not express the facts but both parties know the facts or assume their existence, and the comment is clearly based on those assumed facts. (2) The *mixed type* is one which, while in form or context an opinion, is apparently based on undisclosed facts that have not been stated or assumed to exist.

Comment c explains the effect of the *Gertz* dictum as follows: "This categoric statement was not necessary to the decision ... , and the Supreme Court's indications that an expression of opinion cannot be the basis of a defamation action have involved public communications on matters of public concern. Although it is thus possible that private communications on private matters will be treated differently, the logic of the constitutional principle would appear to apply to all expressions of opinion of the first, or pure, type." (See Special Note, *Rest.2d, Torts*, Vol. 3, p. 153, observing that as a result of §566, "the privilege of fair comment has become obsolete.")

SUPPLEMENT: [This section is current through the latest supplement]



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bb. No Separate Constitutional Privilege for Opinions.

5 *Witkin Sum. Cal. Law Torts* § 619

[§ 619] No Separate Constitutional Privilege for Opinions.

The dictum in *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789, 805, *supra*, §613, that "there is no such thing as a false idea" was construed and limited in *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1, holding that there is *no separate constitutional privilege protecting statements of opinion*, and that the governing constitutional principle is that defamation liability may not be imposed unless the statement in question is *provably false*. Defendant wrote an article in defendant newspaper implying that plaintiff, a local high school wrestling coach, lied under oath in a judicial proceeding about an incident involving his team at a wrestling match. An Ohio court gave summary judgment for defendants on the ground that the article constituted an "opinion" entitled to First Amendment protection. *Held*, reversed.

(a) The *Gertz* dictum was not intended to create a wholesale defamation exemption for anything that might be labeled "opinion." (110 S.Ct. 2705, 111 L.Ed.2d 16.)

(b) "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' " (110 S.Ct. 2706, 111 L.Ed.2d 16.)

(c) No separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question is whether a reasonable factfinder could conclude that the statements in D's column imply an assertion that M perjured himself in a judicial proceeding. "We think this question must be answered in the affirmative." (110 S.Ct. 2707, 111 L.Ed.2d 19.) (See *Ringler Associates v. Maryland Cas. Co.* (2000) 80 C.A.4th 1165, 1181, 96 C.R.2d 136 [statement of opinion may be actionable if it implies allegation of undisclosed defamatory facts as basis of opinion; following *Milkovich*]; *Wilbanks v. Wolk* (2004) 121 C.A.4th 883, 903, 17 C.R.3d 497 [even if speaker states facts on which opinion is based, statement may still imply false assertion of fact where facts

stated are incorrect, incomplete, or erroneously assessed]; *Gallagher v. Connell* (2004) 123 C.A.4th 1260, 1270, 20 C.R.3d 673 [essential difference between statement of fact and statement of opinion is that statement of fact implies provable false factual assertion while statement of opinion does not]; 104 Harv. L. Rev. 219; BAJI, No. 7.00.1; CACI, No. 1707.)

After *Milkovich*, the question is not strictly whether the published statement is fact or opinion but whether a reasonable fact finder could conclude that the published statement declares or implies a provably false assertion of fact. The totality of circumstances test is used to determine whether the statement communicates or implies a provably false statement of fact, considering the context in which the statement was made. (*Franklin v. Dynamic Details* (2004) 116 C.A.4th 375, 385, 10 C.R.3d 429.)

SUPPLEMENT: [This section is current through the latest supplement]

Totality of circumstances test: See *Ruiz v. Harbor View Community Assn.* (2005) 134 C.A.4th 1456, 1471, 37 C.R.3d 133 [in determining whether allegedly defamatory statement is actionable opinion, totality of circumstances are examined, starting with opinion itself; citing *Franklin v. Dynamic Details* (2004) 116 C.A.4th 375, 10 C.R.3d 429, text, p. 922].



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5 *Witkin Sum. Cal. Law Torts* § 620

[§ 620] In General.

The reasoning and holding of *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1, supra, §619, have been followed in a number of cases. The following are illustrative:

Edwards v. Hall (1991) 234 C.A.3d 886, 904, 285 C.R. 810 [whether defendant wrongfully demanded \$ 4,000 from talk show host to either refrain from creating unfounded controversy or look the other way was sufficiently factual to be susceptible of being proved true or false].

Rudnick v. McMillan (1994) 25 C.A.4th 1183, 1191, 31 C.R.2d 193 [letter to editor of newspaper expressing disagreement with previously published article was nonactionable].

Morningstar v. Superior Court (1994) 23 C.A.4th 676, 686, 29 C.R.2d 547 [article in financial newsletter labeled "commentary" and criticizing plaintiff's advertisement of its mutual funds on ground that it manipulated statistics to its advantage was nonactionable].

Copp v. Paxton (1996) 45 C.A.4th 829, 836, 52 C.R.2d 831 [words "As Doug Copp says, let us prey [sic]," which implied existence of undisclosed facts as basis for opinion, were actionable].

Seelig v. Infinity Broadcasting Corp. (2002) 97 C.A.4th 798, 809, 119 C.R.2d 108 [phrases "local loser," "chicken butt," and "big shank," said by radio commentators regarding contestant in TV show, were not actionable, because they were too subjective and vague for any fact finder to reasonably interpret these comments as stating provable facts].

Franklin v. Dynamic Details (2004) 116 C.A.4th 375, 383, 10 C.R.3d 429 [e-mails stating opinion that plaintiff had stolen copyrighted materials were not actionable where based on disclosed, provably true facts].

Wilbanks v. Wolk (2004) 121 C.A.4th 883, 901, 17 C.R.3d 497 [statements made on website by industry consumer watchdog suggesting that defendant had engaged in incompetent and unethical practices were actionable where statements included some truthful facts but omitted other facts that showed statements to be misleading].

Gallagher v. Connell (2004) 123 C.A.4th 1260, 1270, 20 C.R.3d 673 [assertion that trustee of elderly widow's trust who was subsequently named beneficiary "was there to help himself" was actionable; statement implied facts capable of being proved true or false].

In *Weller v. American Broadcasting Cos.* (1991) 232 C.A.3d 991, 283 C.R. 644, plaintiff, a dealer in silver antiques, obtained on consignment two candelabra for \$ 45,000 from a Texas family and resold them to a museum for \$ 65,000. Acting on a call from a confidential source, defendant television station aired a series of broadcasts allegedly implying that plaintiff had defrauded the museum by selling stolen property at a greatly inflated price. In the ensuing defamation suit, defendant unsuccessfully sought to exclude evidence of 25 specific statements on the ground that they constituted opinion and hence were privileged as a matter of federal constitutional law. *Held*, judgment for plaintiff affirmed.

(a) *Constitutional standards.* *Milkovich* disposes of defendant's argument that there is a separate constitutional privilege protecting statements of opinion. However, even after *Milkovich*, federal constitutional law precludes a statement's being the basis of a defamation claim unless (a) it expressly or impliedly asserts a fact that is susceptible of being proved false; and (b) its language and tenor can reasonably be interpreted as stating actual facts. (232 C.A.3d 1000.)

(b) *Broadcasts could be understood as implying defamatory statements.* The broadcasts implied that plaintiff had sold stolen property to the museum at a greatly inflated price by linking him to a convicted felon who had reportedly stolen the candelabra from the home of a well-known San Francisco sculptress, and by referring to the transaction with the museum as a "sweetheart deal." Although defendant repeatedly qualified its broadcasts by stating that it was merely posing the question and that there were conflicting stories, the broadcasts could nevertheless have been understood as implying defamatory facts, as alleged by plaintiff. Hence, it was proper to allow the jury to decide in what manner the broadcasts were ultimately understood. (232 C.A.3d 1003.)

(c) *Implied defamatory facts were provably false.*

(1) Although the valuation of antiques is an inexact science and experts could have reached varying estimates as to the value of the candelabra, *Milkovich* requires only that the allegedly defamatory fact be objectively verifiable. Hence, although there may have been a range of reasonable valuation, whether the museum acquired the candelabra at an unfair price could be objectively verified. (232 C.A.3d 1005.)

(2) The assertion that the candelabra had been stolen from the sculptress was obviously subject to being proved false by plaintiff's demonstration at trial that they had, in fact, belonged to the Texas family for at least the last 40 years and that a member of this family had sold them to plaintiff. Nevertheless, defendant argued that the origin of the candelabra could not have been verified at the time the broadcasts aired because plaintiff refused to disclose the name of the former owner (who wished to remain anonymous). This argument, however, misses the point. The issue is whether the statement was provably false in a court of law, not whether defendant knew or could have known it was false when it was made. (232 C.A.3d 1006.)

(d) *Nature of broadcasts did not negate impression that they were assertions of actual fact.* Defendant contended that the broadcasts were entitled to constitutional protection under *Milkovich* because they merely aired conflicting information on an issue of public importance, and hence were the type of material that could not reasonably have been understood as being assertions of actual fact. However, unlike hyperbole or satire, the publication of implied defamatory statements as part of an apparently objective and neutral investigation is almost certain to be understood as factual. "[W]e reject the notion that merely couching an assertion of a defamatory fact in cautionary language such as 'apparently' or 'some sources say' or even putting it in the form of a question necessarily defuses the impression that the speaker is communicating an actual fact." (232 C.A.3d 1004.)

(e) *No protection under California Constitution.* *Brown v. Kelly Broadcasting Co.* (1989) 48 C.3d 711, 257 C.R. 708, 771 P.2d 406, supra, §599, signaled a reluctance to provide greater protection for defamation defendants under the

state Constitution than that provided by the federal Constitution. Nevertheless, defendant attempted to distinguish *Brown* on the ground that it addressed the issue whether the state Constitution should impose a higher standard of fault, not whether it should provide greater protection for speech designated as opinion or conjecture. However, the extension of state constitutional law sought by defendant would be even more expansive than the protection rejected in *Brown*, because it would protect false broadcasts without regard to both the degree of fault involved and the plaintiff's status as a private individual. "We read the *Brown* court's extensive refutation of the policy arguments advanced in favor of expanded constitutional protection for media defendants as a clear sign that such expansion is not warranted under our state Constitution." (232 C.A.3d 1007.)

SUPPLEMENT: [This section is current through the latest supplement]

The following cases are likewise illustrative of those following the reasoning and holding of *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1, text, §619:

Ruiz v. Harbor View Community Assn. (2005) 134 C.A.4th 1456, 1472, 37 C.R.3d 133 [in letter to homeowner who had applied for building permit, lawyer representing community association that denied application stated that applicant was seeking "Shakespearean 'pound of flesh,' " making "cockamamy" document inspection requests, and "virtually stalking and staring down" directors at their meetings; statements constituted nonactionable "rhetorical hyperbole, epithets, and figurative statements"].

Integrated Healthcare Holdings v. Fitzgibbons (2006) 140 C.A.4th 515, 527, 44 C.R.3d 517 [opinions expressed in e-mail that plaintiff's financial position was poor were not actionable defamation; e-mail set forth basis for opinions that was not provably false].

Del Junco v. Hufnagel (2007) 150 C.A.4th 789, 797, 60 C.R.3d 22 [defendant's false accusations on website resembling that of plaintiff surgeon that plaintiff was untrained and lacked proper credentials were actionable statements of fact, not expressions of opinion].

Overstock.com v. Gradient Analytics (2007) 151 C.A.4th 688, 703, 61 C.R.3d 29 [investment analysts' publications falsely implying that plaintiff manipulated its accounting procedures to defraud investors were actionable statements of fact, even though framed as opinions].

Contemporary Services Corp. v. Staff Pro (2007) 152 C.A.4th 1043, 1059, 61 C.R.3d 434 [defendants' comments in e-mail sent to its customers of "personal opinion" that "most everyone in the industry knows" that business rival "uses the courts as a weapon against its competitors" and that "I sincerely believe that the record must be set straight concerning [its] conduct and the baseless accusations that [it] has made against us" could be construed as declared or implied provable assertions of fact on which defamation claim could be based].

McGarry v. University of San Diego (2007) 154 C.A.4th 97, 116, 64 C.R.3d 467 [statement that plaintiff was immoral was nonactionable statement of opinion; because concepts of morality are infinitely debatable, and their precise meaning is extremely elusive, statement was not reasonably susceptible to interpretation implying provably false assertion of fact].

Nygard v. Uusi-Kerttula (2008) 159 C.A.4th 1027, 1048, 72 C.R.3d 210 [former employee's statements in magazine interview regarding high profile employer, such as that work conditions were "horrible," that he "slaved," "felt used" and endured taunting "around the clock," and that employer kept his eye on workers "like a hawk," were nonactionable statements of opinion or hyperbole, rather than provably false assertions of fact].

Paterno v. Superior Court (2008) 163 C.A.4th 1342, 1355, 78 C.R.3d 244, Supp., supra, §550A [journalist's statements in magazine article that employer had "slashed" employees' benefits and overtime pay were constitutionally acceptable "literary license"; citing *Nygard*].

Mamou v. Trendwest Resorts (2008) 165 C.A.4th 686, 727, 81 C.R.3d 406 [employer's statements of employee's

misconduct and bad character, stated as flat assertion of facts with references to specific instances of alleged misconduct rather than "phrased in terms of apparency," were actionable statements of fact and not opinion].



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bb. Statements in Labor Disputes.

5 *Witkin Sum. Cal. Law Torts* § 621

[§ 621] Statements in Labor Disputes.

In *Gregory v. McDonnell Douglas Corp.* (1976) 17 C.3d 596, 131 C.R. 641, 552 P.2d 425, after a labor dispute had resulted in an hourly wage increase, a disagreement arose between the employer and unions as to the implementation of retroactive payment. Union leaders released information opposing the employer's position, and the employer responded with a bulletin and a letter, in which it asserted that union officers and other union leaders were playing politics and seeking personal gain and political prestige rather than the best interests of their members. Plaintiffs, the president and vice president of the union, sued the employer for libel, alleging that the statements were defamatory and published with knowledge of their falsity and with a reckless disregard as to their truth. *Held*, judgment for defendant on demurrer affirmed.

(a) The requirement of a showing of knowledge of falsity or reckless disregard of truth applies to statements made in labor disputes, not as a constitutional requirement, but because of the policy of the *Labor Management Relations Act*. (17 C.3d 600.)

(b) The Constitution generally protects statements of opinion rather than of fact. (17 C.3d 600.) The distinction is frequently difficult, and in a heated labor dispute or similar controversy, "epithets, fiery rhetoric or hyperbole" that might generally be considered factual may be regarded as statements of pure opinion. (17 C.3d 601 et seq.) The statements in the present case are of the kind typically generated in the give-and-take of a spirited labor dispute, and are not of a factual nature. (17 C.3d 603.)

(c) *Eva v. Smith* (1928) 89 C.A. 324, 329, 264 P. 803, states that the right to criticize conduct of public officers "does not warrant aspersive attack on the motives or character of the officer." This was dictum, because the court held the statements privileged, and no subsequent case has adopted its distinction. (17 C.3d 604.)

(d) "Publications otherwise protected under the First Amendment do not lose their protection because they contain statements which attribute improper motives to a public officer or to an active participant in a labor dispute. The legal effect of attacks on motives must be carefully distinguished, however, from accusations that an individual has

committed a crime or is personally dishonest. No First Amendment protection, of course, enfolds the latter charges." (17 C.3d 604.) (See *Morales v. Coastside Scavenger Co.* (1985) 167 C.A.3d 731, 753, 213 C.R. 482 [letter written by defendant manager of defendant company to union bargaining agent accusing latter of improper practices, with copy to company's labor attorney; *Gregory* followed]; *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees Local 483* (1999) 69 C.A.4th 1057, 1065, 82 C.R.2d 10 [televised statement in labor dispute that federal Government had found certain firings to be illegal, although slanderous when taken by itself, was not slanderous when whole broadcast was considered, because audience was repeatedly informed that plaintiff had only been charged and that hearing was going to be held].)

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cc. Statements in Political Campaign.

5 *Witkin Sum. Cal. Law Torts* § 622

[§ 622] Statements in Political Campaign.

In *Desert Sun Publishing Co. v. Superior Court* (1979) 97 C.A.3d 49, 158 C.R. 519, plaintiff, a candidate for office as a director of a public hospital, sued defendant newspaper for printing a letter accusing him of political chicanery; e.g., using "touched-up photographs," "contrived public opinion polls," and "a lot of slick, big-time, expensive political public relations." *Held*, the publication was within the protected opinion type of political comment. The court observed that "[i]t is an essential part of our national heritage that an irresponsible slob can stand on a street corner and, with impunity, heap invective on all of us in public office. ... Our political history reeks of unfair, intemperate, scurrilous and irresponsible charges against those in or seeking public office. Washington was called a murderer, Jefferson a blackguard, a knave and insane (Mad Tom), Henry Clay a pimp, Andrew Jackson a murderer and an adulterer, and Andrew Johnson and Ulysses Grant drunkards. Lincoln was called a half-witted usurper, a baboon, a gorilla, a ghoul. Theodore Roosevelt was castigated as a traitor to his class, and Franklin Delano Roosevelt as a traitor to his country. Dwight D. Eisenhower was charged with being a conscious agent of the Communist Conspiracy." (97 C.A.3d 51.) (See *Okun v. Superior Court* (1981) 29 C.3d 442, 448, 453, 175 C.R. 157, 629 P.2d 1369, *supra*, §546 [in campaign to repeal ordinance allowing plaintiff to develop former city land, letters suggesting conspiracy with council member to improperly acquire the land, and comparing plaintiff with corrupt developer in popular novel, were nonactionable]; *Carr v. Warden* (1984) 159 C.A.3d 1166, 1170, 206 C.R. 162, *supra*, §546 [in initiative campaign, statement that change of vote meant someone on planning commission had been bought, but denying knowledge of sustaining evidence, implied no undisclosed defamatory facts, and hence was nonactionable]; 37 A.L.R.4th 1088 [criticism or disparagement of character, competence, or conduct of candidate for office as defamation].)

In *Botos v. Los Angeles County Bar Assn.* (1984) 151 C.A.3d 1083, 199 C.R. 236, plaintiff, a candidate for judge of the Los Angeles county superior court, was given a "not qualified" rating by defendant bar association. The statement was released to the newspapers and reported, and, after his defeat in the election, plaintiff sued for defamation. *Held*, the statement was one of opinion merely and was not libelous. The evaluation was only the collective opinion of the bar committee; and, by entering the arena of public elections, plaintiff subjected himself to evaluative comment from any and all interested persons. (151 C.A.3d 1088, 1089.) The public is well served by this kind of public comment; and "a

local bar association has a vested interest in aiding the public to form sound judgments concerning the quality of judicial candidates." (151 C.A.3d 1090.)

A distinguishable situation--defamation by a committee supporting or opposing a candidate or ballot measure--is covered by statute. The *candidate* or *proponent* of the measure who controls the committee, or the *sponsor* of a sponsored committee, is liable for any slander or libel committed by the committee if the candidate, proponent, or sponsor "willfully and knowingly directs or permits the libel or slander." (Elec.C. 2050120.) (See 19 Pacific L. J. 590.)

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 - dd. Criticism of Judge.

5 *Witkin Sum. Cal. Law Torts* § 623

[§ 623] Criticism of Judge.

In *Grillo v. Smith* (1983) 144 C.A.3d 868, 193 C.R. 414, plaintiff, presiding judge of the Los Angeles Municipal Court, served a clerk in the auditor's office with an order to issue airline tickets for a Sacramento legislative hearing. The clerk, under orders from his superior, refused to issue the tickets. Plaintiff then personally arrested the clerk, had him brought to the courtroom, held him in contempt, and ordered that he serve 2 days in jail unless he complied with the order. The county bar association publicly censured plaintiff, and the Los Angeles Times published a strongly critical article and an editorial denouncing plaintiff's conduct. (144 C.A.3d 876, 877, 878.) Plaintiff then brought this libel action against the corporate owner and individual publisher of the newspaper. *Held*, summary judgment for defendants affirmed.

(a) The statements in the *article*, e.g., that plaintiff was "angry," "shouted," "stormed," and that the proceeding was a "kangaroo court," were subjective words and phrases and matters of opinion; they were absolutely privileged as statements of mere opinion concerning the conduct of public officials. (144 C.A.3d 872, quoting at length from *Desert Sun Publishing Co. v. Superior Court* (1979) 97 C.A.3d 49, 158 C.R. 519, *supra*, §622.)

(b) An *editorial* is likewise an expression of opinion and equally privileged. Plaintiff nevertheless asserted that it contained five factual misstatements, which raised triable issues: (1) he "swept into the man's office, cited him for contempt, sentenced him to jail and harangued about separation of powers"; (2) he issued an "illegal court order"; (3) he "wanted the taxpayers to pay his way on a lobbying trip"; (4) he "commandeered the rights of an innocent man and embarked on an odyssey far outside his court's authority"; and (5) he later "changed his mind under pressure from his peers." (144 C.A.3d 874.) These statements were not actionable. "A newspaper is perfectly free to opine that court orders are illegal and to criticize judges for violating the rights of innocent persons and exceeding their authority. There is no requirement that opinion and criticism of that sort have any legal or factual basis whatsoever. ... The second and fourth items listed above are nothing more than the subjective opinions of the Times concerning the conduct in office of a public official; they are absolutely protected under the First Amendment. ... While the three remaining statements might be considered assertions of fact rather than expressions of opinion in some contexts, a newspaper editorial criticizing the official actions of the presiding judge of the largest municipal court in the state (if not the country),

particularly concerning the application of harsh judicial remedies to administrative trivia, is not one of them." (144 C.A.3d 875.) (See *Aisenson v. American Broadcasting Co.* (1990) 220 C.A.3d 146, 156, 269 C.R. 379 [television station's opinion poll of attorneys showing plaintiff as county's lowest rated judge was not actionable even though published in nonelection year].)

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e. Fair Comment.

3. Particular Statements.

ee. Criticism of Performance of Profession or Occupation.

5 Witkin Sum. Cal. Law Torts § 624

[§ 624] Criticism of Performance of Profession or Occupation.

A number of cases concern criticism of the character or conduct of persons involved in particular professions or occupations. (See *Gill v. Hughes* (1991) 227 C.A.3d 1299, 1309, 278 C.R. 306 [statement that plaintiff was incompetent surgeon was statement of fact, because it implied knowledge of supporting facts and was susceptible of being proved true or false]; *James v. San Jose Mercury News* (1993) 17 C.A.4th 1, 14, 20 C.R.2d 890 [newspaper article on deputy public defender's illegal acquisition of school records to use in child molestation case was fair comment]; *Sommer v. Gabor* (1995) 40 C.A.4th 1455, 1476, 48 C.R.2d 235 [statements that plaintiff actress was old, unattractive, impoverished, and a frequenter of sleazy bars, taken as whole, were ones of fact]; *Campanelli v. Regents of Univ. of Calif.* (1996) 44 C.A.4th 572, 577, 51 C.R.2d 891 [alleged defamatory statements to effect that plaintiff coach by his tirades inflicted psychological damage on his players were nonactionable]; *Eisenberg v. Alameda Newspapers* (1999) 74 C.A.4th 1359, 1377, 1381, 88 C.R.2d 802 [statement that plaintiff's reporting had been "unfair and lacked balance" was opinion; even if opinion implied knowledge of facts, it was not actionable, because any factual implication was not provably false]; *Ferlauto v. Hamsher* (1999) 74 C.A.4th 1394, 1401, 88 C.R.2d 843 [comments in book describing opposing attorney in spicy prose and employing hyperbole in manner consistent with rest of book were nonactionable].)

In *Moyer v. Amador Valley Joint Union High School Dist.* (1990) 225 C.A.3d 720, 275 C.R. 494, plaintiff high school teacher filed a complaint against defendant district based on an article in the student publication of the school, reporting that a smoke bomb had gone off in plaintiff's classroom. The headline stated: "Students terrorize Moyer." The article quoted the bomb-thrower student, who merely "wanted to play a joke," as well as "The Shadow," the student who supplied the bomb, because "Mr. Moyer is a babbler, and babblers are annoying to me. ... Also he pissed me off, he is the worst teacher at FHS." *Held*, judgment on demurrer for defendants affirmed.

(a) "Before *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1, *supra*, §619, the California courts had employed a 'totality of the circumstances' test to differentiate between fact and opinion. ... The crucial determination whether the statement was fact or opinion was held to be a question of law for the court. ... *Milkovich* did not substantially change these principles; it underscored that in cases such as this, raising First Amendment issues, a reviewing court must make an independent examination of the whole record in order to ensure

that there is no infringement of free expression. ... The dispositive question for the court is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." (225 C.A.3d 724.)

(b) Considering the nature and meaning of the language used, including the verifiability of the statements, and the context in which the statements appeared, they were not actionable:

(1) The "worst teacher" statement was an expression of subjective judgment--an expression of anger or disgust; it contained no verifiable facts. (225 C.A.3d 725.)

(2) The "babbler" statement was a form of exaggerated expression conveying the student's disapproval of plaintiff's teaching or speaking style; it could not reasonably have been understood to be stating actual facts about plaintiff. (225 C.A.3d 726.)

(3) The headline "Students Terrorize Moyer" arguably implies a factual assertion. "But even if the descriptive term 'terrorize' is an exaggeration of the actual event, it nonetheless falls within the protectable category of rhetorical hyperbole--a word used in a loose figurative sense. Moreover, the article read in full context accurately reported that one student supplied another student with a smoke bomb that was set off during plaintiff's class." (225 C.A.3d 726.)

In *Kahn v. Bower* (1991) 232 C.A.3d 1599, 284 C.R. 244, plaintiff was terminated from her job as a county social worker on the basis of a letter to her supervisor from defendant, the director of a children's center. Plaintiff's subsequent defamation action was based on the following statements contained in the letter: (1) that there are needy children whose lives "we feel" are seriously being interfered with by plaintiff's incompetence; (2) that the staff at the children's center has tried to figure out what is the matter with plaintiff; (3) that plaintiff's action in sending a child back to Alaska, contrary to the center's recommendation, goes so far beyond incompetence that "I almost wonder about some kind of hostility towards the child or toward handicapped children in general"; (4) that plaintiff's level of incompetence and the confusion, chaos, and time wasting make it impossible for the center to work with her. Plaintiff contended that these statements were actionable under *Milkovich*, because they conveyed the requisite false factual imputations, i.e., that she was incompetent and hostile to children. *Held*, the statements regarding incompetence were actionable, but those regarding hostility were not.

(a) The sentence regarding plaintiff's hostility towards children merely states that defendant was so mystified by plaintiff's conduct that she wondered whether it reflected such hostility. This sentence is cautiously phrased in terms of apparency or rumination, i.e., something less even than surmise or conjecture, and hence cannot be reasonably understood to assert as an actual fact that plaintiff is hostile towards children. (232 C.A.3d 1609.)

(b) The same cannot be said of the imputation of incompetence. Because of the professional status of both defendant and plaintiff's supervisor, the letter is susceptible to the interpretation that plaintiff's incompetence was being asserted as a matter of fact. And, with respect to the real issue, i.e., whether the assertion is provably false, the letter can be reasonably interpreted as meaning that plaintiff's performance of her duties as a social worker was so poor that it was deleterious to the children in her care and made it impossible for the center to economically provide services to those children. Because a jury can decide whether that premise is true or false, the statements imputing incompetence are actionable as against the objection that they lack the requisite factual content. (232 C.A.3d 1609.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Morrow v. Los Angeles Unified School Dist.* (2007) 149 C.A.4th 1424, 1444, 57 C.R.3d 885 [school district superintendent's reported statements that high school where plaintiff was principal needed "stronger leadership," that his retirement plans did not "fit with the district's needs," and that his "handling of the recent violence" at school had "accelerated" a decision to replace him" were all protected opinions]; *Krinsky v. Doe 6* (2008) 159 C.A.4th 1154, 1173, 72 C.R.3d 231 [anonymous poster's references on Internet message board to corporate president as "crook" and "cockroach" and stating she had "fake medical degree" and "poor feminine hygiene" were not actionable; viewed in context of prolonged heated discussion of corporation, they could not be interpreted as asserting or implying objective

facts].



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ff. Review of Program.

5 Witkin Sum. Cal. Law Torts § 625

[§ 625] Review of Program.

In *Baker v. Los Angeles Herald Examiner* (1986) 42 C.3d 254, 228 C.R. 206, 721 P.2d 87, defendant Bunzel, a featured editorial columnist, wrote a column in defendant newspaper reviewing plaintiff producer's television documentary on sex education. The column, in eight paragraphs, contained the following passage alleged to be defamatory: "My impression is that the executive producer Walt Baker, who is also vice president in charge of programs for channel 9, told his writer/producer, Phil Reeder, 'We've got a hot potato here--let's pour on titillating innuendo and as much bare flesh as we can get away with. Viewers will eat it up.' " *Held*, judgment for defendants on demurrer affirmed; the statement was a nonactionable opinion.

(a) California decisions, such as *Gregory v. McDonnell Douglas Corp.* (1976) 17 C.3d 596, 131 C.R. 641, 552 P.2d 425, supra, §621, and *Okun v. Superior Court* (1981) 29 C.3d 442, 448, 453, 175 C.R. 157, 629 P.2d 1369, supra, §546, have developed a "totality of the circumstances" test.

(1) The *language* of the statement must be examined, and to be defamatory the words must be understood in a defamatory sense. Where the statement is "cautiously phrased in terms of apparency," it is less likely to be reasonably understood as a statement of fact. (42 C.3d 260.)

(2) The *context* in which the statement was made must be considered. The court must look to the nature and full content of the publication and the knowledge and understanding of the audience to whom it was directed. (42 C.3d 261.)

(b) The beginning phrase "my impression is" puts the reader on notice that the maker is not vouching for its accuracy; a reasonable person would understand that a statement of opinion is to follow. (42 C.3d 261, 262, citing *Gregory and Carr v. Warden* (1984) 159 C.A.3d 1166, 1170, 206 C.R. 162, supra, §546.)

(c) *Selleck v. Globe Int.* (1985) 166 C.A.3d 1123, 212 C.R. 838, supra, §545, is distinguishable: Nowhere is it asserted as a fact that Baker made the disputed statement; by using the term "impression" Bunzel made it clear that he intended only to convey his opinion about what Baker might have said to his writer/producer. (42 C.3d 263.)

(d) Plaintiff's contention, that the use of quotation marks made the statement one of fact, is without merit. Plaintiff's use of a hypothetical conversation was a permissible literary means of emphasizing the message to be communicated. (42 C.3d 263, 264.)

(e) A contextual analysis of the column shows that it was a highly critical review of a television documentary, and the text was permeated with opinion. (42 C.3d 264, 265.)

(f) Under *Rest.2d, Torts* §566 (supra, §618) and *Slaughter v. Friedman* (1982) 32 C.3d 149, 185 C.R. 244, 649 P.2d 886, supra, §564, a statement of opinion may be actionable if it implies the existence of undisclosed defamatory facts. But the statements here differ from those in *Slaughter*. An insured reasonably expects an insurance company's explanation regarding noncoverage of a claim to be based on facts; a reader of a television review expects a reviewer's opinions to be based on aesthetic sense and discriminating taste. And Bunzel's use of flashy hyperbole and sarcasm indicated that the conversation was a hypothetical tongue-in-cheek invention. (42 C.3d 267.)

(g) The consideration is strengthened by considering the societal context in which the article was published, the audience it intended to address, and the public debate to which it was meant to contribute. "Sex education in the public schools is a controversial subject. Discussion of this topic often engenders heated debate, similar in vigor to that typically experienced in labor disputes or in the political arena. ... Under these circumstances, a reader would be more likely to expect and understand critical commentary to be the intended statement of opinion." (42 C.3d 268.)

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f. Innocence or Good Faith.

1. Original Publisher.

5 Witkin Sum. Cal. Law Torts § 626

[§ 626] Original Publisher.

The long established rule has been that innocence or good faith of the defendant who makes a defamatory statement is not a defense, although it may be shown in mitigation of damages (*infra*, §1630). Thus, where the defendant or the defendant's employees through an honest and reasonable mistake defame the *wrong person*, the defendant is liable. (See *Taylor v. Hearst* (1895) 107 C. 262, 270, 40 P. 392; 69 *Harv. L. Rev.* 902, 912; 7 *So. Cal. L. Rev.* 346; 8 *So. Cal. L. Rev.* 359; 17 *So. Cal. L. Rev.* 684; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §270; cf. 22 *So. Cal. L. Rev.* 82 [discussing unintended identity of name of character in novel with that of actual person].)

The same is true where the defendant did not intend a statement in any defamatory sense, or made it in jest or anger; he or she is liable if a third person reasonably understands it in a defamatory sense. (*Ervin v. Record Publishing Co.* (1908) 154 C. 79, 82, 97 P. 21.)

This rule is, however, subject to the *New York Times* requirement of proof of actual malice where the defamatory statement is directed at public officials or public figures (see *supra*, §602 et seq.), and to the *Gertz* requirement of proof of negligence where the defamatory statement is directed at a private individual (see *supra*, §613 et seq.). (See Dobbs, *The Law of Torts* §417.)

West's Key Number Digest, Libel and Slander k.51

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §252.



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2. Ordinary Disseminator or Circulator.

5 *Witkin Sum. Cal. Law Torts* § 627

[§ 627] Ordinary Disseminator or Circulator.

Innocence is generally considered a defense where the defendant merely circulates another's libel; e.g., news dealers, bookstores, and circulating libraries are not liable where books or periodicals sold contain libelous materials, unless they knew or should have known of their defamatory nature. (*Osmond v. EWAP* (1984) 153 C.A.3d 842, 852, 200 C.R. 674, citing the text; *Rest.2d, Torts* §§581, 612; 69 *Harv. L. Rev.* 910.)

The Restatement discusses the effect of the rule on bookstores and libraries: "The vendor or lender is not liable, if there are no facts or circumstances known to him which would suggest to him, as a reasonable man, that a particular book contains matter which upon inspection, he would recognize as defamatory. Thus, when books of a reputable author or the publications of a reputable publishing house are offered for sale, rent or free circulation, he is not required to examine them to discover whether they contain anything of a defamatory character. If, however, a particular author or a particular publisher has frequently published notoriously sensational or scandalous books, a shop or library that offers to the public such literature may take the risk of becoming liable to any one who may be defamed by them." (*Rest.2d, Torts* §581, Comment e.)

In *Osmond v. EWAP*, *supra*, defendant operated a chain of retail "adult book stores" that sold sexually explicit films. One of the films contained matter allegedly libeling plaintiff, but all had been purchased from publishers or producers, and none of defendant's officers had any knowledge of plaintiff or any recollection of the libelous film. *Held*, summary judgment for defendant affirmed.

(a) The general rule, supported by the Restatement and text writers, is that a mere vendor or distributor of libelous matter is not liable unless he or she knew or should have known of the defamatory nature of the material. (153 C.A.3d 852.)

(b) This rule applies to an adult bookstore. "[F]ree speech guarantees of the First Amendment, as well as notions of due process, require that the activities of the 'adult' bookstores, like EWAP, receive the same protection from civil liability as ordinary bookstores and other distributors which merely disseminate libels produced or published by others." (153 C.A.3d 854.)

Although expressed in terms of privilege, the defense of a telegraph company, which ordinarily transmits a message without reason to know that it contains defamatory matter, is similar. (See *Mason v. Western Union Tel. Co.* (1975) 52 C.A.3d 429, 437, 125 C.R. 53; *Rest.2d, Torts* §§612, 581, Comment f; 4 *Hastings L. J.* 207; 91 A.L.R.3d 1015 [liability of telegraph or telephone company for transmitting or permitting transmission of libelous or slanderous messages].)

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3. Radio or Television Broadcaster.

5 Witkin Sum. Cal. Law Torts § 628

[§ 628] Radio or Television Broadcaster.

An approach to the liability of broadcasters, on the basis of the strict common law liability of newspaper publishers, has not proved satisfactory. The newspaper publisher is in a broad sense in charge of everything that appears in his paper, while the broadcasting company usually sells time to a sponsor and is not always able to control a performer who uses no script or departs from it. Late cases and modern legislation, therefore, tend to reject absolute liability and to treat the broadcaster as a disseminator, liable only for failure to exercise reasonable care to prevent the defamatory publication. (See 64 *Harv. L. Rev.* 727, 740; 66 *Harv. L. Rev.* 483; 69 *Harv. L. Rev.* 907; 24 *So. Cal. L. Rev.* 216; 50 *A.L.R.3d* 1311 [defamation by radio or television].)

California has solved the problem by a broad statutory exemption from liability for unintended defamation by radio and television broadcasts. The owner, licensee, or operator of the station or network, and his or her agents or employees, are protected from liability in the following circumstances:

(1) The defendant alleges and proves that he or she exercised due care to prevent the publication of the defamatory matter. (C.C. 48.5(1).)

(2) The defamatory matter comes over a network, except as to the station originating the broadcast. (C.C. 48.5(2).)

(3) The defamatory matter is a part of a broadcast "by or on behalf of any candidate for public office, which broadcast cannot be censored by reason of the provisions of federal statute or regulation of the Federal Communications Commission." (C.C. 48.5(3).) (See 23 *So. Cal. L. Rev.* 44.)

Even in the absence of such a state statute, the station will not be liable for defamation broadcast by a political candidate. Under the Federal Communications Act (47 U.S.C., §315), a station that permits a candidate for public office to broadcast must "afford equal opportunities" to other candidates, and "shall have no power of censorship over the material." In *Farmers Educational Cooperative Union of America, North Dakota Div. v. WDAY* (1959) 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407, a candidate for senator was allowed to give a defamatory reply to speeches of other candidates. Although the statute contains no express immunity provision for a station in these circumstances, the Court

found an implied immunity in the provision against censorship. Two alternatives to an immunity rule were rejected: (a) Exercise of the station's statutory right to refuse to allow any candidate to broadcast (47 U.S.C., §315) would withdraw political discussion from the air and defeat a major public object of the license. (b) The possibility of insurance against liability is too speculative. (See 73 *Harv. L. Rev.* 233 [generally approving result but suggesting that insurance may be practical solution]; 53 *Cal. L. Rev.* 421 [television, tort law, and federalism]; 72 *Harv. L. Rev.* 478; 32 *So. Cal. L. Rev.* 71.)

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g. Retraction by Newspaper or Broadcaster.

1. Background and Scope of Statute.

5 *Witkin Sum. Cal. Law Torts* § 629

[§ 629] Background and Scope of Statute.

The general rule is that a subsequent retraction or correction of a mistaken newspaper publication is not a defense, although proof of it is admissible in mitigation of damages. (*Taylor v. Hearst* (1895) 107 C. 262, 270, 40 P. 392; *Turner v. Hearst* (1896) 115 C. 394, 402, 47 P. 129.) The same is true, in the absence of statute, of defamatory broadcasts. (See 69 *Harv. L. Rev.* 940; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §342.)

In 1931, California enacted C.C. 48a, an extremely broad retraction or correction statute, applicable to newspaper libels. (See *Behrendt v. Times-Mirror Co.* (1938) 30 C.A.2d 77, 88, 85 P.2d 949.) In 1945 it was amended to cover slander by radio broadcast. C.C. 48.5, added in 1949, defines "radio broadcast" to include "both visual and sound radio broadcasting," thus including television broadcasting. (For general discussions, see *Werner v. Southern Calif. Associated Newspapers* (1950) 35 C.2d 121, 132, 216 P.2d 825 [upholding constitutionality of statute]; *Kapellas v. Kofman* (1969) 1 C.3d 20, 30, 81 C.R. 360, 459 P.2d 912, *infra*, §632; *Farr v. Bramblett* (1955) 132 C.A.2d 36, 43, 281 P.2d 372, *infra*, §635; C.E.B., 2 California Business Litigation, §11.150; 38 *Cal. L. Rev.* 951 [constitutionality and practical problems of application]; 64 *Harv. L. Rev.* 678; 69 *Harv. L. Rev.* 941; 3 *Hastings L. J.* 136; 4 *Hastings L. J.* 75 [comparing other retraction statutes]; 12 *So. Cal. L. Rev.* 225, 254; 19 *So. Cal. L. Rev.* 124; 23 *So. Cal. L. Rev.* 89, 591; 7 *Stanf. L. Rev.* 275 [public policy and conflict of laws]; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §342 et seq.)

In an action for libel or slander brought by a candidate for public office, the defendant's willingness or unwillingness to retract or correct a communication made during a campaign, and his or her action in doing so, are admissible in the exemplary damages phase of a bifurcated trial. (*Elec.C.* 20502(a); see *Elec.C.* 20502(b) [remedy is in addition to any other provided by law].)

SUPPLEMENT: [This section is current through the latest supplement]

Retraction in absence of statute: See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §325.

Retraction legislation: See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §325 et seq.



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2. Notice and Demand.

aa. Necessity.

5 *Witkin Sum. Cal. Law Torts* § 630

[§ 630] Necessity.

(1) *Statutory Requirement.* The plaintiff, within 20 days after knowledge of the publication or broadcast, must serve a written notice on the publisher at the place of publication or the broadcaster at the place of broadcast, specifying the defamatory statements, and demanding a correction. (C.C. 48a(1); see *Farr v. Bramblett* (1955) 132 C.A.2d 36, 44, 281 P.2d 372, *infra*, §635 [telegrams to defendant newspaper's editors demanding attendance at meeting in office of plaintiff's attorney to arrange for a retraction was not demand for a retraction within meaning of statute]; *O'Hara v. Storer Communications* (1991) 231 C.A.3d 1101, 1111, 282 C.R. 712 [letter from plaintiff's attorney requesting that defendant contact him to discuss retraction was conditional request, instead of required demand for correction]; on persons served, see *infra*, §631; on specification of statements, see *infra*, §632.)

(2) *Effect of Failure To Make Demand.* If the plaintiff does not serve the demand, he or she may recover only special damages. (C.C. 48a(1); see *Werner v. Southern Calif. Associated Newspapers* (1950) 35 C.2d 121, 125, 216 P.2d 825 [recovery limited to special damages]; *Pridonoff v. Balokovich* (1951) 36 C.2d 788, 791, 228 P.2d 6 [same]; *Farr v. Bramblett*, *supra*, 132 C.A.2d 43 [same]; BAJI, No. 7.08; CACI, No. 1722.)

In *Fisher v. Larsen* (1982) 138 C.A.3d 627, 188 C.R. 216, the court considered whether special damages to a plaintiff candidate for public office, limited to benefits and salaries obtainable only by election to the office, are recoverable in a defamation action. Following the approach of other jurisdictions--that lost future financial perquisites of office are too uncertain and speculative because many factors might influence an election--partial summary judgment against plaintiff on this issue was affirmed. (138 C.A.3d 635, 636.)

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bb. Persons Served.

5 *Witkin Sum. Cal. Law Torts* § 631

[§ 631] Persons Served.

(1) *Publisher or Broadcaster.* Even though the defendant is a third party, the statute requires service of the notice on the publisher or broadcaster. The reason is that they alone have the power to make an effective correction or retraction. The authority of the newspaper or station gives the statement its credibility; many news stories do not reveal the identity of the author, and are accepted by the public as statements of the publishing or broadcasting enterprise; and, even when the participant is identified, the weight attached to the statement is determined largely by the reputation of the enterprise. (*Field Research Corp. v. Superior Court* (1969) 71 C.2d 110, 115, 77 C.R. 243, 453 P.2d 747 [expanding on views expressed in *Pridonoff v. Balokovich* (1951) 36 C.2d 788, 791, 228 P.2d 6, *infra*, §634].)

In *Freedom Newspapers v. Superior Court* (1992) 4 C.4th 652, 14 C.R.2d 839, 842 P.2d 138, the required notice was served on the editor of the newspaper instead of to the publisher. It was nevertheless held sufficient under the pleadings because the complaint alleged that the editor had been designated by the publisher to receive such notices, and that the publisher acquired actual knowledge of the notice within the time period of C.C. 48a(1). (4 C.4th 655.) "[W]e hold that the requirements of section 48a(1) are satisfied when the demand for correction is (a) served upon the publisher, (b) served upon a person designated by the publisher to receive such notices, or (c) served upon someone employed at the newspaper other than the publisher or the publisher's designee *and* the publisher acquires *actual* knowledge of the request for correction within the time limit set forth in the statute. Such a rule is consistent with both the language of the statute and the policy it was designed to serve." (4 C.4th 658.)

(2) *Author.* Although the demand for retraction must be served on the

publisher in order to hold the author liable, there is no need to serve it on the author. (*Larrick v. Gilloon* (1959) 176 C.A.2d 408, 420, 1 C.R. 360.)

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g. Retraction by Newspaper or Broadcaster.

2. Notice and Demand.

cc. Specification of Statements.

5 *Witkin Sum. Cal. Law Torts* § 632

[§ 632] Specification of Statements.

(1) *Object of Requirement.* In *Kapellas v. Kofman* (1969) 1 C.3d 20, 30, 81 C.R. 360, 459 P.2d 912, the court said: "The purpose of the requirement for the described specificity is to facilitate the publisher's investigative efforts in determining whether statements in the initial article contained error and should be corrected. By designating the remarks that the objector considers libelous, a notice may enable the publisher to narrow the scope of his investigation. We recognize, however, that letters written to request retraction of a statement do not compose formal legal complaints; we cannot expect that they will conform to the niceties of common law pleading. In enacting section 48a the Legislature intended to afford publishers an opportunity to correct committed errors before subjecting them to liability; it did not intend to build technical barricades to recovery by the individual who had given notice sufficient to advise a reasonable publisher acting in good faith of the claimed error."

(2) *Test of Sufficiency.* The test of a notice and demand is whether the publisher should reasonably have comprehended which statements the plaintiff protested and wished corrected. (*Kapellas v. Kofman*, *supra*; see *MacLeod v. Tribune Publishing Co.* (1959) 52 C.2d 536, 553, 343 P.2d 36 [demand sufficient]; *Gomes v. Fried* (1982) 136 C.A.3d 924, 938, 186 C.R. 605 [insufficient specification].)

In *Kapellas*, the alleged libel consisted of an editorial stating that plaintiff, the mother of six children and a candidate for the city council, was needed at home rather than in public office, because her children had been guilty of specified misconduct according to police records. The notice requested correction of "every statement" concerning the conduct of the children, plaintiff's qualification for office, and her suitability as a mother. *Held*, it was sufficient. As to the children, it referred clearly enough to the police records; as to the mother, the libel consisted of false inferences or implications from apparently nonlibelous statements. "When the basis of a claim of libel lies in an implication flowing from the rhetoric of a publication, the allegedly damaging implication frequently cannot be connected to any one statement, or to even a few specific statements, but rather emanates from the tone of the article as a whole. In such an instance, section 48a's requirement of a specific notice must be interpreted in light of the nature of the alleged libel. The mere withdrawal of specific statements may not be adequate to purge the original implication; thus the notice requesting correction will necessarily be tailored to the mis-impression given." (1 C.3d 33.) Thus, the demand for the children was

specific, and the demand for the mother, asking for a correction of the implications rather than rectification of any individual statement, was also sufficient, particularly where defendant never sought clarification. (*1 C.3d 33, 34.*)

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3. Retraction.

5 Witkin Sum. Cal. Law Torts § 633

[§ 633] Retraction.

(1) *Statutory Requirement.* If a correction is not published or broadcast within 3 weeks after service of the demand, in "substantially as conspicuous a manner" as the original statements, the plaintiff may recover general and special damages; and plaintiff may also recover exemplary damages, in the discretion of the court or jury, if he or she pleads and proves actual malice. (C.C. 48a(2).)

(2) *Sufficiency of Retraction.* The question of the conspicuousness of a retraction, not being one of interpretation, is a question of fact. (*Twin Coast Newspapers v. Superior Court* (1989) 208 C.A.3d 656, 662, 256 C.R. 310 [on facts presented, no reasonable juror could find retractions insufficient under statutory standard]; *Pierce v. San Jose Mercury News* (1989) 214 C.A.3d 1626, 1630, 263 C.R. 410 [because reasonable jurors could differ on whether retraction was adequate, trial judge should have submitted question to jury]; 23 *Pacific L. J.* 1575 [sufficiency of retraction as question for judge or jury].)

In *Weller v. American Broadcasting Cos.* (1991) 232 C.A.3d 991, 283 C.R. 644, *supra*, §620, the trial judge, after instructing on the requirement of conspicuousness, added the following language: "For a correction to be legally sufficient and effective, it must be full and complete and cannot be evasive or equivocal, nor partial or hesitant, and it cannot contain any insinuations. It must be an honest endeavor to repair all the wrong caused by any defamatory statements or insinuations." (232 C.A.3d 1010.) Defendants argued that the additional language was erroneous because the only question for the jury was whether the retraction appeared in substantially as conspicuous a manner as did the alleged defamatory statement. *Held*, the instruction was proper. An equivocal or incomplete retraction would serve no purpose even if it were adequately conspicuous. (232 C.A.3d 1010.) (See 40 Proof of Facts 2d 649 [sufficiency of retraction].)

(3) *Publication of Retraction Before Demand.* A correction published before demand has the same effect as one published after. (C.C. 48a(3).) The statute does not, however, indicate the extent to which the publication of the correction, as demanded, absolves the defendant.

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aa. Publisher and Author.

5 *Witkin Sum. Cal. Law Torts* § 634

[§ 634] Publisher and Author.

(1) *Newspaper Publisher and Broadcaster*. C.C. 48a was sponsored by newspaper and broadcasting interests, and the demand must be served on the publisher or broadcaster (see *supra*, §631); hence, its primary purpose seems to be protection of publishers and broadcasters. (See *84 A.L.R.3d 1249* [who is protected by statute restricting recovery unless retraction is demanded].)

(2) *Author*. The statute also broadly applies to "any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast." Hence, although the demand must be served on the publisher or broadcaster (because they have power to make the correction), and need not be served on the author (see *supra*, §631), the protection of the statute extends to reporters, columnists, etc., i.e., authors of the defamatory material. Hence, failure to demand a retraction from the publisher precludes recovery of general or exemplary damages against the author. (*Pridonoff v. Balokovich* (1951) 36 C.2d 788, 791, 228 P.2d 6; see *Di Giorgio Corp. v. Valley Labor Citizen* (1968) 260 C.A.2d 268, 274, 67 C.R. 82, *infra*, §639 [newspaper reporter].)

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bb. Other Participants.

5 *Witkin Sum. Cal. Law Torts* § 635

[§ 635] Other Participants.

The statutory scope was extended in *Farr v. Bramblett* (1955) 132 C.A.2d 36, 281 P.2d 372: "We cannot distinguish the authors of printed newspaper advertisements from other authors who have the products of their pen placed in a newspaper." Moreover, the defense is applicable to the prior display of a matrix or copy of the advertisement to editors, publishers and employees of the newspaper; though this exhibition is not literally publication in a *newspaper*, it is a common prelude thereto and much of the statutory protection would be lost under a contrary rule. (132 C.A.2d 44.) But a different result was reached in the situation where the advertiser's copy was rejected by the newspaper: "The exhibition of the libelous matter to the newspaper personnel is protected when the libel is afterwards published in the newspaper as a part of the necessary process of publication, but where the libel is not afterwards printed in the newspaper its exhibition to the newspaper personnel is no part of such process of publication and section 48a can have no application to it." (132 C.A.2d 45.) (For partial disapproval of *Farr*, see *infra*, §638.)

In *Field Research Corp. v. Superior Court* (1969) 71 C.2d 110, 77 C.R. 243, 453 P.2d 747, the statute was held inapplicable to nonparticipants (see *infra*, §638). But the court also reaffirmed the holding in *Pridonoff v. Balokovich* (1951) 36 C.2d 788, 228 P.2d 6, *supra*, §634, that its protection is not limited to publishers and broadcasters: It protects all who participated in the publication or broadcast, including reporters, columnists, authors, critics, and editors. "Otherwise, that section would protect, not those engaged in the rapid dissemination of news, but merely those who owned or operated the facilities for such dissemination; it would protect, not a special form of news reporting, but a special form of investment. If without first demanding and being refused a retraction, plaintiffs could reach behind the publisher or broadcaster and sue instead the offending reporter or other participant, section 48a would serve little purpose and would actively discourage the very free and rapid dissemination of news it seeks to encourage." (71 C.2d 115.) (See 84 A.L.R.3d 1249 [who is protected by statute restricting recovery unless retraction is demanded].)

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5. Where Statute Does Not Apply.

aa. Slander.

5 *Witkin Sum. Cal. Law Torts* § 636

[§ 636] Slander.

The statute refers to libel in a newspaper or slander by broadcast. (See C.C. 48a(1), *supra*, §629.)

(1) *Slander Uttered to Newspaper Reporter*. In *Mercado v. Hoefler* (1961) 190 C.A.2d 12, 11 C.R. 787, defendant employer discharged plaintiff employee, and gave a newspaper reporter an oral explanation, which was concededly slanderous per se. Defendant contended that, because the statements were subsequently printed in newspapers, the tort was libel and the retraction statute applied. *Held*, the mere fact that oral defamation is printed in a newspaper does not make it libel, and the purpose of the statute was to protect news disseminators, not those who make slanderous oral statements. (190 C.A.2d 18.) (See 84 A.L.R.3d 1249.)

(2) *Slander by Intruder in Broadcast*. In *White v. Valenta* (1965) 234 C.A.2d 243, 44 C.R. 241, plaintiff car dealer was broadcasting a television commercial on his lot. Defendant angrily entered and, in view of the camera, made a menacing gesture and a slanderous remark. In this action for slander, defendant invoked the retraction statute which, in literal terms, seemed applicable, because his slander did take place in a broadcast. But the court declared that it would be "a perversion of the legislative intent" and of doubtful constitutionality to allow the defense. (234 C.A.2d 248.) Defendant's position was like that of a person who secretly manages to insert a libelous statement in a newspaper: "[T]o afford him the protection of section 48a would be like clothing a burglar with the privileges and immunities appurtenant to the lawful possession of land." (234 C.A.2d 249.)

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bb. Publication in Magazines.

5 Witkin Sum. Cal. Law Torts § 637

[§ 637] Publication in Magazines.

The requirement of retraction published within 3 weeks of demand (see *supra*, §633) would often be impossible of fulfillment by a magazine, and it has been generally understood that magazines are not within the protected group. (See *Morris v. National Federation of the Blind* (1961) 192 C.A.2d 162, 165, 13 C.R. 336; 18 Southwestern U. L. Rev. 197 [reviewing cases and suggesting legislation to protect magazines].)

In *Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 543, 93 C.R. 866, 483 P.2d 34, *infra*, §§691, 692, the court held that a cause of action for invasion of privacy was stated, but that no action for libel could be maintained because of failure to comply with the retraction statute. The *Briscoe* dictum, set forth in that case without discussion and without citation of the *Morris* case, was repeated in *Johnson v. Harcourt, Brace, Jovanovich* (1974) 43 C.A.3d 880, 894, 118 C.R. 370, *infra*, §689.

In *Montandon v. Triangle Publications* (1975) 45 C.A.3d 938, 952, 120 C.R. 186, *supra*, §611, the court declared that the *Briscoe* and *Johnson* dicta were not controlling, and reaffirmed the *Morris* holding that the statute does not apply to magazines.

In *Burnett v. National Enquirer* (1983) 144 C.A.3d 991, 193 C.R. 206, the court accepted "the better view" of *Morris* and *Montandon*, that C.C. 48a applies only to newspapers (144 C.A.3d 1001), and added some comments on the test to be applied. Defendant's publication did not give normal coverage of news, but followed a formula of "how to" stories, celebrity or medical or personal improvement stories, gossip items, etc. The court observed that the protection of C.C. 48a is limited "to those who engage in the immediate dissemination of news on the ground that the Legislature could reasonably conclude that such enterprises ... cannot always check their sources for accuracy and their stories for inadvertent publication errors." (144 C.A.3d 1004.) Hence, the essential question is not whether a publication is properly called a "magazine," but whether it can be characterized as a "newspaper" within the contemplation of the statute. And here, the evidence supported the trial judge's conclusion that the *National Enquirer* was not a "newspaper." (144 C.A.3d 1004, 1005.)

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cc. Nonparticipants.

5 *Witkin Sum. Cal. Law Torts* § 638

[§ 638] Nonparticipants.

In *Field Research Corp. v. Superior Court* (1969) 71 C.2d 110, 77 C.R. 243, 453 P.2d 747, plaintiff produced a public opinion poll on candidates for governor in the Republican primary. Defendant, a candidate, made defamatory statements to newspaper and broadcasting company representatives (calling the poll inaccurate, corrupt, and dishonest). Plaintiff, without serving a demand for retraction, sued defendant. The trial judge held the statute applicable, and granted partial summary judgment for defendant. *Held*, mandamus granted to vacate order; the statute did not apply.

(a) Defendant was a private citizen, not a participant in the publishing or broadcasting enterprise. The fact that his statements were heard and recorded by representatives of news media did not make him a disseminator of news. "There is a significant difference ... between one who occasionally discovers and makes public an item that is newsworthy and one who, as a daily occupation or business, collects, collates, evaluates, reduces to communicable form, and communicates the news. It is these latter activities that the Legislature sought to protect by section 48a." (71 C.2d 115.)

(b) The newspapers and stations that reported defendant's statements could not have corrected or retracted effectively, for they could not speak for defendant. (71 C.2d 116.)

(c) *Farr v. Bramblett* (1955) 132 C.A.2d 36, 281 P.2d 372, *supra*, §635, suggesting that the statute applied to nonparticipants, is disapproved on that point. (71 C.2d 114, footnote 4.) (See *Dietrich v. Litton Industries* (1970) 12 C.A.3d 704, 711, 90 C.R. 856 [following *Field*; press release to news media distinguished from news story written by reporter; person issuing release is not protected by statute]; *Denney v. Lawrence* (1994) 22 C.A.4th 927, 936, 27 C.R.2d 556 [C.C. 48a did not apply to author of letter to newspaper editor; letter authors are not "participants" in business of news dissemination].)

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5. Where Statute Does Not Apply.

dd. Republication.

5 *Witkin Sum. Cal. Law Torts* § 639

[§ 639] Republication.

In *Di Giorgio Corp. v. Valley Labor Citizen* (1968) 260 C.A.2d 268, 67 C.R. 82, Boehm wrote an article which was published in the Union Gazette of Santa Clara County, using information supplied by G, a labor organizer. G mailed a clipping to the editor of the Valley Labor Citizen, independently owned and circulated in San Joaquin County, and the editor, Ballis, published it. It contained derogatory statements about plaintiff, who sued all the parties for libel. The verdict was for plaintiff, against all defendants, for general and punitive damages. *Held*, reversed.

(a) Boehm, the author of the original story, was not liable at all. Ordinarily, the originator of defamatory matter is liable for every repetition (a separate publication) if he could reasonably have foreseen it. (260 C.A.2d 273; see *supra*, §536.) But this rule was inapplicable here for two reasons: *First*, plaintiff did not raise the issue of foreseeability, either by pleading or by seeking an instruction on it. *Second*, plaintiff did not plead or prove a request for a retraction by the original publisher, *Union Gazette*. (260 C.A.2d 276.) "[B]y legislative fiat a newspaper reporter who authors a libelous article for publication in a newspaper or newspaper chain for which he is employed and who does not authorize, consent to or intentionally participate in the republication of his article by another independently owned and operated newspaper or newspaper chain is not liable for general damages for the republication if the plaintiff does not plead and prove that he requested a retraction by the publisher of the newspaper in which the article initially appeared and his request was refused by the publisher. A contrary holding would effectively defeat the objects and purposes of section 48a. It would subject the publisher of a newspaper (who had no control over retractions by other newspapers) and all others who participated in the original publication of defamatory matter to multiple suits for general damages even though the publisher had published a retraction in his own newspaper or newspaper chain." (260 C.A.2d 274.)

(b) Judgment against the other defendants is reversed because general and punitive damages were awarded against all, in a single amount, under erroneous instructions; thus, the judgment cannot be severed. (260 C.A.2d 278.)

(c) Two significant questions remain open: (1) Whether *general damages* would be recoverable against the author for a foreseeable republication if the original publisher refused a requested retraction. (2) Whether the author would be liable for *special damages* for a foreseeable republication. (260 C.A.2d 276.)

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D. Slander of Title and Trade Libel.

1. In General.

a. Nature of Causes of Action.

5 Witkin Sum. Cal. Law Torts § 640

[§ 640] Nature of Causes of Action.

Slander of title and trade libel are distinct torts, but are classified in the Restatement under the general heading of "disparagement" (see Rest.2d, Torts, Division Six, Chapter 28, Topic 2), both being invasions of the interest in vendibility of property. Slander of title involves false disparagement of the *title* to property, while trade libel involves false disparagement of the *quality* of goods or services. (See *infra*, §§642, 645.) Although in some respects the action for defamation is similar to one for disparagement (see *infra*, §648), there is one basic difference: The action for defamation is designed to protect the *reputation* of the plaintiff, and the judgment vindicates that reputation, whereas the action for disparagement is based on *pecuniary damage* and lies only where that damage has been suffered. (See *Smith v. Stuthman* (1947) 79 C.A.2d 708, 709, 181 P.2d 123; *Glass v. Gulf Oil Corp.* (1970) 12 C.A.3d 412, 423, 89 C.R. 514, *infra*, §643; *Appel v. Burman* (1984) 159 C.A.3d 1209, 1214, 206 C.R. 259, *infra*, §643; *Guess v. Superior Court* (1986) 176 C.A.3d 473, 479, 222 C.R. 79; *Leonardini v. Shell Oil Co.* (1989) 216 C.A.3d 547, 572, 264 C.R. 883, citing the text; Rest.2d, Torts §623A et seq., *infra*, §641; 2 Harper, James & Gray 2d, §6.1; Dobbs, *The Law of Torts* §457; Cal. Civil Practice, 6 Business Litigation, §65:1 et seq.; C.E.B., 1 Real Property Remedies and Damages 2d, §9.1 et seq.; 19 So. Cal. L. Rev. 45; 4 U.C.L.A. L. Rev. 159; 50 Am.Jur.2d (1995 ed.), Libel and Slander §548 et seq.; 55 Proof of Facts 3d 509 [proof of slander of title]; on Uniform Single Publication Act, see *supra*, §538.)

Section 43(a) of the Lanham Act (see 15 U.S.C., §1125(a); 13 Summary (10th), *Personal Property*, §86) creates a related federal cause of action: "Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which ... in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of ... another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." (15 U.S.C., §1125(a)(2); see 194 A.L.R. Fed 174 [application of doctrine of "reverse passing off" under Lanham Act]; 79 Proof of Facts 3d 1 [establishing claim for trade libel or product disparagement under §43(a) of Lanham Act].)

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See 2 Harper, James & Gray 3d §6.1; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §524 et seq. *Lanham Act cause of action*: See *Kirby v. Sega of America* (2006) 144 *C.A.4th* 47, 57, 61, 50 *C.R.3d* 607 [Lanham Act cause of action for misrepresentation that celebrity endorsed product is subject to First Amendment defense recognized in right of publicity cases where there is transformative change (see text, §680); Lanham Act is federal equivalent of right of publicity claim].



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D. Slander of Title and Trade Libel.

1. In General.
- b. Restatement.

5 *Witkin Sum. Cal. Law Torts* § 641

[§ 641] Restatement.

(1) *General Principle.* Chapter 28 of Division Six of the Second Restatement is entitled "Injurious Falsehood (Including Slander of Title and Trade Libel)," and *Rest.2d, Torts* §623A states the general principle: "One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity."

(2) *Scope.* Comment a points out that the principle is applied chiefly in cases of disparagement of property in land, chattels, or intangible things, or of their quality; but is equally applicable to other publications of false statements that do harm to interests of another having pecuniary value and so result in pecuniary loss.

(3) *Intent.* Comment b notes that it is not enough that some third person might be influenced by defendant's casual statement; "[h]e must know of some circumstance that would lead a reasonable man to realize that the publication of the falsehood would be likely to cause the pecuniary loss to the other."

(4) *Effect of Constitution.* Comment c discusses the possible effect of the *New York Times* rule (*supra*, §602). In §623A, Caveats, the Institute takes no position on the matter: "(1) Whether, instead of showing the publisher's knowledge or reckless disregard of the falsity of the statement, as indicated in Clause (b), the other may recover by showing that the publisher had either (a) a motive of ill will toward him, or (b) an intent to interfere in an unprivileged manner with his interests; or (2) Whether either of these alternate bases, if not alone sufficient, would be made sufficient by being combined with a showing of negligence regarding the truth or falsity of the statement."

(5) *Damages.* Comment f points out that compensatory damages have consistently been limited to harm to interests of the plaintiff having pecuniary value and to proved pecuniary loss.

(6) *Defamation Distinguished.* Comment g discusses the differences between injurious falsehood and defamation: "From the beginning, more stringent requirements were imposed upon the plaintiff seeking to recover for injurious falsehood in three important respects--falsity of the statement, fault of the defendant and proof of damage. At common

law a defamatory statement was presumed to be false and truth was a matter to be proved by the defendant; in an action for injurious falsehood, the plaintiff must plead and prove that the statement is false. At common law, a defendant in a defamation action was held to strict liability insofar as falsity of the statement was concerned; in an action for injurious falsehood he was subject to liability only if he knew of the falsity or acted with reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interests of the plaintiff in an unprivileged fashion. In defamation, it was only in a limited number of situations that a plaintiff was required to prove special damages; in injurious falsehood, pecuniary loss to the plaintiff must always be proved."

However, the two torts may overlap in cases of disparagement of the plaintiff's business or product. "If the statement reflects merely upon the quality of what the plaintiff has to sell or solely on the character of his business, then it is injurious falsehood alone. ... On the other hand, if the imputation fairly implied is that the plaintiff is dishonest or lacking in integrity or that he is perpetrating a fraud upon the public by selling something that he knows to be defective, the personal defamation may be found."

West's Key Number Digest, Libel and Slander k.130

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CHAPTER IX - Torts

Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

D. Slander of Title and Trade Libel.

2. What Constitutes Slander of Title.

a. Elements.

5 *Witkin Sum. Cal. Law Torts* § 642

[§ 642] Elements.

Slander of title is a false and unprivileged disparagement, oral or written, of the title to real or personal property, resulting in actual pecuniary damage. (*Gudger v. Manton* (1943) 21 C.2d 537, 541, 134 P.2d 217; *Glass v. Gulf Oil Corp.* (1970) 12 C.A.3d 412, 419, 89 C.R. 514, *infra*, §643, citing the text; *Seeley v. Seymour* (1987) 190 C.A.3d 844, 857, 237 C.R. 282, *infra*, §644; *Rest.2d, Torts* §624; see *Appel v. Burman* (1984) 159 C.A.3d 1209, 1214, 206 C.R. 259, *infra*, §643 [elements are "publication, falsity, absence of privilege, and disparagement of another's land which is relied upon by a third party and which results in pecuniary loss"]; 2 Harper, James & Gray 2d, §6.1; C.E.B., 1 Real Property Remedies and Damages 2d, §9.3 et seq.; 50 Am.Jur.2d (1995 ed.), Libel and Slander §§548, 550 et seq.; 86 A.L.R.4th 738 [sufficiency of plaintiff's interest in real property to maintain action]; 55 Proof of Facts 3d 509 [slander of title]; 28 Am.Jur. Trials 229 [slander of title by improper recording of notice of default].)

The statement is disparaging if it throws any doubt on the ownership of the property. The disparagement may occur not only by complete denial of the title, but also by claim of some interest in it. Thus, filing or recording a document that appears to claim an interest or to cast doubt on the title may furnish the basis for an action. (*Seeley v. Seymour*, *supra*; see *Coley v. Hecker* (1928) 206 C. 22, 27, 272 P. 1045 [abstract of judgment recorded despite stay of execution]; *Davis v. Wood* (1943) 61 C.A.2d 788, 793, 143 P.2d 740 [notice of location of mining claim filed on property held by plaintiff as lessee]; *Wright v. Rogers* (1959) 172 C.A.2d 349, 366, 342 P.2d 447 [filing for record unfounded claim to property of another]; *Contra Costa County Title Co. v. Waloff* (1960) 184 C.A.2d 59, 64, 7 C.R. 358 [experienced purchaser, to gain modification of contract, made unfounded accusations of fraud and recorded unwarranted declaration of rescission, which clouded title and made another deal fall through]; *Southcott v. Pioneer Title Co.* (1962) 203 C.A.2d 673, 676, 21 C.R. 917 [no cause of action stated]; *Rest.2d, Torts* §629, Comment d; 5 *Cal. Proc.* (4th), *Pleading*, §705.)

Although several older California cases dealing with slander of title refer to "malicious" disparagement and state that "malice" is an essential element of the cause of action (see *Burkett v. Griffith* (1891) 90 C. 532, 537, 27 P. 527; *Fearon v. Fodera* (1915) 169 C. 370, 380, 148 P. 200), it was later held, in accordance with the Restatement rule, that actual malice or ill will is unnecessary. These cases hold that all that is required is the fictional malice or "malice implied in law" from the unprivileged character of the act. (*Gudger v. Manton*, *supra*, 21 C.2d 543; see *Contra Costa County Title Co. v. Waloff*, *supra*, 184 C.A.2d 67 [inferred from intemperate statements and unfounded accusations against vendor]; *Spencer v. Harmon Enterprises* (1965) 234 C.A.2d 614, 622, 44 C.R. 683 [fraudulent attempt to secure

title to property by wrongful means]; *Rest.2d, Torts* §623A, Comment d; 50 *Am.Jur.2d* (1995 ed.), Libel and Slander §555.) However, it has been suggested, in the context of trade libel, that a showing of actual malice is constitutionally required where "injurious falsehood" involves a matter of public concern. (See *Melaleuca v. Clark* (1998) 66 *C.A.4th* 1344, 1363, 78 *C.R.2d* 627, *infra*, §650.)

The tort action protects the salability of property, and a title acquired by adverse possession is not a marketable title (see 12 *Summary* (10th), *Real Property*, §212). Hence, until there is a judicial decree establishing of record the adverse possessor's title, the presumption of ownership in the record owner applies, and there can be no recovery by the adverse possessor, "whether one categorizes the missing element as involving a lack of malice or a lack of falsity of the publication." (*Howard v. Schaniel* (1980) 113 *C.A.3d* 256, 264, 169 *C.R.* 678.)

West's Key Number Digest, Libel and Slander k.130 et seq., 134 et seq.

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See 2 Harper, James & Gray 3d §6.1; 103 *Am. Jur. Trials* 1 [slander of title claims]; 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §530 et seq.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §749.



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2. What Constitutes Slander of Title.

b. Illustrations.

5 *Witkin Sum. Cal. Law Torts* § 643

[§ 643] Illustrations.

In *Phillips v. Glazer* (1949) 94 C.A.2d 673, 211 P.2d 37, defendant, after obtaining judgment that plaintiff's adjoining house encroached five inches on her land, placed a large sign on her garage reading: "Notice. Anyone buying No. 20 Malibu [plaintiff's house] is buying law suit. Anyone renting or using main house or garage will be sued for rent. Title clouded rt. sides wall, foundation mine." As a result, prospective purchasers lost interest and brokers would not list the property. *Held*, defendant was liable for slander of title. Her right to the five-inch strip was no longer in dispute, and, apart from this settled issue, there was no cloud on plaintiff's title to the rest of his property. (94 C.A.2d 677.)

In *Baker v. Kale* (1947) 83 C.A.2d 89, 189 P.2d 57, plaintiff, lessee of business premises, contracted to sell the lease, the buyer being protected by a "satisfaction" clause. Defendant lessor falsely informed the buyer that the lease was invalid and that he would not be allowed to take possession. The buyer, invoking the satisfaction provision, refused to perform, asserting that he did not want to buy a lawsuit. In plaintiff's action for slander of title, defendant admitted that the lease was good, and contended that therefore the contract of sale was binding and plaintiff's remedy was against the buyer for breach of contract (citing a dictum in *Burkett v. Griffith* (1891) 90 C. 532, 27 P. 527). *Held*, the dictum was no longer law since the recognition in California of the tort of inducing breach of contract by unlawful means (see *infra*, §731), and plaintiff was entitled to recover for the difference between the buyer's price and the amount later received on a sale to another. (83 C.A.2d 92.) Although the opinion does not discuss the question of alternative remedies, it seems clear that, under these facts, plaintiff, at his election, could have sued for the tort of inducing breach of contract instead of for slander of title. (See *Blender v. Superior Court* (1942) 55 C.A.2d 24, 130 P.2d 179 [similar choice of remedies].)

In *Glass v. Gulf Oil Corp.* (1970) 12 C.A.3d 412, 89 C.R. 514, plaintiffs, husband and wife, purchased a lot that had a private access road. Defendant, engaged in developing adjoining property into a city with a population of over 20,000, filed a master plan with the county planning commission, and publicly displayed a large model. The model and plan appeared to depict plaintiffs' road as a major public access route, and similar representations were made by statements of defendants' representatives, photographs, and radio broadcasts. Plaintiffs' efforts to obtain corrections were futile, and they brought this action for damages for slander of title and injunction against further representations. *Held*, verdict and judgment for plaintiffs affirmed. The court, however, added a word of caution: "[T]he mere planning for improvements which may have a disparaging effect on the value of a neighbor's property" does not give rise to an action "unless, as

here, it is accompanied by evidence to sustain a false claim of right to use the neighbor's property for the purpose of effecting the planned improvement." (12 C.A.3d 440.)

In *Appel v. Burman* (1984) 159 C.A.3d 1209, 206 C.R. 259, plaintiffs, planning an addition to their home, had a survey made, which disclosed that a privacy fence between their land and defendants' land encroached on a six-foot strip of plaintiffs' land. In order to have a utility pole on the strip removed, plaintiffs paid the necessary charge to the utility and department of water and power, and plaintiffs also acquired a building permit for their construction. However, defendants claimed the privacy fence as an agreed boundary, thereby preventing plaintiffs from going ahead with construction until they obtained judgment in the present action for an injunction and damages (a period of two years). *Held*, judgment for plaintiffs affirmed. "The trial court made a finding in which it drew the inference from appellants' own testimony that to protect their privacy they used a claim of agreed upon boundary as an excuse to prevent the respondents from constructing their improvements for as long as possible without any sincere belief that appellants had any right, title or interest in the respondents' property. Appellants published the disparagement to several entities, principally the department of water and power, which agency then refused to move the power pole which resulted in damage to the respondents." (159 C.A.3d 1214.) (On measure of damages, see *infra*, §646.)

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2. What Constitutes Slander of Title.

c. Instrument Void on Its Face.

5 *Witkin Sum. Cal. Law Torts* § 644

[§ 644] Instrument Void on Its Face.

In *Seeley v. Seymour* (1987) 190 C.A.3d 844, 237 C.R. 282, plaintiff Seeley, owner of an unimproved lot in the downtown area of San Francisco, entered into negotiations, in 1978, with defendant Seymour, who wanted a long-term lease. Although the parties were still negotiating, Seymour unilaterally prepared a "Memorandum of Agreement," signed by himself, containing the essential terms of a lease, and presented it to defendant Safeco Title Co., which had it recorded in San Francisco. Negotiations broke down, plaintiff later attempted to sell the property, and a preliminary title report disclosed the existence of the memorandum; but plaintiff's demand that Seymour execute a quitclaim deed was ignored. In 1981, plaintiff gave B an option to buy, conditioned on conveyance of a marketable title, but Seymour still refused to remove the cloud of the memorandum. Plaintiff then filed an action against Seymour and Safeco for slander of title, and another action against defendant San Francisco, its recorder, and Safeco, for negligent recordation of the memorandum. A jury verdict was rendered for compensatory damages against all defendants and punitive damages against Seymour. The trial judge then apportioned liability, 92% to Seymour, 5% to Safeco and 3% to San Francisco. *Held*, the action for slander of title was maintainable.

(a) Defendants contended that, because the memorandum was void on its face as a matter of law, it could not constitute a cloud on Seeley's title. The cases cited to support this contention dealt with the equitable action to cancel an instrument, and the reasoning was that such an instrument casts no legal cloud on title and, hence, there is no need for equitable relief. (190 C.A.3d 856.) But no California decision requires that the published matter create a legal "cloud"; even oral statements or signs may constitute an actionable disparagement. (190 C.A.3d 857, citing *Burkett v. Griffith* (1891) 90 C. 532, 27 P. 527, and *Phillips v. Glazer* (1949) 94 C.A.2d 673, 211 P.2d 37, *supra*, §643.)

(b) "[T]he key to whether the defendant's conduct is actionable is not whether he has succeeded in casting a legal cloud on the plaintiff's title, but whether he could reasonably foresee that 'the conduct of a third person as purchaser or lessee ... might be determined thereby.' " (190 C.A.3d 857, quoting *Rest.2d, Torts* §624.) The spurious memorandum is a perfect example of a publication that defendant could anticipate might chill the enthusiasm of any prospective purchaser. (190 C.A.3d 858.) *Gudger v. Manton* (1943) 21 C.2d 537, 134 P.2d 217, supports the rule that a recorded document may have no effect on title yet still give rise to a cause of action. (190 C.A.3d 858.)

(c) "We conclude that it is the reasonably foreseeable effect upon prospective purchasers or lessees, not the strictly

legal effect on title of a recorded instrument, which is the gravamen of a cause of action for disparagement of title under California law." (190 C.A.3d 859.) (On actions to cancel void instrument, see 3 *Cal. Proc.* (4th), *Actions*, §123; 5 *Cal. Proc.* (4th), *Pleading*, §630.)

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Action to cancel void instrument:

Cross-References: 3 *Cal. Proc.* (5th), *Actions*, §129; 5 *Cal. Proc.* (5th), *Pleading*, §671.



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5 Witkin Sum. Cal. Law Torts § 645

[§ 645] What Constitutes Trade Libel.

A trade libel is an intentional disparagement of the *quality* of property that results in pecuniary damage. (*Rest.2d, Torts* §626; see *Nichols v. Great Amer. Ins. Cos.* (1985) 169 C.A.3d 766, 773, 215 C.R. 416 [complaint that seller of device designed to intercept television signals damaged cable company's business alleged no disparagement, and hence, no trade libel]; *Leonardini v. Shell Oil Co.* (1989) 216 C.A.3d 547, 572, 264 C.R. 883, citing the text [trade libel is well recognized tort in California]; C.E.B., 2 California Business Litigation, §11.88 et seq.; 74 A.L.R.3d 298 [disparagement of quality of intangible property]; 42 A.L.R.4th 318 [derogatory advertising].)

To constitute trade libel, a statement must be false. (*Leonardini v. Shell Oil Co.*, *supra*; *ComputerXpress v. Jackson* (2001) 93 C.A.4th 993, 1010, 113 C.R.2d 625.) Because mere opinions cannot by definition be false statements of fact, opinions alone will not support a cause of action for trade libel. (*Hofmann Co. v. E.I. Du Pont de Nemours & Co.* (1988) 202 C.A.3d 390, 397, 248 C.R. 384; *ComputerXpress v. Jackson*, *supra*; see *Melaleuca v. Clark* (1998) 66 C.A.4th 1344, 78 C.R.2d 627, *infra*, §650 [holding statements in issue to be factual].)

Trade libel differs from defamation in that the plaintiff "must prove special damages in the form of pecuniary loss; he must carry the burden of proving that the disparaging statement is false; and 'such personal elements of damage as mental distress have been strictly excluded from these claims.'" (*Guess v. Superior Court* (1986) 176 C.A.3d 473, 479, 222 C.R. 79 [quoting Prosser in part]; see *Polygram Records v. Superior Court* (1985) 170 C.A.3d 543, 549, 216 C.R. 252, citing the text [distinguishing trade libel and defamation]; 104 A.L.R.5th 523 [defamation of manufacturer regarding product].)

If, however, disparagement of the goods is made in such a manner as to imply business dishonesty or incompetence of the plaintiff, plaintiff is not limited to the pecuniary damages resulting from the disparagement, but may sue for defamation. (See *Rosenberg v. J.C. Penney Co.* (1939) 30 C.A.2d 609, 620, 86 P.2d 696 [defendant displayed samples of plaintiff's gym shorts, labeling them "prison made merchandise," "seconds," "shoddy," etc.]; *Rest.2d, Torts* §623A, Comment g.)

The wiser strategic choice, as indicated in the *Rosenberg* case, is to sue for defamation. In *Erlich v. Etner* (1964) 224 C.A.2d 69, 36 C.R. 256, the court pointed out that in such an action, based on disparagement of goods that implied business dishonesty, recovery could have been had on the theory of libel per se, without proof of special damages. (224

C.A.2d 73.) But plaintiff elected to proceed solely on the theory of trade libel, and failed to meet the burden of proving particular losses caused by the disparagement. The opinion quotes Prosser as follows: "[T]he remedy has been so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived." (224 *C.A.2d 73.*) (See 17 *Hastings L. J.* 394 [Erlich].)

West's Key Number Digest, Libel and Slander k.130, 131, 133 et seq.

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5 *Witkin Sum. Cal. Law Torts* § 646

[§ 646] Damage: Pecuniary Loss.

Pecuniary loss is a necessary element in all injurious falsehood cases. (See *Davis v. Wood* (1943) 61 C.A.2d 788, 799, 143 P.2d 740; *Glass v. Gulf Oil Corp.* (1970) 12 C.A.3d 412, 425, 89 C.R. 514; supra, §643; *Seeley v. Seymour* (1987) 190 C.A.3d 844, 864, 237 C.R. 282, supra, §644; supra, §§640, 641, 642, 645.)

This element is described in *Rest.2d, Torts* §633(1): "The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and (b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement." The Comments on Clause (1)(a) discuss such losses as those caused by deprivation of opportunity to sell to a particular purchaser, resulting from diminution in price, and caused by prevention of sales to unidentified persons. (See *Rest.2d, Torts* §633, Comment c et seq.) The Comment on Clause (1)(b) points out that the recovery may be the expense of defending an action, or other expenses reasonably necessary to counteract the injurious publication, such as the cost of notifying customers of its falsity or the publication of denials. (See *Rest.2d, Torts* §633, Comment k.)

In *Appel v. Burman* (1984) 159 C.A.3d 1209, 206 C.R. 259, supra, §643, the trial judge found that, during the 2-year period of delay caused by defendants, the cost of construction of the planned addition to plaintiffs' home had risen, and damages representing the difference were awarded. The judgment also included attorneys' fees and costs incurred in clearing the title. *Held*, award affirmed. Though the disparagement may not have affected vendibility of the property (it could have been sold with or without the addition), the disparagement did result in a loss of value by reason of the increased cost of construction of the addition. "Regardless of how much the property could be sold for, then or now, this particular sum of money could never be recovered other than in the instant action." (159 C.A.3d 1215.)

A plaintiff suing for trade libel may not rely on a general decline in business to show pecuniary loss from the alleged falsehood, but must instead identify particular customers and transactions of which it was deprived as a result. (*Mann v. Quality Old Time Service* (2004) 120 C.A.4th 90, 109, 15 C.R.3d 215.)

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5. Defenses.
a. Truth.

5 *Witkin Sum. Cal. Law Torts* § 647

[§ 647] Truth.

To be actionable, the disparaging statement must be untrue. But truth is not merely a defense as in actions for defamation; falsity is an element of the cause of action, on which the plaintiff has the burden of proof. (*Rest.2d, Torts* §§634, 651(1)(c); see 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §559.) (On functions of court and jury, see *Rest.2d, Torts* §652.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §535.



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5 Witkin Sum. Cal. Law Torts § 648

[§ 648] Absolute Privilege.

The absolute privileges applicable in actions for defamation (see *supra*, §561 et seq.) are also available in disparagement of title actions. (*Albertson v. Raboff* (1956) 46 C.2d 375, 378, 295 P.2d 405 ["Questions of privilege relating to both torts are now resolved in the light of" C.C. 47].) The same is true in actions for trade libel. (*117 Sales Corp. v. Olsen* (1978) 80 C.A.3d 645, 651, 145 C.R. 778.) (See *Rest.2d, Torts* §635; C.E.B., 2 California Business Litigation, §11.94.)

The privilege protecting publications in a *judicial proceeding* (see C.C. 47(b)(2), *supra*, §567) extends to any publication that "has a reasonable relation to the action and is permitted by law." (*Albertson v. Raboff, supra*, 46 C.2d 381.) In the *Albertson* case, it was held that a notice of lis pendens (see 3 Cal. Proc. (4th), Actions, §344 et seq.) is a publication in the course of a judicial proceeding and is therefore absolutely privileged. The purpose of the lis pendens is to give constructive notice of the facts in the pleadings, and hence, it is in effect a republication of the absolutely privileged pleadings. "It would be anomalous to hold that a litigant is privileged to make a publication necessary to bring an action but that he can be sued for defamation if he lets anyone know that he has brought it ... particularly when he is expressly authorized by statute to let all the world know that he has brought it. Furthermore, [C.C. 47(d)] extends the privilege to reports of judicial proceedings in public journals. It cannot reasonably be held that the Legislature meant to accord such journals a greater immunity for giving actual notice of a proceeding to their numerous readers than that accorded litigants for giving the constructive notice thereof that the Legislature has authorized them to give." (46 C.2d 380.) (See *Frank Pisano & Associates v. Taggart* (1972) 29 C.A.3d 1, 25, 105 C.R. 414 [filing of claim of mechanic's lien; *Albertson* followed]; *Woodcourt II Ltd. v. McDonald Co.* (1981) 119 C.A.3d 245, 249, 173 C.R. 836 [same]; *Wilton v. Mountain Wood Homeowners Assn.* (1993) 18 C.A.4th 565, 569, 22 C.R.2d 471 [following *Frank Pisano & Associates*; publication of assessment liens by condominium homeowners association is absolutely privileged]; *Ojavan Investors v. California Coastal Commission* (1994) 26 C.A.4th 516, 528, 32 C.R.2d 103 [cease and desist notice issued in proceedings before California Coastal Commission; litigation privilege applies to quasi-judicial as well as judicial proceedings]; *Swanson v. St. John's Regional Med. Center* (2002) 97 C.A.4th 245, 249, 118 C.R.2d 325 [lien notices authorized by law are protected by litigation privilege; liens were filed by hospitals for value of services against patients' recoveries from third-party tortfeasors]; *Palmer v. Zaklama* (2003) 109 C.A.4th 1367, 1381, 1 C.R.3d 116 [in cause of action for slander of title, recordation of lis pendens is not absolutely privileged, unless underlying action

properly alleges real property claim]; 30 So. Cal. L. Rev 107; 4 U.C.L.A. L. Rev. 159.)

In *Earp v. Nobmann* (1981) 122 C.A.3d 270, 175 C.R. 767, the absolute privilege was unsuccessfully invoked in connection with a lis pendens filed by E and an expungement order obtained by H.

(a) Filing of the lis pendens was clearly protected by absolute privilege under *Albertson*. (122 C.A.3d 284.)

(b) E could have filed an undertaking to prevent expungement, but chose not to do so: Instead, he attempted to circumvent the statute by permitting the lis pendens to be expunged and by personally notifying nonparties of his claim of an interest in the land. *Held*, the absolute privilege did not extend to this self-help remedy. "His actions were not intended to further the litigation and to promote justice, but rather were intended to circumvent a judicial determination with which he was unhappy and to impede the interests of justice implicit therein." (122 C.A.3d 285.)

(c) E's extrajudicial communications were within the qualified privilege of C.C. 47(3) (now C.C. 47(c)), concerning communications to persons interested in the subject matter (see *supra*, §591), but this privilege is defeated by a showing of malice. (122 C.A.3d 285.)

West's Key Number Digest, Libel and Slander k.136

SUPPLEMENT: [This section is current through the latest supplement]
Notice of lis pendens:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §371 et seq.



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5. Defenses.
c. Qualified Privilege.

5 Witkin Sum. Cal. Law Torts § 649

[§ 649] Qualified Privilege.

(1) *Privileged Communications*. The qualified privileges applicable to actions for defamation (see supra, §591 et seq.) are also applicable to publication of an injurious falsehood. (*Franklin v. Dynamic Details* (2004) 116 C.A.4th 375, 384, 10 C.R.3d 429; *Rest.2d, Torts* §646A; see C.E.B., 2 California Business Litigation, §11.94.)

The most important is the privilege of a *business competitor or rival claimant*. Thus, a person who honestly claims title or an interest in property is privileged to assert that person's interest for his or her own protection. (See *Thompson v. White* (1886) 70 C. 135, 136, 11 P. 564; *Rest.2d, Torts* §647.) And a competitor may make a favorable comparison of his or her own goods with those of the plaintiff. This comparison, even though it involves deliberate exaggeration and is not honestly believed, is nevertheless an accepted practice, and is not actionable unless accompanied by particular *false statements of fact*. (*Rest.2d, Torts* §649; cf. *Rosenberg v. J.C. Penney Co.* (1939) 30 C.A.2d 609, 622, 86 P.2d 696, supra, §645 [disparagement imputing fraudulent business practices was libelous].)

(2) *Abuse of Privilege*. A qualified privilege is defeated by a showing of malice or lack of good faith. (*Gudger v. Manton* (1943) 21 C.2d 537, 545, 134 P.2d 217; *Toney v. California* (1976) 54 C.A.3d 779, 793, 126 C.R. 869; see *Davis v. Wood* (1943) 61 C.A.2d 788, 794, 143 P.2d 740 [slander of title by recording notice of location of mining claim on property leased by plaintiff]; *Baker v. Kale* (1947) 83 C.A.2d 89, 95, 189 P.2d 57, supra, §643 [lessor falsely informed lessee's purchaser that lease was invalid and that purchaser would not be allowed to take possession, his purpose being to break the lease and regain possession]; *Rest.2d, Torts* §650A.)

If the complaint discloses existence of a qualified privilege and the complaint does not allege malice, a general demurrer will lie. (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 C.A.3d 625, 630, 223 C.R. 339.)

West's Key Number Digest, Libel and Slander k.136

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5. Defenses.

d. Constitutional Limits on Recovery.

5 Witkin Sum. Cal. Law Torts § 650

[§ 650] Constitutional Limits on Recovery.

In *Melaleuca v. Clark* (1998) 66 C.A.4th 1344, 78 C.R.2d 627, plaintiff company sold household cleaning, nutrition, and pet care products. Defendant, an independent research scientist, ran a diagnostic center. She claimed to have discovered a cure for cancer, AIDS, and other serious diseases, through the development of a device called a syncrometer, which could detect the presence of benzene and other carcinogenic chemicals that supposedly caused the diseases. Through the use of the syncrometer, defendant claimed to have found benzene in plaintiff's products. When these findings were published in several books, plaintiff retained an independent laboratory, which did not find benzene in plaintiff's products. Plaintiff sued for trade libel and other causes of action. *Held*, judgment for plaintiff reversed; the jury was not properly instructed on the constitutional requirement of actual malice.

(a) Defendant's statements about the quality and contents of consumer goods were a matter of public concern. Regardless of whether the plaintiff is a public official or figure or a private person, liability may not constitutionally be imposed for "injurious falsehood," including trade libel, without a showing of actual malice. This follows from the limited interest in protecting products and the constitutional preference for the free exchange of ideas. This principle stands in contrast to injury to reputation, where negligence will suffice when the plaintiff is a private person. This distinction between injury to reputation and injury to one's products is recognized in the *Rest.2d, Torts* §§623A, 626. (66 C.A.4th 1363.)

(b) The test of "actual malice" is a subjective one, i.e., did the defendant know of the falsity or act in reckless disregard of truth or falsity. Unfortunately the jury was instructed that it could find actual malice if defendant "must have had" serious doubts about the truth of her statements, thereby introducing an objective standard under which the jury could infer actual knowledge. And because the evidence with respect to defendant's requisite subjective knowledge was very close, the error was prejudicial. (66 C.A.4th 1365.) (On First Amendment protections in defamation actions, see *supra*, §601 et seq.)

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E. Invasion of Privacy.

1. In General.

a. Nature of Right to Privacy.

5 *Witkin Sum. Cal. Law Torts* § 651

[§ 651] Nature of Right to Privacy.

(1) *Common Law Right.* The "right of privacy," or right to be "left alone" to live an ordinary private life without being subjected to unwarranted or undesired publicity, was the creation of law writers in 1890, and is recognized by most courts. The tort action provides a remedy for situations in which there is neither injury to a property right nor breach of contract, and where a civil action for defamation would fail because of the defense of truth. (See generally *Gill v. Curtis Publishing Co.* (1952) 38 C.2d 273, 276, 239 P.2d 630; *Melvin v. Reid* (1931) 112 C.A. 285, 287, 297 P. 91, *infra*, §664; *Kerby v. Hal Roach Studios* (1942) 53 C.A.2d 207, 210, 127 P.2d 577; *Smith v. National Broadcasting Co.* (1956) 138 C.A.2d 807, 811, 292 P.2d 600; *Werner v. Times-Mirror Co.* (1961) 193 C.A.2d 111, 116, 14 C.R. 208; *Carlisle v. Fawcett Publications* (1962) 201 C.A.2d 733, 744, 20 C.R. 405; *Johnson v. Harcourt, Brace, Jovanovich* (1974) 43 C.A.3d 880, 887, 118 C.R. 370, *infra*, §689; *Eastwood v. Superior Court* (1983) 149 C.A.3d 409, 416, 198 C.R. 342, *infra*, §678; *Rest.2d, Torts* §652A *et seq.*; 48 *Cal. L. Rev.* 383; BAJI, No. 7.20; CACI, No. 1800; on application of the Uniform Single Publication Act, see *supra*, §538; on pleading invasion of privacy, see 5 *Cal. Proc.* (4th), *Pleading*, §702 *et seq.*) "Acceptance of the right to privacy has grown with the increasing capability of the mass media and electronic devices with their capacity to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public gaze." (*Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 533, 93 C.R. 866, 483 P.2d 34, *infra*, §§691, 692.)

The common law right to privacy is generally analyzed under four categories of wrongs or types of invasion. (See *Rest.2d, Torts* §652A and Comment b; Dobbs, *The Law of Torts* §424.) These include intrusion into private affairs (see *infra*, §658 *et seq.*), public disclosure of private facts (see *infra*, §664 *et seq.*), placing the plaintiff in a false light (see *infra*, §673 *et seq.*), and appropriation of the plaintiff's name or likeness (see *infra*, §676 *et seq.*). More than one type of privacy tort may apply to a particular fact situation. (*Fairfield v. American Photocopy Equipment Co.* (1955) 138 C.A.2d 82, 86, 291 P.2d 194 ["false light" and "appropriation" theories].)

(2) *Constitutional and Statutory Rights.* The California Constitution (Art. I, §1) lists "privacy" among the fundamental "inalienable rights" of all people. This self-executing provision confers a right of action beyond the scope of the decisional law on the common law tort action. (*Porten v. University of San Francisco* (1976) 64 C.A.3d 825, 829, 134 C.R. 839; *Burt v. Orange* (2004) 120 C.A.4th 273, 284, 15 C.R.3d 373.) (For full discussion of California constitutional right to privacy, see 7 *Summary* (10th), *Constitutional Law*, §575 *et seq.*; on federal constitutional right to

privacy, see 7 *Summary* (10th), *Constitutional Law*, §558 et seq.)

A number of statutes protect against specific types of privacy violations and provide remedies in the nature of tort actions. (See *infra*, §§660 et seq., 666 et seq., 681 et seq.; on privacy legislation generally, see 7 *Summary* (10th), *Constitutional Law*, §603 et seq.)

West's Key Number Digest, Torts k.8.5(1), 8.5(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Common Law Right:* See C.E.B., Privacy Compliance and Litigation §2.1 et seq. *Pleading invasion of privacy:*

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §746 et seq.

(3) *(New) Scope of Right.* "The courts have found it analytically helpful to identify two meanings for 'the right of privacy': 'secrecy' and 'seclusion.' ... [A] person claiming the privacy right of seclusion asserts the right to be free, in a particular location, from disturbance *by* others. A person claiming the privacy right of secrecy asserts the right to prevent disclosure of personal information *to* others. Invasion of the privacy right of seclusion involves the *means, manner, and method* of communication in a location (or at a time) which disturbs the recipient's seclusion. By contrast, invasion of the privacy right of secrecy involves the *content* of communication that occurs when someone's private, personal information is disclosed to a third person." (*ACS Systems v. St. Paul Fire & Marine Ins. Co.* (2007) 147 C.A.4th 137, 148, 53 C.R.3d 786, 2 *Summary* (10th), *Insurance*, Supp., §91 [advertising injury clause in commercial general liability insurance policy covered liability for injuries resulting from invasion of "secrecy" privacy, but not "seclusion" privacy].)



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E. Invasion of Privacy.

1. In General.

b. Defamation Distinguished.

5 *Witkin Sum. Cal. Law Torts* § 652

[§ 652] Defamation Distinguished.

Although the *damages* in privacy cases are similar to those in defamation cases (see *infra*, §1704), the torts are fundamentally different. "The gist of the cause of action in a privacy case is not injury to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. ... The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation. ... The injury is mental and subjective. It impairs the mental peace and comfort of the person and may cause suffering much more acute than that caused by a bodily injury." (*Fairfield v. American Photocopy Equipment Co.* (1955) 138 C.A.2d 82, 86, 291 P.2d 194; see *Rest.2d, Torts* §652E, Comment b; 30 *So. Cal. L. Rev.* 291; 23 *Stanf. L. Rev.* 547; 62A *Am.Jur.2d* (2005 ed.), *Privacy* §§6, 7.)

However, "[t]here has been a good deal of overlapping of defamation in the false light cases, and apparently either action, or both, will very often lie." (*Werner v. Times-Mirror Co.* (1961) 193 C.A.2d 111, 120, 14 C.R. 208; on false light cases, see *infra*, §673 et seq.)

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1. In General.

c. No Relational Right.

5 Witkin Sum. Cal. Law Torts § 653

[§ 653] No Relational Right.

(1) *General Rule.* A number of attempts have been made to recover for the invasion of privacy of another, usually by a spouse or other close relative of a deceased person whose privacy was allegedly invaded. The courts have uniformly held, in the absence of statute, that the right is personal and does not survive, and that there is no "relational right" on which an action may be based. (See *Coverstone v. Davies* (1952) 38 C.2d 315, 323, 239 P.2d 876 [no cause of action by father for unwarranted publicity concerning arrest and prosecution of son]; *Kelly v. Johnson Publishing Co.* (1958) 160 C.A.2d 718, 721, 325 P.2d 659 [no cause of action by sister for story that her deceased brother, an ex-boxing champion, "wound up a dope-sodden derelict"]; *Hendrickson v. California Newspapers* (1975) 48 C.A.3d 59, 62, 121 C.R. 429, citing the text [no cause of action by members of family of deceased whose prior criminal conviction was revealed in obituary published by defendant]; *Flynn v. Higham* (1983) 149 C.A.3d 677, 683, 197 C.R. 145, citing the text [no cause of action by children against publisher of book asserting that their father was homosexual and Nazi spy]; *Rest.2d, Torts* §652I; 4 U.C.L.A. L. Rev. 92; 62A Am.Jur.2d (2005 ed.), *Privacy* §§14, 15, 16, 18.)

However, where the invasion of the other person's privacy also constitutes an invasion of the plaintiff's privacy, recovery is allowed. In *Vescovo v. New Way Enterprises, Ltd.* (1976) 60 C.A.3d 582, 130 C.R. 86, defendant published the following classified advertisement in its Los Angeles Free Press: "Hot Lips--Deep Throat Sexy young bored housewife Norma." The advertisement gave the address of plaintiff Norma Vescovo. She and her husband joined in an action for invasion of their privacy (not yet tried) and for invasion of privacy of their daughter Frankie, aged 14 years. Defendant's demurrer, based on the rule that even a close relative may not recover for invasion of the privacy of another, was sustained and judgment was rendered against Frankie. *Held*, reversed. The complaint alleged that, as a result of the advertisement, the Vescovo home had been wrongfully invaded by many undesirable and unsavory persons demanding to see Norma, and using lewd, abusive, and threatening language on being asked to leave; that these acts frightened Frankie and made her the subject of contempt and ridicule of her neighbors and friends, with resulting physical and mental suffering. Thus, the cause of action was not based on the derogatory information about Norma. "Frankie seeks to recover for the physical intrusion by various unsavory characters on her own solitude in her own home." (60 C.A.3d 588.)

(2) *Statutory Modification of Rule.* C.C. 3344.1 allows specified relatives of a deceased personality to recover damages for the commercial exploitation of the deceased personality's identity occurring within 70 years of his death.

(See *infra*, §685; *Rest.2d, Torts* §652I, Comment b [nature of statutes permitting invasion of privacy actions after death].)

West's Key Number Digest, Torts k.8.5(2)

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1. In General.

d. Private Disclosure.

5 *Witkin Sum. Cal. Law Torts* § 654

[§ 654] Private Disclosure.

The right of privacy is violated only by "publicity" or "public disclosure"--a communication to the public in general, or to a large number of persons, as distinguished from an individual or a few persons. (See *Schwartz v. Thiele* (1966) 242 C.A.2d 799, 805, 51 C.R. 767 [defendant's filing of petition asserting that plaintiff was mentally ill]; *Rest.2d, Torts* §652D, Comment a; 48 Cal. L. Rev. 393.)

This limitation has an important application to collection agency practices. In *Timperley v. Chase Collection Service* (1969) 272 C.A.2d 697, 77 C.R. 782, defendant collection agency had an attorney's bill that was allegedly owed by plaintiff, a postal employee. Defendant wrote a letter to plaintiff's employer, the U.S. Post Office, informing the employer of the bill, and asking that plaintiff be advised that, unless payment was made within 5 days, legal action would be taken. Plaintiff alleged that, as a result, he was forced to resign his job, and also that the debt was disputed. *Held*, judgment for defendants on demurrer affirmed. A creditor, or his or her collection agent, has a limited right to reveal to others the existence of the debt in order to collect it. The privilege covers communications to the debtor's employer disclosing the fact of the debt (even if it is disputed), and requesting aid of the employer. (272 C.A.2d 699.) The court observed, however, that it would be an invasion of privacy to inform the public generally of the plaintiff's failure to pay his debts, e.g., by publication in a newspaper or publicly posted notice. (272 C.A.2d 700.) And harassment by continual calls and letters, or letters simulating court documents, or service of an illegal wage assignment, would be actionable. (272 C.A.2d 700.) (See 62A Am.Jur.2d (2005 ed.), *Privacy* §§63, 117 et seq.; 42 A.L.R.3d 865 [threats, institution, or prosecution of legal action as invasion of privacy].)

In *Kinsey v. Macur* (1980) 107 C.A.3d 265, 165 C.R. 608, defendant, relying on *Schwartz* and *Timperley*, contended that mailing letters to some 20 people--a small select group--did not meet the requirement of public exposure. Affirming a judgment for plaintiff, the court observed that defendant's letters were sent to "a diverse group of people living in several states and totally unconnected either socially or professionally," including former spouses, parents, neighbors, and faculty members of a university at which plaintiff was doing advanced study. (107 C.A.3d 272.)

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1. In General.

e. Oral Disclosure.

5 *Witkin Sum. Cal. Law Torts* § 655

[§ 655] Oral Disclosure.

In *Melvin v. Reid* (1931) 112 C.A. 285, 297 P. 91, *infra*, §664, the court summarized the then recognized rules limiting recovery, one of which was: "The right of privacy can only be violated by printings, writings, pictures or other permanent publications or reproductions, and not by word of mouth." (112 C.A. 290.) This dictum was followed by direct holdings in *Gautier v. General Tel. Co.* (1965) 234 C.A.2d 302, 309, 44 C.R. 404, and *Grimes v. Carter* (1966) 241 C.A.2d 694, 698, 50 C.R. 808, which noted that "[w]hatever may be the ruling in other jurisdictions, California adheres to the proposition that the right of privacy may not be violated by word of mouth only."

Some jurisdictions take the opposite view, i.e., that oral declarations may in a proper case provide the basis for a cause of action. (See 62A Am.Jur. (2005 ed.), Privacy §35; 19 A.L.R.3d 1318 [invasion of right of privacy by merely oral declarations].) And the statute authorizing an action for commercial use of a name or likeness does not exclude oral advertising or solicitation. (See C.C. 3344, *infra*, §§681, 683.)

In *H & M Associates v. El Centro* (1980) 109 C.A.3d 399, 167 C.R. 392, the court observed that the rule rejecting oral declarations had been criticized, particularly since the growth of radio, and that it was laid down before the adoption of the California constitutional provision (see *supra*, §577). "There is nothing in section 1 which suggests that one's right to privacy may be inalienable except for the intrusion caused by oral statements. In this electronic age, where oral statements may ultimately receive wider coverage than a printed statement, there is no reason to immunize parties making such statements from liability. The test should turn on the nature of the privacy invaded and not on the means of communication." (109 C.A.3d 412.)

West's Key Number Digest, Torts k.8.5(4)

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1. In General.

f. Necessity of Showing Malice.

5 *Witkin Sum. Cal. Law Torts* § 656

[§ 656] Necessity of Showing Malice.

Generally, malice is not an element of the tort. "The motives of a person charged with invading the right are not material with respect to the determination whether there is a right of action, and malice is not an essential element of a violation of the right. ... Inadvertence or mistake is no defense where the publication does in fact refer to the plaintiff in such manner as to violate his right of privacy." (*Fairfield v. American Photocopy Equipment Co. (1955) 138 C.A.2d 82, 87, 291 P.2d 194.*) (See *Kerby v. Hal Roach Studios (1942) 53 C.A.2d 207, 213, 127 P.2d 577* [malice not required]; *62A Am.Jur.2d (2005 ed.), Privacy* §37.)

However, false light invasion of privacy cases are deemed comparable to defamation actions and a showing of constitutional (actual) malice is required in circumstances where it would be necessary under defamation law. (See *infra*, §673.)

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5 *Witkin Sum. Cal. Law Torts* § 657

[§ 657] Commentary.

The tort has been a favorite subject of commentators. The following are illustrative:

(1) *Texts*. C.E.B., 2 California Business Litigation, §§10.1 et seq., 11.34 et seq.; Dobbs, *The Law of Torts* §424 et seq.; 2 Harper, James & Gray 2d, §9.5; 62A *Am.Jur.2d* (2005 ed.), *Privacy* §1 et seq.

(2) *Practice Works*. Cal. Civil Practice, 1 Torts, Invasion of Privacy, Chap. 20; Cal. Civil Practice, Civil Rights, §6:4 et seq.; 43 Proof of Facts 2d 449 [disclosure of private facts]; 40 Proof of Facts 3d 237 [governmental liability for privacy deprivation resulting from erroneous information in public records].

(3) *Law Reviews*. 27 *Cal. L. Rev.* 84; 29 *Cal. L. Rev.* 229, 233; 48 *Cal. L. Rev.* 383; 50 *Cal. L. Rev.* 357; 77 *Cal. L. Rev.* 957 [The Social Foundations of Privacy: Community and Self in the Common Law Tort]; 80 *Cal. L. Rev.* 1133 [The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1900]; 7 *Cal. Western L. Rev.* 216, 222; 9 *Harv. L. Rev.* 863; 83 *Harv. L. Rev.* 1923; 94 *Harv. L. Rev.* 1892; 17 *Hastings L. J.* 377; 54 *Hastings L. J.* 877 [privacy wrongs without remedies]; 12 *Loyola L.A. L. Rev.* 301 ["Tenant Reports as an Invasion of Privacy: A Legislative Proposal"]; 18 *Loyola L.A. L. Rev.* 949 [privacy and the press]; 7 *Santa Clara Lawyer* 242; 24 *Santa Clara L. Rev.* 53 [business entity's right to privacy]; 13 *So. Cal. L. Rev.* 81; 15 *So. Cal. L. Rev.* 125; 22 *So. Cal. L. Rev.* 82; 26 *So. Cal. L. Rev.* 102, 311; 30 *So. Cal. L. Rev.* 280; 41 *So. Cal. L. Rev.* 902; 4 *Stanf. L. Rev.* 604; 16 *Stanf. L. Rev.* 107; 14 *U.C. Davis L. Rev.* 919 [damages recoverable for publication of information tortiously obtained by newsmen]; 4 *U.C.L.A. L. Rev.* 92; 9 *U.C.L.A. L. Rev.* 862; 46 *U.C.L.A. L. Rev.* 1633 [proposed legislative regulation of paparazzi conduct]; 2 *West L.A. L. Rev.* 74 [computer use and privacy].

(4) *Annotations*. 11 *A.L.R.3d* 1296 [eavesdropping as violating right of privacy]; 18 *A.L.R.3d* 873 [invasion of privacy by publication dealing with one other than plaintiff]; 23 *A.L.R.3d* 865 [invasion of privacy by use of plaintiff's name or likeness in advertising]; 30 *A.L.R.3d* 203 [invasion of privacy by use of plaintiff's name or likeness for nonadvertising purposes]; 33 *A.L.R.3d* 154 [public disclosure of person's indebtedness as invasion of privacy]; 56 *A.L.R.3d* 386 [invasion of privacy by radio or television]; 56 *A.L.R.3d* 434 [uninvited entry into another's living quarters as invasion of privacy]; 56 *A.L.R.3d* 457 [unsolicited mailing, distribution, house call, or telephone call as invasion of privacy]; 57 *A.L.R.3d* 16 [waiver or loss of right of privacy]; 84 *A.L.R.3d* 1159 [publication of address as well as name

of person as invasion of privacy]; 87 *A.L.R.3d* 145 [state or municipal liability for invasion of privacy]; 58 *A.L.R.4th* 902 [false light invasion of privacy--accusation or innuendo as to criminal acts]; 67 *A.L.R.4th* 1086 [invasion of privacy by member of clergy, church, or religious group]; 69 *A.L.R.4th* 1059 [newsgathering entity's intrusion as invasion of privacy].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Texts*. See 2 Harper, James & Gray 3d §9.5.

(2) *Practice Works*. See 105 Am.Jur. Trials 1 [employer liability for employee misuse of Internet]; 103 Proof of Facts 3d 159 [public disclosure of private facts; superseding 43 Proof of Facts 2d 449, text, p. 962].

(3) *Law Reviews*. See 28 J. Juvenile Law 30 [invasion of privacy and defamation on "Myspace" Internet service]; 33 *Pepperdine L. Rev.* 311 [right to anonymity in public places]; 45 *Santa Clara L. Rev.* 679 [camera phone technology and privacy rights].



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2. Intrusion into Private Affairs.
a. Common Law Action.
1. In General.

5 *Witkin Sum. Cal. Law Torts* § 658

[§ 658] In General.

"One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." (*Rest.2d, Torts* §652B.) (See C.E.B., 2 California Business Litigation, §11.41 et seq.; Dobbs, *The Law of Torts* §426; 2 Harper, James & Gray 2d, §9.6; 48 *Cal. L. Rev.* 389; 27 *Hastings Const. L. Q.* 539 [First Amendment Protection for Newsgathering: Applying the Actual Malice Standard to Recovery of Damages for Intrusion]; 62A *Am.Jur.2d* (1990 ed.), *Privacy* §§29, 30, 46; 67 *Proof of Facts* 3d 249 [violation of privacy of Internet user by cookies or other means]; 86 *A.L.R.3d* 374 [unauthorized photographs]; 77 *A.L.R.5th* 541 [HIV testing without consent as giving rise to invasion of privacy claim for intrusion on seclusion]; BAJI, No. 7.20; CACI, No. 1800.)

Shadowing in an objectionable manner is an example of actionable intrusion. In *Noble v. Sears, Roebuck & Co.* (1973) 33 *C.A.3d* 654, 109 *C.R.* 269, plaintiff sued defendant for personal injuries allegedly caused while shopping in the store. Defendant engaged attorneys and a private investigating firm. The latter sent an employee to gain admittance to plaintiff's hospital room and, by deception, to secure the address of a man who had accompanied plaintiff on her shopping trip. Plaintiff brought this action for invasion of privacy. *Held*, a cause of action was stated. (33 *C.A.3d* 659.) (See 62A *Am.Jur.2d* (2005 ed.), *Privacy* §47 et seq.; 13 *A.L.R.3d* 1025 [shadowing and trailing]; 38 *A.L.R.4th* 954 [retailer's surveillance of fitting or dressing rooms]; on statutory tort of stalking, see *infra*, §662.)

Eavesdropping is another example. (See *Rest.2d, Torts* §652B, Comment b; 62A *Am.Jur.2d* (2005 ed.), *Privacy* §46; 49 *A.L.R.4th* 430 [eavesdropping on extension telephone].)

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See *Taus v. Loftus* (2007) 40 *C.4th* 683, 734, footnote 18, 54 *C.R.3d* 775, 151 *P.3d* 1185, Supp., *infra*, §659 [common law tort of intrusion into private affairs may extend to intrusions that do not rise to level of federal constitutional violation; tort was developed to provide remedy for highly offensive intrusions on privacy that otherwise would go unredressed]; 2 Harper, James & Gray 3d §9.6; C.E.B., *Privacy Compliance and Litigation* §2.8 et seq.



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2. Illustrations.

5 Witkin Sum. Cal. Law Torts § 659

[§ 659] Illustrations.

In *Miller v. National Broadcasting Co.* (1986) 187 C.A.3d 1463, 232 C.R. 668, defendant N, an NBC news field producer in charge of new stories, was assigned a minidocumentary on fire department paramedics and their work. He obtained permission from the City of Los Angeles for his camera crew and himself to accompany a unit of paramedics, and on several occasions entered private homes with the paramedics and filmed their activities. In the present case, plaintiffs' husband and father had a heart attack in his bedroom, and N filmed the unsuccessful attempt to save his life. The film was then used by defendant NBC on its nightly news and in a commercial advertising its minidocumentary. Plaintiff wife was present at the filming, but no attempt was made to obtain her consent to the intrusion, and she and her daughter filed this action. *Held*, summary judgment for defendants reversed as to plaintiff wife, but affirmed as to plaintiff daughter (who was not present when the intrusion occurred and was not the owner of the premises).

(a) The plaintiff must meet the Restatement test of "highly offensive to a reasonable person." (187 C.A.3d 1482.) "A court determining the existence of 'offensiveness' would consider the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." (187 C.A.3d 1483.)

(b) Here, reasonable people could regard the NBC camera crew's intrusion in the bedroom at a time of vulnerability and confusion occasioned by his seizure as "highly offensive" conduct. (187 C.A.3d 1484.)

Shulman v. Group W Productions (1998) 18 C.4th 200, 74 C.R.2d 843, 955 P.2d 469, involved the broadcast of audio and video material showing plaintiffs being rescued from an automobile accident. (The facts are set forth in detail, *infra*, §665.) Plaintiffs sued for invasion of privacy, based in part on defendant TV station's intrusion into private affairs. *Held*, summary judgment for defendant reversed.

(a) *Intrusion into private place, conversation, or matter.*

(1) To prove actionable intrusion, the plaintiff must show that the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the

plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source. (18 C.4th 232.)

(2) In this case, the cameraman's mere presence at the accident scene could not be regarded as intrusive, because plaintiffs did not own or control the accident scene, and the presence of journalists to record rescue efforts was in no way unusual or unexpected. However, triable issues of fact existed about the following matters concerning plaintiffs' reasonable expectation of privacy: First, plaintiffs arguably had that expectation with respect to the interior of the rescue helicopter, a place where no law or custom permitted access by the press. Second, by placing a microphone on the rescue nurse, defendant may have listened in on conversations that the parties could reasonably have expected to be private. Third, plaintiffs had a reasonable expectation of privacy in the accident scene itself, because its isolated location prevented the rescue efforts from being seen by passersby. (18 C.4th 232.)

(b) *Intrusion highly offensive to reasonable person.*

(1) In deciding whether a reporter's alleged intrusion into private matters is offensive, courts must consider the extent to which the intrusion is justified by the legitimate motive of gathering the news. Information collecting techniques that may be highly offensive when used for socially unprotected reasons may not be offensive to a reasonable person when employed by a journalist in pursuit of an important story. However, the mere fact that the intruder is in pursuit of a story does not justify an otherwise offensive intrusion, such as trespass into a home or wiretapping. (18 C.4th 236.)

(2) Here, recording plaintiffs' conversations with the rescuers and filming in the helicopter could be found by a jury to have been highly offensive. Arguably, the last thing an injured accident victim should have to worry about while being pried from a wrecked car is that a television producer may be recording everything that he or she says to medical personnel. Similarly, a triable issue of fact existed as to the offensiveness of the intrusion into the helicopter. A reasonable jury could have concluded that defendant's desire to get footage that would convey the real "feel" of the event did not justify the tactics employed. (18 C.4th 237.) (See 27 Western State L. Rev. 535 [Shulman].)

In *Sanders v. American Broadcasting Cos.* (1999) 20 C.4th 907, 85 C.R.2d 909, 978 P.2d 67, a reporter for defendant obtained employment with a "telepsychic" group and, while there, covertly video- and audiotaped several conversations with plaintiff and other coworkers. Plaintiff expected that the taped conversations could be overheard by other employees, but not that they would be videotaped by a reporter. Plaintiff alleged common law intrusion into private affairs and was awarded judgment on that cause of action. The Court of Appeal reversed on the ground that the parties did not have a reasonable expectation of privacy. *Held*, judgment of the Court of Appeal reversed. In stating that the common law tort of intrusion into private affairs had two elements, i.e., (1) intrusion into a private matter (2) in a manner highly offensive to a reasonable person, *Shulman* reiterated the requirement that an intrusion plaintiff must have had a reasonable expectation of privacy. However, neither *Shulman* nor any other case stated that the expectation of privacy, in order to be reasonable for purposes of the intrusion tort, must have been of absolute or complete privacy. (20 C.4th 915.) Therefore, "we conclude that in the workplace, as elsewhere, the reasonableness of a person's expectation of visual and aural privacy depends not only on who might have been able to observe the subject interaction, but on the identity of the claimed intruder and the means of intrusion. ... For this reason, we answer the briefed question affirmatively: a person who lacks a reasonable expectation of complete privacy in a conversation, because it could be seen and overheard by coworkers (but not the general public), may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation." (20 C.4th 923.)

The following cases are also illustrative of intrusion into private affairs:

Vescovo v. New Way Enterprises, Ltd. (1976) 60 C.A.3d 582, 587, 130 C.R. 86, supra, §653 [newspaper was liable for invasion of daughter's privacy by persons answering unauthorized ad accusing her mother of promiscuity].

Sacramento County Deputy Sheriffs' Assn. v. Sacramento (1996) 51 C.A.4th 1468, 1487, 59 C.R.2d 834 [video

surveillance of nonprivate office in booking area of county jail was not sufficiently "offensive" to constitute invasion of privacy, where objective was lawful (to catch a thief), intrusiveness was abated by absence of audio capabilities, and plaintiffs had little expectation of privacy].

Wilkins v. National Broadcasting Co. (1999) 71 C.A.4th 1066, 1075, 84 C.R.2d 329 [defendants, TV reporters posing as investors, taped plaintiffs' "sales pitch" in crowded restaurant; defendants neither intruded into private place nor acted in manner highly offensive to reasonable person].

Sanchez-Scott v. Alza Pharmaceuticals (2001) 86 C.A.4th 365, 372, 103 C.R.2d 410 [doctor's breast examination of patient in front of drug salesperson, who was present as part of training program, was intrusion into private affairs; consent defense was unavailable where salesperson was introduced as "someone observing physician's work," and his true identity was not revealed prior to examination].

SUPPLEMENT: [This section is current through the latest supplement]

In *Taus v. Loftus* (2007) 40 C.4th 683, 54 C.R.3d 775, 151 P.3d 1185, plaintiff, the subject of a prominent case study on recovered memory of childhood abuse, sued a critic of the study and of the repressed memory theory for intrusion into private affairs. In response to defendant's anti-SLAPP motion, plaintiff offered evidence that defendant obtained personal and sensitive information about plaintiff from plaintiff's former foster mother by misrepresenting herself as an associate of the psychiatrist who undertook the study. *Held*, denial of the motion affirmed. An action for intrusion may be based on the defendant obtaining personal information about the plaintiff from another person or entity by improper means. (40 C.4th 732.)



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- E. Invasion of Privacy.
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 - b. Statutory Actions.
 - 1. In General.

5 *Witkin Sum. Cal. Law Torts* § 660

[§ 660] In General.

Certain kinds of intrusion have been made actionable by legislation. Among these statutes are the following and those in the immediately succeeding sections.

(1) *Harassment*. *C.C.P.* 527.6 authorizes a temporary restraining order and injunction against "harassment," defined as "unlawful violence, a credible threat of violence, or a knowing and wilful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose." (For full discussion of statute and procedure under it, see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §318 et seq.)

(2) *Use of Voice Stress Analyzer Without Consent*. A voice stress analyzer is a system that examines or records voice prints or other voice stress patterns of a person to determine the truth or falsity of statements made. Its covert use for investigative purposes may be an invasion of privacy, and P.C. 637.3 prohibits its use without the person's express written consent given before the examination or recordation. Violation of the statute gives the injured person a right of action for actual damages or \$ 1,000, whichever is greater. An exception to the consent requirement exists, however, for a peace officer carrying out his or her official duties. (See 10 *Pacific L. J.* 603.)

West's Key Number Digest, Torts k.8.5(4)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Harassment*.

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §316 et seq.



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b. Statutory Actions.

2. Wiretapping and Electronic Eavesdropping.

5 Witkin Sum. Cal. Law Torts § 661

[§ 661] Wiretapping and Electronic Eavesdropping.

P.C. 630 et seq. make it a felony-misdemeanor for any person to engage in wiretapping or various forms of electronic eavesdropping. (See 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §414 et seq.) P.C. 637.2 allows an injured person to recover the greater of \$ 5,000 or three times the amount of actual damages, or to seek both an injunction and damages. (P.C. 637.2(a), (b).) (See *Shulman v. Group W Productions* (1998) 18 C.4th 200, 234, 74 C.R.2d 843, 955 P.2d 469, *infra*, §665 [requisite confidentiality of communication does not depend on reasonable expectation that contents of communication will be confidential but on whether any participant reasonably expected and desired that communication would not be overheard or recorded by nonparticipant]; *Sanders v. American Broadcasting Cos.* (1999) 20 C.4th 907, 85 C.R.2d 909, 924, 978 P.2d 67, *supra*, §659 [fact that plaintiff may have expected conversations taped by stranger to have been overheard by coworkers meant that communications were not a "confidential communication" within meaning of statute]; *Ion Equipment Corp. v. Nelson* (1980) 110 C.A.3d 868, 879, 168 C.R. 361 [although corporation may not sue for common law invasion of privacy, it may bring statutory action]; 18 U.S.C., §2520 [authorizing civil action for interception, disclosure, or intentional use of wire, oral, or electronic communication in violation of Omnibus Crime Control and Safe Streets Act of 1968]; *Marich v. MGM/UA Telecommunications* (2003) 113 C.A.4th 415, 425, 7 C.R.3d 60 [eavesdropping or recording of conversations without consent is prohibited regardless of whether party expects that content of conversation may later be conveyed to third party]; 18 *Pepperdine L. Rev.* 818; 49 A.L.R.4th 430 [eavesdropping on extension telephone as invasion of privacy]; 9 A.L.R.5th 553 ["caller ID" system, allowing telephone call recipients to ascertain number of telephone from which call originated, as violation of right to privacy, wiretapping statute, or similar protection]; 164 A.L.R. Fed 139 [construction and application of 18 U.S.C., §2520].) It is not necessary that the person have suffered, or be threatened with, actual damages. (P.C. 637.2(c).)

In *Ribas v. Clark* (1985) 38 C.3d 355, 212 C.R. 143, 696 P.2d 637, *supra*, §14, defendant eavesdropped on a telephone conversation between plaintiff and his former wife, and the information obtained was later referred to in testimony in an arbitration proceeding to plaintiff's detriment. The court held that the "litigation" privilege was a defense to plaintiff's claim for actual damages (see *supra*, §567), but the statutory penalty was recoverable. "Because the right to such an award accrues at the *moment of the violation*, it is not barred by the judicial privilege. Here, plaintiff

asserts a violation of the Privacy Act that is alleged to have taken place during a conversation with his wife prior to, and not in the context of, any judicial proceeding. Section 637.2 therefore permits him to pursue his statutory remedy of a civil lawsuit for \$ 3,000 [now \$5,000], even though the judicial privilege bars his recovery for the only actual damage he claims to have suffered. In view of the manifest legislative purpose to accord every citizen's privacy the utmost sanctity, section 637.2 was intended to provide those who suffer an infringement of this aspect of their personal liberty a means of vindicating their right." (38 C.3d 365.) (See *Friddle v. Epstein* (1993) 16 C.A.4th 1649, 1660, 21 C.R.2d 85 [statutory damages are recoverable for any invasion of privacy; following *Ribas*]; *Lieberman v. KCOP Television* (2003) 110 C.A.4th 156, 166, 1 C.R.3d 536 [to recover statutory damages for violation of P.C. 632, plaintiff was not required to prove actual damages; by providing for statutory damages of up to specified amount plus actual damages, P.C. 637.2 shows that Legislature did not intend victim to recover *only* actual damages].)

In *Kimmel v. Goland* (1990) 51 C.3d 202, 271 C.R. 191, 793 P.2d 524, an action by mobilehome owners alleging that the management representatives of a mobilehome park refused to permit them to sell their mobilehomes in place in violation of statute, the park management cross-complained against the owners and their attorney for unlawfully recording confidential telephone conversations between the parties in violation of P.C. 637.2. These recordings were transcribed by plaintiff's attorney, who subsequently filed suit. Prior to trial, the trial court granted plaintiffs' motion for judgment on the pleadings as to the cross-complaint, finding that the tapes were subject to the litigation privilege of C.C. 47(2) (now C.C. 47(b)(2)) because they were made for the purpose of gathering evidence in anticipation of litigation, and that plaintiffs were therefore immune from liability for the alleged violations of the Privacy Act. The case proceeded to trial, and the tapes were admitted into evidence over the park management's objections. The jury awarded damages to plaintiffs. The Court of Appeal reversed. *Held*, judgment of the Court of Appeal affirmed; the privilege does not apply to noncommunicative conduct.

(a) The litigation privilege extends to any communication that has some connection or logical relation to the action. (51 C.3d 209, citing *Silberg v. Anderson* (1990) 50 C.3d 205, 266 C.R. 638, 786 P.2d 365, *supra*, §570, and other cases.) However, the statute applies only to "publications or broadcasts" made in the course of a judicial proceeding; and in the present case, in which defendants complain of injury from taping, not from publication, the privilege is not applicable. (51 C.3d 209.)

(b) *Ribas* and the present case share several common features. Both cases involve alleged violations of the Privacy Act in which the offending party claimed immunity under the litigation privilege. In both cases, moreover, the acts on which liability was premised were committed in anticipation of litigation but prior to the commencement of any actual judicial proceeding. These factual congruities, and the sound reasoning of *Ribas*, compel the conclusion that park management's claim for damages under P.C. 637.2 is not barred by the litigation privilege. (51 C.3d 211.)

(c) Implicit in the *Ribas* decision was the distinction between injury allegedly arising from communicative acts, i.e., the attorney's testimony, and injury resulting from noncommunicative conduct, i.e., the invasion of privacy resulting from the attorney's eavesdropping. This distinction has traditionally served as a threshold issue in determining the applicability of the litigation privilege. (51 C.3d 211, citing *Westlake Community Hosp. v. Superior Court* (1976) 17 C.3d 465, 131 C.R. 90, 551 P.2d 410.) No case has been cited in which the statute was held to bar a suit arising from noncommunicative conduct; and many cases demonstrate that the privilege has been applied only to torts arising from statements or publications. (51 C.3d 211.) "Moreover, since park management's right to a statutory remedy accrued at the moment of the violation, plaintiffs' contention that the telephone conversations were made in anticipation of litigation is simply irrelevant." (51 C.3d 212.)

(d) The attorney for the plaintiffs has no special immunity. He argued that a broad application of the litigation privilege was necessary to avoid the conflict of interest that may arise when an attorney is forced to defend against a cause of action as a codefendant with his clients, and that in the course of such an action, opposing counsel will make efforts to force the attorney to reveal his work product. (51 C.3d 212.) There is no merit in this argument. Under *Ev.C. 956* (see 2 *Cal. Evidence* (4th), *Witnesses*, §153 et seq.), the attorney-client privilege does not apply if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime. The threat of liability

in a civil action based on violation of the Privacy Act or other illegal conduct "may toll the zealouslyness of an attorney's efforts in the advance of his or her client's cause." But such forbearance "is, in fact, healthy to the extent it inhibits an attorney from assisting clients in the commission of crimes." (51 C.3d 213.)

Neither the state nor federal Constitution requires the creation of an affirmative defense to P.C. 632 based solely on a legitimate newsgathering motive. (*Lieberman v. KCOP Television, supra*, 110 C.A.4th 169.)

SUPPLEMENT: [This section is current through the latest supplement]



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 - 3. Stalking.

5 *Witkin Sum. Cal. Law Torts* § 662

[§ 662] Stalking.

(1) *In General.* C.C. 1708.7 creates the tort of stalking. (See 25 *Pacific L. J.* 827; BAJI, No. 7.58; CACI, No. 1808; on crime of stalking, see 1 *Cal. Crim. Law* (3d), *Crimes Against the Person*, §294 et seq.) The statute is not to be construed to impair any constitutionally protected activity, including speech, protest, and assembly. (C.C. 1708.7(f).)

(2) *Elements.* To establish the tort of stalking, the plaintiff must prove all of the following elements:

(a) That the defendant "engaged in a pattern of conduct the intent of which was to follow, alarm, or harass the plaintiff." To establish this element, the allegations must be supported with independent corroborating evidence. (C.C. 1708.7(a)(1).)

(b) That as a result of the defendant's pattern of conduct, the plaintiff reasonably feared for his or her safety, or that of an immediate family member. "Immediate family member" refers to a spouse, parent, child, or any person related by consanguinity or affinity within the second degree. The term also includes any person who regularly resides in the plaintiff's household, or who did so within the 6 months preceding any portion of the pattern of conduct. (C.C. 1708.7(a)(2).)

(c) That the defendant either (1) as part of a pattern of conduct, made a credible threat with the intention of placing the plaintiff in reasonable fear for his or her safety, or that of an immediate family member; and, on at least one occasion, the plaintiff clearly and definitively, but unsuccessfully, demanded that the defendant stop that pattern of conduct (C.C. 1708.7(a)(3)(A)), or (2) violated a restraining order, including one issued under C.C.P. 527.6 (harassment; see *supra*, §660) to prohibit any act described in C.C. 1708.7(a). (C.C. 1708.7(a)(3)(B).) (See BAJI, No. 7.58.)

A "pattern of conduct" refers to "conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose," but does not include constitutionally protected activity. (C.C. 1708.7(b)(1).) A "credible threat" refers to a verbal or written threat, including one communicated by an electronic communications device, or a threat implied by a pattern of conduct, or a combination of statements and conduct, made with the intent

and apparent ability to carry out the threat so as to cause the target to reasonably fear for his or her safety or that of an immediate family member. (C.C. 1708.7(b)(2).) "Electronic communications device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, and pagers. (C.C. 1708.7(b)(3).) "Harass" refers to "a knowing and wilful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose." The course of conduct must be of the type that would cause a reasonable person to suffer substantial emotional distress, and must actually cause such distress to the person stalked. (C.C. 1708.7(b)(4).)

(3) *Remedies*. A person committing the tort of stalking is liable for general, special and punitive damages. (C.C. 1708.7(c).) In addition, the court may grant equitable relief, including an injunction. (C.C. 1708.7(d).) The rights and remedies provided by C.C. 1708.7 are cumulative and in addition to any other rights and remedies provided by law. (C.C. 1708.7(e).)

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- 4. Capturing Impression of Personal or Familial Activity.

5 Witkin Sum. Cal. Law Torts § 663

[§ 663] Capturing Impression of Personal or Familial Activity.

A person is liable for a *physical* invasion of privacy if the person knowingly commits an act of trespass in order to physically invade the privacy of the plaintiff "with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity, and the invasion occurs in a manner that is offensive to a reasonable person." (C.C. 1708.8(a).) A person is liable for a *constructive* invasion of privacy in these circumstances, regardless of whether there is a physical trespass, if the visual image, sound recording, or other physical impression could not have been achieved without a trespass unless a visual or auditory enhancing device was used. (C.C. 1708.8(b).)

A person who commits either or both types of invasion of privacy is liable for up to three times the amount of any general and special damages proximately caused by the violation, and may also be liable for punitive damages, subject to proof according to C.C. 3294 (see *infra*, §1559). If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant is further subject to disgorgement of any proceeds obtained as a result of the violation. (C.C. 1708.8(c).) One who directs, solicits, or otherwise causes another to commit a violation is likewise subject to prescribed liability. (C.C. 1708.8(d).) (See 112 Harv. L. Rev. 1367 [California "anti-paparazzi" statute].)

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SUPPLEMENT: [This section is current through the latest supplement]

C.C. 1708.8(c) was relettered C.C. 1708.8(d) in 2005, and was amended to refer to a person who commits any act described in C.C. 1708.8(a), (b), or (c) (*infra*, this section). C.C. 1708.8(d) was relettered C.C. 1708.8(e) in 2005.

See *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)* (2007) 157 C.A.4th 1056, 1063, 69 C.R.3d 176 [C.C. 1708.8 does not provide exception to governmental investigatory immunity under Govt.C. 821.6 held by school district employees who videotaped teacher at her wedding and honeymoon during investigation of teacher's workers' compensation claim].

(New) *Assault with intent to capture physical impression:* A person committing an assault with intent to capture a

visual image, sound recording, or other physical impression of the plaintiff is subject to liability under C.C. 1708.8. (C.C. 1708.8(c), added in 2005.)



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- 3. Public Disclosure of Private Facts.
 - a. Common Law Action.
 - 1. In General.

5 Witkin Sum. Cal. Law Torts § 664

[§ 664] In General.

Melvin v. Reid (1931) 112 C.A. 285, 297 P. 91, the first California case to recognize the right of privacy, applied it in the context of public disclosure of private facts. Defendant produced a film called "The Red Kimono," and advertised it as the true life story of a prostitute, using plaintiff's maiden name. Plaintiff sued, alleging that she had given up her former life and had become rehabilitated, and that as a result of the film she had been abandoned by her friends and subjected to scorn and obloquy. The court held that a cause of action was stated. (112 C.A. 291.) (See *Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 540, 93 C.R. 866, 483 P.2d 34, *infra*, §§691, 692 ["great general interest in an unfettered press may sometimes be outweighed by other great societal interests"]; *Kinsey v. Macur* (1980) 107 C.A.3d 265, 271, 168 C.R. 608 [interest to be protected is individual freedom from wrongful publicizing of private affairs and activities that are outside realm of legitimate public concern]; *Rest.2d, Torts* §652D; C.E.B., 2 California Business Litigation, §11.45 et seq.; Dobbs, *The Law of Torts* §427; 20 Cal. L. Rev. 100; 48 Cal. L. Rev. 392; 60 Cal. L. Rev. 1042; 36 San Diego L. Rev. 489 [reemergence of disclosure of private facts tort]; 39 Santa Clara L. Rev. 1217 [disclosure of private facts tort and First Amendment]; 1 So. Cal. L. Rev. 293; 14 U.C. Davis L. Rev. 1029 [fiction based on real persons or events]; 48 A.L.R.4th 668 [doctor's unauthorized disclosure of confidential information about patient]; 40 A.L.R.5th 787 [publication of identity of sexual assault victim]; 43 Proof of Facts 2d 449 [public disclosure of private facts]; 68 Proof of Facts 3d 179 [liability for psychological harm from story or picture in media]; BAJI, No. 7.21; CACI, No. 1801.)

Because the right to privacy must be balanced against the often competing right of the press to publish newsworthy matters, the plaintiff must show (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern. (*Diaz v. Oakland Tribune* (1983) 139 C.A.3d 118, 126, 188 C.R. 762, *infra*, §665.) (See *Forsher v. Bugliosi* (1980) 26 C.3d 792, 812, 163 C.R. 628 [disclosure was not offensive to reasonable person]; *Shulman v. Group W Productions* (1998) 18 C.4th 200, 230, 74 C.R.2d 843, 955 P.2d 469, *infra*, §665 [summary judgment was proper where broadcast of accident in which plaintiff was involved included no images or information regarding him that could be offensive to reasonable person of ordinary sensibilities]; *Times-Mirror Co. v. Superior Court* (1988) 198 C.A.3d 1420, 1427, 244 C.R. 556 [name of witness who confronted murder suspect remained "private fact" despite her cooperating with police and revealing her role to selected

neighbors and family members]; *M.G. v. Time Warner* (2001) 89 C.A.4th 623, 631, 107 C.R.2d 504 [in story covering manager of Little League baseball team who had pleaded guilty to child molestation, publication of team photograph, which thus linked plaintiffs with molestation, either as victims, perpetrators, or collaborators, constituted public disclosure of private facts, where no previous story covering manager had identified plaintiffs as members of team].)

The First Amendment generally precludes recovery for disclosure of facts that are a matter of public record. (*Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1028, 1045, 43 L.Ed.2d 328, 348, 7 Summary (10th), *Constitutional Law*, §430.) However, even a matter that was once of public record may be protected as a private fact where disclosure would not be newsworthy. (*Diaz v. Oakland Tribune*, *supra*, 139 C.A.3d 132.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Taus v. Loftus* (2007) 40 C.4th 683, 723, 54 C.R.3d 775, 151 P.3d 1185, Supp., *supra*, §659 [disclosure of plaintiff's initials during deposition in unrelated case was not public disclosure of plaintiff's identity sufficient to support cause of action for public disclosure of private facts]; 103 Proof of Facts 3d 159 [public disclosure of private facts; superseding 43 Proof of Facts 2d 449, text, p. 973].



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 - a. Common Law Action.
- 2. Absence of Newsworthiness.

5 Witkin Sum. Cal. Law Torts § 665

[§ 665] Absence of Newsworthiness.

One of the elements to be shown for recovery in an action based on public disclosure of private facts is the absence of "newsworthiness" of or "public concern" respecting the disclosure, i.e., the lack of legitimate public concern. (See *Matson v. Dvorak* (1995) 40 C.A.4th 539, 549, 550, 46 C.R.2d 880 [whether candidate for public office has refused or neglected to pay traffic fines is legitimate issue of public concern]; on defense of public interest generally, see *infra*, §687 et seq.)

In *Diaz v. Oakland Tribune* (1983) 139 C.A.3d 118, 188 C.R. 762, plaintiff, a transsexual, was born a male. After years of emotional distress and psychological counseling, plaintiff underwent successful gender corrective surgery and became a woman. She made every effort to keep her past identity and the surgery secret, enrolled in a college under her new name, and was elected student body president. During a controversy with the college administrators during her term, defendant J, a columnist on defendant newspaper, was informed by confidential sources that plaintiff was a man. J sought confirmation from unidentified persons, and later defendant newspaper's city editor found city police records of a misdemeanor charge against plaintiff as a man. J then placed this item in his column: "The students at the College of Alameda will be surprised to learn that their student body president, Toni Diaz, is no lady, but is in fact a man whose real name is Antonio. Now I realize, that in these times, such a matter is no big deal, but I suspect his female classmates in P.E. 97 may wish to make other showering arrangements." Plaintiff then brought this action for invasion of privacy, and the jury awarded her sizeable compensatory and punitive damages. *Held*, judgment reversed for errors in instructions, but other issues were discussed "in the interests of judicial administration." (139 C.A.3d 131.)

(a) *No requirement of compelling public need.* The court added to its basic description of the right to privacy the statement that the right "should be abridged only when there is a compelling public need." This language, taken from *White v. Davis* (1975) 13 C.3d 757, 120 C.R. 94, 533 P.2d 222, 7 Summary (10th), *Constitutional Law*, §357 (covert police surveillance of college classrooms) was directed at the government's burden of demonstrating a need for interference with First Amendment freedoms. (139 C.A.3d 127.) Unlike the government's activity in *White*, defendant's publication is a preferred right--the right to publish information in which the public has a legitimate interest; and to require that the article meet the compelling public need standard would severely abridge the constitutional right of free speech and press. (139 C.A.3d 127, citing *Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 93 C.R. 866, 483 P.2d

34, *infra*, §§691, 692, *Virgil v. Time* (9th Cir. 1975) 527 F.2d 1122, and *Rest.2d, Torts* §652D, Comment d.)

(b) *Error in instruction on burden of proving newsworthiness.* The trial judge instructed the jury that the plaintiff had the burden of proving specified elements of the tort, but struck out defendants' proposed element that the article was not newsworthy, thus leaving the jury with the impression that it was defendants' burden to prove newsworthiness. This is erroneous. While a publisher may defend by proving that the matter was newsworthy, the plaintiff has the burden of proving that the publication was not privileged, i.e., that it was not newsworthy. (139 C.A.3d 128, 129.) "The proof that defendants have published an article containing highly offensive private matters does not itself establish a claim for relief. It certainly must be recognized that an otherwise embarrassing article may be newsworthy, depending on the circumstances. Only when the embarrassing publicity is *not* newsworthy can plaintiff recover damages, consistent with defendants' rights of free speech and press." (139 C.A.3d 130, citing *Rest.2d, Torts* §625D, and *Virgil v. Time*.)

(c) *Newsworthiness: test and determination.* In an effort to reconcile the competing interests--the individual's right to keep private facts from the public's gaze and the public's right to know--the courts have adopted a three-part test: (1) the social value of the facts published, (2) the depth of the article's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety. (139 C.A.3d 132.)

(1) *Newsworthiness as a jury question.* As in the related field of obscenity, whether a publication is or is not newsworthy depends on "contemporary community mores and standards of decency." (139 C.A.3d 133, citing *Briscoe, Virgil v. Time*, and *Rest.2d, Torts* §652D, Comment h.) This is largely a question of fact for the jury; and "where reasonable minds could differ, we see no constitutional infirmity in allowing the jury to decide the issue of newsworthiness." (139 C.A.3d 133.)

(2) *Newsworthiness as a matter of law.* Defendants' contention that, as the first female student body president of the college, plaintiff was a public figure whose sexual identity was a newsworthy item, is unsound. She was a public figure for some purposes, but there was little if any connection between the information disclosed and her fitness for office; and the fact that she was the first woman student body president did not in itself warrant opening her entire private life to public inspection. (139 C.A.3d 134, citing *Rest.2d, Torts* §652D, Comment h.)

Shulman v. Group W Productions (1998) 18 C.4th 200, 74 C.R.2d 843, 955 P.2d 469, addresses the balance between privacy and the press in the context of an automobile accident. Plaintiffs R and her son W, who were not public figures, were involved in an automobile accident when their car went off the highway, overturning and trapping them inside. A rescue helicopter, containing a nurse equipped with a microphone and a cameraman employed by defendant, was sent to the accident scene. Without plaintiffs' knowledge or permission, a video was made of the rescue. It included such information as shots of R, her first name, her age, and various personal comments about the accident revealing her physical condition and mental state at that time. This video was shown on TV several months later, and plaintiffs then sued for invasion of privacy based on publication of private facts and intrusion into private affairs. *Held*, with respect to the count of publication of private facts, summary judgment for defendant affirmed; the accident was newsworthy. (For holding on intrusion into private affairs, see *supra*, §659.)

(a) Lack of newsworthiness is both an element of the tort of publication of private facts and a constitutional defense to liability for publication of truthful information, and the requirements of tort law and the Constitution are congruent. However, the exact meaning of newsworthiness, common law or constitutional, is obscured by the fact that the term is used both as a descriptive predicate and a value predicate, i.e., it can refer to the fact that there is widespread public interest or to the fact that publication, and the public's interest in it, is praiseworthy. (18 C.4th 224.) In either event, "newsworthiness" is not based on the taste of an individual judge or juror, but on the taste of reasonable members of the community. (18 C.4th 225.)

(b) A review of past decisions reveals the competing interests to be balanced in determining newsworthiness. First, the analysis requires the courts to undertake to some degree a normative assessment of the social value of a publication. Second, the evaluation depends on the degree of intrusion and the extent to which the plaintiff played an important role

in public events. Courts balancing these interests have recognized that when a person is involuntarily involved in a newsworthy incident, not everything the person says or does is rendered newsworthy. Instead, newsworthiness depends on the logical relationship or nexus between the event that brought the plaintiff into the public eye and the particular facts disclosed. This approach draws a protective line at the point that the material revealed ceases to have any substantial connection to the subject matter of the newsworthy event. However, even when the required nexus exists, a holding of not newsworthy might be mandated when the intrusiveness of the revelation is greatly disproportionate to its relevance, such as when the revelation is intensely personal or intimate. (18 C.4th 226.)

(c) Here, the subject matter of the broadcast as a whole was of legitimate public concern. Automobile accidents are by their nature of interest to the great portion of the public that travels frequently by automobile, as is the rescue and medical treatment of victims, a critical service that any member of the public may someday need. A more difficult question is whether R's appearance and words at the time of the rescue were of legitimate concern. Pursuant to the aforementioned principles, this material was also newsworthy as a matter of law. Given that the focus of the broadcast was on the nurse, one of the challenges faced by her was the confusion, pain, and fear that R felt in the aftermath of the accident. Thus, the video depicting R's physical state (which was not luridly shown) and the audio showing her disorientation and despair were substantially relevant to the segment's newsworthy subject matter. Nor were the video and the audio so sensational in emotional tone or so personal in content as to make their intrusiveness disproportionate to their relevance. And the fact that the broadcast *could* have been edited to exclude some of R's words and images is not determinative, because the courts do not, and constitutionally could not, sit as superior editors of the press. (18 C.4th 228.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Taus v. Loftus* (2007) 40 C.4th 683, 719, 54 C.R.3d 775, 151 P.3d 1185, Supp., supra, §659 [statement at professional conference, by critic of theory of recovery of repressed memory of childhood abuse, that subject of prominent case study supporting theory engaged in destructive behavior and was currently in military could not form basis of action for public disclosure of private facts; disclosure of these facts was newsworthy in light of controversy in mental health community regarding theory]; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 C.A.4th 1424, 1440, 57 C.R.3d 885 [high school principal could not prevail in action for public disclosure of private facts based on statements to press by school district superintendent and local superintendent criticizing his handling of student brawls and explaining his replacement by district; statements were logically relevant to newsworthy subject of violence at school and district's response to it].



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b. Statutory Actions.
1. In General.

5 *Witkin Sum. Cal. Law Torts* § 666

[§ 666] In General.

A number of statutes relate to misuse or improper disclosure of personal information, frequently providing civil remedies. Among the more significant are the following:

- (1) *B. & P.C. 350, 352* [Office of Privacy Protection].
- (2) *C.C. 56 et seq., 1798.91 (2 Cal. Evidence (4th), Witnesses, §518 et seq.)* [regulating disclosure of medical information].
- (3) *C.C. 1785.1 et seq. (4 Summary (10th), Sales, §297 et seq.)* [duties of consumer credit reporting agencies].
- (4) *C.C. 1786 et seq. (4 Summary (10th), Sales, §306)* [duties of investigative consumer reporting agencies].
- (5) *C.C. 1792 et seq. (infra, §668)* [rights of identity theft victims regarding claimants against them].
- (6) *C.C. 1798.29, 1798.82 (infra, §671)* [disclosure of breaches of security concerning computerized personal information].
- (7) *C.C. 1798 et seq. (infra, §667)* [Information Practices Act, prohibiting state agencies from disclosing personal information except in designated situations].
- (8) *C.C. 1798.80 et seq. (infra, §670)* [destruction of customer records and restrictions on disclosure of information in them].
- (9) *C.C. 1798.81.5 (infra, §669)* [requiring reasonable security practices to protect personal information].
- (10) *C.C. 1799.1a* [disclosure of information obtained from income tax return or schedule obtained in financial or other business-related transaction].

(11) C.C. 1799.1, 1799.2 [disclosure by business performing bookkeeping services of information in its records].

(12) C.C. 1799.3 and 18 U.S.C., §2710 (infra, §672) [disclosures of personal information by videotape providers].

(13) *Fin.C. 4050* et seq. [California Financial Information Privacy Act, requiring banks, insurance companies, and other financial institutions to provide specified written form to consumers on sharing nonpublic personal information and generally allowing consumers to direct that information not be shared].

(14) *Ins.C. 791* et seq. (2 *Cal. Evidence* (4th), *Witnesses*, §521) [restrictions on collection, management, and disclosure of personal information by insurance companies].

(15) P.C. 530.5 et seq. (2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §209) [identity theft as crime].

(16) *Pub.Util.C. 2891* [prohibiting phone or telegraph corporations from disclosing without consent specified information regarding residential customers or subscribers, including personal calling patterns, credit or other personal financial information, services received from the corporation, and demographic information].

(17) *Welf.C. 5330* (3 *Cal. Proc.* (4th), *Actions*, §29 et seq.) [permitting recovery of damages, as prescribed, for release of confidential information or records in violation of the Lanterman-Petris-Short Act].

(18) 15 U.S.C., §1681 et seq. [federal Fair Credit Reporting Act, which preempts state legislation to the extent inconsistent (see 15 U.S.C., §1681t)].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *B. & P.C. 350* and *352* were repealed in 2007 and replaced by *Govt.C. 11549.5*.(17) *Welf.C 5330*:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §80 et seq.



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 - 2. Information Practices Act.

5 Witkin Sum. Cal. Law Torts § 667

[§ 667] Information Practices Act.

The Information Practices Act of 1977 (C.C. 1798 et seq.; see 7 *Summary* (10th), *Constitutional Law*, §604) prohibits state agencies from disclosing personal information, except in designated situations. (C.C. 1798.24.) An individual harmed by an unauthorized disclosure may bring a civil action against the agency (C.C. 1798.45(c)) and recover an amount equal to the sum of his or her actual damages, including those for mental suffering, plus costs and attorneys' fees (C.C. 1798.48).

A civil action may also be brought against any person, *other than a governmental employee* acting in the scope of his or her employment, who intentionally discloses personal information obtained from information maintained by a state agency or from records within a system of records maintained by a federal agency. A successful plaintiff may recover special or general damages and must be awarded punitive damages of at least \$ 2,500, plus costs and attorneys' fees. (C.C. 1798.53.)

However, the constitutional guarantee of freedom of the press may be a defense to a newspaper sued under C.C. 1798.53. In *Alim v. Superior Court* (1986) 185 C.A.3d 144, 229 C.R. 599, the action was based in part on a newspaper's disclosure of truthful information about a former state official. The court said: "Almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged. By volunteering his services for public office the official (as opposed to the ordinary employee) waives much of his right to privacy." (185 C.A.3d 153.) Hence, "we view the press disclosure of information bearing on the fitness for office of a public official as within the protective ambit of ... California's constitutional free press constraint." (185 C.A.3d 153, citing *Landmark Communications v. Virginia* (1978) 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1, 2 Cal. Proc. (4th), Courts, §66.) (See *Anti-Defamation League of B'nai B'rith v. Superior Court* (1998) 67 C.A.4th 1072, 1091, 79 C.R. 597 [defendants were immune as journalists from liability under C.C. 1798.53 to extent that plaintiffs were limited public figures; however, defendants were entitled to First Amendment protection only insofar as information in question was used for legitimate journalistic purposes, and this protection did not extend to private disclosure of personal information].)

SUPPLEMENT: [This section is current through the latest supplement]
Landmark Communications case:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §68.



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 - 3. Identity Theft.

5 *Witkin Sum. Cal. Law Torts* § 668

[§ 668] Identity Theft.

(1) *In General.* C.C. 1798.92 et seq. authorize a cause of action for identity theft in prescribed circumstances. (On required preliminary steps by defendant who is victim of identity theft, see 3 *Cal. Proc.* (4th), *Actions*, Supp., §209.)

(2) *Definitions.* "Claimant" means a person who has or purports to have a claim for money or an interest in property in connection with a transaction procured through identity theft. (C.C. 1798.92(a).)

"Identity theft" is the unauthorized use of another person's personal identifying information to obtain credit, goods, services, money, or property. (C.C. 1798.92(b).)

"Personal identifying information" means a person's name, address, telephone number, driver's license number, Social Security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, or credit card number. (C.C. 1798.92(c).)

"Victim of identity theft" is a person whose personal identifying information is used without authorization by another to obtain credit, goods, services, money, or property, which the person did not use, and who filed a police report alleging misuse of personal identifying information under P.C. 530.5 (see 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §209). (C.C. 1798.92(d).)

(3) *Nature of Action.* The action may be brought against a claimant to establish that the person bringing the action is a victim of identity theft in connection with that claim. If the claimant has sued to recover on the claim, the person may file a cross-complaint to establish that he or she is a victim of identity theft. (C.C. 1798.93(a).) A person establishes that he or she is a victim of identity theft by a preponderance of the evidence. (C.C. 1798.93(b).)

(4) *Types of Relief.* The victim may obtain a judgment that, as appropriate, declares that the victim is not obligated on the claim, declares void security interests in the victim's property, dismisses any cause of action based on a claim arising from the identity theft, provides an injunction restraining attempts to collect on the claim, and includes actual damages, attorneys' fees, and costs. In order to recover actual damages or attorneys' fees, the victim must show that he

or she provided written notice to the claimant that a situation of identity theft might exist, including, on written request of the claimant, a valid copy of the police report or the Department of Motor Vehicles investigative report promptly filed pursuant to P.C. 530.5 at least 30 days prior to filing the action or cross-complaint. (C.C. 1798.93(c)(1)-(c)(5).)

A civil penalty, of up to \$ 30,000, in addition to other damages, is recoverable if the victim establishes by clear and convincing evidence (a) that at least 30 days prior to filing the action or cross-complaint, he or she provided written notice to the claimant at the address designated by the claimant for complaints related to credit reporting issues that a situation of identity theft might exist and explaining the basis for that belief, (b) that the claimant failed to diligently investigate the victim's notification of a possible identity theft, and (c) that the claimant continued to pursue its claim against the victim after the claimant was presented with facts that were later held to entitle the victim to a judgment. (C.C. 1798.93(c)(6); on injunctive relief against claims arising from identity theft, see 6 *Cal. Proc.* (4th), *Provisional Remedies*, Supp., §313A.)

(5) *Continuing Jurisdiction*. A court has continuing jurisdiction over an action or cross-complaint filed pursuant to these provisions in order to provide for the joinder of related causes of action based on the theft of the same person's identity and the joinder of further defendants based on that theft. The court's continuing jurisdiction terminates 10 years after filing of the original action unless the court, prior to that date, finds good cause to extend jurisdiction over the matter. (C.C. 1798.95.)

(6) *Statute of Limitations*. The action may be brought, or the defendant joined, within 4 years of the date the victim knew or, in the exercise of reasonable diligence should have known, of the existence of facts that would give rise to bringing the action or joining the defendant. (C.C. 1798.96.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See C.E.B., *Privacy Compliance and Litigation* §10.1 et seq.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §214.(4) *Types of Relief*. See C.E.B., *Privacy Compliance and Litigation* §10.1 et seq.

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§291, 311.



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- 4. Failure To Protect Security of Personal Information.

5 Witkin Sum. Cal. Law Torts § 669

[§ 669] Failure To Protect Security of Personal Information.

(1) *In General.* A business that owns or licenses personal information about a California resident must implement and maintain reasonable security procedures and practices to protect the information from unauthorized access, destruction, use, modification, or disclosure. (C.C. 1798.81.5(b); see C.C. 1798.81.5(a) [phrase "owns or licenses" includes, but is not limited to, personal information retained as part of internal customer account or for purpose of using that information in transactions with person to whom information relates].) Also, a business that discloses personal information to a nonaffiliated third party must require by contract that the third party maintain reasonable security procedures. (C.C. 1798.81.5(c).)

(2) *Information Protected.* "Personal information" means an individual's first name or first initial and his or her last name in combination with any one or more of specified data elements, including the individual's (a) Social Security number, (b) California driver's license or identification card number, (c) account number, credit card, or debit card number, in combination with a required security code, access code, or password that would permit access to an individual's financial account, and (d) medical information. "Personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records. (C.C. 1798.81.5(d).)

(3) *Exclusions.* A business that is regulated by state or federal law providing greater protection to personal information than that provided by these requirements is deemed in compliance with them. Specifically, these requirements do not apply to (a) a provider of health care, health care service plan, or contractor regulated by the Confidentiality of Medical Information Act (C.C. 56 et seq.), (b) a financial institution subject to the California Financial Information Privacy Act (*Fin.C. 4050*), (c) a covered entity governed by the medical privacy and security rules issued by the federal Department of Health and Human Services, or (d) an entity that obtains information under an agreement pursuant to *Veh.C. 1800* et seq. (Department of Motor Vehicles records) and is subject to the confidentiality requirements of the Vehicle Code. (C.C. 1798.81.5(e).)

(4) *Remedies.* A customer injured by a violation of these provisions may institute a civil action to recover damages. A business that fails to comply with the provisions may be enjoined. (C.C. 1798.84.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See C.E.B., Privacy Compliance and Litigation §3.1 et seq.

(3) *Exclusions.* See C.E.B., Privacy Compliance and Litigation §6.47 et seq.



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 - 5. Failure To Destroy Consumer Records.

5 Witkin Sum. Cal. Law Torts § 670

[§ 670] Failure To Destroy Consumer Records.

A business is required to take all reasonable steps to destroy a customer's records within its custody or control containing personal information that is no longer to be retained. Destruction may be by (1) shredding, (2) erasing, or (3) otherwise modifying the personal information to make it unreadable or undecipherable through any means. (C.C. 1798.81.)

Subject to specified exceptions, a business that discloses a customer's personal information, including information relating to income or purchases, to a third party for direct marketing purposes must provide the customer, within 30 days after request, in writing or by e-mail, the names and addresses of the recipients of that information and specified details regarding the information disclosed. The business must also provide information to customers regarding its privacy policy and the designated means of making an inquiry regarding that policy. (C.C. 1798.83.)

A customer injured by a violation of these requirements may institute a civil action to recover damages. Also, a business that violates or proposes to violate the requirements may be enjoined. In the case of a violation of C.C. 1798.83, prescribed civil penalties are recoverable, as well as attorneys' fees and costs. These remedies are cumulative to each other and any others available under the law. Unless an alleged violation of C.C. 1798.83 is wilful, intentional, or reckless, however, the business may assert as a complete defense that it properly provided the information sought within 90 days of learning of the violation. (C.C. 1798.84.)

The term "business" is broadly defined as "a sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit." The definition specifically includes financial institutions and entities that destroy records. (C.C. 1798.80(a).)

A "customer" is a "natural person" who provides personal information to a business for the purpose of purchasing or leasing a product or obtaining a service. (C.C. 1798.80(c), (d).)

"Personal information" includes any information that identifies, relates to, describes, or is capable of being associated with, a particular individual, including, but not limited to, his or her name, signature, Social Security number,

physical characteristics or description, address, telephone number, passport number, driver's license or state identification card number, insurance policy number, education, employment, employment history, bank account number, credit card number, debit card number, or any other financial information. (C.C. 1798.80(e).)

"Records" include any material, regardless of the physical form, on which information is recorded or preserved by any means, including in written or spoken words, graphically depicted, printed, or electromagnetically transmitted. However, the term does not include publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, such as name, address, or telephone number. (C.C. 1798.80(b).)

A waiver of these provisions is contrary to public policy, void, and unenforceable. (C.C. 1798.84(a).)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Privacy Compliance and Litigation §5.71 et seq.



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6. Breach of Security for Computerized Personal Information.

5 Witkin Sum. Cal. Law Torts § 671

[§ 671] Breach of Security for Computerized Personal Information.

(1) *Enactment and Purpose of Legislation.* C.C. 1798.29 and 1798.82 require those who own or license computerized data including personal information to disclose breaches of security in prescribed circumstances.

The Legislature finds that "[t]he privacy and financial security of individuals is increasingly at risk due to the ever more widespread collection of personal information by both the private and public sector," that "[c]redit card transactions, magazine subscriptions, telephone numbers, real estate records, automobile registrations, consumer surveys, warranty registrations, credit reports, and Internet Web sites are all sources of personal information and form the source material for identity thieves," that "[i]dentity theft is one of the fastest growing crimes committed in California" and "is costly to the marketplace and to consumers," that "victims of identity theft must act quickly to minimize the damage," and that "therefore expeditious notification of possible misuse of a person's personal information is imperative." (2002 Stats., Chap. 1054, §1.)

It is the Legislature's intent to preempt all local regulation of the subject matter of these provisions. (2002 Stats., Chap. 1054, §6.)

(2) *Duty To Disclose Breach of Security.* A state agency, or a person or business conducting business in California, that owns or licenses computerized data including personal information must disclose any breach of the security of a computer system following discovery or notification of the breach in the security of the data to any state resident whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. (C.C. 1798.29(a), 1798.82(a).) If the computerized data includes personal information that the agency, person, or business does not own, it must also notify the owner or licensee of that information of the breach. (C.C. 1798.29(b), 1798.82(b).)

(3) *Time of Disclosure.* The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement and the measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system. (C.C. 1798.29(a), 1798.82(a).) The notification may be delayed, however, if a law enforcement agency determines that the notification will impede a criminal investigation. In

these circumstances, the notification may be made after the law enforcement agency determines that it will not compromise the investigation. (C.C. 1798.29(c), 1798.82(c).)

(4) *Manner of Notification.* Notice must generally be provided by one of the following methods:

(a) Written notice. (C.C. 1798.29(g)(1), 1798.82(g)(1).)

(b) Electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in 15 U.S.C., §7001. (C.C. 1798.29(g)(2), 1798.82(g)(2).)

(c) Substitute notice, if the agency, person, or business demonstrates that the cost of providing notice would exceed \$ 250,000, the affected class of subject persons to be notified exceeds 500,000, or the agency, person, or business does not have sufficient contact information. Substitute notice must consist of all of the following: (1) e-mail notice when the agency, person, or business has an e-mail address for the subject persons, (2) conspicuous posting of the notice on the website of the agency, person, or business, if one is maintained, and (3) notification to major statewide media. (C.C. 1798.29(g)(3), 1798.82(g)(3).)

However, an agency, person, or business that maintains its own notification procedures as part of an information security policy for the treatment of personal information which is otherwise consistent with the timing requirements of these provisions is deemed to be in compliance with the notification requirements if it notifies subject persons in accordance with its policies. (C.C. 1798.29(h), 1798.82(h).)

(5) *Remedies.* A customer injured by a violation of these provisions may institute a civil action to recover damages. A business that fails to comply with the provisions may be enjoined. (C.C. 1798.47, 1798.48, 1798.84.)

(6) *Definitions.* "Breach of the security of the system" means unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the agency, person, or business. Good faith acquisition of personal information by an employee or agent of the agency, person, or business for the purposes of the agency, person, or business is not a breach of the security of the system, provided that the personal information is not used or subject to further unauthorized disclosure. (C.C. 1798.29(d), 1798.82(d).)

"Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted: (a) Social Security number; (b) driver's license number or California identification card number; (c) account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account. (C.C. 1798.29(e), 1798.82(e).) However, "personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records. (C.C. 1798.29(f), 1798.82(f).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Enactment and Purpose of Legislation.* See C.E.B., Privacy Compliance and Litigation §4.1 et seq.(6)

Definitions. "Personal information": The specified data elements also include medical information and health insurance information. (C.C. 1798.29(e)(4), (e)(5); C.C. 1798.82(e)(4), (e)(5), both added in 2007.) "Medical information" means any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional. (C.C. 1798.29(f)(2), 1798.82(f)(2), added in 2007.) "Health insurance information" means an individual's health insurance policy number or subscriber identification number, any unique identifier used by a health insurer to identify the individual, or any information in an individual's application and claims history, including any appeals records. (C.C. 1798.29(f)(3), 1798.82(f)(3), added in 2007.)

C.C. 1798.29(f) and 1798.82(f) were both subdivided in 2007. The exclusion from the definition of "personal information" of publicly available information is now in C.C. 1798.29(f)(1) and 1798.82(f)(1).



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- E. Invasion of Privacy.
 - 3. Public Disclosure of Private Facts.
 - b. Statutory Actions.
 - 7. Disclosure by Videotape Provider.

5 *Witkin Sum. Cal. Law Torts* § 672

[§ 672] Disclosure by Videotape Provider.

(1) *California Statute*. C.C. 1799.3 prohibits providers of video cassette sales or rental services from disclosing "any personal information or the contents of any record, including sales or rental information," without the written consent of the person who is the subject of the record. (C.C. 1799.3(a); see 20 *Pacific L. J.* 469.)

The statute does not apply to disclosures made (a) in compliance with a subpoena, court order, or search warrant, (b) in response to the proper use of discovery in a pending civil action, (c) to a law enforcement agency investigating criminal activity, unless prohibited by law, or (d) to a taxing agency for the purpose of tax administration. It is also inapplicable to disclosures of names and addresses for commercial purposes only. (C.C. 1799.3(b).)

Each wilful violation is subject to a civil penalty of up to \$ 500, recoverable by the subject of the record. (C.C. 1799.3(c).) A penalty in the same amount is recoverable by the state, if a provider has three or more violations within a 6-month period. (C.C. 1799.3(d).)

(2) *Federal Statute*. 18 U.S.C., §2710 prohibits a videotape service provider from knowingly disclosing "personally identifiable information" concerning a customer without the customer's written consent. (18 U.S.C., §2710(b); on exceptions, similar to those specified in the California statute, see 18 U.S.C., §2710(b)(2).) The term "personally identifiable information" includes "information which identifies a person as having requested or obtained specific video material or services" from a provider. (18 U.S.C., §2710(a)(3).)

Any person aggrieved by a violation of the statute may recover actual damages (but not less than liquidated damages of \$ 2,500), punitive damages, attorneys' fees and costs, and other appropriate preliminary and equitable relief. (18 U.S.C., §2710(c).) Personally identifiable information obtained in violation of the statute may not be received in evidence in any trial, hearing, arbitration, or other proceeding. (18 U.S.C., §2710(d).)

The federal statute does not preempt state or local law unless that law requires disclosure prohibited by the statute. (18 U.S.C., §2710(f).)

West's Key Number Digest, Torts k.8.5(5.1)

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E. Invasion of Privacy.

4. Placing Plaintiff in False Light.

a. Nature of Wrong.

5 *Witkin Sum. Cal. Law Torts* § 673

[§ 673] Nature of Wrong.

(1) *Resemblance to Defamation*. On the borderline of defamation and privacy is the wrong inflicted by publicity that puts the plaintiff, in Prosser's words, in "a false but not necessarily defamatory position in the public eye." "The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground." (*Werner v. Times-Mirror Co.* (1961) 193 C.A.2d 111, 120, 14 C.R. 208, quoting Prosser on Torts and Prosser, "Privacy," 48 Cal. L. Rev. 383, 400; see *Fellows v. National Enquirer* (1986) 42 C.3d 234, 238, 228 C.R. 215, 721 P.2d 97, *infra*, §675 [publicity placing one in false light will generally be defamatory as well; noting substantial overlap between two torts]; *Grimes v. Carter* (1966) 241 C.A.2d 694, 701, 50 C.R. 808 [same quotation as *Werner*]; C.E.B., 2 California Business Litigation, §11.49 et seq.; Dobbs, *The Law of Torts* §428; 57 A.L.R.4th 22 [cognizability and elements]; 17 Southwestern U. L. Rev. 135 [False Light Invasion of Privacy: False Tort?]; 57 A.L.R.4th 244 [remedies and defenses]; 58 A.L.R.4th 902 [accusation or innuendo as to criminal acts]; 59 A.L.R.4th 502 [neutral or laudatory depiction of subject]; 60 A.L.R.4th 51 [disparaging but noncriminal depiction: dishonesty, cruelty, sexual perversion or promiscuity, substance abuse, financial distress, disease, disability or infirmity, and many other false depictions]; 6 Proof of Facts 3d 585 [false light publicity]; 68 Proof of Facts 3d 179 [liability for psychological harm from story or picture in media]; BAJI, No. 7.22; CACI, No. 1802.)

The Restatement describes the relationship of false light invasion of privacy to defamation as follows: "In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander. ... In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity." However, it is not necessary that the plaintiff be defamed: "It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position." (Rest.2d, Torts §625E, Comment b.)

(2) *Constitutional Requirements*. The *New York Times* rule governing defamation cases (see *supra*, §§601, 602) applies to false light privacy cases. (*Time v. Hill* (1967) 385 U.S. 374, 87 S.Ct. 534, 542, 17 L.Ed.2d 456, 466, 7 Summary (10th), *Constitutional Law*, §429; *Cantrell v. Forest City Publishing Co.* (1974) 419 U.S. 245, 95 S.Ct. 465, 469, 42 L.Ed.2d 419, 426, *infra*, §674; Rest.2d, Torts §652E, Comment d; see 3 *Hastings Const. L. Q.* 543.) A showing

of constitutional (actual) malice is required in circumstances where it would be necessary under defamation law. (*Johnson v. Harcourt, Brace, Jovanovich* (1974) 43 C.A.3d 880, 893, 118 C.R. 370, *infra*, §689; on when actual malice is constitutionally required for defamation recovery, see *supra*, §601 et seq.)

The First Amendment may preclude recovery where the disclosure is of a matter of public concern (see *infra*, §679) or is transformative in nature (see *infra*, §680).

(3) *Applicability of Retraction Statute.* The retraction statute (C.C. 48a) governs where it would apply in defamation cases. (*Johnson v. Harcourt, Brace, Jovanovich, supra*; on retraction by newspaper or broadcaster, see *supra*, §629 et seq.)

(4) *Statement of Elements.* The Restatement defines the tort as follows: "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." (*Rest.2d, Torts* §652E.)

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4. Placing Plaintiff in False Light.

b. Illustrations.

5 *Witkin Sum. Cal. Law Torts* § 674

[§ 674] Illustrations.

In *Kerby v. Hal Roach Studios* (1942) 53 C.A.2d 207, 127 P.2d 577, a moving picture studio, to advertise a picture with a character named "Marion Kerby," sent 1,000 fictitious personal letters to men whose names were taken from the city directory, suggesting a rendezvous, and signed with that name. Plaintiff, an actress and singer of the same name, was subjected to embarrassing calls and adverse publicity. *Held*, a cause of action was stated for invasion of the right of privacy, or perhaps even for libel. The court declared that, in conformity with the rule in defamation cases, neither inadvertence nor mistake is a defense. The decision, however, appears to impose an unusual duty toward an indeterminate class of unknown persons, for the opinion states that, so far as appears, defendants "had no intent to refer therein to plaintiff and did not know of her existence, although they might easily have discovered it." (53 C.A.2d 213.)

In *Cantrell v. Forest City Publishing Co.* (1974) 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419, plaintiffs were the wife and son of a man who was killed, with 43 others, in the collapse of a West Virginia bridge, in 1967. Defendant newspaper published a news story focusing on the funeral of the husband and the impact of his death on the family. Some months later defendant reporter, after conferring with the editor of defendant newspaper's Sunday magazine, went to the family's home, talked with the children, and then published a lead feature stressing the family's poverty and the dilapidated conditions of the home. Some parts of the article were false, including descriptions of the home, and the appearance and behavior of the mother, who was in fact not at home when the interviews took place. *Held*, the evidence was sufficient to support a judgment for invasion of privacy against the reporter and publisher.

(a) *Time v. Hill* (1967) 385 U.S. 374, 87 S.Ct. 534, 542, 17 L.Ed.2d 456, 466, governs in this false light privacy case; i.e., liability can be imposed only if the false statements were made with knowledge of their falsity or in reckless disregard of the truth. (95 S.Ct. 469, 42 L.Ed.2d 426.) Common law malice, which could be mere personal ill will toward the plaintiff, is insufficient; it "would focus on the defendant's attitude toward the plaintiff's privacy, not toward the truth or falsity of the material published." (95 S.Ct. 470, 42 L.Ed.2d 427.)

(b) The evidence met the test: defendant reporter must have known that his statements were false; and his editor approved the idea and told the reporter that the feature would be published if it was good. (95 S.Ct. 471, 42 L.Ed.2d 427.)

In *O'Hilderbrandt v. Columbia Broadcasting System* (1974) 40 C.A.3d 323, 114 C.R. 826, plaintiff, who was formerly movie actress Mary Miles Minter, was acting in pictures directed by William Desmond Taylor, and was reputedly engaged to marry him. He was murdered in 1922 by an unknown person. Plaintiff retired from moving pictures a year later. In 1970, defendant broadcast a program called "Rod Serling's Wonderful World of Crime," dealing with celebrated women murderers. The unsolved Taylor murder and Taylor's romantic attachments, including his relationship with plaintiff, were mentioned, and the following added: "A shrouded figure was observed by a neighbor running from the scene. It could have been a man. It could have been a woman." Plaintiff's theory was that, since her name had been mentioned and her picture shown "in a context of crime, perversion, depravity and conjecture," her privacy had been invaded; i.e., she had been injected into a discourse on murder, with the implication that a reasonable connection did exist. *Held*, a nonsuit was properly granted.

(a) Prosser notes that a form in which the false light branch of invasion of privacy "frequently has made its appearance is the use of the plaintiff's picture to illustrate a book or an article with which he has no reasonable connection. ... [P]ublic interest may justify a use for appropriate and pertinent illustration. But when the face of some quite innocent and unrelated citizen is employed to ornament an article on the cheating propensities of taxi drivers, the negligence of children, profane love, 'man hungry' women, juvenile delinquents, or the peddling of narcotics, there is an obvious innuendo that the article applies to him, which places him in a false light before the public, and is actionable." (40 C.A.3d 331, quoting Prosser, "Privacy," 48 Cal. L. Rev. 383, 399.)

(b) Here, however, plaintiff was a public figure at the time of the murder, and remained one in lesser degree at the time of the telecast; the murder was newsworthy at the time and was still a matter of public interest; plaintiff was mentioned only in connection with that particular event, and the statements about her were true. (40 C.A.3d 334.)

(c) "While it may not have been in good taste to place the recitation of plaintiff's professional and social relationship with the murdered William Desmond Taylor in juxtaposition with the story of the heinous deeds of Louise Peete and Winnie Ruth Judd, that circumstance was not, as a matter of law, so offensive as to shock the community's notions of decency." (40 C.A.3d 334.)

In *M.G. v. Time Warner* (2001) 89 C.A.4th 623, 107 C.R.2d 504, a published story covering the manager of a Little League baseball team who had pleaded guilty to child molestation included a team photograph, and plaintiffs pictured sued for invasion of privacy. *Held*, defendants' motion to strike the complaint was properly denied. Publication of the photograph linked plaintiffs with the molestation, either as victims, perpetrators, or collaborators. Those plaintiffs who were not involved in the molestation had a false light claim, because the story could be interpreted as reporting that all or some of the persons pictured had participated in some way in the molestation. (89 C.A.4th 636.)

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4. Placing Plaintiff in False Light.

c. Special Damages Requirement.

5 *Witkin Sum. Cal. Law Torts* § 675

[§ 675] Special Damages Requirement.

In *Fellows v. National Enquirer* (1986) 42 C.3d 234, 228 C.R. 215, 721 P.2d 97, the court held that where a false light action is based on a publication that is defamatory within the meaning of C.C. 45a (not libelous on its face; see supra, §541), pleading and proof of special damages are required. Defendant National Enquirer carried a photograph of plaintiff Arthur Fellows and actress Angie Dickinson with this accompanying two-sentence article: "Gorgeous Angie Dickinson's all smiles about the new man in her life--TV producer Arthur Fellows. Angie's steady-dating Fellows all over Tinseltown, and happily posed for photographers with him as they exited the swanky Spago restaurant in Beverly Hills." Plaintiff filed a complaint for libel and false light invasion of privacy, alleging that the article cast him in a false light in the eyes of those who knew of his marital status by suggesting that he was engaged in immoral conduct. In a later amended complaint, plaintiff, who had conceded that he had not suffered any special damages, dropped the libel count. Defendant's demurrer was sustained by the trial court and judgment of dismissal was entered. *Held*, the order and judgment were correct.

(a) *Nature of problem.* Placing a person in a highly offensive false light will in most cases be defamatory as well, and Prosser many years ago expressed concern about this overlap: "[W]hat of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims?" (42 C.3d 239, quoting 48 Cal. L. Rev. 401.)

(b) *Prior California decisions.* In *Werner v. Times-Mirror Co.* (1961) 193 C.A.2d 111, 14 C.R. 208, plaintiff, city attorney of Los Angeles from 1929 to 1933, sued defendant newspaper for publishing a story suggesting that he and his first wife had been involved in political scandals and criminal wrongdoing 30 years earlier. The complaint sought only general damages and did not allege a demand for a retraction. The court held that to allow the invasion of privacy suit would be to sanction an evasion of the statutory protections of C.C. 48a. (42 C.3d 241.) The *Werner* view was followed in *Kapellas v. Kofman* (1969) 1 C.3d 20, 35, footnote 16, 81 C.R. 360, 459 P.2d 912, holding a privacy count superfluous; and the *Kapellas* holding was reaffirmed in *Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 543, 93 C.R. 866, 483 P.2d 34, *infra*, §§691, 692. (42 C.3d 242.)

(c) *Rule in other states and Torts Restatement 2d.* "The overwhelming majority of decisions in other jurisdictions enforce defamation restrictions in actions for false light invasion of privacy when such actions are based on a

defamatory publication." (42 C.3d 245, listing a number of cases.) *Rest.2d, Torts* §652E(e) supports this view. (42 C.3d 246.)

(d) *Purpose and policy underlying C.C. 45a.* C.C. 45(a) "manifests a legislative determination that liability imposed for a publication which affords no warning of its defamatory nature, and has not caused actual pecuniary injury, would place too great a burden on the editorial process and would hamper the free dissemination of the news." (42 C.3d 250.)

(e) *Applicability of C.C. 45a in false light cases.* "We find the public policy embodied in section 45a equally applicable to an action for false light invasion of privacy based upon a defamatory publication. Since virtually every published defamation would support an action for false light invasion of privacy, exempting such actions from the requirement of proving special damages would render the statute a nullity. Permitting a plaintiff to circumvent the statutory requirement by labeling the action as one for false light invasion of privacy would defeat the legislative purpose of providing a zone of protection for the operation of a free press. The *Werner*, *Kapellas* and *Briscoe* courts would not allow such an evasion of legislative purpose, nor shall we. We hold that whenever claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required." (42 C.3d 251.)

(f) *Qualification on holding.* "Our holding would not apply to false light publicity that would be actionable as a public disclosure of private facts had the representations made in the publication been true. The public disclosure branch of the privacy tort involves the publication by defendant of non-newsworthy intimate details of plaintiff's private life. In the public disclosure of private facts context, the policies of section 45a are inapposite, since the injurious nature of the report should have been apparent on its face and the question of innocent mistake does not arise. Those false light cases based on publications which, if true, would be actionable as public disclosure of private facts, are conceptually indistinguishable from the latter category, and should not be subject to the special damages requirement of section 45a." (42 C.3d 251, footnote 13.) (See 19 Pacific L. J. 355 [*Fellows v. National Enquirer*].)

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5. Appropriation of Name or Likeness.

a. Common Law Cause of Action.

1. In General.

5 Witkin Sum. Cal. Law Torts § 676

[§ 676] In General.

(1) *Nature and Elements of Action.* "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." (*Rest.2d, Torts* §652C; see C.E.B., 2 California Business Litigation, §§10.4 et seq., 11.53; 81 Cal. L. Rev. 125 [Private Ownership of Public Image: Popular Culture and Publicity Rights]; 66 Harv. L. Rev. 1536; 67 Harv. L. Rev. 1433; 37 Loyola L.A. L. Rev. 85 [commercial use of celebrity's name or likeness]; 26 So. Cal. L. Rev. 313; 32 Southwestern U. L. Rev. 761 [use of celebrity's likeness in news stories in conjunction with advertisements]; 27 U.C. Davis L. Rev. 97 [The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity]; 36 U.C. Davis L. Rev. 543 [right of publicity and fair use doctrine]; 62A Am.Jur.2d (2005 ed.), *Privacy* §68 et seq.; BAJI, No. 7.23; CACI, No. 1803.)

As in the case of other forms of invasion of privacy, protection of plaintiff's personal feelings "is an important factor leading to a recognition of the rule." However, "the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it." (*Rest.2d, Torts* §652C, Comment a; see *Dora v. Frontline Video* (1993) 15 C.A.4th 536, 541, 18 C.R.2d 790, *infra*, §679 [appropriation has two aspects, relating to interest protected and resulting injury].)

(2) *Right of Publicity.* The category of appropriation of name or likeness in which the interest involved is proprietary or commercial is often referred to as invasion of the "right of publicity." While origins of the right of publicity are thus in the common law right of privacy, it "has come to be recognized as distinct" from that right." What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness." (*KNB Enterprises v. Matthews* (2000) 78 C.A.4th 362, 366, 92 C.R.2d 713.) Commercial appropriation statutes have been enacted that complement the common law tort of appropriation. (See C.C. 3344, *infra*, §681; C.C. 3344.1, *infra*, §685.)

(3) *Commentary.* The right of publicity has been the subject of extensive comment. (See 70 Cal. L. Rev. 786 [An Assessment of the Copyright Model in Right of Publicity Cases]; 46 Hastings L. J. 853 [The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality]; 48 Hastings L. J. 601 [application of right of publicity to use of digitally reproduced actors in film]; 14 Loyola L.A. L. Rev. 129 [The Right of Publicity as

a Means of Protecting Performers' Style]; 14 *Pacific L. J.* 181 [The Service Mark Alternative to the Right of Publicity]; 24 *Santa Clara L. Rev.* 111 [Posthumous Right of Publicity: Jurisdictional Conflict and a Proposal for Solution]; 43 *Santa Clara L. Rev.* 1455 [conflict between right of publicity and First Amendment]; 55 *So. Cal. L. Rev.* 727 [Publicity as an Aspect of Privacy and Personal Autonomy]; 60 *So. Cal. L. Rev.* 1179 [proposal of federal statute]; 17 *Southwestern U. L. Rev.* 755 [*Apple Corp. v. Leber*: Did "Beatlemania" Infringe the Beatles' Right of Publicity?]; 17 *U.C. Davis L. Rev.* 191 [Is Independence Day Dawning for the Right of Publicity]; 36 *U.C. Davis L. Rev.* 199 [right of publicity and copyright preemption]; 22 *U.C.L.A. L. Rev.* 1103 [Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild; analysis of emerging proprietary right of publicity and implications of transfer of the interest].)

West's Key Number Digest, Torts k.8.5(6)

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(3) *Commentary.* See 27 *California Lawyer* 36 (February 2007) [Protecting the Right of Publicity]; 35 *Pepperdine L. Rev.* 347 [acquisition of celebrity's right of publicity]; 45 *Santa Clara L. Rev.* 557 [right to control commercial use of name, image, and identity]; 78 *So. Cal. L. Rev.* 1371 [threat to right of publicity by punitive damages limitation of *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585, text, §1568]; 58 *Stanf. L. Rev.* 1161 [What the Right of Publicity Can Learn from Trademark Law].



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a. Common Law Cause of Action.

2. Use of Picture.

5 Witkin Sum. Cal. Law Torts § 677

[§ 677] Use of Picture.

(1) *Commercial Use*. The use of a person's photograph without consent for commercial purposes, such as advertising, is a well recognized basis of liability. (See *Eastwood v. Superior Court* (1983) 149 C.A.3d 409, 417, 198 C.R. 342, *infra*, §678; *Rest.2d, Torts* §652C; 9 *Loyola L.A. L. Rev.* 863 [right of publicity respecting computer-animated celebrities]; 35 *Santa Clara L. Rev.* 725 [commercial appropriation of identity]; 62A *Am.Jur.2d* (2005 ed.), *Privacy* §78; 223 *A.L.R.3d* 865 [invasion of privacy by use of plaintiff's likeness in advertising]; cf. 87 *A.L.R.3d* 1279 [invasion of privacy by use of picture of plaintiff's property for advertising purposes].)

(2) *Noncommercial Use*. Even where a picture is published in connection with a noncommercial article of public interest, its injurious effect on a normal person's feelings may be such as to give rise to a cause of action. Thus, in *Gill v. Curtis Publishing Co.* (1952) 38 C.2d 273, 239 P. 630, a complaint by husband and wife was held sufficient where it alleged that defendants snapped their picture in a romantic pose and published it with an article disparaging love founded on sex attraction alone. In balancing the public interest against the individual's interest, the court said: "Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (38 C.2d 278.) Here, assuming that the article was within the range of public interest, the use of plaintiff's picture was not necessary and the harmful impact on them was substantial. (See 26 *So. Cal. L. Rev.* 314, 317; 62A *Am.Jur.2d* (2005 ed.), *Privacy* §§68, 74; but cf. *Gill v. Hearst Publishing Co.* (1953) 40 C.2d 224, 230, 253 P.2d 441, *infra*, §689 [reaching contrary result despite similar photograph].)

West's Key Number Digest, Torts k.8.5(6)

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a. Common Law Cause of Action.

3. Use of Name.

5 *Witkin Sum. Cal. Law Torts* § 678

[§ 678] Use of Name.

The commercial use of a person's name is also an invasion of privacy. (See *Rest.2d, Torts* §652C; 48 *Cal. L. Rev.* 401; 74 *Harv. L. Rev.* 1238; 35 *Santa Clara L. Rev.* 725 [commercial appropriation of identity]; 32 *Southwestern U. L. Rev.* 761 [use of celebrity's name in news stories in conjunction with advertisements]; 62A *Am.Jur.2d* (2005 ed.), *Privacy* §78; 23 *A.L.R.3d* 865 [invasion of privacy by use of plaintiff's name in advertising]; 82 *A.L.R.3d* 772 [sale or rental of list of customers, subscribers, or the like, to one who will use it for advertising purposes]; 52 *A.L.R.4th* 156 [use by employer or former employer]; *BAJI*, No. 7.23; *CACI*, No. 1803.)

In *Fairfield v. American Photocopy Equipment Co.* (1955) 138 *C.A.2d* 82, 291 *P.2d* 194, defendant manufacturer circulated 30,000 copies of an advertisement throughout the United States, listing the names of satisfied users of its machine. Plaintiff, the only Los Angeles lawyer listed, had purchased and returned a machine as unsatisfactory. *Held*, nonsuit reversed. The advertisement, a pretended endorsement of defendant's product, was "an unauthorized and unwarranted appropriation of plaintiff's personality as a lawyer for pecuniary gain and profit." (138 *C.A.2d* 87.) (See *Williams v. Weisser* (1969) 273 *C.A.2d* 726, 741, 78 *C.R.* 542, 13 *Summary* (10th), *Personal Property*, §46 [following *Fairfield* and applying rule to unauthorized commercial distribution of professor's class notes].)

In *Eastwood v. Superior Court* (1983) 149 *C.A.3d* 409, 198 *C.R.* 342, defendant National Enquirer (Enquirer), a national magazine, published a 600-word article about plaintiff, a well-known motion picture actor, detailing problems involved in a supposed romantic involvement with a celebrated singer and a celebrated actress. Plaintiff's complaint, alleging that defendant employed his name and photograph for the purpose of promoting sales of its magazine, was held to state a cause of action. "The first step toward selling a product or service is to attract the consumers' attention. Because of a celebrity's audience appeal, people respond almost automatically to a celebrity's name or picture. Here, the Enquirer used Eastwood's personality and fame on the cover of the subject publication and in related telecast advertisements. To the extent their use attracted the readers' attention, the Enquirer gained a commercial advantage. Furthermore, the Enquirer used Eastwood's personality in the context of an alleged news account, entitled 'Clint Eastwood in Love Triangle with Tanya Tucker' to generate maximum curiosity and the necessary motivation to purchase the newspaper." (149 *C.A.3d* 420.)

West's Key Number Digest, Torts k.8.5(6)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

- E. Invasion of Privacy.
- 5. Appropriation of Name or Likeness.
 - a. Common Law Cause of Action.
 - 4. Newsworthy Matters.

5 Witkin Sum. Cal. Law Torts § 679

[§ 679] Newsworthy Matters.

Reporting of matters that are newsworthy or of public interest is not an appropriation for which invasion of privacy liability may constitutionally be imposed, even though the reported matter yields profits for the defendant. (*Dora v. Frontline Video* (1993) 15 C.A.4th 536, 542, 18 C.R.2d 790; on defense of public interest generally, see *infra*, §687 et seq.) In *Dora*, defendant produced a video documentary on surfing entitled "The Legends of Malibu." Film of plaintiff, who was one of those legends, was featured in the program. Also featured was the audio portion of an interview of plaintiff, which is heard in the background as the viewer sees plaintiff in photographs. Plaintiff sued defendant for both common law and statutory appropriation of his name, voice, and likeness, claiming that he had not consented to that use nor been interviewed or photographed by defendant. *Held*, on the common law cause of action, summary judgment for defendant affirmed; because the documentary contained matters of public interest, defendant was not required to obtain plaintiff's consent to the use of his name, likeness, and voice. (For similar holding on the statutory cause of action, see *infra*, §681.)

(a) Although both celebrities and noncelebrities have the right to be free from the unauthorized exploitation of their names and likenesses, there is ordinarily no cause of action for the publication of matters in the public interest. The right to publish these matters rests on the right of the public to know, and the freedom of the press to tell, them. And this right and freedom extend to the reproduction of past events. (15 C.A.4th 542.)

(b) "The program in question in this case is a documentary about a certain time and place in California history and, indeed, in American legend. The people who were a part of that era contributed, willingly or unwillingly, to the development of a life-style that has become world-famous and celebrated in popular culture. Although any one of them as individuals may not have had a particular influence on our time, as a group they had great impact. This is the point of the program, and it seems fair comment on real life events 'which have caught the popular imagination.' " (15 C.A.4th 543, quoting *Smith v. National Broadcasting Co.* (1956) 138 C.A.2d 807, 292 P.2d 600.)

(c) Plaintiff argues that the documentary does not meet the criteria of newsworthiness stated in *Maheu v. CBS* (1988) 201 C.A.3d 662, 247 C.R. 304, *infra*, §689, i.e., the social value of the facts published; the depth of the intrusion into private affairs; and the extent to which the person voluntarily acceded to a position of public notoriety. This

argument is without merit. The *Maheu* criteria relate to an action for disclosure of private facts, instead of one for appropriation of name and likeness. (15 C.A.4th 543.) However, for the following reasons, the result in this case would not change even if the *Maheu* criteria were applied:

(1) The documentary has public interest, which gives it social value. (15 C.A.4th 543.)

(2) Although the social value might be limited, so also is the level of intrusion into plaintiff's private affairs. A viewing of the documentary discloses little, if anything, of a private nature about plaintiff. (15 C.A.4th 543.)

(3) Although plaintiff sought to avoid the limelight, he became a public personage by his voluntary action of surfing and by the force of circumstances. A person's voluntary action in a public place waives his right of privacy, because there can be no privacy in that which is already public. (15 C.A.4th 544, citing *Gill v. Hearst Publishing Co.* (1953) 40 C.2d 224, 253 P.2d 441, infra, §689.) And, with respect to the audiotaped interview of plaintiff, there is no evidence that it was private or given for restricted use. Publication of such an interview is constitutionally protected in the absence of a showing that the publisher knew that plaintiff's statements were false or published them in reckless disregard of the truth. (15 C.A.4th 544.)

(d) To establish damage to his feelings, plaintiff complains that the cover of the program packaging and the program itself "prominently" featured scantily clothed women. However, although there is a cartoon drawing of two bikini-clad women and several scenes in which the host is surrounded by such women, they are not prominently featured. Although those scenes are superfluous, they are few and very short. (15 C.A.4th 544.)

In *Montana v. San Jose Mercury News* (1995) 34 C.A.4th 790, 40 C.R.2d 639, defendant newspaper reproduced, in poster form for sale to the general public, previously published pages depicting plaintiff, a professional football player, in connection with his team's winning of two consecutive Super Bowls and four championships in a single decade. Plaintiff brought an action for common law and statutory commercial misappropriation of his name, photograph, and likeness, and the trial judge granted defendant's motion for summary judgment. *Held*, affirmed as to both common law and statutory (see infra, §681) causes of action.

(a) *No common law cause of action.* There is no common law cause of action for the publication of matters in the public interest. A matter in the public interest may be a past event. (34 C.A.4th 793.)

(b) *Matter of public interest.* Defendant's accounts of the Super Bowls and championships by plaintiff's team constituted publication of matters in the public interest entitled to First Amendment protection. The relatively contemporaneous reproduction of the pages, in poster form for resale, was also entitled to that protection, because plaintiff's name and likeness appeared in the posters for the same reason they appeared on the original newspaper pages: plaintiff was a major player in contemporaneous newsworthy sports events. The same public interest considerations applicable to surfing, recognized in *Dora*, apply with equal force to professional football. (34 C.A.4th 794.)

(c) *Right of newspaper to republish.* Defendant had a right to republish its stories to show the quality of its work product. A person's photograph originally published in one issue of a periodical as a newsworthy subject (and therefore exempt from tort liability) may be republished in another medium as an advertisement for the periodical itself, without the person's written consent. The posters were exact reproductions of pages from the paper, and they did not state or imply that plaintiff endorsed the newspaper. (34 C.A.4th 796.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Appropriation of Name or Likeness.

a. Common Law Cause of Action.

5. Transformative Matters.

5 Witkin Sum. Cal. Law Torts § 680

[§ 680] Transformative Matters.

In *Comedy III Productions v. Gary Saderup* (2001) 25 C.4th 387, 106 C.R.2d 126, 21 P.3d 797, plaintiff was the registered owner, within the meaning of former C.C. 990 (now C.C. 3344.1), of all rights to the former comedy act known as "The Three Stooges," and defendant was an artist who made charcoal portraits of the Stooges used in lithographic prints and silk screen images on T-shirts. Without obtaining plaintiff's permission, defendant sold these items, and plaintiff, arguing violation of its right of publicity, obtained a favorable judgment, which included damages, attorneys' fees, and an injunction. The Court of Appeal deleted the injunction and affirmed the judgment as modified. *Held*, affirmed.

(a) The right of publicity is often invoked in the context of commercial speech, when the appropriation of a celebrity's likeness creates the false impression that the celebrity is endorsing a product. Because commercial speech, if misleading, is not protected by the First Amendment and, even if not misleading, is entitled to lesser First Amendment protection, many commercial speech cases do not involve tension between the right of publicity and free speech. However, the present case does not concern commercial speech. As the trial judge found, defendant's portraits consisted of expressive works and not an advertisement for or endorsement of a product. (25 C.4th 396.)

(b) The primary purposes of the First Amendment, i.e., to preserve an uninhibited marketplace of ideas and to foster a fundamental respect for individual development, are often in opposition to the right of publicity. The right of publicity often censors expression by suppressing alternative versions of celebrity images that are irreverent or that otherwise attempt to redefine the celebrity's meaning. (25 C.4th 397.)

(c) Defendant's works, as expressive speech, are clearly eligible for First Amendment protection. This protection continues even though the works are (1) for the purpose of entertaining, rather than informing; (2) take the form of nonverbal, visual representation; (3) convey no discernible message; and (4) appear in large part on a less conventional means of communication. However, because of the considerable time and energy necessary to create the type of celebrity status that is capable of commercial promotion, society may recognize, as the Legislature did with the passage of former C.C. 990, that a celebrity's heirs and assigns have a legitimate interest in benefiting from the merchandizing of the celebrity's image. Thus, the two rights must be balanced according to the relative importance of the interests at

stake. (25 C.4th 398, citing *Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965, 7 Summary (10th), *Constitutional Law*, §433.)

(d) This relative importance fluctuates in accordance with the number of creative contributions made by the artist. "When artistic expression takes the form of a literal depiction or limitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist." However, "when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity. ... Accordingly, First Amendment protection of such works outweighs whatever interest the state may have in enforcing the right of publicity." (25 C.4th 405.) Furthermore, the transformative elements or creative contributions that require First Amendment protection are not confined to parody, but can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to social criticism. (25 C.4th 406.)

(e) In determining whether the work is sufficiently transformative to warrant First Amendment protection, courts must ask (1) is the celebrity likeness but one of the "raw materials" from which an original work is synthesized? and (2) does the value of the work come from the skill and reputation of the artist, rather than from the fame of the celebrity depicted? If each question is answered in the affirmative, it is probable that sufficient transformative elements are present to warrant First Amendment protection. On the other hand, courts should not be concerned with the quality of the artistic contribution, because a vulgar form of expression may qualify for First Amendment protection, while a literal depiction of a celebrity, even if done with great skill, may still be subject to a right of publicity challenge. (25 C.4th 406.)

(f) The Court of Appeal correctly determined that defendant's works were not within the First Amendment, but for the wrong reason. It based this conclusion on the fact that the works were reproductions, rather than original works. This position has no basis in logic or authority. Rather, the inquiry should have been whether defendant's works were sufficiently transformative. Applying this test reveals that defendant made no significant creative contribution in this case. Rather, his undeniable skill was subordinated to the overall goal of creating literal depictions of the Three Stooges in order to exploit their fame. Moreover, the marketability of defendant's works came from the fame of the celebrities depicted, not from the fame of the artist. There were thus no transformative elements requiring the aid of the *First Amendment*. (25 C.4th 409.)

(g) Noting that all portraiture involves creative decisions, defendant argued that all portraits are therefore protected by the First Amendment. This categorical position is without merit. "Without denying that all portraiture involves the making of artistic choices, we find it equally undeniable, under the test formulated above, that when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist's right of free expression is outweighed by the right of publicity." In other words, the artist must create something recognizable as his or her own work. (25 C.4th 408.)

The *Comedy III Productions* case was cited and distinguished in *Winter v. DC Comics* (2003) 30 C.4th 881, 887, 134 C.R.2d 634, 69 P.3d 473, holding that the comic book figures there in issue, although based on real musicians, contained significant creative elements so as to transform them into something more than mere celebrity likenesses, and were accordingly entitled to First Amendment protection. (See 29 Western State L. Rev. 359 [*Comedy III Productions*]; 118 A.L.R.5th 213 [First Amendment protection afforded to comic books, comic strips, and cartoons]; BAJI, Nos. 7.24.1, 7.24.2 [First Amendment defense respecting transformative changes]; CACI, No. 1805 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Kirby v. Sega of America* (2006) 144 C.A.4th 47, 57, 50 C.R.3d 607 [defendants' video game character was transformative and protected by First Amendment, notwithstanding similarities between character and plaintiff celebrity; game character was primarily result of defendants' new expression rather than mere recreation of celebrity's likeness].



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E. Invasion of Privacy.

5. Appropriation of Name or Likeness.

b. Statutory Action.

1. In General.

5 Witkin Sum. Cal. Law Torts § 681

[§ 681] In General.

(1) *Nature of Statute.* C.C. 3344 codifies a person's right to recover damages for the knowing use of his or her "name, voice, signature, photograph, or likeness" in or on commercial products, or to advertise, sell, or solicit sales of products or services, without the person's prior consent or, in the case of a minor, without the prior consent of his or her parent or legal guardian. (C.C. 3344(a); see *Johnson v. Harcourt, Brace, Jovanovich* (1974) 43 C.A.3d 880, 895, 118 C.R. 370, *infra*, §689 [statute held inapplicable to article reprinted in college textbook, where article was not primary reason for textbook and not substantial factor in student purchases of it]; *Gionfriddo v. Major League Baseball* (2001) 94 C.A.4th 400, 408, 114 C.R.2d 307 [right to publicity is statutory as well as common law right]; C.E.B., 2 California Business Litigation, §10.8 et seq.; 23 *Loyola L.A. L. Rev.* 601 [advertisement using imitation of famous singer's voice]; 19 *Southwestern U. L. Rev.* 1337 [same]; 3 *Pacific L. J.* 651; 36 *U.C. Davis L. Rev.* 543 [right of publicity and fair use doctrine]; 62A *Am.Jur.2d* (2005 ed.), *Privacy* §8 et seq.; BAJI, No. 7.24; CACI, No. 1804; on statutory liability for invasion of privacy to capture visual image, sound recording, or other physical impression of plaintiff engaging in personal or familial activity, see *supra*, §663.)

(2) *Remedies.* The injured party may recover (1) the greater of \$ 750 or actual damages, and (2) any profits attributable to the unauthorized use and not accounted for in computing damages. In establishing profits, the burden is on the injured party to prove the gross revenue, and on the violator to prove deductible expenses. The injured party may also recover punitive damages, and the prevailing party is entitled to attorneys' fees and costs. (C.C. 3344(a).) The remedies provided by the statute are cumulative and in addition to any others provided for by law. (C.C. 3344(g).)

(3) *Effect of Copyright Act.* C.C. 3344 is preempted by the federal Copyright Act (17 U.S.C., §301 et seq.) as to rights subject to copyright. (*Fleet v. CBS* (1996) 50 C.A.4th 1911, 1918, 58 C.R.2d 645, 13 *Summary* (10th), *Personal Property*, §60; see *KNB Enterprises v. Matthews* (2000) 78 C.A.4th 362, 366, 92 C.R.2d 713 [in action by copyright owner to photographs asserting C.C. 3344 misappropriation claims against person who allegedly displayed photos on website without authorization, claims were not equivalent to copyright claims and thus were not preempted by federal copyright law].)

(4) *Related Legislation.* Several related statutes are noteworthy:

(a) C.C. 3344.1 [providing cause of action for appropriation of deceased person's identity similar to that provided living person by C.C. 3344; see *infra*, §685].

(b) P.C. 115.1 [making it crime to publish, with intent to deceive, campaign advertisement containing signature known to be unauthorized].

(c) C.C. 3344.5 [affording cause of action for violation of P.C. 115.1 to person whose signature is used without authorization in campaign advertisement and to candidate whose election or defeat is expressly advocated in campaign advertisement containing unauthorized signature].

West's Key Number Digest, Torts k.8.5(6)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Statute.* See *Kirby v. Sega of America* (2006) 144 C.A.4th 47, 61, 50 C.R.3d 607 [C.C. 3344 action, like action for infringement of common law right of publicity, is subject to First Amendment defense arising from transformative change (see text, §680)].

(2) *Remedies.* See *Miller v. Collectors Universe* (2008) 159 C.A.4th 988, 999, 72 C.R.3d 194 [plaintiff whose name was used without authorization on 14,060 certificates of authenticity for collectible autographs and memorabilia was entitled to only one \$ 750 damages award under C.C. 3344(a), not to one for each certificate].

Award of attorneys' fees to prevailing party: See *Kirby v. Sega of America*, *supra*, 144 C.A.4th 62 [attorneys' fee provision of C.C. 3344(a) is clearly mandatory and is not limited to cases where action is frivolous or in bad faith or without substantial justification].



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- 2. Conditions of Recovery.

5 Witkin Sum. Cal. Law Torts § 682

[§ 682] Conditions of Recovery.

(1) *Readily Identifiable Photograph*. To be actionable, the photograph--whether still or moving, videotaped or by live television transmission--must show the person complaining as "readily identifiable," so that "one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use." (C.C. 3344(b)(1); see *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 C.A.4th 318, 325, 79 C.R.2d 207 [plaintiff could not recover for commercial appropriation of name or likeness merely because defendants used name sounding like plaintiff's or employed actor in film resembling plaintiff at age 10].)

If the photograph includes more than one identifiable person, as in a crowd at a sporting event, in a street or public building, at a theatrical production, in a glee club, or on a baseball team, the complaining persons must be represented "as individuals rather than solely as members of a definable group." (C.C. 3344(b)(2).) A person is considered a member of a definable group if he or she is represented in the photograph solely as a result of being present when the photograph is taken and is not singled out as an individual in any manner. (C.C. 3344(b)(3).)

(2) *Employee's Photograph*. If the photograph or likeness of an employee has appeared in an advertisement or other publication prepared for the employer, and the use was only incidental rather than essential to the publication's purpose, a rebuttable presumption arises "that the failure to obtain the consent of the employee was not a knowing use of the employee's photograph or likeness." The presumption affects the burden of producing evidence. (C.C. 3344(c).)

(3) *Commercial Use*. A use is not actionable merely because the material in which the name, photograph, or likeness appears is commercially sponsored or contained paid advertising. It is a question of fact whether the use "was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required." (C.C. 3344(e).)

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 - 3. Exemptions.

5 Witkin Sum. Cal. Law Torts § 683

[§ 683] Exemptions.

C.C. 3344 contains two kinds of exemptions:

(1) It does not apply to owners or employees of an advertising medium (newspapers, magazines, radio and television stations, cable television systems, billboards and transit ads, etc.), unless they had knowledge of the unauthorized use. (C.C. 3344(f).)

(2) It does not apply to certain specified uses that are not deemed commercial: "use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." (C.C. 3344(d); see *Gionfriddo v. Major League Baseball* (2001) 94 C.A.4th 400, 415, 114 C.R.2d 307 [uses of former baseball players' names, images, and likenesses were within "public affairs" exemption of C.C. 3344(d)].) The C.C. 3344(d) exemption does not extend to knowing or reckless falsehood. (*Eastwood v. Superior Court* (1983) 149 C.A.3d 409, 425, 198 C.R. 342, supra, §678 [this cannot have been legislative intent].)

In *Dora v. Frontline Video* (1993) 15 C.A.4th 536, 18 C.R.2d 790, supra, §679, the use of plaintiff's name, voice, and likeness in defendant's surfing video documentary was the basis for a statutory cause of action under C.C. 3344. *Held*, summary judgment for defendant affirmed; because the documentary related to "public affairs" within the meaning of C.C. 3344(d), defendant was not required to obtain plaintiff's consent.

(a) Because C.C. 3344(d) applies to both "news" and "public affairs," it must be presumed that the Legislature intended the category of public affairs to include things that would not necessarily be considered news. As has been established in the cases involving common law privacy and appropriation, the public is interested in and constitutionally entitled to know about matters that affect it. To limit the term "public affairs" to topics that might be covered on public television or public radio would be to jeopardize society's right to know. (15 C.A.4th 546.)

(b) "Having said that, we find that surfing is of more than passing interest to some. It has created a life-style that influences speech, behavior, dress, and entertainment, among other things. A phenomenon of such scope has an economic impact, because it affects purchases, travel, and the housing market. Surfing has also had a significant

influence on the popular culture, and in that way touches many people. It would be difficult to conclude that a surfing documentary does not fall within the category of public affairs." (15 C.A.4th 546.)

In *Montana v. San Jose Mercury News* (1995) 34 C.A.4th 790, 40 C.R.2d 639, supra, §679, defendant newspaper reproduced, in poster form for sale to the general public, previously published pages depicting plaintiff professional football player in connection with his team's winning of Super Bowls. *Held*, the publication was exempt from liability under C.C. 3344(d). Like the common law cause of action for appropriation, the statutory cause of action specifically exempts from liability the use of a name or likeness in connection with the reporting of a matter in the public interest. (34 C.A.4th 793.)

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5. Appropriation of Name or Likeness.

c. Survivable Right of Publicity.

1. Background.

5 Witkin Sum. Cal. Law Torts § 684

[§ 684] Background.

(1) *Lugosi Case. Lugosi v. Universal Pictures* (1979) 25 C.3d 813, 160 C.R. 323, 603 P.2d 425, held that there was no survivable right of publicity. (On right of publicity generally, see *supra*, §676.) Bela Lugosi, an actor, played the character of Count Dracula in a dramatic version of Bram Stoker's novel and in a later movie produced by defendant Universal. The producer's contract gave it the right to use Lugosi's name, likeness, voice, and other unique characteristics in exploiting the picture. Plaintiffs, Lugosi's widow and surviving son, claimed a property interest in decedent's movie portrayal of Count Dracula, and brought this action to recover profits made by defendant from licensing agreements authorizing licensees to use the Count Dracula character. *Held*, judgment for plaintiffs reversed.

(a) *Lugosi's rights during his lifetime.* If Lugosi had established a business and sold the right to have his name and characteristics in the Count Dracula part used by licensees, he would have created a property right apart from that granted to defendant by the production contract. (25 C.3d 820.) This right to exploit his name and likeness could have been assigned, and an assignment was made to defendant, during the actor's lifetime. (25 C.3d 823.)

(b) *No survivable right.* (1) Commentators and decisions support the conclusion that there is no common law right of action for invasion of privacy after death of the individual involved; i.e., there is no right in heirs of the deceased person whose privacy was invaded. (25 C.3d 820, 821, citing the text.) (2) This general position is taken by the better reasoned authorities to extend to the so-called right of publicity. "[U]pon Lugosi's death, anyone, related or unrelated to Lugosi, with the imagination, the enterprise, the energy and the cash could, in his or her own name or in a fictitious name, or a trade name coupled with that of Lugosi, have impressed a name so selected with a secondary meaning and realized a profit or loss by so doing depending upon the value of the idea, its acceptance by the public and the management of the enterprise undertaken. After Lugosi's death, his name was in the public domain. Anyone, including plaintiffs or any person other than, or either of them, or Universal, could use it for a legitimate commercial purpose." (25 C.3d 822, 823.)

(c) *Policy considerations.* If rights to the exploitation of artistic or intellectual property never exercised during the lifetime of the creator were to survive his death, "neither society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor would be served." (25 C.3d 824.) Hence, "the right to exploit name and

likeness is personal to the artist and must be exercised, if at all, by him during his lifetime." (25 C.3d 824.) (See *Guglielmi v. Spelling-Goldberg Productions* (1979) 25 C.3d 860, 160 C.R. 352, 603 P.2d 454 [memorandum opinion based on *Lugosi*]; 29 *Hastings L. J.* 751 [on Court of Appeal opinion in *Lugosi*]; 12 *Pacific L. J.* 987 [The Right of Publicity: Premature Burial for California Property Rights in the Wake of *Lugosi*]; 20 Cal. Western L. Rev. 415 [right of publicity: concerns involving survivability preemption and First Amendment]; 17 *Pepperdine L. Rev.* 933 [A Descendible Right of Publicity: Has the Time Finally Come for a National Standard?]; 10 *A.L.R.4th* 1193 [*Lugosi*: right to publicize or commercially exploit deceased person's name or likeness as inheritable].)

(2) *Legislative Abrogation of Lugosi*. The rule in *Lugosi* was statutorily abrogated by C.C. 3344.1. (See *infra*, §685.)

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c. Survivable Right of Publicity.

2. Statutory Right.

5 Witkin Sum. Cal. Law Torts § 685

[§ 685] Statutory Right.

(1) *In General.* C.C. 3344.1 provides a cause of action for the exploitation of a deceased personality's identity that closely parallels that provided by C.C. 3344 for the exploitation of one's own identity (see *supra*, §681 et seq.). This statute, which abrogates the holding in *Lugosi v. Universal Pictures* (1979) 25 C.3d 813, 160 C.R. 323, 603 P.2d 425, *supra*, §684, is known as the Astaire Celebrity Image Protection Act. (C.C. 3344.1(o).) (See C.E.B., 2 California Business Litigation, §10.20 et seq.; 16 *Pacific L. J.* 725; 31 *McGeorge L. Rev.* 611.)

(2) *Nature of Right.* The cause of action is for the use of a deceased personality's "name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent" from the persons entitled to give consent. (C.C. 3344.1(a)(1).) The remedies are identical to those provided by C.C. 3344, and are likewise cumulative and additional to any others provided by law. (C.C. 3344.1(a)(1), (m).)

"Deceased personality" is any natural person whose name, voice, etc., has commercial value at the time of his death, regardless of whether that person made commercial use of the person's identity during his or her lifetime. (C.C. 3344.1(h).)

A "photograph" is any still or moving photographic reproduction, or any videotape or live television transmission, in which the deceased personality is readily identifiable, i.e., identifiable by one viewing the photograph with the naked eye. (C.C. 3344.1(i).)

(3) *Expiration of Right.* No action may be brought for use of a deceased personality's name, voice, etc., occurring more than 70 years after the deceased personality's death. (C.C. 3344.1(g).)

(4) *Persons Entitled To Give Consent.* The right to give consent to the use of a deceased personality's identity belongs to the persons to whom that right has passed by transfer or descent. (C.C. 3344.1(c).)

(5) *Transfer.* The rights created by C.C. 3344.1 are "property rights freely transferable in whole or in part, by

contract or by means of trust or testamentary documents." (C.C. 3344.1(b).) Prior to death, the rights may be transferred by the deceased personality or his or her transferees; after death, transfer may be by the persons receiving the rights by descent, or by their transferees. (C.C. 3344.1(b).)

(6) *Rights of Survivors Where No Transfer Made.* If no transfer has been made, the rights pass to the surviving personality's spouse, children and grandchildren, and parents, as follows: all to the spouse if there are no surviving children or grandchildren; all to the children and grandchildren if there is no surviving spouse; all to the parents if there is no surviving spouse or children and grandchildren; one-half to the spouse and one-half to the children and grandchildren if each survives. (C.C. 3344.1(d).) If there are no survivors in these categories, the rights terminate. (C.C. 3344.1(e).)

The rights may be exercised, for the benefit of all, "by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights." (C.C. 3344.1(d).)

(7) *Registration.* Any person claiming to be a successor in interest to the rights of a deceased personality, or a licensee of that successor in interest, may register that claim with the Secretary of State on a verified form specifying the deceased personality's name and date of death, the claimant's name and address, the claim's basis, and the rights claimed. (C.C. 3344.1(f)(2).) Claims so registered are public records. (C.C. 3344.1(f)(4).) Neither the successor in interest nor any licensee may recover damages for any unauthorized use occurring before registration. (C.C. 3344.1(f)(1).)

The Secretary of State must post any filing under the statute, along with the entire registry of claimants, on the Internet. The filings may be microfilmed or otherwise reproduced, and the reproduction is admissible in any court. The reproduction may be destroyed 70 years after the deceased personality's death. (C.C. 3344.1(f)(4).) (C.C. 3344.1(f)(3).)

(8) *Exemptions and Conditions.* C.C. 3344.1 contains the same exemptions as C.C. 3344 with respect to uses for news, sports, and political campaigns (C.C. 3344.1(j)) and the liability of owners and employees of advertising mediums (C.C. 3344.1(l)), as well as the same provision on the effect of uses contained in commercially sponsored material (C.C. 3344.1(k)). (See *supra*, §681 et seq.)

The statute is generally inapplicable to a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work. (C.C. 3344.1(a)(2).) If, however, that work includes within it a use in connection with a product, article of merchandise, good, or service, this use is not exempt where the claimant proves that the use is so directly connected with the product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases of that product, article of merchandise, good, or service by the deceased personality without prior consent from the persons entitled to give consent. (C.C. 3344.1(a)(3).) (See 13 Berkeley Technology L. J. 319 [media exemptions in statute concerning exploitation of deceased personality's identity].)

(9) *Limitation to Acts Occurring Directly in State.* The statute applies to the adjudication of liability and the imposition of damages or other remedies in cases "in which the liability, damages, and other remedies arise from acts occurring directly in the state." Acts giving rise to liability are limited, for these purposes, to use on or in products, merchandise, goods, or services, or advertising or selling, or soliciting purchases of, products, merchandise, goods, or services prohibited by the statute. (C.C. 3344.1(n).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.C. 3344.1(o), as amended in 2007, deletes the designation of the statute as the Astaire Celebrity Image Protection Act.(5) *Transfer.* As amended in 2007, C.C. 3344.1(b) provides as follows: The rights recognized under C.C. 3344.1 are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument, whether executed before or after January 1, 1985 (the operative date of the statute).

These rights are deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and, except in specified circumstances, vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of death. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights in his or her name, voice, signature, photograph, or likeness, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets is effective to transfer these rights in accordance with the terms of that provision. These rights are also freely transferable or descendible by contract, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's rights. Nothing in C.C. 3344.1 may be construed to render invalid or unenforceable any contract entered into by a deceased personality during his or her lifetime by which the deceased personality assigned the rights, in whole or in part, to use his or her name, voice, signature, photograph or likeness, regardless of whether the contract was entered into before or after January 1, 1985.(10) *(New) Retroactivity of Rights Under Statute.* The rights recognized in C.C. 3344.1 are expressly made retroactive, including with respect to those deceased personalities who died before January 1, 1985. (C.C. 3344.1(p), added in 2007.)



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CHAPTER IX - Torts

Witkin Summary of California Law IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS E. Invasion of Privacy. 6. Privileges.

5 Witkin Sum. Cal. Law Torts § 686

[§ 686] Privileges.

Rest.2d, Torts §§652F, 652G state that the rules on absolute privilege and conditional privilege in invasion of privacy cases are the same as those in defamation (see *supra*, §561 et seq.), and the California courts are in accord. (See *Jeffrey H. v. Imai, Tadlock & Keeney* (2000) 85 C.A.4th 345, 356, 101 C.R.2d 916 [litigation privilege of C.C. 47(b) (see *supra*, §567 et seq.)].)

In *Conklin v. Sloss* (1978) 86 C.A.3d 241, 150 C.R. 121, it was assumed that the privilege for reports of official proceedings (*supra*, §585) was available as a defense in an action for invasion of privacy; but plaintiff contended that it extended only to contemporaneous news coverage of current events. Although all of the reported cases involved contemporaneous coverage, the court found no authority to support this limitation on the privilege. (86 C.A.3d 247.) However, the court, interpreting language in *Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 93 C.R. 866, 483 P.2d 34, *infra*, §§691, 692, and quoting the Torts Restatement, concluded that the privilege covered only the publication of "newsworthy items." Thus, plaintiff's allegation of facts indicating that he had "reverted to the lawful and unexciting life led by the great bulk of the community" presented a question to the trier of fact: If these allegations were sustained by proof, the publication might be found not newsworthy and therefore not within the privilege. (86 C.A.3d 247, 248.)

To be privileged, the conduct in question must, of course, fall within the applicable statutory language. In *Susan S. v. Israels* (1997) 55 C.A.4th 1290, 1299, 67 C.R.2d 42, an attorney representing the defendant in a sexual battery action invaded the privacy of the plaintiff in that action by reading her medical records and sending them to the defense psychologist. *Held*, the litigation privilege of C.C. 47(b) (see *supra*, §567 et seq.) was unavailable to the attorney. The cause of action did not depend on the "publication" or "broadcast" of the medical records within the terms of C.C. 47 but rested on the attorney's conduct in reading those records. (55 C.A.4th 1299.)

West's Key Number Digest, Torts k.8.5(2)

SUPPLEMENT: [This section is current through the latest supplement]

See *Buchanan v. Maxfield Enterprises* (2005) 130 C.A.4th 418, 423, 29 C.R.3d 909 [neither citizen's arrest by store employee to remove customer (who refused to leave because celebrities were shopping there), nor employee's action, with sheriff's deputies, of taking customer in handcuffs into parking lot where media had gathered, was privileged; these events were not communicative in nature, but rather unprotected conduct]; *Foothill Fed. Credit Union v. Superior Court*

(2007) 155 C.A.4th 632, 635, 66 C.R.3d 249 [litigation privilege of C.C. 47(b) barred invasion of privacy action based on credit union's disclosure of personal financial records beyond those sought in probate proceeding, even though credit union failed to comply with notice requirements of C.C.P. 1985.3 (governing discovery of personal records of consumers; see 2 Cal. Evidence (4th), Discovery, §228 et seq.)].

(New) *Litigation privilege applies to constitutional claims*: In *Jacob B. v. Shasta* (2007) 40 C.4th 948, 56 C.R.3d 477, 154 P.3d 1003, a county agency supervisor's letter, which was attached to a declaration presented in a child visitation proceeding, referred to plaintiff's earlier molestation of the child. Based on the letter, plaintiff sued the county and the program supervisor for invasion of the constitutional right of privacy under Cal. Const., Art. I, §1, among other causes of action. The trial court ruled that the litigation privilege of C.C. 47(b) protected the letter, granted a nonsuit as to all the claims other than the constitutional invasion of privacy claim, and denied nonsuit as to that claim on the ground that plaintiff's constitutional privacy interests prevailed over the privilege. The jury rendered a verdict in plaintiff's favor, and the trial court entered judgment accordingly. The Court of Appeal reversed, holding that the litigation privilege protected against all the causes of action, including the constitutional claim. *Held*, affirmed; the litigation privilege barred the constitutional invasion of privacy claim.

(a) It has been repeatedly held that the litigation privilege bars all tort actions except malicious prosecution. Thus, the privilege has been applied to invasion of privacy actions. The question here is whether a distinction should be made between common law and statutory claims for invasion of privacy and a claim based on the state *Constitution*. (40 C.4th 960.)

(b) There is a conflict in the Courts of Appeal. The courts in *Cutter v. Brownbridge* (1986) 183 C.A.3d 836, 228 C.R. 545, and *Jeffrey H. v. Imai, Tadlock & Keeney* (2000) 85 C.A.4th 345, 101 C.R.2d 916, held that the application of the litigation privilege in the constitutional context calls for a balancing of interests on a case-by-case basis, despite the unqualified application of the privilege in other legal contexts. The main argument in favor of this conclusion is that the litigation privilege, being merely a statutory creation, must yield to the constitutional right to privacy. (40 C.4th 960.) The court in *Wise v. Thrifty Payless* (2000) 83 C.A.4th 1296, 100 C.R.2d 437, disagreed with *Cutter*, and the Court of Appeal in this case disagrees with both *Cutter* and *Jeffrey H.* The *Wise* court and the Court of Appeal here conclude that the litigation privilege is an absolute bar to a privacy cause of action based on the Constitution as well as one based on common law or statute. This is correct. (40 C.4th 961.)

(c) Obviously, if C.C. 47(b) conflicted with Cal. Const., Art. I, §1, the statute would have to yield to the Constitution. But the statutory and constitutional provisions are not in conflict; they can and do coexist. The litigation privilege has existed for well over a century, and since then California courts have given the privilege an expansive reach. When the voters adopted Cal. Const., Art. I, §1, they did so mindful of the preexisting litigation privilege. (40 C.4th 961.)

(d) *Jeffrey H.* and *Cutter* require a balancing of the litigation privilege and the constitutional right of privacy on a case-by-case basis. This is improper. In adopting the litigation privilege, the Legislature has already done the balancing. The litigation privilege furthers the vital public policy of affording free access to the courts and facilitating the crucial functions of the finder of fact. This policy exists even if a privacy cause of action invokes the Constitution, and not on a case-by-case basis but in all cases. Litigants and witnesses could never be free of the fear of derivative tort actions (which the privilege is designed to overcome) if the privilege applied only in some cases but not others. Accordingly, California courts have held that the litigation privilege bars all common law and statutory causes of action for invasion of privacy. The privilege should apply equally to a constitutionally based cause of action for invasion of privacy. *Jeffrey H.* and *Cutter* are disapproved to the extent that they are inconsistent with this opinion. (40 C.4th 962.)



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E. Invasion of Privacy.

7. Defense of Public Interest.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 687

[§ 687] In General.

The protection is given to persons who live ordinary private lives, and covers the private aspects of their lives. Those whose lives are matters of public interest, and those who become involved in an incident of public interest, cannot complain of the normally expectable publicity that results. This is a rule not only of the common law of torts, but also of the federal Constitution. The right to privacy must be balanced against the competing constitutional right of freedom of the press. (*Forsher v. Bugliosi* (1980) 26 C.3d 792, 811, 812, 163 C.R. 628, 608 P.2d 716; *Sipple v. Chronicle Publishing Co.* (1984) 154 C.A.3d 1040, 1047, 1048, 201 C.R. 665, *infra*, §690; *Eastwood v. Superior Court* (1983) 149 C.A.3d 409, 422, 198 C.R. 342, *supra*, §678; *Wasser v. San Diego Union* (1987) 191 C.A.3d 1455, 236 C.R. 772; *Pasadena Star-News v. Superior Court* (1988) 203 C.A.3d 131, 133, 249 C.R. 729; *Gilbert v. National Enquirer* (1996) 43 C.A.4th 1135, 1146, 51 C.R.2d 91; *Rest.2d, Torts* §652D, Special Note and Comment d; see *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, 7 *Summary* (10th), *Constitutional Law*, §430 [disclosure of name of victim of rape, obtained from official sources open to public inspection, did not violate First Amendment]; *Times-Mirror Co. v. Superior Court* (1988) 198 C.A.3d 1420, 1428, 244 C.R. 556 [newsworthiness of name of witness who confronted murder suspect depended on balancing public's need to know against possible harm to witness, and hence was question for jury]; *Gionfriddo v. Major League Baseball* (2001) 94 C.A.4th 400, 409, 114 C.R.2d 307 [major league baseball may disseminate factual data concerning players; profit alone does not render expression "commercial" and thus outside scope of constitutional protection, and this is especially true where profit is accompanied by public interest in information conveyed]; 30 *So. Cal. L. Rev.* 280; 48 *Cal. L. Rev.* 410, 415; 62A *Am.Jur.2d* (2005 ed.), *Privacy* §186 et seq.; BAJI, No. 7.21; CACI, No. 1801; on public interest as affecting liability for disclosure of private facts and appropriation of name or likeness, see *supra*, §§665, 679; on freedom of speech and press generally, see 7 *Summary* (10th), *Constitutional Law*, §311 et seq.)

As the court said in *Stryker v. Republic Pictures Corp.* (1951) 108 C.A.2d 191, 238 P.2d 670, *infra*, §690: "The right of the individual to privacy of his 'private' life is a limited right in that it is always subject to the right of the public to a disclosure thereof where there is a proper warranted public interest as to the facts of his life. The dividing line between the individual right and the so-called public right is not easily drawn and must be determined in every instance by the facts of each case. The general test, in large measure, is whether the public interest in obtaining or having disclosed to it the information outweighs the protection of the individual's personal interest and desires." (108 C.A.2d

194.)

In *Miller v. National Broadcasting Co.* (1986) 187 C.A.3d 1463, 232 C.R. 668, supra, §659, the court observed that ordinarily an intrusion on privacy does not raise a First Amendment issue because intrusion is an observation of private affairs, not a publication of those observations. However, where there was both physical observation and filming and dissemination of it, a First Amendment claim could be made, and newsgathering, as well as news dissemination, was protected. (187 C.A.3d 1490, 1491, 1492.) But the First Amendment does not give immunity to newsgathering by unlawful means such as trespass. (187 C.A.3d 1492.) And to forbid unauthorized entry into the private premises of individuals is not likely to have a chilling effect on the exercise of First Amendment rights. (187 C.A.3d 1493.)

West's Key Number Digest, Torts k.8.5(7)

SUPPLEMENT: [This section is current through the latest supplement]
See 79 So. Cal. L. Rev. 945 [right of publicity and First Amendment].



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7. Defense of Public Interest.

b. Voluntary Exposure to Publicity.

1. General Rule.

5 Witkin Sum. Cal. Law Torts § 688

[§ 688] General Rule.

Candidates for office, figures of the stage and screen, and other persons who seek or voluntarily submit to publicity cannot complain of the resulting publicity. (*Gill v. Hearst Publishing Co.* (1953) 40 C.2d 224, 230, 253 P.2d 441, *infra*, §689; *Kapellas v. Kofman* (1969) 1 C.3d 20, 34, 81 C.R. 360, 459 P.2d 912; *Smith v. National Broadcasting Co.* (1956) 138 C.A.2d 807, 813, 292 P.2d 600, *infra*, §689; *Werner v. Times-Mirror Co.* (1961) 193 C.A.2d 111, 117, 14 C.R. 208, *infra*, §675; *Carlisle v. Fawcett Publications* (1962) 201 C.A.2d 733, 747, 20 C.R. 405; *Rest.2d, Torts* §652D, Comment e.) "A person who by his accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy." (*Cohen v. Marx* (1949) 94 C.A.2d 704, 705, 211 P.2d 320 [prizefighter, who retired from ring in 1939 after unsuccessful career, denied recovery for derisive remark by radio comedian on program in 1949].) (See 29 Cal. L. Rev. 87; 48 Cal. L. Rev. 410, 415, 419; 36 U.C.L.A. L. Rev. 815 [Unauthorized Biographies and Other "Books of Revelations": A Celebrity's Legal Recourse to a Truthful Public Disclosure]; 62A Am.Jur.2d (2005 ed.), *Privacy* §199 et seq.; 57 A.L.R.3d 16 [waiver of right of privacy]; BAJI, No. 7.21.)

The matters publicized about the person need not be current provided they are newsworthy. In *Werner v. Times-Mirror Co.* (1961) 193 C.A.2d 111, 14 C.R. 208, the court quoted Prosser on the authorities upholding the propriety of revival of past events that once were news: "Such decisions indicate that once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days." (193 C.A.2d 118.) (See *Cohen v. Marx*, *supra* [statement 10 years after plaintiff boxer's retirement].)

West's Key Number Digest, Torts k.8.5(7)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Voluntary Exposure to Publicity.

2. Illustrations.

5 *Witkin Sum. Cal. Law Torts* § 689

[§ 689] Illustrations.

In *Gill v. Hearst Publishing Co.* (1953) 40 C.2d 224, 253 P.2d 441, plaintiffs, husband and wife, were at their place of business in Los Angeles Farmers' Market, publicly embracing in full view of onlookers. A photograph of this romantic pose was taken and published by defendants. In holding that no right of recovery was established, the court first restated the basic test of "the norm of the ordinary man," i.e., that the publication must appear offensive in the light of "ordinary sensibilities" (40 C.2d 229), and then pointed out that (a) there was nothing shocking or indecent in the picture; (b) it was not used for commercial advertising; and (c) it was not snapped surreptitiously on private grounds but in a public place, and it merely allowed other members of the public who were not there to see plaintiffs as they voluntarily exhibited themselves. (40 C.2d 230.)

In *Smith v. National Broadcasting Co.* (1956) 138 C.A.2d 807, 292 P.2d 600, plaintiff had previously reported to the police the supposed escape of a black panther in Los Angeles, and was arrested and subjected to psychiatric examination. He brought this action against defendant for a production of a television program based on the incident but not mentioning his name. *Held*, the matter was of public interest and concerned a person in the public eye, despite the fact that the broadcast was 3 months after the event. "There is no allegation that any fictional embellishments were added to the incident; plaintiff's name was not used; from the face of the complaint there appears only the fact that defendants broadcast a factual dramatization of an actual incident which had excited great public interest and concern and had resulted in plaintiff's arrest as the protagonist in the events described. It is clear that the principles which govern the right to recover for the invasion of one's privacy do not encompass facts such as are here alleged." (138 C.A.2d 813.)

In *Johnson v. Harcourt, Brace, Jovanovich* (1974) 43 C.A.3d 880, 118 C.R. 370, plaintiff, a janitor, found a sack containing \$ 240,000 in cash, on a Los Angeles street in March 1961. He reported the discovery to the authorities, and Brink's, which had lost the money in transit, gave him a \$ 10,000 reward. Several magazine articles were written about the incident, including one in the *Nation* in June 1963. In 1965, the *Nation* article was reprinted in a college English textbook entitled "From Thought to Theme." Plaintiff learned of the republication in 1972, and filed a complaint against defendant publishers for invasion of privacy. *Held*, judgment for defendant on demurrer affirmed.

(a) *Related decisions.* In *Sidis v. F.R. Publishing Corp.* (2d Cir. 1940) 113 F.2d 806, defendant published a

biographical description of a former child prodigy who had sought obscurity 27 years before; his life was held still newsworthy. The California cases of *Melvin v. Reid* (1931) 112 C.A. 285, 297 P. 91, *supra*, §664, and *Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 93 C.R. 866, 483 P.2d 34, *infra*, §§691, 692, are distinguishable, in that they involved rehabilitated criminals. (43 C.A.3d 890.) Cases before *Briscoe* had held that a person who became a matter of public interest could not reclaim his private status merely by lapse of time (see, e.g., *Smith v. National Broadcasting Co.*, *supra*, and *Werner v. Times-Mirror Co.* (1961) 193 C.A.2d 111, 14 C.R. 208). But *Briscoe* took a different position: "The fact that a plaintiff may have been a public personage at one time may no longer be a viable defense to this type of invasion of privacy suit. Where the plaintiff is a past criminal and his name is used in a publication, the mere lapse of time may provide a basis for an invasion of privacy suit. The length of time between the commission of the crime and its subsequent redisclosure becomes a factor in the statement of a cause of action." (43 C.A.3d 891.)

(b) *Plaintiff's theory untenable.* Plaintiff pointed out that the article, entitled "Unexpected Rewards of Virtue," had reported that his neighbors and fellow workers had ridiculed him and his sons' schoolmates said their father was dumb and stupid; and in the textbook the reader was asked for comment on the conduct of plaintiff, Brink's, and the public reaction, and for an answer to the question: "Why would anyone consider Johnson a fool for returning the money? Do you?" The court held that there was nothing actionable in these recitals and questions:

(1) The plaintiff was newsworthy. He was not a reformed criminal (as in *Briscoe* and *Melvin*), or a person who tried to avoid public scrutiny (as in *Sidis*). He "injected himself into the vortex of publicity" by his act, for which he received a large reward and a letter from President Kennedy commending him for his "unflinching honesty." (43 C.A.3d 892.)

(2) The article did not reveal facts offensive to notions of decency; rather it praised the act as one deserving of admiration. "[T]he subject matter continued on over the years as one of public attention, and continued in its newsworthiness. Johnson's name became an indispensable part of the total theme of honesty. Just as the fable is an educational tool, so likewise is a true life example of integrity one which justifies repetitive recounting. This was the text's purpose, as well as others more directly related to the literary field, such as style and clarity, development of topic matter, and the like." (43 C.A.3d 893.)

The following cases are also illustrative of waiver of the right to privacy through voluntary exposure to publicity:

Kapellas v. Kofman (1969) 1 C.3d 20, 37, 81 C.R. 360, 459 P.2d 912 [government officials and candidates for office are "public figures" who should be subjected to most thorough scrutiny of themselves or those closely related to them].

Beruan v. French (1976) 56 C.A.3d 825, 828, 128 C.R. 869 [disclosure of prior criminal record of candidate for office in labor union].

McCall v. Oroville Mercury Co. (1983) 142 C.A.3d 805, 806, 191 C.R. 280 [P.C. 11143, prohibiting person from receiving record that he knows he is unauthorized to have, did not destroy newspaper's privilege to publish public officeholder's criminal record].

Maheu v. CBS (1988) 201 C.A.3d 662, 675, 247 C.R. 304 [aide to Howard Hughes who functioned as his "alter ego" and personal representative to world was public figure barred from bringing privacy action based on book about Hughes].

SUPPLEMENT: [This section is current through the latest supplement]



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7. Defense of Public Interest.

c. Involuntary Exposure to Publicity.

1. In General.

5 Witkin Sum. Cal. Law Torts § 690

[§ 690] In General.

Publicity resulting from a public incident in which the plaintiff involuntarily becomes involved, e.g., an accident or crime, is equally expectable and no subject for complaint. (*Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 537, 93 C.R. 866, 483 P.2d 34, *infra*, §§691, 692; *Wasser v. San Diego Union* (1987) 191 C.A.3d 1455, 1462, 236 C.R. 772; *Rest.2d, Torts* §652D, Comment f; see *Metter v. Los Angeles Examiner* (1939) 35 C.A.2d 304, 312, 95 P.2d 491 [publication of picture and story of suicide committed by jumping from office building]; *Pasadena Star-News v. Superior Court* (1988) 203 C.A.3d 131, 134, 249 C.R. 729 [name of young mother who abandoned her newborn child was newsworthy as matter of law]; 48 Cal. L. Rev. 410, 415; 22 So. Cal. L. Rev. 320 [publication of photograph of party to divorce action]; 16 Stanf. L. Rev. 107 [reporting fact of sexual attack on victim]; 57 A.L.R.3d 16 [waiver or loss of right to privacy]; 62A Am.Jur.2d (2005 ed.), *Privacy* §196 et seq.)

This theory was applied to reject liability in *Stryker v. Republic Pictures Corp.* (1951) 108 C.A.2d 191, 238 P.2d 670, where plaintiff alleged that defendants made a motion picture portraying incidents in his military service. Pointing out that nothing in his private life was included, the court said: "We think that men who are called to the colors subject their activities in that particular field to the public gaze and may not contend that in the discharge of such activities their actions may not be publicized." (108 C.A.2d 194.) (See 26 So. Cal. L. Rev. 102 [*Stryker*].)

The concepts of matters that are already public and matters that are newsworthy were explored in *Sipple v. Chronicle Publishing Co.* (1984) 154 C.A.3d 1040, 201 C.R. 665. In September 1975, Sara Jane Moore attempted to assassinate President Ford while he was in San Francisco's Union Square. Plaintiff, an ex-Marine, grabbed or struck Moore's arm as she was about to fire and the attempt failed. Plaintiff's act received immediate and broad publicity in which he was portrayed as a hero. Defendant Chronicle's columnist Caen wrote an article that characterized plaintiff as "One of the heroes of the day," and added facts concerning his prominent membership in the gay community. Defendant Los Angeles Times and many out-of-state newspapers published similar articles, mentioning both the heroic act and his sexual orientation, and speculating on the reason for the President's failure to promptly thank him. Plaintiff sued for invasion of privacy, alleging that the unauthorized disclosure of homosexuality caused various kinds of emotional distress. *Held*, summary judgment for defendant affirmed.

(a) The facts published were not private. The matters dealt with in the newspaper articles were widely known in the gay community, and plaintiff did not make a secret of his being a homosexual. "[S]ince appellant's sexual orientation was already in public domain and since the articles in question did no more than to give further publicity to matters which appellant left open to the eye of the public, a vital element of the tort was missing rendering it vulnerable to summary disposal." (154 C.A.3d 1048.)

(b) The publication was newsworthy. The paramount test of newsworthiness is whether the matter is of legitimate public interest, and this in turn is determined according to the community mores. (154 C.A.3d 1048, citing *Kapellas v. Kofman* (1969) 1 C.3d 20, 81 C.R. 360, 459 P.2d 912, and federal case of *Virgil v. Time* (9th Cir. 1975) 527 F.2d 1122.) Here, "the publications were prompted by legitimate political considerations, i.e., to dispel the false public opinion that gays were timid, weak and unheroic figures and to raise the equally important political question whether the President of the United States entertained a discriminatory attitude or bias against a minority group such as homosexuals." (154 C.A.3d 1049.)

(c) Plaintiff's contention that he did not intend to enter into the limelight is answered by *Rest.2d, Torts* §652D, Comment f: "There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become 'news.' ... These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private." (154 C.A.3d 1049.)

West's Key Number Digest, Torts k.8.5(7)

SUPPLEMENT: [This section is current through the latest supplement]



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IV. INTENTIONAL INJURIES TO REPUTATION AND SIMILAR INTERESTS

E. Invasion of Privacy.

7. Defense of Public Interest.

c. Involuntary Exposure to Publicity.

2. News Report of Current Criminal Activities.

5 Witkin Sum. Cal. Law Torts § 691

[§ 691] News Report of Current Criminal Activities.

In *Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 93 C.R. 866, 483 P.2d 34, *infra*, §692, the court found an actionable invasion of privacy in a news report of past criminal activities of plaintiff. (See *infra*, §692.) But the opinion commences with an exposition of the First Amendment freedom to comment on all issues about which information is appropriate to the public. Thus:

(a) It is ordinarily proper to report recent events of immediate public interest, even though this involves publication of the name or likeness of a person. (4 C.3d 535.) But there are limits; e.g., no absolute privilege has been given to publication of films of naked inmates in a mental hospital, the phone number of a woman identified as having a sexy voice, or the picture of a convicted murderer in the courthouse just before sentencing. (4 C.3d 535, footnote 7.)

(b) Reports of current criminal activities come within this category: The circumstances, the techniques of the criminals, the tragedy of the victims, are vital information for people "coping with the exigencies of modern life." And they promote the values of a public trial, by encouraging unknown witnesses to come forward with useful testimony and friends or relatives to come to the aid of the victim. (4 C.3d 536.)

(c) Identification of an adult person currently charged with commission of a crime is also in the social interest. "While such an identification may not presume guilt, it may legitimately put others on notice that the named individual is suspected of having committed a crime. Naming the suspect may also persuade eyewitnesses and character witnesses to testify. For these reasons, while the suspect or offender obviously does not consent to public exposure, his right to privacy must give way to the overriding social interest." (4 C.3d 536.)

(d) "In general, therefore, truthful reports of *recent* crimes and the names of suspects or offenders will be deemed protected by the First Amendment." (4 C.3d 537.) (See *Rest.2d, Torts §652D*, Comment g ["news" as authorized publicity]; 60 Cal. L. Rev. 1042 [*Briscoe*]; 5 Loyola L.A. L. Rev. 544 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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- E. Invasion of Privacy.
 - 7. Defense of Public Interest.
 - c. Involuntary Exposure to Publicity.
 - 3. News Report of Past Criminal Activities.

5 Witkin Sum. Cal. Law Torts § 692

[§ 692] News Report of Past Criminal Activities.

(1) *Briscoe Case: Privacy Action May Lie.* In *Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 93 C.R. 866, 483 P.2d 34, supra, §692, defendant published a condensed version of a magazine article about truck hijacking crimes. One sentence started with "Typical of many beginners," and described plaintiff's hijacking of a truck and gun battle with police. The article did not mention the fact that the incident occurred 11 years before. Plaintiff sued for invasion of privacy, alleging that he had paid the legal penalty and had become a law-abiding citizen, and that the disclosure of these facts had exposed him to contempt and ridicule. *Held*, judgment on demurrer reversed; a cause of action was stated.

(a) Generally speaking, reports of the facts of past crimes, and identification of past offenders, is protected by the same privilege as are reports of current criminal activities. (4 C.3d 537; see supra, §691.)

(b) But identification of the actor usually serves little independent public purpose, and the integrity of the rehabilitative process must be considered in determining newsworthiness of such an exposure. (4 C.3d 539, 542; citing *Melvin v. Reid* (1931) 112 C.A. 285, 297 P. 91, supra, §664.)

(c) Under the facts pleaded, a jury could reasonably find that plaintiff's identity as a former hijacker was not newsworthy: First, it was of minimal social value; plaintiff had once again become an anonymous member of the community. (4 C.3d 541.) Second, the revelation of a criminal past is grossly offensive, more so than a humiliating disease or business debts; its consequences may be ostracism, isolation, and alienation of one's family. (4 C.3d 542.) Third, there was no consent by plaintiff, who had become rehabilitated. (4 C.3d 542.)

(d) Thus, the pleading was sufficient. "It is for the trier of fact to determine (1) whether plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed." (4 C.3d 543.) (See *Conklin v. Sloss* (1978) 86 C.A.3d 241, 244, 150 C.R. 121 [cause of action stated under *Briscoe*, despite factual differences; crime committed in small community to which plaintiff returned after serving prison term for murder];

Rest.2d, Torts §652D, Comment k [effect of lapse of time on right to publicize matter of public interest]; 5 *Loyola L.A. L. Rev.* 544 [*Briscoe*].)

Briscoe and *Conklin* were distinguished in *Wasser v. San Diego Union* (1987) 191 C.A.3d 1455, 236 C.R. 772, in which defendant newspaper published an article in 1985, referring to a prosecution of plaintiff for murder in 1974 that resulted in an acquittal. "Largely through his own lawful choices, Wasser had continued to rekindle public interest in his criminal trial and acquittal by engaging in one public lawsuit after another, all of which bore some relationship to the 1974 incidents." (191 C.A.3d 1463.)

(2) *Briscoe Overruled*. The *Briscoe* case was overruled in *Gates v. Discovery Communications* (2004) 34 C.4th 679, 21 C.R.3d 663, 101 P.3d 552. A rehabilitated convict brought an invasion of privacy action against producers and presenters of a television documentary about a 13-year-old murder case in which plaintiff was implicated. Defendants' anti-SLAPP motion (see 5 *Cal. Proc.* (4th), *Pleading*, §962 et seq.) was denied. *Held*, this was error.

(a) The U.S. Supreme Court in *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, 7 *Summary* (10th), *Constitutional Law*, §430, and subsequent decisions has determined that the states may not constitutionally impose sanctions on the publication of truthful information contained in official court records open to public inspection. These decisions have fatally undermined *Briscoe*'s holding that a media defendant may be held liable in tort for recklessly publishing true but not newsworthy facts concerning a rehabilitated former criminal, insofar as that holding applies to facts obtained from public official court records. On matters of federal constitutional law, California courts are bound by the decisions of the *U.S. Supreme Court*. (34 C.4th 692.)

(b) Neither the fact that defendants' documentary was of an historical nature nor the fact that it involved reenactments, rather than firsthand coverage, diminishes any constitutional protection it enjoys. The constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature. (34 C.4th 695.)

(c) "Accordingly, following *Cox* and its progeny, we conclude that an invasion of privacy claim based on allegations of harm caused by a media defendant's publication of facts obtained from public official records of a criminal proceeding is barred by the First Amendment." (34 C.4th 696.) It follows that defendants' anti-SLAPP motion should have been granted, because, as a matter of law, plaintiff cannot prevail on his invasion of privacy claim. (34 C.4th 696.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Briscoe Overruled*.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §1017 et seq.



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A. Trespass to Land.

1. Nature of Tort.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 693

[§ 693] In General.

Trespass to property is the unlawful interference with its possession. (See *Rest.2d, Torts* §157 et seq.; C.E.B., 2 Real Property Remedies and Damages 2d, §§11.17, 11.18; Dobbs, *The Law of Torts* §50 et seq.; 1 Harper, James & Gray 3d, §1.1 et seq.; 75 *Am.Jur.2d* (1991 ed.), *Trespass* §25 et seq.; Cal. Civil Practice, 1 Torts, Trespass, Chap. 18; CACI, No. 2000 et seq.) In some situations, it is a crime as well as a tort. (See P.C. 602; 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §247 et seq.)

The tort may be committed by an act that is intentional, reckless, negligent, or the result of ultrahazardous activity. (*Gallin v. Poulou* (1956) 140 *C.A.2d* 638, 645, 295 *P.2d* 958.) The only intent required is an intent to enter, regardless of the actor's motivation. (*Miller v. National Broadcasting Co.* (1986) 187 *C.A.3d* 1463, 1480, 232 *C.R.* 668, *supra*, §659.)

Because it is the plaintiff's right to exclusive possession that is protected by an action for trespass, the invasion must be physical and accomplished by tangible matter. (See *Wilson v. Interlake Steel Co.* (1982) 32 *C.3d* 229, 233, 185 *C.R.* 280, 649 *P.2d* 922, 13 *Summary* (10th), *Equity*, §136 ["actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion"]; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 *C.4th* 893, 935, 55 *C.R.2d* 724, 920 *P.2d* 669, 8 *Summary* (10th), *Constitutional Law*, §1089 [no trespass cause of action existed for property damage caused by electric and magnetic fields arising from power lines operated by defendant public utility, where intrusions from power lines were wholly intangible, and plaintiffs did not allege any physical damage to their property].)

There may be trespass by personal intrusion of the wrongdoer or by his or her failure to leave; by throwing or placing something on the land; or by causing the entry of some other person. (*Rest.2d, Torts* §158; see *Elton v. Anheuser-Busch Beverage Group* (1996) 50 *C.A.4th* 1301, 1304, 58 *C.R.2d* 303 [unnecessary to determine whether damages to plaintiff's property were indirect result of defendant's act of lighting fire or direct result of defendant's negligence in allowing fire to escape because, in either event, fire constituted trespass]; 36 *Santa Clara L. Rev.* 39 [trespass claims in environmental litigation]; 25 *Proof of Facts* 3d 473 [dioxin contamination]; 37 *Proof of Facts* 3d 439 [injury from environmental condition on neighboring land]; 57 *Am.Jur. Trials* 395 [toxic tort litigation].)

Trespass and nuisance are separate torts that protect different interests, although the same conduct may invade both. Trespass protects the possessor's interest in exclusive possession of property, while nuisance protects the use and enjoyment of the property. (See *Capogeannis v. Superior Court* (1993) 12 C.A.4th 668, 674, 15 C.R.2d 796 [landowner had no trespass action against previous owner who had contaminated property; previous owner's act was nuisance, not continuing trespass against present owner]; 26 *Pacific L. J.* 1, 24 [*Capogeannis*]; 13 *Summary* (10th), *Equity*, §136.)

The injured party may recover damages already suffered and an injunction. But if the injured party elects to sue for all damages both past and prospective, and obtains satisfaction of judgment for the amount of diminution in market value of the land, he or she thereby consents to the permanent continuance of the invasion by the defendant. (*Slater v. Shell Oil Co.* (1943) 58 C.A.2d 864, 870, 137 P.2d 713; see 33 A.L.R.3d 1132 [condemnation proceeding or award as precluding action for damages arising from prior trespass on the land]; 12 *Summary* (10th), *Real Property*, §400; 3 *Cal. Proc.* (4th), *Actions*, §§180, 548 et seq.; on damages for trespass to realty, see *infra*, §1726 et seq.)

West's Key Number Digest, Trespass k.1, 9 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 75 *Am.Jur.2d* (2007 ed.), *Trespass* §18 et seq. *Cross-Reference:* 3 *Cal. Proc.* (5th), *Actions*, §§185, 596 et seq.



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A. Trespass to Land.

1. Nature of Tort.

b. Invasion on, Above, or Below Surface.

5 *Witkin Sum. Cal. Law Torts* § 694

[§ 694] Invasion on, Above, or Below Surface.

A trespass may be above the land, as well as on the surface. (*Rest.2d, Torts* §159(1); see 37 *Cal. L. Rev.* 120 [treating injury from artificial rainmaking as trespass]; 1 *Stanf. L. Rev.* 532 [same]; 8 *So. Cal. L. Rev.* 339; 2 *A.L.R.4th* 1054 [injury to land caused by airborne pollutants].) (On ownership of airspace above land, see *infra*, §698.) An encroachment on the space above land, as by trees, roots, or an overlapping portion of a building, is a continuing trespass, which may amount to a nuisance. (*Slater v. Shell Oil Co. (1943)* 58 *C.A.2d* 864, 870, 137 *P.2d* 713.)

The invasion may also be below the surface. (*Rest.2d, Torts* §159(1); see *Cassinis v. Union Oil Co. (1993)* 14 *C.A.4th* 1770, 1778, 18 *C.R.2d* 574 [damage to mineral estate by injection of offsite wastewater into oil well]; *Martin Marietta Corp. v. Insurance Co. of North America (1995)* 40 *C.A.4th* 1113, 1121, 47 *C.R.2d* 670 [plaintiff required to remediate groundwater and contamination emanating from landfill and other sites].) Thus, intentional slant drilling for oil under another's land is a trespass. (See *C.C.P.* 349 3/4; *Union Oil Co. of Calif. v. Mutual Oil Co. (1937)* 19 *C.A.2d* 409, 413, 65 *P.2d* 896; *Union Oil Co. of Calif. v. Reconstruction Oil Co. (1937)* 20 *C.A.2d* 170, 182, 66 *P.2d* 1215; *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate (1938)* 24 *C.A.2d* 587, 591, 593, 76 *P.2d* 167; *Union Oil Co. of Calif. v. Domengeaux (1939)* 30 *C.A.2d* 266, 270, 86 *P.2d* 127; 27 *Cal. L. Rev.* 192; 11 *So. Cal. L. Rev.* 526; 15 *Stanf. L. Rev.* 664; 78 *Proof of Facts* 3d 107 [petroleum contamination from leaking underground storage tank].)

West's Key Number Digest, Trespass k.12

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A. Trespass to Land.

1. Nature of Tort.

c. Actual or Constructive Possession by Plaintiff.

5 *Witkin Sum. Cal. Law Torts* § 695

[§ 695] Actual or Constructive Possession by Plaintiff.

The action may be brought only by a person in actual or constructive possession, but he or she need not show legal title. (*Lightner Mining Co. v. Lane* (1911) 161 C. 689, 694, 120 P. 771; *Alechoff v. Los Angeles Gas & Elec. Corp.* (1927) 84 C.A. 33, 41, 257 P. 569; *Whittaker v. Otto* (1967) 248 C.A.2d 666, 672, 56 C.R. 836; *Williams v. Goodwin* (1974) 41 C.A.3d 496, 508, 116 C.R. 200, *infra*, §1406; *Allen v. McMillion* (1978) 82 C.A.3d 211, 218, 147 C.R. 77, *supra*, §421; see *Smpardos v. Piombo Const. Co.* (1952) 111 C.A.2d 415, 423, 244 P.2d 435 [plaintiff in actual peaceful possession of property may maintain ejectment or recover damages against stranger trespasser]; 5 *Cal. Proc.* (4th), *Pleading*, §590 et seq.)

The appropriate remedy of an out-of-possession property owner for an injury to land by a trespasser is an action for waste. (*Smith v. Cap Concrete* (1982) 133 C.A.3d 769, 774, 775, 184 C.R. 308, 12 *Summary* (10th), *Real Property*, §372.) However, the pleading of waste in such a case has been held not crucial. (See *Hassoldt v. Patrick Media Group* (2000) 84 C.A.4th 153, 171, 100 C.R.2d 662 [lessors of realty have right to bring trespass action if intruder harms their ownership interest; owner may seek recovery "whether the cause of action be technically labeled trespass or some other form of action, such as waste"].)

West's Key Number Digest, Trespass k.20

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §631 et seq.



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- A. Trespass to Land.
- 2. Defense of Privilege.
- a. Entry by Consent.

5 Witkin Sum. Cal. Law Torts § 696

[§ 696] Entry by Consent.

A peaceable entry on land by consent is not actionable. (*Rest.2d, Torts* §§167, 892 et seq.; see Dobbs, *The Law of Torts* §95 et seq.; 1 Harper, James & Gray 3d, §1.11; 75 *Am.Jur.2d* (1991 ed.), *Trespass* §§84, 86.) The following are illustrations of entry by consent:

(1) Entry by a conditional seller, lessor, chattel mortgagee, or other secured party at a reasonable time to repossess personal property on default (a privilege based on consent expressed in, or inferred from, the contract). (*Rest.2d, Torts* §183; see *Williams v. General Elec. Credit Corp.* (1958) 159 C.A.2d 527, 532, 323 P.2d 1046 [defendant's agent entered unlocked door after receiving no reply to knocks, looked for television set to repossess, departed peaceably when ordered to leave]; 99 A.L.R.2d 358 [what conduct by repossessing chattel mortgagee or conditional vendor entails tort liability]; 4 *Summary* (10th), *Sales*, §285; 4 *Summary* (10th), *Secured Transactions in Personal Property*, §178.) However, if the consent is exceeded, e.g., by taking possession of the premises, the privilege is lost, and the tort is committed. (*Civic Western Corp. v. Zila Industries* (1977) 66 C.A.3d 1, 17, 135 C.R. 915, citing the text and distinguishing *Williams*.)

(2) Reentry of leased premises by a lessor, under a lease provision, on the tenant's default (i.e., by advance consent). But the entry must be peaceful; forcible entry is an abuse of the privilege and is no defense in an action for damages for wrongful eviction. (*Eichhorn v. De La Cantera* (1953) 117 C.A.2d 50, 54, 255 P.2d 70; see *Bedi v. McMullan* (1984) 160 C.A.3d 272, 275, 206 C.R. 578, 12 *Summary* (10th), *Real Property*, §760 [entry under invalid writ of execution].)

A conditional or restricted consent to enter land creates a privilege to do so only to the extent that the condition or restriction is complied with. In *Mangini v. Aerojet-General Corp.* (1991) 230 C.A.3d 1125, 281 C.R. 827, plaintiff landowners alleged that defendant corporation committed a trespass by contaminating the property with hazardous waste during its lease of the property from a prior owner and by failing to remove the waste after plaintiffs acquired the property. Defendant argued that a person cannot trespass on land in his or her own possession. *Held*, judgment for defendant on demurrer reversed. A trespass may occur if a party entering land by limited consent exceeds those limits by divergent conduct. Whether defendant exceeded its consent, i.e., the lease, by depositing the waste and refusing to clean it up must be determined by extrinsic evidence. (230 C.A.3d 1141, citing the text.)

West's Key Number Digest, Trespass k.25

SUPPLEMENT: [This section is current through the latest supplement]

See *Santa Clara v. Atlantic Richfield Co.* (2006) 137 C.A.4th 292, 315, 40 C.R.3d 313 [property owner who voluntarily places product on property that turns out to be hazardous cannot prosecute trespass action against product's manufacturer; owner has consented to entry of product onto property]; 75 Am.Jur.2d (2007 ed.), *Trespass* §71 et seq.



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- A. Trespass to Land.
- 2. Defense of Privilege.
- b. Other Privileged Entries.

5 *Witkin Sum. Cal. Law Torts* § 697

[§ 697] Other Privileged Entries.

The following entries are privileged:

(1) *Private Nuisance*. Entry on land by possessor of neighboring land to abate a private nuisance. (See C.C. 3503; *Rest.2d, Torts* §201; 75 *Am.Jur.2d* (1991 ed.), *Trespass* §92; 11 *Summary* (10th), *Equity*, §153.) But he or she cannot cut down trees growing on the neighboring land merely because the branches or roots encroach. (*Fick v. Nilson* (1950) 98 C.A.2d 683, 685, 220 P.2d 752; see 12 *Summary* (10th), *Real Property*, §374.)

(2) *Emergency*. Entry and destruction of property in emergencies, for reasons of public necessity, to avert disaster such as fire or flood. (*Surocco v. Geary* (1853) 3 C. 69, 73; *Rest.2d, Torts* §196; see 75 *Am.Jur.2d* (1991 ed.), *Trespass* §§101, 102.)

(3) *Private Necessity*. Entry in some cases for private necessity (a more limited privilege), to protect person or property from serious harm. (See *Rest.2d, Torts* §197 [entry to protect actor, possessor of land, or third person or to protect their land or chattels, subject to stated conditions].)

(4) *Domestic Animal*. Entry to care for a domestic animal. Somewhat analogous to the public and private necessity privileges is the statutory privilege to enter a place where a domestic animal is confined, to give it necessary food and water. (See P.C. 597e.)

(5) *Landlord*. Entry by the keeper of an apartment house, on court order, to enforce his or her *lien for rent* on the property of the tenant. (See C.C. 1861a; 13 *Summary* (10th), *Personal Property*, §224; 12 *Summary* (10th), *Real Property*, §759.)

(6) *Surveyor*. Entry by a professional land surveyor to investigate and utilize boundary evidence and to perform surveys. The owner must provide reasonable access without undue delay. (C.C. 846.5; see 5 *Pacific L. J.* 465; 75 *Am.Jur.2d* (1991 ed.), *Trespass* §§103, 104.)

West's Key Number Digest, *Trespass* k.23, 24, 26, 27-

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Private Nuisance*. See 75 *Am.Jur.2d* (2007 ed.), *Trespass* §70.

(2) *Emergency*. See 75 *Am.Jur.2d* (2007 ed.), *Trespass* §69.

(3) *Private Necessity*. See CACI, No. 2005 [Affirmative Defense--Necessity], and CACI, No. VF-2001 [Trespass--Affirmative Defense--Necessity].

(6) *Surveyor*. See 75 *Am.Jur.2d* (2007 ed.), *Trespass* §§78, 79.



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- A. Trespass to Land.
- 2. Defense of Privilege.
- c. Flight at Reasonable Height.

5 Witkin Sum. Cal. Law Torts § 698

[§ 698] Flight at Reasonable Height.

Although there may be trespass by an entry above the surface of the earth (see *supra*, §694), legitimate flying in aircraft at a reasonable height, in conformity with state and federal regulations, is regarded as privileged. (*Rest.2d, Torts* §§159, 194.) The old common law doctrine of ownership to the sky has been repudiated. "The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." (*United States v. Causby* (1946) 328 U.S. 256, 66 S.Ct. 1062, 1065, 90 L.Ed. 1206, 1210; see *Drennen v. Ventura* (1974) 38 C.A.3d 84, 87, 112 C.R. 907, 12 Summary (10th), *Real Property*, §403 [overflights are qualifiedly privileged]; 35 Cal. L. Rev. 110; 73 Harv. L. Rev. 790 [infringement of property rights by cloud seeding].) The right of overflight is prescribed and limited by statute. (See *Pub.Util.C.* 21403.)

However, the privilege applies only to the *higher airspace*; the lower airspace, i.e., the part immediately above the land that is capable of reasonable and beneficial use, belongs exclusively to the landowner. Hence, the operator of an airplane who flies at such a low height that there is danger of striking structures erected by the owner is guilty of an unprivileged trespass. (*Strother v. Pacific Gas & Elec. Co.* (1949) 94 C.A.2d 525, 537, 211 P.2d 624; see *Rest.2d, Torts* §159(2) [flight is trespass if "(a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land"].)

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B. Conversion of Personal Property.
1. In General.
a. Nature of Tort.

5 Witkin Sum. Cal. Law Torts § 699

[§ 699] Nature of Tort.

Conversion is the wrongful exercise of dominion over personal property of another. (*Steele v. Marsicano* (1894) 102 C. 666, 669, 36 P. 920; *Poggi v. Scott* (1914) 167 C. 372, 375, 139 P. 815; *Moore v. Regents of Univ. of Calif.* (1990) 51 C.3d 120, 137, 271 C.R. 146, 793 P.2d 479, *infra*, §704; *Kee v. Becker* (1942) 54 C.A.2d 466, 470, 129 P.2d 159; *Farmers Insurance Exchange v. Zerin* (1997) 53 C.A.4th 445, 451, 61 C.R.2d 707; *Rest.2d, Torts* §222A; Dobbs, *The Law of Torts* §59 et seq.; 1 Harper, James & Gray 3d §2.7 et seq.; Cal. Civil Practice, 1 Torts, Conversion, Chap. 15; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §1 et seq.; BAJI, No. 12.99; CACI, No. 2100; on statute of limitations, see 3 *Cal. Proc.* (4th), *Actions*, §567 et seq.) The property need not be appropriated to the use of the defendant; it may be destroyed, or merely damaged. (*Staley v. McClurken* (1939) 35 C.A.2d 622, 628, 96 P.2d 805; *Rest.2d, Torts* §§223, 226; on destruction or alteration, see *infra*, §711.)

An action for conversion properly lies only where there is some substantial interference with possession or the right to possession, and the plaintiff in a conversion suit recovers the full value of the property, in effect forcing the defendant to buy it. Where the act does not amount to a *dispossession*, but consists of use of or damage to the property, the normal action will be for *trespass*, in which the plaintiff recovers only the actual damages suffered by impairment of the property or loss of its use. (*Zaslow v. Kroenert* (1946) 29 C.2d 541, 551, 176 P.2d 1; on alternative remedies where conversion, see *infra*, §700; on trespass to personalty, see *infra*, 720; on damages for injury to personal property, see *infra*, §1718 et seq.)

The defenses of assumption of risk and contributory or comparative negligence, properly invoked in negligence actions (see *infra*, §1336 et seq.), do not apply to conversion suits. Thus, in *Fresno Air Service v. Wood* (1965) 232 C.A.2d 801, 43 C.R. 276, defendant, known to have a drinking problem, chartered a plane and pilot from plaintiff. After a forced landing, the pilot left the plane with the keys in it, and defendant, intoxicated, started it and cracked up. *Held*, judgment for damages affirmed. (232 C.A.2d 807, quoting the text.)

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See *Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 C.A.4th 97, 119, 55 C.R.3d 621, Supp., *infra*, §702

[basic elements of tort of conversion are (a) plaintiff's ownership or right to possession of personal property, (b) defendant's disposition of property in manner inconsistent with plaintiff's property rights, and (c) resulting damages]; 90 Proof of Facts 3d 341 [landlord's conversion of tenant's personal property]; *Salma v. Capon* (2008) 161 C.A.4th 1275, 1295, 74 C.R.3d 873, citing the text [tort of conversion applies to personal property, not real property].

Cross-Reference: 3 Cal. Proc. (5th), Actions, §619 et seq.



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1. In General.
b. Remedies.

5 *Witkin Sum. Cal. Law Torts* § 700

[§ 700] Remedies.

The injured party usually may elect among several remedies in cases involving dispossession of personalty:

(1) Damages for conversion, based on the value of the property. (*Rest.2d, Torts* §222A, Comment c, §927; see *Gonzales v. Personal Storage* (1997) 56 C.A.4th 464, 477, 65 C.R.2d 473, *infra*, §1706 [emotional distress damages are also recoverable]; *Dobbs, The Law of Torts* §67; 1 Harper, James & Gray 3d §2.36; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §116 et seq.; CACI, No. 2102; on measure of damages for conversion, see *infra*, §§1722, 1723; 5 *Cal. Proc.* (4th), *Pleading*, §660.)

(2) Specific recovery of the property, with damages for its detention. (C.C. 3379; C.C.P. 511.010 et seq.; see 5 *Cal. Proc.* (4th), *Pleading*, §651 et seq.; 6 *Cal. Proc.* (4th), *Provisional Remedies*, §247 et seq.)

(3) Quasi-contractual recovery based on "waiver of tort." (*Acme Paper Co. v. Goffstein* (1954) 125 C.A.2d 175, 178, 270 P.2d 505; *Shahood v. Cavin* (1957) 154 C.A.2d 745, 748, 316 P.2d 700; *H. Russell Taylor's Fire Prevention Service v. Coca Cola Bottling Corp.* (1979) 99 C.A.3d 711, 719, 160 C.R. 411, 4 Summary (10th), *Sales*, §213; 1 Summary (10th), *Contracts*, §1040; 3 *Cal. Proc.* (4th), *Actions*, §160.)

(4) Action to quiet title. (See 5 *Cal. Proc.* (4th), *Pleading*, §664.)

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(1) *Damages for conversion:*

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §702.

(2) *Specific recovery:*

Cross-References: 5 *Cal. Proc.* (5th), *Pleading*, §§692, 693; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §245 et seq. (3) *Quasi-contractual recovery:*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §164.

(4) *Action to quiet title:*

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §706.



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2. Property Subject to Conversion.
a. Tangible Property.

5 *Witkin Sum. Cal. Law Torts* § 701

[§ 701] Tangible Property.

Historically, the tort action of trover and conversion was limited to cases involving *tangible* personal property, and most of the cases deal with ordinary chattels. (See Dobbs, *The Law of Torts* §63; 1 Harper, James & Gray 3d §2.13; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §7; *infra*, §708 et seq.; on interference with rights in human biological materials, see *supra*, §402.)

In *Palm Springs-La Quinta Dev. Co. v. Kieberk Corp.* (1941) 46 C.A.2d 234, 115 P.2d 548, a judgment for conversion was upheld where defendant appropriated a *card index file* with names and information concerning prospective customers. The court distinguished *Olschewski v. Hudson* (1927) 87 C.A. 282, 262 P. 43, *infra*, §702, as not involving a tangible list. (46 C.A.2d 240.)

Although in California neither the lessor nor lessee of *oil lands* has title to the oil in place (see 12 *Summary* (10th), *Real Property*, §791), oil actually removed by a trespasser becomes personal property subject to conversion, and the trespasser may be held for the value of the oil taken. (*Union Oil Co. v. Mutual Oil Co.* (1937) 19 C.A.2d 409, 413, 65 P.2d 896; *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate* (1938) 24 C.A.2d 587, 606, 76 P.2d 167; see 15 *Stanf. L. Rev.* 664 [slant drilling]; 84 A.L.R.2d 790 [earth, sand, or gravel as subject of conversion].)

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2. Property Subject to Conversion.
b. Intangible Property.

5 *Witkin Sum. Cal. Law Torts* § 702

[§ 702] Intangible Property.

Generally, conversion requires interference with tangible property. (See *supra*, §701.) Thus, there can be no conversion of the goodwill of a business, trade secrets, a newspaper route, or a laundry list of customers. The usual remedy for the improper use of trade secrets or customers' lists is an injunction. (*Olschewski v. Hudson* (1927) 87 C.A. 282, 286, 262 P. 43; see *Rest.2d, Torts* §242, Comment f; on equitable relief for improper use of trade secrets, see 13 *Summary* (10th), *Equity*, §§83, 89.) And a leasehold interest cannot be converted. (*Vuich v. Smith* (1934) 140 C.A. 453, 455, 35 P. 365.)

However, there may be a conversion of intangibles *represented by documents*, such as bonds, notes, bills of exchange, stock certificates, and warehouse receipts. (See *Acme Paper Co. v. Goffstein* (1954) 125 C.A.2d 175, 179, 270 P.2d 505 [conversion of check]; *Rest.2d, Torts* §242; 44 A.L.R.2d 927 [nature of property or rights other than tangible chattels that may be subject of conversion]; on payee's conversion action against holder of negotiable instrument under forged indorsement, see 4 *Summary* (10th), *Negotiable Instruments*, §58.)

Shares of stock, as well as the certificate representing them, may be the subject of conversion. In *Mears v. Crocker First Nat. Bank* (1948) 84 C.A.2d 637, 191 P.2d 501, plaintiff sued in conversion for refusal of defendant transfer agent, for some 6 weeks, to break up his certificates into a number of 20-share certificates, as required by the stock exchange. Although this could have been viewed as an exercise of wrongful dominion over the tangible certificates, the court stated that the rule regarding conversion of corporate stock "applies as well to the shares represented by a certificate as to the actual certificate," and that "where a corporation refuses to allow a transfer of shares upon its books, the assignee may treat this as a conversion of his shares and sue the company for their value." (84 C.A.2d 644.)

The infringement of property rights in a literary or artistic production is a distinct tort (plagiarism). (See *Italiani v. Metro-Goldwyn-Mayer Corp.* (1941) 45 C.A.2d 464, 466, 114 P.2d 370 [C.C.P. 338(c), statute of limitations on actions for conversion, was not applicable to suit for plagiarism of literary composition]; *Melchior v. New Line Productions* (2003) 106 C.A.4th 779, 791, 131 C.R.2d 347, citing the text [conversion does not apply to ideas (movie based on plaintiff's life)]; on plagiarism, see *infra*, §722.)

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Shares of stock: See *Virtanen v. O'Connell* (2006) 140 C.A.4th 688, 707, 44 C.R.3d 702 [escrow holder converted seller's stock certificates by effecting transfer of shares before satisfaction of escrow conditions].

(*New*) *Net operating losses:* In *Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 C.A.4th 97, 55 C.R.3d 621, plaintiff subsidiary, by and through the Insurance Commissioner as its liquidator, sued its parent company and another subsidiary for conversion of net operating losses of plaintiff's predecessor in interest. The trial court dismissed the complaint after sustaining a demurrer without leave to amend. *Held*, reversed.

(a) Defendants argued that the unauthorized taking of an intangible property interest that is not merged with or reflected in tangible property is not actionable as conversion. This was the rule at common law, noted in *Thrifty-Tel v. Bezenek* (1996) 46 C.A.4th 1559, 54 C.R.2d 468, text, §720, and has applied in *Olschewski v. Hudson* (1927) 87 C.A. 282, 262 P. 43, text, p. 1025, in the context of appropriation of a competitor's customer list. (148 C.A.4th 119.)

(b) However, the California Supreme Court early concluded in *Payne v. Elliot* (1880) 54 C. 339, 342, that to allow a conversion action if the defendant misappropriated shares of stock by converting share certificates but disallow the action if the defendant misappropriated shares of stock without converting share certificates would perpetuate a technicality "not based upon reason." *Payne* concluded that the defendant's conversion of shares of stock, an intangible property interest, was an actionable conversion even without conversion of the share certificates. (148 C.A.4th 121.)

(c) Rather than attempt to conform to the common law rule restricting a conversion action to tangible property, *Payne* acknowledged that shares of stock were intangible property and rejected the common law rule, at least as applied to shares of stock. Moreover, the statement in *Payne*, that "the action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property" suggests a much broader rejection of the restrictive common law rule. (148 C.A.4th 124.)

(d) *Olschewski* held that a list of customers that had not been reduced to writing was more akin to business goodwill or a trade secret than to tangible personal property and was too "intangible, uncertain, and indefinite a property right" to be the subject of a conversion action. The common law of conversion, which developed initially as a remedy for the dispossession or other loss of chattel, may be inappropriate for some modern intangible personal property, the unauthorized use of which can take many forms. In some circumstances, newer economic torts have developed that may better take into account the nature and uses of intangible property, the interests at stake, and the appropriate measure of damages. "On the other hand, if the law of conversion can be adapted to particular types of intangible property and will not displace other, more suitable law, it may be appropriate to do so." (148 C.A.4th 124.)

(e) A net operating loss is a definite amount that can be recorded in tax and accounting records. Both the property and the owner's rights of possession and exclusive use are sufficiently definite and certain. The misappropriation of a net operation loss without compensation is comparable to the misappropriation of tangible personal property or shares of stock. There is no sound basis in reason to allow recovery in tort for one but not the other. (148 C.A.4th 125, declining to follow *Olschewski* and *Thrifty-Tel*.) "At this juncture, we need not decide whether in these circumstances the cause of action should differ in any material respect from a traditional conversion action. ... For purposes of ruling on the demurrer, it is sufficient to conclude ... that the misappropriation of intangible net operating losses alleged here supports a cause of action for conversion." (148 C.A.4th 125.)



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c. Money.

5 *Witkin Sum. Cal. Law Torts* § 703

[§ 703] Money.

Money cannot be the subject of conversion unless a *specific, identifiable sum* is involved. (*Haigler v. Donnelly* (1941) 18 C.2d 674, 681, 117 P.2d 331; see *Vu v. California Commerce Club* (1997) 58 C.A.4th 229, 235, 68 C.R.2d 31 [money allegedly lost in gambling club was not sufficiently identified].) But where an agent failed to turn over a definite sum received by him for his principal's account, the action was held proper. (*Haigler v. Donnelly*, *supra*; see *Watson v. Stockton Morris Plan Co.* (1939) 34 C.A.2d 393, 403, 93 P.2d 855 [defendant savings and loan society was liable for conversion of account where it issued duplicate passbook and delivered funds to third party]; *Fischer v. Machado* (1996) 50 C.A.4th 1069, 1072, 58 C.R.2d 213 [action was proper for conversion of funds that commission merchant received for sale of consigned farm products and used for his personal use, rather than turning them over to plaintiff as obligated to do]; cf. *Shahood v. Cavin* (1957) 154 C.A.2d 745, 748, 316 P.2d 700 [by ratifying wrongful sale of his property, plaintiff waived tort and elected to sue on implied contract theory].)

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See *Mendoza v. Continental Sales Co.* (2006) 140 C.A.4th 1395, 1404, 45 C.R.3d 525 [allegation that commission merchants retained proceeds from sale of reconsigned farm products they sold as subagents for farmer stated cognizable claim; applying rule in *Fischer v. Machado* (1996) 50 C.A.4th 1069, 58 C.R.2d 213, text, p. 1027, respecting liability of commission merchant acting as farmer's agent]; *McKell v. Washington Mut.* (2006) 142 C.A.4th 1457, 1491, 49 C.R.3d 227 [conversion action may not be based on overcharge; money may be subject of conversion only when specific, identifiable sum is involved]; *PCO v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 C.A.4th 384, 395, 58 C.R.3d 516, citing the text [summary adjudication for defendants was proper on conversion claim that could only estimate amount of cash allegedly taken; money cannot be subject of conversion unless specific, identifiable sum is involved].



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d. Human Biological Material.

5 *Witkin Sum. Cal. Law Torts* § 704

[§ 704] Human Biological Material.

For conversion to lie, the interest interfered with must be a property right, rather than a purely personal right. In *Moore v. Regents of Univ. of Calif.* (1990) 51 C.3d 120, 271 C.R. 146, 793 P.2d 479, the issue was whether plaintiff had stated a cause of action against his physician and other defendants (the hospital and other researchers) for using his blood cells, obtained in the course of surgery to remove his spleen, in potentially lucrative medical research without his permission. *Held*, no cause of action was stated for conversion because plaintiff lacked any proprietary interest in those cells, although a cause of action was stated against the physician for breach of fiduciary duty to failing to obtain plaintiff's informed consent (see *supra*, §395).

(a) Plaintiff theorizes that he continued to own his cells following their removal from his body, and that defendants' use of them without consent was an invasion of his proprietary interests, amounting to the tort of conversion. It is therefore necessary to consider whether the existing law of conversion supports his right of action, or, if not, whether it is advisable to extend the tort to this context. (51 C.3d 134, 135, 136.)

(b) Existing law does not support the cause of action. To establish a conversion, plaintiff must establish an interference with his ownership or right of possession. Because he clearly did not expect to retain possession of his cells following their removal, he must have retained an ownership interest in them in order to sue for their conversion. There are several reasons to doubt that he did retain any such interest. (1) No reported decisions do so; (2) California statutory law drastically limits any continuing interest of a patient in excised cells; (3) the patented cell line and the products derived from it cannot be plaintiff's property. (51 C.3d 137.) The decisions on privacy rights, such as the wrongful publicity cases, are not analogous. The genetic material responsible for the production of lymphokines is no more unique to plaintiff than the number of vertebrae in the spine or the chemical formula of hemoglobin. (51 C.3d 138.) And the privacy right of a patient to refuse medical treatment does not call for the conclusion that interference with the right amounts to a conversion of personal property. (51 C.3d 139.)

(c) "While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of [plaintiff's] claim demands express consideration of the policies to be served by extending liability." (51 C.3d 142.) There are three reasons why it is inappropriate to impose liability for conversion based on plaintiff's complaint.

(1) A fair balancing of the relevant policy considerations counsels against this extension. The patient's right to make medical decisions should be protected, but it is important "that we not threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes." (51 C.3d 143.) The appropriate balance is this: "Liability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research." (51 C.3d 144.) Research on human cells plays a critical role in medical research; and the extension of conversion law into this area will restrict access to the necessary raw materials. (51 C.3d 144.)

(2) Problems in this area are better suited to legislative resolution. "Complex policy choices affecting all society are involved, and '[l]egislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties present evidence and express their views.' ... Legislative competence to act in this area is demonstrated by the existing statutes governing the use and disposition of human biological materials. Legislative interest is demonstrated by the extensive study recently commissioned by the United States Congress. ... Commentators are also recommending legislative solutions." (51 C.3d 147.)

(3) The tort of conversion is not necessary to protect the patient's rights. "So long as a physician discloses research and economic interests that may affect his judgment, the patient is protected from conflicts of interest. Aware of any conflicts the patient can make an informed decision to consent to treatment, or to withhold consent and look elsewhere for medical assistance. As already discussed, enforcement of physicians' disclosure obligations protects patients directly, without hindering the socially useful activities of innocent researchers." (51 C.3d 147.) (See 27 Cal. Western L. Rev. 209; 104 Harv. L. Rev. 808; 51 Hastings L. J. 909 [appropriation of identity under *Moore*]; 24 Loyola L.A. L. Rev. 115 [proposed legislative solution]; 32 Loyola L.A. L. Rev. 381 [misappropriation of human eggs and embryos and tort of conversion; *Moore*]; 23 Pacific L. J. 267; 18 Pepperdine L. Rev. 1216; 28 San Diego L. Rev. 455; 32 San Diego L. Rev. 1167 [rights in human biological materials; *Moore*]; 35 San Diego L. Rev. 951 [physician's fiduciary duty to disclose managed care financial incentives]; 34 U.S.F. L. Rev. 733 [same]; 37 U.S.F. L. Rev. 757 [property rights in human tissue; *Moore*]; 43 U.C.L.A. L. Rev. 711, 815 [property rights in body parts under *Moore*]; 16 A.L.R.5th 143 [physician's use of patient's tissue, cells, or bodily substances for medical research or economic purposes]; 121 A.L.R.5th 315 [conversion of genetic material]; on interference with dominion generally, see *infra*, §708 et seq.)

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- 3. Plaintiff's Title or Interest in Property.
- a. Person Without Title or Possession.

5 *Witkin Sum. Cal. Law Torts* § 705

[§ 705] Person Without Title or Possession.

One who has neither title nor possession, nor any right to possession, may not sue for conversion. (*Yukon River Steamboat Co. v. Gratto* (1902) 136 C. 538, 542, 69 P. 252; *Schweitzer v. Bank of America* (1941) 42 C.A.2d 536, 544, 109 P.2d 441; *Metropolitan Life Ins. Co. v. San Francisco Bank* (1943) 58 C.A.2d 528, 534, 136 P.2d 853; *Burlesci v. Petersen* (1998) 68 C.A.4th 1062, 1066, 80 C.R.2d 704; see *Hilmer v. Hills* (1902) 138 C. 134, 139, 70 P. 1080 [no title: plaintiffs were buyers under executory contract of sale]; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §68.)

Thus, where a conversion by the defendant takes place after sale of an automobile to the plaintiff buyer, the buyer's right to sue requires showing that a proper transfer of the certificate of ownership was made to the buyer, or that he or she was in actual possession at the time. If the buyer cannot show either, he or she cannot recover. (*General Motors Acceptance Corp. v. Dallas* (1926) 198 C. 365, 370, 245 P. 184; see 28 *Cal. L. Rev.* 69.)

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b. Possessor Who Is Not Owner.

5 Witkin Sum. Cal. Law Torts § 706

[§ 706] Possessor Who Is Not Owner.

It is not necessary that the plaintiff have legal title in order to sue; *possession alone* is sufficient. The possessor may be liable to the true owner, and consequently is entitled to recover from the converter. Hence, the rule is that a bailee, pledgee, finder, or other person with a special or limited interest may sue for conversion. (*Rosenthal v. McMann* (1892) 93 C. 505, 508, 29 P. 121; *Perlick v. Pacific Discount Corp.* (1942) 53 C.A.2d 136, 141, 127 P.2d 647; *Spates v. Dameron Hosp. Assn.* (2003) 114 C.A.4th 208, 221, 7 C.R.3d 597, *infra*, §712 [next of kin have temporary, quasi-property right in body of deceased; action for conversion requires neither legal title nor absolute ownership]; see *Rest.2d, Torts* §895; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §70; on pleading of plaintiff's right to possession, see 5 *Cal. Proc.* (4th), *Pleading*, §653 et seq.)

A person may sue if he or she has a special interest with a *right of possession*. (*Bastanchury v. Times-Mirror Co.* (1945) 68 C.A.2d 217, 236, 156 P.2d 488; *Everfresh v. Goodman* (1955) 131 C.A.2d 818, 820, 281 P.2d 560; see *McCafferty v. Gilbank* (1967) 249 C.A.2d 569, 572, 57 C.R. 695 [plaintiff, with equitable lien on proceeds of settlement of personal injury action, was entitled to sue defendant for cashing draft without accounting to him]; *Department of Industrial Relations v. UI Video Stores* (1997) 55 C.A.4th 1084, 1095, 64 C.R.2d 457 [state agency that, by statute, had right to immediate possession of checks could successfully claim that defendant unlawfully converted checks to its own use].) An example is a chattel mortgagee after the mortgagor has defaulted, where the mortgage contains a provision allowing the mortgagee to take possession. (See *Mathew v. Mathew* (1903) 138 C. 334, 336, 71 P. 344.)

The person with a special interest will normally be permitted to recover the full value from the converter, being accountable for the proceeds to the true owner, and the plaintiff's full recovery will be a bar to any additional action by the true owner. The basis for this recovery is that "the party having the limited or qualified interest is liable over to the owner of the remaining interest, and in order to be adequately compensated must receive sufficient compensation not only to compensate himself for his own loss but to satisfy the demands of such owner." (*Goldberg v. List* (1938) 11 C.2d 389, 393, 79 P.2d 1087; see *Camp v. Ortega* (1962) 209 C.A.2d 275, 286, 25 C.R. 873 [stating rule and citing *Goldberg*].)

But where the complaint alleges conversion by the true owner, or by someone in privity with the true owner, the plaintiff may recover only the value of plaintiff's special interest. (*California Cured Fruit Assn. v. Ainsworth* (1901) 134

C. 461, 463, 66 P. 586; see *Watson v. Stockton Morris Plan Co.* (1939) 34 C.A.2d 393, 400, 93 P.2d 855 [pledge of savings and loan account passbook; pledgee sued pledgor (depositor) and savings and loan company that wrongfully paid money to depositor].)

In *Goldberg v. List*, *supra*, defendants converted equipment that plaintiff had contracted to buy on conditional sale, and defendants then on demand delivered it to the conditional seller. *Held*, plaintiff buyer could not recover from defendants, for the repossession by the conditional seller ended plaintiff's liability to him, there was no showing that plaintiff had made any payments on the price, and consequently his naked right of possession had no monetary value.

In *Hartford Financial Corp. v. Burns* (1979) 96 C.A.3d 591, 598, 158 C.R. 169, defendant contended that the holder of a security interest may recover only the remaining amount owed by the debtor. In concluding that plaintiff could recover the full market value of the property at the date of conversion, the court made this distinction: (a) Where the lienholder sues the debtor-owner, the damages are so limited. (96 C.A.3d 605, citing *Bastanchury*, *supra*.) (b) Where the lienholder sues a stranger, the plaintiff may recover the full value because plaintiff will be liable to the owner for any amount that exceeds plaintiff's claim. (96 C.A.3d 605, citing *Goldberg* and *Camp*, *supra*.)

West's Key Number Digest, Trover and Conversion k.4, 16

SUPPLEMENT: [This section is current through the latest supplement]
Pleading right to possession:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §695 et seq.



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- 3. Plaintiff's Title or Interest in Property.
- c. Owner Not in Possession.

5 *Witkin Sum. Cal. Law Torts* § 707

[§ 707] Owner Not in Possession.

Either title or a right to possession may be sufficient. (*National Bank of New Zealand v. Finn* (1927) 81 C.A. 317, 344, 253 P. 757.) The clearest example is where the plaintiff has both legal title and a right to immediate possession. (See *Rest.2d, Torts* §225; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §70.) An assignee of the owner may likewise sue, because the assignee asserts the assignor's right to possession. (*Staley v. McClurken* (1939) 35 C.A.2d 622, 626, 96 P.2d 805.)

There was formerly some uncertainty in California whether an owner not entitled to possession may sue, for some of the cases stressed the requirement of right to immediate possession at the time of conversion. (See *Staley v. McClurken*, *supra*; cf. *Rest.2d, Torts* §243 [person entitled to future possession may sue].) The doubt was dissipated, however, in *Reynolds v. Lerman* (1956) 138 C.A.2d 586, 292 P.2d 559. Defendant sheriff, sued by plaintiff judgment debtor for a wrongful sale of the debtor's attached property, contended that plaintiff had no right of immediate possession because the attachment was in effect at the time of the sale. In affirming judgment for plaintiff, the court said: "But he was the owner and we hold that in a case such as this, where the sale divests the owner's title entirely, right of immediate possession is not essential to his recovery for conversion. True, the general rule seems to be that title without immediate right to possession is not sufficient basis for a conversion action, but this rule reflects common law concepts as to the action of trover and has no sound basis for survival with respect to a factual situation such as we have at bar." (138 C.A.2d 596.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Frazier Nuts v. American AG Credit* (2006) 141 C.A.4th 1263, 1282, 46 C.R.3d 869 [growers with statutory lien giving them priority rights to proceeds of sale of farm products by processor stated cause of action for conversion against lender that was paid from proceeds to reduce processor's loan balance; creditor with superior claim to collateral may assert conversion claim against another creditor that has possession of collateral].



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a. Actual Interference Required.

5 Witkin Sum. Cal. Law Torts § 708

[§ 708] Actual Interference Required.

There must be some *actual interference* with the plaintiff's "dominion," i.e., with his or her ownership or right of property. (*Zaslow v. Kroenert* (1946) 29 C.2d 541, 550, 176 P.2d 1; *Jordan v. Talbot* (1961) 55 C.2d 597, 610, 12 C.R. 488, 361 P.2d 20, 12 Summary (10th), *Real Property*, §759; *Farmers Ins. Exchange v. Zerin* (1997) 53 C.A.4th 445, 451, 61 C.R.2d 707; see 18 Am.Jur.2d (2004 ed.), *Conversion* §23; on requirement that interference be with property right, rather than purely personal interest, see *supra*, §402.) However, the interference need occur only at the time of the conversion; the fact that plaintiff later regains possession of the property does not preclude a conversion action. (*Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 C.A.3d 737, 748, 282 C.R. 620.)

In *Home v. Kramer* (1936) 7 C.2d 361, 60 P.2d 854, a tenant of defendant became bankrupt, and plaintiff trustee in bankruptcy claimed the fixtures that the tenant had installed. Defendant sold the premises and gave the purchaser a bill of sale of the fixtures, but the purchaser knew of the controversy over their ownership and acknowledged that the purpose of the bill of sale was merely to transfer such interest as defendant owner might have. The fixtures remained on the premises. *Held*, there was no conversion by defendant; the possession of the property was not changed, and there was no assertion of a right or title hostile to the claim of plaintiff. (7 C.2d 363.)

Despite occasional broad language in certain cases (see *Gruber v. Pacific States Savings & Loan Co.* (1939) 13 C.2d 144, 149, 88 P.2d 137), a mere claim of ownership or a statement of intention to interfere with the property under an asserted right will not of itself amount to a conversion. Thus, in *Kee v. Becker* (1942) 54 C.A.2d 466, 474, 129 P.2d 159, a purported execution sale under a void judgment did not constitute conversion where the property actually remained in undisturbed physical possession of a sublessee.

In *Aronson v. Bank of America* (1937) 9 C.2d 640, 72 P.2d 548, defendant administrators indorsed stock certificates of decedent, then had them cancelled and new ones issued to themselves. Plaintiff heirs alleged that defendants intended to use the shares for their individual benefit. *Held*, on demurrer, the complaint failed to show actual unwarranted exercise of dominion over plaintiff's property. In the absence of contrary evidence, it was presumed that the administrators were innocent of wrong (this former presumption is now restated as a rule of burden of proof; see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §14) and were holding the certificates for the benefit of the heirs and not adversely to them. (9 C.2d 643.) (Cf. *Aronson v. Bank of America* (1941) 42 C.A.2d 710, 716, 109 P.2d 1001

[subsequent action, allegations that defendant made transfer of shares after entry of decree of distribution; cause of action stated].)

In *Itano v. Colonial Yacht Anchorage* (1968) 267 C.A.2d 84, 72 C.R. 823, defendant operated a boat mooring area for which it paid a certain amount to the city of Los Angeles. Plaintiff docked his commercial fishing boat there, but was continuously delinquent in payment of charges. After many warnings, defendant moved plaintiff's boat to a work area for which defendant paid no rent to the city. The boat sank, and, when raised, many articles were missing. *Held*, judgment for plaintiff reversed. (a) There might have been recovery for negligence, but the parties stipulated that plaintiff would not make that claim. (267 C.A.2d 88.) (b) The landlord-tenant theory of eviction was untenable; plaintiff remained a tenant of the mooring slip, and there was no showing that eviction was the proximate cause of the sinking and loss. (267 C.A.2d 88.) (c) There was no conversion, for defendant did not exercise dominion over the boat. Defendant wanted plaintiff to get it and was willing to have him take it at any time, and moving it from one slip to another with no intent to prevent the owner from taking possession was not a substantial interference with possession. (267 C.A.2d 89.) (d) There was perhaps a trespass--intermeddling with personal property--but plaintiff failed to show that damages were proximately caused by the intermeddling. (267 C.A.2d 90.)

In *Simonian v. Patterson* (1994) 27 C.A.4th 773, 780, 32 C.R.2d 722, defendant moved certain property apparently belonging to his daughter from her old apartment, which she shared with plaintiff, to her new apartment. *Held*, judgment on demurrer for defendant affirmed. The act of moving personal property from one place to another, without asserting ownership or preventing the owner from asserting all rights of ownership, is not enough to constitute a conversion. (27 C.A.4th 780; citing *Itano v. Colonial Yacht Anchorage*.)

West's Key Number Digest, Trover and Conversion k.4 et seq.

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b. Actual Taking Unnecessary.

5 Witkin Sum. Cal. Law Torts § 709

[§ 709] Actual Taking Unnecessary.

There need not be a *manual taking* of the property; any wrongful interference with its possession may be enough. (*Farmers Ins. Exchange v. Zerlin* (1997) 53 C.A.4th 445, 451, 61 C.R.2d 707; see 18 Am.Jur.2d (2004 ed.), *Conversion* §23.)

Thus, in *Gruber v. Pacific States Savings & Loan Co.* (1939) 13 C.2d 144, 88 P.2d 137, plaintiff tenant fell into arrears in rent, and defendant landlord refused to permit him to remove personal property stored there, threatening to sell it to pay the indebtedness. *Held*, the refusal amounted to a conversion; plaintiff "was not required to resort to physical violence to remove his property over the defendant's opposition." (13 C.3d 147.) (See *Price v. Hovsepian* (1952) 114 C.A.2d 385, 387, 250 P.2d 252 [defendant landlord locked plaintiffs out; denial of access to personal property was conversion]; *Igaue v. Howard* (1952) 114 C.A.2d 122, 126, 249 P.2d 558 [defendant lessors, without proper notice to quit, took possession of leased hotel, including lessee's furniture and furnishings, and made new lease]; *Kessinger v. Organic Fertilizers* (1957) 151 C.A.2d 741, 751, 754, 312 P.2d 345 [immaterial that property is in actual possession of third party].)

West's Key Number Digest, Trover and Conversion k.5

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c. Particular Acts.

1. Taking.

5 Witkin Sum. Cal. Law Torts § 710

[§ 710] Taking.

Taking the property from the plaintiff's possession is a conversion. (*Ferraro v. Pacific Finance Corp.* (1970) 8 C.A.3d 339, 348, 87 C.R. 226, *infra*, §1589; see *Union Oil Co. v. Mutual Oil Co.* (1937) 19 C.A.2d 409, 413, 65 P.2d 896 [oil removed by trespasser]; *Bonner v. Santa Ana* (1996) 45 C.A.4th 1465, 1476, 53 C.R.2d 671 [tossing homeless person's property into trash]; *Rest.2d, Torts* §§221, 222, 223(a), 225; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §25.) This is so even though there is consent, if the consent is obtained by fraud. (*Elliott v. Federated Fruit & Vegetable Growers* (1930) 108 C.A. 412, 417, 291 P. 681; see *Wendling Lumber Co. v. Glenwood Lumber Co.* (1908) 153 C. 411, 414, 95 P. 1029 [sale induced by fraud]; *Rest.2d, Torts* §§221, 229; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §27.)

Where only a part of a machine or appliance is taken, and the property is thus rendered unfit for use, an action for conversion is proper. But if it is still fit for use, the recovery will be restricted to damages for the actual loss sustained. The same theory has been applied to fungibles: Taking a part does not justify an action for conversion of the whole. (*Horn v. Klatt* (1944) 65 C.A.2d 510, 516, 151 P.2d 149.)

A collecting bank may be liable to a payee for conversion when it pays on a forged indorsement. (*Cooper v. Union Bank* (1973) 9 C.3d 371, 380, 107 C.R. 1, 507 P.2d 609.)

A sheriff or other officer may be guilty of conversion where he or she levies attachment or execution on property without the authority of process valid on its face. (*Missouri State Life Ins. Co. v. Gillette* (1932) 215 C. 709, 711, 12 P.2d 955; *Brinkley-Douglas Fruit Co. v. Silman* (1917) 33 C.A. 643, 651, 166 P. 371; *Silva v. MacAuley* (1933) 135 C.A. 249, 257, 26 P. 887; see *Rest.2d, Torts* §266; on defense where process appears valid, see *supra*, §161.)

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c. Particular Acts.

2. Destruction, Alteration, or Transfer.

5 Witkin Sum. Cal. Law Torts § 711

[§ 711] Destruction, Alteration, or Transfer.

(1) *Destruction or Alteration*. Intentional destruction or alteration of personal property is a conversion. (*Staley v. McClurken* (1939) 35 C.A.2d 622, 628, 96 P.2d 805; *Bedell v. Mashburn* (1948) 87 C.A.2d 417, 423, 197 P.2d 98; see *Rest.2d, Torts* §226; *Dobbs, The Law of Torts* §65; 1 Harper, James & Gray 3d §2.26; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §§47, 50.)

(2) *Unauthorized Transfer*. An unauthorized sale or other transfer of property is a conversion. (See *Metheny v. Davis* (1930) 107 C.A. 137, 139, 290 P. 91 [sale by chattel mortgagee in possession, without complying with required formalities]; *Meyers v. Lasker* (1930) 110 C.A. 538, 540, 294 P. 80 [unauthorized sale of pledged stock by pledgeholders]; *Meyer v. Thomas* (1936) 18 C.A.2d 299, 302, 63 P.2d 1176 [release of pledged securities by pledgee, otherwise than on collection]; *Horn v. Klatt* (1944) 65 C.A.2d 510, 516, 151 P.2d 149 [sale of part of pledged shares]; *Wade v. Markwell & Co.* (1953) 118 C.A.2d 410, 418, 258 P.2d 497 [pledgee's unauthorized sale of mink coat]; *Reynolds v. Lerman* (1956) 138 C.A.2d 586, 592, 292 P.2d 559 [unauthorized sale of attached property by sheriff's agent]; *Lee v. Merchants Collection Assn.* (1957) 155 C.A.2d 762, 765, 318 P.2d 701 [execution sale under void judgment]; *Cerra v. Blackstone* (1985) 172 C.A.3d 604, 609, 218 C.R. 15 [sale by automobile dealer of repossessed car without required notice]; *Rest.2d, Torts* §§223(e), 233, 234; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §33 et seq.)

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c. Particular Acts.

3. Other Acts.

5 Witkin Sum. Cal. Law Torts § 712

[§ 712] Other Acts.

(1) *Unauthorized Use*. The unauthorized use of personal property by a bailee may give a right of action. (See *Fischer v. Machado* (1996) 50 C.A.4th 1069, 1072, 1074, 58 C.R.2d 213 [commission merchant's failure to turn over funds that he had received for sale of consigned farm goods constituted conversion; fact that this situation was dealt with by federal and state law did not preclude plaintiff from bringing common law action for conversion]; *Burlesci v. Petersen* (1998) 68 C.A.4th 1062, 1066, 80 C.R.2d 704 [because creditor did not have security interest in property he stored solely as favor to debtor rather than pursuant to security agreement, property could be converted by creditor]; *Rest.2d, Torts* §227, 228, 256; on bailee's liability for unauthorized use generally, see 13 *Summary* (10th), *Personal Property*, §164; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §45.)

(2) *Refusal To Return Property on Demand*. Even where possession of property has been lawfully acquired, *wrongful withholding* is actionable. Hence, where the person entitled to possession demands it, the unjustified refusal to give it up is a conversion. (*Edwards v. Jenkins* (1932) 214 C. 713, 720, 7 P.2d 702; *Schroeder v. Auto Driveaway Co.* (1974) 11 C.3d 908, 918, 114 C.R. 622, 523 P.2d 662; *Wolfe v. Willard H. George* (1930) 110 C.A. 532, 535, 294 P. 436; *Atwood v. Southern Calif. Ice Co.* (1923) 63 C.A. 343, 345, 218 P. 283; see *Rest.2d, Torts* 237 et seq.; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §41; on bailee's liability for failure to redeliver generally, see 13 *Summary* (10th), *Personal Property*, §165.)

(3) *Misdelivery*. Delivery of goods by a carrier, warehouseman, or other bailee to the wrong person is a conversion. (*Byer v. Canadian Bank of Commerce* (1937) 8 C.2d 297, 299, 65 P.2d 67; *Fisher v. Pickwick Hotel* (1940) 42 C.A.2d Supp. 823, 825, 108 P.2d 1001; see *Rest.2d*, §§234, 235.)

(4) *Transfer From One Without Title or Right*. Generally, a buyer, pledgee, or other transferee of an interest in property, whose transferor is a thief or other person without right, gets nothing by the transfer. Hence, his or her possession of the true owner's goods under a claim of title or interest is a conversion. (*Culp v. Signal Van & Storage* (1956) 142 C.A.2d Supp. 859, 861, 298 P.2d 162, *infra*, §716; see *Jackins v. Bacon* (1923) 63 C.A. 463, 467, 218 P. 1027 [purchase at void execution sale]; *First Nat. Bank v. Thompson* (1943) 60 C.A.2d 79, 82, 140 P.2d 75 [purchasers from conditional buyer]; *State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 C.A.4th 1076,

1080, 62 C.R.2d 178, citing the text [rightful owner versus one who purchased car from party lacking title and right to sell]; *Rest.2d, Torts* §229; on effect of innocence or lack of knowledge, see *infra*, §715 et seq.)

(5) *False Third-Party Claim*. A person who defeats a levy of execution by a false third-party claim is guilty of conversion. (*Service v. Trombetta* (1963) 212 C.A.2d 313, 316, 28 C.R. 68.)

(6) *Repossession by Unlawful Entry*. In *Henderson v. Security Nat. Bank* (1977) 72 C.A.3d 764, 140 C.R. 388, defendant bank, having financed plaintiff's automobile purchase contract, hired a licensed "repossession" to take the car on defendant's default, and the repossession got it by breaking the lock on plaintiff's garage door. *Held*, defendant was liable for conversion. (72 C.A.3d 770.)

(7) *Improper Disposition of Remains*. A hospital did not exercise the requisite dominion or control over the body of plaintiff's deceased mother where it took steps to turn the body over to plaintiff, this attempt failed, and the hospital then turned the body over to the coroner, which was the proper governmental authority. The hospital did nothing to deprive plaintiff of any property interest she had in her mother's body. (*Spates v. Dameron Hosp. Assn.* (2003) 114 C.A.4th 208, 222, 7 C.R.3d 597.)

SUPPLEMENT: [This section is current through the latest supplement]

(8) *(New) Improper Transfer by Escrow Agent*. An escrow holder converts the property held in escrow by effectuating its transfer where the conditions for closure of escrow have not been met. (*Virtanen v. O'Connell* (2006) 140 C.A.4th 688, 707, 44 C.R.3d 702 [escrow holder converted seller's stock certificates when he completed transaction before conditions of escrow instructions had been satisfied, before parties had reached written agreement on material contract terms, and after he had received seller's notice of rescission and demand for return of certificates].)



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a. Wrongful Intent Unnecessary.

5 Witkin Sum. Cal. Law Torts § 713

[§ 713] Wrongful Intent Unnecessary.

(1) *In General.* The act constituting conversion must be knowing or intentional. However, a wrongful intent is not necessary. "The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which the injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action." (*Poggi v. Scott* (1914) 167 C. 372, 375, 139 P. 815.) (See *Henderson v. Security Nat. Bank* (1977) 72 C.A.3d 764, 771, 140 C.R. 388 [wrongful motive or intent is not required].) "Conversion is a strict liability tort. ... [T]he tort consists in the breach of an absolute duty; the act of conversion itself is tortious." (*Burlesci v. Petersen* (1998) 68 C.A.4th 1062, 1066, 80 C.R.2d 704.)

(2) *Mistake, Good Faith, and Due Care Are Not Defenses.* It follows that mistake, good faith, and due care are ordinarily immaterial, and may not be set up as defenses in an action for conversion. (*Chatterton v. Boone* (1947) 81 C.A.2d 943, 946, 185 P.2d 610; *Shahood v. Cavin* (1957) 154 C.A.2d 745, 751, 316 P.2d 700; *Beverly Finance Co. v. American Cas. Co. of Reading, Pennsylvania* (1969) 273 C.A.2d 259, 264, 78 C.R. 334; see *Poggi v. Scott*, *supra* [ignorance of ownership of wine barrels, and mistaken belief that they were empty]; *Edwards v. Jenkins* (1932) 214 C. 713, 719, 7 P.2d 702 [stockbroker failed to deliver securities to buyer on demand, no defense that he sent them to corporation transfer office to be reissued in name of purchaser]; *Byer v. Canadian Bank of Commerce* (1937) 8 C.2d 297, 299, 65 P.2d 67 [goods mistakenly delivered to wrong person]; *Fisher v. Pickwick Hotel* (1940) 42 C.A.2d Supp. 823, 826, 108 P.2d 1001 [garage keeper delivered car to stranger without requiring presentation of claim check]; *Rest.2d, Torts* §244; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §3.)

(3) *Innocent Converter in More Favorable Position.* However, an innocent converter, though liable, is in a more favorable position than one whose act is wilful. Under the rules of accession and confusion, he or she may in some situations be allowed to retain the property and pay its value (see 13 *Summary* (10th), *Personal Property*, §§121, 122); and, by a prompt return or tender of the property on discovery of the true owner's rights, the innocent converter may mitigate the damages (see *infra*, §1630).

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b. Innocent Agent.

5 *Witkin Sum. Cal. Law Torts* § 714

[§ 714] Innocent Agent.

An innocent agent, who at his or her principal's request sells goods that the principal has converted, is liable to the true owner. (*Swim v. Wilson* (1891) 90 C. 126, 129, 27 P. 33; *Rest.2d, Torts* §233; cf. 45 *Cal L. Rev.* 776 [agents who are "mere conduits" are not liable]; 24 *So. Cal. L. Rev.* 202 [same]; on liability of agent for principal's torts generally, see 3 *Summary* (10th), *Agency and Employment*, §201.) Similarly, an agent who turns over money to the principal, with knowledge of a paramount title, may be guilty of conversion. (*McCafferty v. Gilbank* (1967) 249 *C.A.2d* 569, 576, 57 *C.R.* 695.)

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5 Witkin Sum. Cal. Law Torts § 715

[§ 715] Innocent Bailee or Trustee.

Generally, a *bailee* who receives the bailed property from a thief and, without notice of the true owner's claim, returns it to his bailor is not guilty of conversion; the bailee may comply with his or her bailor's demand. (*Steele v. Marsicano* (1894) 102 C. 666, 669, 36 P. 920; *Rest.2d, Torts* §§230, 235.)

A broker or other agent or bailee that has dealt with a security or other *financial asset* at the direction of its customer or principal, or a securities intermediary that has transferred a financial asset under an effective entitlement order, is not liable to an adverse claimant to the financial asset, unless it (a) took the action after being served with an injunction, restraining order, or other legal process enjoining it from doing so, on which it had a reasonable opportunity to act, (b) acted in collusion with the wrongdoer in violating the adverse claimant's rights, or (c) in the case of a security certificate that has been stolen, acted with notice of the adverse claim. (U.C.C. 8115; on transfer of securities generally, see 9 *Summary* (10th), *Corporations*, §§129 et seq., 132 et seq.)

Giacomelos v. Bank of America (1965) 237 C.A.2d 99, 46 C.R. 612, involved the liability of a *trustee*. Trust property was taken by condemnation. The trustee and probate court thought the law required immediate division of the proceeds between the life-income beneficiary and the remaindermen, and acted accordingly. After reversal on appeal, the trustee invested the money. Plaintiff, life-income beneficiary, sued on a theory of conversion to recover additional income that would have been hers if the money had been invested at the time of condemnation (over 2 years before). *Held*, without determining whether this interest was subject to conversion (see *supra*, §702), the tort was not committed. The trustee's position was similar to that of a bailee when a demand is made by a third party: It is entitled to a reasonable opportunity to determine the claim, and its prompt recourse to the courts negated any theory of conversion. (237 C.A.2d 101.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Innocent Buyer.

5 Witkin Sum. Cal. Law Torts § 716

[§ 716] Innocent Buyer.

An innocent buyer from one without title or right to sell is ordinarily liable for conversion. In *Culp v. Signal Van & Storage* (1956) 142 C.A.2d Supp. 859, 298 P.2d 162, M Co. sold jukeboxes to G on conditional sale. G, in default, wrongfully sold them to S, and S resold them to G on a second conditional sale. When G defaulted on the second contract, S sued to repossess, M Co. intervened, and S denied M's claim. *Held*, S, though without knowledge and in good faith, was guilty of conversion for wrongfully asserting ownership and denying the right of the true owner. (142 C.A.2d Supp. 863.) S's theory of escape from this rule (which the dissenting opinion accepts) was that by its second sale it returned the property to G, the conditional buyer, so that M, the first conditional seller, was in the same position as it was prior to G's original wrongful sale. The court, however, distinguished the situations where an innocent bailee returns goods to his or her bailor or an innocent buyer returns goods to the owner without making any claim for himself or herself. Here, the so-called "return" was not to the owner but to G, and not free of adverse claim but under a new conditional sale by which S claimed the title. (142 C.A.2d Supp. 861.) (On liability of transferee of converted property generally, see *supra*, §712.)

However, a purchaser for value and without notice that his or her vendor's title to the property is *voidable*, such as where the vendor obtained the property by fraud, is not liable for conversion. This rule was stated but found inapplicable in *Oakdale Village Group v. Fong* (1996) 43 C.A.4th 539, 546, 50 C.R.2d 810. Defendant received partnership money, which had been converted when a partner sold a partnership note and, in excess of his authority, used the proceeds to pay off a personal debt to defendant. Plaintiff partnership then sued defendant for conversion of the funds. *Held*, defendant was guilty of conversion.

(a) As a general rule, an innocent purchaser for value and without actual or constructive notice that his or her vendor has secured the goods by a fraudulent purchase is not liable for conversion. However, the result is different where the goods are taken with actual or constructive knowledge of the fraud, even though full value has been paid for the property. (43 C.A.4th 546.)

(b) Defendant satisfied neither requirement of an innocent purchaser. First, instead of a purchase for "value," defendant only promised to release the partner from his debt in return for the converted funds. Defendant was left in the same position that he had been in before, i.e., with a cause of action against the partner. In short, defendant had given up

nothing. (43 C.A.4th 547.) Second, defendant had knowledge that other partners were involved. This knowledge provided defendant with constructive knowledge of facts and circumstances sufficient to put a prudent purchaser on inquiry, and defeated any claim by defendant that he was an innocent purchaser. (43 C.A.4th 549.)

Entrusting possession of goods to a *merchant* who deals in goods of that kind gives the merchant power to transfer all rights of the entruster to a buyer in ordinary course of business. (U.C.C. 2403(2), 4 *Summary* (10th), *Sales*, §137.)

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5 *Witkin Sum. Cal. Law Torts* § 717

[§ 717] Innocent Auctioneer.

In *Jessup v. Cattle Center* (1968) 259 C.A.2d 434, 66 C.R. 361, plaintiffs sold cattle to C, a fraudulent dealer, whose draft was without funds and was not paid. C consigned them to defendant auctioneer. Defendant sold them to a bona fide purchaser and then paid the net proceeds to C. *Held*, plaintiffs were not entitled to recover the loss from defendant auctioneer.

(a) Where an auctioneer sells *stolen* property, the auctioneer is liable to the true owner, notwithstanding his or her good faith and lack of knowledge. (259 C.A.2d 436.)

(b) The situation is different when the auctioneer sells property on behalf of a principal who obtains it from the owner by *fraud*. If the auctioneer has knowledge of the fraud, he or she may be liable to the true owner; if the auctioneer is without knowledge or notice, he or she is not liable. And here, the trial judge found on sufficient evidence that plaintiffs were estopped. Plaintiffs knew that the cattle were consigned to defendant, they transferred physical possession to C, and they knew they were accepting a draft. Plaintiffs were in a position to inquire into defendant's ability to pay before putting him in possession and clothing him with indicia of title. (259 C.A.2d 438.) (See 96 A.L.R.2d 208 [personal liability of auctioneer to owner or mortgagee for conversion].)

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f. Negligent Loss or Destruction.

5 *Witkin Sum. Cal. Law Torts* § 718

[§ 718] Negligent Loss or Destruction.

Because the act itself must be knowingly done, no action for conversion will lie where only a negligent loss or destruction of property is shown. (*Emmert v. United Bank* (1936) 14 C.A.2d 1, 4, 57 P.2d 963; *Rest.2d, Torts* §224, Comment b; see 18 *Am.Jur.2d* (2004 ed.), *Conversion* §22.)

In *George v. Bekins Van & Storage Co.* (1949) 33 C.2d 834, 848, 205 P.2d 1037, the court explained contrary dicta in prior cases, and held that where the trial court found that goods were destroyed as a result of defendant warehouseman's negligence, a further finding that defendant had converted the goods could not be sustained.

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6. Defense of Privilege.

5 Witkin Sum. Cal. Law Torts § 719

[§ 719] Defense of Privilege.

Acts that would otherwise be a tortious interference with possession of personal property may be protected by various privileges. (See generally *Rest.2d, Torts* §259 et seq.; supra, §131 et seq.) Thus:

(1) *Repossession by Person Entitled*. A person entitled to possession, such as an unpaid conditional seller, has a privilege to peacefully repossess the goods. (*Silverstin v. Kohler & Chase* (1919) 181 C. 51, 53, 183 P. 451; see *Rest.2d, Torts* §§183, 272.)

(2) *Landlord's Lien*. An apartment house keeper with a lien on his or her tenant's personal property for unpaid rent may, on court order, take possession of the property peaceably. (C.C. 1861a; see *Rest.2d, Torts* §273; on entry under C.C. 1861a as defense to trespass to land, see supra, §697.)

(3) *Court Order*. A public officer, e.g., a sheriff, may take goods under a writ or other court order valid on its face. (*Rest.2d, Torts* §266; supra, §161.) And a peace officer or game warden may seize property used or obtained in violation of the law. (See *Bruce v. Sibeck* (1938) 25 C.A.2d 691, 696, 78 P.2d 741 [game wardens seized boats and equipment of men arrested for illegal fishing].)

(4) *Self-Defense*. A person "is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other." (*Church of Scientology v. Armstrong* (1991) 232 C.A.3d 1060, 1072, 283 C.R. 917 [quoting *Rest.2d, Torts* §261].) In *Church of Scientology*, defendant, a former member of plaintiff church, was given permission to conduct research for a planned biography of the church founder. During the search he ultimately obtained 500,000 to 600,000 documents. He was forced to take a lie detector test for reporting discrepancies between the information in the documents and representations previously made concerning the founder, and he left the church. Plaintiff then issued a series of "suppressive person declares" labeling defendant as an enemy of the church and subjecting him to the "Fair Game Doctrine"; i.e., he could be tricked, sued, lied to, deprived of property, or otherwise injured by any church member. Plaintiff also confiscated photographs of the founder that defendant had arranged to sell to a third party and ordered him to leave the church property when he objected. Thereafter, defendant received a letter from plaintiff threatening him with a lawsuit, and he became aware of investigators watching his house and following him. Fearing that his life was in danger and that he would be subjected to costly and harassing lawsuits, defendant sent a number of the documents to his

attorney, and plaintiff brought this action for conversion. *Held*, judgment for defendant affirmed. Because he believed that his knowledge about the founder's life and the church's secret financial activities endangered the physical and mental well-being of himself and his wife, defendant was justified in taking the documents as a means of enabling him to support what he had said about the founder and the church and to refute the church's allegations against him. (232 C.A.3d 1073.)

West's Key Number Digest, Trover and Conversion k.22

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C. Trespass to Personal Property.

5 Witkin Sum. Cal. Law Torts § 720

[§ 720] Trespass to Personal Property.

(1) *In General*. Where the act in question does not amount to a dispossession, as in the case of conversion (see *supra*, §699), but of intermeddling with or use of or damage to the property, the normal action will be for trespass. The plaintiff recovers the actual damages suffered by impairment of the property or loss of its use. (*Zaslow v. Kroenert* (1946) 29 C.2d 541, 551, 176 P.2d 1 [defendant cotenant removed plaintiff's personal property to warehouse, notifying him that it could be obtained on request]; see *Rest.2d, Torts* §217 et seq.; 37 U.C. Davis L. Rev. 869 [electronic trespass on restricted websites]; CACI, No. 2101 [trespass to chattels].)

The privilege of self-defense may prevent liability for trespass to personalty. (See *Church of Scientology v. Armstrong* (1991) 232 C.A.3d 1060, 1072, 283 C.R. 917, *supra*, §719; *Rest.2d, Torts* §261.)

(2) *Unauthorized Electronic Communications*. In *Thrifty-Tel v. Bezenek* (1996) 46 C.A.4th 1559, 54 C.R.2d 468, plaintiff, a telephone long-distance carrier, sued defendants, the parents of teenage boys who employed computer technology in their efforts to crack plaintiff's system and make long-distance phone calls without paying. In November, defendants' sons used the family home computer and modem to enter plaintiff's system through a confidential "access" code, which one of them knew, and then conducted manual random searches for a six-digit "authorization" code, which would permit them to make calls. Three months later, in February, the sons again tried to find an authorization code. This time they used computer software to perform rapid-fire random number searches, generating over 1,300 calls in 6 or 7 hours and overburdening plaintiff's system. Plaintiff's complaint included a cause of action for conversion. *Held*, judgment for plaintiffs approved on a trespass to personalty theory.

(a) Traditionally, the tort of conversion has provided a remedy for the loss of *intangible* property interests only if those interests are reflected in something tangible that can be physically taken. Whether the intangible computer access code, which was never reduced to paper or reflected on a computer disk, and the tie-up of plaintiff's system, could be the subjects of conversion presents an issue of first impression in California, and apparently most other jurisdictions as well. However, it is unnecessary to resolve this question because the evidence supports the judgment on a trespass theory. (46 C.A.4th 1565.)

(b) The mislabeling of the cause of action as one for conversion is not fatal. Plaintiff pleaded and proved a claim for trespass to personal property, and the defendants are properly liable under that theory. "Trespass to chattel," although seldom employed as a tort theory in California, lies where an intentional interference with the possession of personal

property has proximately caused injury. Trespass to chattel has evolved considerably from its original common law application--concerning the asportation of another's tangible property--to include the unauthorized *use* of such property. The chief importance of the theory today, according to Prosser, is that there may be recovery for interferences with the possession of personal property that are not sufficiently important to be classed as conversion, i.e., as a "little brother of conversion." (46 C.A.4th 1566.) (On fraud cause of action alleged in complaint, see *infra*, §808; on damages aspect of case, see *infra*, §§1230, 1551.)

In *Intel Corp. v. Hamidi* (2003) 30 C.4th 1342, 1 C.R.3d 32, 71 P.3d 296, plaintiff corporation maintained an electronic mail system, connected to the Internet, through which messages between the employees and those outside the company could be sent and received. On six occasions over almost 2 years, defendant, a former employee of plaintiff, sent e-mail criticizing plaintiff's employment practices to numerous current employees on plaintiff's mail system. Plaintiff sued, claiming that by communicating with its employees over its e-mail system defendant committed the tort of *trespass to chattels*, the claimed injury being the disruption or distraction caused to recipients by the *content* of the e-mail. The trial court granted plaintiff's motion for summary judgment and enjoined defendant from further mailings, and a divided Court of Appeal affirmed. *Held*, reversed.

(a) *Current California tort law.*

(1) The tort of trespass to chattels, dubbed by Prosser the "little brother of conversion," allows recovery for interferences with possession of personal property not sufficiently important to be classified as conversion. Though not amounting to conversion, the defendant's interference, to be actionable, must nevertheless have caused some injury to the chattel or the plaintiff's rights to it. The plaintiff may only recover the actual damage suffered by reason of the impairment, rather than the full value of the chattel, as is the case with conversion. (30 C.4th 1350, citing *Rest.2d, Torts* §218.)

(2) Plaintiff suggested that the requirement of actual harm does not apply here because it sought only injunctive relief. This argument is incorrect, because in order to obtain this relief, the plaintiff must ordinarily show that the defendant's wrongful acts threatened irreparable injuries. In short, it would make little legal sense to issue an injunction and not require injury in an action where injury is an element of the offense. (30 C.4th 1352.)

(3) The undisputed evidence revealed no actual or threatened harm to plaintiff's computer hardware or software and no interference with its ordinary and intended operation. Moreover, plaintiff was not dispossessed of its computers or prevented from using them for any length of time. And there was no indication that plaintiff's computer system was slowed by the burden of delivering defendant's messages or that transmission of the messages imposed any cost on the operation of plaintiff's computers. Relying on a line of decisions applying the tort of trespass to chattels to various types of unwanted contact between computers, plaintiff contended that, while its computers were not damaged, its interest in their " 'physical condition, quality or value' " was harmed. (30 C.4th 1353, quoting *Rest.2d, Torts* §218, Comment e.) "We disagree. The cited line of decisions does not persuade us that the mere sending of electronic communications that assertedly cause injury only because of their contents constitutes an actionable trespass to a computer system through which the messages are transmitted. Rather, the decisions finding electronic contact to be a trespass to computer systems have generally involved some actual or threatened interference with the computers' functioning." (30 C.4th 1353, citing *Thrifty-Tel v. Bezenek*, *supra*, and numerous federal decisions.) That defendant's messages temporarily used some portion of plaintiff's computers' processors or storage is not enough; plaintiff must, but did not, demonstrate some measurable loss from the use of its computer system. (30 C.4th 1357.)

(b) *Rejection of proposed extension of California tort law.* California tort law should not be extended to cover, as a trespass to chattels, an otherwise harmless electronic communication with objectionable content. The Legislature has already adopted detailed regulations governing commercial e-mail. "It may see fit in the future also to regulate noncommercial e-mail ... or other kinds of unwanted contact between computers on the Internet. ... But we are not persuaded that these perceived problems call at present for judicial creation of a rigid property rule of computer server inviolability. We therefore decline to create an exception ... to the general rule that a trespass to chattels is not

actionable if it does not involve actual or threatened injury to the personal property or to the possessor's legally protected interest in the personal property." (30 C.4th 1364.)

(c) *Constitutional considerations.* The injunction here was issued by a *state* court and thus implicated First Amendment rights. Moreover, the nonexistence of a constitutional right to trespass does make the injunction in this case valid, because defendant no more invaded plaintiff's property than does a protester holding a sign or shouting through a bullhorn outside corporate headquarters. Nor does the constitutional right not to listen compel a remedy against defendant's messages. There was no evidence that defendant sent the messages to any employee who notified him that the messages were unwelcome. In any event, even if there was such evidence, it would support only a narrow injunction aimed at protecting individual recipients who gave notice of their rejection. (30 C.4th 1364.) (See 40 Cal. Western L. Rev. 355 [*Intel Corp. v. Hamidi*]; 40 *San Diego L. Rev.* 461 [incursions through Internet and trespass to chattels]; 76 *So. Cal. L. Rev.* 893 [liability of Internet advertisers using cookie technology on trespass to chattels grounds]; 107 *A.L.R.5th* 549 [applicability of common law trespass actions to electronic communications].)

West's Key Number Digest, Trespass k.1, 6 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Unauthorized Electronic Communications.* See 78 *So. Cal. L. Rev.* 363 [spam (unsolicited bulk e-mail) as within common law doctrine of trespass to personalty].



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D. Infringement of Trademark, Trade Name, or Trade Secret.

5 Witkin Sum. Cal. Law Torts § 721

[§ 721] Infringement of Trademark, Trade Name, or Trade Secret.

Trademarks and trade names are personal property (see 13 *Summary* (10th), *Personal Property*, §81 et seq.), and their wrongful imitation is a tort, for which damages are recoverable. (See *Rest.3d, Unfair Competition* §9 et seq.; Dobbs, *The Law of Torts* §457; C.E.B., *Attorney's Guide to Damages* 2d, §6.28 et seq.; 61 *Harv. L. Rev.* 184; 68 *Harv. L. Rev.* 864; 21 *Pepperdine L. Rev.* 165 [commercial parodies as constituting copyright or trademark infringement]; 74 *Am.Jur.2d* (2001 ed.), *Trademarks and Tradenames* §132 et seq.; 17 *Proof of Facts* 3d 609 [recovery for trademark infringement]; 5 *Cal. Proc.* (4th), *Pleading*, §733.) The principal remedy, however, is an injunction against wrongful use, and the tort is therefore discussed in detail in another chapter. (See 13 *Summary* (10th), *Equity*, §78 et seq.)

A *trade secret* is not a property right, but is protected from unwarranted disclosure in breach of duty. (See Dobbs, *The Law of Torts* §459; 13 *Summary* (10th), *Equity*, §81; C.E.B., *Attorney's Guide to Damages* 2d, §6.34 et seq.) Although the remedy of damages is available, the important remedy is injunctive relief. (See 13 *Summary* (10th), *Equity*, §83; 5 *Cal. Proc.* (4th), *Pleading*, §734.) This tort is likewise treated in detail elsewhere. (See 13 *Summary* (10th), *Equity*, §81 et seq.)

West's Key Number Digest, Torts k.10(5); Trade Regulation k.1, 331 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

Trade marks and trade names:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §777.

Trade secret:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §778.



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E. Literary Infringement or Plagiarism.

5 Witkin Sum. Cal. Law Torts § 722

[§ 722] Literary Infringement or Plagiarism.

There is a protectable interest in literary property under the federal and state copyright statutes. (See 17 U.S.C., §101 et seq.; C.C. 980 et seq.; 18 Am.Jur.2d (2004 ed.), *Copyright and Literary Property* §1 et seq.) The federal Copyright Act preempts state laws creating equivalent rights in works in a tangible medium of expression. (17 U.S.C., §301; see 18 Am.Jur.2d (2004 ed.), *Copyright and Literary Property* §5 et seq.) Unlawful copying is a tort, commonly called plagiarism. (See Dobbs, *The Law of Torts* §461; C.E.B., *Attorney's Guide to Damages* 2d, §6.15 et seq.; 76 Cal. L. Rev. 421 [An Improved Framework for Music Plagiarism Litigation]; 80 Cal. L. Rev. 513 [Copy Wrong: Plagiarism, Process, Property, and the Law]; 80 Cal. L. Rev. 1413 [A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading]; 76 Harv. L. Rev. 1685 [imitation of actor's distinctive comic delivery]; 101 Harv. L. Rev. 1661 [Reconstructing the Fair Use Doctrine]; 45 Hastings L. J. 359 [digital sound sampling in popular music]; 21 Pepperdine L. Rev. 165 [commercial parodies as constituting copyright infringement]; 33 So. Cal. L. Rev. 190 [civil remedies for unauthorized duplication of phonograph records]; 33 So. Cal. L. Rev. 233 [intent and related problems]; 35 So. Cal. L. Rev. 225 [Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary]; 40 A.L.R.3d 249 [punitive damages for invasion of common law rights in literary property]; 20 Proof of Facts 727 [plagiarism in narrative fiction]; 5 Cal. Proc. (4th), *Pleading*, §§665, 666.)

Damages are recoverable in accordance with the usual rules applicable to taking of personal property. (*Golding v. R.K.O. Pictures* (1950) 35 C.2d 690, 696, 221 P.2d 95; *Kovacs v. Mutual Broadcasting System* (1950) 99 C.A.2d 56, 221 P.2d 108; see 61 Harv. L. Rev. 182 [recovery under federal statute]; on measure of damages for conversion, see *infra*, §1722.) In the *Golding* case, the court discussed the three elements of recovery: (1) ownership of a protectable property interest; (2) unauthorized copying of the material by the defendant; (3) damage. Where the protectable property interest--an original product of the writer's mind--is shown, the important issue is whether the defendant has copied it. Direct evidence is seldom available, but circumstantial evidence--proof of access to the original and similarity of the copy--is sufficient. (35 C.2d 696; see *Burtis v. Universal Pictures Co.* (1953) 40 C.2d 823, 833, 256 P.2d 933 [judgment for damages reversed; no substantial evidence of similarity]; 38 Cal. L. Rev. 332; 64 Harv. L. Rev. 1125.)

The tort is discussed in detail in another chapter. (See 13 *Summary* (10th), *Personal Property*, §46 et seq.)

West's Key Number Digest, Copyrights and Intellectual Property k.1, 2, 51 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 105 Am.Jur. Trials 1 [employer liability for employee misuse of Internet].

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §§707, 708.



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5 Witkin Sum. Cal. Law Torts § 723

[§ 723] Types of Actions.

The common law created a number of torts based on interference with the relations of *husband and wife* and *parent and child* that were recognized in California until legislation in 1939 eliminated most of them. (See Stats. 1939, Chap. 128, §§1, 2, 5 [adding C.C. 43.5 and amending C.C. 49]; *Thome v. Macken* (1943) 58 C.A.2d 76, 77, 136 P.2d 116 [trial court properly declined jurisdiction over alienation of affections action arising in another state; C.C. 43.5 constitutes declaration of public policy]; 28 Cal. L. Rev. 442.) This legislation adopts the policy that the law will not try to repair damaged relationships. (See *Shin v. Kong* (2000) 80 C.A.4th 498, 509, 95 C.R.2d 304 [tort action against defendant doctor as true biological father, based on defendant's artificial insemination of plaintiff's wife without his consent, was barred by policy underlying C.C. 43.5]; *Askew v. Askew* (1994) 22 C.A.4th 942, 954, footnote 20, 28 C.R.2d 284, *infra*, §785 [provisions abolishing common law torts of seduction, breach of promise to marry, criminal conversation, and alienation of affections are sometimes referred to as "anti-heartbalm" legislation].) The following are the abolished actions:

- (1) Abduction of husband or wife or parent. (Former C.C. 49.)
- (2) Enticement of husband or wife. (Former C.C. 49; see *Humphrey v. Pope* (1898) 122 C. 253, 257, 54 P. 847 [wife's action for enticement of husband]; *Rest.2d, Torts* §684.)
- (3) Criminal conversation with a wife (sexual intercourse with an outsider); i.e., adultery as a tort. (Former C.C. 49; see C.C. 43.5(b) [abolishing action]; *Bedan v. Turney* (1893) 99 C. 649, 653, 34 P. 442 [mere fact of intercourse is all that is required; use of force only relevant to damages]; *Barlow v. Barnes* (1916) 172 C. 98, 100, 155 P. 457 [action is distinct from alienation of affections]; *Hirschy v. Coodley* (1953) 116 C.A.2d 102, 103, 253 P.2d 93 [action no longer lies]; *Rest.2d, Torts* §685.)
- (4) Alienation of affections of husband or wife. (See C.C. 43.5(a) [abolishing action]; *Rogers v. Haines* (1930) 104 C.A. 191, 195, 285 P. 412 [malice not an element]; *Jefferson v. Kenoss* (1940) 38 C.A.2d 496, 501, 101 P.2d 711 [action against father for inducing son to separate from wife]; *Rest.2d, Torts* §683.)
- (5) Enticement of parent (alienation of affections of father or mother). In *Rudley v. Tobias* (1948) 84 C.A.2d 454, 190 P.2d 984, the complaint on behalf of plaintiff child alleged that defendant, a woman, induced the father to leave the

household, thus depriving plaintiff of his care, society, and guidance. *Held*, the legislative intent in eliminating the cause of action for *abduction* of a parent was broad enough to preclude the substantially similar action for enticement. (84 C.A.2d 457.) (See 39 Cal. L. Rev. 294, 300; 59 Harv. L. Rev. 297 [on federal case reaching contrary result]; 19 So. Cal. L. Rev. 455 [same]; 5 Hastings L. J. 251; 12 A.L.R.2d 1178 [right of child or parent to recover for alienation of other's affections].)

(6) Breach of promise of marriage. (See C.C. 43.5(d) [abolishing action]; *Harned v. Watson* (1941) 17 C.2d 396, 399, 110 P.2d 431 [punitive damages might be recoverable]; *Syfert v. Solomon* (1928) 95 C.A. 228, 231, 272 P. 810 [same]; *Boyd v. Boyd* (1964) 228 C.A.2d 374, 376, 39 C.R. 400 [cause of action abolished].) The constitutionality of the abolition of the action was sustained in *Langdon v. Sayre* (1946) 74 C.A.2d 41, 44, 168 P.2d 57, and *Ikuta v. Ikuta* (1950) 97 C.A.2d 787, 789, 218 P.2d 854.

(7) Seduction of woman over age of legal consent. (Former C.C. 49(3) ["wife, daughter, orphan sister, or servant"]; see C.C. 43.5(c) [abolishing action for seduction of *person* over age of legal consent].)

(8) Seduction of woman *under age of legal consent*. Although C.C. 49(b) still forbids the seduction of a person under the age of legal consent, the repeal of former C.C.P. 374 and 375 in 1967 abolished the action. The only sanction is the felony-misdemeanor of "unlawful sexual intercourse" with a person under 18 years of age. (P.C. 261.5 [providing both criminal punishment and civil penalties]; see 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §20 et seq.)

West's Key Number Digest, Parent and Child k.7, 18

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

Witkin Summary of California Law
VI. INTERFERENCE WITH DOMESTIC RELATIONS

A. Abolished Actions.

2. Distinction: Professional Negligence.

5 Witkin Sum. Cal. Law Torts § 724

[§ 724] Distinction: Professional Negligence.

In *Richard H. v. Larry D.* (1988) 198 C.A.3d 591, 243 C.R. 807, plaintiff and his wife were patients of defendant for purposes of marital counseling, and the complaint alleged that defendant had surreptitious sexual relations with the wife during the period in which he was acting as their psychiatrist. The trial judge rendered judgment for defendant on demurrer on the ground that the action was barred by C.C. 43.5. *Held*, reversed.

(a) "Section 43.5 was enacted to eliminate a class of lawsuits which were often fruitful sources of fraud and extortion and easy methods 'to embarrass, harass, and besmirch the reputation of one wholly innocent of wrongdoing.' ... A review of the decisional law, however, reveals that section 43.5 does not create a blanket immunization from liability for conduct which, although technically within the constraints of section 43.5, breaches a duty of care independent of the causes of action barred therein." (198 C.A.3d 595, quoting *Ikuta v. Ikuta* (1950) 97 C.A.2d 787, 218 P.2d 854.) Thus, a physician who engages in sexual relations with a patient may be liable for professional negligence if his conduct constitutes a breach of his or her duty of care. (198 C.A.3d 595.)

(b) As a psychiatrist rendering marriage counseling, defendant owed plaintiff a special duty to use due care for his health in the conduct of the therapist-patient relationship. "It is readily foreseeable that a patient seeing a psychiatrist for purposes of stabilizing and improving his or her marriage would feel betrayed and suffer emotional distress upon learning that the psychiatrist has, during the course of the patient's treatment, been engaging in sexual relations with the patient's spouse." (198 C.A.3d 596.)

Smith v. Pust (1993) 19 C.A.4th 263, 23 C.R.2d 364, applied the reasoning of *Richard H. v. Larry D.*, but reached the opposite result. Plaintiff's wife had a brief sexual encounter with defendant therapist that destroyed the marriage, and plaintiff sued him for negligence. *Held*, summary judgment for defendant affirmed.

(a) Although couched in terms of negligence, the substance of plaintiff's action is plainly alienation of affection and criminal conversation. In other words, looking at the nub of plaintiff's action, he is suing on long-dead causes of action. (19 C.A.4th 268.)

(b) *Richard H. v. Larry D.* established that conduct that constitutes alienation of affection or criminal conversation is not immune from tort liability if it breaches a duty of care independent of those old causes of action. (19 C.A.4th

269.) However, subsequent cases have established two requirements for such an independent duty of care: (1) a genuine professional relationship must exist between the plaintiff and the defendant, and (2) the wrongful conduct must have a meaningful connection to the purpose of that professional relationship. (19 C.A.4th 270, citing *Marlene F. v. Affiliated Psychiatric Med. Clinic* (1989) 48 C.3d 583, 257 C.R. 98, 770 P.2d 278, infra, §1024, *Atienza v. Taub* (1987) 194 C.A.3d 388, 239 C.R. 454, infra, §973, *Schwarz v. Regents of Univ. of Calif.* (1990) 226 C.A.3d 149, 276 C.R. 470, infra, §1035, and *McDaniel v. Gile* (1991) 230 C.A.3d 363, 281 C.R. 242, supra, §461.)

(c) Here, plaintiff fails to meet either requirement.

(1) Despite plaintiff's presence at two therapy sessions, and his own subjective belief that he was defendant's patient "when in counsel" with defendant, it is clear from his own deposition testimony that he was not defendant's patient. Also, there is no evidence that plaintiff ever filled out a patient questionnaire, and it is undisputed that he did not sign a contract with defendant. In fact, plaintiff even left one of the sessions 15 minutes early, underscoring the purpose of the therapy to help his wife and not himself. (19 C.A.4th 272.)

(2) The "intent and purpose" of defendant's initial engagement was to help plaintiff's wife deal with her individual problems with "repressed memories" and childhood sexual abuse, as distinct from the couple's relationship per se. Any advice that plaintiff may have received from defendant appears to be strictly incidental to the purpose of dealing with his wife's own problems. (19 C.A.4th 272.)

(d) Thus, defendant had no more duty to plaintiff than any other person not to cause plaintiff emotional distress by having sex with his wife. In other words, no "independent duty" existed to rescue this case from its essential nature as a suit for alienation of affection and criminal conversation. (19 C.A.4th 273.)

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CHAPTER IX - Torts

Witkin Summary of California Law VI. INTERFERENCE WITH DOMESTIC RELATIONS B. Personal Injury to Spouse.

5 Witkin Sum. Cal. Law Torts § 725

[§ 725] Personal Injury to Spouse.

(1) *Injuries to Wife*. An injury to the wife gives rise to two causes of action in the husband based on *separate torts* against his marital interests. (a) He may recover "consequential damages" for the value of the wife's domestic services and the expense of medical care. (*Sanderson v. Niemann* (1941) 17 C.2d 563, 567, 110 P.2d 1025; *Edminster v. Thorp* (1951) 101 C.A.2d 756, 759, 226 P.2d 373.) (b) He may recover for loss of consortium, i.e., conjugal fellowship and sexual relations. (See *infra*, §1679; BAJI, No. 14.40; CACI, Nos. 3903E, 3920; 4 Cal. Proc. (4th), *Pleading*, §135.)

The wife may sue for personal injuries without her husband being joined as a party. (See C.C.P. 370 [married person "may sue without his or her spouse being joined as a party in all actions"]; *Sanderson v. Niemann, supra*; 4 Cal. Proc. (4th), *Pleading*, §135.) Both causes (i.e., those of husband and wife) may be joined and sued on in one action. (*Fassett v. Nascimiento* (1930) 108 C.A. 14, 17, 291 P. 269; *Martin v. Southern Pac. Co.* (1900) 130 C. 285, 286, 62 P. 515; *Robbins v. Roques* (1932) 128 C.A. 1, 6, 16 P.2d 695.)

As to the cause of action for her general damages, the wife is the necessary party; though the husband may join with her to recover on both causes in one suit, he cannot sue alone to recover for her physical and emotional suffering. (*Redwing v. Moncravie* (1933) 131 C.A. 569, 572, 21 P.2d 986; see 4 Cal. Proc. (4th), *Pleading*, §§134, 135.) In *Wetzstein v. Thomasson* (1939) 34 C.A.2d 554, 561, 93 P.2d 1028, it was held that because the husband cannot sue alone for damages, he cannot give a release of liability for them.

(2) *Injuries to Husband*. A husband may sue for personal injuries without his wife being joined as a party. (See C.C.P. 370.) Because the husband recovers for the loss of earning power (see *infra*, §1667), his wife does not suffer any loss of support. However, she does have a cause of action for loss of consortium. (See *infra*, §1679.)

West's Key Number Digest, Husband and Wife k.209(2), 209(3), 209(4)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Injuries to Wife*.

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §153.



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Witkin Summary of California Law VI. INTERFERENCE WITH DOMESTIC RELATIONS C. Personal Injury to Minor Child. 1. Action by Parents.

5 Witkin Sum. Cal. Law Torts § 726

[§ 726] Action by Parents.

(1) *Former California Law and General Law.* Under early law, the parent (usually the father) entitled to the services of a minor unmarried child had a cause of action for injuries to the child. He could recover the value of the child's services during the period of minority, and the expenses of medical care. (See *Durkee v. Central Pac. R. Co.* (1880) 56 C. 388, 392; *Edgar v. Citraro* (1931) 112 C.A. 183, 186, 297 P. 653; *Finnerty v. Cummings* (1933) 132 C.A. 48, 50, 22 P.2d 37; *Bauman v. San Francisco* (1940) 42 C.A.2d 144, 160, 108 P.2d 989.)

This is the common law rule. (*Rest.2d, Torts* §703; *Dobbs, The Law of Torts* §443; 2 Harper, James & Gray 2d §8.8; see 6 *So. Cal. L. Rev.* 170; 36 *U.S.F. L. Rev.* 535 [waiver by parents of children's tort liability claims]; 32 *A.L.R.2d* 1060 [what items of damages for child's personal injury belong to child and what to parent]; 54 *A.L.R.4th* 93 [sexual child abuser's civil liability to child's parent].)

(2) *Revision of C.C.P. 376.* C.C.P. 376, formerly authorizing the action in general terms, was recast in 1949 and 1975 to set forth the following substantive rights and procedural requirements:

(a) *Legitimate child.* Both parents of a legitimate unmarried minor child may bring the action jointly, and if either fails to do so on demand or is dead or cannot be found, the other may sue and must join the coparent, if living, as a defendant. (C.C.P. 376(a).)

(b) *Illegitimate child.* Either parent of an illegitimate unmarried minor child may bring the action if a guardian has not been appointed, and the other may be joined as a party. (C.C.P. 376(b), (d).) If the action is brought by the parent not having custody, the other must be served with summons. (C.C.P. 376(b).) If the action is brought by the father, he must, prior to the child's injury, either have acknowledged in writing before a competent witness that he is the father or have been judicially determined to be the father. (C.C.P. 376(c).)

(c) *Parents' rights to award.* The respective rights of the parents in the award "shall be determined by the court." (C.C.P. 376(a), (b).)

(d) *Action by guardian.* A guardian may maintain the action for a ward. (C.C.P. 376(e).)

(e) *Measure of damages.* Damages may be awarded "as under all of the circumstances of the case may be just,"

subject to certain restrictions after the death of the child. (*C.C.P.* 376(*g*); see BAJI, No. 14.32.)

West's Key Number Digest, Parent and Child k.7(4)

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(1) *Former California Law and General Law*. See 2 Harper, James & Gray 3d §8.8.



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C. Personal Injury to Minor Child.
2. Action by Child.

5 Witkin Sum. Cal. Law Torts § 727

[§ 727] Action by Child.

The child himself or herself, unless emancipated, has a cause of action only for "general damages" for physical and mental suffering, and for future loss of earning power *after majority*. (See *Rest.2d, Torts* §703, Comment h.) However, it has been held that, where the parent sues as guardian ad litem of the child, recovery may be had for loss of earnings or services and medical expenses, on the theory that the parent is thus giving the right to the child. (*Bauman v. San Francisco* (1940) 42 C.A.2d 144, 161, 108 P.2d 989; *McManus v. Arnold Taxi Corp.* (1927) 82 C.A. 215, 223, 255 P. 755; *Girard v. Irvine* (1929) 97 C.A. 377, 386, 275 P. 840; see 36 U.S.F. L. Rev. 535 [waiver by parents of children's tort liability claims]; BAJI, Nos. 14.30, 14.31.)

The distinction between the rights of action of the parent and those of the child was emphasized in *Harper v. Vallejo Housing Authority* (1951) 104 C.A.2d 621, 232 P.2d 262. Plaintiff child was injured by a negligent automobile driver while playing in the recreation area of a housing project. The tenant (his parent) had by lease provision agreed to relieve the landlord from liability for injury "to the tenant or the members of his household." The court held that this purported to release only liability to the *parents*. "We may assume here that it would bar them from recovering damages accruing to themselves, as for medical, surgical and hospital expenses in caring for their injured child. But this is a suit by the child through her guardian *ad litem* for injuries suffered to herself from the accident. The parents did not by the release attempt to contract away the child's rights. It is unnecessary to discuss the question of whether or not they could lawfully have done so." (104 C.A.2d 626.)

West's Key Number Digest, Infants k.72(2)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Personal Injury to Minor Child.
3. Injury to Unborn Child.

5 *Witkin Sum. Cal. Law Torts* § 728

[§ 728] Injury to Unborn Child.

Considerable dispute developed over the question whether a right of action exists for injuries received by a child prior to its birth. The usual cases involve (1) negligence of a physician who, in treating the mother or delivering the child, injures the latter, or (2) automobile accidents causing injuries to a pregnant woman. The early view that no duty was owed to the unborn child has given way to the modern recognition of the duty and right of action. (*Rest.2d, Torts* §869; Dobbs, *The Law of Torts* §288; 3 Harper, James & Gray 2d §18.3; 63 *Harv. L. Rev.* 173; 3 *Hastings L. J.* 76; 13 *Pacific L. J.* 147; 20 *So. Cal. L. Rev.* 231; 40 *A.L.R.3d* 1222 [liability for prenatal injuries]; 62A *Am.Jur.2d* (2005 ed.), *Prenatal Injuries; Wrongful Life, Birth, or Conception* §4 et seq.; on preconception torts, see Dobbs, *The Law of Torts* §290; 3 Harper, James & Gray 2d §18.3; 91 *A.L.R.3d* 316 [liability for preconception torts]; on whether child may sue mother for infliction of prenatal injuries, see 103 *Harv. L. Rev.* 823; 78 *A.L.R.4th* 1082.) The right of action exists even where the child is not viable, although in such a case, it will be more difficult to prove a causal connection between the wrongful act and the harm suffered. (*Rest.2d, Torts* §869, Comment d.)

Scott v. McPheeters (1939) 33 *C.A.2d* 629, 92 *P.2d* 678, held that an action would lie on behalf of a child of 11 years for injuries suffered before birth, from the alleged negligence of defendant physician. The court found some support in C.C. 29, providing that an unborn child "is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth." (33 *C.A.2d* 637.) (See 28 *Cal. L. Rev.* 107 [Scott].) (For denial of recovery for *wrongful death* of unborn child, see *infra*, §1382.)

C.C. 29 was subsequently amended to place a 6-year statute of limitations on the right to sue, running from the time of birth. This provision merely creates a limitation, not a condition on the right; hence, the period may be tolled by the usual factors. (See *Myers v. Stevenson* (1954) 125 *C.A.2d* 399, 402, 270 *P.2d* 885 [malpractice; statute begins to run from date plaintiff, with reasonable diligence, should have discovered wrongful act]; *Segura v. Brundage* (1979) 91 *C.A.3d* 19, 27, 153 *C.R.* 777 [same]; *Call v. Kezirian* (1982) 135 *C.A.3d* 189, 195, 198, 185 *C.R.* 103 [same].)

C.C. 29 was later replaced by C.C. 43.1 and C.C.P. 340.4 without substantive change.

West's Key Number Digest, Torts k.9

SUPPLEMENT: [This section is current through the latest supplement]

See 3 Harper, James & Gray 3d §18.3; 62A *Am.Jur.2d* (2005 ed.), *Prenatal Injuries; Wrongful Life, Birth, or Conception* §4 et seq.



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CHAPTER IX - Torts

Witkin Summary of California Law VI. INTERFERENCE WITH DOMESTIC RELATIONS D. Abduction of Child.

5 Witkin Sum. Cal. Law Torts § 729

[§ 729] Abduction of Child.

(1) *In General.* C.C. 49(a) recognizes an action for "[t]he abduction or enticement of a child from a parent, or from a guardian entitled to its custody." (See *Robbins v. Hamburger Home for Girls* (1995) 32 C.A.4th 671, 680, 38 C.R.2d 534, supra, §143 [girls' shelter and counselor did not violate C.C. 49 by allowing 15-year-old girl to stay at shelter voluntarily and refusing to disclose her whereabouts to her parents while authorities investigated claimed child abuse]; *Rest.2d, Torts* §700; 49 A.L.R.4th 7 [liability of legal or natural parent or one who aids and abets abduction of child].)

In *Surina v. Lucey* (1985) 168 C.A.3d 539, 214 C.R. 509, the court discussed various issues of liability and damages in an abduction suit. Plaintiffs, parents of a 16-year-old girl, alleged that defendant, her maternal uncle, enticed her from their home and engaged in sexual relations with her for 7 months. *Held*, a cause of action was stated.

(a) A third person may not interfere with the parents' right of custody, even if motivated by kindness or affection toward the child. The consent of the child is no defense, and the child need not be joined in the action. (168 C.A.3d 543.)

(b) *Borer v. American Airlines* (1977) 19 C.3d 441, 138 C.R. 302, 563 P.2d 858, infra, §1683, denying a right of action for *negligent* loss of parent-child consortium, emphasized the nonstatutory basis for the action for loss of consortium, and further emphasized the distinction between a negligent and *intentional* wrong--here the intentional interference with parental consortium. (168 C.A.3d 544.)

(c) The right of action may be based not only on the loss of services but also the parent's right to care, custody, and companionship of the child. Damages may be recovered for the emotional distress resulting from loss of the child, and for the expense incurred in vindicating the parent's rights; also, where malice is shown, punitive damages may be awarded. (168 C.A.3d 544.)

(d) Defendant contended that, because there is no longer a cause of action for seduction of a minor female child (see supra, §723), the allegation of sexual relations adds nothing to the complaint and should be stricken. This reasoning is unsound. The allegation serves to support the claim of emotional distress. (168 C.A.3d 545.)

(2) *Abduction by Parent.* The *crime* of child-stealing (see P.C. 278) is against the *parent*, not the child, and one parent, unless deprived of any right to custody by court order, cannot be held criminally liable for taking the child from

the actual custody of the other parent. (*Wilborn v. Superior Court* (1959) 51 C.2d 828, 830, 337 P.2d 65, 1 Cal. Crim. Law (3d), *Crimes Against the Person*, §285.) However, *Rosefield v. Rosefield* (1963) 221 C.A.2d 431, 34 C.R. 479, suggests that such a parent may be liable in tort.

The *Rosefield* case involved the liability of one assisting the taking parent, but the opinion suggests that the parent may be liable as well. The complaint alleged that plaintiff mother and defendant father had a young daughter; that they separated shortly after her birth, leaving her with the mother; that defendant father and defendant grandfather (the father's father) abducted and secreted the child; and that the mother expended a stated amount in efforts to locate her and anticipated further expense. Three causes of action were stated: (a) By the mother, for direct participation in the acts alleged; (b) by the mother, for conspiracy; (c) by a guardian ad litem on behalf of the child. The father was never served, and the grandfather was given judgment of dismissal after demurrer was sustained. *Held*, reversed.

(a) *First count: direct participation by grandfather.* The *Wilborn* case, *supra*, held the parent's assistant criminally liable on the ground that the immunity of the parent was personal and nondelegable. (See 1 Cal. Crim. Law (3d), *Crimes Against the Person*, §286.) This case, as well as C.C. 49(a), supports an action against the grandfather, even though the father might have had a right to take the child. "The actions of the third party, as alleged, did not simply help the father to gain custody of the child, as from a stranger, but effectively deprived the mother of a right, elemental and of value inestimable, which she, too, had." (221 C.A.2d 433.)

(b) *Second count: conspiracy.* Defendant grandfather contended that, because conspiracy is only actionable if the object is a wrong (see *supra*, §46), and the object of the father in taking the child was not wrongful, no action could lie against a third person for conspiring with the father. Under the facts, however, *the father's taking is a legal wrong*. "If ... one parent makes away with the offspring, removes it effectually from judicial control, conceals it, and leaves the other parent utterly bereft of the means of enjoying any of the privileges of parenthood, it is folly to say that the decamping parent is merely exercising his 'equal right' to the custody of the child. There is no equality about it." (221 C.A.2d 435.) Although no precedent can be found for this holding, new torts can be developed. (221 C.A.2d 435, citing the text.) Also, there is statutory support in the broad declaration of C.C. 1708, that every person must abstain from infringing on the rights of another. "One of the highest rights has been infringed upon according to the pleading in this case." (221 C.A.2d 435.) Contrary authorities, including *Rest.2d, Torts* §700, Comment (c), may be dismissed as resting on the now repudiated interspousal immunity. (221 C.A.2d 436; on abrogation of interspousal immunity, see *supra*, §27.)

(c) *Third count: child's action against grandfather.* C.C. 49(a), which gives a remedy to the parent, furnishes no support for this count; but the maxim may be invoked that for every wrong there is a remedy (see C.C. 3523, 3 Cal. Proc. (4th), *Actions*, §5). (221 C.A.2d 437.) "The child is entitled to the society and care, and protection and affection of her mother. The acts of respondent as alleged have deprived her of these rights. If respondent had taken the child and placed her with strangers, we think it clear that a right of the child had been taken away. The fact that the father participated does not change matters so far as the child's rights are concerned, though it may bear on damage." (221 C.A.2d 436.)

West's Key Number Digest, Parent and Child k.7, 18

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Abduction by Parent.* *Cross-Reference:* 3 Cal. Proc. (5th), *Actions*, §5.



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VII. INTERFERENCE WITH BUSINESS RELATIONS

A. Inducing Breach of Contract.

1. In General.

a. Development of Tort.

5 Witkin Sum. Cal. Law Torts § 730

[§ 730] Development of Tort.

In the celebrated case of *Lumley v. Gye* (1853) 118 Eng.Rep.R. 749, an opera singer had agreed to sing exclusively for plaintiff, and defendant, with knowledge of the contract, persuaded her to refuse to perform. The court held that an action would lie for wilfully inducing the breach of contract. The doctrine of this case has been gradually extended to apply to inducing breach of any type of contract, and even to inducing refusal to do business where no contract relations exist. (See *Rest.2d, Torts* §766 et seq.; C.E.B., 2 California Business Litigation, §11.4 et seq.; Dobbs, *The Law of Torts* §452; 2 Harper, James & Gray 2d §6.5; 61 *Harv. L. Rev.* 897; 77 *Harv. L. Rev.* 959; 93 *Harv. L. Rev.* 1510 [Tortious Interference With Contractual Relations in the Nineteenth Century]; 48 *Hastings L. J.* 981 [hiring competitors' employees]; 18 *Stanf. L. Rev.* 1406; 4 *U.C.L.A. L. Rev.* 304 [wrongful threat of civil action as basis of recovery]; 45 *Am.Jur.2d* (1999 ed.), *Interference* §37 et seq.; 26 *A.L.R.2d* 1227 [liability for procuring breach of contract]; 27 *A.L.R.3d* 1227 [purchaser's interference with land purchase contract]; 29 *A.L.R.3d* 1229 [purchaser's interference with contract between vendor and broker]; 34 *A.L.R.3d* 720 [broker's interference with contract between vendor and another broker]; 79 *A.L.R.3d* 672 [interference with employment contract by threat to end contract with employer]; 96 *A.L.R.3d* 862 [interference with lease]; 7 *A.L.R.4th* 572 [interference with physician's contract or relationship with hospital]; 44 *A.L.R.4th* 1078 [punitive damages for interference with contract]; 50 *Proof of Facts* 2d 455 [employment contract]; 17 *Proof of Facts* 3d 685 [parent corporation's interference with subsidiary's contract with third party]; 50 *Proof of Facts* 3d 317 [relocation company's liability for tortious interference with contractual relationship between seller employee and real estate broker]; 64 *Proof of Facts* 3d 273 [tortious interference with contractual relationship involving sale of real estate]; 67 *Proof of Facts* 3d 147 [tortious interference with real estate lease]; 18 *Am.Jur. Trials* 57 [Actions for Interference With Contract Rights].)

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SUPPLEMENT: [This section is current through the latest supplement]

See 2 Harper, James & Gray 3d §6.5; 97 *Am.Jur. Trials* 107 [prospective purchaser's recovery of damages for inducing breach of real estate contract].



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VII. INTERFERENCE WITH BUSINESS RELATIONS

A. Inducing Breach of Contract.

1. In General.

b. California Law.

5 *Witkin Sum. Cal. Law Torts* § 731

[§ 731] California Law.

(1) *Adoption of Majority Rule.* In the early case of *Boyson v. Thorn* (1893) 98 C. 578, 580, 33 P. 492, the court held that an action would not lie against one who, from malicious motives, but without threats, violence, falsehood, deception, or benefit to himself, induced another to violate his contract with the plaintiff.

The *Boyson* case was greatly criticized, and was finally repudiated in *Imperial Ice Co. v. Rossier* (1941) 18 C.2d 33, 112 P.2d 631, which adopted the majority rule that an action lies for inducement to breach a contract even though the means employed are otherwise lawful. Plaintiff bought a business from C who covenanted not to compete, and defendants induced C to violate this contract. *Held*, an injunction would lie. (18 C.2d 37.) (See Cal. Civil Practice, 6 Business Litigation, §64:14 et seq.; 23 Cal. L. Rev. 420; 24 Cal. L. Rev. 208; 30 Cal. L. Rev. 181; 17 So. Cal. L. Rev. 74; 25 So. Cal. L. Rev. 487; 3 Stanf. L. Rev. 554; BAJI, Nos. 7.80, 7.81; CACI, Nos. 2200, 2201; on pleading cause of action, see 5 Cal. Proc. (4th), Pleading, §727 et seq.)

A number of decisions recognize the tort. (See *Herron v. State Farm Mut. Ins. Co.* (1961) 56 C.2d 202, 205, 14 C.R. 294, 363 P.2d 310, *infra*, §756; *Blender v. Superior Court* (1942) 55 C.A.2d 24, 26, 130 P.2d 179 [defamatory statements by defendant resulting in plaintiff's discharge from employment]; *Elsbach v. Mulligan* (1943) 58 C.A.2d 354, 366, 136 P.2d 651 [fraudulent inducement by one of two joint adventurers, to obtain contract solely for himself]; *California Auto Court Assn. v. Cohn* (1950) 98 C.A.2d 145, 149, 219 P.2d 511 [conspiracy to prevent plaintiff broker from obtaining real estate commission]; *Campbell v. Veith* (1953) 121 C.A.2d 729, 733, 264 P.2d 141 [defendant landlord threatened tenant with termination of tenancy unless he evicted plaintiff subtenant]; *Zimmerman v. Bank of America* (1961) 191 C.A.2d 55, 57, 12 C.R. 319, *infra*, §733; *Federal Automotive Services v. Lane Buick Co.* (1962) 204 C.A.2d 689, 691, 22 C.R. 603, citing the text; *Farmers Ins. Exchange v. Zerin* (1997) 53 C.A.4th 445, 458, 61 C.R.2d 707 [attorney receiving payment of judgment or settlement on behalf of client has no obligation to satisfy client's debts out of that fund, unless creditor has property interest in fund or unless trust relationship exists between attorney and creditor; where neither condition existed, attorney did not interfere with contract between insurer and its insureds by failing to make payment]; *AB Group v. Wertin* (1997) 59 C.A.4th 1022, 1033, 69 C.R.2d 652 [for purposes of intentional interference with contract, possibility of obtaining discount on loan by threatening default is not protected economic interest that could be actionably interfered with by making payments].)

(2) *Elements of Cause of Action*. The elements of the cause of action are (a) a valid contract between plaintiff and a third party; (b) defendant's knowledge of this contract; (c) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (d) actual breach or disruption of the contractual relationship; and (e) resulting damage. (*Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 C.3d 1118, 1126, 270 C.R. 1, 791 P.2d 587, *infra*, §763; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 C.4th 26, 55, 77 C.R.2d 709, 960 P.2d 513, *infra*, §737; *Reeves v. Hanlon* (2004) 33 C.4th 1140, 1148, 17 C.R.3d 289, 95 P.3d 513, *infra*, §755.)

Unlike the tort of interference with prospective economic advantage (see *infra*, §744), it is not an element of the action that the defendant's conduct be wrongful apart from the interference itself. (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*.)

Liability has also been recognized, in proper circumstances, for *negligent* interference with contractual interests. (See *infra*, §751 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Adoption of Majority Rule*. See 56 *Hastings L. J.* 1277 [attorneys' liability to adverse parties where California settlement agreement is breached].

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §771 et seq. (2) *Elements of Cause of Action*. See *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 C.A.4th 212, 237, 26 C.R.3d 798 [stating elements].



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A. Inducing Breach of Contract.

2. Existing and Valid Contract.

a. Void Contract.

5 *Witkin Sum. Cal. Law Torts* § 732

[§ 732] Void Contract.

A contract that is void for any reason cannot be the subject of an action for interference with contractual relations. (See *A-Mark Coin Co. v. General Mills* (1983) 148 C.A.3d 312, 320, 321, 195 C.R. 859 [agreement to purchase estate assets based on probate court order later vacated by the probate court, rendering agreement wholly void].) "The particular agreement must be in force and effect at the time of the breach that the actor has caused; and if for any reason it is entirely void, there is no liability for causing its breach." (*Rest.2d, Torts* §766, Comment f.)

The cause of action cannot be based on a contract that is illegal or against public policy. (*Renaissance Realty v. Soriano* (1981) 120 C.A.3d Supp. 13, 18, 174 C.R. 837.)

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2. Existing and Valid Contract.

b. Voidable Contract.

5 *Witkin Sum. Cal. Law Torts* § 733

[§ 733] Voidable Contract.

In *Zimmerman v. Bank of America* (1961) 191 C.A.2d 55, 12 C.R. 319, plaintiff alleged that he made oral agreements with two sets of property owners to employ him as a real estate broker, that he negotiated an exchange of their properties and an agreement to pay him a stated commission, and that defendant's employee brought the property owners together and induced them to breach their contract with plaintiff. In this case of first impression in California, the defense, that plaintiff's oral contract was unenforceable (see 1 *Summary* (10th), *Contracts*, §392), was rejected. The great weight of authority and critical opinion holds that the action for inducing breach of contract is merely a part of the broader protection against interference with advantageous economic relations (infra, §741). Hence, if it is available even in the absence of any contract, it is not made unavailable by the fact that the contract is voidable by reason of the statute of frauds, lack of consideration, or even uncertainty. (191 C.A.2d 58, citing Prosser.)

The California Supreme Court subsequently stated generally that voidable contracts "afford a basis for a tort action when the defendant interferes with their performance." (*Buckaloo v. Johnson* (1975) 14 C.3d 815, 824, 122 C.R. 745, 537 P.2d 865, infra, §748 [in action for interference with prospective advantage].) However, that court noted, in *Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 C.3d 1118, 270 C.R. 1, 791 P.2d 587, infra, §763, that "[m]any cases have treated claims of interference with voidable and terminable contracts as coming within the cause of action for interference with prospective advantage," rather than of interference with a contractual relationship, but it failed to resolve the issue, which was unnecessary to the decision in the case. (50 C.3d 1128, footnote 4.) (See *Di Lorenzo v. Stewart Title Guaranty Co.* (1965) 232 C.A.2d 839, 842, 43 C.R. 261 [following *Zimmerman*]; *Golden v. Anderson* (1967) 256 C.A.2d 714, 719, 64 C.R. 404 [same]; *Friedman v. Jackson* (1968) 266 C.A.2d 517, 520, 72 C.R. 129 [following *Zimmerman* and *Golden*]; *Keely v. Price* (1972) 27 C.A.3d 209, 215, 103 C.R. 531 [following *Zimmerman*]; *Shamblin v. Berge* (1985) 166 C.A.3d 118, 124, 212 C.R. 313 [citing *Zimmerman* and *Buckaloo*]; *Rader Co. v. Stone* (1986) 178 C.A.3d 10, 28, 223 C.R. 806, citing the text; *Rest.2d, Torts* §766, Comment f; 77 *Harv. L. Rev.* 963; 45 *Am.Jur.2d* (1999 ed.), *Interference* §5; 96 *A.L.R.3d* 1294 [liability for interference with invalid or unenforceable contract].)

Courts of Appeal have later held that an action based on interference with a voidable contract must be brought on an interference with prospective advantage theory, and that a valid enforceable contract is a necessary element of an action for interference with a contract. (See *PMC v. Saban Entertainment* (1996) 45 C.A.4th 579, 601, 52 C.R.2d 877

[limiting *Zimmerman* rule]; *Bed, Bath & Beyond of La Jolla v. La Jolla Village Square Venture Partners* (1997) 52 C.A.4th 867, 877, 60 C.R.2d 830 [following *PMC v. Saban Entertainment*; no interference with contractual relations where underlying contract was voidable under statute of frauds].)

The court in *PMC* reasoned as follows: "[W]e are compelled to conclude that a cause of action for intentional interference with contract requires an underlying *enforceable* contract. Where there is no existing, enforceable contract, only a claim for interference with prospective advantage may be pleaded. To do otherwise unnecessarily confuses the two torts and fails to recognize their inherent differences. The tort of interference with contractual relations protects an existing, formally cemented economic relationship. The tort of interference with prospective business relations protects nonformalized or anticipated business relationships which are reasonably certain to occur, but which are nonetheless prospective. Thus, if a plaintiff is to be successful in the former, it is necessary that an enforceable contract be pled and proven." (45 C.A.4th 601.)

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2. Existing and Valid Contract.

c. Contract Terminable at Will.

5 *Witkin Sum. Cal. Law Torts* § 734

[§ 734] Contract Terminable at Will.

There is some authority denying relief where the contract may be terminated at will by the parties. (See *Bentley v. Mountain* (1942) 51 C.A.2d 95, 97, 124 P.2d 91.) This view has been repudiated in California. (See *Speegle v. Board of Fire Underwriters of the Pac.* (1946) 29 C.2d 34, 39, 172 P.2d 867 ["Recognizing that the fact that a contract is 'at the will of the parties, respectively does not make it one at the will of others' ... the great majority of the cases have held that unjustified interference with contracts terminable at will is actionable"]; *Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 C.3d 1118, 1128, 270 C.R. 1, 791 P.2d 587, *infra*, §763 [express termination provisions create no privilege to intervene]; *Reeves v. Hanlon* (2004) 33 C.4th 1140, 1148, 17 C.R.3d 289, 95 P.3d 513, *infra*, §755 [third party's interference with at-will contract is actionable interference with contractual relationship because contractual relationship is at will of parties, not at will of third party]; *Romano v. Wilbur Ellis & Co.* (1947) 82 C.A.2d 670, 673, 186 P.2d 1012 [immaterial that contract was "at will"]; *Freed v. Manchester Service* (1958) 165 C.A.2d 186, 188, 331 P.2d 689 [same]; *Kozlowsky v. Westminster Nat. Bank* (1970) 6 C.A.3d 593, 598, 86 C.R. 52 [employment contract]; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 C.A.4th 434, 448, 26 C.R.2d 305 [same].)

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- 2. Existing and Valid Contract.
- d. Contract Subject to Condition Precedent.

5 *Witkin Sum. Cal. Law Torts* § 735

[§ 735] Contract Subject to Condition Precedent.

In *SCEcorp v. Superior Court* (1992) 3 C.A.4th 673, 4 C.R.2d 372, plaintiff power company and another power company entered into a merger agreement that was subject to the condition precedent that all governmental approvals necessary for consummation of the merger be obtained. Before the parties were able to obtain the required regulatory approvals, defendant power company allegedly interfered with the merger agreement, causing its abandonment. Plaintiff filed a complaint alleging three causes of action based on tortious interference. Defendant demurred, arguing that the unsatisfied condition precedent precluded plaintiff from stating these causes of action. *Held*, the condition precedent did not preclude plaintiff, as a matter of law, from stating valid causes of action for intentional and negligent interference with the merger agreement and for intentional interference with prospective economic advantage.

(a) Contracts subject to conditions precedent can be the basis for tortious interference claims (3 C.A.4th 681, citing *Prosser and Rest.2d, Torts* §766, Comment f), and there is no compelling reason to treat conditions precedent requiring regulatory approval differently. (3 C.A.4th 681.) Disallowing tortious interference claims in this context would lead to the illogical situation where contracts not requiring regulatory approvals would be protected from interference, but those contracts requiring such approvals would be unprotected and subject to virtually unrestricted interference by officious intermeddlers who, especially in the case of public utilities, would be likely to have a great deal of information about the transactions and operations of the utilities. (3 C.A.4th 682.)

(b) Defendant argued that the existence of regulatory approval as a condition precedent to completion of the merger agreement permitted and even encouraged intervention in the merger process. This argument is without merit. Defendant was entitled to participate in the regulatory approval process by appearing before the regulatory agencies and presenting evidence as to why the proposed merger would not be in the public interest. However, it should not be allowed to subvert the regulatory approval process by taking independent and wrongful action, as defendant allegedly did here, to disrupt a merger before the regulatory agencies have had an opportunity fully to consider its merits. (3 C.A.4th 682.)

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3. Knowledge and Intent.

5 Witkin Sum. Cal. Law Torts § 736

[§ 736] Knowledge and Intent.

The defendant must know of the contract, and must intend to interfere with contractual relations. (*Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 C.3d 1118, 1126, 270 C.R. 1, 791 P.2d 587, *infra*, §763.) However, the defendant's primary purpose need not be disruption of the contract. It is sufficient if the interference is known by him or her to be a necessary consequence of his or her action. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 C.4th 26, 56, 77 C.R.2d 709, 960 P.2d 513, *infra*, §737; *Rest.2d, Torts* §766, Comment j.) (On recovery for *negligent* interference with business interests, see *infra*, §751 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Integrated Healthcare Holdings v. Fitzgibbons* (2006) 140 C.A.4th 515, 532, 44 C.R.3d 517 [defendant's e-mail disparaging plaintiff was forwarded by recipient to company with which plaintiff was negotiating; e-mail did not support claim for interference with contractual relationship where there was no evidence that defendant intended that company receive e-mail].



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A. Inducing Breach of Contract.
4. Breach or Disruption of Contractual Relationship.

5 Witkin Sum. Cal. Law Torts § 737

[§ 737] Breach or Disruption of Contractual Relationship.

(1) *Interference With Performance of Contract by Third Person.* The usual case involves a successful inducement of the other party to breach the contract. (See *Rest.2d, Torts* §766; cf. *Tuchscher Dev. Enterprises v. San Diego Unified Port Dist.* (2003) 106 C.A.4th 1219, 1239, 132 C.R.2d 57 [defendants did not interfere with exclusive negotiating contract between plaintiff developer and city merely by discussing project with another developer, which discussions were communicated to city; city let contract expire, which was its right].)

(2) *Interference With Plaintiff's Performance of Own Contract.* "[B]ut the rule is also applicable where the plaintiff's performance has been prevented or rendered more expensive or burdensome and where he has been induced to breach the contract by conduct of the defendant, such as threats of economic reprisals." (*Lipman v. Brisbane Elementary School Dist.* (1961) 55 C.2d 224, 232, 11 C.R. 97, 359 P.2d 465; see 49 Cal. L. Rev. 700, 772; 77 Harv. L. Rev. 968; 34 So. Cal. L. Rev. 346; cf. *1-800 Contacts v. Steinberg* (2003) 107 C.A.4th 568, 585, 132 C.R.2d 789 [defendant did not induce plaintiff's attorney to breach his severance contract where attorney repeatedly showed intent to comply with contract by insisting that he could not reveal confidential information; defendant had no knowledge that breach would occur].)

This rule is set forth in *Rest.2d, Torts* §766A as follows: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him." Comment c explains: "This section and §766 both involve interference with an existing contract. Under §766, the plaintiff's interest in obtaining performance of the contract is interfered with directly. Under this Section the interference is indirect, in that the plaintiff is unable to obtain performance of the contract by the third person because he has been prevented from performing his part of the contract and thus from assuring himself of receiving the performance by the third person." And "[i]f the plaintiff's performance has intentionally been made more burdensome or more expensive by the actor, the cost that he incurs in order to obtain the performance by the third party has increased, and the net benefit from the third person's performance has been correspondingly diminished. This Section covers that loss, too."

(3) *Wrongful Act Is Not Required.* *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 C.4th 26, 55, 77 C.R.2d 709, 960 P.2d 513, involved a title insurer's refusal to issue title insurance because the seller had acquired the property

at a tax sale. *Held*, the defendant's act need not be wrongful other than in the fact that it interferes with the plaintiff's contract. This differs from the tort of interference with prospective economic advantage, which requires wrongfulness independent of the fact of the interference itself (see *infra*, §744); "interference with an existing contract receives greater solicitude than does interference with prospective economic advantage." (19 C.4th 55.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Interference With Performance of Contract by Third Person*. See *Woods v. Fox Broadcasting Subsidiaries* (2005) 129 C.A.4th 344, 356, 28 C.R.3d 463, Supp., *infra*, §739 [corporate directors and officers sufficiently alleged disruption or breach of their contractual stock option rights by alleging that value of options was tied to sale price of corporation and that defendant major shareholder intentionally acted to defeat or diminish those rights by rigging sale terms to hold down price].



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5. Causation and Damage.

5 Witkin Sum. Cal. Law Torts § 738

[§ 738] Causation and Damage.

It must be alleged and proved that the defendant's act caused the breach, i.e., that otherwise the contract would have been performed. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 C.4th 26, 55, 77 C.R.2d 709, 960 P.2d 513, supra, §737 [plaintiff must plead actual breach or disruption of contractual relationship]; *Augustine v. Trucco* (1954) 124 C.A.2d 229, 245, 268 P.2d 780 [complaint insufficient; no allegations that defendants caused landowner to sell property through them, rather than plaintiff]; *Dryden v. Tri-Valley Growers* (1977) 65 C.A.3d 990, 997, 135 C.R. 720, infra, §739 [complaint insufficient; judicially noticed letters established that other party had abandoned contract prior to defendant's alleged interference]; *Mayes v. Sturdy Northern Sales* (1979) 91 C.A.3d 69, 79, 154 C.R. 43 [complaint sufficient; allegation that defendants conspired to destroy plaintiff's business by specified acts was sufficient pleading of causation]; *H & M Associates v. El Centro* (1980) 109 C.A.3d 399, 405, 167 C.R. 392 [complaint sufficient; causation element was satisfied by allegations that defendant city's cutting off water supply to plaintiff's apartment building resulted in termination of numerous tenant contracts and plaintiff's inability to make mortgage payments]; *Franklin v. Dynamic Details* (2004) 116 C.A.4th 375, 391, 10 C.R.3d 429 [trier of fact could not draw reasonable inference that defendant's e-mails were substantial factor in bringing about plaintiff's lost business merely because e-mails preceded loss]; on pleading of causation, see 5 Cal. Proc. (4th), Pleading, §728.)

There must be resulting damage. (*Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 C.3d 1118, 1126, 270 C.R. 1, 791 P.2d 587, infra, §763; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 C.4th 26, 55, 77 C.R.2d 709, 960 P.2d 513, supra, §737.)

SUPPLEMENT: [This section is current through the latest supplement]

Causation: See *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 C.A.4th 212, 238, 26 C.R.3d 798 [evidence of defendant's conduct before contract was formed was irrelevant to claim for interference with contractual relations, which requires existence of valid contract].

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §772.



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6. No Action Against Other Contracting Party.

5 Witkin Sum. Cal. Law Torts § 739

[§ 739] No Action Against Other Contracting Party.

(1) *General Rule*. Ordinarily, a breaching contractual party is not liable for inducing breach of contract. (*Kelly v. General Tel. Co.* (1982) 136 C.A.3d 278, 288, 186 C.R. 184; *Shoemaker v. Myers* (1990) 52 C.3d 1, 24, 276 C.R. 303, 801 P.2d 1054, 2 Summary (10th), *Workers' Compensation*, §47; *Wanland v. Los Gatos Lodge* (1991) 230 C.A.3d 1507, 1523, 281 C.R. 890; *Webber v. Inland Empire Inv.* (1999) 74 C.A.4th 884, 907, 88 C.R.2d 594; *Scripps Clinic v. Superior Court* (2003) 108 C.A.4th 917, 928, 134 C.R.2d 101 [in action against clinic for interfering with patient's contracts with treating physicians, clinic did not meet its burden of showing that treating physicians were its employees]; cf. *Shapoff v. Scull* (1990) 222 C.A.3d 1457, 1469, 272 C.R. 480 [alter ego finding did not, as matter of law, relieve individual defendant from liability for interference with corporation's contract].)

In *Dryden v. Tri-Valley Growers* (1977) 65 C.A.3d 990, 998, 135 C.R. 720, the court followed the weight of authority holding that the action lies only for acts of a third person. Plaintiffs alleged a contract with the Irvings, a cancellation of it by the Irvings, and a sale by the Irvings to defendant Tri-Valley. The complaint alleged that the contract provided that it should bind the successors of the Irvings; hence the purported cause of action was against a defendant who had become a party to the contract. The reason for the general rule is set forth as follows: "It is obvious that if an action is brought for interference with contractual relationship by one party to a contract against another who is also a party to that same contract, the grievance of the plaintiff is, in essence, breach of contract; and, in such case, plaintiff is entitled to recover all damages flowing from the breach. In such an instance to allow the plaintiff to sue under the tort theory of wrongful interference with contractual rights would not only be superfluous, but also would enable him to recover tort damages (e.g., punitive damages, damages for mental suffering) to which he is not entitled under California law." (65 C.A.3d 999.)

(2) *No Conspiracy Liability*. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C.4th 503, 28 C.R.2d 475, 869 P.2d 454, involved two contracts: (1) a subcontract between plaintiff and L, calling for plaintiff to procure and supply L with spare parts needed by defendant to perform its general contract to provide military equipment to Saudi Arabia; and (2) a purchase contract between plaintiff and V, whereby plaintiff ordered from V eleven electron tubes at a stated price per unit. Subsequently, L contacted V directly and renegotiated the purchase contract in a manner that resulted in a reduction in plaintiff's commission. Plaintiff sued both parties for breach of contract and conspiracy to interfere with contractual relations. The trial judge entered judgment for plaintiff against both defendants that included both contract and tort damages. The Court of Appeal affirmed the contract awards and reversed the tort judgment for

inconsistency in the jury's verdicts. However, it rejected V's argument that the rule enunciated in *Wise v. Southern Pac. Co.* (1963) 223 C.A.2d 50, 35 C.R. 652, that a contracting party may be held liable in tort for conspiracy to interfere with its own contract, should be overturned. *Held*, judgment of the Court of Appeal reversed; the *Wise* rule must be rejected because it illogically expands the doctrine of civil conspiracy and obliterates vital and established distinctions between contract and tort theories of liability.

(a) *Conspiracy.*

(1) Conspiracy is a legal doctrine imposing liability on persons who, although not actually committing a tort themselves, share with the actual tortfeasor a common plan or design in its perpetration. For tort liability to arise, the conspiracy must be activated by the commission of an actual tort and the coconspirator must be legally capable of committing the tort, i.e., he or she must owe a duty to the plaintiff recognized by law and be potentially subject to liability for a breach of that duty. (7 C.4th 511.)

(2) California recognizes a cause of action against a *noncontracting* party who interferes with the performance of a contract. (7 C.4th 513.) However, consistent with its underlying policy of protecting the expectations of contracting parties against frustration by outsiders, the tort of interference with contract does not lie against a party to the contract. (7 C.4th 514, citing *Dryden v. Tri-Valley Growers* and other cases.)

(3) Plaintiff's conspiracy theory "is fundamentally irreconcilable with the law of conspiracy and the tort of interference with contract as just discussed. One contracting party owes no general tort duty to another not to interfere with performance of the contract; its duty is simply to perform the contract according to its terms. The tort duty not to interfere with the contract falls only on strangers--interlopers who have no legitimate interest in the scope or course of the contract's performance." (7 C.4th 514.)

(4) This fundamental allocation of duty is not altered by the invocation of conspiracy. Because conspiracy is not an independent tort, it cannot create a duty or abrogate an immunity. Instead, it allows tort recovery only against a party who *already* owes the duty and is not immune from liability. Hence, "[b]ecause a party to a contract owes no tort duty to refrain from interference with its performance, he or she cannot be bootstrapped into tort liability by the pejorative plea of conspiracy." (7 C.4th 514.)

(b) *Contract and tort.*

(1) The law of contracts is designed to enforce legally binding agreements, while the law of torts is designed to vindicate social policy. A breach of contract is a tort only when it also violates an independent duty arising from principles of tort law. (7 C.4th 515.)

(2) These differences between contract and tort law give rise to distinctions in assessing damages and in evaluating motive for particular acts. Contract damages seek to approximate the agreed upon performance. Tort damages are awarded to compensate the victim for the harm suffered. In an intentional tort action, a motive amounting to malice, oppression, or fraud may justify punitive damages. But the law does not generally distinguish between good and bad motives in a breach of contract action. Thus, in the absence of an independent tort, punitive damages may not be awarded for a breach of contract even where the breach was wilful, fraudulent, or malicious. (7 C.4th 516.)

(3) These fundamental differences between contract and tort would be obscured if tort liability were imposed on a contracting party for conspiracy to interfere with the contract. "Whether or not a stranger to the contract induces its breach, the essential character of a contracting party's conduct remains the same--an unjustified failure or refusal to perform. In economic terms, the impact is identical--plaintiff has lost the benefit of a bargain and is entitled to recover compensation in the form of contract damages. In ethical terms, the mere entry of a stranger onto the scene does not render the contracting party's breach more socially or morally reprehensible. A party may breach a contract without any third party inducement because of personal, racial, or ethnic animus, or for other nefarious or unethical reasons. In contrast, a breach may be the product of naive or innocent misunderstanding or misperception created by the aggressive

solicitation of an outsider. In any case, motivation is irrelevant. Regardless of the presence or absence of third party involvement, the contracting party has done nothing more socially opprobrious than to fall short in meeting a contractual commitment. Only contract damages are due." (7 C.4th 516.)

(4) The imposition of tort liability for conspiracy to interfere with one's own contract would also thwart legal rules and policies limiting contract damages to those sums reasonably foreseeable to the contracting parties. For example, in the present case, V, in its contract with plaintiff, assumed only the obligation to perform the contract or pay damages for its breach. It did not assume the independent tort obligation not to interfere with performance of its own contract. Hence, V is legally responsible only in contract. (7 C.4th 518.)

(c) *Contrary holding would not promote stability.* Plaintiff maintained that the imposition of tort liability on contracting parties would promote stability in the contractual relationship. Actually the opposite result would occur. "As a practical matter, it is difficult, if not impossible, for a third party to induce a breach of contract without communicating with the contracting party. Therefore, any and every induced breach creates a potentially triable conspiracy case against the contracting party. In this way, the potential consequences of any breach of contract--efficient or inefficient, socially desirable or undesirable--become uncertain and unpredictable. Tort liability may or may not follow, depending upon a myriad of imponderable factors. As a result, a business fearful of unfathomable tort exposure might lose the ability to respond flexibly to changing economic conditions or hesitate to enter into contracts at all in fast-moving aspects of commercial enterprise. ... Another business, reasonably viewing the prospect of significant tort liability as remote, might not react at all. Tort liability in this context would more likely produce uncertainty, not stability, in commercial dealings." (7 C.4th 520.)

(d) *Conclusion.* All prior cases are disapproved "to the extent they hold that a party to a contract can be held liable in tort based on a conspiracy to interfere with its own contract," including *Wise* and a number of other named Court of Appeal cases. (7 C.4th 521, footnote 10.) (See *Kasparian v. Los Angeles* (1995) 38 C.A.4th 242, 45 C.R.2d 90, *infra*, §746 [applying principles approved in *Applied Equipment Corp.* to tortious interference with prospective economic advantage]; *Webber v. Inland Empire Inv.* (1999) 74 C.A.4th 884, 897, 88 C.R.2d 594 [by refusing to apply alter ego theory, court did not run afoul of rule that party cannot interfere with his or her own contract; *Applied Equipment Corp.* distinguished]; 22 *Pepperdine L. Rev.* 893 [*Applied Equipment Corp.*]; 30 *U.S.F. L. Rev.* 561 [same]; 26 *West L.A. L. Rev.* 561 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* See *PM Group v. Stewart* (2007) 154 C.A.4th 55, 64, 64 C.R.3d 227 [singer and singer's agents were not liable to promoters of concert tour for interfering with subcontracts providing for performances; because contracting party is incapable of interfering with performance of own contract, tort of intentional interference with contractual relations may be committed only by strangers to contract].(3) *(New) Distinction: Claim May Lie Against Owner, Director, or Officer of Business Entity That Is Party to Contract.* In *Woods v. Fox Broadcasting Subsidiaries* (2005) 129 C.A.4th 344, 28 C.R.3d 463, corporate directors and officers sued a major shareholder of the corporation for interference with contract rights in connection with the sale of the corporation, alleging that the decreased sale price, negotiated by the shareholder in order to relieve itself of certain obligations, reduced the value of their contractual stock options. The shareholder's demurrer to the complaint was sustained. *Held*, reversed. The courts have long allowed contract interference claims to be stated against owners, officers, and directors of a company the contracts of which are the subject of the litigation. While these defendants may attempt to prove that their conduct was privileged or justified, that is a defense that must be pleaded and proved. Thus, the trial court erred in sustaining the demurrer on the ground that defendant was not a stranger to the stock option contracts. (129 C.A.4th 350.)



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VII. INTERFERENCE WITH BUSINESS RELATIONS
A. Inducing Breach of Contract.
7. Remedies.

5 Witkin Sum. Cal. Law Torts § 740

[§ 740] Remedies.

(1) *Damages and Injunctive Relief.* In the action for the tort of inducing breach of contract, the plaintiff may recover damages and may be granted an injunction in a proper case. (See *Remillard-Dandini Co. v. Dandini* (1941) 46 C.A.2d 678, 680, 116 P.2d 641; *California Auto Court Assn. v. Cohn* (1950) 98 C.A.2d 145, 149, 219 P.2d 511; *Rest.2d, Torts* §766, Comment u; Dobbs, *The Law of Torts* §455; 45 *Am.Jur.2d* (1999 ed.), *Interference* §52 et seq.)

(2) *Alternative Tort Actions.* The wrongful act, moreover, may give rise to more than one kind of tort action. Thus, the defendant will sometimes interfere with the contract by means of slander or slander of title or fraud, causing the plaintiff to suffer loss of a contract or employment or a contract of sale of property. The plaintiff may elect to frame his or her complaint on the theory of defamation, slander of title, fraud and deceit, or inducing breach of contract, for whatever advantage the election may give plaintiff. (See *Blender v. Superior Court* (1942) 55 C.A.2d 24, 26, 130 P.2d 179 [suit for inducing breach of contract, thereby avoiding bond then required for slander action]; *Romano v. Wilbur Ellis & Co.* (1947) 82 C.A.2d 670, 673, 186 P.2d 1012 [election to sue for fraud and deceit to obtain favorable statute of limitations]; 17 *So. Cal. L. Rev.* 74; on alternative tort remedies, see 3 *Cal. Proc.* (4th), *Actions*, §170 et seq.)

(3) *Successive Contract and Tort Actions.* In *Duff v. Engelberg* (1965) 237 C.A.2d 505, 47 C.R. 114, plaintiffs contracted to buy a lot from vendors M. Defendant neighbors E and C induced vendors M to repudiate the contract and convey to C as trustee. Plaintiffs first sued vendors M in contract, and received a decree of specific performance with incidental damages for wrongful withholding of the land. Then they sued defendants E and C in tort. In this action, the broader tort measure of damages (covering unexpected loss) was available (237 C.A.2d 508, citing the text), and recovery of compensatory and punitive damages was upheld.

On these facts, considered alone, the judgment suggests that plaintiffs obtained an unwarranted double recovery, for the first judgment seemingly made them whole, and the opinion does not point to any other loss for which the second judgment was compensation. But if this was true it was entirely the fault of defendants. They appealed on the judgment roll, the findings were therefore binding on issues of fact, and the general finding that plaintiffs were damaged in the sum awarded was binding on appeal in the absence of a request for special findings. (237 C.A.2d 509.)

West's Key Number Digest, Torts k.12

SUPPLEMENT: [This section is current through the latest supplement]
(2) *Alternative Tort Actions*.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §175 et seq.



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 VII. INTERFERENCE WITH BUSINESS RELATIONS
 B. Interference With Prospective Economic Advantage.

1. Intentional Interference.

a. Nature of Tort.

5 *Witkin Sum. Cal. Law Torts* § 741

[§ 741] Nature of Tort.

The basic principle underlying the tort of inducing breach of contract (*supra*, §730) has been extended to impose liability for intentional interference with business relations or advantages that are merely prospective and ordinarily not the subject of an existing contract. The wrong consists of intentional and improper methods of diverting or taking business from another that are not within the privilege of fair competition. (*Buxbom v. Smith* (1944) 23 C.2d 535, 548, 145 P.2d 305, *infra*, §747; *A.F. Arnold & Co. v. Pacific Professional Ins.* (1972) 27 C.A.3d 710, 714, 104 C.R. 96, quoting the text; *Gold v. Los Angeles Democratic League* (1975) 49 C.A.3d 365, 375, 122 C.R. 732, *infra*, §747, citing the text; *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 C.A.3d 13, 17, 144 C.R. 664, *infra*, §747, 756, citing the text; *Worldwide Commerce v. Fruehauf Corp.* (1978) 84 C.A.3d 803, 809, 149 C.R. 42, quoting the text; *Olivet v. Frischling* (1980) 104 C.A.3d 831, 837, 164 C.R. 87; *Ramona Manor Convalescent Hosp. v. Care Enterprises* (1986) 177 C.A.3d 1120, 1130, 225 C.R. 120, *infra*, §743; *Hofmann Co. v. E.I. Du Pont de Nemours & Co.* (1988) 202 C.A.3d 390, 401, 248 C.R. 384; see *Asia Inv. Co. v. Borowski* (1982) 133 C.A.3d 832, 840, 184 C.R. 317, citing the text [complaint insufficient and conduct privileged]; *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 C.A.3d 200, 220, 194 C.R. 180 [pleading]; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 C.A.4th 434, 449, 26 C.R.2d 305 [triable issue of fact whether public utility's refusal to deal with freelance journalist interfered with her prospective relationship with business journal]; *Westside Center Associates v. Safeway Stores* 23 (1996) 42 C.A.4th 507, 523, 49 C.R.2d 793 [no liability where defendant, which allegedly drove down value of plaintiff's supermarket, causing it to sell at loss, did not interfere with existing relationship]; *Colome v. State Athletic Com.* (1996) 47 C.A.4th 1444, 1459, 55 C.R.2d 300 [Boxing Commission's denial of license to fighter did not interfere with manager's prospective engagements]; *BAJI*, No. 7.82; *CACI*, No. 2202; on privilege of fair competition, see *infra*, §§758, 759; on pleading of cause of action, see 5 *Cal. Proc.* (4th), *Pleading*, §730 et seq.)

The tort is variously known as interference with "prospective economic advantage," "prospective contractual relations," and "prospective economic relations." (*Della Penna v. Toyota Motor Sales, U.S.A.* (1995) 11 C.4th 376, 378, 45 C.R.2d 436, 902 P.2d 740, *infra*, §744; cf. *Manor Inv. Co. v. F.W. Woolworth Co.* (1984) 159 C.A.3d 586, 592, 206 C.R. 37 [criticizing loose practice of using terms "inducing breach of contract" and "interference with business relations" (prospective economic advantage) interchangeably, without distinguishing between two torts].)

It has been suggested that the tort of inducing breach of contact "is merely a species of the broader tort of

interference with prospective economic advantage." (*Buckaloo v. Johnson* (1975) 14 C.3d 815, 823, 122 C.R. 745, 537 P.2d 865, *infra*, §748.) However, interference with prospective economic advantage, unlike inducing breach of contract, requires wrongful conduct other than the act of interference itself. (*Della Penna v. Toyota Motor Sales, U.S.A., supra*, 11 C.4th 393.)

Liability has also been recognized, in proper circumstances, for *negligent* interference with prospective economic advantage. (See *infra*, §751 et seq.)

The commentary on interference with prospective economic advantage is extensive. (See *Rest.2d, Torts* §766B; C.E.B., 2 California Business Litigation, §11.11 et seq.; Cal. Civil Practice, 6 Business Litigation, §64:3 et seq.; Dobbs, The Law of Torts §450; 32 *Cal. L. Rev.* 205; 30 *Ecology L. Q.* 521 [Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) as preempting claim for intentional interference with prospective economic advantage]; 88 *Harv. L. Rev.* 444 [recovery by commercial fishermen of profits lost as result of negligently caused oil spill]; 15 *Pacific L. J.* 381 [surreptitious geophysical survey as interfering with landowner's expectancies]; 24 *Pepperdine L. Rev.* 359 [intentional interference with prospective economic relations]; 22 *San Diego L. Rev.* 401 [necessity of contract]; 8 *Stanf. L. Rev.* 301; 5 *U.C.L.A. L. Rev.* 341; 45 *Am.Jur.2d* (1999 ed.), *Interference* §48; 97 *A.L.R.3d* 890 [interference with franchise]; 5 *A.L.R.4th* 9 [interference with at-will business relationship]; 6 *A.L.R.4th* 195 [interference with prospective contractual relationship]; 44 *A.L.R.4th* 1078 [punitive damages for interference with business relationship]; 65 *A.L.R.4th* 1126 [business interruption without physical damage]; 87 *A.L.R.4th* 845 [interference with physician-patient relationship]; 90 *A.L.R.4th* 621 [interference with attorney-client relationship]; 17 *Proof of Facts* 2d 517 [interference with at-will business relationship]; 50 *Proof of Facts* 3d 317 [relocation company's liability for tortious interference with prospective business relationship between seller employee and real estate broker]; 67 *Proof of Facts* 3d 147 [tortious interference with formation of prospective real estate lease agreement]; on liability for interference with expected inheritance or gift, see 45 *Am.Jur.2d* (1999 ed.), *Interference* §47; 22 *A.L.R.4th* 1229 [interference in making, changing, or revoking of will]; 18 *A.L.R.5th* 211 [tortious interference with bequest as precluded by will contest remedy].)

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SUPPLEMENT: [This section is current through the latest supplement]

See 97 *Am.Jur. Trials* 107 [prospective purchaser's recovery of damages for interference with prospective economic advantage from real estate contract]; 103 *Proof of Facts* 3d 275 [interference with prospective contractual relations; superseding 17 *Proof of Facts* 2d 517, text, p. 1071].

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §774 et seq.



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1. Intentional Interference.

b. Elements.

5 Witkin Sum. Cal. Law Torts § 742

[§ 742] Elements.

(1) *In General.* Under *Youst v. Longo* (1987) 43 C.3d 64, 71, footnote 6, 233 C.R. 294, 729 P.2d 728, *infra*, §749, and *Della Penna v. Toyota Motor Sales, U.S.A.* (1995) 11 C.4th 376, 378, 45 C.R.2d 436, 902 P.2d 740, *infra*, §744, the elements of the tort of intentional interference with prospective economic advantage include the following:

(a) An economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff.

(b) The defendant's knowledge of the relationship.

(c) Intentional acts by the defendant designed to disrupt the relationship.

(d) Actual disruption of the relationship.

(e) Economic harm to the plaintiff proximately caused by the acts of the defendant.

(f) Conduct that was wrongful by some legal measure other than the fact of interference itself. (See BAJI, Nos. 7.82, 7.86.1; on elements of *negligent* interference with economic interests, see *infra*, §753.)

(2) *Nonjustification Is Not an Element.* In *Rickel v. Schwinn Bicycle Co.* (1983) 144 C.A.3d 648, 192 C.R. 732, the trial judge ruled that the plaintiff must allege that the defendant's conduct was not justified or privileged. *Held*, nonjustification is not an element of the tort but an affirmative defense to be pleaded by the defendant.

(a) The cases contain conflicting expressions on this point, but the confusion was resolved in *A.F. Arnold & Co. v. Pacific Professional Ins.* (1972) 27 C.A.3d 710, 104 C.R. 96, 5 Cal. Proc. (4th), *Pleading*, §731, distinguishing between wrongfulness and nonjustification: The plaintiff must plead that defendant's interference is somehow wrongful, and can do this by alleging nonjustification; but plaintiff can also do it by alleging facts that take defendant's actions out of the realm of legitimate business transactions. (144 C.A.3d 657, 658.)

(b) In cases involving inducement of a third party to breach a contract with the plaintiff, the defendant's wrongful

method is apparent from the allegations of fact. Where the interference is with relations which are not contractual but merely prospective, some other element of wrongfulness must be shown; e.g., fraud, misrepresentation, or duress. More commonly, the wrong will be found in the defendant's motive; e.g., when a defendant appropriates a commission after arranging to cut out a prior agent or middleman. In such cases, the wrongfulness of the defendant's actions is apparent from the allegations of fact. (144 C.A.3d 659.)

The *Rickel* case was followed in *Saunders v. Superior Court* (1994) 27 C.A.4th 832, 33 C.R.2d 438. Plaintiffs brought an action against shorthand reporters and insurance companies, alleging interference with prospective economic advantage as a result of "directing contracting" between defendants. The complaint alleged that (1) defendant reporters, who were competitors of plaintiffs, formed an organization (CRA) and agreed that they would provide reporting services to defendant insurers in accordance with terms set by the CRA; (2) defendant insurers entered into contracts with the CRA, the effect of which was that defendants would not pay for reporting services unless the attorneys representing their policyholders used CRA members; and (3) defendant insurers instructed the attorneys representing their policyholders to sever all existing contracts with reporters and to use exclusively the services of CRA reporters. Defendant reporters demurred on the ground of competitive privilege, and defendant insurers demurred on the ground that, as the clients who paid for the depositions, they had the right to determine which reporting service their attorneys should use. The trial judge sustained the demurrers. *Held*, this was error. While both classes of defendant may be able to show at trial that their actions were justified, justification is an affirmative defense, not a ground for sustaining a demurrer to the complaint. (27 C.A.4th 843.)

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(1) *In General*. See *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 C.A.4th 212, 241, 26 C.R.3d 798 [stating elements]. (a) *Economic relationship*: See *San Jose Const. v. S.B.C.C.* (2007) 155 C.A.4th 1528, 1544, 67 C.R.3d 54 [action for intentional interference with prospective economic advantage by construction company against competitor and former employee, who brought several of company's clients with him to competitor allegedly by misappropriation of confidential information; evidence that clients' shift to competitor resulted from employee's misconduct, rather than from employee's termination, was sufficient to show that company had economic relationship with clients that offered probability of future economic benefit]; *Salma v. Capon* (2008) 161 C.A.4th 1275, 1290, 74 C.R.3d 873, citing the text [property owner's allegation that he would have to disclose trespasser's conduct to prospective purchasers and lenders did not state cause of action for intentional interference with prospective economic advantage against trespasser; owner failed to show existing relationship that was disrupted by trespasser or any economic detriment resulting from disruption].

(f) *Wrongful conduct*: See *Contemporary Services Corp. v. Staff Pro* (2007) 152 C.A.4th 1043, 1060, 61 C.R.3d 434 [action for intentional interference with prospective economic advantage could not be based on conduct insufficient to prove plaintiffs' alleged malicious prosecution, abuse of process, or defamation claims; plaintiffs were required to show that defendants engaged in conduct that was wrongful by some legal measure other than fact of interference itself].

(2) *Nonjustification Is Not an Element*.

A.F. Arnold case:

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §775.



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1. Intentional Interference.
c. Intent.

5 Witkin Sum. Cal. Law Torts § 743

[§ 743] Intent.

Interference with prospective economic advantage, like interference with contractual relations (see *supra*, §731) is an intentional tort, and it is essential to show that the defendant intended to cause the result. Thus, in either type of action, the plaintiff must plead and prove intentional acts designed to disrupt the relationship. (*Seaman's Direct Buying Service v. Standard Oil Co.* (1984) 36 C.3d 752, 765, 766, 206 C.R. 354, 686 P.2d 1158; *Reeves v. Hanlon* (2004) 33 C.4th 1140, 1151, 17 C.R.3d 289, 95 P.3d 513, *infra*, §755; *Rest.2d, Torts* §766B; BAJI, No. 7.83; CACI, No. 2203.) (On recovery for *negligent* interference with economic interests, see *infra*, §751 et seq.) In contrast, defendant's *motive* is not an element of the cause of action, but is relevant only to the affirmative defense of justification (see *infra*, §756). (*Seaman's Direct Buying Service v. Standard Oil Co.*, *supra*, 36 C.3d 766, 767.) The disruptive act intended must be "wrongful." (*Della Penna v. Toyota Motor Sales, U.S.A.* (1995) 11 C.4th 376, 378, 45 C.R.2d 436, 902 P.2d 740, *infra*, §744.)

In the *Seaman's* case, the jury was instructed that the defendant is deemed to have acted intentionally if it knew that disruption or interference with an advantageous relationship was substantially certain to result from its conduct. This was prejudicial error. Intent may be established by inference, and it would have been proper to instruct the jury that it *might infer* culpable intent from conduct substantially certain to interfere with the relationship; but the instruction that culpable intent was *deemed to exist* if defendant knew that its conduct would interfere was erroneous. And, because there was no evidence in the record that defendant acted with the purpose or design to interfere with plaintiff's relationship, plaintiff failed to carry its burden of proving intent. (36 C.3d 767.)

In *Ramona Manor Convalescent Hosp. v. Care Enterprises* (1986) 177 C.A.3d 1120, 225 C.R. 120, plaintiff was a prospective lessee of a nursing facility from the owner. Defendant, the existing lessee, was told by the owner that its lease would not be renewed, and that the owner was negotiating with an unnamed third party to take over the lease. Defendant nevertheless remained in possession on termination of the lease, and brought an action seeking a declaration of its right to remain under an alleged oral agreement. The owner promptly cross-complained for unlawful detainer, and was successful at the trial and on appeal. Plaintiff then brought this action for interference with prospective economic advantage. Defendant, citing *Rest.2d, Torts* §766, Comment p (conduct intended to affect a specific person), argued that it could not be held liable because it had no knowledge of the name or identity of the party with whom the owner was negotiating. *Held*, this was incorrect.

(a) The Restatement Comment states: "The rule does not require, however, that the person who loses the performance of the contract as a result of the conduct of the actor should be specifically mentioned by name. It is sufficient that he is identified in some manner." (177 C.A.3d 1133.)

(b) Defendant's decision to hold over was made with the knowledge that this action would frustrate the legitimate contractual expectations of a specific, albeit unnamed, new lessee; and that is all it was required to know to incur liability. (177 C.A.3d 1133.)

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SUPPLEMENT: [This section is current through the latest supplement]



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1. Intentional Interference.
d. Wrongful Conduct.

5 Witkin Sum. Cal. Law Torts § 744

[§ 744] Wrongful Conduct.

In *Della Penna v. Toyota Motor Sales, U.S.A.* (1995) 11 C.4th 376, 45 C.R.2d 436, 902 P.2d 740, plaintiff automobile wholesaler sued defendant automobile manufacturer for intentional interference with prospective economic advantage, based on defendant's enforcement of its "no-export" policy resulting in a lack of cars for plaintiff to export. The trial judge, in instructing the jury, modified the then appropriate BAJI instruction (former BAJI (8th ed.), No. 7.82) to require the jury to find that defendant's interference was "wrongful," and the jury returned a verdict for defendant. *Held*, affirmed.

(a) *Buckaloo v. Johnson* (1975) 14 C.3d 815, 122 C.R. 745, 537 P.2d 865, *infra*, §748, and *Seaman's Direct Buying Service v. Standard Oil Co.* (1984) 36 C.3d 752, 206 C.R. 354, 686 P.2d 1158, *supra*, §743, followed the view of the pleading and burden of proof requirements for intentional torts adopted by the first Restatement of Torts: the plaintiff need only allege a so-called "prima facie tort" by showing the defendant's awareness of the economic relation, a deliberate interference with it, and the plaintiff's resultant injury. The burden then passes to the defendant to demonstrate that its conduct was privileged, that is, "justified" by one or more recognized defenses (see *infra*, §756 et seq.). (11 C.4th 387.)

(b) However, even before *Seaman's*, Rest.2d, Torts §776B had discarded the prima facie tort requirement and required that the defendant's conduct be "improper" (11 C.4th 384), and several Court of Appeal decisions both before and after *Seaman's*, including *Rickel v. Schwinn Bicycle Co.* (1983) 144 C.A.3d 648, 192 C.R. 732, have appeared to engraft onto the elements of the plaintiff's cause of action allegations and proof the defendant's conduct was "wrongful" or was "based on facts that take the defendant's actions out of the realm of legitimate business transactions." Further, former BAJI (8th ed.), No. 7.82.1, enacted in 1990 and based on the Second Restatement of Torts, provides that a defendant in an economic relations tort case may defeat liability by showing that its conduct was not independently "wrongful." (11 C.4th 390.)

(c) These developments, together with a change in views within the American Law Institute and other jurisdictions, present the opportunity for the court to reconstruct the formal elements of the tort. The primary concern is to draw and enforce a sharpened distinction between claims for the tortious disruption of an *existing* contract and claims that a *prospective* contractual or economic relationship has been interfered with by the defendant. A doctrine that blurs the

analytical line between these two torts invites both uncertainty in conduct and unpredictability of its legal effect. The courts should firmly distinguish between the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant. (11 C.4th 391.)

(d) Thus, "a plaintiff seeking to recover from an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (11 C.4th 393, disapproving *Buckaloo* and *Seaman's* to the extent they contain inconsistent language addressing the pleading and proof requirements.) (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 C.4th 1134, 1153, 131 C.R.2d 29, 63 P.3d 937 [act must be wrongful by some legal measure, rather than merely product of improper, but lawful, purpose or motive; independent wrong element was satisfied by allegations of bribery and offering sexual favors]; *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 C.A.4th 464, 475, 54 C.R.2d 888 [surety's rightful protection of its contractual rights, which interfered with plaintiff's relationships with other sureties, was not "wrongful," regardless of motive]; *LiMandri v. Judkins* (1997) 52 C.A.4th 326, 336, 60 C.R.2d 539 [obtaining lien on judgment proceeds superior to lien possessed by plaintiff was not independently wrongful within *Della Penna* test]; *National Med. Trans. Network v. Deloitte & Touche* (1998) 62 C.A.4th 412, 438, 72 C.R.2d 720 [duty to instruct that interference was "independently wrongful"]; *Lange v. TIG Ins. Co.* (1998) 68 C.A.4th 1179, 1187, 81 C.R.2d 39 [exercise of contractual right of termination did not constitute independently wrongful act required for interference with prospective economic advantage]; *Gemini Aluminum Corp. v. California Custom Shapes* (2002) 95 C.A.4th 1249, 1255, 116 C.R.2d 358 ["industry standards" test does not satisfy *Della Penna* requirement that defendant's conduct be wrongful by some *legal measure* other than fact of interference itself]; *Tuchscher Dev. Enterprises v. San Diego Unified Port Dist.* (2003) 106 C.A.4th 1219, 1242, 132 C.R.2d 57 [plaintiff developer had exclusive negotiating contract with city; even assuming that defendants helped draft agreement between city and another developer or suggested other developer to city, defendants did nothing wrong apart from alleged interference itself]; on retroactive application of court's holding, see 9 Cal. Proc. (4th), *Appeal*, §981.)

BAJI, No. 7.82 includes, among the essential elements of a claim for intentional interference with prospective economic advantage, that "[t]he defendant intentionally engaged in wrongful conduct designed to interfere with or disrupt this relationship." (See BAJI, No. 7.86.1 [defining "wrongful conduct"]; on intent requirement generally, see *supra*, §743.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Edwards v. Arthur Andersen L.L.P.* (2008) 44 C.4th 937, 950, 952, 954, 81 C.R.3d 282, 189 P.3d 285, 3 Summary (10th), *Agency and Employment*, Supp., §122 [requiring employee to sign, as condition of resignation, "Termination of Non-Compete Agreement" (TONC) that released employer from "any and all" claims arising from employment could be considered wrongful act for claim of interference with prospective business advantage, but broad language of TONC did not constitute independent wrongful act as it did not encompass nonwaivable statutory rights]. *Retroactivity of Della Penna case*:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §545.

(New) *Violation of trade, association, or professional standards may support interference claim*: In *Stevenson Real Estate Services v. CB Richard Ellis Real Estate Services* (2006) 138 C.A.4th 1215, 42 C.R.3d 235, a licensed real estate broker brought an action for interference with prospective economic advantage against other brokers, alleging that defendants violated the rules of a realtors' association in connection with the procurement of real property for a client. The trial court granted defendants' motion for judgment on the pleadings without leave to amend. *Held*, ruling on motion affirmed but judgment vacated with directions to grant plaintiff leave to amend the complaint.

(a) In certain circumstances, a violation of well-defined, established rules or standards of a trade, association, or profession may constitute the type of wrongful conduct that will support a cause of action for intentional interference with prospective economic advantage. Under *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 C.4th 1134, 1159, 131 C.R.2d 29, 63 P.3d 937, text, p. 1075, wrongful conduct is sufficient to support the cause of action if it is proscribed by "some constitutional, statutory, regulatory, common law, or other determinable legal standard" and amounts to "independently actionable conduct." In an action between competitors who are bound by well-defined, established rules or standards of a trade, association, or profession, those rules may constitute "a determinable legal standard" within the scope of *Korea Supply*. However, the defendant's conduct must also amount to "independently actionable conduct"; this necessarily requires that the rules or standards provide for, or give rise to, a sanction or means of enforcement for a violation of the particular rule or standard that allegedly makes the defendant's conduct wrongful. Although the rules or standards of associations, trades, and professions are unlikely to give rise to legal causes of action, internal remedies available within the association, such as a right of arbitration between the aggrieved members, would suffice to establish "independently actionable conduct." (138 C.A.4th 1223.)

(b) Plaintiff failed to state a cause of action here by failing to allege that defendant brokers' claimed violation of the realtors' association rules was independently actionable. However, plaintiff was entitled to amend the complaint to allege, if such was the case, that the violation was independently actionable because the rules provided for arbitration or another adequate remedy. (138 C.A.4th 1224.)



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e. Probability of Benefit.

5 Witkin Sum. Cal. Law Torts § 745

[§ 745] Probability of Benefit.

There can be no recovery unless the plaintiff shows that, except for the tortious interference, there was a reasonable probability that the contract or profit would have been obtained. (*Youst v. Longo* (1987) 43 C.3d 64, 223 C.R. 294, 729 P.2d 728, *infra*, §749; *Campbell v. Rayburn* (1954) 129 C.A.2d 232, 234, 276 P.2d 671; *Worldwide Commerce v. Fruehauf Corp.* (1978) 84 C.A.3d 803, 811, 149 C.R. 42; see *Roth v. Rhodes* (1994) 25 C.A.4th 530, 545, 30 C.R.2d 706 [podiatrist who was denied space in defendants' medical building had no business relationship with lost future patients that could be interfered with]; *Kasparian v. Los Angeles* (1995) 38 C.A.4th 242, 45 C.R.2d 90, *infra*, §746 [insufficient evidence to show that, but for actions of county supervisor, there was reasonable probability that negotiations to buy out plaintiff's interest in partnership would have concluded to his economic advantage]; 45 *Am.Jur.2d* (1999 ed.), *Interference* §10.)

In *Wilson v. Loew's* (1956) 142 C.A.2d 183, 298 P.2d 152, twenty-three motion picture writers sued defendant producers and distributors. They alleged that they were excluded from employment in the industry after refusal to answer questions on their "political affiliations, beliefs and associations" as witnesses before the House Committee on Un-American Activities. *Held*, no cause of action was stated. (a) No existing contract was alleged but only a prior employment and its termination. (b) No negotiations pending, request for or denial of work, or reasonable prospect of employment, were alleged. Hence the complaint did not show an interference with a legally protected interest. (See 29 *So. Cal. L. Rev.* 268 [*Wilson* case in lower court].)

In *Osteopathic Physicians & Surgeons v. California Med. Assn.* (1964) 224 C.A.2d 378, 36 C.R. 641, the complaint, by individual and corporate osteopaths, attacked a merger of defendant state medical association with defendant state osteopathic association as an attempt to destroy osteopathic practice. The court held that the merger agreement, made a part of the complaint, showed no resulting interference with the rights of individual physicians. (224 C.A.2d 396.) (See *Diodes v. Franzen* (1968) 260 C.A.2d 244, 256, 67 C.R. 19 [solicitation of plaintiff's employees to work for competitor; no allegation of causal relation between loss of employees and loss of customers].)

In *Larez v. Oberti* (1972) 23 C.A.3d 217, 223, 226, 100 C.R. 57, plaintiff migratory workers brought a farmworkers' class action against defendant grower and labor contractors, seeking an injunction and money damages because employment of illegal aliens from Mexico deprived American workers of employment. *Held*, neither injunctive relief

nor damages was proper. The related federal statute does not expressly provide a remedy for its violation, and there is no federal decision that such a remedy exists or that the state may fashion one. (23 C.A.3d 221.) Also, because defendants were under no duty to hire particular persons, they were not interfering with a prospective employment relationship. (23 C.A.3d 223.)

West's Key Number Digest, Torts k.10(1)

SUPPLEMENT: [This section is current through the latest supplement]

See *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 C.A.4th 212, 243, 26 C.R.3d 798 [defendant's misrepresentations made to induce plaintiffs into seeking economic relationship with third parties, not to disrupt existing economic relationship involving plaintiffs, did not give rise to tort of interference with prospective economic advantage; tort protects expectation that relationship will produce desired benefit, not more speculative expectation that potentially beneficial relationship will arise].



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5 Witkin Sum. Cal. Law Torts § 746

[§ 746] No Action Against Other Party to Relationship.

In *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C.4th 503, 28 C.R.2d 475, 869 P.2d 454, supra, §739, the California Supreme Court held that a cause of action for *interference with contractual relations* does not lie against a party to the contract. In *Kasparian v. Los Angeles* (1995) 38 C.A.4th 242, 45 C.R.2d 90, the issue was whether a party to a prospective economic relationship can commit or conspire to commit a tortious interference with that relationship. Plaintiff, a limited partner in a joint venture, brought an action for civil conspiracy against a county and certain general partners in the joint venture, alleging that the general partners and a county supervisor intentionally interfered with plaintiff's prospective economic advantage arising from negotiations to resolve partnership and other disputes between plaintiff and the general partners. *Held*, judgment for plaintiff reversed and remanded with directions to enter judgment for defendants.

(a) *Liability of general partners.*

(1) The torts of interference with prospective economic advantage and that of interference with contract involve similar conduct and issues. In one case the interference takes place when a contract is already in existence; in the other, when a contract would, with certainty, have been consummated but for the conduct of the tortfeasor. (38 C.A.4th 260.)

(2) In determining that a party to a contract cannot, in addition to a breach of contract action, bring a tort action for interference against another party to the contract, the court in *Applied Equipment Corp.* reasoned that to allow the tort action would not only be superfluous, but also would enable the plaintiff to recover tort damages to which he or she is not entitled. The same rationale should also bar prosecution of interference with prospective economic advantage against a party to the relationship from which anticipated economic advantage would arise. Thus, the general partners may not be properly charged with liability under that tort theory. (38 C.A.4th 262.)

(3) Here, the jury found that the general partners had only *conspired* to commit the tort. The court in *Applied Equipment Corp.* rejected the notion that one contracting party, by use of a conspiracy theory, can impose liability on another for interference with that contract. That reasoning is persuasive here also. It is illogical to expand the doctrine of civil conspiracy by imposing tort liability for an alleged wrong that the purported tortfeasor is legally incapable of committing, and it obliterates distinctions between contract and tort theories to allow recovery of tort damages for an

ordinary breach of contract. If the general partners were not legally capable of committing the tort on which plaintiff's judgment rested, then nothing was added by attempting to metamorphose their conduct through reliance on a claim of conspiracy. (38 C.A.4th 262.)

(4) As a simple matter of logic, it makes no sense to distinguish between interference with contractual relations and interference with prospective economic advantage. If a party has no liability in tort for refusing to perform an existing contract, no matter what the reason, that party certainly should not have to bear a burden in tort for refusing to *enter into* a contract where he or she has no obligation to do so. If that same party cannot conspire with a third party to breach or interfere with his or her own contract, then the result should be no different where the "conspiracy" is to disrupt a relationship that has not even risen to the dignity of an existing contract. (38 C.A.4th 265.)

(b) *Liability of county*. With respect to the county, the evidence was not sufficient to prove that it intentionally interfered with negotiations to buy out plaintiff's interest in the partnership. There was insufficient evidence to prove that the supervisor, who had placed a telephone call to a trial judge assigned to a lawsuit pending between the general partners and plaintiff, had any knowledge of the buy-out negotiations, or that the supervisor intended to disrupt negotiations, which had already failed. (38 C.A.4th 267.) (See *JRS Products v. Matsushita Elec. Corp. of America* (2004) 115 C.A.4th 168, 170, 179, 8 C.R.3d 840 [franchisor that wrongfully terminates franchise is liable to franchisee for breach of contract, not for intentional interference with prospective economic advantage, and only contract damages are recoverable; following *Applied Equipment* and *Kasparian*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Woods v. Fox Broadcasting Subsidiaries* (2005) 129 C.A.4th 344, 354, 28 C.R.3d 463, Supp., supra, §739 [declining to follow *Kasparian v. Los Angeles* (1995) 38 C.A.4th 242, 45 C.R.2d 90, text, p. 1078, "to the extent it might hold that some of the individual owners of a business entity are automatically deemed to be exempt from contract interference liability because their economic interest in the entity means they are not strangers to any of the entity's contractual obligations"].



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1. In General.

5 Witkin Sum. Cal. Law Torts § 747

[§ 747] In General.

Relief has been sought for interference with various types of prospective economic opportunities. The following cases are illustrative:

In *International News Service v. Associated Press* (1918) 248 U.S. 215, 39 S.Ct. 68, 70, 63 L.Ed. 211, 218, AP issued bulletins with news gathered at considerable expense, and INS took items from them for distribution to its own users. The Court held that this was an unauthorized interference with and diversion of profits from AP's business, which should be enjoined.

In *Buxbom v. Smith* (1944) 23 C.2d 535, 145 P.2d 305, defendants induced plaintiff to contract for the distribution of defendants' publication. Then, after plaintiff had built up and trained an organization for the purpose of performance, defendants breached the contract and hired plaintiff's crews themselves, thus obtaining the fruits of plaintiff's efforts. *Held*, plaintiff was entitled to damages for the loss of goodwill and business. "A breach of contract is a wrong and in itself actionable. It is also wrongful when intentionally utilized as the means of depriving plaintiff of his employees, and ... constitutes an unfair method of interference with advantageous relations." (23 C.2d 548.) (See 32 Cal. L. Rev. 205.)

In *McCord Co. v. Plotnick* (1951) 108 C.A.2d 392, 239 P.2d 32, plaintiff published Pacific Coast McCord's Daily Notification Sheet containing credit items, and defendant L published "Credit Briefs" with pirated items. *Held*, judgment for damages affirmed. "Defendants took material acquired by plaintiff as the result of organization and the expenditure of labor, skill and money and appropriating it without expense on their part, offered it to their subscribers as their own, diverting customers from plaintiff to themselves." (108 C.A.2d 394.)

In *Guillory v. Godfrey* (1955) 134 C.A.2d 628, 286 P.2d 474, following a dispute over plaintiffs' employment of a black cook in their cafe, defendants intimidated customers by insults and disparagement of the cooking. Recovery was upheld for this malicious interference with the right to pursue a lawful business. (134 C.A.2d 632.)

In *Ojala v. Bohlin* (1960) 178 C.A.2d 292, 2 C.R. 919, plaintiff, with a Hollywood reputation as a fast draw artist, conceived the design of a "fast draw holster." He first manufactured the product himself, then contracted with defendant

to manufacture it. After a disagreement, plaintiff resumed his own manufacture. Defendant, using the designs and patterns, manufactured and sold in competition, and in violation of their original agreement not to compete. *Held*, an injunction and damages were properly granted under the broad and flexible doctrine making it tortious to appropriate the property of another. (178 C.A.2d 301.)

In *Uptown Enterprises v. Strand* (1961) 195 C.A.2d 45, 50, 15 C.R. 486, the court held that a cause of action for an injunction was stated against a sheriff and his deputies, for unlawful searches of automobiles in plaintiff's drive-in theatre.

In *Ernst & Ernst v. Carlson* (1966) 247 C.A.2d 125, 55 C.R. 626, defendant, a C.P.A. discharged from plaintiff firm, attempted in various ways to discredit the firm's handling of one of its tax clients, because of his difference of opinion on an accounting decision. *Held*, this interference with the advantageous contractual relations of the firm was properly enjoined. (247 C.A.2d 128.)

In *Gold v. Los Angeles Democratic League* (1975) 49 C.A.3d 365, 122 C.R. 732, plaintiff, an unsuccessful candidate for office in a Los Angeles city election, sued a number of defendants, alleging that he was the endorsed candidate of the official Democratic Central Committee and that defendant League mailed a pamphlet on the day before the election, endorsing another candidate and conveying the false impression that it was the official body. Counts based on violation of the Elections Code and fraud were found defective (49 C.A.3d 372 et seq.), but judgment on demurrer to a count of intentional interference with prospective advantage was reversed. The allegations "state a cause of action for defendants' intentional interference with plaintiff's opportunity to be elected to the office of city controller." (49 C.A.3d 375.) A strong dissent argued that the defense of First Amendment freedoms, rejected by the majority as not appearing on the face of the complaint, should have been sustained. (49 C.A.3d 381.)

In *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 C.A.3d 13, 144 C.R. 664, the complaint alleged that plaintiff was the owner of a trucking firm receiving 40% of its business from an oral contract to perform delivery services for defendant; that plaintiff intended to sell the business, and one of the prospective buyers conditioned his offer on the firm's continued business with defendant; that defendant informed the prospective buyers that the delivery contract would be terminated if plaintiff sold to a third person; that defendant intended to discourage buyers and thereby depress the purchase price substantially below market value; and that plaintiff thereafter sold the business at substantially below true value. *Held*, a cause of action was stated. (79 C.A.3d 17, 19.) (See 71 A.L.R.5th 491 [liability for tortious interference with prospective contractual relations involving sale of business, stock, or real estate].)

In *Levin v. Gulf Ins. Group* (1999) 69 C.A.4th 1282, 1285, 82 C.R.2d 228, the complaint stated that an insurer and attorneys retained to defend its insureds in a personal injury action, after receiving notice of a lien for fees and costs filed by an attorney discharged by the plaintiff, paid the plaintiff and his new attorney in settlement of the action. *Held*, the trial court erred in dismissing the action. An action was properly alleged for interference with prospective economic advantage.

SUPPLEMENT: [This section is current through the latest supplement]



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2. Interference With Unenforceable Contract.

5 *Witkin Sum. Cal. Law Torts* § 748

[§ 748] Interference With Unenforceable Contract.

(1) *Buckaloo Case*. In *Buckaloo v. Johnson* (1975) 14 C.3d 815, 122 C.R. 745, 537 P.2d 865, plaintiff, a licensed real estate broker, for 2 years had an exclusive right to sell defendant B's undeveloped beach property known as Dark Gulch. His listing expired in 1968, and in 1972, B placed a sign on the property reading: "For Sale--Contact Your Local Broker." Plaintiff was later approached by defendants A, prospective buyers interested in beach land, who were accompanied by defendant J, a real estate salesman for defendant G, and plaintiff gave them a full discussion of beach properties and of Dark Gulch in particular. The group left, promising to return, but never did. Plaintiff sent B a note advising her that he was the "procuring cause" of the A group, and asking that they be referred to him if they came to see her. Instead, she sold directly to them and refused his demand for a commission. Plaintiff brought this action for breach of an implied contract and intentional interference with prospective advantage. His theory was that B's sign was intended to be an "open listing" with brokers operating in the area, who could solicit prospective buyers and obtain a commission if a sale on terms satisfactory to the vendor was negotiated. B did not demur, but a separate judgment on demurrer was rendered in favor of the other defendants. *Held*, affirmed in part and reversed in part. The court promptly disposed of plaintiff's first cause of action by pointing out that the requirement of a writing for a real estate agency (see 1 *Summary* (10th), *Contracts*, §385) precluded any contract recovery, because the sign, not subscribed by the owner, could not possibly be a memorandum. But the allegations of the complaint, liberally construed, would support recovery on the tort theory.

(a) *Principles summarized*. The tort of interference with prospective advantage is broad in scope and applies to real estate brokers acting without an enforceable written contract. (14 C.3d 823, 824, 825.) The fundamental principles are:

(1) The tort "is considerably more inclusive than actions based on contract or interference with contract, and thus is not dependent on the existence of a valid contract. But this broad assertion must be qualified by the statement that the wrong complained of cannot be merely a failure on the part of the actor to comply with an unenforceable contract. The statute of frauds conclusively establishes that brokerage contracts with either the vendor or the vendee must be in writing. We have neither the authority nor the inclination to circumvent that declared policy by permitting tort actions to become an expedient substitute for contract actions specifically forbidden by statute." (14 C.3d 826.)

(2) The "mere fact that a prospective economic relationship has not attained the dignity of a legally enforceable agreement does not permit third parties to interfere with performance. This of course does no violence to traditional contract principles because the third party, a stranger to the economic relationship, was not the party whom the contract principle was designed to affect." (14 C.3d 827.) Hence, a prospective purchaser may not induce a seller to breach an oral agreement with the broker and sell at a price that excludes the broker. This is so not only where fraud is involved, but in any case in which the purchaser, with knowledge of the relationship between broker and seller, "intentionally induces the latter to violate the terms of the relationship and seek refuge in the unenforceability of the contract." However, the broker must show that "the interloper received pecuniary benefit in the way of a reduced selling price resulting from the exclusion of the broker's commission." (14 C.3d 827.)

(3) The elements of the tort, in the real estate brokerage context, are: "(1) an economic relationship between broker and vendor or broker and vendee containing the probability of future economic benefit to the broker, (2) knowledge by the defendant of the existence of the relationship, (3) intentional acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, (5) damages to the plaintiff proximately caused by the acts of the defendant." (14 C.3d 827.)

(b) *Sufficiency of complaint.*

(1) Plaintiff met the *economic relationship* test by alleging (1) that B *intended* her sign to constitute an open listing with all area brokers, (2) that B *intended* that brokers induced by the sign to cooperate with buyers would be paid a commission for procuring a buyer on terms B would accept, and (3) that plaintiff understood this to constitute an invitation to himself and other area brokers to attempt to find a buyer for the B property. These facts, plus any evidence that might establish the real estate custom in the community, "establish a colorable economic relationship" between B and plaintiff "with the potential to develop into a full contractual relationship." (14 C.3d 828.) And plaintiff further alleged that he in fact provided the necessary buyer, and that without his services the sale would not have been made. (14 C.3d 829.)

(2) *Knowledge* by the A group of the special relationship between plaintiff and B was adequately pleaded; it was alleged that they knew that the sign constituted a promise to pay a commission to any local broker whose efforts procured the buyer, and, with that knowledge, induced B to make the agreement leaving plaintiff uncompensated. (14 C.3d 829.)

(3) *Intent, causation and damages* were sufficiently pleaded. (14 C.3d 829.) (See *Deeter v. Angus* (1986) 179 C.A.3d 241, 251, 224 C.R. 801 ["where there is an understanding, albeit oral, that the seller is to pay a brokerage commission, a prospective economic relationship exists between only the seller and broker" and "[w]here an outside party, such as the buyer, intentionally disrupts that relationship a cause of action may lie for interference with a prospective economic advantage"]; 36 *Santa Clara L. Rev.* 1219 [tort of interference with prospective economic advantage as eviscerating real estate broker's statute of frauds]; 15 *U.S.F. L. Rev.* 205 [Intentional Interference With Prospective Economic Relationships: A Case For Intentional Tort Recovery for the California Real Estate Broker]; 71 *A.L.R.5th* 491 [liability for tortious interference with prospective contractual relations involving sale of real estate]; 41 *Proof of Facts* 2d 393 [interference with broker's relationship with seller].)

(2) *Limitation of Holding.* *Buckaloo* was disapproved in *Della Penna v. Toyota Motor Sales, U.S.A.* (1995) 11 C.4th 376, 393, 45 C.R.2d 436, 902 P.2d 740, *supra*, §744, to the extent that it does not require pleading and proof of *wrongful conduct* other than the act of interference itself. (On element of wrongful conduct, see *supra*, §744.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Buckaloo Case.* See 90 *Proof of Facts* 3d 207 [interference with real estate broker's contractual relationship with seller; superseding 41 *Proof of Facts* 2d 393, text, p. 1084].



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3. Interference With Noncommercial Opportunity.

5 Witkin Sum. Cal. Law Torts § 749

[§ 749] Interference With Noncommercial Opportunity.

The tort of interference with prospective economic advantage is not necessarily limited to deprivation of future opportunities that are commercial or contractual in nature. (See *Rest.2d, Torts §774B*, Special Note; Dobbs, *The Law of Torts* §451.) The Restatement provides that "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." (*Rest.2d, Torts §774B*.)

However, a claim was denied in *Youst v. Longo* (1987) 43 C.3d 64, 233 C.R. 294, 729 P.2d 728, with respect to interference with the opportunity to win a sporting contest. The complaint alleged that plaintiff entered his horse Bat Champ in a harness race; that defendant, driving The Thilly Brudder, struck Bat Champ with his whip, causing the horse to break stride; and that Bat Champ finished a disappointing sixth. Plaintiff sued in tort, seeking as compensatory damages the difference in prize money that allegedly would have been received but for defendant's interference. *Held*, judgment on demurrer for defendant affirmed; a cause of action will not lie for prospective economic loss arising between competitors in a sporting contest.

(a) *No liability under record.*

(1) Prosser says: "When the attempt has been made to carry liability for interference ... into such areas as ... deprivation of the chance of winning a contest, the courts have been disturbed by a feeling that they were embarking upon uncharted seas, and recovery has been denied; and it is significant that the reason usually given is that there is no sufficient degree of certainty that the plaintiff ever would have received the anticipated benefits." (43 C.3d 74.) In *Blank v. Kirwan* (1985) 39 C.3d 311, 216 C.R. 718, 703 P.2d 58, this court acknowledged Prosser's suggestion that the interests generally protected in this field are *business expectancies*. (43 C.3d 75.)

(2) *Rest.2d, Torts §774B*, Special Note describes a situation which may justify liability for interference with prospective benefits of a noncontractual nature: The plaintiff is deprived of the expectancy of winning a race or contest when he has a *substantial certainty or at least a high probability of success*; e.g., a contest for obtaining the largest number of subscriptions to a magazine, with 1 week more to run and plaintiff leading all other competitors by a margin

of 2-1. But the Note adds that "if the plaintiff has a horse entered in a race and the defendant wrongfully prevents him from running, there may well not be sufficient certainty to entitle the plaintiff to recover." (43 C.3d 76.)

(3) "We conclude, as a matter of law, that the threshold element of probability for interference with prospective economic advantage was not met by the facts alleged, whether or not some 'conspiracy' between a competitor and noncompetitor may have existed. It was not reasonably *probable*, on the facts alleged, that Bat Champ would have finished in a better position. Indeed, we may take judicial notice of the impossibility of predicting such matters." (43 C.3d 77.)

(b) *Public policy considerations.*

(1) "The courts are not appropriate forums for adjudicating claimed sporting event violations which allegedly resulted in prospective economic loss." The regulation of sports conduct has been delegated to supervising agencies, and numerous administrative remedies are available through the California Horse Racing Board to punish drivers who intentionally or recklessly drive their horses. "If the tort of interference were recognized in the context of a sporting competition, virtually no such event would take place without a tort claim from some losing competitor seeking to recover his supposed *economic* loss; a player's every move would be highly scrutinized for possible use in the courtroom." (43 C.3d 78.)

(2) Allegations of conspiracy do not call for a different holding. "[W]e fail to see why the act of competitors conspiring with others (e.g., teammates, friends, coaches, other competitors) to commit an intentional improper play in a sporting competition is so different in kind from the commission of that act by a competitor acting on his own. It would become impossible to draw a distinction between behavior that is sufficient to justify liability, i.e., a conspiracy, and behavior that is excusable as being committed in the heat of competition, i.e., fair play. Further, the fact that a conspiracy exists does not affect the lack of any reasonable probability that economic gain would have been realized." (43 C.3d 79.)

(c) *Jurisdiction of Horse Racing Board.* The Board has been given broad power to regulate and discipline wrongful conduct, but none of the statutes vest it with power to award compensatory relief such as tort damages. (43 C.3d 80, 82.) The only remedy available from the Board in this case is to reorder the finishing positions of the competitors, which it did. (43 C.3d 83.) The possible authority of the Board to require compensatory relief as a condition for reinstatement of licenses is not in issue here. (43 C.3d 82, footnote 15.) (See 85 A.L.R.4th 1048 [recovery in tort for wrongful interference with chance to win game, sporting event, or contest].)

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4. Destruction of Evidence.

5 *Witkin Sum. Cal. Law Torts* § 750

[§ 750] Destruction of Evidence.

Courts of Appeal in *Smith v. Superior Court* (1984) 151 C.A.3d 491, 496, 198 C.R. 829, and *Willard v. Caterpillar* (1995) 40 C.A.4th 892, 912, 48 C.R.2d 607, held that a cause of action could be stated for intentional destruction (spoliation) of evidence needed for prospective litigation. These cases were disapproved, however, in *Cedars-Sinai Med. Center v. Superior Court* (1998) 18 C.4th 1, 7, 74 C.R.2d 248, 954 P.2d 511, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §117, in which the California Supreme Court determined that the tort of intentional spoliation of evidence does not exist. In *Temple Community Hosp. v. Superior Court* (1999) 20 C.4th 464, 471, 84 C.R.2d 852, 976 P.2d 223, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §118, the Supreme Court held that no tort cause of action will lie against a third party, as well as a first party, for intentional spoliation of evidence. Recovery for spoliation of evidence is treated in detail in 3 *Cal. Evidence* (4th), *Presentation at Trial*, §117 et seq.

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5 Witkin Sum. Cal. Law Torts § 751

[§ 751] In General.

The Restatement rejects liability for *negligent* interference with prospective economic advantage (see *Rest.2d, Torts* §766C), and this was formerly the rule in California. (See *Fifield Manor v. Finston* (1960) 54 C.2d 632, 7 C.R. 377, 354 P.2d 1073; *Stromer v. Yuba City* (1964) 225 C.A.2d 286, 291, 37 C.R. 240; *Costello v. Wells Fargo Bank* (1968) 258 C.A.2d 90, 95, 65 C.R. 612; *Adams v. Southern Pac. Trans. Co.* (1975) 50 C.A.3d 37, 41, 123 C.R. 216.) In 1979, however, the California Supreme Court held in the landmark case of *J'Aire Corp. v. Gregory* (1979) 24 C.3d 799, 157 C.R. 407, 598 P.2d 60, that liability may result from negligent interference with future economic interests. Plaintiff alleged that the county leased airport premises to plaintiff for operation of a restaurant; the lease required that the county furnish heat and air conditioning; the county engaged defendant contractor to make improvements in the premises, including renovation of the heating and air conditioning system; the contract contained no completion date; during 1 month, the restaurant could not operate, and for a longer period, it was without air conditioning; defendant negligently failed to complete the work within a reasonable time; and plaintiff suffered loss of business with resulting loss of profits, in a specified amount. *Held*, a cause of action was stated.

(a) *Applicable rule and criteria.* Damages are recoverable for negligence where there is a special relationship, despite lack of contractual privity. This rule is set forth in *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *infra*, §1179, as are the criteria for determining whether a duty of care is owed. These criteria are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. (24 C.3d 804.) The facts pleaded bring the case within the six *Biakanja* criteria: (1) The contract between defendant and the county could not be performed without a direct effect on plaintiff's business. (2) It was clearly foreseeable that any significant delay would adversely affect plaintiff's business. (3) Plaintiff suffered injury from inability to operate for a time and from loss of business while without heat or air conditioning. (4) The delays were closely connected with plaintiff's injury, because they were the direct cause. (5) Defendant's conduct was particularly blameworthy, for it continued after the probability of damage was drawn to defendant's attention. (6) Public policy supports a duty of care, for failure or refusal of a contractor to perform a construction project with diligence, which causes injury to another, is grounds for discipline. (24 C.3d 804, 805.)

(b) *Holding consistent with cases and statute.* Upholding the cause of action for negligent interference with prospective economic advantage is consistent with the recent trend in tort cases, which stress foreseeability rather than traditional notions of duty (e.g., *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *infra*, §1008, and *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086). (24 C.3d 805, 806.) It is also consistent with the basic principle of tort liability embodied in C.C. 1714, that every person is responsible for injuries caused by his or her lack of ordinary care. (24 C.3d 806.)

(c) *Limited scope of rule announced.* This kind of recovery involves the danger of imposing liability for remote consequences out of proportion to the magnitude of the defendant's wrongful conduct. But the *Biakanja* factors place a limit on recovery by focusing judicial attention on foreseeability of the injury and the nexus between the defendant's conduct and the injury. "Following these principles, recovery for negligent interference with prospective economic advantage will be limited to instances where the risk of harm is foreseeable and is closely connected with the defendant's conduct, where damages are not wholly speculative and the injury is not part of the plaintiff's ordinary business risk." (24 C.3d 808.)

(d) *Conclusion.* The conclusion on these facts is that "a contractor owes a duty of care to the tenant of a building undergoing construction work to prosecute that work in a manner which does not cause undue injury to the tenant's business, where such injury is reasonably foreseeable." (24 C.3d 808.) (See C.E.B., 2 California Business Litigation, §11.18; 23 *San Diego L. Rev.* 37; 12 *Southwestern U. L. Rev.* 87; 37 *Stanf. L. Rev.* 1513; BAJI, No. 7.82.1; CACI, No. 2204.)

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2. Negligent Interference.
b. Scope of Rule.

5 Witkin Sum. Cal. Law Torts § 752

[§ 752] Scope of Rule.

(1) *In General.* The rationale of *J'Aire Corp. v. Gregory* (1979) 24 C.3d 799, 157 C.R. 407, 598 P.2d 60, supra, §751, has been applied in subsequent cases. (See *Chameleon Engineering Corp. v. Air Dynamics* (1980) 101 C.A.3d 418, 423, 161 C.R. 463 [general contractor's cross-complaint against supplier of subcontractor for negligent failure to supply equipment; following *J'Aire*]; *Ott v. Alfa-Laval Agri* (1995) 31 C.A.4th 1439, 1455, 37 C.R.2d 790 [applying six-part test for duty of care derived from *J'Aire*, owners of dairy farm did not establish right to recover economic damages for alleged negligence of milking machine manufacturers, where they failed to show special relationship or that their injury was reasonably foreseeable]; *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 C.A.4th 502, 523, 53 C.R.2d 887 [citing *J'Aire* and *Ott*]; *North Amer. Chemical Co. v. Superior Court* (1997) 59 C.A.4th 764, 781, 69 C.R.2d 466 [*J'Aire* principles applied to allow plaintiff to recover in tort for economic losses caused by breach of services contract].)

(2) *Interference Caused by Negligently Manufactured Product.* The *J'Aire* rule has been extended beyond the negligent rendering of services to include recovery for interference with prospective economic advantage caused by a negligently manufactured product. In *Ales-Peratis Foods Int. v. American Can Co.* (1985) 164 C.A.3d 277, 209 C.R. 917, plaintiffs AP, a buyer, packager, and seller of seafood, was offered a contract to buy, pack, and sell a quantity of abalone in Mexico. It needed cans with a "C" type enamel lining suitable for packing abalone, and contracted for them with Gencan, a Los Angeles can supplier. Gencan informed American Can, a manufacturer, of the type needed, and American Can supplied them; but when they were delivered to AP it was discovered that they did not have the "C" enamel and were unsuitable for packing abalone. As a result, AP was left with 119,200 deficient cans, and lost the contract for sale of the abalone. In plaintiff's action against American Can, summary judgment was granted for defendant on the theory that recovery for economic loss is not allowed in a negligence action. *Held*, reversed. A cause of action was stated on the theory of negligent interference with prospective economic advantage.

(a) *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, infra, §1179, with its six-part test was the basis for the *J'Aire Corp. v. Gregory* line of cases, allowing recovery in negligence actions where the economic loss is especially foreseeable despite the absence of physical injury or property damage. Although *Biakanja* and *J'Aire* involved negligent rendition of services, neither the language nor the logic of the opinions exempts negligent manufacture of a product. (164 C.A.3d 285.)

(b) Applying the six *Biakanja* criteria:

(1) The contract between Gencan and American Can was for supplying cans necessary to performance of the AP contract with its customer, and both Gencan and American Can knew this. "Thus American Can's performance was intended to and did directly affect" AP. (164 C.A.3d 289.)

(2) Under the facts alleged, American Can could have reasonably foreseen that its failure to perform would affect AP's ability to perform. (164 C.A.3d 289.)

(3) Because American Can did not properly perform, AP lost the profits it would have received. (164 C.A.3d 289.)

(4) The facts pleaded a close connection between American Can's acts and the damages suffered. (164 C.A.3d 289.)

(5) The moral blame attaches to American Can because it shipped defective goods which may have proved hazardous to consumers if actually used.

(6) Policy considerations warrant imposition of liability: "Society gains nothing from tolerating a level of negligence by container manufacturers which allows them to ship defective and potentially dangerous cans which will be used to pack foods destined to be purchased and eaten by hapless consumers. Indeed the general public has a stake in the early detection of these defective cans and their immediate removal from the stream of commerce before they cause injury. Cannery and other intermediate enterprises should be encouraged to do just that." (164 C.A.3d 290.)

(c) Applying the *J'Aire* principles, plaintiff has stated a cause of action for negligent interference with prospective economic advantage: (1) A triable issue exists whether defendant knew that a large quantity of its product had been ordered for a single customer and for a specific purpose. (2) A triable issue also exists whether defendant shipped negligently manufactured products not suitable for that purpose and which might have been dangerous to human health if actually used. (3) A triable issue exists whether defendant could reasonably foresee that plaintiff would suffer economic injury if the shipment of cans was defective. (164 C.A.3d 290.) (On strict products liability, see *infra*, §1428 et seq.)

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c. Elements of Action.

5 *Witkin Sum. Cal. Law Torts* § 753

[§ 753] Elements of Action.

BAJI, No. 7.82.1 states that the "essential elements" of the claim are as follows:

"1. An economic relationship existed between the plaintiff and (third party), containing a probable future economic benefit or advantage to plaintiff;"

"2. The defendant knew of the existence of the economic relationship;"

"3. The defendant engaged in wrongful conduct;"

"4. It was reasonably foreseeable that this wrongful conduct would interfere with or disrupt this economic relationship if defendant failed to exercise due care;"

"5. The defendant was negligent in his or her conduct, that is, the defendant failed to exercise due care;"

"6. The economic relationship was actually interfered with or disrupted; and"

"7. The above described conduct caused plaintiff damage, namely, plaintiff lost in whole or in part the economic benefit or advantage from the economic relationship."

However, the court "must first determine as a matter of law whether defendant owed plaintiff a duty of care, by applying the criteria set forth in" *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *infra*, §1179. (Use Note to BAJI, No. 7.82.1 [citing *J'Aire Corp. v. Gregory* (1979) 24 C.3d 799, 157 C.R. 407, 598 P.2d 60, *supra*, §751].)

The duty to instruct that interference with future economic advantage must be "independently wrongful" (see *supra*, §744) applies whether the act is intentional or negligent. (*National Med. Trans. Network v. Deloitte & Touche* (1998) 62 C.A.4th 412, 438, 72 C.R.2d 720; see BAJI, No. 7.86.1 [defining "wrongful conduct"].)

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See CACI, No. 2204 [Negligent Interference With Prospective Economic Relations], listing elements generally similar

to those stated in BAJI, No. 7.82.1.

(3) *Wrongful conduct*: See *Contemporary Services Corp. v. Staff Pro* (2007) 152 C.A.4th 1043, 1060, 61 C.R.3d 434 [action for negligent interference with prospective economic advantage could not be based on conduct insufficient to prove plaintiffs' alleged malicious prosecution, abuse of process, or defamation claims; plaintiffs were required to show that defendants engaged in conduct that was wrongful by some legal measure other than fact of interference itself]; *Venhaus v. Shultz* (2007) 155 C.A.4th 1072, 1077, 66 C.R.3d 432 [trial court erred in modifying CACI, No. 2204 to require that defendant's wrongful conduct be intentional or wilful; negligent misconduct or violation of statutory obligation is sufficient for liability].



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d. Destruction of Evidence.

5 *Witkin Sum. Cal. Law Torts* § 754

[§ 754] Destruction of Evidence.

Despite the California Supreme Court holdings that there is no cause of action for intentional spoliation of evidence (see *supra*, §750), a Court of Appeal recognized a limited cause of action for *negligent* spoliation of evidence by a third party in *Johnson v. United Services Auto. Assn.* (1998) 67 C.A.4th 626, 629, 79 C.R.2d 234, 3 Cal. Evidence (4th), *Presentation at Trial*, §119. With respect to duty, an action for negligent spoliation by a third-party spoliator requires (a) an agreement to preserve; (b) a specific request to preserve accompanied by an offer to pay the cost or otherwise bear the burden of preserving; (c) a voluntary undertaking to preserve that induces reasonable and detrimental reliance; or (d) a duty imposed by contract, statute, regulation or some analogous special relationship. (67 C.A.4th 629.)

A contrary conclusion has been reached by other courts, declaring that there is no tort of negligent spoliation of evidence in either the first-party or third-party situation. (See *Farmers Ins. Exchange v. Superior Court* (2000) 79 C.A.4th 1400, 1403, 95 C.R.2d 51; *Coprich v. Superior Court* (2000) 80 C.A.4th 1081, 1088, 1089, 95 C.R.2d 884; 3 Cal. Evidence (4th), *Presentation at Trial*, *Supp.*, §119; *Lueter v. California* (2002) 94 C.A.4th 1285, 1295, 115 C.R.2d 68; *Forbes v. San Bernardino* (2002) 101 C.A.4th 48, 57, 123 C.R.2d 721 [no cause of action despite public entity's duty to preserve evidence].)

Recovery for spoliation of evidence is treated in detail in 3 Cal. Evidence (4th), *Presentation at Trial*, §117 et seq.

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C. Interference With Employment Relation.

5 Witkin Sum. Cal. Law Torts § 755

[§ 755] Interference With Employment Relation.

(1) *Injuries to Employee*. "The rights of personal relations forbid ... [a]ny injury to a servant which affects his ability to serve his master." (C.C. 49.) The Code Commissioners' Note to the 1872 Code provision shows that it was intended to codify the common law action for loss of services of a *domestic servant* who was member of the master's household. Dictum in *Darmour Productions Corp. v. Herbert M. Baruch Corp.* (1933) 135 C.A. 351, 27 P.2d 664, declared, however, that the right of action covers injuries to ordinary business employees. (135 C.A. 353.) (See *Offshore Rental Co. v. Continental Oil Co.* (1978) 22 C.3d 157, 162, 163, 167, 148 C.R. 867, 583 P.2d 721, supra, §192 [*Darmour* rule was inapplicable to business losses suffered by partnership by reason of injury to partner]; 23 *Cal. L. Rev.* 420 [criticizing *Darmour* opinion on principle and policy grounds]; 36 *A.L.R.3d* 1375 [right of partnership to recover damages for injury to partner]; 4 *A.L.R.4th* 504 [employer's right of action for loss of services or the like against third person tortiously killing or injuring employee].)

The *Darmour* rule has been repudiated. In *I.J. Weinrot & Son v. Jackson* (1985) 40 C.3d 327, 220 C.R. 103, 708 P.2d 682, plaintiff was a closely held corporation. W was its president, employee, and majority shareholder. He was injured in an automobile collision as a result of alleged negligence of defendants. The complaints set forth three main causes of action: (1) damages for W's personal injuries; (2) damages for his wife's loss of consortium; and (3) corporate recovery for salary paid to W while he was unable to work, lost business profits, and reimbursement for payments for his medical expenses. In support of the third cause of action, it was alleged that plaintiff corporation was contractually obligated to pay W's medical expenses and salary despite his inability to perform his usual duties. *Held*, judgment for defendants on demurrer affirmed.

(a) *Darmour* did not discuss the common law, the precedents from other jurisdictions, or the grave policy implications of its rule, and its dictum is disapproved. (40 C.3d 336.)

(b) The 1939 Legislature reenacted C.C. 49 without changing the statutory language in question (subdivision (c)), and plaintiff contends that this was an implied adoption of the *Darmour* interpretation. But the legislative history, including the Governor's message, does not support this contention. (40 C.3d 336, 337, 338.) "[W]e conclude the Legislature simply reenacted the statute as codified in 1872, with appropriate restrictions, to comply with the Governor's request that it not unintentionally curtail an action granted by prior law." (40 C.3d 339.)

(c) The opinion in *Offshore Rental Co. v. Continental Oil Co.* (1978) 22 C.3d 157, 148 C.R. 867, 583 P.2d 721,

supra, §192, suggests that granting the plaintiff corporation a right of recovery for injuries to an employee would be contrary to public policy, and these observations are equally applicable to the present case. (40 C.3d 340.) Moreover, any legitimate objective of the broad interpretation urged is already available by other features of modern California law:

(1) Employers covered under workers' compensation law have a statutory right of subrogation to recover compensation of salary paid to employees injured by third parties. (40 C.3d 340.)

(2) Employers not subject to workers' compensation law who provide employees with contractually guaranteed benefits in the event of incapacity may incorporate in the employment contract a right of reimbursement from the injured employee who eventually recovers from a third-party tortfeasor. (40 C.3d 340.)

(3) Where the third party's intended acts are calculated to disrupt the employer-employee relationship, the employer may sue for intentional interference with contractual relations. (40 C.3d 341.)

Weinrot has been followed in subsequent cases. (See *Von Batsch v. American Dist. Tel. Co.* (1985) 175 C.A.3d 1111, 1118, 222 C.R. 239 [action for wrongful death]; *Fischl v. Paller & Goldstein* (1991) 231 C.A.3d 1299, 1303, 282 C.R. 802 [applying *Weinrot* to general negligence cause of action, and holding that employer could not recover for increased workers' compensation premiums and lost profits].)

In *Herrick v. Superior Court* (1987) 188 C.A.3d 787, 233 C.R. 675, the court rejected the contention that an employer's action would lie for injuries to an employee caused by an intoxicated driver. Plaintiff employer relied on the dictum in *Weinrot*, that an action might lie for an intentional act calculated to disrupt the employer-employee relationship (40 C.3d 341), and *Taylor v. Superior Court* (1979) 24 C.3d 890, 157 C.R. 693, 598 P.2d 854, *infra*, §1775, permitting recovery of punitive damages from a drunken driver. But while some authorities suggest that there might be recovery where the defendant's act is intentional, there appears to be no square holding to that effect. (188 C.A.3d 792.) "[W]e conclude that the policy considerations upon which *Taylor* was based have been served by holding the defendant subject to liability for punitive damages for the injuries caused directly to such a plaintiff. Those policy considerations do not require the extension of liability in favor of an employer for injuries to his employee, in contravention of other important policy considerations." (188 C.A.3d 793.)

(2) *Inducing At-Will Employee To Leave Employment.* In *Reeves v. Hanlon* (2004) 33 C.4th 1140, 17 C.R.3d 289, 95 P.3d 513, a professional law corporation sued two attorneys formerly associated with the firm for improperly inducing firm employees to resign. This conduct was part of a deliberate campaign to disrupt plaintiffs' business that also included solicitation of plaintiffs' clients, misappropriation of trade secrets, and destruction of computer data. The employment relationship between plaintiffs and their resigning employees was at will. *Held*, judgment for plaintiffs affirmed.

(a) A plaintiff may recover damages for intentional interference with an at-will employment relation under the same California standard applicable to claims for intentional interference with prospective economic advantage generally. (33 C.4th 1152, 1154, disapproving *GAB Business Services v. Lindsey & Newsom Claim Services* (2000) 83 C.A.4th 409, 99 C.R.2d 665.) To recover for a defendant's interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act that induced the employee to leave the plaintiff. It is sufficient for this purpose that the act be proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal rule. (33 C.4th 1152.)

(b) Under this standard, a defendant is not subject to liability for intentional interference if the interference consists merely of extending a job offer that induces an employee to terminate his or her at-will employment. (33 C.4th 1153.) However, defendants did not simply extend job offers to plaintiffs' at-will employees. Rather, they purposely engaged in unlawful acts that crippled plaintiffs' business operations and caused plaintiffs' personnel to terminate their employment. Accordingly, judgment was proper for damages attributable to that wrongful conduct. (33 C.4th 1155.)

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5 *Witkin Sum. Cal. Law Torts* § 756

[§ 756] In General.

The Restatement lists a number of privileges specifically applicable in cases involving interference with business relationships. These include competition (*Rest.2d, Torts* §768, *infra*, §758); having a financial interest in the business of the person induced (*Rest.2d, Torts* §769; see *infra*, §760); responsibility for the welfare of another (*Rest.2d, Torts* §770); inducement to influence another's business policy (*Rest.2d, Torts* §771); giving of information or advice (*Rest.2d, Torts* §772); and asserting a bona fide claim (*Rest.2d, Torts* §773). (See C.E.B., 2 California Business Litigation, §11.22 et seq.; Dobbs, *The Law of Torts* §446; 2 Harper, James & Gray 2d §§6.12, 6.13; 12 Cal. Western L. Rev. 475 [agent's privilege to interfere with his principal's contracts]; 45 *Am.Jur.2d* (1999 ed.), *Interference* §25; on defense of privilege generally, see *supra*, §131 et seq.)

The issue of privilege is one of fact, and the *Rest.2d, Torts* §767 sets forth the following factors to be considered in determining whether intentional interference with a contract or prospective contractual relation is proper: "(a) The nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties." (See, quoting the Restatement, *H & M Associates v. El Centro* (1980) 109 C.A.3d 399, 409, 167 C.R. 392; *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 C.A.3d 200, 230, 194 C.R. 180; *Bert G. Gianelli Distr. Co. v. Beck & Co.* (1985) 172 C.A.3d 1020, 1054, 219 C.R. 203.)

Privilege is an affirmative defense and ordinarily must be specially pleaded. (*A.F. Arnold & Co. v. Pacific Professional Ins.* (1972) 27 C.A.3d 710, 714, 104 C.R. 96; *Mayes v. Sturdy Northern Sales* (1979) 91 C.A.3d 69, 80, 154 C.R. 43; see *Culcal Stylco v. Vornado* (1972) 26 C.A.3d 879, 881, 103 C.R. 419 [defendant must plead privilege unless facts constituting that defense appear on face of complaint]; 5 *Cal. Proc.* (4th), *Pleading*, §1027.)

In *Herron v. State Farm Mut. Ins. Co.* (1961) 56 C.2d 202, 14 C.R. 294, 363 P.2d 310, the complaint alleged that plaintiff attorneys had a contingent fee contract (to advance costs and expenses and receive one-third of recovery after deduction of costs) covering a personal injury suit; that defendant, insurance carrier of the allegedly negligent driver, although immediately notified by plaintiffs of their contract, nevertheless told plaintiffs' clients that they did not need an attorney, and induced them to discharge plaintiffs, thereafter settling the claim. Plaintiffs sought compensatory damages of one-third of the reasonable value of the personal injury claim, or one-third of the settlement amount, whichever was

the lesser, plus punitive damages. *Held*, a cause of action was stated. The chief issue was the defense of privilege, which the court rejected on the following analysis:

(a) "Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct and the relationship between the parties." (56 C.2d 206.)

(b) Privilege is an affirmative defense, ordinarily to be pleaded by defendant. (56 C.2d 207.) And the fact that the defendant was the insurance carrier of the alleged tortfeasor (which appeared on the face of the complaint) did not make its action privileged. Defendants argued that the policy of the law encourages settlement, and that an insurance company has a legal duty to effect a settlement of a claim against its insured in an appropriate case; also that settlement furthers its own economic interests. But it did not appear from the complaint that any efforts were made to negotiate with plaintiffs, and "there is no indication that State Farm could not have protected its interests and obtained a satisfactory settlement without interfering with the contract." (56 C.2d 207.) (See *Frazier v. Boccardo* (1977) 70 C.A.3d 331, 339, 138 C.R. 670 [triable issue of fact whether defendant attorney firm had knowledge of prior contract with plaintiff attorney firm; summary judgment for defendant reversed]; 13 Am.Jur. Trials 153 [interference with attorney's contingent fee contract]; 26 A.L.R.3d 679 [liability in tort for interference with attorney-client relationship].)

In *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 C.A.3d 13, 144 C.R. 664, supra, §747, defendant argued that it was free to terminate its business relationship with plaintiff's company or any potential successor, that it was also at liberty to inform prospective buyers that it would not utilize the services of the company if it changed hands, and that, hence, the complaint showed lawful acts on its face and established privilege as a matter of law. The court rejected the contention as follows:

(a) Defendant was not entitled to claim the privilege of a *competitor* (see infra, §§758, 759), for defendant and plaintiff were not competitors. (79 C.A.3d 21.)

(b) Defendant was not entitled to claim the privilege of a person with a financial interest (see infra, §760), for (1) the interest privileged is that of a part owner, partner, stockholder and the like, not that of a person who looks to the other for business; and (2) the privilege is based on a state of mind, and the defendant's predominant purpose must be determined by proof. (79 C.A.3d 22.)

The defense of privilege is often referred to alternatively by the courts as the defense of justification. (See *Environmental Planning & Information Council v. Superior Court* (1984) 36 C.3d 188, 193, 203 C.R. 127, 680 P.2d 1086, infra, §759.)

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See 2 Harper, James & Gray 3d §§6.12, 6.13. *Cross-Reference:* 5 Cal. Proc. (5th), *Pleading*, §1101.



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5 Witkin Sum. Cal. Law Torts § 757

[§ 757] Litigation Privilege.

The absolute privilege in C.C. 47(b) for statements in judicial proceedings that applies in defamation actions (see supra, §567 et seq.) is also available in actions involving interference with business relationships. (*Brody v. Montalbano* (1978) 87 C.A.3d 725, 738, 151 C.R. 206; *Rosenthal v. Irell & Manella* (1982) 135 C.A.3d 121, 125, 128, 185 C.R. 92; see *Herzog v. "A" Co.* (1982) 138 C.A.3d 656, 661, 662, 188 C.R. 133 [privilege must be asserted in good faith for legitimate purpose]; *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 C.A.3d 200, 231, 234, 194 C.R. 180 [applying relevancy test and rejecting claim of privilege]; C.E.B., 2 California Business Litigation, §11.22 et seq.; on absolute privilege, see supra, §561 et seq.)

In *Financial Corp. of America v. Wilburn* (1987) 189 C.A.3d 764, 234 C.R. 653, plaintiffs alleged that defendant, an attorney, made false accusations of narcotics trafficking and other criminal activities in an action he had brought against plaintiffs in federal court, seeking relief under RICO (Racketeer Influenced and Corrupt Organizations Act); that he had also made these accusations to plaintiffs' employees, investors, customers, and others before filing the federal actions; and that his purpose was to have the accusations republished in the news media in order to damage plaintiff's business and to extort money and property as the price for ceasing. The trial court sustained a demurrer to the cause of action for interference with economic advantage on the ground of privilege. *Held*, reversed in part.

(a) *Relevancy test.* For the litigation privilege to apply, the publication must be made in furtherance of the litigation and to promote the interest of justice. (189 C.A.3d 773; see supra, §569.) But if the test is met, an attorney is protected irrespective of the purpose in publishing the matter or his or her belief in its truth. (189 C.A.3d 773, 776.)

(b) *Prelitigation statements.* The alleged statements threatening litigation, i.e., demands to resolve disputes in anticipation of litigation, are privileged. (189 C.A.3d 777.) The same is true of accusations made in preliminary proceedings gathering evidence from prospective witnesses for anticipated litigation. (189 C.A.3d 777, 778.) But the statements allegedly made to "persons throughout Northern California" could be actionable. An attorney will not be protected by absolute privilege as to actionable words spoken to persons in no way connected with the judicial proceeding. (189 C.A.3d 778.) As to this allegation, therefore, the complaint was not subject to demurrer. (189 C.A.3d 778.)

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VII. INTERFERENCE WITH BUSINESS RELATIONS

D. Defense of Privilege.

3. Competition.

a. Restatement.

5 *Witkin Sum. Cal. Law Torts* § 758

[§ 758] Restatement.

Rest.2d, Torts §768 reads as follows:

"One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other." (*Rest.2d, Torts* §768(1).)

"The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will." (*Rest.2d, Torts* §768(2).)

Comment h gives this explanation of Subsection (2): "The rule that competition is not an improper interference with prospective contractual relations as stated in Subsection (1) does not apply to inducement of breach of contract. When B is legally free to deal either with C or with A, freedom to engage in competition implies a privilege on the part of A to induce B to deal with him rather than with C. But when B is legally obligated to deal with C, A is not justified by the mere fact of competition in inducing B to commit a breach of his legal duty."

Comment i explains the provision on contracts terminable at will: "If the third person is free to terminate his contractual relation with the plaintiff when he chooses, there is still a subsisting contract relation; but any interference with it that induces its termination is primarily an interference with the future relation between the parties. ... As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of the third person there is no breach of it."

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3. Competition.

b. California Law.

5 Witkin Sum. Cal. Law Torts § 759

[§ 759] California Law.

(1) *Privilege Applicable.* The privilege of competition, as articulated in the Restatement (see *supra*, §758), is an affirmative defense in California to actions for intentional interference with economic relations. (*San Francisco Design Center Associates v. Portman Cos.* (1995) 41 C.A.4th 29, 40, 50 C.R.2d 716; see *Bed, Bath & Beyond of La Jolla v. La Jolla Village Square Venture Partners* (1997) 52 C.A.4th 867, 880, 60 C.R.2d 830 [competitor obtained lease by paying higher price after lessor's contract with plaintiff was held unenforceable due to statute of frauds]; Dobbs, *The Law of Torts* §445; 2 Harper, James & Gray 2d §6.13; BAJI, Nos. 7.86, 7.86.1.) Generally, one competitor may induce customers of the other to do business with that competitor. (*Shida v. Japan Food Corp.* (1967) 251 C.A.2d 864, 867, 60 C.R. 43; see *Charles C. Chapman Bldg. Co. v. California Mart* (1969) 2 C.A.3d 846, 855, 82 C.R. 830 [defendant constructed modern building, solicited commercial tenants of plaintiff's old building to move, offering reduced rentals and other favorable terms].) Whether the competition privilege constitutes a defense in a particular case is a factual issue to be decided on all the circumstances in that case. (*San Francisco Design Center Associates v. Portman Cos.*, *supra*, 41 C.A.4th 41.)

In *Katz v. Kapper* (1935) 7 C.A.2d 1, 44 P.2d 1060, plaintiff and defendants were rival wholesale fish dealers. It was alleged that defendants offered price reductions to retail customers of plaintiff, and opened competing retail stores to drive these customers out of business, as a means of inducing them to cease trading with plaintiff. *Held*, this competition, however ruthless, was not unlawful. (7 C.A.2d 4.) (See 9 So. Cal. L. Rev. 425 [Katz].)

In *A-Mark Coin Co. v. General Mills* (1983) 148 C.A.3d 312, 195 C.R. 859, the court held that an agreement to purchase estate assets, based on a probate court order later vacated, could not give rise to a protectable expectancy of future economic benefit. (148 C.A.3d 323.) In addition, the court held that defendants' action in offering a competitive bid for those assets clearly came within the privilege of competition. The opinion cites the Restatement and *Charles C. Chapman Bldg. Co.*, *supra*, and quotes Prosser as follows: "So long as the plaintiff's contractual relations are merely contemplated or potential, it is considered to be in the interest of the public that any competitor should be free to divert them to himself by all fair and reasonable means. ... In short, it is no tort to beat a business rival to prospective customers. Thus, in the absence of prohibition by statute, illegitimate means or some other unlawful element, a defendant seeking to increase his own business may cut rates or prices, allow discounts or rebates, enter into secret negotiations behind the plaintiff's back, refuse to deal with him or threaten to discharge employees who do, or even deal

with third parties unless they cease dealing with the plaintiff, all without incurring liability." (148 C.A.3d 323.)

In *PMC v. Saban Entertainment* (1996) 45 C.A.4th 579, 52 C.R.2d 877, involving two companies striving to get an exclusive license from the same company, the following acts were covered by the competition privilege, and thus were not tortious:

(a) Defendant was notified that the company granting the license had decided to grant the license to a company other than defendant. This communication did not preclude defendant from continuing to pursue the deal. (45 C.A.4th 604.)

(b) Defendant promised to indemnify the company if it awarded the license to defendant, and was a party to lawsuits involving the license. "The indemnity agreement is not against public policy as it does not encourage litigation that was not otherwise likely to occur; it merely reallocated the cost of that event." (45 C.A.4th 605.)

(2) *Privilege Is Inapplicable If Existing Contract Is Not at Will.* The interest of a competitor does not justify inducing breach of an existing contract that is not at will. (*Imperial Ice Co. v. Rossier* (1941) 18 C.2d 33, 36, 112 P.2d 631; *Freed v. Manchester Service* (1958) 165 C.A.2d 186, 191, 331 P.2d 689; see *Rest.2d, Torts* §768(1), *supra*, §758; 24 Cal. L. Rev. 208, 211.)

(3) *Privilege Is Inapplicable If Wrongful Means Are Employed.* Employment of "wrongful means" will defeat the defense. (*Bed, Bath & Beyond of La Jolla v. La Jolla Village Square Venture Partners, supra*; see *Rest.2d, Torts* §768(1)(b), *supra*, §758.) In other words, the defendant's conduct "must be unlawful or illegitimate." The plaintiff "must show the competitor's conduct violated a statute or constituted a tort such as fraud or unfair competition. The defendant's conduct must be independently actionable." (*San Francisco Design Center Associates v. Portman Cos., supra*, 41 C.A.4th 41.)

Where a purchaser of real property, after taking advantage of a broker's efforts, induces the seller to accept the "low net price" by excluding broker's commission, the competition privilege does not apply. "There is no public policy to be served by encouraging such devious dealings; on the contrary, such an intrusion into a protected economic relationship is precisely the conduct condemned by the traditional tort of interference with contract." And "the mere fact that the relationship has not yet ripened into a contract is of no moment when the cause of action is based on the actor's subversion of a prospective contractual relationship." (*Buckaloo v. Johnson* (1975) 14 C.3d 815, 828, 122 C.R. 745, 537 P.2d 865, *supra*, §748.)

In *Settimo Associates v. Environ Systems* (1993) 14 C.A.4th 842, 17 C.R.2d 757, plaintiff, the holder of a general B-1 contractor's license, was twice underbid on a private construction project by defendant, the holder of only a specialty contractor's license that was not sufficient for some of the work involved. Plaintiff pleaded alternative causes of action for intentional or negligent interference with prospective economic advantage, asserting that defendant's lack of a general contracting license alone satisfied the element of unlawful interference. *Held*, judgment on the pleadings for defendant affirmed.

(a) Persons involved in the competitive bidding process strive to surpass the competition by submitting the lowest bid possible. This conduct, while admittedly designed to disrupt the prospective business relationships of competitors, is nonetheless essential to the proper functioning of a free-market system. (14 C.A.4th 845.)

(b) The fact that defendant was not properly licensed does not amount to actionable unlawful interference with contracts. There is no statutory authority requiring a private entity to accept bids only from duly licensed contractors. And although defendant's conduct amounted to a misdemeanor and precluded it from enforcing an awarded contract, the regulatory statutes give responsibility for sanctioning the misconduct to the Contractors' Licensing Board. These statutes do not create any action for civil damages in competing bidders who lose projects to unlicensed contractors. (14 C.A.4th 846.)

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(1) *Privilege Applicable*. See 2 Harper, James & Gray 3d §6.13.



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D. Defense of Privilege.
4. Financial Interest in Business.

5 Witkin Sum. Cal. Law Torts § 760

[§ 760] Financial Interest in Business.

"One who, having a financial interest in the business of a third person intentionally causes that person not to enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if he (a) does not employ wrongful means and (b) acts to protect his interest from being prejudiced by the relation." (*Rest.2d, Torts* §769.) While the privilege applies in actions for interference with prospective economic advantage, it is inapplicable to actions for inducing breach of an existing contract. (*Winn v. McCulloch Corp.* (1976) 60 C.A.3d 663, 673, 131 C.R. 597.) (See *Culcal Stylco v. Vornado* (1972) 26 C.A.3d 879, 882, 883, 103 C.R. 419 [privilege cannot be asserted unless alleged as affirmative defense]; 46 *Hastings L. J.* 609 [agent's privilege to interfere with principal's contracts].)

Comment c to Restatement §769 points out that the "financial interest" required for application of the privilege is an interest in the nature of an *investment*: "A part owner of the business, as for example, a partner or stockholder, has at least an interest of this nature. A bondholder or other creditor may also have it. On the other hand, the interest of a person who looks to a third person for business and will lose business opportunities if that person enters into the business relations involved is not a financial interest under the rule stated in this Section."

The privileged act must be done in good faith by appropriate means. (*Richardson v. La Rancherita of La Jolla* (1979) 98 C.A.3d 73, 81, 159 C.R. 285 [citing the Restatement and Prosser].) "Something other than sincerity and an honest conviction by a party in his position is required before justification for his conduct on the grounds of 'good faith' can be established. There must be an objective basis for the belief which requires more than reliance on counsel. ... [T]o merely equate reliance on an attorney's advice with 'good faith' is to shield those parties from liability who seek and obtain counsel." (98 C.A.3d 82.)

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D. Defense of Privilege. 5. Refusal To Do Business With Another.

5 Witkin Sum. Cal. Law Torts § 761

[§ 761] Refusal To Do Business With Another.

(1) *In General.* Ordinarily, one may select the persons with whom he or she wishes to do business, and may refuse to deal with any others. But there are several established exceptions to this rule:

(a) Refusal to deal may violate a statute prohibiting *discrimination*. (See 8 Summary (10th), *Constitutional Law*, §890 et seq.)

(b) Refusal to do business in order to create a *monopoly* may be violative of either statute or public policy. (See 1 Summary (10th), *Contracts*, §591 et seq.)

(c) Where a number of persons agree together to refuse to deal with another, this organized or concerted refusal (usually called a "*boycott*") may be a tort unless it has a reasonable and justifiable business objective. (See 77 Harv. L. Rev. 925; 29 So. Cal. L. Rev. 267; 3 Summary (10th), *Agency and Employment*, §640 et seq.; cf. *Sullivan v. Warner Bros. Theatres* (1941) 42 C.A.2d 660, 662, 109 P.2d 760 [employer may seek to induce employees not to patronize an unfriendly business].)

(2) *Politically Motivated Boycott.* Boycott is also permissible when it has a political objective. *Environmental Planning & Information Council v. Superior Court* (1984) 36 C.3d 188, 203 C.R. 127, 680 P.2d 1086, upholds the common law and constitutional right to maintain a politically motivated boycott. Plaintiff published a newspaper, in El Dorado County. Defendant, a nonprofit corporation with a membership of 100 persons in the county, sought to promote conservationist policies in the county. Defendant's newsletter criticized the editorial policies of the newspaper, accusing it of ignoring facts, printing inaccuracies, and editorializing in its news articles; and the newsletter suggested various methods of combatting this "vicious, irresponsible journalism," including contacting businesses advertising in the newspaper and requesting that they discontinue that advertising. Plaintiff brought an action for injunctive relief and damages, defendant moved for summary judgment, and the motion was denied. *Held*, mandamus issued to compel granting of summary judgment.

(a) *Common law on boycott.*

(1) California has recognized that an unjustified or unprivileged intentional interference with prospective economic

advantage may be tortious. (36 C.3d 193, citing the text.)

(2) The contours of justification, or privilege, are not precisely defined. Where the tort is *interference with contract*, a balancing of the importance of the objective advanced against the importance of the interest interfered with is required. (36 C.3d 193.) However, when the defendant's action does not interfere with the performance of existing contracts, the range of justification is broader; e.g., a competitor's stake in advancing his or her own economic interest will not justify inducement of a contract breach but will suffice where contractual relations are merely contemplated. (36 C.3d 194.)

(3) Most of the cases have involved either commercial or union-management relationships, and there is little authority on a situation in which a group organized for political purposes allegedly undertakes a consumer boycott to achieve its ends. (36 C.3d 194.) But the authority that does exist strongly suggests that this conduct will not give rise to liability. Certainly defendant's objective--to change the editorial policies of the newspaper in relation to public issues affecting the environment--is a lawful one, and the means used--a peaceful secondary boycott--have likewise been held to be lawful under the common law of the state. (36 C.3d 194.)

(b) *Constitutional principles.*

(1) *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215, 7 Summary (10th), *Constitutional Law*, §386, held that a state cannot prohibit a nonviolent, politically motivated boycott designed to force governmental and economic change. The case drew a crucial distinction between solely economic boycott activity, which can be regulated (i.e., by antitrust laws), and political boycotts. The same distinction is present here. (36 C.3d 196.)

(2) Plaintiff seeks to distinguish *Claiborne* on the ground that the objective of the boycott in that case was to vindicate rights of equality and freedom, while here defendants are seeking to further merely their private views on environmental matters. This argument might have merit if this were an ordinary case of interference with advantageous economic relationship in the commercial context; in such a case, the balancing of objective and interest is required. Here, however, as in *Claiborne*, defendant's activities constitute a "politically motivated boycott," and the fact that the changes it seek "bears upon environmental quality rather than racial equality" does not call for a different result. (36 C.3d 197.)

(3) The fact that the boycott is aimed at changing the editorial policies of a newspaper is likewise not a reason for a different result. "The freedom of a newspaper to formulate editorial policies is obviously of great value in our society, and the spectacle of different groups seeking to influence those policies through the use of economic boycott is troublesome to contemplate. Yet, the newspaper is not in a position to claim infringement of its own constitutional rights by such conduct, since no governmental action is implicated, and the degree of economic coercion which exists may be no greater than that which might lawfully be exerted by an advertiser who, on his own, seeks to influence editorial policy by withdrawing or threatening to withdraw its patronage. The market place of ideas contemplated by the First Amendment ... cannot be so insulated." (36 C.3d 197.) (See *Lam v. Ngo* (2001) 91 C.A.4th 832, 847, 111 C.R.2d 582 [picketing restaurant because owner failed to support demonstrations against video store displaying North Vietnamese insignia was constitutionally protected peaceful political activity and could not support tort action for intentional interference with prospective economic advantage; following *NAACP v. Claiborne Hardware Co.* and *Environmental Planning & Information Council v. Superior Court*].)

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5 Witkin Sum. Cal. Law Torts § 762

[§ 762] Confidential Relationship.

A person who is in a confidential relationship with a party to a contract may induce breach of the contract when acting in the party's interests. When an employment relationship is involved with the party, this is sometimes referred to as the "manager's privilege." (See *Aalgaard v. Merchants Nat. Bank* (1990) 224 C.A.3d 674, 684, 274 C.R. 81.)

In *Lawless v. Brotherhood of Painters, Decorators & Paperhangers of America* (1956) 143 C.A.2d 474, 300 P.2d 159, plaintiff, an officer of a local union, had a written contract of employment with the local and also held notes of the local for past services. Defendant international union suspended plaintiff in contravention of his contract and also suspended the local's charter, making it impossible for the local to meet its obligation on the notes. Plaintiff brought this action for damages for inducing breach of contract. *Held*, defendant was protected by its confidential relationship with the local, as well as two other types of privilege.

(a) Defendant was in a confidential relationship with the local, one of the contracting parties. An agent, e.g., may influence his or her employer in its business relations; and an international union stands in a similar position to a local, with common objectives and the same system of internal laws. (143 C.A.2d 478.)

(b) Where two parties have separate contracts with a third, each may resort to any legitimate means to secure performance though the necessary result will be to cause a breach of the other contract; so here, defendant international was privileged to insist on its contract with the local (the union constitution) even though this rendered the local unable to perform its obligations to its creditors. (143 C.A.2d 478.)

(c) Where the inducement to breach is ancillary to the exercise of lawful methods directed to attainment of a legitimate labor objective, it is privileged; here the object was maintenance of internal union discipline. (143 C.A.2d 479.) (On labor union's concerted action as privileged despite inducement of employer breach of contract, see 3 Summary (10th), *Agency and Employment*, §619 et seq.)

In *Aalgaard v. Merchants Nat. Bank*, *supra*, plaintiff cashier of a national bank brought this action against the bank and officers after he was forcibly retired for age. Defendants relied on the manager's privilege. A manager or agent may, with impersonal or disinterested motive, counsel breach of contract with a third party that he or she reasonably believes to be harmful to his or her employer's best interests. *Held*, the privilege was a defense.

(a) The privilege has been recognized in California; but the question whether it is absolute (requiring only a showing that a defendant occupied such a position), or qualified (requiring a defendant to establish a prima facie case of entitlement to it) "is somewhat muddled in California law." (224 C.A.3d 684.) Some authorities, without much analysis, suggest that it is absolute; others seem to hold that it should not be based merely on a defendant's position but on the defendant's purpose in inducing the breach. (224 C.A.3d 685.)

(b) However, even if the privilege is not absolute, the uncontradicted evidence in this case shows that defendants acted not in self-interest but in the bank's interest, "by attempting to reduce the Bank's costs through elimination of a highly paid employee, albeit by allegedly impermissible means, and replacing him with lower-paid workers." (224 C.A.3d 685.)

In *Halvorsen v. Aramark Uniform Services* (1998) 65 C.A.4th 1383, 77 C.R.2d 383, plaintiff sued defendant manager for inducing their employer to terminate plaintiff's at-will employment contract. *Held*, judgment for defendant on demurrer affirmed; under the manager's privilege, defendant's action was absolutely privileged. The cases are divided as to whether this privilege is absolute or whether the manager's motive is relevant and to what degree. However, when the employment is *at will*, the manager's motives and communications with the employer should receive the strongest protection from interlopers--an absolute manager's privilege. This is so, because in this situation, the justification for judicial interference is weak. Just as there is no reason to cause disruption of the business enterprise by investigating the employer's reasons and motives for terminating an employee when the employment is at will, so also there is little justification for causing essentially the same disruption to discern the motives of management and the communications of management with the employer. (65 C.A.4th 1391.)

In *Huynh v. Vu* (2003) 111 C.A.4th 1183, 4 C.R.3d 595, plaintiff broker alleged defendant husband's intentional interference with his wife's contract with plaintiff, and defendant raised the manager's privilege as a defense. The court noted three formulations of the manager's privilege: (1) absolute (the only requirement is that the defendant be the breaching party's agent or manager); (2) mixed motive (the privilege applies if the manager is motivated, at least in part, to benefit the principal); (3) predominant motive (the privilege applies only when the manager's predominant motive is to benefit the principal). (111 C.A.4th 1195, citing *Halvorsen*.) After an exhaustive survey of the cases (111 C.A.4th 1195, 1196, 1197), the court adopted the predominant motive formulation, at least for most commercial tort claims. (111 C.A.4th 1198.) Three reasons support adopting the predominant motive formulation:

(a) Adopting the mixed motive test would be tantamount to proclaiming absolute immunity, which has been applied, although not unanimously, only in the at-will employment context. "Rare indeed would be the case where the principal's interest could not be advanced at least to some degree by the manager's advice." (111 C.A.4th 1198.)

(b) Providing a manager with immunity where the advice to breach is given predominantly to benefit the principal is consistent with the efficient breach theory (where it is more efficient to breach and pay expectation damages than to perform): the principal/promisor is able to obtain and rely on the manager's advice in determining whether its interests are best served by performance or by breach. However, if the manager's privilege is absolute, or subject only to the mixed motive test, the privilege would allow the manager to retain the manager's own benefit from the principal's breach while escaping any allocated share of liability. (111 C.A.4th 1198.)

(c) The predominant motive test has been adopted in several other states. (111 C.A.4th 1199, citing cases from Alaska, Iowa, Minnesota, and Tennessee.)

The court rejected the following two contentions:

(1) That the principal must be a business, rather than a natural person. (111 C.A.4th 1195.)

(2) That a manager's desire to advance his or her own personal interest as a secondary or indirect result of benefiting the principal (as where a husband is motivated to some extent by a desire to enhance whatever community property interest he might have in the proceeds of the transaction) should vitiate the privilege. (111 C.A.4th 1200.)

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7. Inducing Suit on Colorable Claim.

5 *Witkin Sum. Cal. Law Torts* § 763

[§ 763] Inducing Suit on Colorable Claim.

In *Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 C.3d 1118, 270 C.R. 1, 791 P.2d 587, the court held that to allow a cause of action to be stated for intentional interference with contractual relations or intentional interference with prospective economic advantage when the only interference alleged is that defendant induced the bringing of potentially meritorious litigation "would be an unwarranted expansion of the scope of these torts and a pernicious barrier to free access to the court." (50 C.3d 1123.) In 1963, plaintiff P G & E entered into a power purchase contract with the Placer County water agency to buy all of the power generated by its Middle Fork American River Project. The contract provided that the agreement would terminate in 2013 or at the end of the years in which the agency completed retirement of its project bonds, whichever occurred first. Energy prices rose, and defendant Bear Stearns, an investment broker, persuaded the agency to join in an effort to terminate the power contract by retiring its bonds; and with the financial and legal assistance of Bear Stearns, the agency sought a declaratory judgment that it could terminate the contract in this manner. While that proceeding was still pending, plaintiff brought the present action seeking an injunction and damages for disruption of the contractual relations and interference with prospective economic advantage. *Held*, judgment for defendant on demurrer affirmed.

(a) Inducing a party to seek termination of its contract according to its terms may be actionable under the cases upholding actions for interference with at-will and voidable contracts; i.e., a contract at the will of the parties is not at the will of others. (50 C.3d 1127, citing *Speegle v. Board of Fire Underwriters of the Pac.* (1946) 29 C.2d 34, 172 P.2d 867, *supra*, §734, *Zimmerman v. Bank of America* (1961) 191 C.A.2d 55, 12 C.R. 319, *supra*, §733, and other cases.) And express termination provisions do not create a privilege to interfere: "[I]f we protect an economic relationship that is wholly prospective from outside interference, we must also protect contractual relations that are subject to termination." (50 C.3d 1128.)

(b) The plaintiff need not allege an actual or inevitable breach of contract in order to state a cause of action for disruption of contractual relations. It is enough to show that the plaintiff's performance is made more costly or more burdensome. (50 C.3d 1129.) But P G & E has not alleged that defendant's conduct had any impact on P G & E. "It is not alleged that Bear Stearns induced the Agency to undertake a plan to terminate the contract unilaterally and immediately begin to sell its power elsewhere. ... It is not alleged that Bear Stearns's marketing campaign for the Agency's power has caused P G & E a present or imminent injury. There is no allegation that unilateral termination is threatened. The only threat to the contract is the litigation. There will be no termination of the contract unless there is a

judicial determination that the Agency may terminate, and it appears that P G & E's only present damages are in responding to the action for declaratory relief." (50 C.3d 1130.)

(c) The only common law tort claim that treats the instigation of bringing a lawsuit as an actionable injury is the action for malicious prosecution. The actionable harm is in forcing the individual to expend financial and emotional resources to defend against a *baseless* claim; bringing a colorable claim is not actionable. If bringing a colorable claim were actionable, "tort law would inhibit free access to the courts and impair our society's commitment to the peaceful, judicial resolution of the differences." (50 C.3d 1131.) California's concern with assuring free access to the courts has extended to the privilege for statements made in the course of litigation (50 C.3d 1132), and other courts have held that the scope of the interference torts is limited by the constitutional right to petition for redress of grievances (50 C.3d 1133).

(d) The constitutional doctrine assuring the right to petition protects not only the litigant but others who wish to achieve the object of a lawsuit or are involved in bringing it. "If any person who induced another to bring a lawsuit involving a colorable claim could be liable in tort, free access to the courts could be choked off with an assiduous search for unnamed parties. It is important to remember what P G & E is trying to achieve through this lawsuit. It seeks to enjoin Bear Stearns from further participation in the lawsuit in order to avert what it considers to be the irreparable harm of an adverse judgment. It is essentially seeking to abort the lawsuit by starving the litigant of funds." (50 C.3d 1136.) (See *Westinghouse Elec. Corp. v. Newman & Holtzinger* (1995) 39 C.A.4th 1194, 1202, 46 C.R.2d 151 [disclosure of documents protected by secrecy agreement and by protective discovery order, which forced plaintiff to defend numerous lawsuits, could not be basis for tort claim because inducing third party to bring litigation on meritorious claim is not tortious; following *Bear Stearns*]; 18 *Pepperdine L. Rev.* 843 [*Pacific Gas & Elec. Co. v. Bear Stearns*].)

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8. Petitioning Government for Redress of Grievance.

5 Witkin Sum. Cal. Law Torts § 764

[§ 764] Petitioning Government for Redress of Grievance.

Actions for interference with business relations are limited by the constitutional right to petition for grievances; an exception exists, however, where the defendant's efforts to influence the government are merely a *sham*. In *Hi-Top Steel Corp. v. Lehrer* (1994) 24 C.A.4th 570, 29 C.R.2d 646, plaintiffs brought an action against defendants for unfair competition and intentional interference with contractual relations and prospective economic advantage. Plaintiffs alleged that defendants engaged in the following actions that caused plaintiffs to abandon their plan to enter into the automobile body shredding business: (a) made false statements to the city concerning plaintiffs' installation of the shredding equipment; (b) after the city approved plaintiffs' plan design, filed an appeal for the purpose of delaying installation of the shredding equipment; (c) circulated a flyer to residents of the city and the surrounding communities that contained false statements about the shredding equipment and encouraged the residents to oppose plaintiffs' plan of design; and (d) after plaintiffs' plan of design was affirmed on appeal, informed plaintiffs that they would withdraw their appeal if plaintiffs would agree not to shred automobile bodies, but that otherwise they would attempt to delay installation by asking the city to require plaintiffs to provide an environmental impact report. The complaint further alleged that during this time defendants themselves were gathering information about the same type of shredding equipment that plaintiffs were seeking to install. The trial judge, ruling that defendants' actions were protected under Cal. Const., Art. I, §3 (right to petition for redress of grievances), entered judgment on the pleadings for defendants. *Held*, reversed; plaintiffs stated a cause of action under the sham exception to the *Noerr-Pennington* doctrine.

(a) Under the so-called *Noerr-Pennington* doctrine, there is no antitrust liability for efforts to influence government that are protected by the First Amendment right to petition for redress of grievances, even if the motive behind these efforts is anticompetitive. However, there is an exception to the doctrine when the efforts to influence government are merely a sham, i.e., where a person is not genuinely attempting to petition the government for redress of grievance, but is simply attempting to interfere with a competitor. These sham efforts are subject to antitrust liability. (24 C.A.4th 574; see 1 Summary (10th), Contracts, §562.) These principles, although arising in the antitrust context, have been applied or discussed in cases involving other types of liability, including liability for interference with contractual relationships or prospective economic advantage. (24 C.A.4th 577.)

(b) There is no impediment to applying the sham exception in California: (1) In *Blank v. Kirwan* (1985) 39 C.3d 311, 216 C.R. 718, 703 P.2d 58, and *Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 C.3d 1118, 270 C.R. 1, 791 P.2d 587, *supra*, §763, the Supreme Court set forth the *Noerr-Pennington* doctrine and the sham exception, but did

not apply them because they were inapplicable. However, in neither case did the court question the sham exception or suggest that it should not be applied in *California*. (24 C.A.4th 579.) (2) The right-to-petition language in Cal. Const., Art. I, §3, differs from the corresponding language in the First Amendment. However, in the context of the sham exception, these differences in language are irrelevant. (24 C.A.4th 578.) (3) There is no reason not to apply the exception in California. A person should not be protected from tort liability if the person is not engaging in a genuine exercise of his or her constitutional rights. (24 C.A.4th 579.) "Accordingly, we hold the sham exception to the *Noerr-Pennington* doctrine is applicable in California." (24 C.A.4th 579.)

(c) Defendants argued that even if the sham exception applies in California, it can only be applied in an adjudicatory context. This argument is without merit. The *Noerr* case itself (see *Eastern Railroad Presidents Conference v. Noerr Motor Freight* (1961) 365 U.S. 127, 81 S.Ct. 523, 528, 5 L.Ed.2d 464, 470, 1 Summary (10th), *Contracts*, §562) never limited the sham exception to the adjudicatory process only. And subsequent cases have either refused to apply the exception outside the adjudicatory context because the petitioning activity in question was genuine or have applied it in the adjudicatory context without holding that it applies *only* in that context. (24 C.A.4th 579.)

(d) Plaintiffs' allegations show that defendants prosecuted their appeal of plaintiffs' plan design without regard to its merits; that they agreed to withdraw the appeal if plaintiffs would agree not to shred automobile bodies, but threatened additional obstacles if plaintiffs would not agree; and that defendants were working on installing their own automobile body shredder, thus indicating that they had no genuine concern as to its effects on the environment. In other words, defendants were not concerned with stopping plaintiffs' installation of an automobile body shredder through governmental action but through the imposition of costs and burdens associated with the governmental process. Thus, plaintiffs stated a cause of action under the sham exception. (24 C.A.4th 582.)

SUPPLEMENT: [This section is current through the latest supplement]

See *People v. The Pac. Lumber Co.* (2008) 158 C.A.4th 950, 964, 70 C.R.3d 501, 13 Summary (10th), *Equity*, Supp., §128 [sham exception to *Noerr-Pennington* doctrine did not operate to allow state to pursue fraud action against lumber company for alleged misrepresentations and concealments during California Environmental Quality Act proceedings; company's activities were genuine effort to influence government and to secure approval of its sustained yield plan].



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CHAPTER IX - Torts

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VII. INTERFERENCE WITH BUSINESS RELATIONS
D. Defense of Privilege.
9. First Amendment Guarantees.

5 Witkin Sum. Cal. Law Torts § 765

[§ 765] First Amendment Guarantees.

Injurious statements affecting the plaintiff's business relations may be subject to First Amendment protections. (*Blatty v. New York Times Co.* (1986) 42 C.3d 1033, 1042, 232 C.R. 542, 728 P.2d 1177; see 24 *Hastings Const. L. Q.* 709 [First Amendment defense in tortious interference with contract cases]; on constitutional limitations on liability for injurious statements generally, see *supra*, §601 et seq.) Thus, the *Blatty* case held that a newspaper cannot be held liable for failure to include a book in its list of "best sellers." Plaintiff, an author of fiction, brought this action against defendant, a newspaper publisher, alleging that defendant published a weekly list "purporting to rank best selling books ... based on actual sales"; that the list had a substantial influence on promotion and purchase of books, and defendant knew or should have known of this influence; that plaintiff's novel met all the criteria for inclusion on the list, but defendant failed to include it; and that as a result plaintiff suffered loss of the benefits that inclusion would have brought. The trial court gave judgment for defendant on demurrer. *Held*, affirmed: "[T]he First Amendment establishes a broad zone of protection within which the press may publish without fear of incurring liability" on the basis of statements made. (42 C.3d 1042; see 7 *Summary* (10th), *Constitutional Law*, §425 et seq.)

(a) In defamation actions (in which the alleged injurious falsehood is the gravamen of plaintiff's claim), the Amendment has abrogated the common law of strict liability. "For constitutional purposes it is not enough that the traditional affirmative defense of truth, with the burden of proof on the defendant, be available to the press; rather it is the plaintiff who is required to plead and prove falsehood." (42 C.3d 1042, citing *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, *supra*, §601, and *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, *supra*, §613.) And the Amendment also requires that the statement must specifically refer to, or be "of and concerning," the plaintiff. (42 C.3d 1042, citing *Rosenblatt v. Baer* (1966) 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597, *supra*, §601.)

(b) The limitations that define the Amendment's zone of protection for the press are not limited to defamation cases but apply to all claims whose gravamen is the alleged injurious falsehood of a statement. (42 C.3d 1042, citing *Reader's Digest Assn. v. Superior Court* (1984) 37 C.3d 244, 253, 208 C.R. 137, 690 P.2d 610, *supra*, §604.) The reason is that, although the limitations arose in defamation actions, "they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values." (42 C.3d 1043.)

(c) "The 'of and concerning' or specific reference requirement limits the right of action for injurious falsehood,

granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt." (42 C.3d 1044.) The absence of the requirement could invite vexatious lawsuits and seriously interfere with public discussion of issues or groups in the public eye. (42 C.3d 1044.)

(d) Pragmatic concerns also compel the conclusion that First Amendment limitations apply to all these claims, however labeled; e.g., intentional infliction of emotional distress or 'false light' invasion of privacy. (42 C.3d 1045.)

(e) Under these principles, the cause of action for intentional interference with prospective economic advantage--essentially an action for injurious falsehood--is barred. Plaintiff failed to allege, and could not allege, that the statement in the newspaper either expressly mentioned him or referred to him by reasonable implication. (42 C.3d 1046.) And his contention that to require him to make such a showing improperly adds a new element to the tort is unsound: A state's definition of a tort cannot undermine the requirements of the *First Amendment*. (42 C.3d 1047.)

In *Hofmann Co. v. E.I. Du Pont de Nemours & Co.* (1988) 202 C.A.3d 390, 248 C.R. 384, an action for damages for intentional interference with prospective advantage and other claims, the First Amendment defense was raised and held sufficient. "*Blatty* ... put a new gloss on California business tort law. Prior to *Blatty* it appeared that torts involving intentional interference could be accomplished by speech that would ordinarily be protected under the First Amendment. ... *Blatty* repudiated this view by holding that the First Amendment necessarily comes into play when a media defendant is accused of publishing false statements that damage business interests." (202 C.A.3d 402.) Moreover, the *Blatty* rule is not limited to media defendants, and the rule applies to statements of opinion as well as fact. (202 C.A.3d 402.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Krinsky v. Doe 6* (2008) 159 C.A.4th 1154, 1178, 72 C.R.3d 231 [anonymous poster's satirical remarks on Internet message board concerning corporate president, "while offensive" and "juvenile," were protected by First Amendment; thus, president's action for interference with contractual or business relationships was precluded].



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D. Defense of Privilege.
10. Other Privileges.

5 *Witkin Sum. Cal. Law Torts* § 766

[§ 766] Other Privileges.

Additional types of conduct have been held to be privileged in actions for interference to business relations. The following cases are illustrative:

In *Masoni v. Board of Trade* (1953) 119 C.A.2d 738, 260 P.2d 205, plaintiff partners owed \$ 17,000 to 65 creditors, and were negotiating for settlement at a lesser amount or for an extension of time. Defendant association of merchants and manufacturers, following its usual practice, invited creditors to form a committee and assign claims to its agents. But it also advised them that one partner had ample means to pay in full, and that was thereby forced to pay. In denying recovery, the court first reaffirmed the principle underlying the tort and suggested that in a proper case an action would lie against a defendant who, to destroy the plaintiff's business, induced creditors to demand immediate payment and to refuse to extend credit. (119 C.A.2d 742.) Here, however, the legitimate purpose of defendant association was to promote cooperation among creditors of insolvent debtors, and the legitimate means used were the communication of truthful information as to one partner's ability to pay and the offer of collection services. (119 C.A.2d 743.)

In *Cal-Medicon v. Los Angeles County Med. Assn.* (1971) 20 C.A.3d 148, 97 C.R. 530, plaintiff Cal-Medicon assisted the Los Angeles County Department of Public Social Services in transporting disabled persons to doctors' offices for examination. The doctors participating in its program received a letter from defendant county medical society suggesting that their agreements violated the code of ethics of the national and county associations, and also involved illegal solicitation of business. The letter closed with a request for an explanation. Plaintiff Cal-Medicon and Dr. D, a participant in its activities, brought an action for interference with business. *Held*, judgment for defendants on demurrer sustained. Assuming that the acts complained of constituted an interference with Cal-Medicon's business, the complaint showed justification on its face. The relationship between the medical association and its members was sufficient to justify its inquiry into possible violation of professional ethics. (20 C.A.3d 153.)

In *Bledsoe v. Watson* (1973) 30 C.A.3d 105, 106 C.R. 197, plaintiff attorney had a written contract with a city and its council members to challenge asserted irregularities in recall petitions directed at the members. The proponents of the recall engaged defendant W, an attorney, to support their objectives. Plaintiff alleged that defendant W maliciously and by fraudulent representations of law persuaded the city treasurer to repudiate plaintiff's contract and to refuse to disburse city funds to him. *Held*, judgment for defendants on demurrer affirmed.

(a) Public policy, made explicit by *C.C.P. 526a*, encourages citizens to challenge illegal expenditures of public funds. "Since defendants were specifically authorized to initiate a lawsuit to prevent an alleged illegal expenditure of funds by the city treasurer, their less drastic act in writing the treasurer to persuade him not to make an illegal expenditure of funds was likewise justified for the social interest attached to both acts is identical." (30 C.A.3d 109.)

(b) Defendant's conduct was also justifiable under the right of a citizen to protest a public expenditure by petition and instruction (Cal. Const., Art. I, §3; U.S. Const., Amendments I, XIV). "Correspondence with the public officer responsible for the disbursement of the funds under question appears to us an appropriate means of petition and instruction. In our view protection of the means appropriate to prevent an illegal expenditure of public funds and to achieve fiscal integrity in local government carries a greater social value than protection from challenge of plaintiff's employment contract with the city and its council members." (30 C.A.3d 109.)

(c) The official proceeding privilege in defamation (C.C. 47(b), *supra*, §585) is analogous: "[T]he tort of inducing breach of contract cannot be used to dam up the open channel of communication through which citizens may express their grievances to public officials and challenge questioned expenditures of public funds. At bench the balance in favor of the public interest is unusually strong for the operation of the electoral process itself was involved." (30 C.A.3d 110.)

In *Worldvision Enterprises v. American Broadcasting Cos.* (1983) 142 C.A.3d 589, 191 C.R. 148, plaintiff, owner of future syndication rights in a television series, alleged that defendant broadcasting company disparaged the value of the rights by its statements about their unsuitability for general family viewing. *Held*, summary judgment for defendant was affirmed.

(a) "All defendant did in this case was to voice an opinion, through its president, on the merits of a series of dramatic productions and on an issue of significant public interest which had been addressed by Congress, the Federal Communications Commission, and the press: the difficult question of defining what is appropriate television programming for exposure to children. Strong public policy favors defendant's right to comment without malice on matters of public interest." (142 C.A.3d 596, citing the text.)

(b) "The speech was given to defendant's network affiliates who bore a special relationship to defendant and who had an interest in knowing defendant's broadcasting philosophy and the reasons for defendant's scheduling decisions." (142 C.A.3d 596, citing *Cal-Medicon, supra*, and the text.)

(c) "In considering whether there should be recovery for negligent interference with prospective economic advantage, courts and commentators have suggested that a balancing is required among societal interests, the interests of the plaintiff in freedom from interference, and the interests of the defendant in maximum freedom of economic action. ... Here the defendant has a legitimate right to make programming scheduling decisions to promote its economic interests and its judgment of the public interest. If defendant could be held liable on a negligence theory to the owners of syndication rights of each program presently broadcast by defendant, programming decisions would be impossible because scheduling or promoting one program at a particular time necessarily excludes all other programs from that time slot, arguably damaging the other syndicators." (142 C.A.3d 597.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

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VIII. FRAUD AND DECEIT
A. In General.
1. Governing Statutes.

5 Witkin Sum. Cal. Law Torts § 767

[§ 767] Governing Statutes.

(1) *General Fraud Statute.* C.C. 1709 provides a cause of action for "fraudulent deceit": "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." C.C. 1710 specifies four kinds of "deceit" within the meaning of C.C. 1709:

(a) *Intentional misrepresentation:* "The suggestion, as a fact, of that which is not true, by one who does not believe it to be true." (C.C. 1710(1).)

(b) *Negligent misrepresentation:* "The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." (C.C. 1710(2).)

(c) *Concealment:* "The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." (C.C. 1710(3).)

(d) *False promise:* "A promise, made without any intention of performing it." (C.C. 1710(4).)

(2) *Fraud in Making Contract.* C.C. 1572, dealing with fraud in the making of contracts, defines "actual fraud" by essentially setting forth the same four acts as C.C. 1710:

(a) *Intentional misrepresentation:* "The suggestion, as a fact, of that which is not true, by one who does not believe it to be true." (C.C. 1572(1).)

(b) *Negligent misrepresentation:* "The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." (C.C. 1572(2).)

(c) *Concealment:* "The suppression of that which is true, by one having knowledge or belief of the fact." (C.C. 1572(3).)

(d) *False promise:* "A promise made without any intention of performing it." (C.C. 1572(4).)

The definition also includes, as a fifth category, "[a]ny other act fitted to deceive." (C.C. 1572(5).) (See 1 *Summary*

(10th), *Contracts*, §286.)

(3) *False Claims Act*. The False Claims Act (*Govt.C. 12650 et seq.*) imposes civil liability for submitting false claims to state or local public entities. (See *19 Pacific L. J.* 678; on recovery of treble damages, see *infra*, §1570; on statute of limitations, see *3 Cal. Proc. (4th), Actions*, §450.) The Attorney General, or the prosecuting authority of the local public entity is authorized to initiate the action. (*Govt.C. 12652(a), (b).*) A private person ("the qui tam plaintiff") may likewise sue, for himself or herself and on behalf of the public entity. (*Govt.C. 12652(c).*) (See Judicial Council Form No. MC-060 [Confidential Cover Sheet--False Claims Action]; *Rothschild v. Tyco Int. (2000)* 83 C.A.4th 488, 496, 99 C.R.2d 721 [bar against related actions arising from same conduct in *Govt.C. 12652(c)(10)* does not preclude unfair competition action; provision applies only to subsequent actions filed under False Claims Act]; *Pomona v. Superior Court (2001)* 89 C.A.4th 793, 803, 107 C.R.2d 710 [sufficient allegations in complaint by city and qui tam plaintiff against manufacturer of water distribution parts for using metal inferior to that specified in its catalog]; *American Contract Services v. Allied Mold & Die (2001)* 94 C.A.4th 854, 859, 862, 114 C.R.2d 773 [where qui tam action, in which Attorney General has intervened, appears to have little or no merit, good cause for dismissal by Attorney General exists, despite objection by qui tam plaintiff]; *West v. Sundown Little League of Stockton (2002)* 96 C.A.4th 351, 357, 116 C.R.2d 849 ["good cause," within meaning of *Govt.C. 12652(e)(2)(A)* governing dismissals, exists when dismissal is rationally related to legitimate governmental purpose]; *Hawthorne v. H&C Disposal Co. (2003)* 109 C.A.4th 1668, 1679, 1 C.R.3d 312 [rejecting bar of *Govt.C. 12652(c)(10)* (no person may bring related action based on facts underlying pending action) because previous claims had been dismissed and were thus not "pending"; rejecting bar of *Govt.C. 12652(d)(3)(A)* (action may not be based on public disclosures respecting earlier proceedings) because neither of earlier actions presented same issue as present action]; 23 California Lawyer 47 (September 2003) [actions under False Claims Act].)

(4) *Other Statutes*. Other statutes govern particular types or aspects of fraud. (See C.C. 1573, 1 *Summary* (10th), *Contracts*, §294 [constructive fraud]; *Corp.C. 25400 et seq., 25500 et seq., 9 Summary* (10th), *Corporations*, §443 et seq. [fraud in the sale or purchase of securities]; 11 U.S.C., §523(a)(2), 8 *Cal. Proc. (4th), Enforcement of Judgment*, §491 [liability based on intentional fraud as a debt nondischargeable in bankruptcy].)

(5) *Terminology*. Although C.C. 1572 and 1710 seemingly incorporate negligent misrepresentation within "actual fraud" and "deceit," it is treated as a separate type of claim subject to its own requirements. (See *infra*, §818 et seq.)

"California courts have consistently used the words fraud and deceit interchangeably." (*Sixta v. Ochsner (1960)* 187 C.A.2d 485, 490, 9 C.R. 617.) (On pleading of fraud and deceit, see 5 *Cal. Proc. (4th), Pleading*, §667 et seq.; for basic instructions, see BAJI, No. 12.30 et seq.; CACI, No. 1900 et seq.)

West's Key Number Digest, Fraud k.1

SUPPLEMENT: [This section is current through the latest supplement]

(3) *False Claims Act*. A number of decisions have addressed the scope and application of the False Claims Act, including the following:

Campbell v. Regents of Univ. of Calif. (2005) 35 C.4th 311, 324, 25 C.R.3d 320, 106 P.3d 976, 3 *Cal. Proc. (5th), Actions*, §337 [*Govt.C. 12653* (allowing employees to bring suit for retaliatory discharge for reporting false claims) did not excuse terminated University of California employee from exhausting university internal administrative remedies before bringing action under that statute].

California v. Altus Finance, S.A. (2005) 36 C.4th 1284, 1294, 32 C.R.3d 498, 116 P.3d 1175 [assets of insolvent insurer to which Insurance Commissioner acquires title as conservator or liquidator are held in trust for private parties, primarily policyholders, and do not constitute "state funds" for purposes of action under False Claims Act].

Wells v. One2One Learning Foundation (2006) 39 C.4th 1164, 1189, 1199, 1213, 48 C.R.3d 108, 141 P.3d 225

[charter schools and their operators, but not public schools, were "persons" as defined in *Govt.C. 12650(b)(5)* and therefore subject to suit under False Claims Act; suits under Act, even where qui tam, are not subject to Government Claims Act requirement of prior claim for payment].

California v. PricewaterhouseCoopers, LLP (2006) 39 C.4th 1220, 1227, 48 C.R.3d 144, 141 P.3d 256 [city could not bring false claims action on behalf of state; public entities are not "persons" under False Claims Act, authorized to bring qui tam actions on behalf of other public entities].

California v. Bank of America Corp. (2005) 126 C.A.4th 225, 231, 240, 23 C.R.3d 746 [under *Govt.C. 12651(a)(7)*, which attaches liability for "reverse false claims" (knowingly filing false record to conceal obligation to pay money or transmit property to state or political subdivision), obligation must be certain and liquidated].

Solano v. Lionsgate Corp. (2005) 126 C.A.4th 741, 746, 24 C.R.3d 362 [False Claims Act issues were arbitrable under contract providing that all demands for monetary compensation or damages arising under or related to performance would be arbitrated unless arbitration was waived by both parties; references in *Govt.C. 12651* to "a civil action" to recover penalties and damages and to findings and assessments by "the court" did not preclude arbitration].

Armenta v. Mueller Co. (2006) 142 C.A.4th 636, 647, 47 C.R.3d 832 [*Govt.C. 12651(a)(8)* (imposing liability on beneficiaries of false claims that subsequently discover, and fail to disclose, falsity) applies to third persons who do not submit false claims themselves].

California v. Pacific Bell Tel. Co. (2006) 142 C.A.4th 741, 752, 48 C.R.3d 427 [*Govt.C. 12652(d)(3)(A)* (jurisdictional bar to qui tam false claim actions based on publicly disclosed information unless plaintiff is original source) applied where information had already been publicly disclosed in trade and tax periodicals and plaintiff lacked direct and independent knowledge of that information].

Kern v. Sparks (2007) 149 C.A.4th 11, 17, 56 C.R.3d 551 [trial court erred in granting nonsuit and directed verdict as to county's action against sheriff under False Claims Act where reasonable jury could infer from evidence that sheriff acted recklessly in certifying that unauthorized pay to employees was proper; specific intent to defraud is not required for liability under Act (*Govt.C. 12650(b)(2)(C)*)].

Fassberg Const. Co. v. Housing Authority of Los Angeles (2007) 152 C.A.4th 720, 736, 60 C.R.3d 375 [contractor's change order proposals and weekly payroll reports submitted to housing authority were not "claims" under False Claims Act and could not alone support civil penalty; while Act authorizes treble damages award for knowingly presenting either false claim or false record or statement in support of false claim, it authorizes civil penalty only for each false claim].

Thompson Pac. Const. v. Sunnyvale (2007) 155 C.A.4th 525, 548, 66 C.R.3d 175 [trial court did not err in rejecting proposed instruction that demand or request must be "lie" in order to be "false" for purposes of False Claims Act; *Govt.C. 12560(b)* and *12561(a)* do not require deliberate lie but allows for liability where defendant acts in deliberate ignorance or in reckless disregard of truth of claim].

California v. Hamby (2008) 162 C.A.4th 480, 484, 75 C.R.3d 567 [employees of public agency, acting in course and scope of employment and solely on agency's behalf, are not proper defendants in action under False Claims Act; following *Wells* and *PricewaterhouseCoopers*].

Statute of limitations:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §483.

(4) *Other Statutes.* C.C. 1668 provides: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud ... are against the policy of the law." (See 1 *Summary* (10th), *Contracts*,

§660.) Accordingly, a party who has fraudulently induced the other party to enter into a contract cannot be relieved of liability by an exculpatory clause. (*Manderville v. PCG&S Group* (2007) 146 C.A.4th 1486, 1501, 55 C.R.3d 59.)

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgments*, §518.(5) *Terminology*.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §709 et seq.



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VIII. FRAUD AND DECEIT
A. In General.
2. Restatement.

5 Witkin Sum. Cal. Law Torts § 768

[§ 768] Restatement.

Division Four of the Second Restatement of Torts is entitled "Misrepresentation."

Chapter 22, entitled "Misrepresentation and Nondisclosure Causing Pecuniary Loss," consists of four topics: (1) Fraudulent Misrepresentation (Deceit); (2) Concealment and Nondisclosure; (3) Negligent Misrepresentation; and (4) Innocent Misrepresentation. Topic 1 is further subdivided into Title A, Fraudulent Character of Misrepresentation; Title B, Exception of Influencing Conduct; and Title C, Justifiable Reliance.

Chapter 23 deals with fraudulent misrepresentations and nondisclosure in miscellaneous transactions: §553 [inducing gifts to maker or third persons]; §554 [nondisclosure of physical conditions making marital relation dangerous]; §555 [inducing recipient to enter into meretricious relations with maker or third person]; §556 [misrepresentation of third person's fitness for or freedom to marry]; §557 [inducing unlawful acts or omissions]; and §557A [misrepresentations causing physical harm].

The Scope Note on Chapter 22 (p. 54) discusses the general nature of misrepresentation: "Misrepresentation runs all through the law of torts as a method of accomplishing various types of tortious conduct which, for reasons of historical development or as a matter of convenience, usually are grouped under categories of their own. Thus a battery may be committed by feeding the plaintiff poisoned chocolates or inducing his consent to a physical contact by misrepresenting its character. False imprisonment may result from a pretense of authority to make an arrest, a trespass to land from fraudulent statements inducing another to enter, or a conversion from obtaining possession of goods by fraudulent representations. Many of the common forms of negligent conduct, resulting in physical harm to person or property, are in their essence nothing more than misrepresentation, as in the case of a misleading signal by a driver of an automobile about to make a turn or an assurance that a danger does not exist."

"So far as misrepresentation has been treated as giving rise in and of itself to a distinct form of tort liability, it has been concerned and identified with resulting pecuniary loss. Its origins lay in the common law action of deceit, although, as indicated in Topics 3 and 4 of this Chapter, the liability has now progressed in some respects beyond that action. Accordingly, this Chapter is concerned only with the liability for pecuniary loss resulting from misrepresentation or nondisclosure."

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.
3. Standard of Proof.

5 *Witkin Sum. Cal. Law Torts* § 769

[§ 769] Standard of Proof.

Earlier Court of Appeal opinions stating that fraud must be proved by "clear and convincing evidence" were disapproved in *Liodas v. Sahadi* (1977) 19 C.3d 278, footnotes 3, 8, 13, 137 C.R. 635, 562 P.2d 316. The court examined the conflicting cases and clarified the law as follows:

(a) The cases approving the clear and convincing standard emphasized the former statutory presumption against "crime or wrong," and usually involved equitable remedies such as reformation or rescission of documents. During the same period, cases dealing with actions for damages for fraud followed the general rule applicable to all civil actions, that the proper standard of proof is a preponderance of the evidence. (19 C.3d 287.)

(b) The Evidence Code abolished the presumption and replaced it with an allocation of the burden of proof in *Ev.C.* 520 (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §14), and the standard of proof by a preponderance of evidence applies under *Ev.C.* 115 (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §35). (19 C.3d 290, 291.) The decisions in other jurisdictions are in accord. (19 C.3d 291.)

(c) *Aggregates Associated v. Packwood* (1962) 58 C.2d 580, 25 C.R. 545, 375 P.2d 425, dealing with sufficiency of the evidence to support a finding of fraudulent conveyance, contains a dictum that clear and convincing evidence is required. This statement is inconsistent with the law laid down by other Supreme Court decisions, in fraudulent conveyance cases as well as others in which the issue of fraud was involved, and is not to be followed. (19 C.3d 292, 293.) (See BAJI, No 2.60 [burden and standard of proof generally]; CACI, No. 200 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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VIII. FRAUD AND DECEIT
A. In General.
4. Constitutional Limitations.

5 *Witkin Sum. Cal. Law Torts* § 770

[§ 770] Constitutional Limitations.

A constitutional defense was raised to a fraud action in *Molko v. Holy Spirit Assn. for the Unification of World Christianity* (1988) 46 C.3d 1092, 252 C.R. 122, 762 P.2d 46, but rejected under the facts. Plaintiffs were approached by members of defendant church, and after a long continued series of meetings and educational programs with group members, were allegedly "brainwashed" and induced to join the church. During the period of indoctrination, they frequently asked whether the group was associated with any religious organization and were told that it was not. At the end of the period, the identity and purpose of defendant were fully disclosed, and the initial deception was explained as necessary to carry out the recruitment objective. Plaintiffs nevertheless continued as church members until abducted by "deprogrammers" hired by their parents, and the deprogrammers persuaded them to leave the church. Thereafter they filed the present action for fraud. *Held*, summary judgment for defendant reversed.

(a) *Applicable principles.*

(1) Under *United States v. Ballard* (1944) 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148, 7 Summary (10th), *Constitutional Law*, §514, religious belief is absolutely protected under the First Amendment. However, religiously motivated conduct is not. This conduct is subject to regulation for the protection of society, under a balancing test, in which the importance of a state's interest is weighed against the severity of the burden imposed. And even if the balancing test is met, it must further be shown that (a) no action imposing a lesser burden would satisfy the government's interest, and (b) the action does not discriminate between religions or between religion and nonreligion. (46 C.3d 1112, 1113.)

(2) Although judicial sanctioning of tort recovery is state action sufficient under the Fourteenth Amendment to invoke the same constitutional protections as statutes and other legislative actions, religious groups are not immune from all tort liability. They may be liable even for acts that are religiously motivated. (46 C.3d 1114.)

(3) The present action does not interfere with religious belief: "The legal question is simply whether a religious organization can be held liable on a traditional cause of action in fraud for deceiving nonmembers into subjecting themselves, without their knowledge or consent, to coercive persuasion." (46 C.3d 1116.)

(b) *Analysis of claim.*

(1) Tort liability for fraudulent recruitment does impair the church's ability to recruit members; but the burden is not substantial. "Being subject to liability for fraud does not in any way or degree prevent or inhibit Church members from operating their religious communities, worshiping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading Reverend Moon's message among the population. ... At most, it potentially closes one questionable avenue for bringing new members into the Church." (46 C.3d 1117.)

(2) The state's interest justifies this marginal burden: "[I]t is one thing when a person knowingly and voluntarily submits to a process involving coercive influence, as a novice does on entering a monastery or seminary. ... But it is quite another when a person is subjected to coercive persuasion without his knowledge or consent. While some individuals who experience coercive persuasion emerge unscathed, many others develop serious and sometimes irreversible physical and psychiatric disorders, up to and including schizophrenia, self-mutilation, and suicide. ... The state clearly has a compelling interest in preventing its citizens from being deceived into submitting unknowingly to such a potentially dangerous process." (46 C.3d 1118.) And the state has an equally compelling interest in protecting families from suffering great stress and incurring significant financial loss as a result of that deception. (46 C.3d 1118.)

(3) To allow injured parties to bring private actions for fraud is the least restrictive means available for advancing this state interest. (46 C.3d 1119.) And the traditional tort liability is nondiscriminatory. "Were a nonreligious organization--e.g., a group espousing a political or social cause--to deceive a person into unknowingly submitting to coercive persuasion, the same liability would ensue." (46 C.3d 1119.) (See 25 Loyola L.A. Law Rev. 499, 518 [*Molko*].)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Commentary.

5 *Witkin Sum. Cal. Law Torts* § 771

[§ 771] Commentary.

The subject of fraud is comprehensively covered not only in the Torts Restatement (see *supra*, §768), but in additional texts and articles. The following are illustrative:

(1) *Texts*. See Dobbs, *The Law of Torts* §469 et seq.; 2 Harper, James & Gray 2d §7.1 et seq.; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §1 et seq.

(2) *Practice Works*. See Cal. Civil Practice, 2 Torts, Fraud, Deceit, and Bad Faith, Chap. 22; 5 Proof of Facts 363 [fraud]; 35 Proof of Facts 2d 607 [misrepresentation in sale of animal]; 50 Proof of Facts 3d 371 [liability for sale of forged antique or work of art]; 51 Proof of Facts 3d 361 [liability of real estate professional for interstate real estate fraud]; 20 Proof of Facts 3d 621 [computer vendor's liability for misrepresentation in sale or lease of computer system]; 30 Proof of Facts 3d 1 [fraudulent representations inducing purchase of small business]; 39 Proof of Facts 3d 309 [real estate broker's fraud as to condition or value of realty]; 43 Proof of Facts 3d 407 [fraud by land sales broker]; 36 *Am.Jur. Trials* 1 [broker-dealer fraud: churning]; 39 *Am.Jur. Trials* 527 [fraud in sale of show horse].

(3) *Law Reviews*. See 16 *California Lawyer* 78 (June 1996) [fraud claims in employment litigation]; 28 *San Diego L. Rev.* 401 [misrepresentation of research results]; 21 *Pepperdine L. Rev.* 553 [You May Have Already Won ... Telemarketing Fraud and the Need for a Federal Legislative Solution]; 77 *So. Cal. L. Rev.* 53 [expansion of liability for corporate fraud to accountants, underwriters, lawyers, and other "gatekeepers"].

(4) *Annotations*. See 64 *A.L.R.3d* 6 [fraud in connection with franchise or distributor relationship]; 90 *A.L.R.3d* 568 [vendor's misrepresentation or concealment of danger of flooding or other unfavorable water conditions]; 30 *A.L.R.4th* 474 [vendor's action against vendee's lender for misrepresentation concerning loan commitment]; 85 *A.L.R.4th* 1079 [vocational or trade school's misrepresentations inducing student to enroll or pay fees]; 14 *A.L.R.5th* 537 [employer's liability for fraud in inducing employees to take early retirement].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Texts*. See 2 Harper, James & Gray 3d §7.1 et seq.

(2) *Practice Works*. See 104 *Am. Jur. Trials* 1 [real estate seller's fraudulent misrepresentation of quantity of land

sold].



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 B. Fraudulent Misrepresentation.
 1. In General.

5 *Witkin Sum. Cal. Law Torts* § 772

[§ 772] In General.

(1) *Elements*. The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. (C.C. 1709; *Seeger v. Odell* (1941) 18 C.2d 409, 414, 115 P.2d 977; *Andrew v. Bankers & Shippers Ins. Co.* (1929) 101 C.A. 566, 575, 281 P. 1091; *Nathanson v. Murphy* (1955) 132 C.A.2d 363, 367, 282 P.2d 174; *Harazim v. Lynam* (1968) 267 C.A.2d 127, 130, 72 C.R. 670, quoting the text; *Cicone v. URS Corp.* (1986) 183 C.A.3d 194, 200, 227 C.R. 887; *Conrad v. Bank of America* (1996) 45 C.A.4th 133, 155, 53 C.R.2d 336, citing the text; *Agosta v. Astor* (2004) 120 C.A.4th 596, 599, 603, 15 C.R.3d 565; see *Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 C.A.3d 388, 404, 264 C.R. 779 [reversible error to omit intent and reliance elements in instructions to jury]; *Lacher v. Superior Court* (1991) 230 C.A.3d 1038, 1046, 281 C.R. 640 ["It is the element of intent which makes the fraud actionable, irrespective of any contractual or fiduciary duty one party might owe the other"]; *Atascadero v. Merrill Lynch* (1998) 68 C.A.4th 445, 481, 80 C.R.2d 329, quoting the text [fraudulent intent is element that distinguishes fraud from actionable negligent misrepresentation and from nonactionable innocent misrepresentation]; *Rest.2d, Torts* §525; Dobbs, *The Law of Torts* §470; 2 Harper, James & Gray 2d §7.1; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §22 et seq.; BAJI, No. 12.31; CACI, No. 1900; on pleading elements of fraud, see 5 *Cal. Proc.* (4th), *Pleading*, §667 et seq.)

(2) *Benefit Is Not Required*. It is not essential to liability for fraud that the person charged should have received any benefit. (*Snyder v. Security First Nat. Bank* (1939) 31 C.A.2d 660, 665, 88 P.2d 760.) For example, the person may be liable for misrepresentations concerning property that he or she does not own. (*Swasey v. de L'Etanche* (1936) 17 C.A.2d 713, 718, 62 P.2d 753.)

(3) *Jury Verdict*. Nine of the 12 jurors must agree on all the elements of fraud. However, this requirement is satisfied if 9 of the 12 jurors agree that *some* act of fraud was committed; they do not have to agree on the nature of the specific act. (*Stoner v. Williams* (1996) 46 C.A.4th 986, 993, 54 C.R.2d 243; on 9-3 verdict in civil actions, see Cal. Const., Art. I, §16, 7 *Cal. Proc.* (4th), *Trial*, §90.)

West's Key Number Digest, Fraud k.3, 6

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Elements*. See *R & B Auto Center v. Farmers Group* (2006) 140 C.A.4th 327, 345, 44 C.R.3d 426 [trial court's finding that insurer had no fiduciary duty to insured did not require nonsuit in favor of insurer on misrepresentation claim; misrepresentation cause of action is not predicated on existence of fiduciary duty]; 2 Harper, James & Gray 3d §7.1.

In *Manderville v. PCG&S Group* (2007) 146 C.A.4th 1486, 55 C.R.3d 59, the court stated: "To establish a claim for deceit based on intentional misrepresentation, the plaintiff must prove seven essential elements: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff." (146 C.A.4th 1498, citing CACI, No. 1900.) However, the tort "is sometimes stated with five, or even four, elements." (146 C.A.4th 1498, footnote 4.) Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §709 et seq.

(3) *Jury Verdict*.

Cross-Reference: 7 Cal. Proc. (5th), *Trial*, §80.



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B. Fraudulent Misrepresentation.

2. Misrepresentation.

a. General Requirement That Misrepresentation Must Be of Fact.

5 *Witkin Sum. Cal. Law Torts* § 773

[§ 773] General Requirement That Misrepresentation Must Be of Fact.

The representation must ordinarily be an affirmation of *fact*. (C.C. 1710(1); *Schroeder v. Auto Driveaway Co.* (1974) 11 C.3d 908, 917, 114 C.R. 622, 523 P.2d 622; *Hauter v. Zogarts* (1975) 14 C.3d 104, 112, 120 C.R. 681, 534 P.2d 377, *infra*, §778; *Nibbi Bros. v. Home Fed. Savings & Loan Assn.* (1988) 205 C.A.3d 1415, 1425, 253 C.R. 289, citing the text; see *Nathanson v. Murphy* (1955) 132 C.A.2d 363, 367, 282 P.2d 174 [misrepresentation of acreage of land sold]; *Ashburn v. Miller* (1958) 161 C.A.2d 71, 75, 326 P.2d 229 [misrepresentation of character of soil that was uncompacted fill]; *Buist v. C. Dudley De Velbiss Corp.* (1960) 182 C.A.2d 325, 330, 6 C.R. 259 [representation that land on which house was sold was on cut when in fact it was on fill, not properly compacted, and in area of ancient slide and underground water]; *Wilson v. Houston Funeral Home* (1996) 42 C.A.4th 1124, 1139, 50 C.R.2d 169 [misrepresentations that funeral director would inform plaintiff whether it was necessary to cash insurance check, and would wait whatever time was required for check to clear bank]; *Shafer v. Berger, Kahn, Shafon, Moss, Figler, Simon & Gladstone* (2003) 107 C.A.4th 54, 74, 131 C.R.2d 777, 1 Cal. Proc. (4th), Attorneys, Supp., §328 [insurer's attorney made statement about coverage to nonclient who was engaged in litigation with insured; in view of previous communications between attorney and nonclient, statement was misrepresentation of factual nature]; *Intrieri v. Superior Court* (2004) 117 C.A.4th 72, 85, 12 C.R.3d 97 [misrepresentations that Alzheimer's unit in nursing home was secure and accessible only by authorized persons]; *Rest.2d, Torts* §525, Comment d; Dobbs, *The Law of Torts* §470; 2 Harper, James & Gray 2d §7.8; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §§60 et seq., 138 et seq.; 54 *A.L.R.2d* 660 [misrepresentation of area of land]; 32 *A.L.R.4th* 828 [misrepresentation of heating or cooling costs]; BAJI, No. 12.31; CACI, No. 1900.) (On misrepresentations of opinion, see *infra*, §774 et seq.)

A representation that property produces a certain income is one of fact. (See *Hefferan v. Freebairn* (1950) 34 C.2d 715, 721, 214 P.2d 386 [representation that coffee shop sold for \$ 55,000 would net over \$ 20,000 in year of sale]; *Salvati v. Cusolito* (1950) 98 C.A.2d 582, 584, 220 P.2d 800 [representations that house was connected with public utilities and that fruit and crops produced \$ 2,000 annual return]; *Mariani v. Schonfeld* (1954) 126 C.A.2d 187, 189, 271 P.2d 940 [defendants used false statement of operation of business to show profit when actual records showed loss]; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §186; 27 *A.L.R.2d* 14 [false representations as to income, profits, or productivity of property as fraud]; 39 *Proof of Facts* 3d 309 [real estate broker's misrepresentation or nondisclosure as to condition or value of realty].)

Although a misrepresentation of *law* is ordinarily not actionable (see *infra*, §779), it may become so either as an actionable opinion or as a statement of mixed law and fact (see *infra*, §780).

West's Key Number Digest, Fraud k.9, 12

SUPPLEMENT: [This section is current through the latest supplement]

See *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 C.A.4th 226, 241, 70 C.R.3d 199

[broker-dealer's oral representations concerning offering of company's bridge notes, that preferred stock offering was "done deal" and that early prepayment of notes was "guaranteed," were actionable statements of facts, rather than opinion or prediction]; *Unterberger v. Red Bull North America* (2008) 162 C.A.4th 414, 422, 75 C.R.3d 368, citing the text [beverage distributor failed to present evidence of fraud by energy drink manufacturer sufficient to withstand summary adjudication motion; distributor did not present evidence of specific misrepresentation of fact, knowing falsity of misrepresentation, or intent to defraud, but merely restated claim that manufacturer breached contract in terminating business relationship]; 2 Harper, James & Gray 3d §7.8.

Shafer case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §304.



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B. Fraudulent Misrepresentation.

2. Misrepresentation.

b. Statement of Opinion.

1. General Rule That Opinions Are Not Actionable.

5 *Witkin Sum. Cal. Law Torts* § 774

[§ 774] General Rule That Opinions Are Not Actionable.

A representation is one of opinion "if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment." (*Rest.2d, Torts* §538A.) Representations of opinion are ordinarily not actionable. (See *Padgett v. Phariss* (1997) 54 C.A.4th 1270, 1284, 63 C.R.2d 373 [real estate broker's opinion as to fair market value of real property].)

Thus, assertions to the effect that a particular article is the "best," or speculative statements about possible profits, are "dealer's talk," and a party is not entitled to rely on them. (*Williams v. Lowenthal* (1932) 124 C.A. 179, 185, 12 P.2d 75; see *Pacesetter Homes v. Brodtkin* (1970) 5 C.A.3d 206, 211, 85 C.R. 39 [vendor of duplex buildings stated that they would be an excellent investment "[i]f you receive the rents as we contemplate"]; *Gentry v. eBay* (2002) 99 C.A.4th 816, 833, 121 C.R.2d 703, citing the text [Internet auction provider's statement that its positive rating was "worth its weight in gold" was one of opinion that could not support action for misrepresentation]; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §75.)

Moreover, the representation must ordinarily be about past or existing facts; predictions about *future events*, or statements about future action by some third party, are deemed opinions, and not actionable fraud. (*Henry v. Continental Bldg. & Loan Assn.* (1909) 156 C. 667, 680, 105 P. 960; *Zeh v. Alameda Community Hotel Corp.* (1932) 122 C.A. 366, 368, 10 P.2d 190; see *Richard P. v. Vista Del Mar Child Care Service* (1980) 106 C.A.3d 860, 864, 165 C.R. 370, citing the text [future events]; *Borba v. Thomas* (1977) 70 C.A.3d 144, 152, 138 C.R. 565, quoting the text [future action by third party]; *Neu-Visions Sports v. Soren/McAdam/Bartells* (2000) 86 C.A.4th 303, 307, 103 C.R.2d 159 [alleged misrepresentations about value of property to be used to obtain loan and whether lessor would have clear title at time of financing were opinions about future events]; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §80 et seq.)

In *Chavez v. Citizens For a Fair Farm Labor Law* (1978) 84 C.A.3d 77, 148 C.R. 278, plaintiffs, who campaigned in favor of the initiative measure creating the Agricultural Labor Relations Act, sued defendants, who campaigned against it. The complaint alleged that defendants made false representations to the electorate as to the effect of the proposed law on property and personal rights, and compensatory damages (money spent to combat the representations) and punitive damages were sought. *Held*, no cause of action was stated. Debate on public issues should be uninhibited,

and statements made in the course of that debate generally are, and should be, treated as opinions, not representations of fact. (84 C.A.3d 81, 82, citing and quoting from

Gregory v. McDonnell Douglas Corp. (1976) 17 C.3d 596, 600, 131 C.R. 641, 552 P.2d 425, supra, §621.)

In *Finch v. McKee* (1936) 18 C.A.2d 90, 94, 62 P.2d 1380, a representation by defendant vendors that a building would withstand shocks of earthquake was said to be mere opinion and speculation, the court observing that "every person of common understanding knows it is impossible to estimate the destructive forces of nature accompanying earthquakes, tornadoes, cyclones, storms or floods." This view seems unsound, for the representation fairly implied that established construction methods of minimizing the effects of earthquake had been employed.

In certain circumstances, however, statements of opinion may be actionable. (See infra, §775 et seq.)

West's Key Number Digest, Fraud k.11

SUPPLEMENT: [This section is current through the latest supplement]

Fraudulent misrepresentation must ordinarily be about past or existing facts: See *Hinesley v. Oakshade Town Center* (2005) 135 C.A.4th 289, 295, 37 C.R.3d 364 [statements by shopping center's agent to prospective tenant suggesting that major chain businesses would be located in vicinity of tenant's leased premises contained implied assertion that landlord had already signed leases with these businesses, which was false assertion of existing fact, rather than nonactionable opinion regarding future actions of third parties].



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2. Misrepresentation.

b. Statement of Opinion.

2. Assumption of Superior Knowledge: Expert Opinion.

5 Witkin Sum. Cal. Law Torts § 775

[§ 775] Assumption of Superior Knowledge: Expert Opinion.

Despite the general rule just stated (*supra*, §774), misrepresentations of opinion are actionable in several situations, the first being where the defendant holds himself or herself out to be specially qualified. (*Hobart v. Hobart Estate Co.* (1945) 26 C.2d 412, 433, 434, 159 P.2d 958; *Gammon v. Ealey & Thompson* (1929) 97 C.A. 452, 458, 275 P. 1005; *Sime v. Malouf* (1949) 95 C.A.2d 82, 101, 212 P.2d 946, 213 P.2d 788; *Harazim v. Lynam* (1968) 267 C.A.2d 127, 131, 72 C.R. 670; *Hanberry v. Hearst Corp.* (1969) 276 C.A.2d 680, 686, 81 C.R. 519, citing the text; *O'Hara v. Western Seven Trees Corp.* (1977) 75 C.A.3d 798, 805, 142 C.R. 487, *infra*, §817, citing the text; *Cohen v. S & S Const. Co.* (1983) 151 C.A.3d 941, 946, 201 C.R. 173.) "When one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false." (*Haserot v. Keller* (1924) 67 C.A. 659, 670, 228 P. 383.) (See *Rest.2d, Torts* §542; *Dobbs, The Law of Torts* §477; 2 Harper, James & Gray 2d §7.8; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §71; *BAJI*, No. 12.32; *CACI*, No. 1904.)

Thus, representations by the vendor of land, that it was free from alkali and excellent for raising grapes and general farming purposes, constituted actionable deceit. (*Palladine v. Imperial Valley Farm Land Assn.* (1924) 65 C.A. 727, 737, 225 P. 291.)

SUPPLEMENT: [This section is current through the latest supplement]
See 2 Harper, James & Gray 3d §7.8.



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b. Statement of Opinion.

3. Opinion Stated as Fact or Implying Justifying Facts.

5 Witkin Sum. Cal. Law Torts § 776

[§ 776] Opinion Stated as Fact or Implying Justifying Facts.

(1) *In General*. "Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation of fact." (*Crandall v. Parks* (1908) 152 C. 772, 776, 93 P. 1018 [quoting Pomeroy's Equity Jurisprudence]; *Rest.2d, Torts* §539; Dobbs, *The Law of Torts* §478; 2 Harper, James & Gray 2d §7.8; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §69; BAJI, No. 12.32.)

(2) *Value of Property*. Statements concerning value of property, though ordinarily matters of opinion, may be actionable under this rule. (*Hobart v. Hobart Estate Co.* (1945) 26 C.2d 412, 430, 159 P.2d 958; *Crandall v. Parks*, supra; *Williams v. Myers* (1930) 110 C.A. 265, 276, 294 P. 61; *Dunshee v. Boadway* (1932) 119 C.A. 678, 684, 7 P.2d 325; *Bedell Engineering Co. v. Rouse* (1943) 57 C.A.2d 734, 736, 135 P.2d 404; *Timberlake v. Schwank* (1967) 248 C.A.2d 708, 711, 56 C.R. 799, citing the text; *Cooper v. Jevne* (1976) 56 C.A.3d 860, 866, 128 C.R. 724; *Southern Calif. Dist. Council, Assemblies of God v. Shepherd of Hills Evangelical Lutheran Church* (1978) 77 C.A.3d 951, 960, 144 C.R. 46; *Cohen v. S & S Const. Co.* (1983) 151 C.A.3d 941, 946, 201 C.R. 173; see *Willson v. Municipal Bond Co.* (1936) 7 C.2d 144, 151, 59 P.2d 974 [representation that bonds were "worth 100 cents on the dollar," coupled with statement that a certain bank would lend \$ 27,500 on them]; *Rest.2d, Torts* §525, Comment b; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §175.)

(3) *Future Events*. As pointed out above (supra, §774), predictions or representations as to what will happen in the future are normally treated as opinions; but sometimes they may be interpreted as implying knowledge of facts that make the predictions probable. If the defendant does not know of these facts, the statement is an actionable misrepresentation. (See *Rest.2d, Torts* §§539, 525, Comment f; 35 *A.L.R.3d* 1369 [purchaser's misrepresentations as to intended use of land].) Thus, a statement by an architect that a building will not cost more than a certain amount may be regarded as an affirmation of fact. (*Edward Barron Estate Co. v. Woodruff Co.* (1912) 163 C. 561, 574, 126 P. 351.) The same is true where an agent states that his or her principal will advance money to harvest a crop, or where a corporation agent represents that the corporation will lease certain property or locate a plant in a certain city. (See *Eade v. Reich* (1932) 120 C.A. 32, 35, 7 P.2d 1043 [discussing holdings to this effect].)

(4) *Returns on Investment*. Although general statements made to prospective purchasers of stock, to the effect that profits will be earned or dividends paid, have been held not actionable (*Zeh v. Alameda Community Hotel Corp.* (1932) 122 C.A. 366, 368, 10 P.2d 190), a representation by a corporation's agent that a particular dividend will be paid within a specified period implies a superior knowledge and amounts to a representation of fact. (*H.W. Smith v. Swenson* (1930) 105 C.A. 60, 63, 286 P. 1050.) (See *Dyke v. Zaiser* (1947) 80 C.A.2d 639, 652, 182 P.2d 344 [actionable representations as to profitable future business of amusement center, with knowledge that law enforcement officers intended to close it up immediately]; *Daniels v. Oldenburg* (1950) 100 C.A.2d 724, 728, 224 P.2d 472 [actionable representation by seller of motel that plaintiffs could keep it rented all the time]; *Gillespie v. Ormsby* (1954) 126 C.A.2d 513, 527, 272 P.2d 949 [actionable representation that oil well could be made commercially productive at 1,100 feet]; 16 A.L.R.3d 1311 [employer's misrepresentations of employee's or agent's future earnings]; 37 Am.Jur.2d (2001 ed.), *Fraud and Deceit* §§187, 188.)

In *Wilke v. Coinway* (1967) 257 C.A.2d 126, 64 C.R. 845, plaintiffs were elderly people without business experience. Defendants induced them to buy coin-operated machines to test reflexes, on representations that the devices were in great demand and would produce large profits. The income did not pay for upkeep, and plaintiffs sought rescission. *Held*, judgment for defendants reversed; the opinion was asserted as an existing fact. (257 C.A.2d 137.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 2 Harper, James & Gray 3d §7.8.



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b. Statement of Opinion.

4. Opinion by Fiduciary or Other Trusted Person.

5 *Witkin Sum. Cal. Law Torts* § 777

[§ 777] Opinion by Fiduciary or Other Trusted Person.

Where the defendant is a fiduciary, such as a trustee or agent, reliance on his or her opinion is of course justifiable; and this theory has been extended to other confidential relationships resulting from friendly social or business dealings over a period of time that are such as to induce the plaintiff to place confidence in the defendant's integrity. (*Hobart v. Hobart Estate Co.* (1945) 26 C.2d 412, 433, 159 P.2d 958; *George v. Simpson* (1936) 14 C.A.2d 571, 576, 58 P.2d 666; *Martin v. Martin* (1952) 110 C.A.2d 228, 233, 242 P.2d 688; see *Bank of America v. Sanchez* (1934) 3 C.A.2d 238, 242, 38 P.2d 787 [escrow officer of bank]; *Lynch v. Cruttenden & Co.* (1993) 18 C.A.4th 802, 808, 22 C.R.2d 636 [plaintiff could rely on legal opinion of nonlawyer who, by gaining plaintiff's trust and confidence, had assumed control over plaintiff's financial affairs]; *Rest.2d, Torts* §542; 6 U.C.L.A. L. Rev. 170; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §71 et seq.)

The Restatement goes still further by justifying reliance on the opinion of an *apparently disinterested person*, though the person expressing the opinion has neither superior knowledge to, nor a confidential relationship with, the recipient. (*Rest.2d, Torts* §543.) The recipient's reasonable belief, even if incorrect, that the person expressing the opinion has no interest adverse to the recipient is sufficient to justify his or her reliance on the opinion. (*Rest.2d, Torts* §543, Comment a.)

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5. Opinion on Quality or Safety of Goods.

5 Witkin Sum. Cal. Law Torts § 778

[§ 778] Opinion on Quality or Safety of Goods.

Seller's opinions regarding the quality or safety of goods may be actionable. In *Hauter v. Zogarts* (1975) 14 C.3d 104, 120 C.R. 681, 534 P.2d 377, defendants were the manufacturer and seller of the "Golfing Gizmo," a training device for golfers described as a "completely equipped backyard driving range." It consisted of metal pegs driven into the ground 25 inches apart, with an elastic cord looped over them and a 21-foot cotton cord with ball attached tied to the middle of the elastic cord. The user hit the ball and its place of return indicated the correctness or defect in the shot. The label on the carton and cover of the instruction booklet contained the statement "Completely Safe Ball Will Not Hit Player." Mrs. H bought the device, gave it to Fred, her 13 1/2-year-old son, as a present, and he read the instructions and proceeded to use it. In a shot underneath the ball, his club caught the cord and the ball looped over and struck him on the head, causing serious injuries. In plaintiffs' action, their experts testified that the device was dangerous. Defendants offered no contradictory evidence on this issue. The jury verdict was for defendants, but the trial judge granted plaintiffs' motion for judgment notwithstanding the verdict. *Held*, affirmed; plaintiffs were entitled to recover as a matter of law on each of four causes of action.

(a) Defendants contended first that the assertion of safety was mere "puffing," a statement of opinion. Many cases, and *Rest.2d, Torts §402B*, hold such dealer's talk nonactionable (14 C.3d 111), and defendant seller's catalogue furnishes an illustration: "You may be a duffer and divot digger but just give yourself a few hours with this and you'll be challenging Jack Nicklaus!" (14 C.3d 112, footnote 5.) But a representation of safety is generally held to be one of fact—a description of an important characteristic of the product. (14 C.3d 112, 113; see *Rest.2d, Torts §402B*.) And the former tendency of courts to allow the seller considerable latitude in puffing has given way to a modern tendency to construe language liberally in favor of the injured consumers. (14 C.3d 112.) "This expansion of sellers' liability has been necessary to counteract the shrewd technique of those sellers who, instead of making broad factual assertions about their products, seek to couch their representations in opinion form." (14 C.3d 112, footnote 7.)

(b) Defendants also contended that plaintiffs' reliance on the assurance of safety was not justifiable (see *infra*, §812 et seq.), because there is danger inherent in the sport, and the Gizmo was completely safe only when the ball was hit squarely. But Fred was not playing golf, subject to the risks of the game; he was learning to play with the aid of a supposedly danger-free training device. "Fred Hauter's injury stemmed from a risk inherent in defendants' product, not a

risk inherent in the game of golf." (14 C.3d 113.) The assurance of safety would be illusory if limited to the relatively infrequent instances in which duffers managed to hit the ball solidly. (14 C.3d 114.) (For the holding on express and implied warranties, see 4 *Summary* (10th), *Sales*, §§59, 71.) (See *Westlye v. Look Sports* (1993) 17 C.A.4th 1715, 1750, 22 C.R.2d 781 [advertising representing that ski safety bindings were safe and would release easily long before injury to the leg; following *Hauter*]; 35 Proof of Facts 2d 255 [misrepresentation as to quality or character of product]; 74 A.L.R.3d 1298 [statements on container that enclosed toy, game, sports equipment, or the like, is safe].)

Misrepresentations of material fact concerning a product are subject to strict liability for resulting harm to persons or property. (See *Rest.3d, Torts: Products Liability* §9; *infra*, §826.)

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c. Misrepresentation of Law.

1. In General.

5 *Witkin Sum. Cal. Law Torts* § 779

[§ 779] In General.

The earlier cases contain statements to the effect that, in the absence of a confidential relationship or other special circumstances, misrepresentation of law does not constitute fraud. The theory was either that everyone is bound to know the law, or that a statement regarding the law is a mere opinion on which one may not rely. (See *Champion v. Woods* (1889) 79 C. 17, 21, 21 P. 534 [representations by husband to wife, that certain property was separate and not community, were not actionable]; *Haviland v. Southern Calif. Edison Co.* (1916) 172 C. 601, 608, 158 P. 328 [recovery denied where plaintiff signed release of claims for injuries, with full knowledge of its contents, relying on statements of defendant's agent that same was mere matter of form and not binding]; *Zeh v. Alameda Community Hotel Corp.* (1932) 122 C.A. 366, 368, 10 P.2d 190; *Watt v. Patterson* (1954) 125 C.A.2d 788, 793, 271 P.2d 200; *Miller v. San Francisco* (1960) 187 C.A.2d 480, 483, 9 C.R. 767; *Orange County Rock Products Co. v. Cook Bros. Equipment Co.* (1966) 246 C.A.2d 698, 701, 55 C.R. 265 [defendant rented dump trucks to plaintiff, falsely representing that they were allowable deductions from gross income under federal and state income tax laws].)

Rest.2d, Torts §545 states the modern view as follows:

(1) "If a misrepresentation as to a matter of law includes, expressly or by implication, a misrepresentation of fact, the recipient is justified in relying upon the misrepresentation of fact to the same extent as though it were any other misrepresentation of fact." (*Rest.2d, Torts* §545(1).)

(2) "If a misrepresentation as to a matter of law is only one of opinion as to the legal consequences of facts, the recipient is justified in relying upon it to the same extent as though it were a representation of any other opinion." (*Rest.2d, Torts* §545(2).) (See Dobbs, *The Law of Torts* §477; 2 Harper, James & Gray 2d §7.8; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §97 et seq.; on actionable misrepresentations, see *infra*, §780.)

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Modern view under Restatement: See 2 Harper, James & Gray 3d §7.8.



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2. Actionable Misrepresentations.

5 *Witkin Sum. Cal. Law Torts* § 780

[§ 780] Actionable Misrepresentations.

(a) *Misrepresentations of Opinion.* The "presumption" that everyone is bound to know the law is outmoded, and the rule seems to rest mainly upon the "mere opinion" theory (*supra*, §779). Hence, misrepresentations of law may be actionable under any of the exceptions to the rule governing misrepresentations of opinion (see *supra*, §775 et seq.), namely, assumption of superior knowledge, opinion stated as fact, or existence of confidential relations. (See *Seeger v. Odell* (1941) 18 C.2d 409, 416, 115 P.2d 977 [opinion stated as fact]; *Bowman v. Payne* (1921) 55 C.A. 789, 796, 204 P. 406 [assumption of superior knowledge]; *Jarvis v. Singleton* (1933) 129 C.A. 250, 253, 18 P.2d 382 [statement by vendor that path across property was not legally binding easement, held representation of fact]; *Bank of America v. Sanchez* (1934) 3 C.A.2d 238, 242, 38 P.2d 787 [confidential relation between escrow officer and client of bank]; *George v. Simpson* (1936) 14 C.A.2d 571, 576, 58 P.2d 66 [confidential relations]; *Regus v. Schartkoff* (1957) 156 C.A.2d 382, 388, 319 P.2d 721 [statement by party purporting to have expert knowledge]; *Rest.2d, Torts* §545; 30 Cal. L. Rev. 197; 37 Am.Jur.2d (2001 ed.), *Fraud and Deceit* §100 et seq.; 24 A.L.R.2d 1039 [foreign law]; 29 A.L.R.2d 213 [misrepresentation by one other than insurance agent as to effect of policy].)

(b) *Misrepresentations of Mixed Fact and Law.* In *Bobak v. Mackey* (1951) 107 C.A.2d 55, 236 P.2d 626, defendant seller represented that Los Angeles land was located in zone C-2, permitting manufacture of plaintiff's food product. Actually, it was in zone R-3, in which no manufacturing was allowed. In upholding recovery, the court said: "Such a statement, if made and relied upon by the purchaser is as much a representation of fact as would be a statement that the premises involved were within the corporate limits of Los Angeles, when they were not, or that they abutted on a certain named thoroughfare in Los Angeles, when they did not. In each of these examples the facts represented come about by reason of law. But the facts as stated are not for that reason misrepresentations of law, but on the contrary of facts. The same is true here. ... The representation was not a mere misrepresentation of law, i.e., the classification made by the law, but of the fact that the property lay within a zone of a particular character." (107 C.A.2d 57.) (See *De Zemplén v. Home Fed. Savings & Loan Assn.* (1963) 221 C.A.2d 197, 202, 34 C.R. 334 [representation by loan association employee that there was indemnity agreement between vendors and title company that would protect plaintiffs against mechanics' liens]; *Southern Calif. Dist. Council, Assemblies of God v. Shepherd of Hills Evangelical Lutheran Church* (1978) 77 C.A.3d 951, 956, 144 C.R. 46 [following *Bobak* and *De Zemplén*]; 37 Am.Jur.2d (2001 ed.), *Fraud and Deceit* §102; 33

A.L.R.3d 1077 [fraud used to prevent bringing of action within statute of limitations].)

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1. Theory of Misrepresentation of Intention.

5 Witkin Sum. Cal. Law Torts § 781

[§ 781] Theory of Misrepresentation of Intention.

Statements relating to what may happen in the future are generally not actionable (see *supra*, §774), and the mere failure to perform a promise is not a tort. (*Rheingans v. Smith* (1911) 161 C. 362, 366, 119 P. 494.) On the other hand, a statement of what the defendant or some third person *intends to do* relates to an existing state of mind, and is a representation of fact.

It is on this theory that a *promise made without any intention to perform* may constitute fraud. A promise to do something necessarily implies the intention to perform, and where that intention is absent, there is an implied misrepresentation of fact, which is actionable fraud. (C.C. 1710(4); *Lazar v. Superior Court* (1996) 12 C.4th 631, 49 C.R.2d 377, 909 P.2d 981, 3 Summary (10th), *Agency and Employment*, §265; *California Credit & Collection Corp. v. Carpenter* (1926) 77 C.A. 18, 28, 246 P. 126; *Masten v. Fox West Coast Theatres* (1931) 117 C.A. 303, 311, 3 P.2d 610; *Wilson v. Rigali & Veselich* (1934) 138 C.A. 760, 764, 33 P.2d 455; *Union Flower Market Ltd. v. Southern Calif. Flower Market* (1938) 10 C.2d 671, 676, 76 P.2d 503; *Squire's Department Store v. Dudum* (1953) 115 C.A.2d 320, 323, 252 P.2d 418; *Grant v. United States Electronics Corp.* (1954) 125 C.A.2d 193, 199, 270 P.2d 64; *Valdez v. Taylor Auto. Co.* (1954) 129 C.A.2d 810, 815, 278 P.2d 91; *Vogelsang v. Wolpert* (1964) 227 C.A.2d 102, 116, 38 C.R. 440; *Brockway v. Heilman* (1967) 250 C.A.2d 807, 811, 58 C.R. 772, quoting the text; *Hills Trans. Co. v. Southwest Forest Industries* (1968) 266 C.A.2d 702, 708, 72 C.R. 441; *R.D. Reeder Lathing Co. v. Cypress Ins. Co.* (1970) 3 C.A.3d 995, 999, 84 C.R. 98; *Kuffel v. Seaside Oil Co.* (1970) 11 C.A.3d 354, 360, 90 C.R. 209; *Santoro v. Carbone* (1972) 22 C.A.3d 721, 728, 99 C.R. 488; *Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 C.A.3d 101, 133, 135 C.R. 802, citing the text; *Walker v. Signal Cos.* (1978) 84 C.A.3d 982, 994, 149 C.R. 119, *infra*, §787; *Cicone v. URS Corp.* (1986) 183 C.A.3d 194, 203, 227 C.R. 887; *Manson v. Reed* (1986) 186 C.A.3d 1493, 1502, 231 C.R. 446; *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 C.A.4th 153, 158, 2 C.R.2d 861; *Service by Medallion v. Clorox Co.* (1996) 44 C.A.4th 1807, 1816, 52 C.R.2d 650; *Locke v. Warner Bros.* (1997) 57 C.A.4th 354, 367, 66 C.R.2d 921, *infra*, §787, citing the text; see *Agosta v. Astor* (2004) 120 C.A.4th 596, 599, 606, 15 C.R.3d 565 [fraudulent inducement of employment contract is actionable, regardless whether employment is at will]; *Rest.2d, Torts* §§530, 544; *Dobbs, The Law of Torts* §479; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §§88, 89; 40 *A.L.R.2d* 971 [misrepresentation as to third person's intention]; *BAJI*, No. 12.40; *CACI*, No. 1902; on actions respecting fraud in

inducement of contract generally, see 3 *Cal. Proc. (4th), Actions*, §148 et seq.) This type of action has been referred to as one of "promissory fraud." (See *Lazar v. Superior Court*, *supra*, 12 C.4th 638; *Agosta v. Astor*, *supra*, 120 C.A.4th 603; *Building Permit Consultants v. Mazur* (2004) 122 C.A.4th 1400, 1414, 19 C.R.3d 562.)

A declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, does not constitute fraud, even though it is not carried out. (See *Church of Merciful Saviour v. Volunteers of America* (1960) 184 C.A.2d 851, 859, 8 C.R. 48 [no fraud where, at time of statement, defendant intended to perform promise and actually made efforts to carry it out]; *Edmunds v. Valley Circle Estates* (1993) 16 C.A.4th 1290, 1301, 20 C.R.2d 701 [no fraud where breach of promise not to sell lots to third parties evolved naturally due to changed circumstances]; *Magpali v. Farmers Group* (1996) 48 C.A.4th 471, 480, 55 C.R.2d 225 [promise not to interfere with plaintiff's insurance business was true when made, as evidenced by its being kept for many years, and was not basis for fraud, even though subsequent events made it necessary for defendant to interfere].)

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See *Helmer v. Bingham Toyota Isuzu* (2005) 129 C.A.4th 1121, 1128, 29 C.R.3d 136 [plaintiff induced to leave employment by promissory fraud may recover damages based on future loss of income from that employment, provided that damages are not speculative or remote]; *Yield Dynamics v. TEA Systems Corp.* (2007) 154 C.A.4th 547, 575, 66 C.R.3d 1, citing the text [although fraud requires intentional representation of fact, declarant's intention may constitute fact for this purpose]. *Cross-Reference:* 3 *Cal. Proc. (5th), Actions*, §152 et seq.



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2. Proof of Intention Not To Perform.

5 *Witkin Sum. Cal. Law Torts* § 782

[§ 782] Proof of Intention Not To Perform.

It is a difficult matter to prove the original lack of intention by direct evidence. But circumstantial evidence of *subsequent conduct* is admissible and may be sufficient. (*Longway v. Newbery* (1939) 13 C.2d 603, 611, 91 P.2d 110; *Masten v. Fox West Coast Theatres* (1931) 117 C.A. 303, 307, 3 P.2d 610; *Wilson v. Rigali & Veselich* (1934) 138 C.A. 760, 765, 33 P.2d 455; *Estate of Barrow* (1938) 27 C.A.2d 402, 405, 80 P.2d 1006; *Grant v. United States Electronics Corp.* (1954) 125 C.A.2d 193, 199, 270 P.2d 64; *Boyd v. Bevilacqua* (1966) 247 C.A.2d 272, 292, 55 C.R. 610; *Green Trees Enterprises v. Palm Springs Alpine Estates* (1967) 66 C.2d 782, 786, 59 C.R. 141, 427 P.2d 805; *Brockway v. Heilman* (1967) 250 C.A.2d 807, 811, 58 C.R. 772; *Wilkenson v. Linnecke* (1967) 251 C.A.2d 291, 293, 59 C.R. 290; *Rambo v. Blain* (1968) 263 C.A.2d 158, 163, 69 C.R. 132; see *Miller v. National Amer. Life Ins. Co.* (1976) 54 C.A.3d 331, 338, 126 C.R. 731, *infra*, §787 [instructions to claims examiners and subsequent conduct of insurer in processing claim]; *Diamond Woodworks v. Argonaut Ins. Co.* (2003) 109 C.A.4th 1020, 1046, 135 C.R.2d 736 [where leasing company impliedly promised plaintiff that its new hires were leasing company employees from the outset and thus covered under workers' compensation policy, its unhesitating rejection of worker's claim for benefits because of lack of certain employment papers constituted substantial evidence that it never intended to fulfill its promise]; *Rest.2d, Torts* §530, Comment d; BAJI, No. 12.41; CACI, No. 1902; cf. *Mack v. White* (1950) 97 C.A.2d 497, 499, 218 P.2d 76 [defendant's admission of lack of intention of keeping promise]; on evidence of subsequent conduct generally, see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §107 et seq.)

In *Santoro v. Carbone* (1972) 22 C.A.3d 721, 99 C.R. 488, plaintiff's former wife promised to remarry him if he purchased a house and had the title placed in their names as joint tenants. He did so and, 2 months later, she moved out and immediately returned to her second husband. "Since direct proof of fraudulent intent is often impossible, the intent may be established by inference from acts of the parties." (22 C.A.3d 727.)

An extraordinarily liberal application of this rule appears in *Jarkieh v. Badagliacco* (1946) 75 C.A.2d 505, 170 P.2d 994, where the court held: "[T]he trier of the facts was justified in inferring from the fact of the subsequent repudiation that defendant never intended to carry out the agreement when it was made. The subsequent repudiation relates back to the original promise." (75 C.A.2d 509.) This language would imply that a plaintiff may prevail if he or she can convince the trial judge that the oral agreement was made and not performed; the fraudulent character of the promise is then

inferable without the need of any other evidence of prior or subsequent acts or statements.

However, *Jarkieh* and similar language in *Santoro* were disapproved by the California Supreme Court in *Tenzer v. Superscope* (1985) 39 C.3d 18, 31, 216 C.R. 130, 702 P.2d 212, *infra*, §783, holding that mere nonperformance is insufficient to warrant an inference of intent not to perform.

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3. Oral Promise Unenforceable in Contract Action.

5 Witkin Sum. Cal. Law Torts § 783

[§ 783] Oral Promise Unenforceable in Contract Action.

(1) *Former Denial of Recovery.* Sometimes an action based on fraud is chosen by the plaintiff merely because of advantages that plaintiff may gain by suing in tort rather than on the contract. But if the contract itself is unenforceable, the tort action may be the *only one* available. In that case, it has been successfully argued that the fraud action is a means of evasion of the law making the contract unenforceable.

(a) *Statute of Frauds.* In *Kroger v. Baur* (1941) 46 C.A.2d 801, 117 P.2d 50, plaintiff, a licensed real estate broker, sued his client for damages for fraud, alleging that plaintiff performed services in reliance on defendant's oral promise to compensate him, which promise defendant made falsely, without any intention to perform. *Held*, an objection to this evidence was properly sustained. "If the law can be thus nullified by the transparent device of predicated a tort action upon the invalid oral promise on the ground that the promisor did not intend to perform it, then the section might just as well be stricken from the statute." (46 C.A.2d 803.) (See *Beach v. Arblaster* (1961) 194 C.A.2d 145, 163, 14 C.R. 854 [following *Kroger*]; *Keely v. Price* (1972) 27 C.A.3d 209, 215, 103 C.R. 531 [same; alleged oral promise to reduce agreement to writing]; *Munoz v. Kaiser Steel Corp.* (1984) 156 C.A.3d 965, 976, 203 C.R. 345 [same].)

(b) *Parol Evidence Rule.* The same result was reached where the oral promise contradicted the terms of a written agreement. The oral promise, ineffective under the parol evidence rule, could not be the foundation of either a contract or tort action. (*Cobbs v. Cobbs* (1942) 53 C.A.2d 780, 783, 128 P.2d 373; *Shyvers v. Mitchell* (1955) 133 C.A.2d 569, 572, 284 P.2d 826; see 38 Cal. L. Rev. 535; 49 Cal. L. Rev. 876 [criticizing rule].)

(2) *Recovery Allowed.*

(a) *Statute of Frauds.* The *Kroger* rule was disapproved in *Tenzer v. Superscope* (1985) 39 C.3d 18, 216 C.R. 130, 702 P.2d 212. The complaint alleged that T, acting for defendant, falsely promised to compensate plaintiff for his services, and that plaintiff, in reliance on the fraud, suffered damages. *Held*, summary judgment for defendant reversed.

(a) The *Kroger* rule, *supra*, is rejected by *Rest.2d, Torts* §530, Comment c; the rule is difficult to reconcile with the estoppel doctrine; it is untrue that the plaintiff is attempting to get around the statute of frauds by a "transparent device"

as suggested in *Kroger*; and *Kroger* dealt with the statute of frauds relating to brokers' contracts at a time when the law had little sympathy with a broker who failed to sign up a client. (39 C.3d 29.) The *Kroger* approach is also inconsistent with the rule that the statute of frauds should not be used to aid in the preparation of a fraud. (39 C.3d 30; see 1 Summary (10th), *Contracts*, §406.)

(b) The *Kroger* rule is not necessary to prevent nullification of the statute of frauds. Although some California cases have suggested that subsequent failure to perform warrants the inference that the defendant did not intend to perform (citing *Santoro v. Carbone* (1972) 22 C.A.3d 721, 99 C.R. 488, supra, §782, and *Jarkieh v. Badagliacco* (1946) 75 C.A.2d 505, 170 P.2d 994, supra, §782), this is not correct; something more than nonperformance is required. (39 C.3d 30, citing *Rest.2d, Torts* §530, Comment d.) Prosser cites cases on fraudulent intent inferred from such circumstances as defendant's insolvency, his hasty repudiation of the promise, his failure even to attempt performance, or his continued assurances after it was clear that he would not perform. "However, if plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury. The policies of the statute of frauds will not be subverted by affording plaintiffs who can prove actual fraud the opportunity to do so." (39 C.3d 31.) (See *Lacher v. Superior Court* (1991) 230 C.A.3d 1038, 1052, 281 C.R. 640 [following *Tenzer*].)

However, *Phillippe v. Shapell Industries* (1987) 43 C.3d 1247, 241 C.R. 22, 743 P.2d 1279, 1 Summary (10th), *Contracts*, §354, subsequently created an exception for oral promises to licensed brokers. The court noted in dictum that a licensed broker cannot maintain a fraud action based on an oral promise to pay a commission, because the broker is presumed to be aware of the statute of frauds and thus reliance on the oral promise is unreasonable as a matter of law. (43 C.3d 1270; on requirement of justifiable reliance generally, see *infra*, §808 et seq.)

(b) *Parol Evidence Rule*. The statute stating the parol evidence rule was amended in 1978 to provide that the rule does not exclude evidence "to establish illegality or fraud." (C.C.P. 1856(g).)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 1135, fifth line of page, "preparation" should be "perpetration".



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aa. Promise Inducing Transfer: Restitution.

5 *Witkin Sum. Cal. Law Torts* § 784

[§ 784] Promise Inducing Transfer: Restitution.

In *Mack v. White* (1950) 97 C.A.2d 497, 218 P.2d 76, plaintiff gave defendant part of the proceeds of the sale of certain property in consideration of his oral false promise to marry her. *Held*, she was entitled to recover the money.

(a) The statute of frauds is not a bar, because it applies to contract and not tort actions. (97 C.A.2d 500.) (On statute of frauds respecting premarital agreements, see 1 *Summary* (10th), *Contracts*, §399.)

(b) The anti-heartbalm statute (C.C. 43.5(d), *supra*, §723) is not a bar, because this action is not for breach of promise to marry but for obtaining money by fraud. (97 C.A.2d 500.) (See 24 *So. Cal. L. Rev.* 204; 44 *A.L.R.5th* 1 [right to engagement or courtship present when marriage does not ensue]; cf. *Santoro v. Carbone* (1972) 22 C.A.3d 721, 99 C.R. 488, *supra*, §782 [false promise to remarry].)

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bb. Promise Inducing Marriage: Damages.

5 Witkin Sum. Cal. Law Torts § 785

[§ 785] Promise Inducing Marriage: Damages.

(1) *Former Rule Permitting Recovery.* Where a person is promised marriage, and, although not transferring any money or property, changes position in reliance on the promise, does that person have a remedy? At common law, an action would lie for general damages for breach of marriage promise; though expressed in terms of contract, it was generally regarded as more a tort than a contract action. But this action was eliminated by the anti-heartbalm statute (*supra*, §723). And it has been generally held that this legislation was intended to prevent any action for harm resulting from the failure to perform a marriage promise, whether in the form of a contract or tort action. (See dissent, *Langley v. Schumacker* (1956) 46 C.2d 601, 604, 297 P.2d 977; 9 Stanf. L. Rev. 406.)

Nevertheless, in *Langley v. Schumacker*, a divided court upheld recovery. Plaintiff alleged that she was induced to leave her employment (with a stated monthly salary and fringe benefits) in reliance on defendant's fraudulent representations that he intended marriage; that they went through a ceremony, but he refused to cohabit and that she then obtained an annulment. *Held*, a cause of action was stated. The brief opinion did not fully explore the problem, but held simply that the language of the anti-heartbalm statute "indicates that it was only intended to abolish causes of action based on an alleged breach of contract. The plaintiff's complaint states a cause of action for fraud--the making of promises without any intention of performing them." (46 C.2d 603.)

(2) *Legislative Response: Abrogation of Cause of Action.* Law review comment on the decision was uniformly critical. (See 70 Harv. L. Rev. 1098 [suggesting that better theory for instant case would have been failure to carry out obligations of marriage actually celebrated rather than breach of promise to marry]; 8 Hastings L. J. 210; 30 So. Cal. L. Rev. 548; 6 Stanf. L. Rev. 406; 4 U.C.L.A. L. Rev. 114.) In 1959, the Legislature nullified the rule by the enactment of C.C. 43.4: "A fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages."

(3) *Representation of Love or Sexual Attraction Is Not Actionable.* In *Askew v. Askew* (1994) 22 C.A.4th 942, 28 C.R.2d 284, defendant wife filed for dissolution of her 13-year marriage with plaintiff. Shortly before filing, defendant admitted during a therapy session that she had no sexual desire for plaintiff prior to or during the marriage. As a result,

plaintiff brought a separate action for fraud and related causes of action. Plaintiff alleged that prior to their marriage, defendant had stated that she felt a sexual attraction for him, that before and after the marriage, defendant promised to hold any separate property he transferred to her for the benefit of his minor children by a previous marriage, and that these false representations induced him to marry defendant and to put certain parcels of real property, which he claimed were his separate property, into both their names as joint tenants. After a jury verdict for plaintiff, judgment was entered awarding damages and imposing resulting and constructive trusts on defendant's interest in the properties. *Held*, reversed.

(a) Plaintiff argued that the analysis should be limited to those statements that arguably support the notion that the couple had an oral trust arrangement for plaintiff's separate property, independent of any statement of love, sex, or passion. However, the record shows that it was defendant's misrepresentation concerning her love and sexual attraction for plaintiff that was the very essence of his case, i.e., had defendant not misrepresented her feelings concerning love and sexual desire, plaintiff would never have married her and put property into joint tenancy. Thus, the substance of plaintiff's case was nothing more than the latter-day incarnation of a breach of promise suit. (22 C.A.4th 953.)

(b) From the Legislature's swift reaction to *Langley v. Schumacker* by the enactment of C.C. 43.4, it is clear that the fact of false representations, even fraudulent representations, is not enough, by itself, to escape California's anti-heartbalm legislation. (22 C.A.4th 957.)

(c) Love and sexual desire are generally part of the "bundle of expectations" of marriage. Hence, even if such representations are "fraudulently" false, they substantively come under the rubric of the words "promise of marriage" or, to be more precise, "cohabitation after marriage," as used in C.C. 43.4. Because the word "cohabitation" encompasses copulation, defendant's false statement that she loved and sexually desired plaintiff clearly comes within the legal category of a fraudulent promise to "cohabit" after marriage. (22 C.A.4th 957.)

(d) The anti-heartbalm statutes reveal a basic reluctance on the part of the Legislature and the judiciary to allow recovery for promises of love. "Words of love, passion and sexual desire are simply unsuited to the cumbersome strictures of common law fraud and deceit. The idea that a judge, or jury of 12 solid citizens, can arbitrate whether an individual's romantic declarations at a certain time are true or false, or made with intent to deceive, seems almost ridiculously wooden, particularly where the statements were made prior to marriage and the marriage lasted more than 13 years." (22 C.A.4th 959.)

(e) Another aspect of the policy against heartbalm suits is that these suits are fundamentally incompatible with a statutory scheme of no-fault divorce. Either concept allows the ready circumvention of the other. For example, the large assortment of tort and contract damages recoverable in the old-fashioned breach of promise of marriage action can be circumvented by the unwilling spouse's tactic of going through with the marriage and then filing a petition for dissolution where recovery is basically limited to half the community property and support. On the other hand, the limited recovery available in a dissolution action is easily circumvented if the spouses are allowed to sue each other because of love-related promises. "As in the present case, a couple undergoing the unpleasantness of a dissolution could wind up in civil court litigating the very emotional underpinnings of the marriage itself in a 'fraud' action. This is just another name for 'fault' divorce." (22 C.A.4th 960.)

(4) *Protection Under Other Theories*. In some situations, however, the defrauded person may receive protection on other theories. Thus, a person may be induced to enter into a bigamous marriage, but if the circumstances are such as to raise an estoppel against the other party, the void marriage will be binding between the parties and that person will have same rights as if married. (See *Spellens v. Spellens* (1957) 49 C.2d 210, 222, 317 P.2d 613, 11 Summary (10th), *Husband and Wife*, §112; *In re Marriage of Buckley* (1982) 133 C.A.3d 927, 932, 184 C.R. 290 [discussing *Langley*, criticism of decision, legislative response in enactment of C.C. 43.4, and citing the text on defrauded wife's protection on estoppel theory].) And the Restatement recognizes an action for damages based on a fraudulent misrepresentation that the promisor is free to contract a lawful marriage (*Rest.2d, Torts* §555), or that a third person is physically fit and legally free to marry (*Rest.2d, Torts* §556). (See 72 A.L.R.2d 956 [liability of one putative spouse to other for

wrongfully inducing entry into or cohabitation under illegal, void, or nonexistent marriage].)

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cc. Promise To Support.

5 Witkin Sum. Cal. Law Torts § 786

[§ 786] Promise To Support.

Another ingenious but unsuccessful attempt to overcome the barrier of C.C. 43.4 (supra, §785) and C.C. 43.5 (supra, §723) was made in *Boyd v. Boyd* (1964) 228 C.A.2d 374, 39 C.R. 400. Plaintiff alleged that while a widow, she received monthly payments from the Veterans' Administration and a Social Security allowance; that she married defendant in reliance on his false promise to live with and support her; that upon her marriage, the payments were terminated; and that 2 days after the marriage, defendant left her and has since refused to live with her or support her. *Held*, judgment on demurrer affirmed.

(a) The fact of an actual marriage, rather than a broken promise to marry, does not take the case outside the statutory bar. The policy is the same, whether the defendant jilts his bride at the church door or afterwards. (228 C.A.2d 377.)

(b) An express promise of support does not take the case outside the statute. The express promise is no more binding than the implied obligation. (228 C.A.2d 379.)

(c) The allegation of a fraudulent promise to live with and support plaintiff, though avoiding use of the word "cohabit," nevertheless amounts in substance to that, and comes within C.C. 43.4. (228 C.A.2d 381.)

(d) The loss of government payments superficially appears to be hardship of a kind distinct from loss of the usual marital advantages. But C.C. 43.4 abolishes the action without regard to differences between kinds of damage. (228 C.A.2d 380.)

(e) An alternative count, pleading negligent marriage and negligent leaving, could not be maintained; i.e., the claim was purely breach of promise, and could not be transformed into a tort by allegations of negligent breach. (228 C.A.2d 382.)

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5 Witkin Sum. Cal. Law Torts § 787

[§ 787] Illustrations.

A representation by a vendor of land that *the vendor* will install improvements may be actionable as a false promise, and the vendor's statement that *third persons* planned to construct buildings nearby, though relating to the future, may nevertheless be actionable as a misrepresentation of fact. (*Wilson v. Rigali & Veselich* (1934) 138 C.A. 760, 764, 33 P.2d 455.)

In *Nyulassie v. Mozer* (1948) 85 C.A.2d Supp. 827, 193 P.2d 167, the complaint alleged that (a) defendant owner, to get rid of plaintiff tenant during World War II, obtained an Office of Price Administration eviction certificate on the false representation that his son was to occupy the premises; (b) defendant served a notice to quit on plaintiff, making the same false representation of intended use; and (c) plaintiff, in reliance on the representations, gave up possession. *Held*, a cause of action was stated. The basis of the action is the deceit practiced directly on plaintiff. "The fact that as a necessary step in the fraudulent plan defendant also deceived the Office of Price Administration in order to get the certificate does not alter the situation." (85 C.A.2d Supp. 830.) (Cf. *Tranchina v. Arcinas* (1947) 78 C.A.2d 522, 524, 178 P.2d 65 [same fraud was practiced on O.P.A., but tort to plaintiffs was eviction by writ of possession, an abuse of process].)

In *Kuffel v. Seaside Oil Co.* (1970) 11 C.A.3d 354, 90 C.R. 209, plaintiffs were induced to terminate existing leases and a sale contract on defendant's promise that he would continue to serve them and give them a new contract. *Held*, the refusal to send the new contract--that had been represented as being on the sales manager's desk in another city--and stopping services constituted fraud. (11 C.A.3d 360.)

In *Miller v. National Amer. Life Ins. Co.* (1976) 54 C.A.3d 331, 126 C.R. 731, plaintiff insured alleged that defendant insurer falsely represented that it would make certain mortgage payments for certain periods if he became disabled from performing his occupation. In its appeal from a judgment for plaintiff, defendant contended that representations made only in the policy itself, and not in a communication prior to formation of the contract, could not support a finding of fraud. *Held*, there is no such rule. The inducement "may be more blatant" where it is contained in a separate communication, but "it is no less apparent where, as here, it is found in the very contractual promises that constitute the consideration for which the insured enters the agreement and exchanges his premium payments." (54

C.A.3d 338.)

In *Walker v. Signal Cos.* (1978) 84 C.A.3d 982, 149 C.R. 119, plaintiffs contracted with defendants for construction of a residential home, and defendants agreed to complete it at a specified date to avoid a capital gains tax from the sale of plaintiffs' former home. The complaint alleged that completion was delayed nearly 5 months, and that the contemplated tax benefits were lost. *Held*, judgment for compensatory and punitive damages affirmed. (84 C.A.3d 994.)

In *Locke v. Warner Bros.* (1997) 57 C.A.4th 354, 66 C.R.2d 921, 1 Summary (10th), *Contracts*, §784, defendant film studio contracted to pay plaintiff director \$ 250,000 per year for 3 years in exchange for plaintiff's agreement to first submit to defendant any picture plaintiff was interested in developing, which defendant could accept or reject in 30 days, and to pay plaintiff \$ 750,000 for a directing deal whether or not her services were used. Plaintiff sued for fraud, alleging that defendant never intended to accept any of her proposals or to use her as a director. Plaintiff presented testimony of two witnesses regarding conversations they had with executives of defendant who stated defendant would never work with plaintiff. *Held*, summary judgment for defendant reversed. Fraudulent intent must often be established by circumstantial evidence, and may be inferred from such circumstances as defendant's failure even to attempt performance. Based on the evidence that defendant expressed an absolute unwillingness to work with plaintiff, a trier of fact reasonably could infer that defendant never intended to give plaintiff's proposals a good faith evaluation and that defendant entered into the agreement with plaintiff solely as an accommodation to a film star who was attempting to settle litigation involving plaintiff. (57 C.A.4th 367.)

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See *Warren v. Merrill* (2006) 143 C.A.4th 96, 110, 49 C.R.3d 122 [finding of real estate agent's actual and constructive fraud was supported by evidence that she deliberately and falsely promised purchaser that she would place his name on title to property if he went along with her plan for structuring transaction, that she never intended to perform promise but intended to procure property for herself, and that she both kept property and retained his downpayment]; *Yield Dynamics v. TEA Systems Corp.* (2007) 154 C.A.4th 547, 575, 66 C.R.3d 1 [unperformed promise to deliver source code to software developer did not constitute fraudulent inducement of developer into entering into asset purchase agreement, absent evidence that defendants lacked intention to perform obligations at time of agreement].



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5 Witkin Sum. Cal. Law Torts § 788

[§ 788] Representations Concerning Credit.

Under the statutes of frauds of California and a few other states, a *writing* is necessary to charge a person "upon a representation as to the credit of a third person." (C.C.P. 1974; see *Carr v. Tatum* (1933) 133 C.A. 274, 277, 24 P.2d 195; *Cutler v. Bowen* (1935) 10 C.A.2d 31, 34, 51 P.2d 164; *Beckjord v. Slusher* (1937) 22 C.A.2d 559, 567, 71 P.2d 820; *Bank of America v. Western United Constructors* (1952) 110 C.A.2d 166, 168, 242 P.2d 365; *Seneca Communications v. International Bank of Calif.* (1980) 103 C.A.3d 541, 547, 163 C.R. 176 [statute applies to all third-party deceit actions, including negligent misrepresentation]; for commentary, see 22 Cal. L. Rev. 358; 8 So. Cal. L. Rev. 57; 16 U.C.L.A. L. Rev. 603; 32 A.L.R.2d 184 [misrepresentations as to financial condition or credit of third person as actionable by one extending credit].)

The statute ordinarily applies to a representation by a corporate officer as to the credit of the corporation. But where a corporation is the defendant's alter ego, the court may disregard the corporate entity and avoid the bar of the statute; i.e., the statements will not be regarded as dealing with the credit of a third person, but as representations of the credit of the defendant himself or herself. (*Grant v. United States Electronics Corp.* (1954) 125 C.A.2d 193, 198, 270 P.2d 64.)

It has been held that the statute applies even where the defendant receives an *incidental benefit*. In *Baron v. Lange* (1949) 92 C.A.2d 718, 207 P.2d 611, defendant father, in order to induce plaintiffs to sell his son Harold an interest in a business for \$ 20,000 on credit, repeatedly represented that the son was the beneficiary of a \$ 500,000 trust; that the trustees, including the father, had discretion to distribute accumulated income to the son in excess of \$ 180,000; and that they would shortly do so. The interest in the business was sold, the son's note was eventually dishonored, and thereafter, plaintiffs were informed that there was no such trust. *Held*, on demurrer, C.C.P. 1974 was a complete bar to recovery against the father. It was apparently conceded that the first representation (that the son would receive money) was a representation as to the son's credit; the court held also that the representation by defendant father that he and others would cause distribution to be made was "so inextricably interwoven with the other representations as to Harold's financial status and credit as to be unseverable therefrom, since, in effect, it is a representation that Harold's note was good." (92 C.A.2d 723.) The opinion laid down the following rule: "Where the primary purpose in making the representation is to procure credit for another, the representation comes within the purview of the statute, even though in making it the person also makes false representations concerning himself or derives an incidental benefit therefrom." (92 C.A.2d 721.) (See *Bank of America v. Western United Constructors*, *supra*, 110 C.A.2d 169 [to same effect].)

If, however, the *primary purpose* of the defendant is to gain a benefit for himself or herself, the "main purpose" or "leading object" rule of the statute of frauds applies, and the defendant may be held liable. This result follows from the second sentence of *C.C.P. 1974*, which provides: "This section is a Statute of Frauds provision and is to be applied in a manner that is consistent with the manner in which subdivision 2 of *Section 1624 of the Civil Code* [now C.C. 1624(a)(2)] is applied." The Legislative Committee Comment states: "The most significant effect of the second sentence is to make construction of the general Statute of Frauds applicable in cases where the representation is made under circumstances where ... the defendant receives a benefit to himself." (See *Seneca Communications v. International Bank of Calif.*, *supra*, 103 C.A.3d 548, 555 [discussing 1970 amendment to *C.C.P. 1974* adding second sentence]; on main purpose rule, see 1 *Summary* (10th), *Contracts*, §376.)

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See *Lease & Rental Management Corp. v. Arrowhead Cen. Credit Union* (2005) 126 C.A.4th 1052, 1060, 24 C.R.3d 483 [credit union representing that borrower had satisfactory credit in response to lender's inquiry was not liable for fraud, even though substantial loan and borrower's subsequent bankruptcy resulted in financial loss to lender, where inadequacy of lender's credit reference request form was root of problem; there is no basis for liability when credit union's subjective opinion about customer's creditworthiness is not demonstrably false].



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1. Representation That Contraceptive Measures Were Taken.

5 *Witkin Sum. Cal. Law Torts* § 789

[§ 789] Representation That Contraceptive Measures Were Taken.

In *Stephen K. v. Roni L.* (1980) 105 C.A.3d 640, 164 C.R. 618, Roni brought a paternity suit against Stephen. He admitted paternity and cross-complained for damages, alleging that Roni had falsely represented that she was taking birth control pills, and that in reliance on that representation, he had engaged in intercourse that resulted in the birth of an unwanted child, subjecting him to the obligation of support and causing him emotional distress. *Held*, no cause of action was stated. Although phrased in terms of tort liability for fraud, the pleading sought judicial interference with private activity in which the state has only a minimal interest. "[W]e need not and do not reach the question of whether Stephen has established or pleaded tort liability on the part of Roni under recognized principles of tort law. ... [T]he circumstances and the highly intimate nature of the relationship wherein the false representations may have occurred, are such that a court should not define any standard of conduct therefor." (105 C.A.3d 643.) (See 2 A.L.R.5th 301 [fraudulent misrepresentation regarding use of birth control].) (Cf. *Perry v. Atkinson* (1987) 195 C.A.3d 14, 18, 240 C.R. 402 [unmarried pregnant woman held to have no cause of action against the father, who induced her to have abortion by falsely promising to impregnate her at later date; *Stephen K.* followed; *Barbara A. v. John G.* (1983) 145 C.A.3d 369, 193 C.R. 422, *infra*, §790, rejected; *Kathleen K. v. Robert B.* (1984) 150 C.A.3d 992, 198 C.R. 273, *infra*, §791, distinguished].)

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2. Representation of Sterility.

5 Witkin Sum. Cal. Law Torts § 790

[§ 790] Representation of Sterility.

In *Barbara A. v. John G.* (1983) 145 C.A.3d 369, 193 C.R. 422, an attorney sued his client for fees, and the client filed a cross-complaint seeking damages on theories of battery and fraud. The cross-complaint alleged that the parties engaged in intercourse after cross-complainant had declared that she would not do so if there was a likelihood of pregnancy; that he falsely represented that he was sterile; that the attorney-client relationship produced a sense of trust justifying her reliance on the representation; and that she had a tubal pregnancy requiring surgery that made her sterile. *Held*, the cross-complaint stated a cause of action for battery (see *supra*, §416) and fraud.

(a) *Cause of action for fraud.* The cross-complaint alleged the elements of an action for deceit under C.C. 1709 and 1710 (*supra*, §767). (145 C.A.3d 375, 376.)

(b) *Anti-heartbalm statute inapplicable.*

(1) C.C. 43.5, abolishing the cause of action for seduction, is not a bar to the cross-action. Seduction involves illicit intercourse accomplished by persuading a chaste female to step aside from the paths of virtue; and the action "was used primarily to protect young, inexperienced women who had succumbed to the sexual advances of older men." But "[i]t is no longer possible for two consenting adults in the State of California to engage in 'illicit intercourse.'" (145 C.A.3d 377, citing note; 13 San Diego L. Rev. 439.)

(2) Here, cross-complainant complains "not because her virtue was violated or because she suffered humiliation and loss of reputation but because the sexual act was *unprotected and led to an ectopic pregnancy.*" (145 C.A.3d 377.) And the policy grounds of the anti-heartbalm statute (eliminate fraud and extortion and harassment) are not present here. As the Supreme Court said in *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *infra*, §1008, the fear of unfounded or fraudulent claims is not a valid reason for disallowing a tort action based on a meritorious claim. (145 C.A.3d 377.)

(c) *Stephen K. is distinguishable.* *Stephen K. v. Roni L.* (1980) 105 C.A.3d 640, 164 C.R. 618, *supra*, §789, and the present case are both based on deceit, but the significant distinction between them lies in the element of damage.

Plaintiff there was seeking damages for the "wrongful birth" of his child, which resulted in support obligations and alleged mental suffering; Cross-complainant here is seeking damages for severe injury to her own body. (145 C.A.3d 378, 379.) *Stephen K.* correctly concluded that it was against public policy to allow one parent to sue the other over the wrongful birth of their child. (145 C.A.3d 379.)

(d) *Constitutional right of privacy is not a defense.* The constitutional right of privacy is not absolute, and "governmental intervention in matters affecting an individual's right to privacy in sexual matters has been sanctioned in both criminal and civil law." (145 C.A.3d 380.) Examples are Penal statutes such as P.C. 262, on spousal rape, and Ev.C. 621 (now *Family C. 7540, 7541*), allowing an exception to the conclusive presumption of parentage. (145 C.A.3d 380, 381.) Hence, the right of privacy should not insulate from liability one sexual partner who by intentionally tortious conduct causes physical injury to the other. (See 2 A.L.R.5th 301 [fraudulent misrepresentation regarding sterility].)

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5 *Witkin Sum. Cal. Law Torts* § 791

[§ 791] Representation of Freedom From Disease.

In *Kathleen K. v. Robert B.* (1984) 150 C.A.3d 992, 198 C.R. 273, plaintiff voluntarily engaged in sexual intercourse with defendant and contracted genital herpes. She brought an action for damages for this physical injury on four theories: (1) Negligence: defendant had intercourse with her when he knew or should have known that he was a carrier of venereal disease. (2) Battery. (3) Intentional infliction of emotional distress. (4) Fraud: defendant deliberately represented to her that he was free from venereal disease, and she had intercourse with him in reliance on the false representation. The trial judge, relying on *Stephen K. v. Roni L.* (1980) 105 C.A.3d 640, 164 C.R. 618, supra, §789, granted defendant's motion for judgment on the pleadings. *Held*, reversed; *Stephen K.* is distinguishable and *Barbara A. v. John G.* (1983) 145 C.A.3d 369, 193 C.R. 422, supra, §790, is controlling.

(a) As in *Barbara A.*, there is no child involved, and the public policy considerations related to parentage are not present. (150 C.A.3d 992.)

(b) The chief defense here was the constitutional right of privacy in matters relating to marriage, family, and sexual acts. The courts have frowned on *unwarranted* governmental intrusion into these matters. But the right of privacy may be outweighed by the authority of the state to promote the public health (as in penal statutes covering both forcible and consensual sexual acts, and laws relating to paternity). And in *Barbara A.*, the court concluded that liability exists when one sexual partner by intentionally tortious conduct causes physical injury to the other. That is the case here. Plaintiff alleged that she sustained physical injury due to defendant's tortious conduct in either negligently or deliberately failing to inform her that he was infected with venereal disease. (150 C.A.3d 996.)

(c) Defendant further contended that several out-of-state cases relied on in the *Barbara A.* opinion involved the confidential relationship of trust and confidence between husband and wife, and that this does not exist between nonmarried persons. "However, a certain amount of trust and confidence exists in any intimate relationship, at least to the extent that one sexual partner represents to the other that he or she is free from venereal or other dangerous contagious disease. The basic premise underlying these old cases--consent to sexual intercourse vitiated by one partner's fraudulent concealment of the risk of infection with venereal disease--is equally applicable today, whether or not the partners involved are married to each other." (150 C.A.3d 997.)

(d) Defendant finally contended that plaintiff was attempting to revive the abolished action for seduction--"the use of deception to effect intercourse." But, under *Barbara A.*, seduction "imports the idea of illicit intercourse"; here, plaintiff willingly engaged in intercourse and complains only of injury to her body caused by her reliance on his misrepresentation that he was free from disease. (150 C.A.3d 997.) (See 40 A.L.R.4th 1089 [tort liability for infliction of venereal disease].)

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f. Representations Concerning Sexual Relations.

4. Representation of Paternity.

5 *Witkin Sum. Cal. Law Torts* § 792

[§ 792] Representation of Paternity.

In *Richard P. v. Superior Court* (1988) 202 C.A.3d 1089, 249 C.R. 246, Linda and Gerald were married, and Linda had an affair with Richard, resulting in the birth of two children in 1984. In 1985, Linda filed a petition for dissolution and in 1986, Richard filed a complaint to establish his paternity. The cases were consolidated, and in January 1987, a stipulated judgment was entered recognizing Richard's paternity, awarding custody of the children to Linda and Richard, and providing for child support to be paid by Richard. In February 1987, the present action was filed by Gerald and his mother and stepfather against Richard, seeking damages for fraud and intentional infliction of emotional distress. The complaint alleged in substance that Richard concealed his paternity and falsely represented that Gerald was the father of the children, and that in reliance on the fraud, Gerald and his mother and stepfather became emotionally attached to the children, and Gerald was induced to support them. Richard's demurrer was overruled. *Held*, mandamus granted to compel judgment on demurrer in favor of Richard.

(a) "[A]ny wrong which has occurred as a result of Richard's actions is not one which can be redressed in a tort action. We do not doubt that this lawsuit emanated from an unhappy situation in which the real parties in interest suffered grief. We feel, however, that the innocent children here may suffer significant harm from having their family involved in litigation such as this and that this is exactly the type of lawsuit which, if allowed to proceed, might result in more social damage than will occur if the courts decline to intervene." (202 C.A.3d 1094.)

(b) Several analogous cases support this conclusion, including *Boyd v. Boyd* (1964) 228 C.A.2d 374, 39 C.R. 400, supra, §786, and *Stephen K. v. Roni L.* (1980) 105 C.A.3d 640, 164 C.R. 618, supra, §789. *Barbara A. v. John G.* (1983) 145 C.A.3d 369, 193 C.R. 422, supra, §790, and *Kathleen K. v. Robert B.* (1984) 150 C.A.3d 992, 198 C.R. 273, supra, §791, are distinguishable in that both cases involved physical injury to the plaintiff and had no potential for harming innocent children. (202 C.A.3d 1094, 1095.)

(c) "We find Gerald, who did not participate in the conception of the children involved here, in a more sympathetic position than the plaintiff in *Stephen K.* Nevertheless, we conclude that this case which involves no physical injuries to the plaintiffs and the potential for harm to the innocent children is much more like *Stephen K.* than *Barbara A.* or *Kathleen K.* For a man married to the mother of children at the time of their conception to be allowed to bring a tort

action such as this against the true father of the children could, as in *Stephen K.*, 'seldom, if ever, result in benefit to a child.' " (202 C.A.3d 1095.)

(d) "Furthermore, to allow the imposition of tortious liability in circumstances such as these would frustrate the strong public policy in having natural fathers acknowledge and support their own children. Men in Richard's situation, who are otherwise willing to voluntarily acknowledge and support their children, would have strong disincentive to do so since revealing the truth would expose them to this type of tort action for compensatory and punitive damages. We deem this result undesirable as a matter of public policy." (202 C.A.3d 1096.)

(e) "We do not foreclose the possibility that a man in Gerald's position might be able to recover actual out of pocket costs incurred in supporting another man's children on an equitable theory for reimbursement, such as unjust enrichment. We do not decide that issue as it is not before us." (202 C.A.3d 1096, footnote 3.)

Nagy v. Nagy (1989) 210 C.A.3d 1262, 258 C.R. 787, reached a similar conclusion. Plaintiff ex-husband brought this action against his ex-wife for damages for fraud and intentional infliction of emotional distress alleging the following: While they were married, defendant represented to him that she was pregnant with his child; on birth of the child, plaintiff, relying on the representation, developed a close father and son relationship with the child; in a subsequent dissolution proceeding defendant, at a deposition, disclosed to him that he was not the father; this fact was confirmed by a blood test; and the false representation was intentional and malicious and for the purpose of causing him emotional distress. *Held*, no cause of action was stated.

(a) An action for fraud would be contrary to public policy. "[A]llowing a nonbiological parent to recover damages for developing a close relationship with a child misrepresented to be his and performing parental acts is not a 'damage' which should be compensable under the law. Although we do not condone respondent's misrepresentations, they are similar to a 'betrayal' for which the law wisely should not provide a remedy." (210 C.A.3d 1269, citing *Stephen K.* and *Barbara A.*)

(b) The falsity of the representation was disclosed during a deposition in the dissolution proceeding, and therefore was protected by the absolute privilege for publication in a judicial proceeding set forth in C.C. 47 (see *supra*, §567). Hence, any emotional distress that the statement caused was not actionable. (210 C.A.3d 1270.) And even if plaintiff could separate future emotional distress from the privileged disclosure, public policy would still preclude recovery. (210 C.A.3d 1271.) (See 33 *Loyola L.A. L. Rev.* 449 [emotional distress claims based on domestic deceit that interferes with parent-child relationship].)

In *McBride v. Boughton* (2004) 123 C.A.4th 379, 20 C.R.3d 115, the plaintiff sought to recover funds expended for the child on an *unjust enrichment* theory, noting that the court in *Richard P.* expressly declined to foreclose the possibility of recovery on this basis. *Held*, the action could not be maintained. "For much the same public policy reasons on which *Nagy* and *Richard P.* relied in declining to authorize a tort claim for the loss of a purported father's relationship with a child, we likewise decline to authorize a restitution remedy for support payments" in these circumstances. (123 C.A.4th 392.) (See 33 *Loyola L.A. L. Rev.* 449 [emotional distress claims based on domestic deceit that interferes with parent-child relationship].)

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g. Nondisclosure or Concealment.

1. In General.

5 Witkin Sum. Cal. Law Torts § 793

[§ 793] In General.

An action for deceit will lie for the "suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." (C.C. 1710(3); see C.C. 1572(3) ["actual fraud" includes the "suppression of that which is true, by one having knowledge or belief of the fact"].)

Although material facts are known to one party and not the other, failure to disclose them is ordinarily not actionable fraud unless there is some *fiduciary relationship* giving rise to a duty to disclose (see *infra*, §§794, 795). (*Mesmer v. White* (1953) 121 C.A.2d 665, 670, 264 P.2d 60; *Watt v. Patterson* (1954) 125 C.A.2d 788, 792, 271 P.2d 200; *Cooper v. Jevne* (1976) 56 C.A.3d 860, 874, 128 C.R. 724, citing the text; *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 C.A.3d 1131, 1152, 261 C.R. 146, citing the text; *Nussbaum v. Weeks* (1989) 214 C.A.3d 1589, 1599, 263 C.R. 360, *infra*, §797, citing the text; see *Goodman v. Kennedy* (1976) 18 C.3d 335, 347, 348, 134 C.R. 375, 556 P.2d 737 [no liability where no facts alleged to show confidential relationship, representation or active concealment, or defendant's exclusive knowledge]; *People v. Highland Fed. Savings & Loan* (1993) 14 C.A.4th 1692, 1719, 19 C.R.2d 555 [savings and loan institution, as beneficial owner of rental properties, was not required to disclose that ownership to tenants]; *LiMandri v. Judkins* (1997) 52 C.A.4th 326, 336, 60 C.R.2d 539 [attorney for lender had no duty to plaintiff attorney to disclose that he was obtaining lien on judgment proceeds superior to contractual lien possessed by plaintiff]; *Rest.2d, Torts* §551; *Dobbs, The Law of Torts* §481; 29 *So. Cal. L. Rev.* 378; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §200 et seq.; BAJI, No. 12.35 et seq.; on failure to disclose cause of action as ground for tolling statute of limitations, see 3 *Cal. Proc.* (4th), *Actions*, §693 et seq.)

However, the duty necessary to support a fraud cause of action for failure to disclose may be based on *statute*, rather than on fiduciary duty. (*Pastoria v. Nationwide Ins.* (2003) 112 C.A.4th 1490, 1499, 6 C.R.3d 148 [insurer, knowing that rate increases were imminent, had duty under *Ins.C.* 330 et seq. to disclose this fact to prospective insureds, and failure to do so was fraud]; *Lovejoy v. AT & T Corp.* (2004) 119 C.A.4th 151, 158, 14 C.R.3d 117, *infra*, §807 [duty to disclose in context of changing provider of telephone service is governed by *Pub.Util.C.* 2889.5, which requires both full disclosure and customer's agreement and thus knowing receipt of information disclosed; sufficiency of disclosure in monthly billing statements to fulfill statutory duty was triable issue of fact].) Also, *active concealment* of facts may be fraudulent. (See *infra*, §798.) Moreover, mere nondisclosure may be actionable where the facts are within

the defendant's *exclusive knowledge*. (See *infra*, §§796, 797; 29 *So. Cal. L. Rev.* 378; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §203.)

In *Heliotis v. Schuman* (1986) 181 C.A.3d 646, 226 C.R. 509, citing the text, plaintiff purchaser brought an action against defendant S, the vendor, based on failure to disclose facts of unstable soil. He also joined B, the vendor's attorney, contending that he owed the same duty to disclose material facts as a real estate broker would owe in the same situation. *Held*, the attorney, who merely represented the vendor and handled the details of the sale, was not liable; he did not attempt to persuade plaintiff to purchase and did not interfere with plaintiff's investigation. (181 C.A.3d 650.)

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In *Hahn v. Mirda* (2007) 147 C.A.4th 740, 54 C.R.3d 527, a patient and her husband sued her physicians for fraudulent concealment. The complaint alleged that the physicians informed the patient that she had a particularly aggressive form of breast cancer; that she underwent chemotherapy and had a radical mastectomy in an attempt to save her life; that the pathology report prepared after the surgery showed that she did not have cancer at all; that the physicians, despite learning this, did not tell the patient; and that, as a result, she lived for more than 2 years believing that she had a fatal disease. *Held*, the complaint stated a cause of action. "[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (147 C.A.4th 748, quoting *Marketing West v. Sanyo Fisher (USA) Corp.* (1992) 6 C.A.4th 603, 612, 7 C.R.2d 859.) The complaint here met these requirements. (147 C.A.4th 748.)

See *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 C.A.4th 226, 241, 70 C.R.3d 199 [broker-dealer's written representations concerning offering of company's bridge notes, that notes would be repaid in full from proceeds of preferred stock offering, made without disclosing conditions on broker-dealer's obligation to proceed with offering, stated cause of action for fraud by concealment].

Tolling statute of limitations:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §770 et seq.



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2. Fiduciary Relationship.

aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 794

[§ 794] In General.

Liability is imposed for concealment where the defendant is in a fiduciary or other confidential relationship that imposes a duty of disclosure. (C.C. 1710(3) ["suppression of a fact, by one who is bound to disclose it"]; see *Hobart v. Hobart Estate Co.* (1945) 26 C.2d 412, 433, 159 P.2d 958 [corporate director]; *Fink v. Weisman* (1933) 129 C.A. 305, 311, 18 P.2d 961 [joint venturer]; *Barron Estate Co. v. Woodruff Co.* (1912) 163 C. 561, 576, 126 P. 351 [architect is fiduciary of client]; *Sime v. Malouf* (1949) 95 C.A.2d 82, 94, 212 P.2d 946, 213 P.2d 788 [joint venturer]; *Black v. Shearson, Hammill & Co.* (1968) 266 C.A.2d 362, 367, 72 C.R. 157, *infra*, §795, citing the text [stockbroker is fiduciary of customers]; *Cooper v. Jevne* (1976) 56 C.A.3d 860, 866, 128 C.R. 724 [real estate broker or agent]; *Roddenberry v. Roddenberry* (1996) 44 C.A.4th 634, 664, 51 C.R.2d 907 [husband's corporation had duty to inform ex-wife that, as part of divorce settlement, she was receiving only one-third, rather than one-half, of profits from television series]; *Rest.2d, Torts* §551; *Dobbs, The Law of Torts* §481; 2 Harper, James & Gray 2d §7.14; 37 *Am.Jur.2d* (2001 *ed.*), *Fraud and Deceit* §207; 51 *Proof of Facts* 3d 361 [liability of real estate professional for interstate real estate fraud]; 80 *A.L.R.3d* 13 [duty to disclose material facts to stock purchaser]; *BAJI*, No. 12.36; *CACI*, No. 1901; on abuse of fiduciary relationship as constructive fraud rendering contract voidable, see 1 *Summary* (10th), *Contracts*, §295; on corporate director as fiduciary, see 9 *Summary* (10th), *Corporations*, §98 *et seq.*; on pleading constructive fraud, see 5 *Cal. Proc.* (4th), *Pleading*, §673.)

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See *Schauer v. Mandarin Gems of Calif.* (2005) 125 C.A.4th 949, 960, 23 C.R.3d 233 [wife did not state constructive fraud cause of action against jewelry store that allegedly misrepresented value of engagement ring sold to husband; complaint failed to plead facts establishing requisite fiduciary or special confidential relationship between plaintiff and defendant]; *Persson v. Smart Inventions* (2005) 125 C.A.4th 1141, 1159, 23 C.R.3d 335, *Supp.*, *infra*, §830 [no confidential relationship arose in arm's-length buyout negotiations between coowners of company, both of whom were represented by counsel and accountants, simply because one professed to paint truest picture possible of company's

financial situation and other relied on him to do so; vulnerability or incapacity is necessary predicate to confidential relationship]; *Hahn v. Mirda* (2007) 147 C.A.4th 740, 748, 54 C.R.3d 527, Supp., supra, §793 [because physician-patient relationship is fiduciary one, physician is prohibited from concealing or otherwise misrepresenting nature of patient's medical condition]; 2 Harper, James & Gray 3d §7.14; BAJI, No. 12.37.1 [Negligent Disclosure by Fiduciary]. *Pleading constructive fraud*:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §717. *Correction*: Page 1149, line 6 of section, "*Barron Estate Co. v. Woodruff Co.*" should be "*Edward Barron Estate Co. v. Woodruff Co.*"



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2. Fiduciary Relationship.

bb. Dual Fiduciary Relationship.

5 *Witkin Sum. Cal. Law Torts* § 795

[§ 795] Dual Fiduciary Relationship.

In *Black v. Shearson, Hammill & Co.* (1968) 266 C.A.2d 362, 72 C.R. 157, defendant Shearson, a national stockbrokerage partnership, engaged in the common practice of having partners serve as directors of newly-formed corporations, giving financing and other advice. Defendant D, a Shearson partner, became a director and advisor of USAMCO, a new venture in the automatic vending machine business. He "made the market" for its stock on over-the-counter sales by having Shearson buy it and sell at a markup, instead of handling sales on commission. He actively pushed sales among Shearson customers through Shearson sales representatives, and Shearson distributed press releases and reports, supplemented by oral statements, about the good financial condition and excellent prospects of USAMCO. Actually, the corporation was a failure from the start, the statements were false, and the corporation's financial plight was concealed by D from Shearson personnel; also, D himself sold much of his holdings at a high profit. Plaintiffs bought in reliance on the representations, and their stock proved worthless. They sued Shearson, D, and the sales representatives. The trial judge absolved the innocent sales representatives, but held Shearson and D liable for compensatory damages (the amount paid for worthless stock) and punitive damages. *Held*, affirmed.

(a) Shearson's chief defense was that D, as a USAMCO director, had a fiduciary duty not to reveal information about the corporation, and that this was a higher duty than that of a stockbroker to his or her customer. In this connection, a New York Stock Exchange Educational Circular was read by stipulation. It stated that the broker partner "should recognize that his first responsibility in this area is to the corporation on whose Board he serves." (266 C.A.2d 368, footnote.) There is no merit in the defense and no support for it in the circular. This case presents the classic problem of serving two masters, and it cannot be resolved by weighing the conflicting duties. It should be avoided in advance, or terminated when it arises. (266 C.A.2d 367.)

(b) The court is even less impressed with the prediction of defendants that the "salutary practice" of stockbrokers giving expertise in financing and other problems facing newly-formed corporations "will end" if the broker-director is held to a "traditional fraud standard." Even if this came to pass, customers should not be deprived of the protection against fraud merely because the broker chooses to occupy the dual role. (266 C.A.2d 368.)

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aa. In General.

5 *Witkin Sum. Cal. Law Torts* § 796

[§ 796] In General.

The duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts that are not accessible to the plaintiff. (*Sime v. Malouf* (1949) 95 C.A.2d 82, 100, 212 P.2d 946, 213 P.2d 788; *De Spirito v. Andrews* (1957) 151 C.A.2d 126, 130, 311 P.2d 173; *Lingsch v. Savage* (1963) 213 C.A.2d 729, 735, 29 C.R. 201; *Massei v. Lettunich* (1967) 248 C.A.2d 68, 73, 56 C.R. 232; *Magpali v. Farmers Group* (1996) 48 C.A.4th 471, 482, 55 C.R.2d 225, citing the text; *Rest.2d, Torts* §551; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §205; BAJI, No. 12.36; CACI, No. 1901.)

Wells v. John Hancock Mut. Life Ins. Co. (1978) 85 C.A.3d 66, 149 C.R. 171, is illustrative. Plaintiff loaned money to P over a period between May 1, 1973, and August 1, 1974. In September 1974, the loan total was \$ 31,000, and P assigned to plaintiff as security a life insurance policy with defendant insurer. In October 1974, defendant acknowledged receipt of the assignment on its printed form, with a disclaimer of responsibility for its sufficiency or validity. Defendant did not advise plaintiff that P had assigned the same policy on May 22, 1974, to secure a loan of \$ 35,000 from F Bank, and also did not advise plaintiff that at the time of the assignment to her, the policy had lapsed for nonpayment of premium. In this action against defendant insurer for damages for fraud and deceit, a general demurrer was sustained. *Held*, reversed.

(a) Defendant was under no duty to disclose the fact of the previous assignment. It had no way of knowing whether the debt secured had been paid; and to advise plaintiff that P had made a previous loan on the strength of the policy would have been a betrayal of confidential information, perhaps serving no useful purpose. (85 C.A.3d 70.)

(b) Defendant was under a duty to disclose the fact that the policy had lapsed. (1) Because it was returning the duplicate assignment form to plaintiff, the information could have been given without extra effort. (2) It was not a disinterested party; it had established procedures for notification of assignments. "By thus involving itself in the transaction, John Hancock acts in part in its own interest: it not only promotes the efficiency of life insurance policies as a security device, but also keeps itself informed concerning the changing interests of owners and creditors of owners in the policies which it has issued." (85 C.A.3d 71.) (3) Knowledge of the legal status of the policy is peculiarly that of the

insurer, and in such cases, there is a duty of disclosure. (85 C.A.3d 72, citing the text, *Rest.2d, Torts* §551, and cases.)

(c) The disclaimer in the assignment form relates only to validity of the assignment, not to the policy itself. (85 C.A.3d 73.)

(d) Defendant was not estopped to deny validity of the policy. If an estoppel were found, plaintiff would be able to collect the full amount of her loan from the policy proceeds (\$ 85,900). But at the time of the assignment by P, she had already loaned the money to P; hence, she could not claim that defendant's nondisclosure induced her to do so. Her loss, if any, must be shown by proving that she could have obtained other security if she had been aware of the undisclosed fact of the policy's lapse. (85 C.A.3d 74.)

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bb. Real Estate Transactions.

5 *Witkin Sum. Cal. Law Torts* § 797

[§ 797] Real Estate Transactions.

(1) *General Duty of Seller.* Where material facts are accessible only to the vendor of property, and the vendor knows them not to be accessible to the purchaser, the vendor has a duty to disclose those facts. (See *Rothstein v. Janss Inv. Corp.* (1941) 45 C.A.2d 64, 68, 113 P.2d 465 [vendor failed to disclose fact that land was filled ground]; *Barder v. McClung* (1949) 93 C.A.2d 692, 697, 209 P.2d 808 [vendor failed to disclose that part of house violated zoning ordinances]; *Curran v. Heslop* (1953) 115 C.A.2d 476, 480, 252 P.2d 378 [vendors failed to disclose that old house violated state law in respects not discoverable by ordinary casual inspection]; *Karoutas v. Homefed Bank* (1991) 232 C.A.3d 767, 775, 283 C.R. 809, 4 *Summary* (10th), *Security Transactions in Real Property*, §165 [deed of trust beneficiary selling property under power of sale may owe duty to prospective bidders to disclose known facts materially affecting property's value]; 39 *Proof of Facts* 3d 309 [real estate broker's nondisclosure of condition or value of realty]; 70 *So. Cal. L. Rev.* 1571 [commercial real estate seller's duty to disclose]; 22 *A.L.R.3d* 972 [real estate vendor's failure to disclose termite infestation]; 18 *A.L.R.4th* 1168 [liability of vendor of existing structure for property damage occurring after transfer]; 46 *A.L.R.4th* 546 [real estate broker's liability for nondisclosure to buyer of physical defects in property].)

For example, a subdivider or vendor of real property has a duty to disclose to purchasers that the property has a history of underground water or has been filled. These soil conditions are factors, not observable by the purchaser, that materially affect the desirability or value of the property. And neither a certification that fill has been properly compacted nor a belief that preexisting slides, seeps, and springs have been permanently repaired, eliminates the duty of disclosure. (*Barnhouse v. Pinole* (1982) 133 C.A.3d 171, 188, 183 C.R. 881; see 80 *A.L.R.2d* 1453 [liability of vendor for failure to disclose that structure was built on filled ground].)

Reed v. King (1983) 145 C.A.3d 261, 193 C.R. 130, is also illustrative. The complaint alleged that defendant vendor and his agents represented to plaintiff purchaser that a house was in good condition and fit for an "elderly lady" living alone; and they did not disclose the fact that 10 years earlier, a woman and her four children had been murdered there. The lower court sustained a demurrer on the ground that the pleading did not allege concealment of a *material* fact. *Held*, reversed; a cause of action was stated for rescission and damages.

(a) Many cases have upheld recovery for nondisclosure of physical defects and legal impediments to the use of real property (145 C.A.3d 266, and footnote 5), but no prior case has presented the issue of nondisclosure of "this variety of ill-repute" (145 C.A.3d 266). The chief argument against imposing liability is that "[a]ny fact that might disquiet the enjoyment of some segment of the buying public may be seized upon by a disgruntled purchaser to void a bargain." (145 C.A.3d 266.)

(b) But murder is not such a common occurrence that purchasers should be charged with anticipating and discovering it; and a purchaser may be unable to reside in a home where it has occurred. (145 C.A.3d 267.) If plaintiff can prove her allegation that the decade-old multiple murder had a significant effect on the market value of the home, she is entitled to a favorable ruling on the issues of materiality and duty to disclose. (145 C.A.3d 268.)

(2) *Distinction: Facts Equally Accessible to Both Parties.* There is no fraud from nondisclosure of facts equally accessible to both parties to the transaction, and nothing is said or done to mislead the other. (See *Kallgren v. Steele* (1955) 131 C.A.2d 43, 45, 279 P.2d 1027 [liability established although possible effect of known defect was probably overlooked rather than intentionally concealed]; *Stevenson v. Baum* (1998) 65 C.A.4th 159, 75 C.R.2d 904 [where purchase contract warned purchaser that it took mobilehome park subject to easements of record, seller had no duty to disclose oil company pipeline easement that was matter of public record equally accessible to both parties, even though title insurance failed to mention easement]; *Assilzadeh v. California Fed. Bank* (2000) 82 C.A.4th 399, 410, 98 C.R.2d 176 [where seller disclosed that it had acquired property at foreclosure sale, that it had little knowledge of property, and that lawsuit for construction defects had been settled, it fulfilled its common law duty of disclosure; details of lawsuit required diligent attention of buyer]; 29 So. Cal. L. Rev. 378 [*Kallgren*].)

(3) *Distinction: Legal Ramifications of Status of Property.* Also, the legal ramifications of the factual nature of realty, and a conclusion as to how they may adversely impact value, are not "facts" subject to required disclosure. (*Sweat v. Hollister* (1995) 37 C.A.4th 603, 608, 43 C.R.2d 399 [where fact that house was in floodplain was revealed to buyers, sellers had no duty to disclose existence and effect of city ordinances regulating rebuilding or improvement of house in floodplain, because this was information as readily available to buyers as to sellers].)

(4) *Statutory Requirements and Immunities.* C.C. 1102 et seq. require transferors of real property (or of specified manufactured homes and mobilehomes) and their brokers to give prospective purchasers prescribed written disclosures concerning the condition of the property. (See 12 Summary (10th), *Real Property*, §471 et seq.)

Under C.C. 1710.2, no cause of action arises against an owner of real property, his or her agent or the transferee's agent for failing to disclose to the transferee the occurrence, or manner, of an occupant's death on the premises where the death occurred more than 3 years prior to the date of the transferee's offer to purchase, lease, or rent the property, or that an occupant was afflicted with, or died from, AIDS. (C.C. 1710.2(a).) However, this statute does not immunize an owner or agent from making an intentional misrepresentation in response to a direct inquiry from a transferee or a prospective transferee concerning deaths on the property. (C.C. 1710.2(d).)

(5) *Limited Duty of Buyer.* The duty to disclose may likewise rest on a buyer with exclusive knowledge but is more limited than that placed on the seller. *Nussbaum v. Weeks* (1989) 214 C.A.3d 1589, 263 C.R. 360, citing the text, discussed this duty as follows: "The buyer has the same duty to disclose material facts affecting the property to the seller, but it is rare that the buyer has knowledge of such facts which would impose a disclosure duty. While the duty has been expressed in the context of a fact that would affect the 'value or desirability' of the property, the extent that a party must disclose matters which do not affect the physical integrity of the property, but which affect the property's value, has not been fully developed. If the buyer's duty were extended as broadly as the seller's duty, the rule would result in the ridiculous conclusion that a buyer must disclose to the seller factors that have or will indicate that the seller is selling the property below its true value. Absent affirmative representation, such a rule would eliminate the freedom to negotiate in the marketplace." (214 C.A.3d 1600.) The buyer has a duty to disclose material facts only under limited circumstances. These include situations in which a fiduciary or confidential relationship exists, situations in which a partial or misleading disclosure is made, and situations in which the buyer knows that the seller would reasonably

expect a disclosure to be made. (214 C.A.3d 1600, citing *Rest.2d, Torts* §551.)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Limited Duty of Buyer*. See *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 C.A.4th 858, 868, 76 C.R.3d 325 [realtor who represented lessee in commercial lease transaction did not have duty to disclose to lessor, after lease was executed, that lessee's financial condition had weakened such that lessee might not be able to perform conditions of lease].



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g. Nondisclosure or Concealment.

4. Active Concealment.

5 Witkin Sum. Cal. Law Torts § 798

[§ 798] Active Concealment.

Even more obnoxious than failure to disclose is active concealment of material facts. (See *Outboard Marine Corp. v. Superior Court* (1975) 52 C.A.3d 30, 37, 124 C.R. 852 [legal effect of active concealment is same as that of affirmative misrepresentation]; *Stevens v. Superior Court* (1986) 180 C.A.3d 605, 609, 225 C.R. 624, citing the text [concealment by defendant hospital of fact that foreign physicians not licensed to practice in California were authorized to function as staff physicians without supervision required by statute]; *Rest.2d, Torts* §550; 37 Am.Jur.2d (2001 ed.), *Fraud and Deceit* §§200, 203, 233 et seq.; BAJI, No. 12.37; CACI, No. 1901.)

Liability may result, for example, from conduct seeking to conceal defects in real property, or to prevent investigation and discovery of material facts about the property. (*Sime v. Malouf* (1949) 95 C.A.2d 82, 99, 212 P.2d 946, 213 P.2d 788; see *Williams v. Graham* (1948) 83 C.A.2d 649, 652, 189 P.2d 324 [defendant agreed to sell property, concealing from purchaser the fact (and instructing his agent to do likewise) that he had no title and was endeavoring to obtain title].)

Lovejoy v. AT & T Corp. (2001) 92 C.A.4th 85, 111 C.R.2d 711, *infra*, §807, is also illustrative of active concealment. Defendant, plaintiff's long-distance phone carrier, fraudulently induced the carrier of plaintiff's toll-free business service to switch this service to defendant. Defendant concealed the switch from plaintiff, and when the long-distance service was terminated over a dispute about the bill, the toll-free service was also terminated, causing plaintiff much loss of business and forcing him into bankruptcy. *Held*, this constituted fraudulent concealment. Because of the concealment of the switch of the toll-free service, plaintiff permitted his long-distance service to be terminated, something that he would not have done had he known of the switch, because he would have known that termination of the long-distance service would have also led to termination of a service that was vital to his business. Plaintiff was not aware of the termination of the toll-free service. (92 C.A.4th 95.) (See 92 A.L.R.5th 1 [state regulation of telephone "slamming"].)

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5 Witkin Sum. Cal. Law Torts § 799

[§ 799] Partial Suppression of Facts.

Liability is also recognized where one who is under no duty to speak nevertheless does so. "Deceit" includes "suppression of a fact, by one ... who gives information of other facts which are likely to mislead for want of communication of that fact." (C.C. 1710(3).) In such a case, he or she is bound to speak honestly, and not to suppress facts that materially qualify those stated. In other words, misleading half-truths may be actionable. (*Pohl v. Mills* (1933) 218 C. 641, 654, 24 P.2d 476; *American Trust Co. v. California Western States Life Ins. Co.* (1940) 15 C.2d 42, 65, 98 P.2d 497; *Rogers v. Warden* (1942) 20 C.2d 286, 289, 125 P.2d 7; *Dyke v. Zaiser* (1947) 80 C.A.2d 639, 652, 182 P.2d 344; *Sime v. Malouf* (1949) 95 C.A.2d 82, 101, 212 P.2d 946, 213 P.2d 788; *Wice v. Schilling* (1954) 124 C.A.2d 735, 746, 269 P.2d 231; *Milmoe v. Dixon* (1950) 101 C.A.2d 257, 260, 225 P.2d 273; *Gillespie v. Ormsby* (1954) 126 C.A.2d 513, 527, 272 P.2d 949; *De Spirito v. Andrews* (1957) 151 C.A.2d 126, 130, 311 P.2d 173; *Sanfran Co. v. Rees Blow Pipe Mfg. Co.* (1959) 168 C.A.2d 191, 202, 335 P.2d 995; *McCue v. Bruce Enterprises* (1964) 228 C.A.2d 21, 27, 39 C.R. 125; see *Rest.2d, Torts* §529; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §209; BAJI, No. 12.37.)

In *Sullivan v. Helbing* (1924) 66 C.A. 478, 226 P. 803, plaintiffs and defendants were negotiating for an exchange of real properties. Defendants stated that their premises were under lease for a rental of a stated amount per month, but failed to disclose the fact that they were regularly accepting a lesser sum from the tenant. *Held*, the representation, though literally true, was, by reason of the concealment, deceptive and fraudulent. (66 C.A. 483.)

In *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 C.A.4th 282, 17 C.R.3d 26, plaintiff shareholder of the acquired corporation in a merger transaction sued the law firm for the acquiring corporation, alleging that the firm specifically undertook to disclose the acquiring corporation's financing transaction that would precede acquisition, but then failed to disclose that the financing involved issuance of worthless "toxic" stock to be exchanged for plaintiff's shares. The firm's demurrer to the complaint was sustained. *Held*, reversed; the complaint properly stated a fraud claim based on nondisclosure. (121 C.A.4th 292, 300.)

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See *Persson v. Smart Inventions* (2005) 125 C.A.4th 1141, 1161, 23 C.R.3d 335, Supp., infra, §830 [owner of half interest in company, who specifically undertook to provide all relevant financial information in buyout negotiations with coowner, was liable for intentional concealment where he suppressed facts materially qualifying those provided].



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h. (New) Representations Concerning Employment.

5 *Witkin Sum. Cal. Law Torts* § 799A

[§ 799A] (New) Representations Concerning Employment.

"The elements of a cause of action for fraudulent inducement to an employment contract are (1) that the employer misrepresented or concealed a material fact during the hiring process, (2) knowledge of the falsity of the fact or lack of reasonable grounds for believing it to be true, (3) an intent to induce reliance, (4) justifiable reliance by the employee, and (5) resulting damages." (*Garamendi v. Golden Eagle Ins. Co. (2005) 128 C.A.4th 452, 470, 27 C.R.3d 239.*) The *Garamendi* case held that evidence submitted to the Insurance Commissioner by former employees of an insurer in liquidation, concerning the insurer's fraudulent business practices, was insufficient to establish fraudulent inducement of their employment contracts. There was no evidence regarding any specific false representations made in hiring them. (*128 C.A.4th 471.*)

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3. Knowledge of Falsity (Scienter).

a. Actual Knowledge.

5 Witkin Sum. Cal. Law Torts § 800

[§ 800] Actual Knowledge.

Knowledge of falsity or "scienter" is ordinarily considered an essential element of fraud. (*Griswold v. Morrison* (1921) 53 C.A. 93, 100, 200 P. 62; *Wishnick v. Frye* (1952) 111 C.A.2d 926, 930, 245 P.2d 532; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 C.A.3d 1324, 1331, 231 C.R. 355, citing the text; *Anderson v. Deloitte & Touche LLP* (1997) 56 C.A.4th 1468, 1475, 66 C.R.2d 512, *infra*, §820; see *Hayter v. Fulmor* (1949) 92 C.A.2d 392, 399, 206 P.2d 1101 [representations of ownership of land, with knowledge of previous relinquishment of title to substantial parties]; *Rest.2d, Torts* §526(a); 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §116 et seq.; 5 *U.C.L.A. L. Rev.* 583; BAJI, No. 12.31; CACI, No. 1900.) And *ambiguous* statements, with a possible true or false meaning, are fraudulent only if the false meaning was intended, or if the statement was made with either reckless indifference as to how it would be interpreted or without any belief as to how it would be understood. (*Rest.2d, Torts* §527.)

In *Black v. Shearson, Hammill & Co.* (1968) 266 C.A.2d 362, 367, 72 C.R. 157, *supra*, §795, defendants contended that scienter was not shown because there was testimony that defendant D did not know that his statements were false at the time he made them. *Held*, this evidence did not negative scienter, for it was clear that D permitted the statements to stand after he learned of their falsity and before plaintiffs relied on them. Thus, his knowledge and approval were part of a continuing course of conduct. (266 C.A.2d 366.)

If the defendant *does believe* the representations to be true, and merely lacks reasonable grounds for the belief, he is guilty only of *negligent misrepresentation*. (See *infra*, §818.) Hence, an instruction that a party "knowing the circumstances is guilty of fraud when he negligently, carelessly or with lack of foresight makes representations" which will cause deception, and that "gross negligence alone may furnish conclusive evidence of fraudulent intent even where there is no actual intention to deceive," was held reversible error. (*Rutherford v. Standard Engineering Corp.* (1948) 88 C.A.2d 554, 563, 199 P.2d 354.)

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3. Knowledge of Falsity (Scienter).

b. Reckless Misrepresentation.

5 *Witkin Sum. Cal. Law Torts* § 801

[§ 801] Reckless Misrepresentation.

Actual knowledge is not always required. If the defendant *has no belief in the truth* of the statement, and makes it recklessly, without knowing whether it is true or false, the element of scienter is satisfied. (See C.C. 1572(1) ["the suggestion, as a fact, of that which is not true, by one who does not believe it to be true" constitutes "actual fraud"]; C.C. 1710(1) [same included in definition of "deceit"]; *Gagne v. Bertran* (1954) 43 C.2d 481, 487, 275 P.2d 15; *Gaffney v. Graf* (1925) 73 C.A. 622, 625, 238 P. 1054; *Andrew v. Bankers & Shippers Ins. Co.* (1929) 101 C.A. 566, 578, 281 P. 1091; *Hargrove v. Henderson* (1930) 108 C.A. 667, 673, 292 P. 148; *White v. Sarff* (1931) 115 C.A. 317, 318, 1 P.2d 519; *Lerner v. Riverside Citrus Assn.* (1953) 115 C.A.2d 544, 547, 252 P.2d 744; *Horrell v. Santa Fe Tank & Tower Co.* (1953) 117 C.A.2d 114, 119, 254 P.2d 893; *Nathanson v. Murphy* (1955) 132 C.A.2d 363, 367, 282 P.2d 174; *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 C.A.4th 1061, 1073, 13 C.R.3d 586, citing the text; see *Yellow Creek Logging Corp. v. Dare* (1963) 216 C.A.2d 50, 55, 30 C.R. 629 ["false representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered"]; *Rest.2d, Torts* §526(b), (c); 5 *U.C.L.A. L. Rev.* 588; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §120 et seq.; BAJI, No. 12.31; CACI, No. 1900.)

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4. Intent To Defraud.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 802

[§ 802] In General.

The representation must be made with the intent to defraud the plaintiff, that is, to induce his or her reliance. (See C.C. 1709, *supra*, §767 [imposing liability on "[o]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk"]; *Lovejoy v. AT& T Corp.* (2004) 119 C.A.4th 151, 161, 14 C.R.3d 117 [telecommunications carrier's failure to disclose change in provider of telephone service, as required by *Pub.Util.C.* 2889.5, supported inference of intent to defraud]; *Rios v. Scottsdale Ins. Co.* (2004) 119 C.A.4th 1020, 1029, 15 C.R.3d 18 [insurer's alteration of insured's application for policy was not fraudulent misrepresentation where alteration was intended as counteroffer]; *Rest.2d, Torts* §531; Dobbs, *The Law of Torts* §471; 4 *Stanf. L. Rev.* 310; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §§107, 108; BAJI, Nos. 12.50, 12.50.1; CACI, No. 1906.)

Intent to defraud is not shown by evidence that statements were made recklessly but without knowledge of falsity. (*Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 C.A.4th 1061, 1074, 13 C.R.3d 586, citing the text.)

West's Key Number Digest, Fraud k.4, 21, 29, 42, 54, 62(2), 65(2)

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b. Intent To Deceive Particular Persons.

1. General Rule.

5 *Witkin Sum. Cal. Law Torts* § 803

[§ 803] General Rule.

The representation must be made to induce action by *some particular person or persons* in reliance on it, and the defendant is liable only to those persons to whom the representation was made with this intent. If others become aware of the statements and act on them, there is no liability even though the defendant should reasonably have foreseen this possibility. (See *Bell v. Renaldo* (1975) 51 C.A.3d 779, 781, 124 C.R. 233; *Walters v. Marler* (1978) 83 C.A.3d 1, 19, 147 C.R. 655, quoting the text.)

However, the representation may be made *indirectly* as well as directly. (See *infra*, §804.)

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2. Representation to One for Another.

5 Witkin Sum. Cal. Law Torts § 804

[§ 804] Representation to One for Another.

The statement may be made to one person intending that he or she shall communicate it to another, as where a misrepresentation is made to one of two spouses, to an agent, or to a credit rating agency that communicates it to one who extends credit. (See *Lewis v. McClure* (1932) 127 C.A. 439, 447, 16 P.2d 166; *Varwig v. Anderson-Behel Porsche/Audi* (1977) 74 C.A.3d 578, 580, 141 C.R. 539, citing the text; *Rest.2d, Torts* §533; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §§109, 110; BAJI, Nos. 12.50, 12.50.1; CACI, No. 1906.)

In *Crystal Pier Amusement Co. v. Cannan* (1933) 219 C. 184, 25 P.2d 839, false representations were made to certain individuals, officers of a corporation, with respect to quality of materials to be used for a pier. Later, these individuals organized another corporation to take title and build certain structures on the pier. *Held*, the second corporation could sue for the fraud, despite the fact that it was not in existence at the time of the representations. The representations were actually made to individuals rather than to the "corporation," and that they were relied on by these individuals in acting for the second corporation. (219 C. 186.) (See *Nathanson v. Murphy* (1955) 132 C.A.2d 363, 368, 282 P.2d 174 [following *Crystal Pier Amusement Corp.*].)

A cause of action was also stated in *Geernaert v. Mitchell* (1995) 31 C.A.4th 601, 37 C.R.2d 483. Plaintiff real property purchasers sued defendants, two entities that had owned the property prior to the seller, alleging fraudulent misrepresentations and concealment regarding significant structural and foundation problems with the property. The trial judge, determining that defendants owed no duty to plaintiffs, sustained defendants' demurrers and dismissed the case. *Held*, reversed with directions to overrule the demurrers.

(a) Under *Rest.2d, Torts* §533, the maker of a fraudulent representation is liable to a person who acts in justifiable reliance on it if the misrepresentation, although not made directly to the person, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the person, and he or she will be influenced by it. (31 C.A.4th 605.)

(b) Plaintiffs stated facts to support a cause of action under this standard. One defendant was a corporation that quickly resold the property, presumably for commercial gain, and had special reason to expect that fraud would be

transmitted to subsequent purchasers, such as plaintiffs. The other defendant, although two sales removed from plaintiffs, allegedly used his construction expertise to take extraordinary measures to conceal the true condition of the property and therefore knew there was a strong likelihood that the deception would be passed on to a subsequent buyer. (31 C.A.4th 608.)

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3. Representation to Public or Class.

5 Witkin Sum. Cal. Law Torts § 805

[§ 805] Representation to Public or Class.

(1) *In General*. "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit." (C.C. 1711; see *Hauter v. Zogarts* (1975) 14 C.3d 104, 111, 120 C.R. 681, 534 P.2d 377, supra, §778 [label on carton and cover of instruction booklet on device]; *Gill v. Johnson* (1932) 125 C.A. 296, 300, 13 P.2d 857, 14 P.2d 1017 [false showing of service of summons in default action]; *Quirici v. Freeman* (1950) 98 C.A.2d 194, 201, 219 P.2d 897 [falsely inadequate label on paint can]; *Block v. Tobin* (1975) 45 C.A.3d 214, 219, 119 C.R. 288 [notice by trustee and beneficiary of deed of trust announcing public auction, with secret intention to arrange for private sale without competitive bids]; *Varwig v. Anderson-Behel Porsche/Audi* (1977) 74 C.A.3d 578, 580, 141 C.R. 539, quoting the text [defendant automobile dealer sold car to another dealer, representing that title was good; plaintiff, who purchased from second dealer in reliance on representation, was entitled to sue defendant]; *Barnhouse v. Pinole* (1982) 133 C.A.3d 171, 192, 183 C.R. 881, citing the text [liability of developer of land to subpurchasers]; cf. *Cohen v. Citizens Nat. Trust & Savings Bank* (1956) 143 C.A.2d 480, 486, 300 P.2d 14, infra, §806 [discussing scope of statute]; *Whiteley v. Philip Morris* (2004) 117 C.A.4th 635, 680, 11 C.R.3d 807 [tobacco companies' misrepresentations regarding health risks of smoking]; *Rest.2d, Torts* §534; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §111; BAJI, Nos. 12.50, 12.50.1; CACI, No. 1906.)

(2) *Representation in Document*. The false statement may be made in a document that circulates among the public or some group of persons. (See *Andrew v. Bankers & Shippers Ins. Co.* (1929) 101 C.A. 566, 575, 281 P. 1091 [forged conditional sale contracts]; *Fuhrman v. American Nat. Bldg. & Loan Assn.* (1932) 126 C.A. 202, 213, 14 P.2d 601 [corporation prospectus and other advertising matter]; *Mary Pickford Co. v. Bayly Bros.* (1939) 12 C.2d 501, 521, 86 P.2d 102 [certificates of interest violating Corporate Securities Act]; *Wice v. Schilling* (1954) 124 C.A.2d 735, 745, 269 P.2d 231 [false certificate that property was free from termites, sent to escrow holder with knowledge that buyer might rely on it]; *Rest.2d, Torts* §532; 27 *Cal. L. Rev.* 477.)

(3) *Information Required by Statute*. False statements in a financial or other report required by statute, e.g., from banks or other corporations, may give rise to liability. (See *American Trust Co. v. California Western States Life Ins. Co.* (1940) 15 C.2d 42, 68, 98 P.2d 497; *Rest.2d, Torts* §536; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §112.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Representation in Document.* See *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 C.A.4th 835, 859, 68 C.R.3d 828 [investment bank that prepared offering memorandum for company's promissory notes was subject to liability in fraud to ultimate purchasers of notes for failure to disclose company's negative financial information; bank was initial purchaser of unregistered notes and sold them knowing that they would be transformed to registered notes and traded on open market].



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4. Unknown Third Persons.

5 *Witkin Sum. Cal. Law Torts* § 806

[§ 806] Unknown Third Persons.

(1) *In General.* The situations described in preceding sections, where liability for indirect representations was imposed, were distinguished in *Cohen v. Citizens Nat. Trust & Savings Bank* (1956) 143 C.A.2d 480, 300 P.2d 14. The complaint alleged that A (now deceased and represented by defendant bank) unlawfully added basement apartments without a permit, and sold the apartment house to D with intent to defraud D and subsequent purchasers; that D, presumably ignorant of the defects, sold to plaintiffs, who were subsequently cited by the health department and suffered damages. *Held*, no cause of action was stated. A had no dealings with plaintiffs, did not know they existed, and could not have had any interest in defrauding them since they came into the transaction after A had parted with title and made his profit. In the absence of an assignment of the defrauded party's cause of action to the plaintiff, there is no authority supporting relief "to a subsequent grantee of property upon the latter's complaint that a fraud had been perpetrated by defendant upon one such grantee's predecessors in title." (143 C.A.2d 485.)

Cohen was disapproved in *Varwig v. Anderson-Behel Porsche/Audi* (1977) 74 C.A.3d 578, 581, 582, 141 C.R. 539, adopting the rule of *Rest.2d, Torts* §533 that subjects the maker of a fraudulent misrepresentation to liability "to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct." This principle has been followed in subsequent cases. (See *Barnhouse v. Pinole* (1982) 133 C.A.3d 171, 192, 183 C.R. 881; *Geernaert v. Mitchell* (1995) 31 C.A.4th 601, 605, 37 C.R.2d 539.) It has been referred to as the "indirect deception" doctrine. (*Shapiro v. Sutherland* (1998) 64 C.A.4th 1534, 1548, 76 C.R.2d 101.)

Shapiro v. Sutherland is illustrative. Defendant, having received a job transfer, sold his house to a relocation management service, who then sold it to plaintiff. Prior to the initial sale, defendant had executed a disclosure form indicating, falsely, that he was unaware of any neighborhood noise problem. In holding that plaintiff could rely on this misrepresentation even though it was not made by defendant directly to him, the court stated that the *Cohen* rule had been rejected and replaced by the principle of indirect deception. The court emphasized that when defendant made the misrepresentation, it was obvious that the service, having purchased the property as an employment benefit solely for resale, was going to show it to *someone* when the property was resold. (64 C.A.4th 1548.)

(2) *Representations Resulting in Physical Harm.* Under *Rest.2d, Torts §310*, a defendant who makes an intentional misrepresentation "is subject to liability to another for physical harm which results from an act done by ... a third person in reliance upon the truth of the representation," if the actor intends the statement to induce action, or should realize that it is likely to induce action, "which involves an unreasonable risk of physical harm." This rule was followed in *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 C.4th 1066, 1075, 60 C.R.2d 263, 929 P.2d 582, *infra*, §822, which authorizes recovery, in prescribed circumstances, for physical injury to a third person resulting from a misrepresentation.

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B. Fraudulent Misrepresentation.

4. Intent To Defraud.

c. Intent To Induce Particular Action.

5 *Witkin Sum. Cal. Law Torts* § 807

[§ 807] Intent To Induce Particular Action.

The theory of intent to defraud has been given a further limitation that seems unjustly to narrow liability: Under this view, except where documents are circulated or public reports are made, it must be shown that the defendant intended to induce the particular action that took place, or conduct in substantially the same transaction. It is not considered enough that defendant should have realized the likelihood of the plaintiff's action, for the law of deceit (as distinguished from the law of negligence) does not impose liability for unintended consequences. (See *Conrad v. Bank of America* (1996) 45 C.A.4th 133, 157, 53 C.R.2d 336 [defendant "must intend to induce a particular act of the plaintiff and is not liable in fraud for unintended consequences"]; *Rest.2d, Torts* §531 [requiring defendant's intent or reasonable expectation that pecuniary loss be suffered by plaintiffs "in the type of transaction in which he intends or has reason to expect their conduct to be influenced"].)

In *Carlson v. Murphy* (1935) 8 C.A.2d 607, 47 P.2d 1100, plaintiffs purchased a note and mortgage from Joseph Murphy Mortgage Company, with a written guaranty by Joseph Murphy. Defendant falsely represented that the company was a corporation, and in reliance thereon after Murphy's death, plaintiffs failed to file a claim against his estate on the guaranty, believing that the purported corporation was responsible. Suit was brought to recover loss. It appeared from the complaint that the false representations had been made not to induce plaintiffs to refrain from presenting the claim, but with the object of gaining further business from plaintiffs. *Held*, no cause of action was stated. (8 C.A.2d 611.)

This view was rejected, and the *Carlson* and *Conrad* cases disapproved, in *Lovejoy v. AT & T Corp.* (2001) 92 C.A.4th 85, 111 C.R.2d 711. Plaintiff businessman had long-distance phone service with defendant carrier, and his business had toll-free 800 service with another carrier. Due to a false representation by defendant to the other carrier that plaintiff wished to switch his toll-free service to defendant, the other carrier was induced to do so. Defendant then charged plaintiff for the toll-free service, but hid the charges within those for long-distance service. When plaintiff disputed the bill for his long-distance service, both services were terminated, but plaintiff, unaware that the toll-free service had been transferred, was also unaware that it had been terminated. As a result, plaintiff found it necessary to file for bankruptcy. The trial judge implied that, in order to state a cause of action for fraud, it is necessary that the defendant intend to cause the plaintiff a particular type of damage, and ruled that the intent here was to keep plaintiff as a toll-free service customer, not to drive him out of business. *Held*, judgment on the pleadings for defendant reversed.

"[T]he only intent by a defendant necessary to prove a case of fraud is the intent to *induce reliance*. Moreover, liability is affixed not only where the plaintiff's reliance is intended by the defendant but also where it is *reasonably expected* to occur." (92 C.A.4th 93.) (See 92 A.L.R.5th 1 [state regulation of telephone "slamming"].)

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1. In General.

5 Witkin Sum. Cal. Law Torts § 808

[§ 808] In General.

It must be shown that the plaintiff actually relied on the misrepresentation. (*Schroeder v. Auto Driveaway Co.* (1974) 11 C.3d 908, 917, 114 C.R. 622, 523 P.2d 662; *Mirkin v. Wasserman* (1993) 5 C.4th 1082, 1088, 23 C.R.2d 101, 858 P.2d 568, *infra*, §811; *Alliance Mortg. Co. v. Rothwell* (1995) 10 C.4th 1226, 1239, 1246, 44 C.R.2d 352, 900 P.2d 601, 4 Summary (10th), *Security Transactions in Real Property*, §177, citing the text; *Elkind v. Woodward* (1957) 152 C.A.2d 170, 175, 313 P.2d 66; *Bernson v. Bowman* (1960) 182 C.A.2d 697, 703, 6 C.R. 455; *Brown v. Critchfield* (1980) 100 C.A.3d 858, 866, 161 C.R. 342, citing the text; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 C.A.3d 1324, 1332, 231 C.R. 355, citing the text; *Commonwealth Mortg. Assur. Co. v. Superior Court* (1989) 211 C.A.3d 508, 520, 259 C.R. 425; see *Linden Partners v. Wilshire Linden Associates* (1998) 62 C.A.4th 508, 534, 73 C.R.2d 708 [plaintiffs purchased building in reliance on incorrect formula for calculating tenant's rent]; *Dobbs*, *The Law of Torts* §474 et seq.; *Rest.2d, Torts* §546 et seq.; 2 Harper, James & Gray 2d §7.13; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §239 et seq.; BAJI, No. 12.51; CACI, No. 1907; on pleading actual reliance, see 5 *Cal. Proc.* (4th), *Pleading*, §686; cf. *Podlasky v. Price* (1948) 87 C.A.2d 151, 162, 196 P.2d 608, 1 Summary (10th), *Contracts*, §306 [recovery denied, but decision based on both lack of reliance and unjustifiable reliance]; *Wilkins v. National Broadcasting Co.* (1999) 71 C.A.4th 1066, 1081, 84 C.R.2d 329 [no actual reliance where plaintiff sales representatives being investigated by TV network would have given same "sales pitch" had they known that defendants were TV reporters, rather than potential investors]; *Furia v. Helm* (2003) 111 C.A.4th 945, 4 C.R.3d 357 [contractor who successfully asserted in prior proceeding before Contractors' State License Board that he did not abandon construction project could not later claim abandonment in reliance on attorney's fraudulent advice; expenses contractor incurred in defending case before board were not caused by reliance on attorney's advice, because contractor did not rely on this advice].)

Thus, it must appear that the representation was "an immediate cause of his conduct which alters his legal relations," and that without such representation, "he would not, in all reasonable probability, have entered into the contract or other transaction." (*Spinks v. Clark* (1905) 147 C. 439, 444, 82 P. 45 [quoting Pomeroy's Equity Jurisprudence].)

However, the fraud need not be the sole cause; reliance is established where the representation substantially

influenced plaintiff's choice, even though other influences operated as well. (See *Rest.2d, Torts* §546; 37 *Am.Jur.2d* (2001), *Fraud and Deceit* §245.) And reliance may be shown by direct evidence or may be inferred from the circumstances. (*Hunter v. McKenzie* (1925) 197 C. 176, 185, 239 P. 1090; *Peskin v. Squires* (1957) 156 C.A.2d 240, 249, 319 P.2d 405.)

The words "as is" in a contract of sale do not give immunity from fraud, but are a factor to be considered in determining whether the buyer was misled, i.e., whether he or she relied on a seller's failure to disclose relevant information. (*Driver v. Melone* (1970) 11 C.A.3d 746, 752, 90 C.R. 98.)

Reliance may be indirect, as through an agent. In *Thrifty-Tel v. Bezenek* (1996) 46 C.A.4th 1559, 54 C.R.2d 468, supra, §720, plaintiff, a telephone long-distance carrier, sued defendants, the parents of teenage boys who employed computer technology in their efforts to crack plaintiff's system and make long-distance phone calls without paying. Plaintiff's complaint included a fraud cause of action on which it was successful at trial. *Held*, affirmed. As asserted by plaintiff, the use by defendants' sons of a confidential access code was the legal equivalent of a misrepresentation that they were authorized users of plaintiff's services, and plaintiff relied to its detriment on that misrepresentation when its computer automatically granted them access. (46 C.A.4th 1567.) It is true that no human received and acted on the misrepresentation. However, reliance may be indirect, and reliance by an agent may be imputed to the principal, even though the misrepresentation was never communicated to that principal. (46 C.A.4th 1568.) Plaintiff's computerized network can be viewed as an agent or the legal equivalent. Thus, plaintiff, through its agent, relied on the misrepresentation, and that reliance was detrimental because the access, in effect, permitted the boys to steal plaintiff's services. (46 C.A.4th 1568.)

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See *Cadlo v. Owens-Illinois* (2004) 125 C.A.4th 513, 519, 23 C.R.3d 1, Supp., supra, §44 [plaintiff injured by exposure to asbestos did not state cause of action for fraud against company that had sold its asbestos business before plaintiff was exposed to product made by successor company; while original company may have knowingly misrepresented that product was safe and concealed its hazardous nature, plaintiff did not allege actual reliance on this misrepresentation]; *Schauer v. Mandarin Gems of Calif.* (2005) 125 C.A.4th 949, 960, 23 C.R.3d 233 [wife did not have cause of action for fraud against jewelry store that allegedly misrepresented value of engagement ring sold to husband; only husband could show requisite reliance on representation]; *Boeken v. Philip Morris* (2005) 127 C.A.4th 1640, 1659, 26 C.R.3d 638 [evidence was sufficient to establish actual reliance on tobacco company's fraudulent statements by smoker who contracted cancer, even though he could not recall words of specific advertising that made him decide to smoke; smoker remembered company's advertising themes with "fair certainty" and how they "enticed him to smoke with false images of health, sophistication, and machismo"]; *Leegin Creative Leather Products v. Diaz* (2005) 131 C.A.4th 1517, 1524, 33 C.R.3d 139 [employer failed to establish reliance on employee's allegedly fraudulent workers' compensation claim as inducing employer to forward claim to insurer; employer was required by both law and insurance policy to forward all claims, and thus had no choice but to do so]; 2 Harper, James & Gray 3d §7.13.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §730.



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2. Investigation or Examination.

5 *Witkin Sum. Cal. Law Torts* § 809

[§ 809] Investigation or Examination.

(1) *Recovery Denied*. A plaintiff who has access to the necessary information and actually makes an independent investigation that the defendant does not hinder will be charged with knowledge of the facts that reasonable diligence would have disclosed and cannot claim reliance on the representations. (*Hackleman v. Lyman* (1920) 50 C.A. 323, 326, 195 P. 263; *Beggs v. Spalding* (1921) 56 C.A. 21, 27, 204 P. 429; *Cameron v. Cameron* (1948) 88 C.A.2d 585, 594, 199 P. 443, *infra*, §812; *Vickerson v. Frey* (1950) 100 C.A.2d 621, 626, 224 P.2d 126; *Carlson v. Brickman* (1952) 110 C.A.2d 237, 245, 242 P.2d 94; *Elkind v. Woodward* (1957) 152 C.A.2d 170, 176, 313 P.2d 66; see *Ostayan v. Serrano Reconveyance Co.* (2000) 77 C.A.4th 1411, 1418, 92 C.R.2d 577 [fraud action did not lie where, although purchaser of foreclosed property was unaware that second, senior lien remained on property, he did not rely on any misrepresentation by defendants but instead reached wrong conclusion based on own investigation]; *Rest.2d, Torts* §547; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §239; BAJI, No. 12.53.)

In *Carpenter v. Hamilton* (1936) 18 C.A.2d 69, 62 P.2d 1397, plaintiffs, buying a house, inspected it four times, going through nearly all rooms, and they employed an expert to look for dry rot and termites underneath the structure. But they did not discover other conspicuous defects, such as sunken floor levels and foundation, warped window frames, plaster cracks, and defective condition of the roof. *Held*, they could not rely on defendant's representations as to these matters, for having undertaken to inspect, they were bound by what was easily discoverable. (18 C.A.2d 71.)

(2) *Recovery Allowed*. The mere fact that some investigation was made does not conclusively show that the plaintiff relied on his or her own judgment. (*Sullivan v. Helbing* (1924) 66 C.A. 478, 483, 226 P. 803; *Ferguson v. Koch* (1928) 204 C. 342, 346, 268 P. 342; *Linden Partners v. Wilshire Linden Associates* (1998) 62 C.A.4th 508, 527, 73 C.R.2d 708; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §252.) "An independent investigation or an examination of property does not preclude reliance on representations where the falsity of the statement is not apparent from an inspection, or the person making the representations has a superior knowledge, or the party relying thereon is not competent to judge the facts without expert assistance." (*Bagdasarian v. Gragnon* (1948) 31 C.2d 744, 748, 192 P.2d 935, *infra*, §830.)

Thus, where an inexperienced person buys property, a mere visit to the premises not accompanied by an expert, or a casual survey of books or equipment, does not preclude that person from showing reliance on the representations. (*Dow*

v. Swain (1899) 125 C. 674, 682, 58 P. 271; *French v. Freeman* (1923) 191 C. 579, 587, 217 P. 515; *Willson v. Municipal Bond Co.* (1936) 7 C.2d 144, 151, 59 P.2d 974; *Hobart v. Hobart Estate Co.* (1945) 26 C.2d 412, 434, 435, 159 P.2d 958; *Palladine v. Imperial Valley Farm Land Assn.* (1924) 65 C.A. 727, 744, 225 P. 291; *Payne v. Clow* (1931) 114 C.A. 597, 600, 300 P. 138.)

Recovery will be allowed, despite plaintiff's independent investigation, where the defendant prevents plaintiff from learning the true facts. In *Kramer v. Musser* (1943) 57 C.A.2d 942, 944, 136 P.2d 74, recovery was upheld where plaintiff, an experienced businessman, inspected a house, but there was some evidence of deception preventing investigation of termite damage.

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3. Time of Reliance.

5 Witkin Sum. Cal. Law Torts § 810

[§ 810] Time of Reliance.

(1) *In General.* Ordinarily, of course, the plaintiff must not know of the falsity of the representation at the time that he or she relies on it. (*Kazerouni v. De Satnick* (1991) 228 C.A.3d 871, 873, 279 C.R. 74.) An exception exists, however, where the defendant's actions have prevented plaintiff from acting on that knowledge. (*Molko v. Holy Spirit Assn. for the Unification of World Christianity* (1988) 46 C.3d 1092, 1108, 252 C.R. 122, 762 P.2d 46, *supra*, §770 [plaintiff allegedly "brainwashed" by defendant church before joining it despite learning of falsity of its representations].)

If the statements did not come to the knowledge of the plaintiff until *after* he or she acted, obviously plaintiff cannot claim reliance on them. (*Bank of St. Helena v. Lilienthal-Brayton Co.* (1928) 89 C.A. 258, 263, 264 P. 546.)

(2) *Reliance at Inception Is Sufficient.* It has been held sufficient that reliance exist at the formation or inception of the agreement, and that it need not continue until the agreement is executed. (*Storage Services v. C.R. Oosterbaan* (1989) 214 C.A.3d 498, 510, 262 C.R. 689.) In *Jue v. Smiser* (1994) 23 C.A.4th 312, 28 C.R.2d 242, plaintiffs executed an agreement to purchase defendants' home on April 28, escrow to close on June 11. Part of the inducement for plaintiffs' purchase was a brochure indicating that the home had been designed by a famous architect. Shortly before the close of escrow plaintiffs received information that there was no official proof that the home had been designed by this particular architect. Nevertheless, plaintiffs closed escrow, and then sued defendants for damages. The trial judge entered summary judgment for defendants on the ground that plaintiffs did not justifiably rely on the alleged fraud because, despite having actual knowledge of all material facts before the close of escrow, they voluntarily elected to proceed with the purchase. *Held*, reversed.

(a) *Storage Services v. C.R. Oosterbaan, supra*, held that reliance must be established at the time the initial contract was made. In other words, it is not necessary that a plaintiff establish *continuing* reliance until the contract is fully executed in order to maintain an action for damages. (23 C.A.4th 317.) There is no reason to deviate from or limit that holding. (23 C.A.4th 318; disapproving, to extent that it suggests to contrary, *Kazerouni v. De Satnick, supra*.)

(b) Defendants argued that *Storage Services* should be read as reconfirming the general rule that a party discovering fraud while the contract is still executory cannot complete performance and still sue for fraud. This argument is without

merit. The *Storage Services* court did note that a party who learns of a fraud before a contract has been completed will not complete it in "reliance" on the fraud. However, that court also noted that, under *Bagdasarian v. Gragnon* (1948) 31 C.2d 744, 192 P.2d 935, infra, §830, a party's continued performance of an agreement does not constitute a waiver of his or her action for damages. (23 C.A.4th 317.)

(c) Sound public policy considerations support a rule allowing a purchaser to bring an action for damages even though he or she learns the truth prior to the close of escrow. That rule encourages sellers and their representatives to investigate and learn the true facts before property is offered for sale. And the possession and communication of that knowledge will benefit all parties in the course of negotiations leading to execution of a sales agreement. (23 C.A.4th 319.)

(d) "In addition, if we were to adopt the rule urged upon us by respondents, a buyer of real property who learns of a misrepresentation or a potential misrepresentation after a purchase contract is struck but before escrow closes would be faced with an extraordinarily difficult choice: (1) consummate the purchase and waive any claim for damages or (2) rescind and deal with the consequences of that choice. Among those consequences may be (1) problems in securing a return of moneys deposited with the escrow holder; (2) the loss of moneys spent to secure a loan and to meet other costs of acquisition, such as escrow fees; and (3) the risk of being sued by the seller and/or the seller's representatives. One who may be the victim of another's fraud should not be forced to make such a choice. That policy is especially strong where, as here, it is unclear whether or not a particular representation was (is), in fact, false at the time a choice is required, and the time period in which to choose is extraordinarily short." (23 C.A.4th 319.)

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4. Securities Cases.

5 Witkin Sum. Cal. Law Torts § 811

[§ 811] Securities Cases.

In *Mirkin v. Wasserman* (1993) 5 C.4th 1082, 23 C.R.2d 101, 858 P.2d 568, the California Supreme Court declined to apply to common law fraud actions involving the sale of securities the "fraud-on-the-market" doctrine used in actions under the securities laws, reaffirming the requirement that actual reliance be pled and proved. Plaintiffs purported to represent all persons who purchased defendant corporation's shares of common stock during a prescribed period of time. Defendants were the corporation, its officers and directors, the accounting firm that audited its financial statements, and the underwriters of public offerings of the securities. The complaint alleged that defendants, after the stock experienced a dramatic drop in value, made numerous misrepresentations about the corporation's prospects and financial status in prospectuses, documents filed with the SEC, and in other public communications, thus allowing them to sell the securities for more than their true value. Plaintiffs conceded that they could not plead or prove that they had actually read or heard the alleged misrepresentations, but contended that the fraud-on-the-market doctrine obviates the need for this pleading and proof. *Held*, judgment for defendants on demurrer affirmed.

(a) *Fraud-on-the-market doctrine.*

(1) To justify their failure to plead actual reliance on the alleged misrepresentation, plaintiffs argued that the price of securities traded in an open and developed market adjusts in response to material information, regardless of whether the information is true or false. Thus, misrepresentations are reflected in the market price of a security, and a person relying on the market price as indicating the actual value of a security is relying, although indirectly, on the misrepresentation. (5 C.4th 1089.)

(2) Based on this reasoning, which is sometimes referred to as the "fraud-on-the-market doctrine," the United States Supreme Court has held that it is appropriate to apply a presumption of reliance in actions brought under SEC Rule 10b-5. However, the characteristics of a private action under that Rule are not derived from, or identical to, the common law of deceit. The Rule was promulgated by the SEC under a broad statutory grant of authority, and the federal courts have gone far beyond the limits of the common law in imposing liability. (5 C.4th 1089, 1090.)

(3) Plaintiffs' argument is in essence a plea to incorporate the fraud-on-the-market doctrine into the common law of

deceit. No appellate court has done so. (5 C.4th 1090.) And it is not necessary to do so in order to create a remedy for an unremedied wrong. Plaintiffs already have remedies under federal and state securities laws, both of which afford a presumption of reliance in actions based on material misrepresentations. (5 C.4th 1090.) Indeed, a class action on behalf of defendant corporation's investors under Rule 10b-5 has been filed in the federal court. Nevertheless, a presumption of reliance under state common law would offer plaintiffs a more favorable statute of limitations and the possibility of recovering punitive damages. Thus, to obtain these advantages, plaintiffs argued that California law already affords a presumption of reliance, and that if it does not, California should adopt one as a matter of policy. (5 C.4th 1091.)

(b) *Requirement of reliance under California statutes.* The deceit statutes (C.C. 1709, 1710) do not expressly require a showing of actual reliance, and plaintiffs contend that reliance is merely one method of proving causation, and can be pleaded by alleging that defendants' misrepresentations had the purpose and effect of causing plaintiffs to purchase or to sell, whether or not such representations come to plaintiffs' attention. This conclusion is unsound:

(1) The law of deceit in California is a mixture of statutory and common law; and C.C. 1709 and 1710 have been recognized as continuations of the common law. It is entirely consistent with these statutes to require plaintiffs to plead and prove the common law element of actual reliance. (5 C.4th 1091, 1092, citing *Molko v. Holy Spirit Assn. for the Unification of World Christianity* (1988) 46 C.3d 1092, 252 C.R. 122, 762 P.2d 46, supra, §770, *Garcia v. Superior Court* (1990) 50 C.3d 728, 268 C.R. 779, 789 P.2d 960, infra, §821, and other cases.)

(2) C.C. 1711, dealing with deceit to defraud the public or a class of persons (see supra, §805), simply points out that one who makes false representations with fraudulent intent need not have any particular victim in mind. (5 C.4th 1092.)

(3) C.C. 3343, defining the measure of damages for one defrauded in the purchase, sale, or exchange of property (see infra, §1714), provides that lost profits are available only when the party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale. This statute cannot plausibly be read as eliminating the element of reliance from the tort of deceit. (5 C.4th 1093.)

(c) *Reliance on omission is susceptible of proof.* Plaintiffs argued that actual reliance cannot logically be an element of a cause of action for deceit based on an omission because it is impossible to demonstrate reliance on something that one was not told. In support of this argument, plaintiffs relied on *Affiliated Ute Citizens of Utah v. United States* (1972) 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741, in which the United States Supreme Court, in interpreting Rule 10b-5, created a presumption of reliance in a fact situation involving an omission. However, one can prove reliance on an omission by proving that, had the omitted information been disclosed, one would have been aware of it and behaved differently. Moreover, Rule 10b-5 is not sufficiently analogous to the law of fraud to justify adoption of the *Ute* presumption as *California law*. (5 C.4th 1093.)

(d) *Consumer class actions.* Plaintiffs relied heavily on two cases involving consumer class actions, *Vasquez v. Superior Court* (1971) 4 C.3d 800, 821, 94 C.R. 796, 484 P.2d 964, and *Occidental Land v. Superior Court* (1976) 18 C.3d 355, 361, 134 C.R. 388, 556 P.2d 750, 4 Cal. Proc. (4th), *Pleading*, §269, which held that it would be appropriate to infer that each member of a class had actually relied on the defendant's alleged misrepresentations. However, the plaintiffs in each case specifically pleaded that the defendants had made identical representations to each class member. Thus, the holding in these decisions was that when the same material misrepresentations have actually been communicated to each member of a class, an inference of reliance arises as to the entire class. These decisions do not support an argument for presuming reliance on the part of a person who never read or heard the alleged misrepresentation, such as plaintiffs in the present case. (5 C.4th 1095.)

(e) *Indirect communication cases.* Plaintiffs next argued that an indirect communication of the alleged misrepresentation is sufficient to state a cause of action for deceit. Plaintiffs relied on *Rest.2d, Torts* §533, which provides that the maker of a fraudulent misrepresentation is liable to a person who acts in justifiable reliance on it if the misrepresentation, although not made directly to the person, is made to a third person and the maker intends or has

reason to expect that its terms will be repeated or its substance communicated to the other. This provision, and the cases involving indirect communication, offer plaintiffs no assistance. As the Restatement provision indicates, a plaintiff who hears of a misrepresentation indirectly must still show justifiable reliance on it. In other words, to say that a plaintiff who relies on secondhand misrepresentations can state a cause of action for deceit is not to say, as plaintiffs contended, that reliance may be presumed. (5 C.4th 1096, citing *Varwig v. Anderson-Behel Porsche/Audi* (1977) 74 C.A.3d 578, 141 C.R. 539, supra, §806, and many other cases.)

(f) *Should the law be changed?*

(1) Plaintiffs contended that incorporating the fraud-on-the-market doctrine into California law is necessary to provide a remedy for victimized investors. However, investors do have these remedies: (a) In federal court actions, Rule 10b-5 affords a private right of action and a presumption of reliance. (5 C.4th 1101.) (b) Defrauded investors may also sue under the antifraud provisions of state securities law. (5 C.4th 1102, 1103, discussing *Corp.C. 25400* and *25500*, 9 Summary (10th), *Corporations*, §443 et seq.)

(2) Plaintiffs pointed out that incorporation of the fraud-on-the-market doctrine would afford advantages beyond those that the relevant statutes provide. But the advantages appear to conflict with several specific legislative policy choices. (5 C.4th 1105.)

First, a more favorable statute of limitations is provided by federal law. But the shorter limitations period in the Corporations Code was specifically intended to counterbalance the tremendous advantage that a presumption of reliance affords to plaintiffs. (5 C.4th 1105.)

Second, the securities laws do not permit an award of punitive damages. However: (a) The federal decisions reflect a long-standing consensus that the burden on the securities business from punitive damages outweighs their contribution to enforcement of securities laws. (5 C.4th 1106.) (b) Actual damages alone represent a potentially crushing liability in securities fraud cases, and the class action mechanism tends to ensure that the securities laws will be enforced. (5 C.4th 1106.) (c) The prospect of punitive damages may discourage settlement of marginal claims. (5 C.4th 1107.)

(3) To incorporate the fraud-on-the-market doctrine into the law of deceit would permit plaintiffs to avoid two important limitations that the federal courts have imposed on cases brought under Rule 10b-5. A plaintiff must plead and prove (a) actual purchase or sale of securities, and (b) that the defendant had scienter. "These requirements ... reflect a deliberate effort, guided by judicial experience with securities fraud cases, to balance the advantages associated with a presumption of reliance against the danger of speculative and harassing claims." (5 C.4th 1107.)

(g) *Conclusion.* "[T]o incorporate the fraud-on-the-market doctrine into the common law of deceit would only bring about difficulties that the state Legislature and the federal courts have apparently attempted to avoid. Nor would the proposed expansion of the common law of deceit offer benefits sufficient to offset the difficulties, since the state and federal securities laws already offer remedies that give plaintiffs the benefit of a presumption of reliance. Under these circumstances, there is insufficient justification for upsetting the policy choices that the existing laws reflect. Accordingly, we decline to do so." (5 C.4th 1108.) (See *Gawara v. United States Brass Corp.* (1998) 63 C.A.4th 1341, 1348, 74 C.R.2d 663 [rejecting fraud-on-the-market doctrine and holding that plaintiff in economic loss cases must show reliance; following *Mirkin* and distinguishing *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 C.4th 1066, 60 C.R.2d 263, 929 P.2d 582, infra, §822, on ground that it involved personal injury loss]; *Small v. Fritz Cos.* (2003) 30 C.4th 167, 173, 183, 132 C.R.2d 490, 65 P.3d 1255 [policy considerations do not justify categorical denial of fraud cause of action by those allegedly induced by corporate misrepresentations to hold stock rather than selling it; however, actual reliance on misrepresentations must be pleaded with specificity].)

SUPPLEMENT: [This section is current through the latest supplement]
Occidental Land case:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §303.



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1. In General.

5 Witkin Sum. Cal. Law Torts § 812

[§ 812] In General.

The plaintiff must show not only actual reliance (supra, §808), but justifiable reliance; i.e., that the circumstances were such as to make it reasonable for plaintiff to accept the defendant's statements without an independent inquiry or investigation. (*Kahn v. Lischner* (1954) 128 C.A.2d 480, 489, 275 P.2d 539, *infra*, §815; *Bank of America v. Vannini* (1956) 140 C.A.2d 120, 131, 295 P.2d 102; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 C.A.3d 1324, 1332, 231 C.R. 355, citing the text; see *Pacesetter Homes v. Brodtkin* (1970) 5 C.A.3d 206, 210, 85 C.R. 39, citing the text [statements by vendor about future rentals were hedged with significant qualifications ("if" and "we contemplate"); trial judge properly concluded that purchaser could not justifiably rely]; *Hadland v. NN Investors Life Ins. Co.* (1994) 24 C.A.4th 1578, 1586, 30 C.R.2d 88, citing the text [plaintiff insureds could not justifiably rely on representation by insurer's associate that new policy would be as good as or better than old policy where this was patently at odds with express provisions of written contract]; *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 C.A.4th 620, 639, 41 C.R.2d 329, 3 Summary (10th), *Agency and Employment*, §211 [at-will employee, who had no reasonable expectation of employment for any particular length of time, could not justifiably rely on statements by employer as to availability of other positions within company, so as not to seek other employment]; *Rest.2d, Torts* §537 et seq.; *Dobbs, The Law of Torts* §474 et seq.; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §239; *BAJI*, No. 12.52; *CACI*, No. 1908; on pleading justifiable reliance, see 5 *Cal. Proc.* (4th), *Pleading*, §§688, 689; on effect of negligent failure to read an instrument or other paper, see 1 *Summary* (10th), *Contracts*, §301.) However, negligence by plaintiff in failing to discover the falsity of a statement is no defense provided the misrepresentation was intentional rather than negligent. The issue is whether the plaintiff was justified in believing the representation in the light of his or her own knowledge and experience. (*Whiteley v. Philip Morris* (2004) 117 C.A.4th 635, 684, 11 C.R.3d 807 [trier of fact could reasonably conclude that smoker's reliance on tobacco companies' misrepresentations concerning health risks was justifiable based on her lack of sophistication, cigarette addiction, and lack of information to contrary].) Whether reliance is reasonable is a question of fact. (*Blankenheim v. E.F. Hutton & Co.* (1990) 217 C.A.3d 1463, 1473, 1475, 266 C.R. 593.)

Issues of justifiable reliance and the effect of actual investigation are likely to arise in actions by a spouse, after a dissolution of marriage and property settlement, to set aside the property settlement agreement for fraud. (See *Jorgensen v. Jorgensen* (1948) 32 C.2d 13, 22, 193 P.2d 728.) In *Cameron v. Cameron* (1948) 88 C.A.2d 585, 199 P.2d 443, for

example, plaintiff contended that defendant, her former husband, had induced her to sign the agreement by misrepresenting that his interest in a partnership was his separate property, and by misstating its value. Relief was denied on two alternative grounds: (1) Her attorneys were aware of the problems, made their own investigations, were not denied access to any information, and advised her to sign the agreement. (2) Even if her attorneys did not fully or competently carry out their investigation and did not ascertain all material facts, their neglect was chargeable to her and defendant was not responsible for it. (88 C.A.2d 594.)

In the absence of a special relationship between the parties, a private person is not entitled to rely on the opinion of another private person concerning the future decision of a public body. (*Borba v. Thomas* (1977) 70 C.A.3d 144, 154, 138 C.R. 565.)

In a political campaign, a plaintiff who alleges that the defendant disseminated false information to prospective voters obviously had knowledge of its falsity and could not justifiably have relied on it. (*Gold v. Los Angeles Democratic League* (1975) 49 C.A.3d 365, 374, 122 C.R. 732; see *Chavez v. Citizens For a Fair Farm Labor Law* (1978) 84 C.A.3d 77, 80, 148 C.R. 278 [following *Gold*].)

West's Key Number Digest, Fraud k.22(1)

SUPPLEMENT: [This section is current through the latest supplement]

See *Dore v. Arnold Worldwide* (2006) 39 C.4th 384, 393, 46 C.R.3d 668, 139 P.3d 56 [plaintiff-employee admitted signing defendant-employer's letter stating that employment was at will and terminable at any time; as matter of law, admission defeated plaintiff's contention that he reasonably understood defendant to have promised him long-term employment]; *Hinesley v. Oakshade Town Center* (2005) 135 C.A.4th 289, 297, 37 C.R.3d 364 [shopping center tenant failed to show that he justifiably relied on false representations by landlord's agent that certain major chain businesses had signed leases in vicinity of leased premises; lease provision specifically disavowed reliance on these representations, and tenant failed to question, clarify, or confirm agent's statements, to notify his attorney of agent's statements, or to seek to modify provision]; *Manderville v. PCG&S Group* (2007) 146 C.A.4th 1486, 1501, 55 C.R.3d 59 [exculpatory provisions in real estate sales agreement did not preclude, as matter of law, showing justifiable reliance as element of fraud claim; under C.C. 1668 (see 1 *Summary* (10th), *Contracts*, §660), contract provisions exempting party from responsibility for fraud are against public policy]; *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 C.A.4th 835, 863, 68 C.R.3d 828, citing the text [evidence was sufficient to show that purchasers of company's promissory notes justifiably relied on representations in investment bank's offering memorandum, which failed to disclose negative information, despite evidence of availability of negative information from other sources and purported disclaimers in memorandum; bank's fraud was proximate cause of purchasers' out-of-pocket losses, even though purchasers were aware of company's distressed conditions, where company would not have collapsed if it had assets represented in memorandum].

Reasonableness of reliance as affected by plaintiff's own circumstances: Whether reliance is reasonable in an intentional fraud case is not tested against the standard of precaution or minimum knowledge of a hypothetical reasonable person. (*Boeken v. Philip Morris* (2005) 127 C.A.4th 1640, 1666, 26 C.R.3d 638 [evidence was sufficient to establish that reliance on tobacco company's fraudulent statements by smoker who contracted cancer was justifiable; evidence supported conclusion that company knew and intended that addicted smokers, like plaintiff, would use its misrepresentations about health dangers of smoking to engage in denial and rationalization].)

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §§732, 733.



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 2. No General Duty To Investigate.

5 Witkin Sum. Cal. Law Torts § 813

[§ 813] No General Duty To Investigate.

(1) *In General.* The rule of unjustifiable reliance (supra, §812) is seldom applied in practice, for the old notion of "caveat emptor" is thoroughly discredited. There is ordinarily no duty to investigate, and the former defense of contributory negligence of the plaintiff was held not to be a defense to the intentional tort of fraud. (*Seeger v. Odell* (1941) 18 C.2d 409, 414, 115 P.2d 977; *Anderson v. Thacher* (1946) 76 C.A.2d 50, 70, 172 P.2d 533; *Ashburn v. Miller* (1958) 161 C.A.2d 71, 79, 326 P.2d 229; *Arthur L. Sachs v. Oceanside* (1984) 151 C.A.3d 315, 323, 198 C.R. 483, supra, §241, quoting the text; see *Alliance Mortg. Co. v. Rothwell* (1995) 10 C.4th 1226, 1239, 1240, 44 C.R.2d 352, 900 P.2d 601 [plaintiff's negligence in failing to discover falsity of statement is no defense when misrepresentation is intentional]; *Charpentier v. Los Angeles Rams Football Co.* (1999) 75 C.A.4th 301, 322, 89 C.R.2d 115 [jury could find that, in deciding to purchase season ticket, football fan could justifiably rely on promise that club had no plans to move in following seasons]; *Rest.2d, Torts* §§540, 545A; *Dobbs, The Law of Torts* §474 et seq.; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §239; *BAJI*, No. 12.52; *CACI*, No. 1908.) (On present system of comparative negligence, see *infra*, §1327 et seq.)

(2) *Opportunity To Investigate Does Not Preclude Reliance.* The mere existence of an opportunity to investigate, or of sources of information, will not preclude the plaintiff from relying on the representations. (*Teague v. Hall* (1916) 171 C. 668, 670, 154 P. 851; *McMahon v. Grimes* (1929) 206 C. 526, 536, 275 P. 440; *Williams v. Myers* (1930) 110 C.A. 265, 282, 294 P. 61; *Jackson v. Meinhardt* (1929) 99 C.A. 283, 287, 278 P. 462; *Seeger v. Odell*, supra, 18 C.2d 415; *Milmoe v. Dixon* (1950) 101 C.A.2d 257, 260, 225 P.2d 273; *Lobdell v. Miller* (1952) 114 C.A.2d 328, 340, 250 P.2d 357; *Nathanson v. Murphy* (1955) 132 C.A.2d 363, 369, 282 P.2d 174; *Perkins v. Ketchum* (1962) 211 C.A.2d 245, 251, 27 C.R. 278, citing the text; *Winn v. McCulloch Corp.* (1976) 60 C.A.3d 663, 671, 131 C.R. 597; see *Clement v. Smith* (1993) 16 C.A.4th 39, 45, 19 C.R.2d 676 [insured was justified in relying on agent's representation that previously purchased policy covered breach of contract actions].)

In *Blackman v. Howes* (1947) 82 C.A.2d 275, 185 P.2d 1019, the representation was that a filled lot was solid. The court observed that the truth could be determined only by an expert, and that "a buyer is not required to employ experts to investigate matters of a technical nature, as to which the seller has full knowledge and the buyer none, and if for this reason the investigation is incomplete he (the buyer) may show that he relied upon the representation as to the matters

which he did not investigate." (82 C.A.2d 280.)

Blackman was followed in *Hefferan v. Freebairn* (1950) 34 C.2d 715, 214 P.2d 386, where the representation was that a coffee shop sold to plaintiff would net over a specified amount a year. Plaintiff had never been in the restaurant business, although he inspected some records, he was not shown all of them, and defendant falsely explained a discrepancy. (34 C.2d 720.)

In *Mariani v. Schonfeld* (1954) 126 C.A.2d 187, 271 P.2d 940, plaintiffs purchased a bowling alley in reliance on a false statement of the operations of the business, showing a profit instead of an actual loss. *Held*, recovery was proper despite the fact that plaintiffs had investigated bowling alleys generally, checked the daily receipts of this business and worked there for a time; many concealed expenses were not apparent, and an accountant's statement was not then available. (126 C.A.2d 189.)

(3) *When Duty To Investigate Arises*. A plaintiff who is aware of circumstances indicating that defendant's representations may be false has a duty to investigate the truth of the facts represented. In *Bishop Creek Lodge v. Scira* (1996) 46 C.A.4th 1721, 54 C.R.2d 745, defendants, the owners of property burdened by a restrictive covenant, were sued by the owners of the property benefited by the covenant for its alleged violation. As part of that action, defendants filed a cross-complaint, accompanied by a lis pendens. Plaintiff, knowing of the lis pendens, purchased the property from the party benefited by the covenant. While the purchase was in escrow, the parties to the original lawsuit entered into a settlement, which included withdrawal of the lis pendens and a stipulated judgment that the covenant was not to be enforced. Although plaintiff had insisted that the lis pendens be removed, he did not know about the agreement not to enforce the covenant, and he brought a fraud action against defendants to enforce it. *Held*, judgment for plaintiff reversed. The lis pendens did not justify plaintiff in relying on defendants' failure to disclose. Instead, it gave him actual knowledge that mandated that he inquire further into precisely how the lis pendens was cleared. (46 C.A.4th 1736.)

Also, even where the original reliance is justified, if facts subsequently come to the plaintiff's notice that should arouse an inquiry, failure to investigate may result in the bar of the statute of limitations being interposed (under C.C.P. 338(d), 3 years after discovery of the fraud), or denial of equitable relief for laches. (See 3 Cal. Proc. (4th), Actions, §602; 13 Summary (10th), Equity, §§16, 18.)

West's Key Number Digest, Fraud k.22(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Manderville v. PCG&S Group* (2007) 146 C.A.4th 1486, 1502, 55 C.R.3d 59 [lack of due diligence by buyers in investigating zoning laws did not preclude, as matter of law, showing of justifiable reliance on sellers' alleged misrepresentations that property could be subdivided]. (3) *When Duty To Investigate Arises*. *Cross-Reference:* 3 Cal. Proc. (5th), Actions, §659.



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 3. Constructive Notice Is Not a Bar.

5 Witkin Sum. Cal. Law Torts § 814

[§ 814] Constructive Notice Is Not a Bar.

(1) *In General*. The plaintiff is not barred by constructive notice, e.g., where public records disclose the falsity of representations; the recording acts are designed for the protection of bona fide purchasers, not persons guilty of fraud. (*Richard v. Baker* (1956) 141 C.A.2d 857, 864, 297 P.2d 674; *Grange Co. v. Simmons* (1962) 203 C.A.2d 567, 576, 21 C.R. 757; see *Jackson v. Meinhardt* (1929) 99 C.A. 283, 287, 278 P. 462 [statement that land was corner lot, actionable even though recorded map showed the contrary]; *Brown v. Oxtoby* (1941) 45 C.A.2d 702, 706, 114 P.2d 622 [representation by vendor that title was clear except for first trust deed, actionable even though record showed second trust deed]; *Mills v. Hellinger* (1950) 100 C.A.2d 482, 487, 224 P.2d 34 [representation that land comprised 9 acres, actionable even though record showed true area of 6.6 acres]; 37 Am.Jur.2d (2001 ed.), *Fraud and Deceit* §258.)

(2) *State of Plaintiff's Own Title*. It has been occasionally stated that an owner of property is conclusively presumed to know the state of his or her own title, and hence cannot rely on misrepresentations concerning it. (See *Robins v. Hope* (1881) 57 C. 493, 495.) This theory was repudiated and the *Robins* case overruled in *Seeger v. Odell* (1941) 18 C.2d 409, 115 P.2d 977. A mortgage on plaintiffs' lot was foreclosed. To induce them to refrain from redeeming it, defendants falsely represented that defendants had purchased it at an execution sale, and prevailed on plaintiffs to execute an oil lease to one of defendants. *Held*, plaintiffs could rescind. (See *Rogers v. Warden* (1942) 20 C.2d 286, 288, 125 P.2d 7 [following *Seeger*]; *Stoll v. Selander* (1947) 81 C.A.2d 286, 292, 183 P.2d 935 [same]; *Hayter v. Fulmor* (1949) 92 C.A.2d 392, 399, 206 P.2d 1101 [same]; *Barder v. McClung* (1949) 93 C.A.2d 692, 697, 209 P.2d 808 [same]; 30 Cal. L. Rev. 197 [*Seeger*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Manderville v. PCG&S Group* (2007) 146 C.A.4th 1486, 1502, 55 C.R.3d 59 [buyers' failure to examine county general plan was not defense to action based on sellers' alleged misrepresentation that property could be subdivided].



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4. Exceptionally Gullible or Careless Person.

5 Witkin Sum. Cal. Law Torts § 815

[§ 815] Exceptionally Gullible or Careless Person.

Representations are sometimes made that are too preposterous to be believed by a person of ordinary intelligence, yet an exceptionally ignorant, careless, or gullible person may in fact rely on them. The decisions on this point are not always consistent, but the modern tendency is to reject the "reasonable person" standard, and to permit the deluded plaintiff to recover, particularly where the defendant knew of his or her weakness and took advantage of it. (See *Seeger v. Odell* (1941) 18 C.2d 409, 415, 115 P.2d 977; *Ashburn v. Miller* (1958) 161 C.A.2d 71, 79, 326 P.2d 229; *Carroll v. Dungey* (1963) 223 C.A.2d 247, 256, 35 C.R. 681; *Hartong v. Partake* (1968) 266 C.A.2d 942, 964, 72 C.R. 722; 37 Am.Jur.2d (2001 ed.), *Fraud and Deceit* §249.)

If, however, the falsity of the statements should be apparent even to the plaintiff's limited intelligence, or is obvious to the senses, e.g., where a cursory glance at property shown to the plaintiff would disclose the truth, reliance is not justified. (See *Rest.2d, Torts* §541.) It has also been suggested that where a person deals with another who was guilty of previous fraudulent representations to that person, a greater degree of caution should be employed. (*Turman v. Holmes* (1938) 29 C.A.2d 198, 206, 84 P.2d 225.)

These loose and somewhat contradictory propositions were examined in the light of an unusual factual background in *Kahn v. Lischner* (1954) 128 C.A.2d 480, 275 P.2d 539. "It is true that a victim in a fraud action is not necessarily held to the standard of precaution or of minimum knowledge of a hypothetically reasonable man. The law under appropriate circumstances will protect the gullible and the ignorant from those who would take advantage of them, even where persons of normal intelligence would not have been misled." But, "if the conduct of the complaining party in the light of his own intelligence and information, or ready availability of information, was manifestly unreasonable, he will be denied a recovery." (128 C.A.2d 489.) In *Kahn*, defendant vendor, living in Los Angeles, contracted to sell Humboldt County timberland to plaintiff purchaser, living in Portland. The negotiations were by mail and the parties never met. Later, defendant breached by a sale to a third person for \$ 7,500. *Held*, plaintiff was entitled to recover \$ 5,000 damages. Defendant vendor's main defense was that plaintiff purchaser had falsely represented the value of the property, by stating, with some qualification, that she had been offered a similar tract for \$ 2,000. The court first observed that "[t]here is a plethora of cases in which owners have misled prospective purchasers as to value in order to induce the latter to buy. But cases are rare indeed, and appellant has cited none, where an owner complains that he was

deceived as to the value of his own property by a designing purchaser. This may be because the law generally assumes one will have some knowledge of the value of that which he owns." (*128 C.A.2d 487*.) Here, assuming that the statement was an actionable misrepresentation, there was no justifiable reliance on it. Defendant, a professional man, knew that property values were going up and should have made inquiry as to values; though the property was distant from him, it was also distant from the purchaser. (*128 C.A.2d 488*.)

The Restatement offers the following observations: "Although the plaintiff's reliance on the misrepresentation must be justifiable ... , this does not mean that his conduct must conform to the standard of the reasonable man. Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than the application of a community standard of conduct to all cases. ... Cases frequently arise in which negligent reliance is justified, when the defendant knows of the plaintiff's incapacity to conform to the standard of conduct of a reasonable man, or of his credulity, gullibility or other tendency to depart from it, and deliberately practices upon the deficiencies of the plaintiff in order to deceive him." (*Rest.2d, Torts §545A, Comment b.*)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Resulting Damage.

a. Pecuniary or Property Loss.

5 *Witkin Sum. Cal. Law Torts* § 816

[§ 816] Pecuniary or Property Loss.

The final element in actionable fraud is *damage resulting* from reliance on the misrepresentation. (C.C. 1709; *Guttermann v. Gally* (1933) 131 C.A. 647, 651, 21 P.2d 1000; *Gaffney v. Graf* (1925) 73 C.A. 622, 626, 238 P. 1054; *Billings v. Farm Dev. Co.* (1925) 74 C.A. 254, 259, 240 P. 298; *Tsang v. Kan* (1947) 78 C.A.2d 275, 281, 177 P.2d 630; *Hill v. Wrather* (1958) 158 C.A.2d 818, 825, 323 P.2d 567; *Bernson v. Bowman* (1960) 182 C.A.2d 697, 704, 6 C.R. 455; *Lane v. Davis* (1959) 172 C.A.2d 302, 307, 342 P.2d 267, 5 Cal. Proc. (4th), *Pleading*, §687; *Lacher v. Superior Court* (1991) 230 C.A.3d 1038, 1049, 281 C.R. 640, citing the text; *Service by Medallion v. Clorox Co.* (1996) 44 C.A.4th 1807, 1818, 52 C.R.2d 650; see *Agnew v. Parks* (1959) 172 C.A.2d 756, 768, 343 P.2d 118 [allegations were insufficient where damages were highly speculative]; *Goehring v. Chapman University* (2004) 121 C.A.4th 353, 365, 17 C.R.3d 39 [summary adjudication for defendant law school was proper where evidence showed that plaintiff student's damages were caused by academic dismissal due to poor academic performance, rather than defendant's alleged misrepresentations on consequences of its lack of accreditation]; *Building Permit Consultants v. Mazur* (2004) 122 C.A.4th 1400, 1415, 19 C.R.3d 562 [fraud without damage is not actionable]; *Rest.2d, Torts* §549(1) ["The recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause"]; *Dobbs, The Law of Torts* §470; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §272 et seq.; 11 *A.L.R.5th* 88 [right to recover for mental or emotional distress in fraud action]; *BAJI*, No. 12.31; *CACI*, No. 1900.) (On pleading damage, see 5 *Cal. Proc.* (4th), *Pleading*, §§687, 894; on measure of damages, see *infra*, §1710 et seq.)

Typically, the resulting damage is pecuniary or property loss. (See *Hull v. Sheehan* (1952) 108 C.A.2d 804, 239 P.2d 704 [no proof by plaintiff purchaser that property was worth less than he paid for it]; *Bramaric v. Churich* (1951) 101 C.A.2d 846, 850, 226 P.2d 657 [sale of apartment house; lot area less than represented but no evidence that property less valuable or rentals less than previously received]; *Saunders v. Taylor* (1996) 42 C.A.4th 1538, 1542, 50 C.R.2d 395 [plaintiff failed to prove out-of-pocket loss, i.e., that price he paid for house was greater than actual value].) Thus, in *Gonsalves v. Hodgson* (1951) 38 C.2d 91, 237 P.2d 656, an action for deceit in estimating the cost of construction of a vessel, recovery was denied. Plaintiff made no showing of its value, and the fact that it cost more than he expected to pay was not proof of injury or damage. (38 C.2d 101.) Also, in *Auerbach v. Great Western Bank* (1999) 74 C.A.4th 1172, 1184, 88 C.R.2d 718, the court held that a borrower's continuing to make payments on a preexisting

note in reliance on the lender's fraudulent promise to negotiate in good faith to modify the loan did not constitute damages necessary for a fraud action.

However, where rescission is sought, pleading and proof of material injury is sufficient, without a showing of loss of a specific sum as damages. (See 1 *Summary* (10th), *Contracts*, §303; 4 *Cal. Proc.* (4th), *Pleading*, §506.)

Sometimes a judgment is obtained by fraud practiced in a judicial proceeding that has the effect of preventing a fair or "adversary" trial of the case. This is known as "extrinsic fraud" and the appropriate remedy is a suit in equity to set aside the judgment. An ordinary action of deceit will fail because the judgment, until set aside, refutes any showing of *damage*, and it cannot be collaterally attacked in the deceit action. (See 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §214 et seq.)

West's Key Number Digest, Fraud k.25, 59 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See *Leegin Creative Leather Products v. Diaz* (2005) 131 C.A.4th 1517, 1525, 33 C.R.3d 139 [employer failed to show damages resulting from employee's allegedly fraudulent workers' compensation claim; damages resulting from employer's payment of higher insurance premiums were speculative, given that claim had not yet been adjudicated, and costs of replacing employee because of her absence would have been necessary regardless of whether claim was false]; *Fladeboe v. American Isuzu Motors* (2007) 150 C.A.4th 42, 64, 58 C.R.3d 225 [although commonly owned automobile dealerships failed to disclose to manufacturer that one dealership had dissolved and the other used first's dealer identification number, manufacturer could not recover damages either for warranty reimbursements it made or for dealer incentives it paid as to cars not existing in first dealership's inventory at time of dissolution; manufacturer would have made those payments to some entity in any event, and deception without resulting loss is not actionable fraud]; *Patrick v. Alacer Corp.* (2008) 167 C.A.4th 995, 1016, 84 C.R.3d 642 [corporate cofounder could not allege causal connection between any misrepresentations by three corporate trustees that induced cofounder to vote them onto board of directors and her resulting damages; because trust had five trustees, these three could have installed themselves as directors without cofounder's vote]. *Lane case*:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §731.

Pleading damages:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §§731, 941. *Where rescission is sought:*

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §545.

Equitable relief:

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §215 et seq.



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CHAPTER IX - Torts

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VIII. FRAUD AND DECEIT

B. Fraudulent Misrepresentation.

6. Resulting Damage.

b. Other Elements.

5 *Witkin Sum. Cal. Law Torts* § 817

[§ 817] Other Elements.

Ordinarily, the damage is pecuniary or property loss (see *supra*, §816); the great majority of fraud cases involve transfer of property or payment of money in reliance on the misrepresentation. However, this is not necessarily the case. For example, a wife was held to have a cause of action against a third person who, by false representations, induced the plaintiff to mistreat her husband, causing them to separate. (*Work v. Campbell* (1912) 164 C. 343, 348, 128 P. 943; see 1 *Cal. L. Rev.* 296 [*Work*]; on representations involving promise of marriage, see *supra*, §784 et seq.; on right to recover for mental or emotional distress in fraud action, see 11 *A.L.R.5th* 88.)

In *O'Hara v. Western Seven Trees Corp.* (1977) 75 C.A.3d 798, 142 C.R. 487, plaintiff tenant in defendant's apartment complex was raped in her apartment. She sued on two causes of action--negligence and fraud--alleging that defendants were aware of previous rapes of tenants, and had composite drawings of the suspect furnished by the local police; that they nevertheless assured plaintiff at the time of renting that the premises were safe and patrolled by professional guards, and did not inform her of the previous crimes; and that the person who raped her was the one depicted in the composite drawings. *Held*, judgment for defendants on demurrer reversed. The representations of safety were either of fact or of opinions of one with presumed superior knowledge. (75 C.A.3d 805, citing the text.) And, although a deceit action usually seeks recovery of pecuniary loss, this is not a limitation. (75 C.A.3d 805, citing *Work v. Campbell*, *supra*, and *Rest.2d, Torts* §557A.) (For the holding on negligence liability, see *infra*, §1142.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Negligent Misrepresentation.
1. Nature of Tort.

5 Witkin Sum. Cal. Law Torts § 818

[§ 818] Nature of Tort.

(1) *In General.* Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for that belief, he or she may be liable for *negligent misrepresentation*. (See *Gagne v. Bertran* (1954) 43 C.2d 481, 487, 488, 275 P.2d 15, *infra*, §1711 [holding against plaintiff on the facts]; *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 C.4th 1066, 60 C.R.2d 263, 929 P.2d 582, *infra*, §822; *Cicone v. URS Corp.* (1986) 183 C.A.3d 194, 211, 227 C.R. 887, 1 Cal. Proc. (4th), Attorneys, §328; *Anderson v. Deloitte & Touche LLP* (1997) 56 C.A.4th 1468, 1476, 66 C.R.2d 512, *infra*, §820.)

If, however, defendant's belief is both honest and reasonable, the misrepresentation is *innocent* and there is ordinarily no tort liability. (See *infra*, §826.)

(2) *Elements.* BAJI lists the elements of a claim of fraud by negligent misrepresentation as follows:

(a) "The defendant made a representation as to a past or existing material fact."

(b) "The representation was untrue."

(c) "Regardless of [his] [her] actual belief the defendant made the representation without any reasonable ground for believing it to be true."

(d) "The representation was made with the intent to induce plaintiff to rely upon it."

(e) "The plaintiff was unaware of the falsity of the representation; must have acted in reliance upon the truth of the representation and was justified in relying upon the representation."

(f) "[A]s a result of the reliance upon the truth of the representation, the plaintiff sustained damage." (BAJI, No. 12.45; see *Byrum v. Brand* (1990) 219 C.A.3d 926, 940, 268 C.R. 609 [approving giving of instruction]; *Shamsian v. Atlantic Richfield Co.* (2003) 107 C.A.4th 967, 132 C.R.2d 635 [negligent misrepresentation requires false statement of past or existing material fact]; BAJI, No. 16.50.3 [form of special verdict--negligent misrepresentation]; CACI, No. 1903 [negligent misrepresentation], CACI, No. VF-1903 [form of special verdict--negligent misrepresentation].)

(3) *Commentary.* The commentary on the tort is considerable. (See, e.g., Dobbs, *The Law of Torts* §472; 2 Harper, James & Gray 2d §7.6; 77 *Harv. L. Rev.* 773; 22 *Loyola L.A. L. Rev.* 761 [The Expanding Scope of the Tort of Negligent Misrepresentation: Are Publishers Next?]; 39 *Santa Clara L. Rev.* 905 [liability for negligent misrepresentation of system operator posting third person's misstatements on electronic bulletin board]; 22 *So. Cal. L. Rev.* 77 [discussing distinction and problem of liability for personal injuries resulting from reliance on negligent misrepresentation]; 28 *So. Cal. L. Rev.* 193; 66 *So. Cal. L. Rev.* 2251 [negligent misrepresentation of real estate appraiser]; 12 *U.C.L.A. L. Rev.* 464; 56 *A.L.R.4th* 1162 [newspaper's liability to reader-investor for negligent misstatement of financial news]; 39 *Proof of Facts* 3d 309 [real estate broker's negligent misrepresentation as to condition or value of realty]; 43 *Proof of Facts* 3d 407 [negligent misrepresentation by land sales broker]; 47 *Proof of Facts* 3d 1 [negligent misrepresentation in employment reference].)

West's Key Number Digest, Fraud k.13(3)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Cicone case:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §304.

(3) *Commentary.* See 2 Harper, James & Gray 3d §7.6.



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2. Tort as Form of Deceit.

5 *Witkin Sum. Cal. Law Torts* § 819

[§ 819] Tort as Form of Deceit.

By statutory definition, negligent misrepresentation is a form of deceit. (See C.C. 1710(2) [defining "deceit" as including "[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true"]; C.C. 1572(2) [defining "actual fraud" as including "[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true"].) And California courts generally treat it as such. (See *McMahon v. Grimes* (1929) 206 C. 526, 534, 275 P. 440; *Gagne v. Bertran* (1954) 43 C.2d 481, 487, 488, 275 P.2d 15; *De Zemplen v. Home Fed. Savings & Loan Assn.* (1963) 221 C.A.2d 197, 205, 34 C.R. 334; *Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 C.A.3d 388, 403, 264 C.R. 779, citing the text.)

Hence, the broad statements that "scienter" is an element of every cause of action for deceit, and that an "intent to deceive" is essential, are untrue, because neither is a requisite of negligent misrepresentation. (*Spreckels v. Gorrill* (1907) 152 C. 383, 387, 92 P. 1011; *Clar v. Board of Trade* (1958) 164 C.A.2d 636, 644, 331 P.2d 89; *De Zemplen v. Home Fed. Savings & Loan Assn.*, *supra*, 221 C.A.2d 206; *Hale v. George A. Hormel & Co.* (1975) 48 C.A.2d 73, 84, 121 C.R. 144, citing the text; *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 C.A.3d 104, 111, 128 C.R. 901, 1 Cal. Proc. (4th), Attorneys, §327; *Agosta v. Astor* (2004) 120 C.A.4th 596, 599, 603, 15 C.R.3d 565; see *Intrieri v. Superior Court* (2004) 117 C.A.4th 72, 85, 12 C.R.3d 97 [although elements of causes of action for fraud and negligent misrepresentation are similar, fraud is intentional tort while negligent misrepresentation is not].)

In jurisdictions in which negligent misrepresentation is considered a form of negligence governed by the rules of negligence liability, comparative negligence would limit recovery. (See *Rest.2d, Torts* §552A; Dobbs, *The Law of Torts* §472; 2 Harper, James & Gray 2d §7.6.) California, classifying the tort as a form of deceit, does not recognize the defense in these cases. (See *Howell v. Courtesy Chevrolet* (1971) 16 C.A.3d 391, 403, 94 C.R. 33, quoting the text; *Carroll v. Gava* (1979) 98 C.A.3d 892, 897, 159 C.R. 778 [in buying and selling transactions, "application of comparative fault principles, designed to mitigate the often catastrophic consequences of personal injury, would only create unnecessary confusion and complexity"]; *Christiansen v. Roddy* (1986) 186 C.A.3d 780, 789, 231 C.R. 72 [employee of mortgage company was justified in relying on colleague's loan brochure, even though independent investigation would have uncovered error in appraiser's report]; 22 A.L.R.5th 464 [applicability of comparative negligence doctrine to negligent misrepresentation actions].) Thus, in *Van Meter v. Bent Const. Co.* (1956) 46 C.2d 588, 297 P.2d 644, plaintiff made a subcontract bid to clear a reservoir basin, relying on defendant contractor's representation as to the area involved. The contractors believed their representation to be true, but it was not warranted by their

information. Plaintiff relied on it, but did not exercise reasonable care to ascertain the area. *Held*, plaintiff was entitled to recover the expense of the additional work. (46 C.2d 595.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Oakland Raiders v. Oakland-Alameda County Coliseum* (2006) 144 C.A.4th 1175, 1184, 51 C.R.3d 144, Supp., infra, §830 [term "fraud" may be used to describe not just intentional representation, but also certain misrepresentations that are merely negligent; negligent misrepresentation, though separate and distinct tort, is "species of the tort of deceit"].

Scienter is not required: See *Melican v. Regents of Univ. of Calif.* (2007) 151 C.A.4th 168, 182, 59 C.R.3d 672 [elements of negligent misrepresentation are similar to those of intentional fraud except for requirement of scienter; plaintiff need not allege that statement was intentionally false statement, but simply that defendant lacked any reasonable ground for believing its truth].

Roberts case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §303. *Comparative negligence is not defense:* See 2 Harper, James & Gray 3d §7.6.



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3. Scope of Tort.

5 *Witkin Sum. Cal. Law Torts* § 820

[§ 820] Scope of Tort.

The difference in the language of the code sections defining negligent misrepresentation as a form of deceit (see C.C. 1572(2), 1710(2), *supra*, §819) was emphasized in *Williams v. Spazier* (1933) 134 C.A. 340, 25 P.2d 851. Defendants, casual acquaintances of plaintiffs, misrepresented the value of stock and financial condition of a corporation, and plaintiffs, in reliance, bought shares from the corporation. Defendants were not connected with the company; they believed their statements were true, having heard them from an officer, but they did not investigate. The court reasoned that if these had been parties to a contract, it might be concluded that defendants were guilty of fraud under C.C. 1572(2) because they had no information "sufficient to warrant" their statements; but because they were third parties, they would only be liable under C.C. 1710(2) if they had "no reasonable ground for believing" the statements. The lower court had made no finding on this latter issue, and for that reason the judgment was reversed. (134 C.A. 347.)

Gagne v. Bertran (1954) 43 C.2d 481, 275 P.2d 15, apparently treating the statutory language as substantially similar, carefully analyzes the possible theories of recovery in this confused field. Plaintiffs contracted to purchase two lots for the construction of an apartment house. They engaged defendant to make a soil test, and he reported that the land was normal without more than 12 to 16 inches of fill. In reliance, plaintiffs contracted for construction of the building, agreeing to pay an extra charge for unforeseen conditions of fill. The land actually contained areas of 3 to 6 feet of fill, and the foundation cost over \$ 3,000 extra. Plaintiffs were awarded judgment in the trial court for that amount, on three theories: (a) strict liability for breach of warranty; (b) deceit; and (c) negligence. *Held*:

(a) *No strict liability for breach of warranty.* "For historical reasons warranties have become identified primarily with transactions involving the sale or furnishing of tangible chattels ... , but they are not confined to such transactions. Strict liability has also been imposed for innocent misrepresentations of facts that the maker purported to know, that the recipient relied on in matters affecting his economic interests, and that the maker positively affirmed under circumstances that justify the conclusion that he assumed responsibility for their accuracy." (43 C.2d 486.) Here, however, defendant was not a seller of property, and there were no facts to show that he had assumed responsibility for the accuracy of his statements. Hence, "the general rule is applicable that those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct." (43 C.2d 487.)

(b) *Liability for deceit (negligent misrepresentation).* Defendant held himself out as an expert, plaintiffs hired him

to supply information on matters of which they were ignorant, and his statement was either a representation of fact or an actionable opinion. The representation or opinion need not be made with knowledge of actual falsity, but only as an assertion of fact, of that which is not true, by one who has no reasonable ground for believing it to be true. (43 C.2d 489.)

(c) *Liability for negligence.* "The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance." (43 C.2d 489.) Here, defendant's duty was established by the contract with plaintiffs; the breach was shown by evidence that his employee discovered a deep fill and that defendant failed to make a necessary laboratory test. (43 C.2d 490; on negligence in performance of contract, see *infra*, §1179.)

In *B.L.M. v. Sabo & Deitsch* (1997) 55 C.A.4th 823, 64 C.R.2d 335, plaintiff developer, in the course of negotiations with a city concerning a public construction project, was wrongly told by defendants, the attorneys for the city, that the prevailing wage laws did not apply. Plaintiff then filed a complaint against defendants that included a cause of action for negligent misrepresentation. *Held*, summary judgment for defendants affirmed. There was no allegation that defendants made the statement with the intent that plaintiff rely on it. The mere fact that they made the statement is insufficient to supply this element. Also, the complaint fails to allege justifiable reliance by plaintiff. In fact, plaintiff had been given the opposite information by its own counsel. A third party, such as plaintiff, can successfully sue an attorney for negligence if he or she is the person intended to be benefited by the attorney's performance. However, plaintiff was negotiating with defendants' client at arm's length, and thus was not justified in relying on someone who owed it no duty of due care. (55 C.A.4th 834.)

In *Anderson v. Deloitte & Touche LLP* (1997) 56 C.A.4th 1468, 66 C.R.2d 512, plaintiffs, through V Corp. as the general partner, invested in four limited partnerships that had been formed to purchase four wineries that included M and J. The goals were to earn a high rate of income during the existence of the partnerships and to sell the wineries at a profit. Defendant accounting firm prepared a confidential offering memorandum (COM) for V Corp. in which it projected a rate of return of 16 to 19% over a 6-year period. However, all of the limited partnerships and V Corp. filed for bankruptcy, and plaintiffs lost their investments. They then sued for negligent, as well as intentional, misrepresentation. *Held*, summary judgment for defendant reversed as it applied to the M and J offerings.

(a) In connection with the COMs for the M and J wineries, defendant had prepared an Independent Accountants' Report (IAR), stating that the two wineries had supplied certain information and that, according to the standards of the American Institute of Certified Accountants, this information was a reasonable basis for defendant's forecasts. However, plaintiffs presented expert testimony that defendant's actions severely departed from good accounting practices. Based on this state of the evidence, plaintiffs attempted to supply the requisite knowledge by arguing that, given the inadequacies of defendant's accounting techniques, it must have known that the information supplied by the wineries was not a reasonable basis on which to make its predictions. However, this contention goes to negligent, rather than intentional, misrepresentation. (56 C.A.4th 1476.)

(b) Plaintiffs' allegations raised substantial questions as to the existence of negligent misrepresentation with respect to the M and the J offerings: (1) the misrepresentation, i.e., that the wineries would earn a certain rate of income, although stated in the form of an opinion, was of a fact, because it was a deliberate assertion of the matters stated by one who had special expertise in the area; (2) the misrepresentation was arguably made without a reasonable belief in its truthfulness, because there was evidence that defendant had used faulty practices on which it could not rely; (3) the intent to induce reliance by plaintiffs was supplied by evidence that defendant knew that plaintiffs would rely on the report it had made for its client; (4) there was ample evidence that defendant knew that the reports were not for V Corp.'s internal use only but were to be communicated to potential investors, that the forecasts, and the assumptions on which they were based, were designed for the specific purpose of attracting investors, and that several investors relied on the IARs in making their investment decisions; and (5) except for rare cases, the question whether plaintiff's reliance

was reasonable is one of fact. (56 C.A.4th 1476.)

The following cases also analyze various aspects of negligent misrepresentation claims:

Christiansen v. Roddy (1986) 186 C.A.3d 780, 788, 231 C.R. 72 [defendant mortgage company employee had no reasonable basis for believing appraiser's report which, patently and incorrectly, included value of personalty in its final estimate].

Quality Wash Group V, Ltd. v. Hallak (1996) 50 C.A.4th 1687, 1696, 58 C.R.2d 592 [seller's misrepresentation as to property's boundaries, based on longtime experience, was reasonable, and thus could not be basis for negligent misrepresentation].

Furla v. Jon Douglas Co. (1998) 65 C.A.4th 1069, 1077, 76 C.R.2d 911 [for summary judgment purposes, there were questions of fact (a) whether approximation of square footage over 20% too high was negligent misrepresentation, and (b) whether plaintiff relied on alleged misrepresentation, even though he was invited to hire his own expert to estimate footage].

SUPPLEMENT: [This section is current through the latest supplement]

See *Lease & Rental Management Corp. v. Arrowhead Cen. Credit Union* (2005) 126 C.A.4th 1052, 1061, 24 C.R.3d 483 [credit union representing that borrower had satisfactory credit in response to lender's inquiry was not liable for negligence, even though substantial loan and borrower's subsequent bankruptcy resulted in financial loss to lender, where inadequacy of lender's credit reference request form was root of problem, seemingly large number of borrower's overdrafts with credit union was actually small percentage of volume of borrower's checks processed, and borrower was not truly in financial difficulties until after time of inquiry]; *Melican v. Regents of Univ. of Calif.* (2007) 151 C.A.4th 168, 182, 59 C.R.3d 672 [decedent's siblings failed to establish cause of action against university based on alleged negligent misrepresentations that decedent's donated body would be used exclusively for cancer research; decedent's widow, who was not plaintiff in action, was sole holder of dispositional rights respecting decedent's body, and thus only person who could have detrimentally relied on representations]; *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 C.A.4th 835, 854, 68 C.R.3d 828 [multiple representations of company's success contained in investment bank's offering memorandum for company's promissory notes, without reference to company's poor quarter or factors inflating its financial estimates, were "half truths" as misleading as affirmative representations in action for negligent misrepresentation]; *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 C.A.4th 226, 243, 70 C.R.3d 199 [allegations of broker's affirmative representations that sufficiently stated claim for fraud necessarily also stated claim for negligent representation].



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C. Negligent Misrepresentation.

4. Representation Resulting in Physical Harm.

a. In General.

5 *Witkin Sum. Cal. Law Torts* § 821

[§ 821] In General.

Under the Restatement, one "who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information." The negligence may consist of failure to exercise reasonable care either in ascertaining the accuracy of the information or in the manner in which it is communicated. (*Rest.2d, Torts* §311.)

This rule was followed in *Garcia v. Superior Court* (1990) 50 C.3d 728, 268 C.R. 779, 789 P.2d 960. Plaintiffs, the children of a woman killed by a parolee (a convicted murderer) with whom she had previously cohabited, filed a wrongful death action against the state and a parole officer, alleging that the parole officer knew that the parolee had threatened to kill decedent but nevertheless told her that the parolee would "not come looking" for her; that decedent therefore failed to take steps to protect herself from the parolee, and that the parolee subsequently kidnaped and shot her. The trial court sustained demurrers by the parole officer and the state without leave to amend and the Court of Appeal denied a writ. *Held*, reversed insofar as decision denied plaintiffs leave to amend to state a cause of action for negligent misrepresentation involving a risk of physical harm.

(a) *No need to establish special relationship.* The Court of Appeal held that plaintiffs' allegations did not establish a special relationship with either the parolee or decedent under the theory enunciated in *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *infra*, §1050. However, a special relationship is a prerequisite only for liability based on a defendant's *failure to act*; here plaintiffs assert that defendant parole officer's *acts* (negligent misrepresentations) induced decedent to be less careful. (50 C.3d 734.)

(b) *Liability for negligent misrepresentations involving risk of physical harm.* Negligent misrepresentations involving risk of physical harm are actionable under the circumstances described in *Rest.2d, Torts* §311. California courts have relied both on the Restatement and C.C. 1710(2) (see *supra*, §818) in holding that causes of action have been stated for negligent misrepresentations causing physical harm. (50 C.3d 735.)

(c) *Information may be supplied gratuitously.* Ordinarily, liability for negligent misrepresentations is imposed only on those who supply information for business purposes in the course of a business or profession; in financial matters, a plaintiff cannot expect the defendant to exercise the same degree of care in social meetings as he or she would when

acting in a business or professional capacity. (50 C.3d 735, citing the text.) However, the duty to use reasonable care in giving information applies more broadly when physical safety is involved. Thus, there may be liability even though the information is given gratuitously and the actor derives no benefit from giving it. (50 C.3d 735, citing *Rest.2d, Torts* §311, Comment c.)

(d) *Elements of sufficient complaint.*

(1) Plaintiffs must allege that defendant parole officer had a duty to exercise reasonable care in giving decedent information about the parolee. "In this context, 'duty' and 'reasonable reliance' are closely connected. The likelihood that one's statements about personal safety will be taken seriously is a primary factor in determining whether one has a duty to exercise care in making such statements." (50 C.3d 735.) Ordinarily, law enforcement officers have no duty to volunteer information about released criminals under their supervision; but the absence of a duty to speak does not entitle one to speak falsely. Accordingly, defendant parole officer, having chosen to communicate information about the parolee to decedent, had a duty to use reasonable care in doing so. (50 C.3d 736.)

(2) Plaintiffs must allege that defendant parole officer negligently gave false information to decedent, and the complaint is sufficient in this respect: its allegations raised the question whether he exercised due care in communicating what he knew about the parolee's threats. (50 C.3d 736.)

(3) As in all actions for negligent misrepresentation, plaintiffs must allege facts to show that the person for whom recovery is sought actually and reasonably relied on the alleged misrepresentations, and the complaint is deficient in this respect. (50 C.3d 737.) The complaint contains a general allegation of causation, but plaintiffs cannot establish a complete causal relationship between defendant parole officer's statements and decedent's death without the further allegation that decedent actually and reasonably relied on the statements. (50 C.3d 737.)

(e) *No statutory immunity.* For guidance of the trial judge on remand, it should be noted that the statutory immunity of public employees from liability for misrepresentations provided by *Govt.C. 818.8* and *822.2* "does not apply to negligent misrepresentations involving a risk of physical harm." (50 C.3d 738, footnote 8, discussing *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, *supra*, §352, which held that the legislative intent was to limit immunity to cases involving misrepresentations of financial or commercial character.)

In *Weissich v. Marin* (1990) 224 C.A.3d 1069, 274 C.R. 342, the court distinguished *Garcia* in denying recovery for negligent misrepresentation. The complaint alleged that defendants represented to plaintiff that they would inform him promptly of any conduct by S that posed a threat to his physical well-being; that plaintiff "reasonably believed *and it was implicit in such representation, that the mechanism was in place to implement same*"; and that in fact no such procedures had been established and defendants were not in a position to carry out the representation. (224 C.A.3d 1082.) *Held*, these allegations did not state a cause of action.

(a) Although *Garcia* did not discuss the question whether an *implied representation* is sufficient, cases decided before *Garcia* indicate that it is not. (224 C.A.3d 1082, citing *Yanase v. Automobile Club of Southern Calif.* (1989) 212 C.A.3d 468, 260 C.R. 513, *infra*, §824, and *Huber, Hunt & Nichols v. Moore* (1977) 67 C.A.3d 278, 136 C.R. 603, *infra*, §825.)

(b) The complaint did not allege facts to show reasonable reliance by plaintiff on the negligent misrepresentation; he was aware of S's plans for revenge, and it would have been unreasonable for him to rely on the continued existence of a mechanism to monitor S's conduct for 11 years. (224 C.A.3d 1083.)

Recovery was also denied in *M.B. v. San Diego* (1991) 233 C.A.3d 699, 284 C.R. 555, *supra*, §304. Plaintiff received a phone call from J, who stated that he was the man who had recently stolen some lingerie from her home and that he was going to return. When she relayed this information to the police, she was told, on two separate occasions, not to worry because persons making threatening phone calls do not return to the scene. After J returned 2 days later and raped her, plaintiff sued defendant city, alleging police negligence in investigating the case and giving advice. On

appeal from summary judgment for defendant, plaintiff sought to amend her complaint to include a cause of action for negligent misrepresentation as outlined in *Garcia*. *Held*, the allegations did not state a cause of action.

(a) To establish a cause of action for negligent misrepresentation under *Garcia*, plaintiff had to show that the police had a duty to exercise reasonable care in giving her information about J; that they gave her false information with a degree of culpability at least equal to negligence; that plaintiff reasonably relied on the false misrepresentations; and that her reliance proximately caused her harm. (233 C.A.3d 708.)

(b) Instead of making representations that were based on any special knowledge about the suspect, as was the case in *Garcia*, the officers here gave only generalized reassurances that suspects such as J are usually not dangerous, and there was nothing to indicate that the reassurances were false. Also, instead of merely relying on the representations that the perpetrator would not return, plaintiff took precautionary actions on her own, including changing the locks on her house. And the fact that the officers coupled their generalized representations with advice as to precautionary measures, e.g., to obtain Mace or a stun gun, did not establish a cause of action for negligent misrepresentation; this was advice applicable to crime victims generally. (233 C.A.3d 708.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Negligent Misrepresentation.

4. Representation Resulting in Physical Harm.

b. Liability to Third Parties.

5 *Witkin Sum. Cal. Law Torts* § 822

[§ 822] Liability to Third Parties.

Under the Restatement, liability for negligent furnishing of false information resulting in physical harm extends to "such third persons as the actor should expect to be put in peril by the action taken." (*Rest.2d, Torts* §311(1)(b).)

Randi W. v. Muroc Joint Unified School Dist. (1997) 14 C.4th 1066, 60 C.R.2d 263, 929 P.2d 582, involved liability for fraud (i.e., intentional misrepresentation; see *supra*, §806) as well as negligent misrepresentation. G sexually molested plaintiff, a 13-year-old student, while he was employed as a vice-principal. Prior to that, he had been employed in various administrative positions by defendant school districts. At the conclusion of these employments, defendants sent a placement bureau positive letters of recommendation, not mentioning that G had been involved in various acts of sexual misconduct during his employment. It was partly on the basis of these letters that G was hired by his current employer. Plaintiff sued defendant districts and various school officials on several causes of action. The trial judge sustained a demurrer as to all counts on the theory that defendants owed no duty to plaintiff. The Court of Appeal reversed as to those counts alleging fraud and negligent misrepresentation and the Supreme Court affirmed.

(a) *Required analysis.* *Rest.2d, Torts* §§310 (*supra*, §806) and 311 authorize recovery, in prescribed circumstances, where an intentional or negligent misrepresentation results in physical harm to a third person. Although ordinarily a duty of care analysis is unnecessary with respect to fraud (intentional misrepresentation), the matter of liability to an injured third person is an extension of ordinary tort liability based on fraud. Accordingly, in deciding whether to adopt the two Restatement provisions in the circumstances of this case, it is necessary to inquire whether plaintiff sufficiently alleged that defendants owed her a duty, that they breached that duty by making misrepresentations or giving false information, that G's current employer reasonably relied on their statements, and that this reliance proximately caused plaintiff's injury. (14 C.4th 1075.)

(b) *Duty to plaintiff.* The question, one of first impression, is whether a person who intentionally or negligently communicates false information to another owes a duty of care to a third person who neither receives the information nor has any special relationship with the provider. As a starting point, it must be recognized that the general rule in this state is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. To determine whether departure from this general rule is appropriate, it is necessary to analyze the factors set forth in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086. (14 C.4th 1076.) The

following factors are especially relevant in this case:

(1) First is the question whether plaintiff's injuries were a *foreseeable* result of defendants' misrepresentations. Based on the allegations, it seems that defendants could have foreseen that G's current employer would read and rely on the letters of recommendation in deciding to hire him; that, had they not unqualifiedly recommended G, the current employer would not have hired him; and that, once hired, G might molest a student, such as plaintiff. (14 C.4th 1077.)

(2) Second is the *moral blame* to be attached to defendants' conduct. Although the determination whether defendants were actually guilty of any moral blame must await trial, it is certainly arguable from the allegations that unreservedly recommending G, while failing to disclose facts necessary to reduce the risk of further child molestation, could be called morally blameworthy. (14 C.4th 1078.)

(3) Third is the availability of either *insurance or alternative courses of conduct*. It may be assumed that standard business liability insurance is available with respect to negligent misrepresentation, but not with respect to the intentional torts. However, regarding the latter, defendants could have avoided tort liability either by writing a "full disclosure" letter revealing all relevant facts about G's background, or writing a "no comment" letter that merely verified basic employment dates and details. There is no authority suggesting that a former employer has an affirmative duty of disclosure that would preclude such a no comment letter, at least in the absence of some special relationship, not alleged here. (14 C.4th 1078.)

(4) Fourth is the analysis of competing *policy considerations*. It cannot be questioned that one of society's highest priorities is to protect children from sexual or physical abuse. Defendants, however, argue that imposing tort liability will have the effect of forcing employers to either write no letters of recommendation for former employees or, at most, to write only a "no comment" letter, to the detriment of both employers and employees. Noting that doing otherwise would subject the employer to the risk of a defamation, breach of privacy, or wrongful interference suit from a rejected jobseeker, plaintiff correctly points out that an employer would be protected from a defamation suit by the qualified immunity granted by C.C. 47(c) (supra, §591) concerning letters of recommendation regarding former employees. However, the legislative history of this provision indicates that it was intended to afford employers with a defense to *actions by former employees*, rather than to insulate employers from all tort liability arising from the disclosure, or nondisclosure, of employment information. Furthermore, assuming that C.C. 47(c) would provide a defense in negligent or intentional actions brought by injured third persons, it would not apply in this case, because, by its terms, the privilege pertains only to communications made "upon request of" the former employer, a condition not satisfied here. (14 C.4th 1078.)

(5) "In light of these factors and policy considerations, we hold, consistent with *Restatement Second of Torts* sections 310 and 311, that the writer of a letter of recommendation owes to prospective employers and third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the prospective employer or third persons. In the absence, however, of resulting physical injury, or some special relationship between the parties, the writer of a letter of recommendation should have no duty of care extending to third persons for misrepresentations made concerning former employees. In those cases, the policy favoring free and open communication with prospective employers should prevail." (14 C.4th 1081.)

(c) *Misrepresentation or nondisclosure*. Defendants were not duty bound to disclose G's sexual misconduct. However, this case may properly be viewed as a "misleading half-truth" situation in which defendants, having undertaken to provide some information regarding G's credentials and character, were obligated to disclose all other facts that "materially qualify" the limited facts disclosed. In other words, because the letters of recommendation praised G's character, e.g., he was described by the use of such terms as "pleasant personality," "high standards," and "relates well to students," defendants were required "to complete the picture" by disclosing the material facts regarding the sexual improprieties. An incomplete picture, such as the one presented, amounts to an actionable, affirmative misrepresentation, rather than a mere nondisclosure, which is nonactionable. (14 C.4th 1084.)

(d) *Reliance*. Plaintiff pleaded that G's current employer relied on the letters of recommendation in hiring G, but the complaint is silent regarding plaintiff's own reliance on these letters. However, "even though defendants made no misrepresentations directly to plaintiff, who probably neither knew of, nor relied on, their statements, she was nonetheless entitled to protection in accordance with the Restatement principles previously discussed." The Court of Appeal was correct in determining that neither *Rest.2d, Torts* §310 nor §311 requires plaintiff to plead his or her own reliance on the misrepresentation. The cases relied on by defendants, in which reliance by the plaintiff was required, all involved economic loss, rather than personal injury, and were thus subject to a more restrictive rule. (14 C.4th 1084.)

(e) *Proximate cause*. Plaintiff's complaint alleged that her injury was a proximate result of defendants' fraud and misrepresentation, and defendants do not suggest otherwise, assuming that the other elements of duty, misrepresentation, and reliance are sufficiently pleaded. In other words, plaintiff's injury foreseeably and proximately resulted from her employer's decision to hire G in reliance on defendants' unqualified recommendation of him. (14 C.4th 1086.)

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5. Endorsement of Commercial Product.
a. Recovery Allowed.

5 *Witkin Sum. Cal. Law Torts* § 823

[§ 823] Recovery Allowed.

There has been considerable discussion by law writers on the liability of a commercial product certifier or endorser, i.e., whether the basis may be express warranty, strict products liability, or negligent misrepresentation. (See 2 *Stanf. L. Rev.* 496; 5 *U.S.F. L. Rev.* 137; 39 *A.L.R.3d* 181 [liability of product endorser or certifier for product-caused injury]; 1 *A.L.R.5th* 431 [products liability of endorser, trade association, or certifier expressing approval of product].) Several California cases have analyzed liability in the context of negligent misrepresentation, allowing recovery, or denying it (see *infra*, §824), under the particular circumstances.

The Torts Restatement classifies negligently giving false information as negligent misrepresentation where it results in physical harm (see *Rest.2d, Torts* §311, *supra*, §821), and this approach was followed in *Hanberry v. Hearst Corp.* (1969) 276 *C.A.2d* 680, 81 *C.R.* 519, in a commercial endorsement case. Plaintiff alleged purchase of a defective pair of shoes from a local dealer, and injury resulting from a slip and fall on a vinyl floor. She sued the dealer and manufacturer, but also joined Hearst Corp., publisher of Good Housekeeping magazine, on the ground that the shoes contained the "Good Housekeeping Consumers' Guaranty Seal," on which she relied in buying them. She alleged that this defendant either did not examine the shoes or did so negligently, in violation of its duty to exercise ordinary care in issuance of the seal. *Held*, a cause of action was stated.

(a) Defendant Hearst is not just a publisher of a magazine that accepts advertisements of consumer products. To enhance the value of its magazine as an advertising medium, it offers its advertisers, whose products meet the standards it sets, the seal and certification: "We have satisfied ourselves the products and services advertised in Good Housekeeping are good ones and the advertising claims made for them in our magazine are truthful." (276 *C.A.2d* 684.)

(b) Defendant's endorsement is not confined to the pages of the magazine; manufacturers or retailers of a certified product are permitted to advertise this fact and use the seal in the ads. This is an implied representation that defendant "has taken reasonable steps to make an independent examination of the product endorsed, with some degree of expertise, and found it satisfactory." And it is foreseeable that consumers will rely on the representation, in some instances, even more than on statements made by the retailer, manufacturer, or distributor. (276 *C.A.2d* 684.)

(c) "Having voluntarily involved itself into the marketing process, having in effect loaned its reputation to promote

and induce the sale of a given product, ... Hearst has placed itself in the position where public policy imposes on it the duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm." (276 C.A.2d 684.)

(d) Lack of privity of contract between plaintiff and defendant is not a defense where the duty arises out of a voluntarily assumed relationship and is dictated by public policy. (276 C.A.2d 685, citing *Merrill v. Buck* (1962) 58 C.2d 552, 25 C.R. 456, 375 P.2d 304, *infra*, §1060, and *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *infra*, §1179.)

(e) Defendant's express contractual limitation of liability in its seal, to replacement or refund, does not affect its full liability for tortious negligent misrepresentation. (276 C.A.2d 686.)

(f) This conclusion is "influenced more by public policy than by whether such cause of action can be comfortably fitted into one of the law's traditional categories of liability." (276 C.A.2d 683.) The theory is rejected that a product endorser could be subjected to strict products liability. (276 C.A.2d 687.) (For a strong argument in favor of the latter theory, see 5 U.S.F. L. Rev. 137, 143.)

Liability was based on another Restatement provision in *FNS Mortg. Service Corp. v. Pacific General Group* (1994) 24 C.A.4th 1564, 29 C.R.2d 916. The owner of an apartment complex brought an action for damages caused by defective plastic plumbing pipe installed in the complex. Defendant was a nonprofit association that promotes uniformity in the plumbing trade by means of its uniform plumbing code and its publication of a plumbing research directory listing plumbing products that it finds meet the code's standards. Most public entities had adopted the code, and an unlisted pipe not bearing the code logo was unmarketable. Plaintiff sought to hold defendant liable on a negligence theory, but the trial judge entered summary judgment for defendant on the grounds that, being a nonprofit organization, it had no duty and that its activities were in the nature of a governmental function. *Held*, reversed.

(a) The relevant rule of liability is set forth in *Rest.2d, Torts* §324A: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." (24 C.A.4th 1572.)

(b) Defendant has undertaken to render the services of pipe inspection and the delisting of manufacturers whose products do not conform to code standards. Customer protection is one of its avowed purposes. Arguably it performs a duty owed by local building officials to consumers. In the present case, consumers suffered harm because of the reliance of local building officials on defendant's undertakings. Under the Restatement principles, defendant should be subject to liability for physical harm resulting from its failure to exercise reasonable care. (24 C.A.4th 1572.)

(c) There are no persuasive policy reasons why the general rule should not apply. Defendant's conduct is intended to affect consumers, such as plaintiff, and the harm to plaintiff was foreseeable. If defendant had delisted the product at issue, it would not have been installed, and thus defendant's conduct was a cause of the damage suffered. The fact that that conduct was not intentional or outrageous does not render it moral. Finally, the policy of preventing future harm will be advanced by a rule inducing competent inspection, and defendant has presented no evidence that insurance is unavailable. In light of these factors supporting imposition of a duty of care, summary judgment for defendant was error. (24 C.A.4th 1575, 1576.)

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b. Recovery Denied.

5 *Witkin Sum. Cal. Law Torts* § 824

[§ 824] Recovery Denied.

In *Walters v. Seventeen Magazine* (1987) 195 C.A.3d 1119, 241 C.R. 101, an action against defendant magazine by a reader who suffered toxic shock after using one of the tampons advertised in it, the court, noting that the ads bore absolutely no resemblance to regular copy, rejected the contention that their mere placement amidst articles on menstruation, sex, and the female body constituted an implied endorsement to the immature reader. (195 C.A.3d 1122.) And the court refused to create a new tort of negligently failing to investigate the safety of advertised products: "Such a tort would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous cost of these groups, along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue. Others would comply, but raise their prices beyond the reach of the average reader. Still others would be wiped out by tort judgments, never to revive. Soon the total number of publications in circulation would drop dramatically." (195 C.A.3d 1122.)

The reasoning of the *Walters* case was followed in *Yanase v. Automobile Club of Southern Calif.* (1989) 212 C.A.3d 468, 260 C.R. 513. Decedent, a member of defendant Auto Club, stayed in a motel listed and favorably rated in defendant's Tourbook. He was shot and killed by an unknown assailant at night in the motel parking lot. Plaintiff widow and children brought this action for negligent misrepresentation, alleging that defendant's negligent failure to inspect and warn that the motel was located in a high crime area resulted in decedent's death. *Held*, judgment on the pleadings for defendant affirmed.

(a) The tort of negligent misrepresentation requires a positive assertion, and does not apply to implied representations; hence no cause of action was stated. (212 C.A.3d 473, citing the text.)

(b) The facts alleged do not establish a duty of care owed to the decedent for an injury occurring on premises over which defendant had no control. (212 C.A.3d 473.) "[I]f those closely connected with the safety of premises, such as hired security guards, are not subject to a duty even to warn of possible danger represented by nearby third persons not on the premises, then a fortiori those having no particular connection with the premises, such as Auto Club, have no duty of care." (212 C.A.3d 475.)

(c) The Tourbook ratings relate to quality of "accommodations." They serve the same purpose as an advertisement;

and, as said in *Walters*, "we are loathe to create a new tort of negligently failing to investigate the safety of an advertised product." (212 C.A.3d 478.)

In *McCulloch v. Ford Dealers Advertising Assn.* (1991) 234 C.A.3d 1385, 286 C.R. 223, plaintiff entered and won a car race sponsored by defendants, but was not paid the \$ 1 million promised to the winner. In addition to suing defendant sponsors for breach of contract and deceit, plaintiff sued defendant advertising association for negligent misrepresentation on the theory that by allowing its logo to be placed on the promotional materials it falsely represented that the winner would receive \$ 1 million. *Held*, summary judgment for defendant association affirmed; under the factors set forth in *Hanberry v. Hearst Corp.* (1969) 276 C.A.2d 680, 81 C.R. 519, defendant had no duty to investigate the truth of the statements contained in the promotional materials.

(a) The connection between defendant's conduct and plaintiff's injury was remote. The promotional materials clearly stated that defendant sponsors had organized the race and were responsible for the publicity and prize money. The aura of legitimacy given to the race by the participation of defendant association, which was nationally known, is an insufficient basis for holding it as guarantor of the truth of all statements made by the race sponsors. (234 C.A.3d 1391.)

(b) Defendant association was free of moral blame; it had performed all obligations under its contract with defendant sponsors, and was relieved by that contract of any obligation to provide prize money. And no moral blame attached to defendant's failure to investigate the truth of the promotional materials; there was no reason for it to believe that it had such an obligation. (234 C.A.3d 1391.)

(c) Requiring defendant to investigate the truth of all materials to which it attaches its logo, although reducing the risk of harm such as that suffered by plaintiff, would have a drastic impact on corporate sponsorship of events of every description. "The risk of tort liability could bring an end to corporate sponsorship of all but the wealthiest of enterprises and could cripple the functioning of organizations at every level of our society." (234 C.A.3d 1392.)

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6. Limitations on Recovery.

5 Witkin Sum. Cal. Law Torts § 825

[§ 825] Limitations on Recovery.

Under the prevailing view, the scope of liability for negligent misrepresentation is not as broad as in other fields of negligence (see *infra*, §831 et seq.), but is subject to important limitations derived from the rules governing intentional fraud (see *supra*, §767 et seq.). In fact, it is not as broad, in significant respects, as is the scope of liability for intentional fraud.

(1) *Persons Entitled To Rely*. The class of persons entitled to rely on the representations is restricted to those to whom or for whom the misrepresentations were made. Even though the defendant should have anticipated that the misinformation might reach others, he or she is ordinarily not liable to them. (See *Rest.2d, Torts* §552, Comments g, h; *Hawkins v. Oakland Title Ins. & Guaranty Co.* (1958) 165 C.A.2d 116, 128, 331 P.2d 742 [title company negligently searched title for H, who transferred to B 10 years later; title company was not liable to B]; *Christiansen v. Roddy* (1986) 186 C.A.3d 780, 787, 231 C.R. 72 [appraiser negligently evaluated property for mortgage company, which then arranged for investors to make loan secured by property; appraiser was not liable to investors]; *Cicone v. URS Corp.* (1986) 183 C.A.3d 194, 208, 227 C.R. 887, 1 Cal. Proc. (4th), Attorneys, §328 [recognizing rule, but holding buyer's attorney liable to seller's attorney for misrepresentation made directly to him]; 65 Harv. L. Rev. 355; on general requirement in deceit actions of intent to deceive particular persons, see *supra*, §803 et seq.) However, liability is not limited to the initial recipient of the misinformation, but extends to third parties for whose benefit and guidance it is supplied. (See *Soderberg v. McKinney* (1996) 44 C.A.4th 1760, 1764, 52 C.R.2d 635 [distinguishing and limiting *Christiansen v. Roddy, supra*; defendant appraiser, who made appraisal for broker, was liable to plaintiff investors who were members of group that he contemplated would rely on appraisal, even though broker rather than defendant furnished appraisal to investors].)

(2) *Intended Rather Than Foreseeable Reliance*. The liability does not extend to damages resulting from any reliance that might have been foreseen, but only to damage from the particular action which the defendant intended to induce, or something substantially similar. (See *Rest.2d, Torts* §552; 36 So. Cal. L. Rev. 285; on general requirement in deceit actions of intent to induce particular action, see *supra*, §807.)

(3) *Information Supplied for Business Purposes*. The liability has generally been imposed only on those who supply information for business purposes in the course of a business or profession. This rules out casual statements or opinions given in ordinary private conversations or social meetings; the plaintiff cannot expect the defendant to exercise the same

degree of care as he or she would when acting in a business or professional capacity. (See *Hawkins v. Oakland Title Ins. & Guaranty Co.*, *supra*, 165 C.A.2d 125; *De Zemplén v. Home Fed. Savings & Loan Assn.* (1963) 221 C.A.2d 197, 205, 34 C.R. 334; *Rest.2d*, Torts §552, Comment c; 19 Cal. L. Rev. 454; but cf. *Williams v. Spazier* (1933) 134 C.A. 340, 25 P.2d 851, *infra*, §820 [repeating statements heard from corporate officer].) However, a contractual or fiduciary relationship is not a necessary condition for liability. (*Lacher v. Superior Court* (1991) 230 C.A.3d 1038, 1047, 281 C.R. 640.)

(4) *Liability Dischargeable in Bankruptcy*. To come within the fraud exception of the Bankruptcy Act, the liability must be based on knowing or reckless misrepresentation; if the basis is merely negligent misrepresentation, the obligation is discharged. (See *Yellow Creek Logging Corp. v. Dare* (1963) 216 C.A.2d 50, 57, 30 C.R. 629 [stating the distinction and construing findings to make debt nondischargeable]; 8 Cal. Proc. (4th), *Enforcement of Judgment*, §491.)

(5) *No Implied Representations*. "[N]o case has been cited and we find none in which any court held that the doctrine of negligent misrepresentation applies to *implied* representations. In all cases a 'positive assertion' was involved." (*Huber, Hunt & Nichols v. Moore* (1977) 67 C.A.3d 278, 304, 136 C.R. 603, citing the text.) (See *Walters v. Marler* (1978) 83 C.A.3d 1, 17, 147 C.R. 655 [title insurance policy covering contingency of house encroaching on neighboring land was not actionable representation that it did not so encroach]; *Byrum v. Brand* (1990) 219 C.A.3d 926, 942, 268 C.R. 609 [financial advisor's failure to disclose material facts concerning land investment did not constitute negligent implied misrepresentation; following *Huber, Hunt & Nichols v. Moore*]; *Wilson v. Century 21 Great Western Realty* (1993) 15 C.A.4th 298, 306, 18 C.R.2d 779 [homeowner's statement that he was unaware of any defect in foundation, coupled with disclosure of other defects, was not positive assertion that foundation was defect-free]; *Yanase v. Automobile Club of Southern Calif.* (1989) 212 C.A.3d 468, 473, 260 C.R. 513, *supra*, §824, citing the text [motel rating in defendant auto club's tourbook was not positive assertion].)

(6) *No Punitive Damages or Damages for Emotional Distress*. Punitive damages are not recoverable in these actions. (See *Reid v. Moskovitz* (1989) 208 C.A.3d 29, 32, 255 C.R. 910; on punitive damages in fraud cases generally, see *infra*, §1587.) The same is true of damages for emotional distress. (*Branch v. Homefed Bank* (1992) 6 C.A.4th 793, 8 C.R.2d 182, *infra*, §1031; *Friedman v. Merck & Co.* (2003) 107 C.A.4th 454, 484, 131 C.R.2d 885, *infra*, §836.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Persons Entitled To Rely*.

Cicone case:

Cross-Reference: 1 Cal. Proc. (5th), *Attorneys*, §304.(3) *Information Supplied for Business Purpose*. See *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 C.A.4th 835, 856, 68 C.R.3d 828 [investment bank that prepared offering memorandum for company's promissory notes was not shielded from liability to purchasers for negligent misrepresentation under "secondary role" rule for opinion givers; bank was aware of company's poor fiscal quarter, of information that negated positive financial forecast, and that memorandum was basis for securities registration statement].

(4) *Liability Dischargeable in Bankruptcy*.

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §518.(6) *No Punitive Damages or Damages for Emotional Distress*. See *PM Group v. Stewart* (2007) 154 C.A.4th 55, 69, 64 C.R.3d 227 ["it is well settled that punitive damages are not recoverable for negligent representation"; trial court properly granted nonsuit on claim].



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D. Innocent Misrepresentation.

5 *Witkin Sum. Cal. Law Torts* § 826

[§ 826] Innocent Misrepresentation.

(1) *General Rule of Nonliability.* Liability may result, in proper circumstances, from either intentional (see *supra*, §772 et seq.) or negligent (see *supra*, §818 et seq.) misrepresentation. If the defendant's belief is both honest and reasonable, however, the misrepresentation is innocent and there is ordinarily no tort liability. (See *Graham v. Ellmore* (1933) 135 C.A. 129, 132, 26 P.2d 696; cf. *Podlasky v. Price* (1948) 87 C.A.2d 151, 161, 196 P.2d 608, 1 Summary (10th), *Contracts*, §306 [court seems to confuse negligent and innocent misrepresentation].) However, certain exceptions have been recognized.

(2) *Sale, Rental, or Exchange Transaction.* The Second Restatement adopts the rule followed in a number of jurisdictions upholding tort recovery for innocent misrepresentations in a sale, rental, or exchange transaction. (*Rest.2d, Torts* §552C(1).) Damages recoverable are limited to the difference between the value of what the plaintiff has parted with and the value of what he or she has received in the transaction. (*Rest.2d, Torts* §552C(2).) Transactions within the rule include "any sale, rental or exchange of land, chattels, securities or anything else of value, such as copyrights, patents and other valuable intangible rights." (*Rest.2d, Torts*, Comment c.) The rule is restricted to the immediate parties to the transaction. (*Rest.2d, Torts* §552C, Comment d.)

In view of the similarities between this rule and the remedy of restitution, "it is difficult to say with certainty whether this rule should be regarded as one of strict liability in the law of torts, eliminating the requirement of intent or negligence in making the representation, or one of the law of restitution, eliminating the requirement of rescinding and restoring the status quo." (*Rest.2d, Torts* §552C, Comment b; on remedy of rescission and restitution, see 1 Summary (10th), *Contracts*, §930 et seq.)

(3) *Sale or Distribution of Product.* Rest.3d, Torts: Products Liability provides that one engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation. The representation may be either fraudulent, negligent, or innocent. (*Rest.3d, Torts: Products Liability* §9.) The plaintiff is not required to show that the product was defective at the time of the sale or distribution. (*Rest.3d, Torts: Products Liability* §9, Comment d.) (On strict products liability generally, see *infra*, §1428 et seq.)

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E. Alternative Remedies.
1. Rescission and Restitution.

5 *Witkin Sum. Cal. Law Torts* § 827

[§ 827] Rescission and Restitution.

The majority of the cases involve actions by the defrauded party to a *contract*, and the preliminary question is whether he or she intends to affirm or rescind it. If the defrauded party rescinds, and restores any benefits received, he or she is entitled to restitution of the consideration given. (*Seeger v. Odell* (1941) 18 C.2d 409, 417, 115 P.2d 977; see *Denevi v. LGCC* (2004) 121 C.A.4th 1211, 1220, 18 C.R.3d 276 [fraud victim may elect to undo transaction in entirety, restoring both parties to status quo ante]; Dobbs, *The Law of Torts* §483; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §§374, 375; 53 *Cal. L. Rev.* 1062 [real property purchaser's remedies]; on rescission generally, see 1 *Summary* (10th), *Contracts*, §937; on notice of rescission, see 3 *Cal. Proc.* (4th), *Actions*, §201; on pleading in action for restitution after rescission, see 4 *Cal. Proc.* (4th), *Pleading*, §502; on demand for rescission and restitution set up as partial defense or cross-claim, see 5 *Cal. Proc.* (4th), *Pleading*, §§1016, 1037.)

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Notice of rescission:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §206.

Pleading in action for restitution after rescission:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §§541, 542.

Demand for rescission and restitution as partial defense or cross-claim:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §§1090, 1111.



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5 Witkin Sum. Cal. Law Torts § 828

[§ 828] Affirmance and Damages.

The injured party may elect to retain the benefits of the contract, e.g., the property purchased, and make up in damages the loss suffered by the fraud. Hence, he or she may *affirm* the contract, and simply sue for damages for the fraud. (*Campbell v. Birch* (1942) 19 C.2d 778, 791, 122 P.2d 902; *Montes v. Peck* (1931) 112 C.A. 333, 340, 296 P. 624; *Fink v. Weisman* (1933) 129 C.A. 305, 313, 18 P.2d 961; *Gogo v. Los Angeles County Flood Control Dist.* (1941) 45 C.A.2d 334, 338, 114 P.2d 65; *De Campos v. State Comp. Ins. Fund* (1954) 122 C.A.2d 519, 525, 265 P.2d 617; *Brockway v. Heilman* (1967) 250 C.A.2d 807, 811, 58 C.R. 772; *Jue v. Smiser* (1994) 23 C.A.4th 312, 315, 28 C.R.2d 242, supra, §810; *Denevi v. LGCC* (2004) 121 C.A.4th 1211, 1220, 18 C.R.3d 276; see *Hargrove v. Henderson* (1930) 108 C.A. 667, 675, 292 P. 148 [action for damages by defrauded grantee was proper, not limited to suit on covenants in deed]; *Vista v. Robert Thomas Sec.* (2000) 84 C.A.4th 882, 888, 101 C.R.2d 237; 37 Am.Jur.2d (2001 ed.), *Fraud and Deceit* §368; on nature of tort action for damages for fraud generally, see 3 Cal. Proc. (4th), *Actions*, §125.)

The remedy may also be invoked defensively; i.e., the defrauded purchaser may keep the property, and, when the vendor sues for the price or for possession, the defendant may set up the claim for damages by way of affirmative defense or cross-complaint. (*Nevada Land & Inv. Corp. v. Sistrunk* (1934) 220 C. 174, 178, 30 P.2d 389; *Pavlovich v. Neidhardt* (1954) 128 C.A.2d 559, 561, 275 P.2d 836; on pleading fraud as defense, see 5 Cal. Proc. (4th), *Pleading*, §1016.)

A buyer may recover damages for fraud even where in default; and this is true even though he or she may have lost property through foreclosure or repossession by the seller. (*Garrett v. Perry* (1959) 53 C.2d 178, 182, 346 P.2d 758.)

West's Key Number Digest, Fraud k.31

SUPPLEMENT: [This section is current through the latest supplement]
Nature of tort action for fraud:

Cross-References: 3 Cal. Proc. (5th), *Actions*, §131.

Pleading fraud as defense:

Cross-References: 5 *Cal. Proc.* (5th), *Pleading*, §1090.



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VIII. FRAUD AND DECEIT
E. Alternative Remedies.
3. Election of Remedies.

5 *Witkin Sum. Cal. Law Torts* § 829

[§ 829] Election of Remedies.

The remedies of affirmance and rescission are inconsistent, involving different types and amounts of recovery, and the defrauded party must *elect* to proceed on one theory or another. But the mere attempt to obtain one remedy, or even the commencement of an action seeking one remedy, is not a binding election. Thus, where the plaintiff gives an ineffectual notice of rescission, or fails to obtain restitution, he or she may nevertheless sue for damages; i.e., plaintiff's right to recover damages for the fraud is not lost by election unless he or she successfully disaffirms the contract. (See *Hjorth v. Bernstein* (1941) 44 C.A.2d 561, 564, 112 P.2d 643; *MacIsaac v. Pozzo* (1945) 26 C.2d 809, 814, 161 P.2d 449; *Karapetian v. Carolan* (1948) 83 C.A.2d 344, 355, 188 P.2d 809; *Denevi v. LGCC* (2004) 121 C.A.4th 1211, 1221, 18 C.R.3d 276; see 36 Cal. L. Rev. 636; 21 So. Cal. L. Rev. 399; cf. *Evans v. Rancho Royale Hotel Co.* (1952) 114 C.A.2d 503, 507, 250 P.2d 283 [completed rescission terminates contract and bars action for damages]; for election of tort remedy where contract action is precluded by illegality, see 3 Cal. Proc. (4th), *Actions*, §149.)

In *De Campos v. State Comp. Ins. Fund* (1954) 122 C.A.2d 519, 265 P.2d 617, plaintiff partners had an employee-partner, P, who was a poor credit risk, so they concealed his membership and employment from defendant workers' compensation insurer. P died and his dependents received a death benefit award from the former Industrial Accident Commission against the insurer. Plaintiffs brought this action for reimbursement of costs and attorneys' fees incurred in their defense of the Commission proceedings after the insurer's failure to act. Defendant cross-complained for damages for fraud (the amount of compensation it paid the dependents). *Held*, judgment for defendant affirmed. "Whether the failure to rescind occurred by deliberate choice of the insurer or by lapse of time and force of circumstances is immaterial. The insurer well may have deemed it good business to pay this particular risk, recoup the amount thereof from the insured, and continue with its coverage of other risks at the mine. It is not for a defaulting employer to tell the aggrieved insurer which of several available remedies it shall elect to pursue, or that if it neglects to make a timely rescission it shall forfeit its right to damages." (122 C.A.2d 528.)

If, however, the defrauded party elects to affirm and recover damages, and fails to establish his or her right, the rule is different. Having affirmed the contract, he or she cannot thereafter attempt to rescind. (*Bancroft v. Woodward* (1920) 183 C. 99, 101, 190 P. 445; *Helm v. K.O.G. Alarm Co.* (1992) 4 C.A.4th 194, 204, footnote 10, 5 C.R.2d 615, quoting the text; see *Guterman v. Gally* (1933) 131 C.A. 647, 653, 21 P.2d 1000 ["plaintiff's election to affirm and sue for alleged damages constituted a waiver of any right to subsequently disaffirm and sue for the money paid"].)

West's Key Number Digest, Fraud k.32, 35

SUPPLEMENT: [This section is current through the latest supplement]

Illegal contract:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §153.



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4. Waiver of Tort Remedy.

5 *Witkin Sum. Cal. Law Torts* § 830

[§ 830] Waiver of Tort Remedy.

Various acts, such as the acceptance of substantial benefits from the other contracting party, have been held to result in a waiver of the tort remedy. Thus, in *Schied v. Bodinson Mfg. Co.* (1947) 79 C.A.2d 134, 179 P.2d 380, plaintiff buyer agreed to purchase gold dredging equipment from defendant conditional seller on an installment contract. The equipment was installed and the buyer later complained of fraud. By agreement, the seller then made repairs and installed additional equipment, and the buyer agreed to resume payments under the contract. *Held*, "a party to an executory contract, who, with full knowledge of the facts constituting the fraud complained of, subsequently, with intention to do so, affirms the contract and recognizes it as valid, either by his written agreement or by acts and conduct, and accepts substantial payments, property or the performance of work or labor not required by the original contract, thereby waives his right to damages on account of the fraud." (79 C.A.2d 142.) (On what constitutes election of remedy generally, see 3 *Cal. Proc.* (4th), *Actions*, §178 et seq.)

However, later decisions refuse to find a waiver in acceptance of benefits unless there is an estoppel, i.e., the change would work a substantial injury to the adverse party. The leading case is *Bagdasarian v. Gragnon* (1948) 31 C.2d 744, 192 P.2d 935. Plaintiff vendor sued to foreclose a mortgage securing the price, and defendant purchaser, electing to affirm, cross-complained for damages for fraud. The vendor showed that the purchaser had asked for favors (e.g., requesting an extension of time for payment of his notes). *Held*, no waiver resulted, none of the requested favors having in fact been granted. The court, disapproving earlier dicta, squarely held that merely making an unfulfilled request will not constitute a waiver as a matter of law, and observed that there is "serious doubt whether even a granted request of a favor, such as an extension of time, should be held to constitute a waiver in the absence of estoppel or the making of a new agreement supported by consideration." (31 C.2d 751.) (See *Lawson v. Town & Country Shops* (1958) 159 C.A.2d 196, 200, 323 P.2d 843 [false representations by lessor to induce lessee to lease; lessee's acceptance of modifications was not a waiver]; *Jue v. Smiser* (1994) 23 C.A.4th 312, 317, 28 C.R.2d 242, *supra*, §810 [no waiver by real estate purchasers who proceeded to close escrow after learning of sellers' misrepresentation and only then to sue for damages; following *Bagdasarian*]; 13 A.L.R.2d 807 [proceeding under executory contract after discovering fraud as waiver of right to recover damages for the fraud].)

West's Key Number Digest, Fraud k.35

SUPPLEMENT: [This section is current through the latest supplement]

In *Oakland Raiders v. Oakland-Alameda County Coliseum* (2006) 144 C.A.4th 1175, 51 C.R.3d 144, plaintiff, a professional football team, sued defendant, a nonprofit public corporation administering a public coliseum and stadium, for negligent misrepresentation regarding the status of season ticket sales, representations that were allegedly made to induce the team to leave Los Angeles and sign a long-term contract to play at their former home in Oakland. After learning the true facts regarding the ticket sales, plaintiff entered into a supplemental contract with defendant providing plaintiff with significant concessions. The trial court determined that the issue of implied waiver by entering the supplemental contract was a question of fact for the jury, and instructed the jury that defendant was required to prove that plaintiff intended to waive its fraud claim at that time. The jury awarded plaintiff substantial damages, and the trial court denied defendant's motion for judgment notwithstanding the verdict. *Held*, reversed.

(a) The California Supreme Court, first in the seminal case of *Schmidt v. Mesmer* (1897) 116 C. 267, 48 P. 54, and subsequently in *Bagdasarian v. Gragnon* (1948) 31 C.2d 744, 192 P.2d 935, text, p. 1203, has established the rule that one who, after discovery of an alleged fraud, ratifies an original contract by entering into a new agreement granting that party substantial benefits with respect to the same subject matter is deemed to have waived the right to claim damages for fraudulent inducement. While the rule has not recently been the central focus of judicial scrutiny in this state, it still stands as binding precedent, and it is universally recognized and is illustrated in cases from numerous other jurisdictions. (144 C.A.4th 1185.)

(b) The implied waiver recognized in *Schmidt* and *Bagdasarian* is better understood as an application of the doctrine of equitable estoppel than "waiver" in the traditional sense, which generally rests on a party's intent. The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if the person intentionally led another to believe a particular circumstance to be true and to rely on that belief to the other's detriment. While the question of waiver ordinarily turns on the intent of the party against whom it is asserted, estoppel focuses solely on the party's conduct. Equitable estoppel is, for practical purposes, indistinguishable from the doctrine of implied waiver through conduct. (144 C.A.4th 1189.) Application of the *Schmidt/Bagdasarian* rule to the facts of this case vindicates the estoppel principles on which it rests. By signing the supplemental contract, plaintiff reaffirmed the validity of the original contract and induced defendant to change its position, to its detriment. (144 C.A.4th 1193.)

(c) The record establishes an implied waiver of plaintiff's fraud claim as a matter of law. Although the existence of waiver is ordinarily a question of fact, this does not mean that it can never be a question of law. Implied waiver, especially where it is based on conduct manifestly inconsistent with the intention to enforce a known right, may be determined as a matter of law where the underlying facts are undisputed or the evidence is susceptible of only one reasonable conclusion. The facts surrounding the execution of the supplemental contract satisfied all the elements of implied waiver, while the only evidence to the contrary--plaintiff's undisclosed subjective intent to preserve its fraud claim--was entitled to "no weight whatsoever." (144 C.A.4th 1191.) Because implied waiver of plaintiff's fraud claim was established as a matter of law, the trial court erred in denying defendant's motion. (144 C.A.4th 1194.)

(New) *Effect of release in fraudulently induced contract*: In *Persson v. Smart Inventions* (2005) 125 C.A.4th 1141, 23 C.R.3d 335, plaintiff, one of two shareholders in a closely held household products corporation, sold his shares to the other shareholder in a buyout agreement at less than their true value. He sued the buyer for fraud, alleging concealment of the existence of a promising new product about to be marketed when the agreement was made. The agreement contained mutual releases of all liability, known or unknown, arising from the agreement. *Held*, judgment for plaintiff affirmed.

(a) A party who is fraudulently induced to contract cannot be deprived of the well-recognized option to affirm the contract and sue for damages for fraud simply because the contract contains a release of claims. "Not only would that result be a 'Catch-22' of major proportions, the cases do not support it." (125 C.A.4th 1154.)

(b) A party may not ordinarily rescind only part of a contract. However, this rule does not apply in all circumstances. A court has equitable power to set aside a release in a contract it finds to be induced by fraud, and is not

constrained by the rule against partial rescission, which is itself founded on equitable principles. (125 C.A.4th 1153, 1156.)

Election of remedies:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §183 et seq.



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A. Meaning of Negligence.
1. Definitions.

6 Witkin Sum. Cal. Law Torts § 831

[§ 831] Definitions.

"Negligence is not the act itself, but the fact which defines the character of the act, and makes it a legal wrong." (*Stephenson v. Southern Pac. Co.* (1894) 102 C. 143, 147, 34 P. 618, 36 P. 407.) "Negligence is either the *omission* of a person to do something which an ordinarily prudent person would have done under given circumstances or the *doing* of something which an ordinarily prudent person would not have done under such circumstances. It is *not absolute* or to be measured in all cases in accordance with some precise standard but *always relates to some circumstance of time, place and person.*" (*Fouch v. Werner* (1929) 99 C.A. 557, 564, 279 P. 183.) (See *Tucker v. Lombardo* (1956) 47 C.2d 457, 462, 303 P.2d 1041; *Calvillo-Silva v. Home Grocery* (1998) 19 C.4th 714, 728, 80 C.R.2d 506, 968 P.2d 65, *infra*, §1099 [distinguishing wilful misconduct]; *Delaney v. Baker* (1999) 20 C.4th 23, 31, 82 C.R.2d 610, 971 P.2d 986, *infra*, §1687; 3 Harper, James & Gray 2d §16.1 [comparing theories based on conduct and state of mind]; Dobbs, *The Law of Torts* §110 et seq.; 57A *Am.Jur.2d, Negligence* (2004 ed.) §5 et seq.; Cal. Civil Practice, 1 Torts, Negligence, Chap. 1; 54 *So. Cal. L. Rev.* 1 [Negligence Reconsidered: The Role of Rationality in Tort Theory]; 74 *So. Cal. L. Rev.* 193 [Distributive and Corrective Justice in the Tort Law of Accidents]; *infra*, §833 et seq.)

The Restatement (*Rest.2d, Torts* §282) defines the term as follows: "[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregarding of an interest of others."

Comment e to *Rest.2d, Torts* §282 distinguishes *recklessness*: "As defined in this Section, the word 'negligence' excludes conduct which the actor does or should realize as involving a risk to others which is not merely in excess of its utility, but which is out of all proportion thereto and is therefore 'recklessly disregarding of the interests of others.' As the disproportion between risk and utility increases, there enters into the actor's conduct a degree of culpability which approaches and finally becomes indistinguishable from that which is shown by conduct intended to invade similar interests. Therefore, where this disproportion is great, there is a marked tendency to give the conduct a legal effect closely analogous to that given conduct which is intended to cause the resulting harm." And comment g to *Rest.2d, Torts* §500 adds that recklessness involves more than "inadvertence, incompetence, unskillfulness, or a failure to take precautions" but rather rises to the level of a "conscious choice of a course of action ... with knowledge of the serious danger to others involved in it."

SUPPLEMENT: [This section is current through the latest supplement]

See 3 Harper, James & Gray 3d §16.1; CACI, No. 425 ["gross negligence" explained].



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2. Jury Instructions.

6 *Witkin Sum. Cal. Law Torts* § 832

[§ 832] Jury Instructions.

(1) *BAJI*. The basic negligence instruction, *BAJI*, No. 3.10, states as follows:

"Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence."

"It is the failure to use ordinary or reasonable care."

"Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence."

BAJI, No. 3.10 is intended for *ordinary negligence* cases that do not involve special standards of conduct or affirmative duties, such as those affecting children, common carriers, and medical practitioners; these are covered by appropriate special instructions. (See *BAJI*, No. 3.10, Use Note; 7 *Cal. Proc.* (4th), *Trial*, §286.)

(2) *CACI*. The basic negligence instruction, *CACI*, No. 401, states as follows:

"Negligence is the failure to use reasonable care to prevent harm to oneself or to others."

"A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation."

"You must decide how a reasonably careful person would have acted in [name of plaintiff/defendant]'s situation."

West's Key Number Digest, Negligence k.200

SUPPLEMENT: [This section is current through the latest supplement]

(1) *BAJI*.

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §273.

(2) *CACI*. See CACI, No. 424 [Negligence Not Contested--Essential Factual Elements].



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B. California Statute.

6 *Witkin Sum. Cal. Law Torts* § 833

[§ 833] California Statute.

C.C. 1714(a), derived from the common law and included in the original code, reads in part as follows: "Every one is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself."

In *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086, the court reexamined negligence liability and came to the surprising conclusion that this general section is the foundation of California negligence law. Rephrased, it establishes the general principle that "[a]ll persons are required to use ordinary care to prevent others being injured as the result of their conduct." And, "in the absence of statutory provision declaring an exception to the fundamental principle ... , no such exception should be made unless clearly supported by public policy." (69 C.2d 112.)

The opinion then sets forth broad criteria for determining the applicability of the principle or an exception: "A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (69 C.2d 112.)

West's Key Number Digest, Negligence k.203

SUPPLEMENT: [This section is current through the latest supplement]



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C. Restatement.

6 *Witkin Sum. Cal. Law Torts* § 834

[§ 834] Restatement.

(1) *Restatement 2d*. The Restatement 2d covers negligence in Chapters 12-19, §§281-503.

Chapter 12. General Principles.

Topic 1. The Elements of a Cause of Action for Negligence. (§281.)

Topic 2. The Standard by Which Negligence Is Determined. (§§282-284.)

Topic 3. Determination of Standard of Conduct. (§§285-296.)

Topic 4. Types of Negligent Acts. (§§297-309.)

Topic 5. Misrepresentations Threatening Physical Harm. (§§310, 311.)

Topic 6. Conduct Negligent Because Intended or Likely To Cause Physically Dangerous Emotional Distress.
(§§312, 313.)

Topic 7. Duties of Affirmative Action. (§§314-325.)

Chapter 13. Liability for Condition and Use of Land.

Topic 1. Liability of Possessors of Land to Persons on the Land. (§§328E-350.)

Topic 2. Liability of Vendors and Other Transferors of Land to Persons on the Land. (§§351-354.)

Topic 3. Liability of Lessors of Land to Persons on the Land. (§§355-362.)

Topic 4. Liability for Natural Conditions to Persons Outside of the Land. (§363.)

Topic 5. Liability of Possessors to Persons Outside of the Land. (§§364-371.)

Topic 6. Liability of Vendors and Other Transferors to Persons Outside of the Land. (§§372-376.)

Topic 7. Liability of Lessors to Persons Outside of the Land. (§§377-379A.)

Topic 8. Liability of Persons Other Than a Possessor, Vendor, or Lessor. (§§380-387.)

Chapter 14. Liability of Persons Supplying Chattels for the Use of Others.

Topic 1. Rules Applicable to All Suppliers. (§§388-390.)

Topic 2. Persons Supplying Chattels To Be Used for Their Business Purposes. (§§391-393.)

Topic 3. Manufacturers of Chattels. (§§394-398.)

Topic 4. Sellers of Chattels Manufactured by Third Persons. (§§399-402.)

Topic 5. Strict Liability. (§§402A, 402B.)

Topic 6. Independent Contractors. (§§403, 404.)

Topic 7. Donors, Lenders, and Lessors of Chattels. (§§405-408.)

Chapter 15. Liability of an Employer of an Independent Contractor.

Topic 1. Harm Caused by Fault of Employers of Independent Contractors. (§§410-415.)

Topic 2. Harm Caused by Negligence of a Carefully Selected Independent Contractor. (§§416-429.)

Chapter 16. The Causal Relation Necessary to Responsibility for Negligence.

Topic 1. Causal Relation Necessary to the Existence of Liability for Another's Harm. (§§430-453.)

Topic 2. Causal Relation Affecting the Extent of Liability But Not Its Existence. (§§454-461.)

Topic 3. Causal Relation Necessary To Make Actor's Conduct Contributory Negligence. (§462.)

Chapter 17. Contributory Negligence.

Topic 1. General Principles. (§§463-466.)

Topic 2. When Bar to Action. (§§467-478.)

Topic 3. When No Bar to Action. (§§479-484.)

Topic 4. Contributory Negligence of Third Persons; Imputed Negligence. (§§485-494A.)

Topic 5. Failure To Control Conduct of Third Persons. (§§495, 496.)

Chapter 17A. Assumption of Risk.

Chapter 18. Negligent Invasions of Interests in the Physical Condition of Land and Chattels.

Chapter 19. Reckless Disregard of Safety.

(2) *Restatement 3d.* A single volume of the Restatement 3d deals with the apportionment of liability.

Topic 1. Basic Rules of Comparative Responsibility. (§§1-9.)

Topic 2. Liability of Multiple Tortfeasors for Indivisible Harm. (§§10-21.)

Topic 3. Contribution and Indemnity. (§§22, 23.)

Topic 4. Settlement. (§§24, 25.)

Topic 5. Apportionment of Liability When Damages Can Be Divided by Causation. (§26.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Elements of Actionable Negligence.
1. Traditional Analysis.
a. Duty--Breach--Causation.
1. In General.

6 Witkin Sum. Cal. Law Torts § 835

[§ 835] In General.

Actionable negligence is traditionally regarded as involving the following: (1) a legal duty to use due care; (2) a breach of that duty; and (3) the breach as the proximate or legal cause of the resulting injury. (See *Toomey v. Southern Pac. R. Co.* (1890) 86 C. 374, 381, 24 P. 1074; *Means v. Southern Calif. Ry. Co.* (1904) 144 C. 473, 478, 77 P. 1001; *Johnstone v. Panama Pac. Int. Exposition Co.* (1921) 187 C. 323, 326, 202 P. 34; *Schwartz v. Helms Bakery Ltd.* (1967) 67 C.2d 232, 241, footnote 9, 60 C.R. 510, 430 P.2d 68; *United States Liab. Ins. Co. v. Haidinger-Hayes* (1970) 1 C.3d 586, 594, 83 C.R. 418, 463 P.2d 770, citing the text; *Artiglio v. Corning* (1998) 18 C.4th 604, 614, 76 C.R.2d 479, 957 P.2d 1313, *infra*, §1061, citing the text; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 C.4th 26, 57, 77 C.R.2d 709, 960 P.2d 513, citing the text; *Casson v. Atchison, Topeka & Santa Fe Ry. Co.* (1931) 119 C.A. 222, 225, 6 P.2d 336; *Raymond v. Paradise Unified School Dist. of Butte* (1963) 218 C.A.2d 1, 6, 31 C.R. 847, *infra*, §861; *Ewart v. Southern Calif. Gas Co.* (1965) 237 C.A.2d 163, 170, 46 C.R. 631, *infra*, §1216; *Galanis v. Mercury Int. Ins. Underwriters* (1967) 247 C.A.2d 690, 695, 55 C.R. 890; *Fuller v. Standard Stations* (1967) 250 C.A.2d 687, 691, 58 C.R. 792; *Peter W. v. San Francisco Unified School Dist.* (1976) 60 C.A.3d 814, 821, 131 C.R. 854, *supra*, §8, citing the text; *Clarke v. Hoek* (1985) 174 C.A.3d 208, 213, 219 C.R. 845, *infra*, §1064; *Jackson v. Ryder Truck Rental* (1993) 16 C.A.4th 1830, 1837, 20 C.R.2d 913, quoting the text; *Federico v. Superior Court* (1997) 59 C.A.4th 1207, 1211, 69 C.R.2d 370 [duty, breach, and causation elements are interrelated; whether act or omission is considered breach of duty or proximate cause of injury necessarily depends on scope of duty imposed]; *Mark K. v. Roman Catholic Archbishop of Los Angeles* (1998) 67 C.A.4th 603, 612, 79 C.R.2d 73, citing the text; *Rest.2d, Torts* §§281, 497, 499; 3 Harper, James & Gray 2d §16.1; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §71 et seq.; 15 *Cal. L. Rev.* 1; 5 *San Diego L. Rev.* 253; 34 *San Diego L. Rev.* 1503 [use of policy considerations in analyzing duty to limit liability]; 48 *Stanf. L. Rev.* 311 [Reasonableness and Rationality in Negligence Theory]; 100 *A.L.R.2d* 942 [foreseeability as element of negligence and proximate cause]; BAJI, Nos. 3.00, 16.00; CACI, Nos. 400 et seq.; VF-400 et seq.; 4 *Cal. Proc.* (4th), *Pleading*, §537; on inference of negligence under doctrine of *res ipsa loquitur*, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §114 et seq.)

The "legal duty" of care may be of two general types: (1) the duty of a person to use ordinary care in activities from which harm might reasonably be anticipated. (See *infra*, §867 et seq.) (2) An affirmative duty where the person occupies

a particular relationship to others. (See *infra*, §1038 et seq.) In the first situation, the person is not liable unless he or she is actively careless; in the second, the person may be liable for failure to act affirmatively to prevent harm. (See *McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 C.A.4th 1011, 1017, 67 C.R.2d 516, quoting the text.)

The rules governing negligence causing injury to property are the same as those that apply to personal injuries. (See *Royal Ins. Co. v. Mazzei* (1942) 50 C.A.2d 549, 552, 123 P.2d 586; *Rest.2d, Torts* §497.) (On the concept of duty as it applies to intentional as well as negligent torts, see *supra*, §6 et seq.)

West's Key Number Digest, Negligence k.202

SUPPLEMENT: [This section is current through the latest supplement]

See 3 Harper, James & Gray 3d §16.1. *Cross-Reference:* 4 *Cal. Proc.* (5th), *Pleading*, §576.



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a. Duty--Breach--Causation.
2. Duty as Matter of Law and Assumed Duty.

6 Witkin Sum. Cal. Law Torts § 836

[§ 836] Duty as Matter of Law and Assumed Duty.

In *Friedman v. Merck & Co.* (2003) 107 C.A.4th 454, 131 C.R.2d 885, plaintiff applied for a position with a medical group and was required, as a condition of employment, to undergo a TB test. Because he was a strict ethical vegan with a strong belief that it was immoral to kill or exploit animals for any reason, plaintiff said that he could not submit to this test if it contained animal products. An employee of the medical group inquired of defendants, the distributors of the test, and was told that the TB test was "Vegan safe." This information was given to plaintiff, but, after he had taken the test, he learned that the test did, in fact, contain animal products. Plaintiff then sued for negligence and negligent infliction of emotional distress, alleging that he suffered and continues to suffer severe mental pain. Defendants' demurrer was sustained on the ground that they owed no duty to plaintiff, and judgment was entered in their favor. *Held*, affirmed.

(a) *Duty as matter of law.*

(1) A court's task, in determining duty as a matter of law, is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the *category of negligent conduct* at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party. In applying the "sufficiently likely" standard, the court must determine whether the negligent conduct at issue is likely enough to cause harm that a reasonably thoughtful person would take account of in guiding practical conduct. (107 C.A.4th 465.)

(2) Plaintiff's injury arose because of his strongly held beliefs as an ethical vegan, but there was no allegation that the class of ethical vegans who would suffer *serious* harm upon taking a test containing animal products is sufficiently appreciable or substantial so as to permit the imposition of tort liability under these circumstances. In other words, there is no duty to warn of the possibility of rare, hypertensive reactions to otherwise safe products. (107 C.A.4th 466, citing *Briggs v. National Industries* (1949) 92 C.A.2d 542, 207 P.2d 110, and *Rest.2d, Torts* §402A, Comment j.)

(3) The TB test distributor's negligent failure to warn that the test contains animal products is not sufficiently likely to result in *serious* harm to a sufficiently significant segment of the population as to impose a duty to so advise on

defendants as a matter of law. However, this conclusion does not resolve the issue whether defendants, with knowledge of plaintiff's ethical veganism, reasonably should have anticipated that their negligence would put him at risk of serious emotional harm. (107 C.A.4th 468.)

(b) *Assumed duty: negligence.*

(1) The issue is whether defendants assumed a duty to plaintiff in which his emotional condition was an object. Although the courts have found an assumed duty in a variety of situations, such as misdiagnosing a patient or mistreating a decedent's remains, the cases do not provide any bright-line guidance about the meaning of an assumed duty in which the plaintiff's emotional condition is an object. Even if defendants knew that plaintiff was a strict ethical vegan, "it was not reasonably foreseeable that their negligence in responding to the prospective employer's inquiry would likely cause plaintiff to suffer *serious* emotional distress. ... It was reasonably foreseeable, under these circumstances, that plaintiff would be upset upon subsequently learning the TB test did in fact contain cow serum. However, it was not reasonably foreseeable plaintiff would suffer *serious* emotional harm. There is no allegation defendants knew who plaintiff was or the strength of his ethical beliefs." (107 C.A.4th 474.)

(2) Moreover, defendants did not assume a duty in which plaintiff's emotional condition was an object. At best, defendants assumed a duty to exercise reasonable care to provide accurate information, but the duty assumed was "not of a personal nature involving an unavoidable risk of *serious* emotional trauma." (107 C.A.4th 475.)

(c) *Assumed duty: negligent misrepresentation.*

(1) The complaint, although labeled "negligence," more accurately alleges negligent misrepresentation in that it focuses on defendants' representations and plaintiff's reliance on them. With respect to duty, plaintiff contended that, even if defendants had no general duty to advise that the TB test contained animal products, once they chose to respond to plaintiff's prospective employer's inquiry, they had a legal responsibility to respond accurately. However, California and the Rest.2d, Torts recognize a duty to communicate accurate information only where there is a risk of physical harm or the representation is made in a commercial setting for a business purpose. No California court has recognized a cause of action for negligent misrepresentation involving a risk of emotional injury alone. (107 C.A.4th 475.)

(2) The rule that negligent misrepresentation causing physical harm is actionable, as recognized in *Rest.2d, Torts* §311, is an exception to the general rule that the negligent misrepresentation must occur in a commercial context (see *supra*, §825). In the present case, plaintiff alleged both emotional and physical pain, but conceded that the physical injuries flowed from the emotional harm, not directly from the negligent misrepresentation. In other words, plaintiff was so upset that he became physically ill. Defendants had insufficient reason to believe that plaintiff's *physical* safety might depend on the accuracy of their information about the TB test. "That plaintiff, for sincere ethical reasons, would not submit to the TB test if it did contain animal products raised no apparent threat of physical harm." (107 C.A.4th 481.)

(3) The usual rule, i.e., that negligent misrepresentation only occurs in a commercial setting, set forth in *Rest.2d, Torts* §552, applies only when the defendant has a pecuniary interest in the transaction in which the information is given. "Defendants *are* in the business of distributing the TB test. And they *did* respond to the inquiry in their business capacities. But the inaccurate information concerning the TB test was not offered ... as part of a business transaction between plaintiff and defendants. Defendants had no significant pecuniary interest in whether plaintiff submitted to the TB test or not. Defendants' alleged misrepresentations did not interfere with any financial or business interest. Under these circumstances, plaintiff has not stated a cause of action for negligent misrepresentation in a business setting for a business purpose." (107 C.A.4th 483.)

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6 Witkin Sum. Cal. Law Torts § 837

[§ 837] Palsgraf Theory: Negligence Toward Class.

Under the duty approach (supra, §§835, 836), conduct is negligent when it creates an unreasonable risk of harm to some general class of persons. If the plaintiff is not within that class toward whom the defendant is negligent, the injury does not give rise to liability. (See *Rest.2d, Torts* §281.)

This doctrine was fully expounded in the leading case of *Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339, 162 N.E. 99. Plaintiff stood on a platform of defendant's railroad. A man, carrying a package of fireworks wrapped in a newspaper, attempted to board a moving train. Defendant's employee assisted him, and the package was dislodged, fell, and exploded. The shock threw down platform scales many feet away, and these struck plaintiff. *Held*, Plaintiff could not recover from defendant. (a) Assuming that the package was dislodged through the employee's negligence, there was nothing in the appearance of the package to indicate its danger to persons far away, and consequently the only wrong was toward the man carrying the package. (b) Negligence in the abstract is not a tort; there must be a violation of duty toward the plaintiff, and he or she cannot recover for negligence toward someone else. (c) The question of proximate cause is not involved where there is no negligence as to the plaintiff.

The important practical effect of the *Palsgraf* theory is that liability for unforeseeable consequences is avoided by limiting the scope of the *duty*, rather than by the application of restrictive rules of proximate cause. Hence, the admonition of writers to "look for the duty before you talk causation," and "there is no duty to an unforeseeable plaintiff." (See *Mosley v. Arden Farms Co.* (1945) 26 C.2d 213, 220, 157 P.2d 372 [concurring opinion]; *Hatch v. Ford Motor Co.* (1958) 163 C.A.2d 393, 396, 329 P.2d 605; *Kane v. Hartford Acc. & Indem. Co.* (1979) 98 C.A.3d 350, 455, 159 C.R. 446; *Wawanesa Mut. Ins. Co. v. Matlock* (1997) 60 C.A.4th 583, 585, 70 C.R.2d 512; *Rest.2d, Torts* §281, Comment c; 3 Harper, James & Gray 2d §18.2; 38 Cal. L. Rev. 412; 63 Harv. L. Rev. 671, 677; 27 Hastings L. J. 776 [cartoon strip poking fun at *Palsgraf*]; 31 So. Cal. L. Rev. 99; 2 U.C.L.A. L. Rev. 146.)

SUPPLEMENT: [This section is current through the latest supplement]
Practical effect of theory: See 3 Harper, James & Gray 3d §18.2.



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6 Witkin Sum. Cal. Law Torts § 838

[§ 838] Restatement 2d.

Rest.2d, Torts §281 sets forth the elements of a cause of action for negligence as follows:

"The actor is liable for an invasion of an interest of another, if:"

"(a) the interest invaded is protected against unintentional invasion, and"

"(b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and"

"(c) the actor's conduct is a legal cause of the invasion, and"

"(d) the other has not so conducted himself as to disable himself from bringing an action for such invasion."

Comment h explains the relation of duty to legal cause: "The problem which is involved in determining whether a particular intervening force is or is not a superseding cause of the harm is in reality a problem of determining whether the intervention of the force was within the scope of the reasons imposing the duty upon the actor to refrain from negligent conduct. If the duty is designed, in part at least, to protect the other from the hazard of being harmed by the intervening force, or by the effect of the intervening force operating on the condition created by the negligent conduct, then that hazard is within the duty, and the intervening force is not a superseding cause. ... A completely accurate analysis of the hazard element in negligence would require the material on superseding cause in Chapter 16 to be placed in this chapter. However, in the past the courts generally have discussed the effect of intervening forces in terms of causation. The solution of the problem of determining whether the presence of an intervening force should relieve the actor from liability for harm which his conduct was a substantial factor in bringing about ... is facilitated by an appreciation of the fact that the problem is a 'hazard problem' rather than a problem of causation."

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6 *Witkin Sum. Cal. Law Torts* § 839

[§ 839] Relaxation of Duty Approach.

In *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *infra*, §1008, the court, relying heavily on modern text writers, found the legal duty approach unsatisfactory in the particular case, and cast doubt on its usefulness in other situations:

(a) The duty analysis begs the question. It is a shorthand statement of the conclusion--merely the sum of policy considerations that say that the plaintiff is entitled to protection. (68 C.2d 734.)

(b) The duty concept is not deep-rooted; it is a legal device of the latter half of the 19th century designed to curtail the propensities of jurors to give redress for all foreseeable harms. (68 C.2d 734.)

(c) Use of the concept as a means of preventing fraudulent claims is unjustified. (68 C.2d 735.)

(d) The concept should not be used as a means of limiting potential liability where there is a difficulty in fixing definitions for recovery. (68 C.2d 739.)

A number of later decisions are instructive. (See *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1077; *Adams v. Southern Pac. Trans. Co.* (1975) 50 C.A.3d 37, 41, 123 C.R. 216; *Valdez v. J.D. Diffenbaugh Co.* (1975) 51 C.A.3d 494, 505, 124 C.R. 467; *Smith v. Alameda County Social Services Agency* (1979) 90 C.A.3d 929, 935, 153 C.R. 712; *George A. Hormel & Co. v. Maez* (1979) 92 C.A.3d 963, 967, 155 C.R. 337; *Bastian v. San Luis Obispo* (1988) 199 C.A.3d 520, 530, 245 C.R. 78, *infra*, §1080; 3 Harper, James & Gray 2d §18.2; 5 Cal. Western L. Rev. 206; 6 *San Diego L. Rev.* 148; 16 *San Diego L. Rev.* 793 [Current Status of Duty Concept in California]; 34 *San Diego L. Rev.* 1503 [use of policy considerations in analyzing duty so as to limit liability].)

Despite this criticism, the duty approach, as illustrated in the preceding sections, has continued to be employed in numerous decisions. (See *infra*, §840 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Later decisions: See 3 Harper, James & Gray 3d §18.2.



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a. General Rule: No Liability.

6 Witkin Sum. Cal. Law Torts § 840

[§ 840] General Rule: No Liability.

A common illustration of the duty analysis occurs when a vehicle, left with the ignition key in the lock, is stolen; and the thief, driving negligently, injures the plaintiff. (On the concept of duty as it applies to intentional as well as to negligent torts, see *supra*, §6 et seq.)

Some courts treat the problem as one of *proximate cause*. Negligence of the vehicle owner is assumed (ignoring the *Palsgraf* requirement of negligence toward a class of persons; see *supra*, §837), and liability is based on the conclusion that the intervening act of the thief is either foreseeable or a superseding cause. However, the realizable likelihood of an intervening criminal act is often the reason why leaving the key in the ignition is negligent, and the fact that the intervening act is intentional or criminal does not by itself make it a superseding cause. (See *infra*, §842.)

Other jurisdictions, including California, have treated the issue as one of the *nature and scope of legal duty*: Does the car owner, under common law or statutory principles, owe a duty of care to the stranger who is ultimately injured by the thief? Or, in the *Palsgraf* analysis, is the stranger an unforeseeable plaintiff, so that the negligent defendant is not negligent toward him or her? On that approach, many courts have reached the conclusion of nonliability, holding that the automobile owner owes no duty to persons who might be injured. (See *Holder v. Reber* (1956) 146 C.A.2d 557, 558, 304 P.2d 204; *Brooker v. El Encino Co.* (1963) 216 C.A.2d 598, 602, 31 C.R. 24; 13 Proof of Facts 3d 405 [liability of motorist leaving keys in vehicle for injury caused by thief operating vehicle]; 43 Cal. L. Rev. 140; 14 Hastings L. J. 444; 2 U.C.L.A. L. Rev. 146; 45 A.L.R.3d 787 [liability of motorist leaving key in ignition for injury caused by stranger operating vehicle]; see 70 A.L.R.4th 276 [liability where ignition key had been removed].)

In *Richards v. Stanley* (1954) 43 C.2d 60, 271 P.2d 23, plaintiff alleged that defendant wife left her car parked with the ignition key in the lock, in violation of a city ordinance, and that R stole the car and negligently struck plaintiff. *Held*, no cause of action was stated.

(a) A key-removal statute, clearly intended to impose a duty to lock cars for the protection of persons who might be injured by a thief, would be a proper basis for liability here. But the ordinance under consideration showed, by its terms, that it was designed only to prevent theft and not to establish a duty toward the class of persons who might be injured by negligent driving. (43 C.2d 63.)

(b) Defendant wife was negligent, but only to her own and her husband's proprietary interests; in the absence of statute, there was no negligence toward plaintiff. There was a foreseeable risk of possible theft and negligent driving by a thief, but this is less than the risk of negligent driving by a person to whom the car is actually entrusted for driving. This latter risk has not been considered unreasonable in the absence of knowledge of incompetence of the driver, and the statutory liability of an owner for negligence of one driving with permission is limited in amount. (43 C.2d 65.)

(c) "By leaving the key in her car she at most increased the risk that it might be stolen. Even if she should have foreseen the theft, she had no reason to believe that the thief would be an incompetent driver. In view of the fact that the risk of negligent driving she created was less than the risk she might intentionally have created without negligence by entrusting her car to another, and in the light of the rule that she owed no duty to protect plaintiff from harm resulting from the activities of third persons, we conclude that her duty to exercise reasonable care in the management of her automobile did not encompass a duty to protect plaintiff from the negligent driving of a thief." (43 C.2d 66.)

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b. Criticism of General Rule.

6 *Witkin Sum. Cal. Law Torts* § 841

[§ 841] Criticism of General Rule.

In *Kiick v. Levias* (1980) 113 C.A.3d 399, 169 C.R. 859, the court, though necessarily following *Richards v. Stanley* (1954) 43 C.2d 60, 63, 271 P.2d 23, supra, §840, suggested that its holding--though still the majority rule--should be reexamined in the light of later California decisions and current conditions:

(a) "Insofar as the issue is one of foreseeability, it is certainly a matter of common knowledge that the risk of auto thefts in metropolitan areas has increased substantially over the years since that decision; and it is at least arguable that auto thefts are more likely to occur when keys are left in or about the car, that vehicles operated by thieves are more likely to end up in accidents, and that city dwellers should be held to knowledge of these matters." (113 C.A.3d 404.)

(b) "Insofar as the issue calls for an overall policy determination under the heading of duty, a weighing of relevant factors in addition to foreseeability arguably inclines toward liability as well: the burden upon the defendant in exercising due care is slight, the imposition of liability may increase citizen diligence, and insurance against such risks by owners (assuming liability based on negligence) is presumably both available and prevalent. Thieves, by contrast, are not likely to carry applicable liability insurance, and absent liability on the part of the owner, the entire burden of the accident would fall upon the wholly innocent victim." (113 C.A.3d 404.) (See *Hosking v. San Pedro Marine* (1979) 98 C.A.3d 98, 104, footnote 4, 159 C.R. 369 [arguing that criteria of *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §833, and empirical data justify departure from *Richards v. Stanley* rule]; *Archer v. Sybert* (1985) 167 C.A.3d 722, 730, 213 C.R. 486 ["It may be time to reexamine *Richards*, but such action can come only from the Legislature or the Supreme Court"]; concurring and dissenting opinion in *Ballard v. Uribe* (1986) 41 C.3d 564, 581, 587, 588, 224 C.R. 664, 715 P.2d 624, infra, §842.)

Numerous later cases, while not abolishing the rule in favor of nonliability, have found reasons for not applying it. (See infra, §842 et seq.)

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c. Special Circumstances Exception.

1. Trucks and Other Heavy Vehicles.

6 *Witkin Sum. Cal. Law Torts* § 842

[§ 842] Trucks and Other Heavy Vehicles.

In *Richardson v. Ham* (1955) 44 C.2d 772, 285 P.2d 269, a duty was found in the special circumstances, and, under modern proximate cause rules (see *infra*, §1215), the intervening negligent driving of the thief was not a superseding cause. Defendants, earth movers, left two 26-ton bulldozers on a mesa at the close of Saturday's work, one unlocked. Three intoxicated young men (aged 17, 18, and 20) managed to start the unlocked one, drove around causing damage, and then lost control of the machine, which went for about a mile, damaging plaintiffs' house and injuring them. *Held*, defendants were liable.

(a) *Richards v. Stanley* (1954) 43 C.2d 60, 63, 271 P.2d 23, *supra*, §840, is distinguishable. Unlike an ordinary automobile, a bulldozer attracts spectators; curious persons are known to climb on them, and they are attractive to children. Hence, "there was a reasonably foreseeable risk that defendants' bulldozers might be tampered with when left unattended." (44 C.2d 776.) The bulldozer's size, particularly when left on top of a mesa, made it particularly dangerous. (44 C.2d 776.)

(b) As to causation, the theory of §449 of the Restatement applies; i.e., the likelihood of intermeddling was what made defendants' conduct negligence. (See *infra*, §1215.) "[D]efendants' duty to protect plaintiffs from injuries caused by the uncontrolled and unauthorized operation of their bulldozer included a duty to protect plaintiffs from the intentional misconduct of the young men, and such misconduct did not therefore constitute a superseding cause of plaintiffs' harm." (44 C.2d 777.) (See 2 *San Diego L. Rev.* 153; 5 *Santa Clara Lawyer* 91; 29 *So. Cal. L. Rev.* 381; 38 *So. Cal. L. Rev.* 125; 12 *U.C.L.A. L. Rev.* 1260.)

In *Ballard v. Uribe* (1986) 41 C.3d 564, 224 C.R. 664, 715 P.2d 624, defendant was a concrete subcontractor of Atkinson, a general contractor constructing a freeway interchange. Defendant brought his truck-mounted aerial manlift to the job, but discovered that the stabilizing cable of the ladder was frayed and broken; he then obtained permission from Atkinson's manager to leave the lift in Atkinson's fenced equipment yard until defendant's mechanic could repair it. Defendant told Atkinson's manager that he could use the machine after repairing it; and, contrary to his usual practice (and industry custom), he left the keys to both the truck and the lift engine in the truck without posting any warning signs. Atkinson's master mechanic removed the broken cable and ordered a replacement. But before it arrived, plaintiff,

defendant's employee, while using the lift in sandblasting a bridge column, was thrown from the ladder basket and seriously injured. *Held*, judgment for plaintiff affirmed. The fact that the machine was left in a fenced-in area instead of an unenclosed location, as in *Richardson*, did not compel a contrary conclusion.

(a) "Although the location in which defendant has left his machinery, as well as other steps which defendant may have taken to minimize the danger of injury--for example, notifying Atkinson's foreman and other supervisory employees of the lift's dangerous condition--could well have been found by the jury to render defendant nonnegligent in controlling his machinery, those factors, in themselves, did not negate defendant's general duty--as the owner of a piece of heavy construction machinery--to use due care to prevent injurious misuse. That general duty applies wherever the machinery may be found." (41 C.3d 573.)

(b) The issue of negligence was properly left to the jury. "[I]t may have concluded that defendant did not act with due care in leaving the keys to the defective lift with the machinery where it could be used by unknowing employees or in failing to attach warning tags to the vehicle." (41 C.3d 574.) (See 14 *Pepperdine L. Rev.* 220.)

In *Hergenrether v. East* (1964) 61 C.2d 440, 39 C.R. 4, 393 P.2d 164, defendants E and C were employees of defendant roofing contractor. With E driving, they took defendant's truck out of town on business, and with implied authority, stayed overnight at a hotel. While eating and drinking, they left the truck parked in the local "skid row" area. During the night, it was stolen, and an unidentified thief drove it negligently and collided with plaintiffs' car. *Held*, judgment for defendants notwithstanding the verdicts reversed; the driver and his employer were liable for plaintiffs' injuries. The special circumstances supporting the jury's verdict were: (a) The vehicle was left in a neighborhood frequented by lawless persons and drunks. (b) It was intended to be left there for a relatively long time--midafternoon to the following morning, and, more important, overnight. (c) It was a partially loaded truck, which possessed unusual potentiality of harm, because its safe operation was not a matter of common experience, and it was capable of inflicting more serious injury than an ordinary vehicle when not properly controlled. (61 C.2d 445.) (For criticism see 2 *San Diego L. Rev.* 153; 5 *Santa Clara Lawyer* 91; 38 *So. Cal. L. Rev.* 125; 12 *U.C.L.A. L. Rev.* 1260.)

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c. Special Circumstances Exception.

2. Ordinary Vehicles.

6 *Witkin Sum. Cal. Law Torts* § 843

[§ 843] Ordinary Vehicles.

In *Enders v. Apcoa* (1976) 55 C.A.3d 897, 127 C.R. 751, Z left her car with defendant's parking lot attendant. The car was stolen, and plaintiff, a police officer, was injured in a collision with the fleeing thieves. *Held*, summary judgment for defendant reversed.

(a) The special circumstances that could establish foreseeability of the harm were as follows: (1) It is a common practice of parking lots to require patrons to leave keys in their vehicles so that attendants may move them, and failure to guard against car theft thereafter may be negligence. (2) Only one attendant was on duty, and this may sometimes be as ineffectual in guarding against theft as no attendant at all. (3) Prior thefts of cars from defendant's lot could establish foreseeability of the danger of injury to a police officer who was under a duty to recover a stolen car. (55 C.A.3d 904.)

(b) The police intervention, the attempt of the thief to avoid arrest, negligent driving during this attempt, and the likelihood of injury to the arresting officer or others were all foreseeable. (55 C.A.3d 905.)

(c) Plaintiff offered empirical data to demonstrate that it is foreseeable that a stolen vehicle will be involved in an accident. Although the admissibility of this data is doubtful, "we take notice of the widely published warnings by law enforcement offices against leaving a key in the ignition. A parking lot operator is no less knowledgeable of these risks and dangers than a private citizen, and perhaps should be held to a greater degree of responsibility because of the volume of cars left in his care." (55 C.A.3d 906.) (See *Murray v. Wright* (1958) 166 C.A.2d 589, 592, 333 P.2d 111 [defendants, who operated used car lot and left ignition keys in all cars to encourage public to examine and operate vehicles, was liable when B took car and collided with plaintiff].)

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3. Exception Not Applicable.

6 *Witkin Sum. Cal. Law Torts* § 844

[§ 844] Exception Not Applicable.

In *Avis Rent A Car System v. Superior Court* (1993) 12 C.A.4th 221, 15 C.R.2d 711, J stole a rental car from defendant rental car company's check-in parking lot. During the check-in process, keys were left in the cars for as long as 45 minutes. There was no fence or wall around the check-in lot and no guarded gate where cars leaving the lot might be examined. Defendant had been warned about security problems, and other cars had been stolen from the check-in area. In fact, J herself had been convicted of an earlier theft of a vehicle from the same lot. One week after the present theft, J, while driving the stolen vehicle and being pursued by the police from the scene of a shoplifting, ran a stop sign and collided with plaintiff's vehicle. After its motion for summary judgment was denied, defendant sought mandamus. *Held*, mandamus granted; the "special circumstances" doctrine was not applicable to this case.

(a) Supreme Court decisions establish that special circumstances exist when *heavy vehicles* are left unattended and available for use by those not accustomed to driving them. (12 C.A.4th 228, citing *Richardson v. Ham* (1955) 44 C.2d 772, 285 P.2d 269, *supra*, §842, and other cases.) Also, dictum in *Richards v. Stanley* (1954) 43 C.2d 60, 63, 271 P.2d 23, *supra*, §840, suggests that an owner might be liable, under some circumstances, for leaving keys in an ordinary automobile, such as where the car is left in front of a school; the special circumstance of making a car available to irresponsible children is similar to an invitation to tamper with heavy equipment. Hence, the *Richards* dictum means only that one has a duty not to invite or entice others to tamper with vehicles that they are incompetent to drive. (12 C.A.4th 229.)

(b) Two Court of Appeal decisions, *Murray v. Wright* (1958) 166 C.A.2d 589, 333 P.2d 111, *supra*, §843, and *Enders v. Apcoa* (1976) 55 C.A.3d 897, 127 C.R. 751, *supra*, §843, have found special circumstances to exist in situations involving keys left in ordinary automobiles. However, *Murray* is distinguishable from the present case, because the policy of used car dealers leaving vehicles unlocked with keys in the ignition was found to encourage intoxicated persons to drive the vehicles. (12 C.A.4th 230.) And *Enders*, which involved a police chase while the thief was driving the stolen vehicle, focused solely on the foreseeability of the particular accident, and hence is an improper extension of the special circumstances doctrine. (12 C.A.4th 232.)

(c) As explained in *Ballard v. Uribe* (1986) 41 C.3d 564, 224 C.R. 664, 715 P.2d 624, *supra*, §842, foreseeability of

harm is only one factor in the calculus for determining duty, and the court's task is to evaluate generally whether the type of negligent conduct in question is sufficiently likely to result in the kind of harm experienced to allow liability to be imposed on the negligent party. Injuries to motorists during police chases (as a general kind of harm) are a foreseeable result of leaving a key in the ignition (a category of negligence). However, for policy reasons, the *Richards* court found no duty, i.e., even the possibility of injury during a chase is not a special circumstance creating a duty to protect motorists from negligent driving by a thief. (12 C.A.4th 232.)

(d) Here, defendant's conduct of parking its cars in a negligently attended lot with keys in the ignitions did not create a duty to control the conduct of a thief. "It is true that the risk of theft increases when more cars are involved and when they are in a fixed location. Thieves may learn about the target cars and may find ways to defeat the security provided. But this increase in the risk of theft due to negligence of an owner of a fleet of cars is much like the increased risk associated with leaving keys in the ignition of a car left unattended on the street. It is not equivalent to inviting or enticing an incompetent driver to tamper with a vehicle. These actions are not the 'special circumstances' which create a special relationship between or among the parties. Thus, they do not impose on the car owner the duty to control the actions of the thief." (12 C.A.4th 233.)

(e) Even if the circumstances in this case were "special," the resulting duty would not be perpetual and unlimited. As a matter of law, the duty would not extend to this accident, which occurred in another county 1 week later during a police chase not caused by a report of the vehicle theft. (12 C.A.4th 233.)

SUPPLEMENT: [This section is current through the latest supplement]

See *May v. Nine Plus Properties* (2006) 143 C.A.4th 1538, 1544, 50 C.R.3d 13 [conduct of automobile body shop in parking cars with keys in ignition in lot with fence and security cameras was not special circumstance that created duty to control conduct of thief and protect third parties, notwithstanding previous thefts from shop, and thus shop was not liable for injuries suffered by police officer, 2 days later, in collision with stolen vehicle].



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a. Adoption of Firefighter's Rule.

6 Witkin Sum. Cal. Law Torts § 845

[§ 845] Adoption of Firefighter's Rule.

Where a person negligently causes a fire that results in injury or death to a firefighter, is the negligent person liable for that death or injury? Under the "fireman's rule," adopted for California in *Giorgi v. Pacific Gas & Elec. Co.* (1968) 266 C.A.2d 355, 72 C.R. 119, the negligent person is not. Plaintiffs were six federal employees in the government service, required to fight forest fires and trained to do so. A fire broke out in a National Forest, and they were trapped when the fire shifted. Four were killed, two were injured. Actions were brought against defendant utility on the theory that its negligent maintenance of a pole and wires caused the fire. *Held*, judgment for plaintiffs reversed; there was no liability.

(a) The fireman's rule has been established by almost unanimous agreement of authorities elsewhere. (266 C.A.2d 357.) Some of the theories relied on by other courts are unacceptable: e.g., assumption of risk, not applicable under late California cases, and the limited duty owed to a licensee, now repudiated by *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086. "Hence our early reaction was that the fireman's rule was but an anachronism still extant only because of a somewhat myopic adherence to *stare decisis*." (266 C.A.2d 359.)

(b) However, as pointed out in a leading New Jersey case, "it is the fireman's business to deal with that very hazard," and "he cannot complain of negligence in the creation of the very occasion for his engagement." "In terms of duty, it may be said there is none owed the fireman to exercise care so as not to require the special services for which he is trained and paid." For that risk, the firefighter should receive compensation from the public he or she serves--in pay and compensation benefits. (266 C.A.2d 359.)

(c) Other policy considerations are opposed to liability: (1) Judicial determination of the cause of a fire, after its destruction, presents difficult problems. (2) There are grave dangers of expansion of such a rule: May an ambulance driver, responding to a call to pick up victims of an automobile collision, and injured, recover from the negligent driver in the collision? May an attendant or nurse in a contagious disease ward of a public hospital, contracting illness from a patient confined there through the patient's negligent exposure to infection, recover from the patient? (266 C.A.2d 360.)

(d) "We hold that a paid fireman has no cause of action against one whose *passive* negligence caused the fire in which he was injured. We do not deal with the arsonist or with one who prankishly or maliciously turns in a false alarm." (266 C.A.2d 360.) (See Dobbs, *The Law of Torts* §284 et seq.; 41 Proof of Facts 2d 133 [breach of duty of care

to fire fighter or police officer]; 71 *Cal. L. Rev.* 218; 4 *U.S.F. L. Rev.* 125; 11 *A.L.R.4th* 597 [liability to firefighter coming on premises in discharge of duty]; 30 *A.L.R.4th* 81 [liability to police officer coming on premises in discharge of duty]; 62 *A.L.R.4th* 727 [firefighter's rule as defense in products liability case]; 89 *A.L.R.4th* 1079 [application of rule to bar recovery by emergency medical personnel injured in responding to, or at scene, of emergency].)

The scope of the firefighter's rule was refined in later cases:

(1) It is immaterial that the defendant's negligence is passive rather than active or that the injury is caused by an explosion rather than a fire. (*Scott v. E. L. Yeager Const. Co.* (1970) 12 *C.A.3d* 1190, 1195, 1198, 91 *C.R.* 232.)

(2) The firefighter's rule applies even though the defendant was engaged in an *ultrahazardous* activity. (*Lipson v. Superior Court* (1982) 31 *C.3d* 362, 376, 182 *C.R.* 629, 644 *P.2d* 822 [boilover at chemical manufacturing plant]; see *Rowland v. Shell Oil Co.* (1986) 179 *C.A.3d* 399, 224 *C.R.* 547 [cleanup of chemical spill is "ordinary" duty].)

(3) A defendant stipulating to negligence may not assert the rule. (*Assad v. Southern Pac. Trans. Co.* (1996) 42 *C.A.4th* 1609, 1612, 50 *C.R.2d* 443.)

(4) The rule applies only to injuries caused by the very misconduct that created the risk that necessitated the firefighter's presence. (*Lipson v. Superior Court*, *supra*.)

The firefighter's rule has survived all challenges in subsequent cases (see *Neighbarger v. Irwin Industries* (1994) 8 *C.4th* 532, 34 *C.R.2d* 630, 882 *P.2d* 347, *infra*, §850), but it has been subjected to both judicial and statutory exceptions (see *infra*, §853 et seq.).

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b. Injured Party.

1. Volunteer Firefighter.

6 Witkin Sum. Cal. Law Torts § 846

[§ 846] Volunteer Firefighter.

In *Baker v. Superior Court* (1982) 129 C.A.3d 710, 181 C.R. 311, plaintiffs were "paid-call" members of a county fire department, i.e., volunteer firefighters who, when informed of a fire, could elect to assist in fighting it. They received some hours of training, provided their own transportation and firefighting clothing, and were paid \$ 5 regardless of the length of time spent. An agricultural burn went out of control, the fire department was called, and plaintiffs elected to assist. When a truck in which they were riding backed up to escape flames, they jumped to the ground and were run over. They brought this action against the owners and employees of the ranch, seeking damages for the injuries from the fall and for burns received in fighting the fire. *Held*, they were not entitled to recover.

(a) Nearly all of the firefighter's rule cases have involved full-time professional firefighters or police officers, and the opinions uniformly mention the fact that the injured firefighter or police officer was a professional or paid to undertake the very risk involved. (129 C.A.3d 716.) But no valid distinction can be made on this basis. Plaintiffs had special training; they were compensated (although in a meager sum); by statute they were entitled to workers' compensation benefits, to the same special presumptions of industrial causation as full-time firefighters, and to reasonably necessary medical treatment. (129 C.A.3d 716, 717.)

(b) Plaintiffs contended that *Walters v. Sloan* (1977) 20 C.3d 199, 142 C.R. 152, 571 P.2d 609, *infra*, §848, in pointing to the assumption of risk basis of the rule, stressed the element of compensation. This is unsound. The opinion "discloses no intent on the part of the court to limit the assumption of the risk basis for the rule to cases in which the risk was assumed for compensation." (129 C.A.3d 719.)

(c) Plaintiffs further contended that assumption of risk has become a disfavored doctrine in view of the comparative negligence case of *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, *infra*, §1329. But *Li* abolished the defense only where it was a variant of contributory negligence; true assumption of risk--which negates a duty of care--remains as a defense and as a support for the firefighter's rule. (129 C.A.3d 720.)

(d) Certain policy reasons for the firefighter's rule, as set forth in *Walters*, apply equally to the present plaintiffs. And an additional policy consideration is entitled to some weight: If liability to paid-call firefighters is imposed, persons

such as defendants may be reluctant to call on fire departments for fear of lawsuits; i.e., they will have no way of knowing whether firefighters who respond are paid-call or regular firefighters. (129 C.A.3d 721, 722.)

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2. Police Officer.

aa. Off-Duty Officer.

6 *Witkin Sum. Cal. Law Torts* § 847

[§ 847] Off-Duty Officer.

In *Hodges v. Yarian* (1997) 53 C.A.4th 973, 62 C.R.2d 130, an off-duty deputy sheriff was injured when he confronted, shot, and killed a suspected burglar in the apartment building in which he lived. He sued the apartment building owners, alleging that their failure to correct known security and maintenance problems was the cause of his injuries. *Held*, summary judgment for defendants affirmed; the fact that plaintiff's injuries were sustained off duty did not avoid the firefighter's rule.

(a) *Firefighter's rule is applicable.* As a matter of law, the firefighter's rule bars plaintiff's claims. Plaintiff acted in response to suspected criminal activity; he acted as a California peace officer, utilizing his professional training; he asserted his authority as a California peace officer; and he exercised his statutory authority to use force, including deadly force. (53 C.A.4th 980.) These activities were inherently part of plaintiff's job and were the types of hazards plaintiff had been trained and employed to confront. Also, plaintiff was eligible for special public compensation, such as disability benefits, for confronting the dangers posed by defendants' failure to provide security measures to prevent criminal intrusions. Because residents of the county, probably including defendants, had already been taxed to provide these benefits, they were entitled to the benefit of the cost-spreading aspect of the public compensation system. (53 C.A.4th 981.)

(b) *Risk need not be assumed for compensation.* The firefighter's rule is not strictly limited to cases in which the particular risk was assumed for compensation. (53 C.A.4th 982.) It is not the fact or amount of compensation that is determinative, but rather the relationship between the public and the firefighters or police officers who serve it. Although peace officers like plaintiff are entitled to special public compensation for undertaking the hazards peculiar to their line of work, it is not this that determines the applicability of the firefighter's rule. Plaintiff performed a "public" service when he sought to apprehend the suspected burglar. Indeed, he points to no material difference between the "service" he would have performed if on duty and the "service" he performed in this case. (53 C.A.4th 983.)

(c) *Nexus required between plaintiff's employment and presence at scene is not required.* Moreover, a nexus between plaintiff's presence at the scene and his employment is not required for application of the firefighter's rule.

Whether he entered the premises as an ordinary citizen or a police officer was irrelevant. The firefighter's rule was triggered because he reacted as a police officer to the disturbance, and deliberately encountered the danger posed. (53 C.A.4th 984.)

(d) *Plaintiff is distinguishable from ordinary tenant.* In light of plaintiff's status, he was not similarly situated to an ordinary tenant who may have been able to recover from defendants. A peace officer is not similarly situated to an ordinary tenant when it comes to handling the type of risk plaintiff confronted. An ordinary tenant is neither trained nor under any duty to apprehend a criminal suspect. Those are precisely the types of "public functions" the taxpayers expect, pay, and equip California peace officers to perform. (53 C.A.4th 984.)

(e) *Exception for wilful acts is inapplicable.* C.C. 1714.9(a)(1) provides an exception to the firefighter's rule where a peace officer's injuries result from a person's wilful acts and the person knows or should know of the peace officer's presence (see *infra*, §857 et seq.). This exception does not allow recovery here. The statute may have applied if the deputy were seeking damages from the suspect for his injuries. But he was not, and there was no showing that the persons he attempted to hold responsible "knew or should have known" of his presence on the premises as a peace officer. (53 C.A.4th 985.)

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6 *Witkin Sum. Cal. Law Torts* § 848

[§ 848] Officer Responding to Existing Crisis.

In *Walters v. Sloan* (1977) 20 C.3d 199, 142 C.R. 152, 571 P.2d 609, the complaint alleged that defendants left their home in charge of their 16-year-old daughter. She hosted a party attended by 200 people, including many minors, and provided the guests with liquor. Plaintiff police officer, who was sent to the home to quell a disturbance, was attacked and injured while attempting to arrest a minor for public drunkenness. *Held*, judgment for defendants on demurrer affirmed.

(a) The firefighter's rule has received nearly unanimous acceptance, and is applicable to police officers. (20 C.3d 202.) Although repeatedly attacked as based on outdated concepts of tort liability, the rule is premised on sound public policy and is in accord with modern tort liability principles. (20 C.3d 203.)

(b) The rule is in accord with public policy and fundamental concepts of justice. For the risk of negligence, the firefighter should receive appropriate compensation from the public, both in pay that reflects the hazard and in workers' compensation benefits for the consequences of the inherent risks of the calling. (20 C.3d 205.) California statutes make adequate provision for this compensation. (20 C.3d 205, 206.) And, if the rule were abolished, *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, 2 Summary (10th), *Workers' Compensation*, §92, would give the public agency employer a lien against the recovery, so that much of it would not go to the public employee but would be returned to the public agency. And the courts would be burdened with litigation among the public agency employer, the retirement system, and the negligence insurer. (20 C.3d 206.)

(c) The argument that the firefighter's rule should not apply where the theory of the action is negligence per se (see *infra*, §890), is not persuasive. The presumption of negligence arises where the plaintiff was one of the class of persons for whose protection the statute was adopted. (20 C.3d 206, citing the text.) Ordinarily, a criminal statute is enacted not to protect police officers from injury while investigating or terminating the prohibited conduct, but rather to protect the public. (20 C.3d 207.)

(d) The rule precludes recovery only where the negligence alleged--in this case furnishing liquor to minors who

became drunk--was the same negligence that resulted in summoning the police. (20 C.3d 207.) (See *Kelhi v. Fitzpatrick* (1994) 25 C.A.4th 1149, 31 C.R.2d 182 [rule applied where highway patrol officer, responding to emergency created by truck losing rear tires, was injured when tires bounced off retaining wall and struck him]; *Tilley v. Schulte* (1999) 70 C.A.4th 79, 82, 82 C.R.2d 497 [rule applied in police officer's action against allegedly negligent psychiatrist of man who shot officer responding to report of gunshots]; 66 Cal. L. Rev. 585 [urging adoption of professional rescuers rule]; 67 Cal. L. Rev. 529 [Walters v. Sloan]; 41 Proof of Facts 2d 133 [breach of duty of care to firefighter or police officer].)

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See *May v. Nine Plus Properties* (2006) 143 C.A.4th 1538, 1544, 50 C.R.3d 13 [under firefighter's rule, police officer, who was injured while pursuing vehicle that, 2 days earlier had been stolen from repair shop parking area, could not recover from shop owner].



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2. Police Officer.

cc. Officer Responding to New Crisis.

6 *Witkin Sum. Cal. Law Torts* § 849

[§ 849] Officer Responding to New Crisis.

In *Seibert Sec. Services v. Superior Court* (1993) 18 C.A.4th 394, 22 C.R.2d 514, plaintiff police officer brought an arrested suspect to a hospital for an examination of possible injuries. While plaintiff was there, a mental patient became abusive toward a security guard employed by defendant, and plaintiff helped to subdue him. The patient was then handcuffed and put into a security cell, but the handcuffs were soon removed by another security guard, L. Shortly thereafter, the patient attacked L, plaintiff responded to L's call for help, and plaintiff was injured while attempting to subdue the patient. During the struggle, L dropped back and did not assist, but another security guard did offer assistance. Relying on the firefighter's rule as a defense, defendant security service moved for summary judgment, but the motion was denied. Defendant then sought mandamus. *Held*, mandamus granted.

(a) *Effect of defendant's contractual duty to provide security services.* Plaintiff argued that the firefighter's rule is superseded in this case because defendant breached its contractual duty to protect visitors to the hospital, including plaintiff. This argument is without merit. If plaintiff's injury had occurred while he was completing paper work at the hospital counter, it is arguable that defendant would have been liable. However, plaintiff's injury occurred after he had responded, *as a police officer*, to a request for help. Thus, at the moment of his injury, plaintiff was no longer a business invitee or visitor to whom the landowner owed a duty of protection that had been delegated to defendant. Instead, as a police officer acting on behalf of the public, he waived any duty of care owed to him by defendant, and became subject to the greater social policy denying him recovery in tort against those who caused the danger. (18 C.A.4th 414.)

(b) *Effect of defendant's ineffective assistance.* Also without merit is plaintiff's argument that liability may be imposed because one of defendant's employees apparently assisted plaintiff in restraining the patient, while another backed away from the struggle. When attempting to apprehend or subdue a suspect or dangerous person, a police officer has no right to expect private assistance. Hence, the officer cannot complain if any assistance that is offered is not enough. (18 C.A.4th 416.) The result might have been different had plaintiff been injured *because of* the assistance. However, this possibility was not raised, and hence is not decided. With respect to L, backing away from the struggle may have been a breach of the duty owed to *defendant*. However, L, who, like plaintiff, was a victim of the patient's assault, owed no duty to plaintiff to rejoin the fray. (18 C.A.4th 416, footnote 15.)

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3. Private Safety Employee.

6 Witkin Sum. Cal. Law Torts § 850

[§ 850] Private Safety Employee.

Neighbarger v. Irwin Industries (1994) 8 C.4th 532, 34 C.R.2d 630, 882 P.2d 347, presents the question whether a private safety employee who has occasional firefighting duties may state a cause of action against a third party, not the employer, for injuries caused by the third party's negligence in starting a fire. Two oil refinery employees working as safety supervisors brought a personal injury action against a maintenance services contractor after they were burned in a petroleum fire started by the contractor's employee (the third person). The job duties of both plaintiffs included responding to emergencies at the refinery and participating in the fire brigade, and both had training in firefighting. The trial judge granted summary judgment for defendant, and the Court of Appeal affirmed. *Held*, reversed; because the firefighter's rule did not apply, plaintiffs stated a cause of action.

(a) The firefighter's rule should not be viewed as a separate concept, but as an example of the proper application of the doctrine of assumption of risk, i.e., as an illustration of when it is appropriate to find that the defendant owes no duty of care. (8 C.4th 538.) Moreover, after *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *infra*, §1339, the rule cannot be said to rest on the firefighter's voluntary acceptance of a known risk of injury in the course of employment. Thus, the court in *Holland v. Crumb* (1994) 26 C.A.4th 1844, 32 C.R.2d 366, reasoned incorrectly in applying the rule to the claim of a privately employed tow truck driver on the theory that the tow truck driver must assume the foreseeable risks of his hazardous employment. (8 C.4th 541, 545.)

(b) The proper basis for the rule is the legal conclusion that the person who starts a fire owes no duty of care to the firefighter who is called to respond to the fire. The policy reasons supporting this conclusion do not apply where the plaintiff is a privately employed firefighter or safety employee. (8 C.4th 541, 542.)

(c) When the public secures the services of a firefighter by taxing itself, it purchases exoneration from the duty of care. It should not have to pay twice (through taxation and individual liability) for those services. "But when a safety employee is privately employed, a third party lacks the relationship that justifies exonerating him or her from the usual duty of care. ... Having no relationship with the employee, and not having contracted for his or her services, it would not be unfair to charge the third party with the usual duty of care towards the private safety employee." (8 C.4th 543.) (See *Marquez v. Mainframe* (1996) 42 C.A.4th 881, 885, 50 C.R.2d 34 [private security guard was not subject to firefighter's

rule; citing *Neighbarger*]; 22 *Pepperdine L. Rev.* 1785 [*Neighbarger*]; cf. *Bryant v. Glastetter* (1995) 32 *C.A.4th* 770, 38 *C.R.2d* 291, *infra*, §862 [*Neighbarger* is controlling, but court believed that *Holland v. Crumb* stated correct result]; *Herrle v. Estate of Marshall* (1996) 45 *C.A.4th* 1761, 1771, 53 *C.R.2d* 713, *infra*, §1353 [firefighter's rule may apply to private employees; distinguishing *Neighbarger*.])

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4. Tow Truck Operator.

6 *Witkin Sum. Cal. Law Torts* § 851

[§ 851] Tow Truck Operator.

Neighbarger v. Irwin Industries (1994) 8 C.4th 532, 34 C.R.2d 630, 882 P.2d 347, *supra*, §850, was distinguished in *Dyer v. Superior Court* (1997) 56 C.A.4th 61, 65 C.R.2d 85, and the firefighter's rule was applied to a private tow truck operator who was injured while rendering services. The tow truck driver sued defendant motorist on the ground that negligent failure to maintain his car caused a mechanical breakdown that brought plaintiff to a freeway location where defendant's car was struck by another car. *Held*, the trial judge erred in denying defendant's motion for summary judgment. Given that plaintiff had a contract-based obligation to help defendant in case of mechanical breakdown (through defendant's automobile club membership), the firefighter's rule applied as a matter of law, i.e., defendant did not owe a duty to plaintiff to keep his car in good mechanical order so that defendant would not need plaintiff's assistance on the freeway. (56 C.A.4th 69.) Hence, the firefighter's rule precludes imposing liability. It is good social policy to encourage motorists like defendant to rely on their contractual arrangements for aid from private towing services, rather than to discourage them by imposing on them potential liability for asking for help. (56 C.A.4th 72.) The crucial question in applying the firefighter's rule is the relationship between the public and the safety worker, not whether the worker is a public or private employee. (56 C.A.4th 73.)

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c. Extension of Firefighter's Rule to All Public Safety Personnel.

6 Witkin Sum. Cal. Law Torts § 852

[§ 852] Extension of Firefighter's Rule to All Public Safety Personnel.

Oceanside v. Superior Court (2000) 81 C.A.4th 269, 96 C.R.2d 621, on unusual facts, has extended the firefighter's rule to *all* public safety personnel. Plaintiff and defendant, both lifeguards, but employed by different agencies, conducted a joint rescue operation to save a jet ski collision victim stranded in ocean water next to a jetty. After the lifeguards experienced difficulty in transporting the victim over the jetty rocks, defendant asserted authority over the mission by directing plaintiff and others to lower the victim off the rocks and onto a floating sled. During this procedure, a wave pushed plaintiff into the jetty rocks, resulting in her injury. In this personal injury action, defendant's motion for summary judgment was denied, and he sought mandamus. *Held*, mandamus issued; the firefighter's rule barred the action.

(a) The firefighter's rule extends to all public safety personnel, including publicly employed lifeguards. The rule is not limited to firefighters, police officers, and emergency medical personnel referred to in C.C. 1714.9, the statutory exception for wilful misconduct or negligent acts. All respond to public emergencies or crises for which they have been employed and specially trained. (81 C.A.4th 279.)

(b) Both the common law exception for independent acts of misconduct that are committed after the public safety officer has arrived on the scene (supra, §§855, 856), and the statutory exception for wilful misconduct or negligent acts relating to conduct after the defendant knows or should know of the public safety officer's presence (supra, §857 et seq.) do not apply to actions between public safety officers engaged in a joint operation. The same public policy considerations underlying the application of the firefighter's rule to exonerate the victim should also apply to exonerate a fellow lifeguard whose presence and actions are in furtherance of the joint rescue operation for that victim. Allowing public safety officers to be threatened with personal injury lawsuits by fellow public safety officers would (1) endanger public safety, (2) encourage costly litigation even though the public has already financed statutory compensation of injured public safety personnel, (3) impair efficient judicial administration by encouraging complicated lawsuits, and (4) threaten the exclusivity of the Workers' Compensation Act by allowing an injured officer to sue when the negligent officer is employed by another agency but not by his or her own employer. (81 C.A.4th 280.)

(c) That plaintiff received only ordinary workers' compensation benefits is immaterial. The absence of special compensation or benefits to which firefighters and police officers are entitled does not preclude the application of the

firefighter's rule. (*81 C.A.4th 284.*)

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[§ 853] Firefighter Cases.

In *Lipson v. Superior Court* (1982) 31 C.3d 362, 182 C.R. 629, 644 P.2d 822, plaintiff B, a fireman, responded to a chemical boilover at defendants' chemical manufacturing plant, and was injured while attempting to contain it. His complaint alleged in part that defendants, negligently or intentionally, incorrectly informed him that the boilover did not involve toxic chemicals or materials, thereby causing him to suffer injury that could have been avoided had he been correctly informed. *Held*, under the fraud exception to the firefighter's rule, the complaint stated a cause of action, and denial of summary judgment for defendants was proper.

(a) A number of jurisdictions have allowed recovery where a landowner or occupier failed to warn a firefighter or police officer of a known, hidden danger on the premises; and California, in *Bartholomew v. Klingler Co.* (1975) 53 C.A.3d 975, 978, 126 C.R. 191, *infra*, 856, applied this exception. (31 C.3d 371, 372.)

(b) Intentional misrepresentation of the nature of a hazard cannot be distinguished from failure to warn of a known hidden danger, for in both situations, the defendant misleads the firefighter about the nature or extent of the hazards, and is responsible for the firefighter's erroneous belief that controlling the fire will not require any special safety precautions. (31 C.3d 372.)

(c) The fraud exception is supported by the doctrine of *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086. "This court can conceive of no policy reason to shield from liability a landowner or occupier whose negligent or intentional misrepresentation of the nature of a hazard proximately causes injury to a firefighter. Indeed, firefighters may often have to rely on information provided by the owner or occupier of the premises to determine how most effectively and safely to combat a fire. If this information is misleading, the result may well be the tragic loss of not only the fireman's life but also the lives of members of the public. Public policy dictates that recovery for injuries or for loss of life should be compensated and the fireman's rule should not be used to shield property owners or occupiers from liability for such tortious acts." (31 C.3d 373.) (For holding on claim that defendants' activity was ultrahazardous, and thus beyond scope of firefighter's rule, see *supra*, §845 et seq.)

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[§ 854] Police Officer Cases.

In *Boon v. Rivera* (2000) 80 C.A.4th 1322, 96 C.R.2d 276, plaintiff police officer, responding to a 911 call, found defendant's husband barricaded in his house. Defendant advised plaintiff and other officers that her husband was not violent, even though she had information to the contrary. Relying on this fraudulent information, plaintiff responded with nonlethal force and was shot as a result. In the resulting personal injury action, the trial court sustained defendant's demurrer on the ground of the firefighter's rule. *Held*, judgment for defendant reversed.

(a) In applying the firefighter's rule, courts have distinguished between conduct occurring *before* the officer's arrival (recovery barred) and conduct occurring *after* the officer's arrival (recovery not barred). (80 C.A.4th 1328, citing *Spargur v. Park* (1982) 128 C.A.3d 469, 180 C.R. 257, *infra*, §856, and other cases.)

(b) The present case is governed by *Lipson v. Superior Court* (1982) 31 C.3d 362, 182 C.R.2d 629, 644 P.2d 822, *supra*, §853, where the firefighter's rule was held not to bar recovery for injury to a firefighter who, after his arrival, received misrepresentations about the nature of a chemical boilover. Here, defendant's statement that her husband was nonviolent was a misrepresentation, because defendant knew that he had an M-16 rifle in the house, had threatened to kill the first officer on the scene, had been declared to be a danger to himself and others, and had recently held a gun to defendant's head and had threatened to kill her and her child. As in *Lipson*, where the firefighter, relying on the statement that the chemicals were nontoxic, was injured when he did not take adequate precautions, so plaintiff here alleged that he relied on the misrepresentation and, as a result, was injured when he applied nonlethal force. (80 C.A.4th 1328.)

(c) "[A] police officer may expect force, even deadly force, in responding to an emergency call of a barricaded man, but the risk that someone at the scene will deceive the officer as to the nature of the violent tendencies of the person inside is not an inherent risk of a police officer's job. An officer cannot reasonably be expected to anticipate such misconduct." (80 C.A.4th 1330.)

(d) Defendant contended that even if the firefighter's rule did not bar recovery, traditional duty analysis did so. Defendant's assumption that the duty inquiry must proceed separately is inappropriate, because the firefighter's rule is

but a limitation on traditional duty principles, which require every person to use due care to prevent harm to another. As to the duty of care owed to police officers, C.C. 1714.9 (infra, §857) incorporates the "before/after" distinction. Although most of the cases analyzing the effect of this section have treated it as an *exception* to the firefighter's rule, more accurately, it can be described as *reimposing* the duty of ordinary care that was otherwise abrogated by the firefighter's rule. In an emergency, the duty imposed on those present at the scene is to refrain from misstating material facts concerning the nature of the emergency to those public officials present. (80 C.A.4th 1330, citing *Lipson*.)

(e) Relying on *Wise v. Superior Court* (1990) 222 C.A.3d 1008, 272 C.R. 222, infra, §1220, defendant argued that she could not be held liable for the criminal act of another. However, *Wise* dealt with a failure to warn and was based on the principle that, lacking a special relationship, a person should not be liable for *nonfeasance*. This principle has no application where the defendant, through *misfeasance*, has created a foreseeable risk of harm from the criminal act of a third person. (80 C.A.4th 1331, citing *Pamela L. v. Farmer* (1980) 112 C.A.3d 206, 169 C.R. 282, infra, §1058.) Here, both the victim and the harm were foreseeable in view of defendant's affirmative misrepresentation that her husband was not violent. Based on these facts, defendant owed a duty to plaintiff not to misrepresent the nature of the hazard that he faced. (80 C.A.4th 1332.)

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[§ 855] Firefighter Cases.

Under the independent cause exception, the firefighter's rule does not apply where acts of misconduct are independent of those that necessitated summoning the plaintiff. Although the exception has been applied mainly in police officer cases (see *infra*, §856), it is equally applicable to firefighters. (*Lipson v. Superior Court* (1982) 31 C.3d 362, 369, 182 C.R. 629, 644 P.2d 822, *supra*, §853; *Krueger v. Anaheim* (1982) 130 C.A.3d 166, 171, 181 C.R. 631.)

In *Lipson*, plaintiff sought recovery mainly on the theory of fraud (see *supra*, §853), but also contended that the firefighter's rule should not apply to strict liability for an ultrahazardous activity. The court held that the fraud exception applied (see *supra*, §§853, 854), but then added a dictum on the independent cause exception.

(a) Where the firefighter's injuries are proximately caused by tortious conduct independent from the conduct that was responsible for summoning him or her, the rule does not bar recovery; and this exception applies whether that independent act is fraud or maintenance of an ultrahazardous activity or condition on the premises. (31 C.3d 376.)

(b) Illustrative of this distinction are two hypothetical situations in which storage of a gasoline tank in the basement of a house constitutes an ultrahazardous activity: (1) The tank explodes, causing a fire, and the firefighter is burned while trying to extinguish it; he or she cannot recover, because the defendant's maintenance of the ultrahazardous condition was the very occasion for the firefighter's presence. (2) Faulty electrical wiring on the first floor causes a fire; the responding firefighter, unaware of a tank in the basement, attempts to extinguish the fire; the tank explodes, causing the floor to collapse, and flames from the explosion engulf the firefighter. The firefighter can recover; the tank explosion occurred independently of the electrical fire that was responsible for his or her presence. (31 C.3d 377.)

(c) If the toxic chemicals here were a factor in causing the chemical boilover, the firefighter's rule would bar recovery; but if the chemicals were independent from the cause of the boilover, the action could be maintained. (31 C.3d 377.) The record on the motion for summary judgment did not show how plaintiff sustained his injuries or how the boilover began; hence, it cannot be said as a matter of law that the firefighter's rule was a bar. (31 C.3d 378.)

Lipson was followed in *Terhell v. American Commonwealth Associates* (1985) 172 C.A.3d 434, 218 C.R. 256,

where the complaint alleged that defendants negligently constructed and maintained a roof with an unguarded and concealed opening, and failed to warn plaintiff or anyone else of the danger. *Held*, a cause of action was stated: "Having an unguarded hole in the roof was not the cause of appellant's presence at the scene, and the firefighter's rule has never been applied to negligence which did not cause the fire." (172 C.A.3d 441.) (See *Donohue v. San Francisco Housing Authority* (1993) 16 C.A.4th 658, 663, 20 C.R.2d 148, *infra*, §1354 [firefighter's rule did not bar claim by firefighter who fell on slippery steps while on defendant's premises to inspect for fire code violations]; *Stapper v. GMI Holdings* (1999) 73 C.A.4th 787, 791, 86 C.R.2d 688 [firefighter's rule did not preclude claim for injuries sustained in responding to fire, where injuries were allegedly caused by failure of defectively designed garage door opener to function properly].)

C.C. 1714.9, providing statutory exceptions to the firefighter's rule (see *infra*, §857), "is not intended to change or modify the common law independent cause exception." (C.C. 1714.9(e).)

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6 Witkin Sum. Cal. Law Torts § 856

[§ 856] Police Officer Cases.

The independent cause exception, although applicable to firefighters (*supra*, §855), has been applied mainly to police officers.

Spargur v. Park (1982) 128 C.A.3d 469, 180 C.R. 257, reversing summary judgment for defendant, presents a close issue of independent cause. Plaintiff motorcycle officer stopped defendant driver for speeding, and then stopped his own motorcycle in front of defendant's car. Defendant did not come to a full stop, but continued on, striking the motorcycle and injuring plaintiff. *Held*, there was a question of fact whether the officer was injured because of a continuation of the speeding that brought him to the scene, or because of a separate independent act. (128 C.A.3d 473, 474, 475.)

In *Krueger v. Anaheim* (1982) 130 C.A.3d 166, 181 C.R. 631, K, attending a professional baseball game, became unruly, and R, a security guard, sustained injuries in attempting to subdue him. In K's action against the city, the latter cross-complained to obtain reimbursement for workers' compensation payments to R. K set up the firefighter's rule as a defense and was granted summary judgment. *Held*, reversed.

(a) The firefighter's rule applies not only to negligence but also to wilful misconduct. (130 C.A.3d 168.) But an intentional tort in the nature of an assault and battery, intended to interfere with or prevent the performance of the officer's duties, and occurring after the incident giving rise to his presence on the scene, is distinguishable. (130 C.A.3d 169, 170.)

(b) A police officer confronts certain risks when called to the scene of a crime, but there is no public policy supporting assumption of the risk of intentional abuse directed specifically and independently at the officer. Such an assault is a separate and different criminal act arising after the offense that occasions the officer's presence; and to permit the firefighter's rule to apply "would be to countenance unlimited violence directed at the policeman in the course of most routine duties." (130 C.A.3d 171.)

A number of other decisions apply the exception. (See *Bartholomew v. Klingler Co.* (1975) 53 C.A.3d 975, 978, 126 C.R. 191 [deputy sheriff fell through defective ceiling while answering silent burglar alarm; exception was

applicable]; *Kocan v. Garino* (1980) 107 C.A.3d 291, 296, 165 C.R. 712 [police officer, pursuing felony suspect into backyard of defendant's property, was injured when fence gave way; exception was applicable]; *Malo v. Willis* (1981) 126 C.A.3d 543, 178 C.R. 774 [police officer stopped defendant for speeding, and was then injured by defendant's negligent driving of unfamiliar vehicle; exception was applicable]; *Shaw v. Plunkett* (1982) 135 C.A.3d 756, 185 C.R. 571 [police officer in process of arresting prostitute in parking lot of motel was struck by automobile driven by prostitute's customer; exception was applicable]; *Rose v. Los Angeles* (1984) 159 C.A.3d 883, 888, 206 C.R. 49 [plaintiff was shot by fellow police officer while attempting to serve warrant; exception was applicable]; *Terry v. Garcia* (2003) 109 C.A.4th 245, 252, 134 C.R.2d 565 [negligence of truck driver was independent of misconduct that summoned officer to high-speed response to domestic disturbance incident; exception was applicable]; on effect of C.C. 1714.9 on the independent cause exception, see *supra*, §855.)

In *Seibert Sec. Services v. Superior Court* (1993) 18 C.A.4th 394, 22 C.R.2d 514, plaintiff police officer brought an arrested suspect to a hospital for an examination of possible injuries. While there, he was himself injured while trying to subdue a patient who had attacked a security guard. (For complete statements of facts, see *supra*, §849.) Relying on the firefighter's rule as a defense, defendant security company moved for summary judgment, but the motion was denied. Defendant then sought mandamus. *Held*, mandamus granted; the independent cause exception was not applicable.

(a) The trial judge erred in ruling that a triable issue of fact existed whether defendant's employees committed an independent act of negligence. The independent act exception applies only where the police officer or firefighter has come to a specific location to perform a specific immediate duty, and the defendant's unrelated negligent or intentional conduct increases the risks inherent in performing that duty. This was the situation in *Rose* where a police officer was carrying out a specific law enforcement duty, i.e., serving a warrant, when the negligence of a fellow officer increased the risk inherent *in that duty* and caused injury. (18 C.A.4th 411.)

(b) Here, on the other hand, plaintiff was performing one duty, i.e., completing paperwork relating to the injured suspect, when the alleged negligence of defendant's employees caused him to initiate the new and different law enforcement action of attempting to subdue the patient. While the conduct of defendant's employees might have been independent of the conduct that originally brought plaintiff to the hospital, it was factually undisputed that it was the *immediate cause* of plaintiff's presence in or near the holding cell in which the patient was struggling with one of defendant's employees. (18 C.A.4th 411.)

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1. In General.

6 Witkin Sum. Cal. Law Torts § 857

[§ 857] In General.

(1) *Former Law.* Prior to the statutory exception, the cases did not recognize an exception for wilful misconduct or intentional acts of the defendant. (See *Hubbard v. Boelt* (1980) 28 C.3d 480, 484, 169 C.R. 706, 620 P.2d 156 [plaintiff police officer pursued defendant speeding motorist who collided with third vehicle, scattering debris on roadway; attempting to avoid debris at high speed, plaintiff drove onto embankment and was injured; firefighter's rule was applicable despite claim that defendant's conduct was reckless]; *Lenthall v. Maxwell* (1982) 138 C.A.3d 716, 719, 188 C.R. 260 [plaintiff police officer was called to subdue violent offense involving firearms at defendant's home, and was shot and injured by defendant; rule was applicable].)

(2) *Liability for Wilful or Negligent Acts.* C.C. 1714.9 provides additional exceptions to the firefighter's rule for wilful or negligent acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, in any of the following situations:

(a) Where the conduct occurs after the defendant knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel. (C.C. 1714.9(a)(1).)

(b) Where the conduct causing injury violates a statute, ordinance, or regulation and was itself not the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel. (C.C. 1714.9(a)(2).)

(c) Where the defendant's conduct was intended to injure the plaintiff. (C.C. 1714.9(a)(3).)

(d) Where the defendant's conduct is arson as defined in P.C. 451. (C.C. 1714.9(a)(4).)

The statute does not preclude the reduction of an award because of the comparative fault of the plaintiff (C.C. 1714.9(b)), and the liability does not apply to an employer of a peace officer, firefighter, or emergency medical personnel (C.C. 1714.9(d)). However, the employer may be subrogated to the rights granted by the statute "to the extent of the workers' compensation benefits, and other liabilities of the employer, including all salary, wage, pension, or other

emolument paid to the employee or the employee's dependents." (C.C. 1714.9(c).)

The liability imposed is not intended to abrogate the independent cause exception (see *supra*, §§855, 856) as set forth in *Donohue v. San Francisco Housing Authority* (1993) 16 C.A.4th 658, 663, 20 C.R.2d 148, *supra*, §855. (C.C. 1714.9(e).) (See 71 Cal. L. Rev. 250; 14 Pacific L. J. 744; 15 Pacific L. J. 687; BAJI, No. 4.61; CACI, No. 453 [rescue doctrine and exceptions].)

The statute was applied *retroactively* in *Redlands v. Sorensen* (1985) 176 C.A.3d 202, 221 C.R. 728, *infra*, §858.

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2. Exception Applicable.

6 Witkin Sum. Cal. Law Torts § 858

[§ 858] Exception Applicable.

In *Redlands v. Sorensen* (1985) 176 C.A.3d 202, 221 C.R. 728, plaintiff, B, a city of Redlands police officer, responded to a radio announcement that the California Highway Patrol was in pursuit of two vehicles, one of which was probably stolen. He followed one of the vehicles at high speeds, flashing his police car's red lights and sounding his siren. Arriving at an area where children had been skating on the street, B deliberately rammed the suspect vehicle to prevent the driver from turning the corner into that street. He received workers' compensation benefits for his injuries, and then filed a third-party action against the driver of the fleeing vehicle. The city filed an action to recover the benefits paid to B, the two actions were consolidated, and the trial court, relying on *Hubbard v. Boelt* (1980) 28 C.3d 480, 169 C.R. 706, 620 P.2d 156, gave summary judgment against both B and the city. *Held*, reversed.

(a) "Whether classified as only a specific subcategory of the independent act exception or a separate exception, there is also a public policy exception to application of the fireman's rule for situations in which the negligence causing injury occurred after the plaintiff's presence was known or should have been known and involved the violation of a statute enacted to protect the class of persons of which the plaintiff is a member." (176 C.A.3d 207.) *Hubbard* rejected this public policy exception, holding that the statutes in question were designed to protect the general public, not pursuing police officers; i.e., the officer was not within the protected class of persons. (176 C.A.3d 209.)

(b) However, in 1982, a statute established liability for injury to a police officer "[n]otwithstanding statutory or decisional law to the contrary." (176 C.A.3d 209.) In 1983, it was replaced, clarified, and expanded. "It is inferable that the driver of the vehicle being chased either knew or should have known of the officer's presence and that, through the flashing red lights and siren, he was being ordered to stop. His continued high speed flight therefore inferably constituted a violation of a statute or ordinance designed for the protection of the officer." (176 C.A.3d 210.)

Gibbs v. Stetson (1988) 199 C.A.3d 1008, 245 C.R. 283, applies the exception of C.C. 1714.9(a)(1). Plaintiff, a deputy marshal acting as the bailiff in a criminal trial, took defendant into custody on order of the court. Defendant resisted, and in the course of subduing her, plaintiff was injured. He brought this action alleging negligence and battery. The trial court, relying on *Hubbard* gave summary judgment for defendant. *Held*, reversed. The statute was intended to abrogate the *Hubbard* holding and adopt the view of the *Hubbard* dissent. (199 C.A.3d 1014.) Here, defendant was

aware of the presence of the bailiff at the time of the injury, and plaintiff's causes of action clearly lie. (199 C.A.3d 1015.) (See *Yamaguchi v. Harnsmut* (2003) 106 C.A.4th 472, 479, 130 C.R.2d 706 [where participant in fight knew of police officer's presence and committed wilful act (throwing hot oil at officer), C.C. 1714.9 reimposed duty of ordinary care, which otherwise would have been abrogated by firefighter's rule].)

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3. Exception Not Applicable.

6 Witkin Sum. Cal. Law Torts § 859

[§ 859] Exception Not Applicable.

In *Calatayud v. California* (1998) 18 C.4th 1057, 77 C.R.2d 202, 959 P.2d 360, plaintiff, a city police officer, and defendant, a state highway patrol officer, were subduing a suspect. During the struggle, defendant's shotgun discharged, injuring plaintiff. *Held*, judgment for plaintiff reversed. Plaintiff's action was barred by the firefighter's rule, and the exception in C.C. 1714.9(a)(1) (*supra*, §857), for conduct of "any person" causing injury that occurs after the person knows or should have known of the presence of the peace officer, did not apply.

(a) The Legislature did not intend "any person" to include fellow public safety members who are jointly engaged in the discharge of their responsibilities. The evil to be prevented by the statute is the situation in which the firefighter's rule is invoked to shield a defendant whose original misconduct occasioned an officer's presence and whose subsequent acts caused injury. Thus, whatever literal meaning "any person" may have in other contexts, applying it to fellow officers also involved in responding to the original misconduct does not conform to the spirit of the statute. (18 C.4th 1068.)

(b) Extending C.C. 1714.9(a)(1) to jointly engaged fellow officers would raise substantial policy concerns inconsistent with the purpose of the statute. The potential for conflicting duties would be substantial. Imposing liability in these circumstances would override statutory immunities currently conferred on public safety personnel and their employers. The extension would compromise the cost-spreading rationale underlying the firefighter's rule. It would impair efficient judicial administration. Finally, extension would create serious anomalies, because C.C. 1714.9(d) preserves the exclusivity of the Workers' Compensation Act where the fellow officer is employed by the same agency, and it would be irrational to permit recovery only where the officer has another employer. (18 C.4th 1069.) (See *Farnam v. California* (2000) 84 C.A.4th 1448, 1450, 101 C.R.2d 642 [applying *Calatayud* reasoning in holding that defendant police officer was not liable when his canine companion bit fellow officer]; *McElroy v. California* (2002) 100 C.A.4th 546, 548, 122 C.R.2d 612 [C.C. 1714.9(a)(1) did not apply where highway patrol officers voluntarily joined in pursuit being conducted by city police officers and caused injury; highway patrol officers were "jointly engaged" within meaning of *Calatayud*].)

In *Seibert Sec. Services v. Superior Court* (1993) 18 C.A.4th 394, 22 C.R.2d 514, plaintiff police officer brought an

arrested suspect to a hospital for examination of possible injuries. While there, he was himself injured while trying to subdue a mental patient who had attacked a security guard. (For complete statement of facts, see *supra*, §849.) Relying on the firefighter's rule as a defense, defendant security company moved for summary judgment, but the motion was denied. Defendant then sought mandamus. *Held*, mandamus granted; the statutory exception to the firefighter's rule was not applicable under the facts presented.

(a) Under C.C. 1714.9(a)(1), an injured police officer may recover if the negligence occurs after the defendant knows or should have known of the officer's presence. Read literally, this provision would impose liability on defendant here because at the time of the alleged negligent act, i.e., the removal of handcuffs from a patient known to be violent, plaintiff's presence was known to defendant's employees. (18 C.A.4th 408.)

(b) However, reading the statute as applying to conduct occurring while a police officer is present, but *before* the officer has undertaken his or her duties of protection or crime prevention, would produce unreasonable results. For example, a driver on a mountain road who happened to observe a fire truck behind him or her and who then carelessly flicked a lighted cigarette butt out the window, thereby negligently causing a brush fire, would be liable for an injury incurred by a firefighter. However, there would be no liability if, at the time of the negligent act, the driver was unaware of the presence of the fire truck. "As long as conduct is merely negligent, and not wilful or malicious, there is no point in imposing liability on the defendant whose acts are likely to involve a specific police officer, while precluding liability on the defendant whose negligent acts require the summoning of an officer at random." (18 C.A.4th 409.)

(c) Hence, the trial judge erred in relying on C.C. 1714.9 in determining that a triable issue of fact existed concerning whether the negligent act occurred after defendant knew or should have known of plaintiff's presence. Because plaintiff was not performing any police duty with respect to the patient when the negligent act occurred, he could, for purposes of the firefighter's rule, just as well have been 20 blocks away instead of 20 feet. (18 C.A.4th 410.)

In a number of other decisions, the exception was not applicable. (See *Kelhi v. Fitzpatrick* (1994) 25 C.A.4th 1149, 31 C.R.2d 182, *supra*, §848 [exception was not applicable where highway patrol officer, responding to emergency created by truck losing its rear tires, was injured when tires bounced off retaining wall and struck him]; *Hodges v. Yarian* (1997) 53 C.A.4th 973, 985, 62 C.R.2d 130, *supra*, §847 [off-duty police officer was injured when he shot and killed burglary suspect in building where he lived; exception was not applicable]; *Tilley v. Schulte* (1999) 70 C.A.4th 79, 84, 82 C.R.2d 497 [although psychiatric patient intentionally shot plaintiff officer, psychiatrist was not vicariously liable under C.C. 1714.9(a)]; *Hamilton v. Martinelli & Associates* (2003) 110 C.A.4th 1012, 1026, 2 C.R.3d 168 [C.C. 1714.9(a)(1) applies only when officer is injured by separate act of negligence other than that which necessitated officer's presence; thus, where officer was present for training, allegedly negligent injury that occurred during training course was not within statutory exception].)

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F. Questions of Law and Fact.

1. Legal Duty.

a. Question of Law.

6 *Witkin Sum. Cal. Law Torts* § 860

[§ 860] Question of Law.

Unlike the factual issues of due care, causation, and contributory fault in the particular case (see *infra*, §866), the existence of a legal duty on the part of a person in the defendant's situation to the class of persons of which the plaintiff is a member (see *supra*, §837) is primarily for the court to determine, for a judicial declaration of duty may constitute a statement of law that operates as a precedent. (See *Artiglio v. Corning* (1998) 18 C.4th 604, 614, 76 C.R.2d 479, 957 P.2d 1313, *infra*, §1061, citing the text; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 C.4th 26, 57, 77 C.R.2d 709, 960 P.2d 513, citing the text; *Wright v. Arcade School Dist.* (1964) 230 C.A.2d 272, 40 C.R. 812; *Galanis v. Mercury Int. Ins. Underwriters* (1967) 247 C.A.2d 690, 695, 55 C.R. 890; *Fuller v. Standard Stations* (1967) 250 C.A.2d 687, 691, 58 C.R. 792; *Matthias v. United Pac. Ins. Co.* (1968) 260 C.A.2d 752, 754, 67 C.R. 511; *Harris v. De La Chapelle* (1976) 55 C.A.3d 644, 647, 127 C.R. 695; *Peter W. v. San Francisco Unified School Dist.* (1976) 60 C.A.3d 814, 822, 131 C.R. 854, *supra*, §8, citing the text; *Lundy v. California Realty* (1985) 170 C.A.3d 813, 818, 216 C.R. 575, citing the text; *Clarke v. Hoek* (1985) 174 C.A.3d 208, 214, 219 C.R. 845, *infra*, §1064, citing the text; *St. Francis Med. Center v. Superior Court* (1987) 194 C.A.3d 668, 671, 239 C.R. 765; *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 C.A.3d 1089, 1095, 283 C.R. 53, *infra*, §864; *Nichols v. Keller* (1993) 15 C.A.4th 1672, 1686, 19 C.R.2d 601, 1 Cal. Proc. (4th), Attorneys, §320; *Jackson v. Ryder Truck Rental* (1993) 16 C.A.4th 1830, 1837, 20 C.R.2d 913; *Ord & Norman v. Surplus Line Assn. of Calif.* (1995) 38 C.A.4th 1276, 1279, 45 C.R.2d 292; *DiRosa v. Showa Denko K.K.* (1996) 44 C.A.4th 799, 805, 52 C.R.2d 128; *Hernandez v. Pomona* (1996) 49 C.A.4th 1492, 57 C.R.2d 406, *supra*, §304; *Kockelman v. Segal* (1998) 61 C.A.4th 491, 498, 71 C.R.2d 552, *infra*, §1056; *Asplund v. Selected Inv. in Financial Equities* (2000) 86 C.A.4th 26, 50, 103 C.R.2d 34 [existence and scope of duty are legal question that depends on nature of activity involved and on parties' relationship to it]; *Rest.2d, Torts* §328B; 3 Harper, James & Gray 2d §18.8; 57A *Am.Jur.2d* (2004 ed.) *Negligence* §17 et seq.) (See *Dutton v. Pacifica* (1995) 35 C.A.4th 1171, 1175, 41 C.R.2d 816 [existence of duty "must be decided by the court on a case-by-case basis"].)

Ballard v. Uribe (1986) 41 C.3d 564, 572, footnote 6, 224 C.R. 664, 715 P.2d 624, citing the text, makes the following distinctions:

(a) Duty is decided by the court, not the jury. Foreseeability of a particular kind of harm plays a significant rule in determining the issue; "but a court's task--in determining 'duty'--is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether

the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." (41 C.3d 573, footnote 6.)

(b) The jury considers foreseeability in two "more focused, fact-specific" settings. "First, the jury may consider the likelihood of foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury." (41 C.3d 573, footnote 6.)

West's Key Number Digest, Negligence k.692

SUPPLEMENT: [This section is current through the latest supplement]

See *Baptist v. Robinson* (2006) 143 C.A.4th 151, 167, 49 C.R.3d 153 [winery had no duty to train employee to secure agricultural bin to pickup truck, and thus was not liable in negligence for injuries to motorcyclist who struck bin after it fell from employee's truck; bin was used for fermenting, not hauling, and thus it was not foreseeable that employee would use bin for hauling]; 3 Harper, James & Gray 3d §18.8.

Nichols case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §295.



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1. Legal Duty.

b. Illustrations.

1. School District and Children on School Property.

6 *Witkin Sum. Cal. Law Torts* § 861

[§ 861] School District and Children on School Property.

In *Raymond v. Paradise Unified School Dist. of Butte* (1963) 218 C.A.2d 1, 8, 31 C.R. 847, defendant school district provided bus transportation. A major stop was at the high school premises, where high school students were discharged and some elementary school children taken on. The loading zone, used by several buses, was a semicircular driveway next to the high school lawn. Plaintiff, a 7-year-old elementary student, ran to the bus, placed his hand on it while it was operating, and fell backward, suffering injuries. The evidence showed that the driver had warned children not to approach the bus until it stopped, that plaintiff had received this warning, that no driver had called the matter to the attention of the school authorities, and that they had made no provision for supervision of the area. *Held*, judgment for plaintiff against the district affirmed.

(a) *Factors involved*. "The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow citizens--such are the factors which play a role in the determination of duty." (218 C.A.2d 8.)

(b) *Application*. There was no dispute about the district's duty in connection with the actual movement of buses; the issue was conduct in a bus stop area, and it presented many practical problems, e.g., the number of stops, the location requiring cooperation of owners, and children playing. Hence, it was undesirable to attempt a general formulation of the duty with respect to supervision at bus stops. But as to this accident, the following considerations were deemed controlling: (1) The area was not an isolated roadside stop, but a principal pickup and discharge point; (2) the district had knowledge of the presence of primary school students lacking the judgment of high school students; (3) the district had complete control of the location, and had employees nearby available for supervision. Hence, "as a matter of law defendant had a duty to provide adequate supervisory measures to protect children using the bus loading zone on the grounds of the high school." (218 C.A.2d 11.)

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2. Negligent Motorist and Tow Truck Driver.

6 Witkin Sum. Cal. Law Torts § 862

[§ 862] Negligent Motorist and Tow Truck Driver.

In *Bryant v. Glastetter* (1995) 32 C.A.4th 770, 38 C.R.2d 291, defendant was seen by highway patrol officers weaving in and out of traffic, and was pulled over to the side of the road. Field sobriety tests determined that she was driving under the influence, and the police called decedent tow truck driver to haul her car away. While decedent was involved in his duties, he was hit and killed by a third party. Plaintiffs, the relatives of decedent, brought this wrongful death action against defendant. Defendant filed a successful demurrer, and the action was dismissed. *Held*, affirmed; under *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086, defendant owed decedent no duty to prevent him, while working, from being hit by a third party.

(a) *Foreseeability of harm*. "The risk reasonably to be perceived defines the duty to be obeyed." (32 C.A.4th 778, quoting *Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339, 162 N.E. 99, *supra*, §837.) Defendant, of course, owed a duty to decedent, and to every other person on the road, not to drive under the influence. That conduct might reasonably be expected to cause a collision by defendant's car with another vehicle or a pedestrian, or with an inanimate object. However, the harm suffered by decedent was not a "harm of a kind normally to be expected" as a consequence of negligent driving. (32 C.A.4th 779, quoting *Rest.2d, Torts* §281.) Indeed, even without being intoxicated, defendant might have ended up on the side of the road in need of a tow truck for any number of reasons. Other than making it more probable that decedent would be in the place where the accident happened, her consumption of alcohol did not make more probable the accident that occurred. (32 C.A.4th 780.)

(b) *Closeness of connection between defendant's conduct and decedent's injury*. Related to the question of foreseeability is the question of the closeness of the connection between the defendant's conduct and the injury suffered. Defendant's negligence consisted of driving under the influence of alcohol. There is no logical cause-and-effect relationship between that negligence and the harm suffered by decedent except for the fact that it placed decedent in a position to be acted on by the negligent third party. Here, defendant was not even directly responsible for having brought decedent to the place where he was injured, because he had been contacted by the police officers. (32 C.A.4th 782.)

(c) *Consequences to community of imposing duty*. If defendant's initial negligence expands her liability beyond its

usual scope to include harm resulting from the fact that she needed decedent's services, a rule would be established requiring a court to examine the culpability of a defendant in needing the help of a tow truck. (32 C.A.4th 782.) As a matter of policy, it is unwise to create an incentive for drivers whose cars are disabled to attempt self-help solutions rather than to call for assistance. Even if those drivers were negligent in having created the initial problem, they should be encouraged to seek help in resolving it in the interest of the safety of all drivers. Although society has a great interest in discouraging driving under the influence of alcohol, there is the countervailing interest in encouraging drivers to obtain the help they need. (32 C.A.4th 782.)

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3. Negligent Motorist and Child Not Yet Conceived.

6 *Witkin Sum. Cal. Law Torts* § 863

[§ 863] Negligent Motorist and Child Not Yet Conceived.

In *Hegyes v. Unjian Enterprises* (1991) 234 C.A.3d 1103, 286 C.R. 85, the issue on appeal was: "Does a negligent motorist owe a legal duty of care to the subsequently conceived child of a woman who is injured in an automobile accident?" (234 C.A.3d 1110.) Plaintiff, a minor, sued defendant, the employer of an employee whose negligent operation of an automobile seriously injured plaintiff's mother (O'Hare) before plaintiff was conceived. A prior proceeding by O'Hare against defendant was settled, and defendant was released from liability for the injuries to O'Hare. As a result of the accident O'Hare was fitted with a lumbo-peritoneal shunt, and 2 years later she became pregnant with plaintiff. During the pregnancy, the fetus compressed the shunt, and plaintiff was delivered by cesarean section 50 days premature. In the present action, plaintiff alleged that she suffered injuries related to the premature birth due to the negligence of defendant. *Held*, defendant owed no duty to plaintiff

(a) Plaintiff relied on the wrongful life cases in which liability was imposed for preconception negligence on a medical professional or a product manufacturer. But no such liability has been imposed in the absence of a special relationship giving rise to such a duty. (234 C.A.3d 1113 et seq., reviewing California cases; see *infra*, §979 et seq.) "[T]he prevailing principle is clear. A special relationship between physician and patient may, in certain circumstances where the conduct is directly related to the resulting pregnancy and birth, give rise to a duty to the subsequently conceived child. Unlike in the present case, the defendants held liable in those cases were health care providers who were retained to provide genetic counseling to the respective parents. Understandably, their negligence in performing that function led the courts to recognize a duty owed to the foreseeably impaired children. Those defendants were specifically consulted for conception and pregnancy related purposes, and the parents relied on the doctors' advice in deciding *whether* to conceive a child or to terminate a pregnancy." (234 C.A.3d 1118.)

(b) No special relationship exists between motorists, and the ordinary principles of negligence apply. (234 C.A.3d 1118, 1119.) "Those principles cannot be validly extended to encompass a duty owed to a child conceived several years after her mother was involved in an automobile accident. ... The implications associated with finding a duty under the present facts are indeed staggering, and the trial court properly refused to find one." (234 C.A.3d 1119.)

(c) Liability for preconception negligence in other jurisdictions hinges on the existence of duty. (234 C.A.3d 1119)

et seq., analyzing cases.) Plaintiff's theory that actual causation substitutes for duty, and that the existence of damage obviates the necessity of a finding that a duty was violated, is untenable. (234 C.A.3d 1134.)

There was one dissenting justice. (234 C.A.3d 1153.)

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4. Lender and Borrower.

6 Witkin Sum. Cal. Law Torts § 864

[§ 864] Lender and Borrower.

In *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 C.A.3d 1089, 283 C.R. 53, plaintiff purchased a residence, and executed a promissory note and deed of trust for \$ 129,000. He sought to refinance with a \$ 100,000 loan from defendant. Defendant conducted an appraisal of the property, found it in excellent condition, and approved the loan with a deed of trust as security. In the present action against defendant lender, plaintiff alleged that he relied on the representations of good condition in the appraisal report; that later a county inspection revealed defects and building code violations requiring an expenditure of \$ 50,000 in repairs; and that the property was "red-tagged" as unsafe for habitation, as a result of which plaintiff was forced to vacate it and obtain another residence, at considerable expense. Defendant answered and cross-complained for judicial foreclosure, alleging that plaintiff was in default on the note and that defendant elected to declare the whole sum immediately due. Defendant then moved for summary judgment on its cross-complaint for foreclosure and a deficiency judgment, and plaintiff argued that there were triable issues with respect to his entitlement to damages as a setoff. *Held*, summary judgment for defendant affirmed.

(a) "The parties have not identified, nor have we found, any California case specifically addressing whether a lender has a duty of care to a borrower in appraising the borrower's collateral to determine if it is adequate security for a loan. However, as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (231 C.A.3d 1095.)

(b) Defendant performed the appraisal in the usual manner to protect its *own* interest in adequate security for the loan. The complaint did not allege, and the summary judgment papers did not indicate, that the appraisal was intended to induce plaintiff to enter into the loan transaction or to assure him that his collateral was sound. Thus, defendant owed no duty of care to plaintiff. (231 C.A.3d 1096, 1099.)

(c) "While it was foreseeable the appraisal might be considered by plaintiff in completing the loan transaction, the foreseeability of harm was remote. Plaintiff was in as good a position as, if not a better position than, defendant to know the value and condition of the property. One who seeks financing to purchase real property has many means available to assess the property's value and condition, including comparable sales, advice from a realtor, independent appraisal,

contractors' inspections, personal observation and opinion, and the like. Here, plaintiff already had purchased the house and had lived in it for two years, apparently without complaint, before applying to defendant for a refinancing loan." (231 C.A.3d 1099.)

(d) Creation of a lender's duty of care in the preparation of an appraisal would adversely affect consumers. "A lender which currently obtains a cursory appraisal at minimal cost to the borrower in order to satisfy itself that the collateral provides adequate security for the loan would be compelled by the threat of negligent appraisal liability to undertake a comprehensive examination of the collateral. The added cost of such a detailed appraisal undoubtedly would be passed on to the borrower. For housing loans, this consequence would be contrary to the public interest in reducing the cost of acquiring housing." (231 C.A.3d 1100.)

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5. Other Illustrations.

6 Witkin Sum. Cal. Law Torts § 865

[§ 865] Other Illustrations.

(1) *Duty of Utility*. In *Schauf v. Southern Calif. Edison Co.* (1966) 243 C.A.2d 450, 52 C.R. 518, defendant, acting under its franchise, placed a power pole in a proper place near an intersection. Three years later, the county installed a stop sign at a place where the pole obscured it for westbound traffic. The county did not relocate the sign or request the relocation of the pole. *Held*, defendant had no duty to take steps to protect the public against this hazard.

(a) The franchise would not relieve the utility from liability for negligence in installing or maintaining a pole or other structure (see *supra*, §188), but there was no similar negligence here. The dangerous condition was in the relationship of the stop sign to the pole, for which the county was responsible. (243 C.A.2d 460.)

(b) The remaining question was whether defendant, not originally negligent in the creation of the condition, nevertheless, by reason of constructive notice of the danger and the power to correct it by relocating the pole, had a duty to take affirmative steps to protect motorists. There is no basis for imposing that duty. There was no special relationship (see *infra*, §1038 et seq.) and no strong policy consideration: Defendant could assume that the governmental agency would act properly by moving the badly placed sign or posting an advance warning, and injured persons have a remedy against the governmental agency for failure to repair the defective sign. (243 C.A.2d 463.)

(2) *Duty of Insurer*. In *Galanis v. Mercury Int. Ins. Underwriters* (1967) 247 C.A.2d 690, 695, 55 C.R. 890, the court held that an insurance company selling flight insurance through vending machines is under no duty to investigate to determine the possible suicidal intentions of a buyer. (247 C.A.2d 696.) And in *Stopp v. Mutual of Omaha Ins. Co.* (1970) 4 C.A.3d 239, 84 C.R. 344, the court held that there was no duty to post signs or indicate on the policy that it would not cover death or injury caused by the voluntary act of the insured. Hence, plaintiffs, heirs of passengers who died in a crash allegedly caused by another passenger who had purchased large amounts of insurance from defendant, were not entitled to recover from defendant. (See 3250 Wilshire Boulevard Bldg. v. *Employers Ins. of Wausau* (1995) 39 C.A.4th 1277, 1279, 46 C.R.2d 399 [insurance information clearinghouse that had no regulatory power over insurers as matter of law was not in privity with, and had no duty toward, plaintiff, who purchased policy from nonadmitted insurer that became insolvent].)

In *Matthias v. United Pac. Ins. Co.* (1968) 260 C.A.2d 752, 754, 67 C.R. 511, plaintiff was injured by a fall on a defective stairway of rented premises. He sued the owner's insurer, alleging that with actual knowledge of the defective condition, it issued a liability policy instead of advising or directing the owner to make the stairway safe. *Held*, judgment for defendant on demurrer affirmed. Balancing the factors: (a) The activity out of which the injury arose--writing of public liability insurance--has obvious social utility, in spreading losses and assuring plaintiffs of recovery up to policy limits. (b) The risk of negligence by the insured owner is the very risk against which the insurance issues. To accept plaintiff's argument would subject the insurer to direct and unlimited liability in every case in which the risk materialized. This would defeat the social purposes--making insurance more expensive for the insured or less attractive to the insurer, and would tend to limit insurance to cases in which it serves no purpose, i.e., where there is no possibility of negligence and loss. (260 C.A.2d 754.) (c) The insurer has no reason to foresee that the owner would fail to repair or maintain the premises merely because of limited liability coverage. (260 C.A.2d 755.)

(3) *Duty of Police.* In *Munoz v. Union City* (2004) 120 C.A.4th 1077, 16 C.R.3d 521, officer W and other police officers, responding to an emergency call, found L, high on drugs and hallucinating, standing in the front doorway with a knife. For about 15 minutes, W unsuccessfully tried to persuade L to put down the knife. L was then shot and killed by W when she allegedly moved toward other occupants of the house. With respect to duty, the court, relying heavily on *Adams v. Fremont* (1998) 68 C.A.4th 243, 80 C.R.2d 196, *infra*, §1044, distinguished police activity prior to the shooting from the shooting itself.

(a) "[L]ike *Adams*, the need to protect the overall safety of the community by encouraging law enforcement officers to exercise their best judgment in deciding how to deal with public safety emergencies vastly outweighs the societal value of imposing tort liability for the judgments they make in emergency situations. *Adams* stands for the proposition that law enforcement officers are shielded from ordinary negligence claims based on their response to public safety emergencies when those efforts prove to be ineffective in preventing self-inflicted harm or harm caused by third parties. Applied to the present case, *Adams* means that the conduct of the police--Woodward's decisions as to how to deploy his officers at the scene, the efforts made in an attempt to defuse the situation as safely as possible, and other such factors--cannot subject appellants to liability. For these reasons, finding a tort duty and submitting to the jury the question of whether police decisions fell below the standard of care, was error." (120 C.A.4th 1097.)

(b) However, under *Grudt v. Los Angeles* (1970) 2 C.3d 575, 86 C.R. 465, 468 P.2d 825, and *Munoz v. Olin* (1979) 24 C.3d 629, 156 C.R. 727, 596 P.2d 1143, there is a duty on the part of police officers to use reasonable care in deciding to use and in fact using deadly force. (120 C.A.4th 1099.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Duty of Driver.* In *Gilmer v. Ellington* (2008) 159 C.A.4th 190, 70 C.R.3d 893, defendant driver, after yielding his right of way, gestured for a left-turning motorist to proceed. The left-turning motorist did so, striking plaintiff motorcyclist, who had refused to yield his right-of-way. In the ensuing action, the trial court granted defendant's motion for judgment on the pleadings. *Held*, affirmed; under three of the factors enunciated in *Rowland v. Christian* (1968) 69 C.2d 108 70 C.R. 97, 443 P.2d 561, text, §833, defendant owed no duty of care to plaintiff.

(a) The collision occurred because plaintiff refused to yield his right-of-way to the left-turning motorist. Defendant merely gestured for the left-turning motorist to proceed as an act of courtesy, and thus bore no moral blame for the resulting collision. (159 C.A.4th 198.)

(b) Holding defendant liable under these circumstances would place an unreasonable burden on yielding drivers by imposing on them a duty of assuring that left-turning motorists could safely cross all lanes of traffic. (159 C.A.4th 199.)

(c) The relaxed vigilance by left-turning motorists would result in negative consequences to the community, such as "road rage" and suits against courteous drivers. (159 C.A.4th 199.)



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2. Due Care and Causation Are Questions of Fact.

6 Witkin Sum. Cal. Law Torts § 866

[§ 866] Due Care and Causation Are Questions of Fact.

In the usual negligence case, the elements of due care and proximate cause present questions of fact for the jury. A verdict and judgment for or against the plaintiff will be upheld on appeal, even though there is no conflict in the evidence, if different conclusions can rationally be drawn from the evidence. (See *Wahlgren v. Market Street Ry. Co.* (1901) 132 C. 656, 663, 62 P. 308, 64 P. 993; *Hoff v. Los Angeles Pac. Co.* (1910) 158 C. 596, 599, 112 P. 53; *Mark v. Pacific Gas & Elec. Co.* (1972) 7 C.3d 170, 174, 101 C.R. 908, 496 P.2d 1276, *infra*, §§1096, 1097, ; *Weirum v. RKO General* (1975) 15 C.3d 40, 46, 123 C.R. 468, 539 P.2d 36, *infra*, §914; *Phoenix Assur. Co., Ltd., of London v. Texas Holding Co.* (1927) 81 C.A. 61, 68, 252 P. 1082; *Terrell v. Key System* (1945) 69 C.A.2d 682, 686, 159 P.2d 704; *McIntyre v. Doe & Roe* (1954) 125 C.A.2d 285, 287, 270 P.2d 21; *Williams v. Pacific Gas & Elec. Co.* (1960) 181 C.A.2d 691, 701, 5 C.R. 585; *Ishmael v. Millington* (1966) 241 C.A.2d 520, 525, 50 C.R. 592; *Rice v. Southern Pac. Co.* (1967) 247 C.A.2d 701, 706, 55 C.R. 840; *Greyhound Lines v. Superior Court* (1970) 3 C.A.3d 356, 360, 83 C.R. 343, *infra*, §923; *Diamond Springs Lime Co. v. American River Constructors* (1971) 16 C.A.3d 581, 593, 597, 94 C.R. 200; *DiRosa v. Showa Denko K.K.* (1996) 44 C.A.4th 799, 806, 52 C.R.2d 128 [two of four elements to be proved to establish negligence per se under *Ev.C.* 669 (*infra*, §§873, 874), i.e., that defendant violated statute, ordinance, or regulation of public entity, and that violation proximately caused injury, "are normally considered questions for the trier of fact"]; *Kockelman v. Segal* (1998) 61 C.A.4th 491, 498, 71 C.R.2d 552, *infra*, §1056 [whether psychiatrist breached duty to prevent suicide of patient was question of fact]; *Munoz v. Union City* (2004) 120 C.A.4th 1077, 1101, 16 C.R.3d 521 [whether police officer acted with due care in shooting person high on drugs was question of fact]; *Rest.2d, Torts* §328C.)

As a result, few of the decisions actually lay down rules of what constitutes due care or negligence or what intervening acts are foreseeable. Instead, the large majority of the cases that uphold recovery for the plaintiff merely purport to decide that, in the light of the evidence produced, the jury could have inferred that the defendant did not act with due care and that an intervening act was foreseeable. These cases are generally presented to the appellate court on (a) an appeal by the defendant from a judgment for the plaintiff in accordance with a verdict in his or her favor, or (b) an appeal by the plaintiff from a judgment for the defendant following a nonsuit or directed verdict, or from a judgment for the defendant notwithstanding the verdict. Pursuant to the basic principle declared in these decisions, a verdict against the plaintiff would likewise be sustained on appeal in the absence of reversible error.

The significance to this limited appellate review (which is not, of course, confined to negligence cases or to tort

cases) is that the statement of the holdings in terms of propositions of law is, theoretically as well as practically, misleading, although there appears to be no other convenient way of stating them without continual repetition of language to the effect that "the jury could have inferred" *as a fact*, the *legal conclusion* of negligence, proximate cause, or contributory negligence.

In rare cases, the evidence will support a finding of negligence or lack of negligence as a matter of law. (See *Toschi v. Christian* (1944) 24 C.2d 354, 364, 149 P.2d 848; *Gray v. Brinkerhoff* (1953) 41 C.2d 180, 183, 258 P.2d 834; *Richards v. Stanley* (1954) 43 C.2d 60, 66, 271 P.2d 23; *Huetter v. Andrews* (1949) 91 C.A.2d 142, 145, 204 P.2d 655 [judgment for defendants reversed]; *Whinery v. Southern Pac. Co.* (1970) 6 C.A.3d 126, 132, 85 C.R. 649; *Rest.2d, Torts* §285, Comment f; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §21 et seq.)

West's Key Number Digest, Negligence k.693-

SUPPLEMENT: [This section is current through the latest supplement]



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A. Standard of Due Care: In General.
1. The Ordinarily Prudent Person.

6 *Witkin Sum. Cal. Law Torts* § 867

[§ 867] The Ordinarily Prudent Person.

The duty is of ordinary care under all the circumstances, and it varies with changing circumstances. The standard is that of the "ordinary prudent or reasonable person." (*Tucker v. Lombardo* (1956) 47 C.2d 457, 464, 303 P.2d 1041; *Phoenix Assur. Co., Ltd., of London v. Texas Holding Co.* (1927) 81 C.A. 61, 73, 252 P. 1082; *Fouch v. Werner* (1929) 99 C.A. 557, 565, 279 P. 183; *Beck v. Sirota* (1941) 42 C.A.2d 551, 557, 109 P.2d 419 ["The amount of care must be in proportion to the danger to be avoided and the consequences reasonably to be anticipated"]; see *Rest.2d, Torts* §§283, 289; 3 Harper, James & Gray 2d §16.2; Dobbs, *The Law of Torts* §116 et seq.; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §132 et seq.; BAJI, Nos. 3.10, 3.11; CACI, No. 401.)

The principle just stated is subject to several practical qualifications: (a) Certain types of persons, or persons engaging in certain types of conduct, are required to exercise a higher degree of care, although this requirement of greater care may be explained in terms of reasonable care *under the circumstances*. (See *infra*, §§869, 918.) (b) A statute regulating certain kinds of conduct may conclusively establish the minimum standards of ordinary care. (See *infra*, §871.) (3) Proof at trial of care and lack of care may be affected by the jury's power to determine the issue in accordance with the inference of negligence under the doctrine of *res ipsa loquitur*. (See 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §118 et seq.)

It has been said that the test is not what the *jurors* would have done in the defendant's place under the circumstances, and an instruction to that effect has been held improper. (*Freeman v. Adams* (1923) 63 C.A. 225, 226, 218 P. 600.) However, later cases have declared instructions of this type to be unobjectionable. (See *Kelley v. Hodge Trans. System* (1925) 197 C. 598, 607, 242 P. 76.) In *Chalmers v. Hawkins* (1926) 78 C.A. 733, 741, 248 P. 727, the court said: "The jury represent the ideal prudent man whose assumed course of conduct under given circumstances constitutes ordinary care; and whether such care was used in view of the facts of a particular case ... is necessarily determined by the sense and experience of the individual jurors collectively expressed in the verdict."

Many articles and notes are available on negligence actions classified under headings descriptive of the subject matter or the parties. (See listing in 4 *Cal. Proc.* (4th), *Pleading*, §539; and see 12 *Am.Jur.2d* (1997 ed.), *Boats and Boating* §35 et seq.; 15 *Proof. of Facts* 411 [swimming accidents]; 23 *Proof. of Facts* 393 [toys causing injury or disease]; 31 *Proof of Facts* 3d 1 [nonuse of computer]; 31 *Proof of Facts* 3d 145 [motorist's signaling vehicle or pedestrian to proceed or pass]; 46 *Proof of Facts* 3d 1 [ski accidents]; 7 *Am.Jur. Trials* 1 [motorboat accidents]; 7

Am.Jur. Trials 643 [swimming pool accidents]; 14 Am.Jur. Trials 101 [glass door accidents]; 15 Am.Jur. Trials 147 [skiing accidents]; 1 *Lincoln L. Rev.* 52 [motorboat accidents]; 75 *A.L.R.2d* 792 [merry-go-rounds]; 94 *A.L.R.2d* 1431 [winter sports--skiing, tobogganing, bobsledding]; 14 *A.L.R.3d* 629 [funeral homes]; 15 *A.L.R.3d* 1420 [pool halls]; 20 *A.L.R.3d* 1395 [swimming pool accidents]; 24 *A.L.R.3d* 945 [carnival games]; 24 *A.L.R.3d* 1447 [skiing]; 26 *A.L.R.3d* 1314 [drive-in movie theatres]; 33 *A.L.R.3d* 316 [ice skating]; 38 *A.L.R.3d* 10 [parking lots]; 38 *A.L.R.3d* 419 [dance halls]; 41 *A.L.R.3d* 690 [automatic car washes]; 41 *A.L.R.3d* 986 [power lawnmowers]; 42 *A.L.R.3d* 1442 [snowmobiles, skimobiles]; 45 *A.L.R.3d* 1428 [drive-in restaurants]; 63 *A.L.R.3d* 1252 [cemeteries]; 95 *A.L.R.3d* 203 [ski lifts]; 2 *A.L.R.4th* 795 [dune buggies]; 13 *A.L.R.4th* 623 [race tracks]; 66 *A.L.R.4th* 622 [golf carts]; 38 *A.L.R.5th* 107 [skating rinks]; 49 *A.L.R.5th* 659 [wire, structure, or pole struck by aircraft].)

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SUPPLEMENT: [This section is current through the latest supplement]

See 3 Harper, James & Gray 3d §16.2.

Negligence actions classified under descriptive headings:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §578.



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2. Foreseeability of Unreasonable Risk.

6 Witkin Sum. Cal. Law Torts § 868

[§ 868] Foreseeability of Unreasonable Risk.

(1) *Theory of Unreasonable Risk.* Due care requires the avoidance of any "unreasonable risk," which means any "unduly dangerous conduct." The basic question is whether the risk of danger to others outweighs the utility of the act or the manner in which it is done; if so, the risk is unreasonable and the act is negligent. (See *Crane v. Smith* (1943) 23 C.2d 288, 299, 144 P.2d 356 ["If the actor reasonably can accomplish the same result by other conduct which involves less opportunity for harm to others, the risk incurred in the manner of doing business which resulted in injury is clearly unreasonable"]; *Rest.2d, Torts* §§282, 289, 291, 292, 293, 297; *Dobbs, The Law of Torts* §143 et seq.; 63 *Harv. L. Rev.* 671; 47 *Hastings L. J.* 61 [explaining reasonableness to jurors]; 52 *Hastings L. J.* 207 [video game manufacturer's tort liability based on violent video games]; 48 *Stanf. L. Rev.* 311 [Reasonableness and Rationality in Negligence Theory]; *BAJI*, No. 3.10; *CACI*, No. 401.)

(2) *Test of Foreseeability.* Conduct is negligent where some unreasonable risk of danger to others would have been foreseen by a reasonable person. (See *Crane v. Smith*, *supra*, 23 C.2d 298; *Dillon v. Legg* (1968) 68 C.2d 728, 739, 69 C.R. 72, 441 P.2d 912, *infra*, §1008; *Weirum v. RKO General* (1975) 15 C.3d 40, 46, 123 C.R. 468, 539 P.2d 36, *infra*, §914; *Sweatman v. Los Angeles Gas & Elec. Corp.* (1929) 101 C.A. 318, 322, 281 P. 677; *Darnold v. Voges* (1956) 143 C.A.2d 230, 240, 300 P.2d 255; *George A. Hormel & Co. v. Maez* (1979) 92 C.A.3d 963, 969, 155 C.R. 337; *Dutton v. Pacifica* (1995) 35 C.A.4th 1171, 41 C.R.2d 816 [defendant police officer owed no duty to plaintiff, who, when ordered to leave park, was directed to ride in back of truck that was subsequently involved in accident]; *Chaney v. Superior Court* (1995) 39 C.A.4th 152, 157, 46 C.R.2d 73, *infra*, §1058 [sexual abuse of child visiting assailant's home was not reasonably foreseeable by assailant's wife]; *Ludwig v. San Diego* (1998) 65 C.A.4th 1105, 1110, 76 C.R.2d 809 [traffic inspector was not negligent in denying permission to place cement-like substance in trench, where there was no evidence that collapse of trench was reasonably foreseeable]; *Rest.2d, Torts* §§284, 289, 291; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §124 et seq.; 63 *Harv. L. Rev.* 671; 65 *Harv. L. Rev.* 188; 100 *A.L.R.3d* 942; 15 *A.L.R.4th* 1148 [liability of one other than electric power or light company or its employee for interruption, failure, or inadequacy of electric power]; *BAJI*, No. 3.11.)

As the court said in *Brandenburg v. Pacific Gas & Elec. Co.* (1946) 28 C.2d 282, 285, 169 P.2d 909: "Thus an actor's duties vary according to whether he faces a child or an adult, a blind man or one who can see, one who sleeps or one who is awake. His duties also vary according to whether he may reasonably expect another to be aware of danger or must know that another's sense of security has been relaxed."

The foreseeability test of unreasonable risk has been used in the analysis of either duty or proximate cause: "Many of the circumstances involved in a consideration of the foreseeability of an occurrence which will determine the existence of a duty to exercise due care toward a particular person may ... be equally pertinent in considering the test of foreseeability of an injury to determine whether a precedent act of negligence proximately caused that injury." (*Bilyeu v. Standard Freight Lines* (1960) 182 C.A.2d 536, 542, 6 C.R. 65.) "The California Supreme Court recently has considered the superseding intervening cause cases, as one eminent scholar in the field of torts has declared courts should do, not as presenting issues of causation, or even of proximate (i.e., legal) causation, but as a problem of determining the duty of the defendant to protect the person injured against the particular intervening cause." (*Premo v. Grigg* (1965) 237 C.A.2d 192, 195, 46 C.R. 683, *infra*, §1197; *Sagadin v. Ripper* (1985) 175 C.A.3d 1141, 1159, 221 C.R. 675, quoting the text; cf. *Gonzalez v. Derrington* (1961) 56 C.2d 130, 133, 14 C.R. 1, 363 P.2d 1 [analysis solely in terms of proximate cause].)

West's Key Number Digest, Negligence k.213, 387, 431, 504

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6 Witkin Sum. Cal. Law Torts § 869

[§ 869] Degrees of Care and Negligence.

The division of negligence into degrees ("slight," "ordinary," and "gross") has been criticized by modern courts and writers. It has been pointed out that frequently, in cases where a higher "degree" of care is said to be required, all that is meant is that the particular circumstances require a greater *amount* of care, but that the *standard* remains the same: ordinary care under the circumstances. (See *Henderson v. Los Angeles Traction Co.* (1907) 150 C. 689, 693, 89 P. 976; *Donnelly v. Southern Pac. Co.* (1941) 18 C.2d 863, 870, 118 P.2d 465; *Polk v. Los Angeles* (1945) 26 C.2d 519, 525, 159 P.2d 931; *De Greek v. Freeman* (1930) 108 C.A. 645, 646, 291 P. 854; *Beck v. Sirota* (1941) 42 C.A.2d 551, 557, 109 P.2d 419; *McNear v. Pacific Greyhound Lines* (1944) 63 C.A.2d 11, 18, 146 P.2d 34; *Rangel v. Badolato* (1955) 133 C.A.2d 254, 259, 284 P.2d 138; *Continental Ins. Co. v. American Protection Industries* (1987) 197 C.A.3d 322, 330, 242 C.R. 784 [adoption of comparative negligence doctrine removed need for degrees of negligence]; 57A *Am.Jur.2d* (1989 ed.), *Negligence* §218 et seq.)

In *Lasater v. Oakland Scavenger Co.* (1945) 71 C.A.2d 217, 162 P.2d 486, the court criticized the proposed instruction that plaintiff, a pedestrian, crossing a street in the dark while dressed in black, should have used "a greater degree of care" for her own safety: "The degree of care required of a person for his own safety is always the same, i.e., ordinary care, although in some circumstances the quantum or amount of care required to reach the degree of ordinary care is greater than in others. While neither courts nor lawyers have uniformly observed this distinction in terminology, it is a substantial one and well established in our law." (71 C.A.2d 221.) (See *Dalzell v. Los Angeles* (1948) 88 C.A.2d 271, 276, 198 P.2d 554 [quoting from Minnesota case: "It is but ordinary prudence to exercise a high degree of care in the presence of imminent danger, when casualty is apt to come unless much care is exerted to avoid it"].)

Nevertheless, some statutory provisions and some decisions prescribed different degrees of care, and distinguish between "ordinary" and "gross" negligence. (See C.C. 1846, 1852 [degrees of care of different kinds of bailees]; *Colich & Sons v. Pacific Bell* (1988) 198 C.A.3d 1225, 1240, 244 C.R. 714 [tariff permitting recovery of damages up to \$ 10,000 for telephone utility's gross negligence]; 13 *Summary* (10th), *Personal Property*, §159 et seq.; *infra*, §918 et seq.)

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4. Wilful Misconduct.

6 Witkin Sum. Cal. Law Torts § 870

[§ 870] Wilful Misconduct.

The law recognizes a distinct type of misconduct that is more culpable than negligence, yet falls short of intentional wrong. The Torts Restatement characterizes this as "reckless disregard of the safety of another" (*Rest.2d, Torts* §500); its usual designation is "wanton" or "wilful" misconduct. (See *Donnelly v. Southern Pac. Co. (1941)* 18 C.2d 863, 869, 118 P.2d 465; *Haft v. Lone Palm Hotel (1970)* 3 C.3d 756, 779, 91 C.R. 745, 478 P.2d 465 [evidence of knowledge of violation of safety regulations was admissible on issue]; *Mahoney v. Corralejo (1974)* 36 C.A.3d 966, 973, 112 C.R. 61, *infra*, §1302 [wilful misconduct not found]; *Morgan v. Southern Pac. Trans. Co. (1974)* 37 C.A.3d 1006, 1012, 112 C.R. 695, citing the text [backing train at night; wilful misconduct found]; *Bains v. Western Pac. R. Co. (1976)* 56 C.A.3d 902, 905, 128 C.R. 778 [wilful misconduct not found in maintaining railroad crossing without automatic gates, in rural area with little traffic]; *Colich & Sons v. Pacific Bell (1988)* 198 C.A.3d 1225, 1242, 244 C.R. 714 [no allegation of conscious act or omission]; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §241 et seq.)

Wilful misconduct is also relevant where the unsuccessful defendant afterward attempts to plead that the judgment was discharged by bankruptcy. (See *Fitzgerald v. Herzer (1947)* 78 C.A.2d 127, 131, 177 P.2d 364; *supra*, §187.) And liability for a child's wilful misconduct is imposed on his or her parent or guardian. (See *infra*, §§1229, 1230.) (On "conscious disregard of rights or safety" as basis for award of punitive damages, see *infra*, §1574 et seq.); on diminished importance of wilful misconduct concept as result of adoption of doctrine of comparative negligence, see *Southern Pac. Trans. Co. v. California (1981)* 115 C.A.3d 116, 121, 171 C.R. 187, *infra*, §1333.)

In *New v. Consolidated Rock Products Co. (1985)* 171 C.A.3d 681, 217 C.R. 522, *infra*, §1111), the court, holding defendant liable under the wilful misconduct exception of C.C. 846 (the recreational licensee statute, *infra*, §1103), examined the concept in some detail.

(a) " 'Wilful or wanton misconduct' travels under several other names. Its aliases include 'serious and wilful misconduct,' 'wanton misconduct,' 'reckless disregard,' 'recklessness,' and combinations of some or all of these. These terms are interchangeable because they all identify the same thing--an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care.' The usual meaning assigned to 'wilful,' 'wanton' or 'reckless,' according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." (171 C.A.3d 689, quoting Prosser.)

(b) "Three essential elements must be present to raise a negligent act to the level of wilful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." (171 C.A.3d 689, quoting *Morgan v. Southern Pac. Trans. Co.*, *supra*.)

(c) "It is obvious that constructive knowledge must be measured by an objective standard, since there is no other way to measure it. ... The test ... is whether a reasonable man under the same or similar circumstances as those faced by the actor would be aware of the dangerous character of his conduct. ... If conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then, regardless of the actual state of mind of the actor and his actual concern for the rights of others, we call it wilful misconduct, and apply to it the consequences and legal rules which we use in the field of intended torts." (171 C.A.3d 690.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Berkley v. Dowds* (2007) 152 C.A.4th 518, 61 C.R.3d 304, plaintiff widow sued defendant physician, who had treated plaintiff's husband for injuries sustained in an automobile accident, alleging a cause of action for "willful misconduct." The trial court sustained defendant's demurrer without leave to amend. *Held*, affirmed.

(a) The parties argued extensively about whether a tort called "willful misconduct" is recognized in California. That cause of action exists. However, it is not a separate tort but simply an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care. Its pleading requirements are similar to negligence but stricter. (152 C.A.4th 526.)

(b) The well-known elements of any negligence cause of action (see text, §835 et seq.) are duty, breach of duty, proximate cause, and damages. (152 C.A.4th 526.) In addition, three essential elements must be present to raise a negligent act to the level of wilful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. (152 C.A.4th 528.)

(c) Plaintiff failed to state a cause of action, either in negligence or wilful misconduct. No causation connection was alleged between defendant's alleged denial of medically appropriate procedures and the husband's death. Also, no facts were alleged to show that defendant knew that the lack of these procedures would probably cause injury or death. (152 C.A.4th 528.)



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1. In General.
a. Nature of Doctrine.

6 Witkin Sum. Cal. Law Torts § 871

[§ 871] Nature of Doctrine.

(1) *In General.* What constitutes due care under the circumstances is ordinarily a question of fact for the jury in each case. (See *supra*, §866.) But the proper conduct of a reasonable person in particular situations may become settled by judicial decision, or be prescribed by statute or ordinance, and conduct below this standard is negligence per se, or negligence as a matter of law. In other words, "if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for violation is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care." (*Satterlee v. Orange Glenn School Dist. of San Diego* (1947) 29 C.2d 581, 588, 177 P.2d 279; see *Clinkscales v. Carver* (1943) 22 C.2d 72, 75, 136 P.2d 777; *Finnegan v. Royal Realty Co.* (1950) 35 C.2d 409, 416, 218 P.2d 17; *Haft v. Lone Palm Hotel* (1970) 3 C.3d 756, 763, 91 C.R. 745, 478 P.2d 465; *Vesely v. Sager* (1971) 5 C.3d 153, 164, 95 C.R. 623, 486 P.2d 151; *Alechoff v. Los Angeles Gas & Elec. Corp.* (1927) 84 C.A. 33, 38, 257 P. 569; *Reid & Sibell v. Gilmore & Edwards Co.* (1955) 134 C.A.2d 60, 71, 285 P.2d 364; *Whinery v. Southern Pac. Co.* (1970) 6 C.A.3d 126, 129, 85 C.R. 649; *Sagadin v. Ripper* (1985) 175 C.A.3d 1141, 1163, 221 C.R. 675; *Rest.2d, Torts* §§285, 286; *Dobbs, The Law of Torts* §132 et seq.; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §674 et seq.; 13 *Cal. L. Rev.* 428; 11 *Pacific L. J.* 907; *BAJI*, No. 3.45; cf. *Rest.2d, Torts* §288 [circumstances in which statutory or administrative standard is not adopted].)

Standards settled by judicial decision are less numerous than those imposed by statute (*infra*, §875), and are usually found in decisions involving the former doctrine of contributory negligence. (See *infra*, §1315 et seq.); *Rest.2d, Torts* §285, Comment e; on inapplicability of doctrine to immature child, see *infra*, §896.)

(2) *Applicability to Motor Vehicle Cases.* Rules and standards for driving and parking motor vehicles, established by the Vehicle Code and local ordinances, are the most common types of regulations the violation of which constitutes negligence per se. (See *infra*, §878 et seq.)

Some jurisdictions have held it to be negligence per se for a motorist to drive at so great a speed that he or she cannot stop to avoid an object coming within the range of vision, or for one whose vision has been obscured by the lights of another car to fail to bring it under such control that he or she can stop it immediately. California cases have rejected both rules, and permit the case to go to the jury. (See *Casey v. Gritsch* (1934) 1 C.A.2d 206, 213, 36 P.2d 696; *Smarda v. Fruit Growers' Supply Co.* (1934) 1 C.A.2d 265, 271, 36 P.2d 701; *Scoville v. Kegl* (1938) 27 C.A.2d 17,

33, 80 P.2d 162; 23 Cal. L. Rev. 498.)

(3) *Applicability to Professional Negligence.* In *Huang v. Garner* (1984) 157 C.A.3d 404, 203 C.R. 800, the court pointed out that, in California and elsewhere, the doctrine operates in the professional negligence context. (157 C.A.3d 414, citing *Derrick v. Ontario Community Hosp.* (1975) 47 C.A.3d 145, 151, 120 C.R. 566, *infra*, §875.) The California cases so far have applied the presumption only in medical malpractice actions, but "there is no reason to limit the presumption strictly to that context." Hence, it may properly be applied in an action against a professional design engineer. (157 C.A.3d 415.) (See 11 U.S.F. L. Rev. 517 [medical malpractice actions].)

(4) *Employer and Employee.* The presumption of negligence from a violation of *safety orders* occurs only in the employer-employee situation. (*Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 C.4th 1066, 1086, 60 C.R.2d 263, 929 P.2d 582, *supra*, §822.) Thus, a premises owner, who was not responsible for asbestos contamination, was not an employer presumed negligent for failing to comply with safety orders. (*Smith v. ACandS* (1994) 31 C.A.4th 77, 89, 37 C.R.2d 457.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* The doctrine of negligence per se does not provide a private right of action for violation of a statute; instead, it operates to establish a presumption of negligence for which the statute serves the subsidiary function of providing evidence of an element of a preexisting common law cause of action. (*Quiroz v. Seventh Avenue Center* (2006) 140 C.A.4th 1256, 2384, 45 C.R.3d 222.)



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b. Federal Law Violations.

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[§ 872] Federal Law Violations.

The courts have differed on whether negligence per se causes of action survive federal preemption of other tort claims based on the same conduct.

In *Evraets v. Intermedics Intraocular* (1994) 29 C.A.4th 779, 34 C.R.2d 852, *infra*, §1540, the negligence per se claim was held to survive. A negligence per se claim could be based on a violation of federal Food, Drug and Cosmetic Act (FDCA) standards, even though those standards preempt strict liability and negligence claims based on the same conduct. The preemption provision (21 U.S.C., §360k) only preempts state requirements "different from, or in addition to" federal requirements. "In applying a negligence per se theory, the state's requirements are equal to the federal requirements; in fact, they simply adopt the federal standard of conduct." (29 C.A.4th 792.)

However, in *Scott v. CIBA Vision Corp.* (1995) 38 C.A.4th 307, 314, 44 C.R.2d 902, also involving FDCA preemption, the court expressly disagreed with *Evraets*. "[T]here is no basis for allowing a negligence [per se] claim to proceed ... while finding that negligence itself is a preempted cause of action." Absent preemption, "California plaintiffs would have an advantage over plaintiffs in other jurisdictions, all of which prohibit state claims based on asserted violations of federal regulations." (38 C.A.4th 324.) (On federal supremacy, see 7 Summary (10th), *Constitutional Law*, §8 et seq.)

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[§ 873] Codification of Doctrine.

(1) *Statute*. *Ev.C.* 669, enacted in 1967, codified the doctrine of negligence per se as a presumption affecting the burden of proof. (See 11 *Pacific L. J.* 907; *Casey v. Russell* (1982) 138 C.A.3d 379, 383, 188 C.R. 18, citing the text; *Sagadin v. Ripper* (1985) 175 C.A.3d 1141, 1164, 221 C.R. 675; BAJI, No. 3.45.)

The failure of a person to exercise due care is presumed if all the following conditions are met:

- (a) "He violated a statute, ordinance, or regulation of a public entity" (*Ev.C.* 669(a)(1).)
- (b) "The violation proximately caused death or injury to person or property." (*Ev.C.* 669(a)(2).)
- (c) "The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent." (*Ev.C.* 669(a)(3).)
- (d) "The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (*Ev.C.* 669(a)(4).)

Application of the doctrine depends on a showing of all of the four statutory elements. (*Capolungo v. Bondi* (1986) 179 C.A.3d 346, 352, 224 C.R. 326.)

(2) *Questions of law and Fact*. Of the four elements to be proved to establish negligence per se under *Ev.C.* 669, the first two elements (i.e., that the defendant violated a statute, ordinance, or regulation of a public entity, and that the violation proximately caused the injury) are normally considered questions of fact for the trier of fact. The last two elements (i.e., that the injury resulted from an occurrence of the nature that the statute was designed to prevent, and that the plaintiff was one of the class of persons for whose protection the statute was adopted) are determined by the trial court as a matter of law, because they involve statutory interpretation. (*Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 C.A.3d 318, 326, 277 C.R. 753; see *Hoff v. Vacaville Unified School Dist.* (1998) 19 C.4th 925, 938, 80 C.R.2d 811, 968 P.2d 522, supra, §328 [whether injury resulted from occurrence of nature that statute was designed to prevent and whether plaintiff was one of persons for whose protection it was enacted are questions of law]; *DiRosa v. Showa Denko K.K.* (1996) 44 C.A.4th 799, 805, 52 C.R.2d 128 [jury was properly allowed to determine whether

defendant manufacturer and importer of contaminated dietary supplement violated federal Food, Drug, and Cosmetic Act (21 U.S.C., §301 et seq.)); *Reyes v. Kosha* (1998) 65 C.A.4th 451, 463, 76 C.R.2d 457 [whether statutory violation proximately caused injury is generally question of fact.]) (On questions of law and fact generally, see *supra*, §§860, 866).)

(3) *Underlying Negligence Action*. Satisfying the four elements of *Ev.C.* 669 does not alone entitle the plaintiff to a presumption of negligence, unless he or she has an underlying negligence action. It is the tort of negligence, and not the violation of the statute itself, that entitles a plaintiff to recover damages. Either the courts or the Legislature must have created a duty of care. The presumption of negligence created by *Ev.C.* 669 concerns the *standard* of care, rather than the *duty* of care. (*California Service Station & Auto. Repair Assn. v. American Home Assur. Co.* (1998) 62 C.A.4th 1166, 1177, 73 C.R.2d 182 [regulation requiring workers' compensation insurer to provide prescribed disclosure statement did not, under *Ev.C.* 669, create duty of care on which to base negligence action against insurer for failure to provide statement].)

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[§ 874] Illustrations.

In *Capolungo v. Bondi* (1986) 179 C.A.3d 346, 224 C.R. 326, plaintiff sued for injuries sustained in a bicycle accident when she swerved her bicycle to clear defendant's parked car and was struck by another car. The basis of her action was that defendant had parked his car too long in a yellow-curb loading zone. *Held*, summary judgment for defendant affirmed. The only element of *Ev.C.* 669 (supra, §873) established was the first--violation of a local parking ordinance specifying a maximum of 24 minutes for parking in a yellow zone. As to the other elements:

(a) The ordinance was not designed for the purpose of providing safety to motorists and pedestrians on the street; limitation to loading and unloading, and the maximum time provision, show that the purpose was to prevent motorist from monopolizing parking spaces. (179 C.A.3d 353.)

(b) In view of that purpose, plaintiff--a passing bicyclist--was not a member of the class of persons for whose protection the ordinance was adopted--persons desiring access to curb space for loading or unloading. (179 C.A.3d 354.)

(c) The violation of the parking restriction was not a proximate cause of plaintiff's injury: She would have had to swerve around the car in exactly the same manner whether it had been parked there 5 minutes or 5 hours. (179 C.A.3d 354.)

In *Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 C.A.3d 318, 277 C.R. 753, plaintiff farmer obtained two loans, secured by different parcels of real property, from defendant members of the Farm Credit System. After plaintiff defaulted and the parcels were sold at a trustee's sale, plaintiff alleged that defendants were negligent in that they violated the Agricultural Credit Act of 1987 by failing to accept and later review denial of plaintiff's loan restructure proposals and by refusing to lease the property to him after the foreclosure. The trial judge overruled defendants' demurrer, and they sought mandamus. *Held*, mandamus granted.

(a) Plaintiff argued that defendants were presumptively negligent under *Ev.C.* 669 because they violated a federal statute that was designed to prevent the harm suffered by plaintiff, a member of the class for whose protection the statutory scheme was adopted. This position is unique and anomalous in that it attempts to take a portion of federal law and engraft it onto state law to create a cause of action that neither jurisdiction would otherwise recognize. (227 C.A.3d

331.)

(b) Some decisions have held that a federal statute may be adopted as a standard of care in a state negligence action under *Ev.C. 669*. (227 C.A.3d 332, citing *Toole v. Richardson-Merrell* (1967) 251 C.A.2d 689, 60 C.R. 398, *infra*, §875.) However, the plaintiffs in those decisions were relying on federal safety standards while pursuing recognized state causes of action for personal injury based on negligence. By contrast, plaintiff here is relying on economic legislation intended by Congress to guide the credit decisions of the component members of the Farm Credit System; and his allegations, i.e., that he defaulted on loans obtained from defendants who then exercised the powers of sale in the deeds of trust given to secure his performance, do not even hint at a viable cause of action for negligence under *California law*. (227 C.A.3d 334.) Hence, plaintiff is not pursuing a negligence action in which he urges adoption of a congressionally devised standard of care. (227 C.A.3d 335.)

(c) For *Ev.C. 669* to apply, the injured person must be within the protected class and the injury must result from an occurrence the nature of which the transgressed statute was designed to prevent. These requirements can be satisfied here only by focusing on the loan restructure provisions of the Act and ignoring its primary objectives, which are to restore financial integrity to the Farm Credit System and to minimize the possible exposure of the federal budget. Indeed, when the entire Act is considered, it appears that farmers who might qualify for restructuring are nothing more than incidental beneficiaries. (227 C.A.3d 336.)

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6 Witkin Sum. Cal. Law Torts § 875

[§ 875] Statute or Ordinance.

(1) *In General.* In a few instances, the statute or ordinance expressly states the requirement of a standard of care applicable to civil cases. (See *Rest.2d, Torts* §286, Comment c.) Usually, however, the statute or ordinance prohibits certain conduct and makes it a crime, without reference to civil liability. Obviously, if the legislation was enacted for the protection of others, the criminal penalty implies that its violation constitutes a breach of the duty of care. Accordingly, the court will accept the legislative determination that the prohibited conduct falls below that required of a reasonable person. (*Clinkscales v. Carver* (1943) 22 C.2d 72, 75, 136 P.2d 777; see 57A Am.Jur.2d (2004 ed.), *Negligence* §§701 et seq., 723 et seq.; 23 *Santa Clara L. Rev.* 427 [The Application of Criminal Legislation to Negligence Cases: A Reexamination]; 14 *So. Cal. L. Rev.* 194; 87 A.L.R.2d 977 [scaffold]; 38 A.L.R.3d 530 [violation of safety equipment statute leading to automobile accident]; 79 A.L.R.4th 461 [violation of governmental regulations governing swimming pools]; 46 A.L.R.5th 479 [violation of Uniform Fire Code as negligence per se]; cf. C.C. 1714.6 [violation of statute or ordinance is not negligence per se when done in compliance with authorized military proclamation or emergency directive of Governor]; *Veh.C.* 40830 [violation of code is not negligence per se when required under federal law or California Emergency Services Act]; *Mathers v. Riverside* (1943) 22 C.2d 781, 785, 141 P.2d 419 [standard fixed by criminal statute is not always applicable in civil suit].)

(2) *Illustrations.* Illustrations are numerous. (See *Edwards v. Hollywood Canteen* (1946) 27 C.2d 802, 808, 167 P.2d 729 [city ordinance prohibiting intoxicated and disorderly persons' presence at public dance]; *Finnegan v. Royal Realty Co.* (1950) 35 C.2d 409, 416, 218 P.2d 17 [building code requiring correction of hazardous conditions]; *Haft v. Lone Palm Hotel* (1970) 3 C.3d 756, 763, 91 C.R. 745, 478 P.2d 465 [Health & Safety Code regulations requiring safety information to be posted at swimming pool]; *Alechoff v. Los Angeles Gas & Elec. Corp.* (1927) 84 C.A. 33, 37, 257 P. 569 [burning trash in manner or at times prohibited by ordinance]; *Roxas v. Gogna* (1940) 41 C.A.2d 234, 241, 106 P.2d 227 [ordinance requiring owner of premises to install fire escapes]; *Kasunich v. Kraft* (1962) 201 C.A.2d 177, 182, 19 C.R. 872 [ordinance requiring safety measures for private swimming pools]; *Toole v. Richardson-Merrell* (1967) 251 C.A.2d 689, 703, 60 C.R. 398 [drug violating federal statute on labeling and marketing]; *Lucas v. Hesperia Golf & Country Club* (1967) 255 C.A.2d 241, 251, 63 C.R. 189 [Health & Safety Code regulations for public swimming pool]; *Olsen v. McGillicuddy* (1971) 15 C.A.3d 897, 901, 93 C.R. 530 [city ordinance prohibiting possession and firing

of B.B. gun by minor]; *Derrick v. Ontario Community Hosp.* (1975) 47 C.A.3d 145, 151, 120 C.R. 566 [Health & Safety Code statute requiring report of infectious disease to local health officer]; *Little v. Community Bank* (1991) 234 C.A.3d 355, 359, 286 C.R. 4 [Code of Civil Procedure statute requiring disclosure of IRS tax liens]; *Nowlon v. Koram Ins. Center* (1991) 1 C.A.4th 1437, 1441, 2 C.R.2d 683 [Penal Code and Insurance Code provisions prohibiting sale of insurance for insurer not admitted to transact business in California]; *Newhall Land & Farming Co. v. Superior Court* (1993) 19 C.A.4th 334, 347, 348, 23 C.R.2d 377 [Health & Safety Code and Water Code provisions on contamination of groundwater]; *Delfino v. Sloan* (1993) 20 C.A.4th 1429, 1431, 25 C.R.2d 265 [local leash law]; *Klein v. BIA Hotel Corp.* (1996) 41 C.A.4th 1133, 1140, 49 C.R.2d 60, *infra*, §1055 [regulations governing residential care facilities for elderly]; *Daum v. SpineCare Med. Group* (1997) 52 C.A.4th 1285, 1306, 61 C.R.2d 260 [California statutes and federal regulations concerning clinical trials of investigational or experimental devices]; *Reyes v. Kosha* (1998) 65 C.A.4th 451, 462, 76 C.R.2d 457 [Housing Act requiring employer to provide safe housing].)

(3) *Invalid Statute or Ordinance.* The fact that the statute or ordinance is invalid for technical reasons may be immaterial, for the court may still accept and apply the standard. In *Clinkscates* defendant was held liable for driving through a posted stop sign, although the ordinance authorizing the particular sign had not been validly adopted. "Failure to observe a stop-sign is unreasonably dangerous conduct whether or not the driver is immune from criminal prosecution because of some irregularity in the erection of the stop-sign" (22 C.2d 76); the driver should realize that the public relies on the actual sign appearing in the customary manner. (22 C.2d 76.)

(4) *Federal Legislation.* A federal statute or regulation may be adopted as the standard of care in a negligence action under *Ev.C.* 669. (*DiRosa v. Showa Denko K.K.* (1996) 44 C.A.4th 799, 808, 52 C.R.2d 128 [dietary supplement violating federal Food, Drug and Cosmetic Act (21 U.S.C., §301 et seq.); citing *Toole v. Richardson-Merrell*, *supra*, and *Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 C.A.3d 318, 332, 277 C.R. 753, *supra*, §874]); *Daum v. SpineCare Med. Group*, *supra*; *Norman v. Life Care Centers of America* (2003) 107 C.A.4th 1233, 1240, 132 C.R.2d 765 [regulations governing skilled nursing facility; citing *Klein*].)

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2. Administrative Regulation.

6 Witkin Sum. Cal. Law Torts § 876

[§ 876] Administrative Regulation.

Safety orders and similar regulations of the Public Utilities Commission and the Division of Industrial Accidents (formerly the Industrial Accident Commission; see 2 *Summary* (10th), *Workers' Compensation*, §10) are given the same effect as statutes in this connection. (See *Nevis v. Pacific Gas & Elec. Co.* (1954) 43 C.2d 626, 629, 275 P.2d 761; *Langazo v. San Joaquin Light & Power Corp.* (1939) 32 C.A.2d 678, 682, 90 P.2d 825, *infra*, §1094 [general safety order requiring removal of abandoned telephone lines]; *Mula v. Meyer* (1955) 132 C.A.2d 279, 284, 282 P.2d 107; *Wiese v. Rainville* (1959) 173 C.A.2d 496, 510, 343 P.2d 643; *Longway v. McCall* (1960) 181 C.A.2d 723, 727, 5 C.R. 818; *Di Muro v. Masterson Trusafe Steel Scaffold Co.* (1961) 193 C.A.2d 784, 791, 14 C.R. 551; *Halliday v. Greene* (1966) 244 C.A.2d 482, 488, 53 C.R. 267; *Galvez v. Frields* (2001) 88 C.A.4th 1410, 1420, 107 C.R.2d 50; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §753 et seq.)

The same is true of regulations of other administrative agencies. (See *Elsworth v. Beech Aircraft Corp.* (1984) 37 C.3d 540, 545, 208 C.R. 874, 691 P.2d 630 [safety standards promulgated by Federal Aviation Agency]; *Fagerquist v. Western Sun Aviation* (1987) 191 C.A.3d 709, 717, 236 C.R. 633 [same]; 79 A.L.R.3d 962 [OSHA regulation].)

In *Porter v. Montgomery Ward & Co.* (1957) 48 C.2d 846, 313 P.2d 854, plaintiff, a customer in defendant's store, slipped and fell on a stairway that was over 88 inches wide and had no center handrail as required by a safety order. *Held*, an instruction that the violation constituted negligence per se was proper. The court made this distinction: (a) Some safety orders, such as those regulating the use of machinery, might be regarded as solely for the protection of employees, where the public is prohibited from entering the place of employment. (b) In other situations, such as this one, the benefits of the order are extended to *business invitees* entitled to use the particular facility. (48 C.2d 849.)

In *Hyde v. Russell & Russell* (1959) 176 C.A.2d 578, 1 C.R. 631, plaintiff steelworker was injured in a fall from a defective scaffold supplied by defendant to plaintiff's employer. *Held*, the modern tendency is to regard safety orders as binding regardless of whether the relationship of employer and employee exists; hence, it was proper to impose the duty of compliance on a professional supplier. (176 C.A.2d 584.) (Cf. *Morris v. Horton* (1994) 22 C.A.4th 968, 972, 973, 27 C.R.2d 585 [property owners claiming costs incurred to repair or change work that contractor agreed to perform could not recover on negligence per se theory; building code provisions at issue were designed to ensure safety of persons])

using staircase, not to prevent owners from incurring costs in remedying violations]; *Resolution Trust Corp. v. Rossmoor Corp.* (1995) 34 C.A.4th 93, 105, 40 C.R.2d 328 [water quality board order requiring owner to clean up contaminated property created duty to clean up gasoline spill, and was designed to protect adjoining owners, but did not establish duty, prior to order, to prevent land from becoming contaminated in first place].)

An administrative agency cannot independently impose a duty of care if that authority has not been properly delegated to the agency by the Legislature. (*California Service Station & Auto. Repair Assn. v. American Home Assur. Co.* (1998) 62 C.A.4th 1166, 1175, 73 C.R.2d 182 [regulation requiring workers' compensation insurer to provide prescribed disclosure statement did not create duty of care on which to base negligence action against insurer for failure to provide statement].)

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3. Agency Manual Is Not Regulation.

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[§ 877] Agency Manual Is Not Regulation.

(1) *Case Holding Manual To Be Regulation of Public Entity.* In *Peterson v. Long Beach* (1979) 24 C.3d 238, 155 C.R. 360, 594 P.2d 477, V, a Long Beach police officer, responded to a radio call erroneously reporting a burglary at P's apartment. When V arrived, P was running from his apartment. V approached with gun drawn, P fled, and V shot and killed him. In this action for wrongful death by P's parents against V and the city, defendants relied on P.C. 196, making homicide justifiable when necessarily committed in an attempt to arrest, and on the immunity under Govt.C. 820.6 of a public employee who acts under the apparent authority of an enactment that is inapplicable. Plaintiffs offered proof of V's violation of the guidelines for discharge of a firearm in the Long Beach Police Department Manual, and then invoked the presumption of negligence in Ev.C. 669(a). In entering judgment for defendants, the trial court found that V failed to comply with the guidelines, but concluded that the manual did not constitute a minimal standard of care, and that V's act was within the limits set by the Penal Code. *Held*, reversed.

Defendants contended that the phrase "statute, ordinance, or regulation of a public entity" in Ev.C. 669(a)(1) covers local ordinances but not local regulations of the Chief of Police and City Manager. But Ev.C. 200 broadly defines "public entity" to include "public agency," and the Law Revision Commission Comment states that the term includes "every form of public authority." (24 C.3d 244.) Cases establishing the rule codified by Ev.C. 669 have involved administrative regulations as well as statutes and ordinances, and Govt.C. 811.6 defines regulation to include a "standard" having the force of law, adopted by "an employee or agency" of a public entity. (24 C.3d 238.) Thus, the manual's guidelines were standards having the force of law, and the presumption of Ev.C. 669(a) applied. (24 C.3d 246.) (See 8 *Pepperdine L. Rev.* 419.)

(2) *Legislation Repudiation.* The result in *Peterson* has been repudiated by the enactment of Ev.C. 669.1. "A rule, policy, manual, or guideline of state or local government setting forth standards of conduct or guidelines for its employees in the conduct of their public employment shall not be considered a statute, ordinance, or regulation of that public entity within the meaning of Section 669, unless the rule, manual, policy, or guideline has been formally adopted as a statute, as an ordinance of a local governmental entity in this state empowered to adopt ordinances, or as a regulation by an agency of the state pursuant to the Administrative Procedure Act ... or by an agency of the United States government pursuant to the federal Administrative Procedure Act." This provision "affects only the presumption

set forth in Section 669, and is not otherwise intended to affect the admissibility or inadmissibility of the rule, policy, manual, or guideline under other provisions of law." (*Ev.C. 669.1.*) (See *Lugtu v. California Highway Patrol* (2001) 26 C.4th 703, 720, 110 C.R.2d 528, 28 P.3d 249 [CHP Officer Safety Manual could not be used to establish standard of care, but it could serve as evidence on question of negligence]; 19 *Pacific L. J.* 611.)

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(2) *Legislative Repudiation.* See *Minch v. Department of Calif. Highway Patrol* (2006) 140 C.A.4th 895, 907, 44 C.R.3d 846 [CHP Safety Manual admonishing officers to perform traffic control functions when necessary did not create duty of care to tow truck driver who was struck by car at accident scene; manual was not adopted pursuant to Administrative Procedure Act, and thus did not have force of law needed to establish duty on part of officers].



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1. Speed Limits.

6 Witkin Sum. Cal. Law Torts § 878

[§ 878] Speed Limits.

Early cases dealing with the speed laws declared that proof of a violation was conclusive on the question of negligence. (See *Benjamin v. Noonan* (1929) 207 C. 279, 282, 277 P. 1045; *Schilling v. Central Calif. Traction Co.* (1931) 115 C.A. 30, 33, 1 P.2d 53.) But in 1931, the statutes were changed, and they now provide as follows:

(1) *Basic Speed Law*. "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." (*Veh.C.* 22350; see *Hardin v. San Jose City Lines* (1953) 41 C.2d 432, 438, 260 P.2d 63; 7A Am.Jur.2d (1997 ed.), *Automobiles and Highway Traffic* §288 et seq.; 14 *Hastings L. J.* 452; BAJI, No. 5.30; 91 A.L.R.2d 1260 [duty of an overtaken driver to adjust speed].)

(2) *Prima Facie Speed Limits*. Certain limits are specified by statutes dealing with particular conditions (*Veh.C.* 22351 et seq.), e.g., 15 miles per hour when traversing a railway grade crossing or certain obstructed highway intersections, or traveling on an alley; 25 miles per hour when passing a school building or a facility primarily used by senior citizens, or proceeding in a business or residence district. (*Veh.C.* 22352; see *Reynolds v. Filomeo* (1951) 38 C.2d 5, 11, 236 P.2d 801 [business or residence district must be sign-posted]; *Mapes v. Yowell* (1960) 54 C.2d 231, 232, 5 C.R. 159, 352 P.2d 527; *Johnson v. Williams* (1950) 100 C.A.2d 294, 298, 223 P.2d 266; *Clark v. Pamplin* (1957) 147 C.A.2d 676, 679, 305 P.2d 950; 14 *Hastings L. J.* 451; 87 A.L.R.2d 539 [necessity of instruction on prima facie speed limit]; BAJI, No. 5.31.)

Violation of the prima facie limit is only "prima facie unlawful"; the defendant may show that his or her driving was in compliance with the Basic Speed Law of *Veh.C.* 22350. (*Veh.C.* 22351.) And "[i]n any civil action proof of speed in excess of any prima facie limit ... does not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence." (*Veh.C.* 40831; see *Hardin v. San Jose City Lines*, *supra*, 41 C.2d 439; *Clark v. Pamplin*, *supra*, 147 C.A.2d 679 [notwithstanding language of *Veh.C.* 22351 suggesting burden of proof on defendant, *Veh.C.* 40831 governs in civil case]; *Faselli v. Southern Pac. Co.* (1957) 150 C.A.2d 644, 649, 310 P.2d 698 [same].)

(3) *Maximum Speed Limit*. The maximum limits are 65 miles per hour (*Veh.C.* 22349) or 70 miles per hour if approved by the Department of Transportation (*Veh.C.* 22356). However, 55 miles per hour is the maximum on two-lane, undivided highways. (*Veh.C.* 22349(b); see BAJI, No. 5.32; CACI, No. 708.)

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(1) *Basic Speed Law*. See 7A *Am.Jur.2d* (2007 ed.), *Automobiles and Highway Traffic* §263 et seq.



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2. Right-of-Way: Driver and Other Motorists.
- aa. Intersections.

6 Witkin Sum. Cal. Law Torts § 879

[§ 879] Intersections.

At uncontrolled intersections, the driver of a vehicle that is approaching an intersection must yield to a vehicle that has already entered the intersection from a different highway. (*Veh.C. 21800(a)*.) When the vehicles enter at the same time, the driver on the left must yield to the driver on the right, except that a driver on a terminating highway, i.e., one intersecting a continuing highway, but not continuing beyond the intersection, must yield to the driver on the continuing highway. (*Veh.C. 21800(b)*.) The rule of yielding to the driver on the right also applies to vehicles entering at the same time an intersection controlled from all directions by stop signs. (*Veh.C. 21800(c)*.)

A driver approaching an intersection with *inoperable* traffic control signals must stop, and then proceed with caution when it is safe. When two drivers approach such an intersection from different highways, the right-of-way rules are the same as those for uncontrolled intersections. (*Veh.C. 21800(d)*.)

These provisions do not apply at intersections controlled by an official traffic control signal, a "yield right-of-way" sign, or stop signs for some but not all directions, or to vehicles approaching each other from opposite directions when one driver intends to or is making a left turn. (*Veh.C. 21800(e)*.) (See *Satterlee v. Orange Glenn School Dist. of San Diego* (1947) 29 C.2d 581, 591, 177 P.2d 279, *infra*, §891 [driver cannot arbitrarily rely on right-of-way gained as result of excessive speed, other negligent act, or violation of law]; 7A Am.Jur.2d (1997 ed.), *Automobiles and Highway Traffic* §314; on waiver of right-of-way, see *Sesler v. Ghumman* (1990) 219 C.A.3d 218, 220, 223, 268 C.R. 70 [analyzing *Veh.C. 21801* and BAJI instructions].)

For intersections where stop signs have been erected on some (but not all) approaches, the driver coming to a stop sign must stop at the limit line or the entrance to the intersection, and must yield the right-of-way to other vehicles that have approached or are approaching so closely from another roadway as to constitute an immediate hazard. The driver must continue yielding the right-of-way until he or she can proceed with reasonable safety. Once the driver has yielded and properly proceeded, drivers of all approaching vehicles must give him or her the right-of-way. These provisions, however, do not apply where stop signs are erected on all approaches to an intersection. (*Veh.C. 21802*.) (See *Grasso v. Cunial* (1951) 106 C.A.2d 294, 300, 235 P.2d 32; 2 A.L.R.3d 12 [motor vehicle accident as affected by reliance on or

disregard of stop-and-go signal]; 3 *A.L.R.3d* 180, 507 [vehicular accident at intersection as affected by unchanging stop signal or sign]; 7 *A.L.R.3d* 1204 [what is intersection]; BAJI, Nos. 5.10, 5.11, 5.12.)

SUPPLEMENT: [This section is current through the latest supplement]

Application of provisions: See 7A *Am.Jur.2d* (2007 ed.), *Automobiles and Highway Traffic* §284.



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bb. Other Situations.

6 *Witkin Sum. Cal. Law Torts* § 880

[§ 880] Other Situations.

(1) *Left Turns*. A driver who intends to turn left or to complete a U-turn upon a highway, or into public or private property or into an alley, must yield the right-of-way to all vehicles that have approached or are approaching from the opposite direction and that are so close as to constitute a hazard at any time during the turning movement. The driver must continue to yield the right-of-way until the turn can be made with reasonable safety. Once the driver has yielded and given the required signal, he or she may turn left and drivers of approaching vehicles must yield the right-of-way. (*Veh.C. 21801*.) (See *Sesler v. Ghumman* (1990) 219 C.A.3d 218, 224, 268 C.R. 70 [under *Veh.C. 21801*, driver turning left across multiple lanes, some of which yield right-of-way to him or her, has continuing duty to ascertain if remaining lanes are clear]; 35 Proof of Facts 2d 405; 47 Proof of Facts 2d 127 [motorcycle accidents]; BAJI, Nos. 5.20, 5.21.)

(2) *"Yield Right-of-Way" Signs*. A driver approaching a "yield right-of-way" sign must yield to other vehicles that have entered the intersection from an intersecting street or approaching so closely as to constitute an immediate hazard. The driver must continue yielding until he or she can proceed with reasonable safety. Once the driver has yielded, the driver may proceed and approaching drivers must yield. (*Veh.C. 21803*.) (See 2 A.L.R.3d 275 [intersection accident as affected by yield sign or signal]; 87 A.L.R.5th 1 [failure to yield right-of-way to emergency vehicle]; BAJI, No. 5.13.)

(3) *Non-Highway Approaches*. A driver about to enter or cross a highway from public or private property, or from an alley, must yield the right-of-way to all approaching "traffic," i.e., pedestrians, ridden animals, vehicles, streetcars, and other conveyances (see *Veh.C. 620*) that constitute an immediate hazard, and must continue to yield until he or she can proceed with reasonable safety. (*Veh.C. 21804(a)*.) Once the driver has so yielded, he or she may enter or cross the highway, and approaching drivers must then yield. (*Veh.C. 21804(b)*.) (See *Malone v. Perryman* (1964) 226 C.A.2d 227, 235, 37 C.R. 864 [statute does not confer absolute and uncontrolled right, and does not apply where signaling device and flagman are controlling traffic over highway crossing]; BAJI, No. 5.22; 40 A.L.R.3d 1429 [traffic merging onto limited access highway from service road or ramp].)

(4) *Equestrian Crossings*. The driver of a motor vehicle must yield the right-of-way to a horseback rider crossing a roadway at a properly designated equestrian crossing. (*Veh.C. 21805(b)*.) However, the rider must use due care for his

or her safety, and may not suddenly leave a place of safety and proceed into the path of a vehicle so close as to constitute an immediate hazard. (*Veh.C. 21805(c)*.) (See *7A Am.Jur.2d (1997 ed.)*, *Automobiles and Highway Traffic* §693.)

(5) *U-Turns*. A driver must not make a U-turn on a curve or on the approach to or near the crest of a grade where his or her vehicle cannot be seen by the driver of another vehicle approaching from either direction within 200 feet. (*Veh.C. 22105*; see *4 Pacific L. J. 555*; *7A Am.Jur.2d (1997 ed.)*, *Automobiles and Highway Traffic* §268; 24 *Proof of Facts* 697 [U-turn accidents]; 53 *A.L.R.4th* 849 [U-turn collisions].)

West's Key Number Digest, *Automobiles* k.154

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Equestrian Crossings*. See *8 Am.Jur.2d (2007 ed.)*, *Automobiles and Highway Traffic* §609.

(5) *U-Turns*. See *7A Am.Jur.2d (2007 ed.)*, *Automobiles and Highway Traffic* §244.



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- aa. In General.

6 Witkin Sum. Cal. Law Torts § 881

[§ 881] In General.

(1) *Who Is a Pedestrian.* A pedestrian is any person who is afoot or who is using a means of conveyance propelled by human power other than a bicycle (*Veh.C. 467(a)(1)*) or an electric personal assistive mobility device (*Veh.C. 467(a)(2)*). The term "pedestrian" includes "any person who is operating a self-propelled wheelchair, motorized tricycle, or motorized quadricycle and, by reason of physical disability, is otherwise unable to move about as a pedestrian." (*Veh.C. 467(b)*.) (See *Jermane v. Forfar* (1952) 108 C.A.2d 849, 850, 240 P.2d 351 [decided prior to statutory definition; child crossing facedown on scooter propelled by one foot at crosswalk was pedestrian entitled to right-of-way]; 7A Am.Jur.2d (1997 ed.), *Automobiles and Highway Traffic* §§344 et seq., 1087 et seq.; 25 So. Cal. L. Rev. 456; 35 A.L.R.4th 1117 [who is "pedestrian"].) Unless extended, *Veh.C. 467* is repealed January 1, 2008. (*Veh.C. 467(c)*.)

(2) *Pedestrian on Roadway.* Outside a business or residence district, a pedestrian walking on the roadway must do so "close to his or her left-hand edge of the roadway." (*Veh.C. 21956(a)*.) In *Myers v. King* (1969) 272 C.A.2d 571, 77 C.R. 625, plaintiff was walking on the left-hand side of a two-lane road, facing oncoming traffic, when he was struck from behind by defendant's vehicle, which had swung out to pass another car going in the same direction. At the trial, defendant unsuccessfully sought instructions under *Veh.C. 21954* (infra, §882). *Held*, no error; the left-hand side rule of *Veh.C. 21956* relates to pedestrians walking along a highway, while *Veh.C. 21954* refers to people crossing or upon a highway. A pedestrian walking in compliance with *Veh.C. 21956* is not governed by *Veh.C. 21954*. (272 C.A.2d 579.) (On right of persons in disabled vehicle to walk to nearest freeway exit, see *Veh.C. 21960*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Who Is a Pedestrian.* See 7A Am.Jur.2d (2007 ed.), *Automobiles and Highway Traffic* §319 et seq.; 8 Am.Jur.2d (2007 ed.), *Automobiles and Highway Traffic* §433 et seq.

The portion of *Veh.C. 467(b)* quoted in the text was amended in 2007 without substantive change.



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3. Right-of-Way: Driver and Pedestrian.
- bb. Crosswalks.

6 *Witkin Sum. Cal. Law Torts* § 882

[§ 882] Crosswalks.

(1) *Pedestrian in Crosswalk*. The driver of a vehicle must yield the right-of-way to a pedestrian crossing a roadway within a marked crosswalk or within an unmarked crosswalk at an intersection. (*Veh.C. 21950(a)*.) If the driver approaches a pedestrian within a marked or unmarked crosswalk, he or she must exercise all due care and must reduce speed or take any other action as necessary to safeguard the safety of the pedestrian. (*Veh.C. 21950(c)*.) But these provisions do not relieve the pedestrian from using due care for his or her safety: "[n]o pedestrian may suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard." And "[n]o pedestrian may unnecessarily stop or delay traffic while in a marked or unmarked crosswalk." (*Veh.C. 21950(b)*.) (See 42 Proof of Facts 2d 1 [negligence of pedestrian struck by motor vehicle].) However, these duties of the pedestrian do not relieve the driver from the duty to exercise due care for the safety of a pedestrian within a marked crosswalk or within an unmarked crosswalk at an intersection. (*Veh.C. 21950(d)*.) (See BAJI, No. 5.50 et seq.)

In *Gray v. Brinkerhoff* (1953) 41 C.2d 180, 184, 258 P.2d 834, the court declared that a driver's failure to yield the right-of-way to a pedestrian crossing in a marked crosswalk amounts to "a violation of the statute and negligence as a matter of law in the absence of a reasonable explanation for defendant's conduct." (See *Novak v. Dewar* (1961) 55 C.2d 749, 752, 13 C.R. 101, 361 P.2d 709 [following *Gray*].)

In *Schmitt v. Henderson* (1969) 1 C.3d 460, 82 C.R. 502, 462 P.2d 30, the court held that there was no duty on the part of a pedestrian crossing in a marked crosswalk and in obedience to a traffic signal to look *behind*, because doing so would blind the pedestrian to the more common sources of danger. (1 C.3d 464.) (On accident where there is reliance on traffic signal, see 2 A.L.R.3d 155 [stop-go signal]; 3 A.L.R.3d 557 [signal other than stop-go].)

(2) *Pedestrian Outside Crosswalk*. A pedestrian on a roadway at a point (a) other than within a marked crosswalk, or (b) within an unmarked crosswalk at an intersection, must yield the right-of-way to all vehicles on the roadway so near as to constitute an immediate hazard. (*Veh.C. 21954(a)*); see 42 Proof of Facts 2d 1 [negligence of pedestrian struck by motor vehicle]; BAJI, No. 5.52.2.) The driver, however, must still exercise due care for the safety of pedestrians on the roadway. (*Veh.C. 21954(b)*.) (See 34 A.L.R.3d 425 [liability when person on sidewalk is struck by overhang of

vehicle].)

In *Stockstill v. South Laguna Disposal Co.* (1969) 1 C.A.3d 1022, 82 C.R. 268, plaintiff, an elderly woman, walked into the street in front of her home to sweep up leaves that had just fallen from defendant's departing refuse truck. While plaintiff had her back to the truck, the driver began to back up to make a turn and struck plaintiff with the rear of the vehicle. The trial judge instructed the jury that the pedestrian should have yielded the right of way to the vehicle. *Held*, reversed; *Veh.C. 21954* "was not intended to give motorists a superior right over pedestrians when backing a vehicle on a highway. The section was obviously designed to require a pedestrian to yield the right of way to normal *oncoming* vehicular traffic, not to give superior rights to a motorist backing up on a highway." (1 C.A.3d 1027.) When backing up, a driver must act "with reasonable safety." (1 C.A.3d 1027, citing *Veh.C. 22106*.)

(3) *Driver Blocking Crosswalk*. No person may stop a vehicle unnecessarily so as to block a marked or unmarked crosswalk or sidewalk. (*Veh.C. 21970(a)*.) However, this provision does not preclude the driver of a vehicle facing a steady circular red light from turning right or left from a one-way street onto a one-way street as otherwise permitted by law. (*Veh.C. 21970(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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aa. Driving in Wrong Location or Manner.

6 Witkin Sum. Cal. Law Torts § 883

[§ 883] Driving in Wrong Location or Manner.

(1) *Driving on Wrong Side of Roadway.* With certain exceptions, a vehicle must be driven on the right half of a highway. (*Veh.C.* 21650; see *Harris v. Johnson* (1916) 174 C. 55, 57, 161 P. 1155; *Mathers v. Riverside* (1943) 22 C.2d 781, 785, 141 P.2d 419; *Armstrong v. Allen* (1946) 75 C.A.2d 514, 517, 171 P.2d 552; *Altomare v. Hunt* (1950) 101 C.A.2d 10, 13, 224 P.2d 904 [even on private road, universal custom establishes standard of care requiring driver to keep on right side].)

(2) *Turning From Wrong Lane.* No person may turn a vehicle from a direct course or move right or left on a roadway until the movement can be made with reasonable safety, and then only after the giving of an appropriate signal. (*Veh.C.* 22107 [requiring reasonable safety and giving of signal]; see 24 Proof of Facts 559 [right turns]; 7 A.L.R.3d 282 [right turn from lane other than right-hand lane]; BAJI, Nos. 5.20, 5.21.)

(3) *Maintaining Intervening Distance.* No driver should follow another vehicle more closely than is reasonable and prudent, having regard for speed, traffic, and road conditions. (*Veh.C.* 21703.) (See *Sweeney v. Pozarelli* (1964) 228 C.A.2d 585, 590, 39 C.R. 601; *Pittman v. Boiven* (1967) 249 C.A.2d 207, 214, 57 C.R. 319; 29 Proof of Facts 2d 121 [passing]; 85 A.L.R.2d 613 [driver's failure to maintain proper distance from vehicle ahead]; 75 A.L.R.3d 327 [effect of sudden emergency].)

(4) *Driving Too Slowly.* No person should drive on a highway at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or while the vehicle is on a grade or to comply with the law. (*Veh.C.* 22400.) (See 66 A.L.R.2d 1194 ["slow-speed" traffic statutes].)

(5) *Driving Under Influence of Liquor or Drug.* A person may not recover nonpecuniary damages if, at the time of the accident, he or she was operating a vehicle in violation of *Veh.C.* 23152 (driving with blood-alcohol percentage above allowable limits) or *Veh.C.* 23153 (causing bodily injury while driving under the influence), and was convicted. (See C.C. 3333.4(a)(1), *infra*, §1657 [barring recovery of noneconomic damages by motorist convicted of driving under influence]; BAJI, Nos. 5.40, 5.41.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Turning From Wrong Lane*. See 96 Proof of Facts 3d 169 [right turns; superseding 24 Proof of Facts 559, text, p. 116].



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- bb. Obstruction of View.

6 Witkin Sum. Cal. Law Torts § 884

[§ 884] Obstruction of View.

No person may drive a vehicle that is so loaded, or so filled with persons in the front seat, that the driver's (1) view is obstructed to the front or sides, or (2) control is interfered with. (*Veh.C. 21700.*) (See *Goodwin v. Bryant* (1964) 227 C.A.2d 785, 794, 39 C.R. 132 [in view of general knowledge that auto seats are wider than before, mere proof that three adults were in the front seat was insufficient to justify instruction on *Veh.C. 21700*].)

No person may drive a motor vehicle with any object or material "placed, displayed, installed, affixed, or applied" on the windshield or side or rear windows (*Veh.C. 26708(a)(1)*), or applied in or upon the vehicle so that it obstructs or reduces the driver's clear view through the windshield or side windows (*Veh.C. 26708(a)(2)*). This section, however, does not apply to the following: rearview mirrors; adjustable nontransparent sun visors mounted forward of the side windows and not attached to the glass; signs, stickers, or other materials displayed in a seven inch square in the lower corner of the windshield farthest from the driver or in the lower corner of the rear window farthest from the driver, or in a five-inch square in the lower corner of the windshield nearest the driver; side windows to the rear of the driver; informational signs on a common carrier, when the signs do not interfere with the driver's clear view of approaching traffic; rear window wiper motors; rear trunk lid handles or hinges; rear windows when the vehicle has outside mirrors on both sides affording a view of at least 200 feet to the rear; clear, transparent lens of specified dimensions on the side window opposite the driver to give him or her a wide-angle view; sun screens on the front side windows if authorized in writing by a licensed physician or surgeon; school buses if the signs do not interfere with the driver's clear view of approaching traffic; and certain electronic communication devices for electronic toll and traffic management or for California Highway Patrol enforcement facilities to communicate with the vehicle. (*Veh.C. 26708(b)*.) (On requirements for affixing transparent material to top of windshield, see *Veh.C. 26708(c)*; on requirements for affixing clear, colorless, and transparent material to front side windows, see *Veh.C. 26708(d)*.)

Placing a transparent material on the windshield or side or rear windows is also prohibited if the material alters the color or reduces the light transmittance of the windshield or windows. This requirement is subject to the same exceptions as *Veh.C. 26708(b)*, (c), and (d). (*Veh.C. 26708.5(a)*.) The section does not apply to tinted safety glass complying with safety standards of the United States Department of Transportation and installed in a location permitted

by those standards for the type of glass used. (*Veh.C. 26708.5(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

Veh.C. 26708 does not apply to a portable global positioning system mounted on the windshield in the seven-inch square in the lower corner of the windshield farthest from the driver or in the five-inch square in the lower corner of the windshield nearest the driver. (*Veh.C. 26708(b)(12)*, added in 2008.)



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6 *Witkin Sum. Cal. Law Torts* § 885

[§ 885] Equipment and Signals.

(1) *Use of Brakes*. All vehicles must be equipped with a service brake system and (except for motorcycles) a parking brake system. (*Veh.C.* 26450 et seq.) (See *Alarid v. Vanier* (1958) 50 C.2d 617, 621, 327 P.2d 897; *Maloney v. Rath* (1968) 69 C.2d 442, 444, 71 C.R. 897, 445 P.2d 513, *infra*, §1251) [presumption of negligence arose from statutory violation but was properly rebutted]; 7A *Am.Jur.2d* (1997 ed.), *Automobiles and Highway Traffic* §222; 3 Proof of Facts 1 [brakes]; 72 *A.L.R.2d* 6 [failure to apply brakes in timely manner]; 40 *A.L.R.3d* 9 [defective brakes].)

(2) *Use of Headlights*. During darkness and inclement weather, every vehicle (except a motorcycle) must have at least two lighted headlamps at its front. (*Veh.C.* 24400 et seq.) (See *Matlock v. Farmers Mercantile Co.* (1968) 258 C.A.2d 362, 366, 65 C.R. 723; *Arellano v. Moreno* (1973) 33 C.A.3d 877, 882, 109 C.R. 421 [vehicle was still within requirements of *Veh.C.* 24800 and 24250 though temporarily inoperable]; 7A *Am.Jur.2d* (1997 ed.), *Automobiles and Highway Traffic* §224; 62 *A.L.R.3d* 560 [inadequate front lighting]; 62 *A.L.R.3d* 771 [inadequate taillights or rear reflectors], 62 *A.L.R.3d* 844 [inadequate auxiliary lighting of improper clearance or load, etc.]; 63 *A.L.R.3d* 824 [failure to dim headlights]; 64 *A.L.R.3d* 551 [blinding lights].) (On headlamps for motorcycles, see *Veh.C.* 25650.5; 4 *Pacific L. J.* 557.)

(3) *Duty To Give Proper Visual Signals*. Signals must be given by signal lamp, unless a vehicle is not required to be and is not equipped with turn signals. Drivers of these vehicles must give a hand and arm signal when required. (*Veh.C.* 22110(a).) In the event the signal lamps become inoperable while driving, hand and arm signals must be used. (*Veh.C.* 22110(b).) (See *Veh.C.* 22107, 22108 [turn signals]; *Veh.C.* 22109 [signals for stopping or suddenly decreasing speed]; *Veh.C.* 22111 [methods of signaling with hand and arm]; *Veh.C.* 22112 [school bus signals]; *Sweeney v. Pozarelli* (1964) 228 C.A.2d 585, 590, 39 C.R. 601; *Pittman v. Boiven* (1967) 249 C.A.2d 207, 214, 57 C.R. 319; 7 *A.L.R.3d* 292 [right turns from wrong lane]; 84 *A.L.R.4th* 124 [failure to proceed in accordance with turn signal given].)

(4) *Duty To Give Proper Sound Signals*. When reasonably necessary to insure safety, the driver should give audible warning with the vehicle's horn. "The horn shall not otherwise be used." (*Veh.C.* 27001.) (See *Veh.C.* 27000 [requiring every vehicle to be equipped with horn normally audible from at least 200 feet, but not emitting unreasonably loud or

harsh sound]; *Menchaca v. Helms Bakeries* (1968) 68 C.2d 535, 541, 67 C.R. 775, 439 P.2d 903; 16 A.L.R.3d 897 [at curve or hill]; 21 A.L.R.3d 268 [at intersection]; 22 A.L.R.3d 325 [when passing]; 24 A.L.R.3d 183 [on approaching pedestrian].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Use of Brakes*. See 7A Am.Jur.2d (2007 ed.), *Automobiles and Highway Traffic* §199.(2) *Use of Headlights*. See 7A Am.Jur.2d (2007 ed.), *Automobiles and Highway Traffic* §203 et seq.



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- dd. Other Situations.

6 *Witkin Sum. Cal. Law Torts* § 886

[§ 886] Other Situations.

Everyone other than a driver's license examiner or an approved driving instructor is prohibited from wilfully interfering with a driver or the vehicle's mechanism in such a way as to affect the driver's control of the vehicle. (*Veh.C. 21701.*) In *Reclusado v. Mangum* (1964) 228 C.A.2d 8, 39 C.R. 157, the court held that the statute was violated by a mother placing her 18-month-old baby in the front seat next to the driver. The statute does not explicitly require physical and direct interference, and that it must be deemed to cover acts like blinding the driver's view of the road or thrusting a baby forward so as to cause a lapse of the driver's control. (228 C.A.2d 15.)

Numerous other statutes and articles deal with driving rules. (See *Veh.C. 21280* et seq. [electric personal assistive mobility device]; *Veh.C. 21712* [unlawful riding and towing]; *Veh.C. 28070* et seq. [need for bumpers on passenger vehicle]; *Veh.C. 38025* [driving rules for off-highway vehicles when operated on highway]; 7 Proof of Facts 333 [negligent lookout]; 46 Proof of Facts 2d 647 [negligence in backing up]; 66 Proof of Facts 3d 379 [turning and jackknifing of commercial vehicles]; 10 Am.Jur. Trials 493 [Divider Line Automobile Accident Cases]; 13 A.L.R.3d 431 [racing on highway]; 19 A.L.R.3d 731 [projecting loads]; 27 A.L.R.3d 12 [collision with person engaged about stalled vehicle]; 32 A.L.R.4th 933 [driving with vision obscured by smoke or steam]; 34 A.L.R.4th 520 [failure of highway user to remove material spilled from vehicle]; 43 A.L.R.3d 725 [escape of trailer]; 14 A.L.R.5th 193 [signaling other vehicle or pedestrian to proceed or to pass signaling vehicle].)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Parking.

6 Witkin Sum. Cal. Law Torts § 887

[§ 887] Parking.

The violation of parking standards set forth in the Vehicle Code (*Veh.C.* 22500 et seq.) or a local ordinance is negligence per se. (See *Thomson v. Bayless* (1944) 24 C.2d 543, 546, 150 P.2d 413; *Flynn v. Bledsoe Co.* (1928) 92 C.A. 145, 152, 267 P. 887; *Mason v. Crawford* (1936) 17 C.A.2d 529, 62 P.2d 420 [double parking]; *Carlton v. Pacific Coast Gasoline Co.* (1952) 110 C.A.2d 177, 183, 242 P.2d 391 [parking partly off traveled portion of highway when it is practicable to park entirely off it]; *Parker v. San Francisco* (1958) 158 C.A.2d 597, 602, 323 P.2d 108 [local ordinance on bus stopping in marked zone].)

A number of practice works involve parking. (See 7A *Am.Jur.2d* (1997 ed.), *Automobiles and Highway Traffic* §329 et seq.; 26 *Proof of Facts* 2d 575 [accidents involving stalled or disabled vehicle]; 17 *A.L.R.2d* 582, 585 [parallel parking]; 82 *A.L.R.2d* 726 [double parking]; 92 *A.L.R.2d* 1037 [parked car with open door]; 4 *A.L.R.3d* 324 [illegal parking in vicinity of street corner or intersection]; 42 *A.L.R.3d* 1252 [runaway due to faulty brakes or failure to set brakes]; 42 *A.L.R.3d* 1283 [accidental starting up of parked vehicle]; 45 *A.L.R.3d* 787 [stranger's operation of vehicle parked with key left in ignition]; 61 *A.L.R.3d* 13 [parked or standing vehicle without sufficient lights]; 70 *A.L.R.4th* 276 [stranger's operation of vehicle parked with key removed from ignition].)

Under the Anti-Gridlock Act of 1987, a driver may not (1) enter an intersection or marked crosswalk, (2) make a turn at an intersection when facing a steady circular yellow or yellow arrow signal, or (3) enter a railroad or rail transit crossing unless there is sufficient space on the other side of the crossing to accommodate the vehicle. (*Veh.C.* 22526(a), (b), (c).)

A violation of the Act is either a stopping violation (if a notice to appear is issued by a peace officer) or a parking violation (if a notice of a parking violation is issued by a person, other than a peace officer, who is authorized to enforce parking statutes and regulations). (*Veh.C.* 22526(e).)

West's Key Number Digest, Automobiles k.169, 173(3), 173(4), 201(5)

SUPPLEMENT: [This section is current through the latest supplement]

Practice works: See 7A Am.Jur.2d (2007 ed.), *Automobiles and Highway Traffic* §303 et seq. *Anti-Gridlock Act:* See *Gilmer v. Ellington* (2008) 159 C.A.4th 190, 202, 70 C.R.3d 893 [Anti-Gridlock Act is not related to safe operation of vehicles; thus any violation of Act by driver who yielded right-of-way to left-turning driver did not support negligence per se action by motorcyclist hit by turning driver].



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c. Bicycles.

6 *Witkin Sum. Cal. Law Torts* § 888

[§ 888] Bicycles.

A bicycle is "a device upon which any person may ride, propelled exclusively by human power through a belt, chain, or gears, and having one or more wheels." (*Veh.C. 231.*) The rights and duties of motor vehicle drivers apply to bicycle riders, except those provisions that by their very nature can have no application (*Veh.C. 21200(a)*) and except for peace officers when engaged in specified activities (*Veh.C. 21200(b)*). Bicycles operated on a roadway or shoulder of a highway must proceed in the same direction as vehicles. (*Veh.C. 21650.1.*) (On equipment and operation, see *Veh.C. 21201* et seq.; for regulations concerning motorized bicycles, see *Veh.C. 406, 23135, 24015.*)

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6 *Witkin Sum. Cal. Law Torts* § 889

[§ 889] Boats.

Harb. & Nav.C. 652 grants the Department of Boating and Waterways general power to adopt regulations for safety standards that comply with federal law; and *Harb. & Nav.C. 655.3* specifically grants power to establish state rules of the road and pilot rules in conformity with those contained in the federal navigation laws or the navigation rules promulgated by the Coast Guard. (See *Harb. & Nav.C. 655, 655.2, 660*; for definitions, see *Harb. & Nav.C. 651*; for exemptions, see *Harb. & Nav.C. 650.1*; for penalties, see *Harb. & Nav.C. 668*.)

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a. In General.

6 Witkin Sum. Cal. Law Torts § 890

[§ 890] In General.

Under the strictest view of the doctrine, a statute or ordinance prescribes an inflexible standard of due care, and proof of its violation conclusively establishes negligence. However, the view followed by the majority of courts recognizes that in emergencies, or under unusual conditions, it may be difficult if not impossible to comply, and that the statutes are subject to implied qualifications or exceptions that excuse the violation. (See *Mora v. Favilla* (1921) 186 C. 199, 202, 199 P. 17; *Berkovitz v. American River Gravel Co.* (1923) 191 C. 195, 199, 215 P. 675 [taillight inspected and found in good order short time before it went out]; *Satterlee v. Orange Glenn School Dist. of San Diego* (1947) 29 C.2d 581, 588, 177 P.2d 279; *Maloney v. Rath* (1968) 69 C.2d 442, 444, 71 C.R. 897, 445 P.2d 513, *infra*, §1251; *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 C.4th 284, 294, 65 C.R.2d 872, 940 P.2d 323, *infra*, §1248; *Rath v. Bankston* (1929) 101 C.A. 274, 279, 281 P. 1081 [gasoline supply exhausted despite reasonably careful inspection]; *Jolley v. Clemens* (1938) 28 C.A.2d 55, 68, 82 P.2d 51; *Dennis v. Gonzales* (1949) 91 C.A.2d 203, 210, 205 P.2d 55; *State Comp. Ins. Fund v. Operated Equipment Co.* (1968) 265 C.A.2d 759, 764, 71 C.R. 531; *Casey v. Russell* (1982) 138 C.A.3d 379, 383, 384, 188 C.R. 18, citing the text; *Rest.2d, Torts* §288A; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §710 et seq.; 10 *Cal. L. Rev.* 255; 13 *Cal. L. Rev.* 428; 3 *So. Cal. L. Rev.* 131.)

Some opinions expressed the view that the excuse must be a cause "beyond the control" of the party charged with the violation. (See, e.g., *Ornales v. Wigger* (1950) 35 C.2d 474, 480, 218 P.2d 531; *Gallichotte v. California Mut. Bldg. & Loan Assn.* (1935) 4 C.A.2d 503, 506, 41 P.2d 349;) This view was expressly disapproved, as involving an impossible standard, in *Alarid v. Vanier* (1958) 50 C.2d 617, 327 P.2d 897: "In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might be reasonably expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (50 C.2d 624.)

Ev.C. 669(b) restates this principle generally, with special attention to when the person violating the statute is a child. The presumption may be rebutted by proof of either of the following:

(1) "The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (*Ev.C.* 669(b)(1).)

(2) "The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications." (*Ev.C. 669(b)(2).*)

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6 Witkin Sum. Cal. Law Torts § 891

[§ 891] Illustrations.

Satterlee v. Orange Glenn School Dist. of San Diego (1947) 29 C.2d 581, 177 P.2d 279, extensively considers the effect of the doctrine. The action arose out of a collision between plaintiff's automobile and defendant's school bus at an intersection. Defendant asked for an instruction substantially in the language of *Veh.C. 21800*, requiring one driver to yield the right of way to another, under specified circumstances (see *supra*, §§879, 880), and for a further instruction that violation of the statute by the plaintiff would be negligence that, if it proximately contributed in the slightest degree to the accident, would bar recovery. The trial judge refused and instead instructed the jury on his own motion that one driver could not arbitrarily rely on the right of way, and that the test of negligence in such a case is the usual one: What would a reasonably prudent person do under those circumstances? *Held*, both instructions were erroneous, and judgment for plaintiff was reversed.

(a) The instruction proposed by defendant omitted the essential issue whether circumstances existed that might excuse the violation of the statute. An emergency or other unusual conditions beyond the control of the person charged with the violation may rebut the presumption of negligence, and the jury must ordinarily determine, as a question of fact, whether the excuse is shown. (29 C.2d 591.)

(b) The instruction given by the judge erroneously disregarded the doctrine of negligence per se and applied the reasonable man standard alone. (29 C.2d 592.)

(c) The correct rule is as follows: "The presumption created by proof of the failure to comply with a statute or ordinance relieves a defendant from the burden of proving that the plaintiff failed to act as a reasonably prudent man. All that the defendant need prove to establish contributory negligence is that plaintiff's violation of the statute in question proximately caused the accident. ... If there was a violation of the applicable statute, the burden of going forward is then cast upon the plaintiff, if the defendant is relying upon contributory negligence, to present evidence justifying an excuse for violation. If the jury does not believe that the evidence is sufficient to excuse violation, it must find for the defendant." (29 C.2d 592.)

In *Combs v. Los Angeles Ry. Corp.* (1947) 29 C.2d 606, 177 P.2d 293, the court, restating the principles laid down in *Satterlee*, affirmed a judgment for plaintiff on somewhat doubtful facts. Plaintiff was injured in a collision of an

automobile and a streetcar while riding on the step of the streetcar in violation of a local ordinance. *Held*, the jury could conclude, from his testimony, that he boarded the car without noticing its crowded condition, that he was endeavoring to make his way into the car and thought the people in front would soon move up, that he was prevented from doing so by "subsequent events beyond his control," and that the violation of the ordinance was therefore excusable. (29 C.2d 610.) (See *Espinoza v. Rossini* (1966) 247 C.A.2d 40, 47, 55 C.R. 205, *infra*, §1317 [*Veh.C.* 21712, prohibiting riding on portion of vehicle not intended for passengers, is expressly inapplicable to employee engaged in necessary discharge of duties].)

In *Alarid v. Vanier* (1958) 50 C.2d 617, 327 P.2d 897, plaintiff's car, stopped in traffic at a stoplight, was struck in the rear by defendant's car. Defendant testified that his foot brake failed, that he was so excited that he did not think of using his hand brake, and that there had been nothing wrong with his brakes prior to that moment. *Held*, this testimony was sufficient to overcome the presumption and sustain a verdict and judgment for defendant. (50 C.2d 624.)

In *State Comp. Ins. Fund v. Operated Equipment Co.* (1968) 265 C.A.2d 759, 71 C.R. 531, the negligent tortfeasor operated a crane. A safety order required a warning device that could be heard above noise on the site, and permitting the crane to operate without such a device was a breach of duty. But the evidence showed a custom of the crane operator to give vocal warning; this supported an inference that the warning was equal to the signal called for in the safety order. (265 C.A.2d 764.)

In *Martin v. Smith* (1951) 103 C.A.2d 894, 230 P.2d 679, a truck became disabled (brakes locked) in the daytime. The driver set out warning reflectors in front and back, flagged a passing car, and went for assistance, leaving his truck unattended for an hour. The operator of plaintiff's car did not observe or heed the warnings and collided. *Held*, the truck driver was not negligent; the yellow truck and reflectors were ample warning to oncoming traffic. (103 C.A.2d 898.)

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6 Witkin Sum. Cal. Law Torts § 892

[§ 892] Class of Persons.

Even where the violation is not excused, so that the conduct is below the standard of due care (see *supra*, §§871, 872), this does not establish all the elements of a cause of action. Other limiting doctrines applicable to negligence generally apply here as well, including the basic principle that liability is dependent upon a duty owed to persons in the class of which the plaintiff is a member. (*Ev.C. 669(a)(4)*, *supra*, §873; *Figone v. Guisti* (1919) 43 C.A. 606, 609, 185 P. 694; see *Richards v. Stanley* (1954) 43 C.2d 60, 62, 271 P.2d 23; *Vesely v. Sager* (1971) 5 C.3d 153, 164, 95 C.R. 623, 486 P.2d 151; *Cheong v. Antablin* (1997) 16 C.4th 1063, 1069, 68 C.R.2d 859, 946 P.2d 817, *infra*, §1349; *Flynn v. Bledsoe Co.* (1928) 92 C.A. 145, 150, 267 P. 887; *Hatch v. Ford Motor Co.* (1958) 163 C.A.2d 393, 398, 329 P.2d 605; *Sagadin v. Ripper* (1985) 175 C.A.3d 1141, 1166, 221 C.R. 675; *Goodwin v. Reilley* (1985) 176 C.A.3d 86, 96, 221 C.R. 374; *Nowlon v. Koram Ins. Center* (1991) 1 C.A.4th 1437, 1445, 2 C.R.2d 683; *Andres v. Y.M.C.A.* (1998) 64 C.A.4th 85, 92, 74 C.R.2d 788; *Rest.2d, Torts* §§286, Comment f et seq., 288; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §725 et seq.)

Thus, in *Corbett v. Spanos* (1918) 37 C.A. 200, 202, 173 P. 769, violation of an ordinance requiring permanent flooring on stairways, intended to assure unobstructed access for firefighters, was held not to be negligence toward an ordinary licensee coming on the premises. And *Hoff v. Vacaville Unified School Dist.* (1998) 19 C.4th 925, 937, 80 C.R.2d 811, 968 P.2d 522, *supra*, §328, held that a school district had no duty under a statute (*Educ.C. 44807*) requiring public school teachers to hold students to strict account for their conduct going to and from school to a pedestrian struck by a car driven by a student leaving an unsupervised parking lot of the high school; plaintiff was not a member of the class of persons (students) that the statute was designed to protect.

On the other hand, in *Cappa v. Oscar C. Holmes* (1972) 25 C.A.3d 978, 102 C.R. 207, defendant, constructing a multilevel parking lot, left a slab on a high level without a fence or railing. *Held*, the judge properly instructed on a general safety order of the Department of Industrial Relations requiring these safeguards. Although intended primarily for the protection of workers, where an order does not indicate the contrary, it may apply to persons coming on the premises. (25 C.A.3d 982.) Prior cases have assumed that such an order does not protect trespassers, but under *Rowland v. Christan* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086, in determining its application, "no distinction may be made between trespassers, licensees, and invitees." (25 C.A.3d 983.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Ramirez v. Nelson* (2008) 44 C.4th 908, 916, 80 C.R.3d 728, 188 P.3d 659 [statute prohibiting moving tools and equipment within six feet of power lines imposes strict criminal misdemeanor liability on employers whose employees violate statute; it did not give rise to special standard of care owed by homeowners to landscaping contractor or workers to ensure that their tree trimming work would not result in death or injury to either contractor or workers]. *Correction*: Page 124, third line from end of section, "*Rowland v. Christan*" should be "*Rowland v. Christian*".



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b. Type of Harm.

6 Witkin Sum. Cal. Law Torts § 893

[§ 893] Type of Harm.

Liability is also dependent on a showing that the harm caused was that which the statute was designed to prevent. (*Ev.C. 669(a)(3)*, supra, §873; see *Stafford v. United Farm Workers* (1983) 33 C.3d 319, 324, 188 C.R. 600, 656 P.2d 564 [applying rule to analogous situation of violation of temporary restraining order]; *Cheong v. Antablin* (1997) 16 C.4th 1063, 1069, 68 C.R.2d 859, 946 P.2d 817, infra, §1349 [skiing safety ordinance specifically stating that skiers assumed inherent risks of skiing did not govern tort liability between skiers]; *Hoff v. Vacaville Unified School Dist.* (1998) 19 C.4th 925, 937, 80 C.R.2d 811, 968 P.2d 522, supra, §328; *Miglierini v. Havemann* (1966) 240 C.A.2d 570, 573, 49 C.R. 795, infra, §894; *Cade v. Mid-City Hosp. Corp.* (1975) 45 C.A.3d 589, 598, 119 C.R. 571; *Nowlon v. Koram Ins. Center* (1991) 1 C.A.4th 1437, 1444, 2 C.R.2d 683; *Wawanesa Mut. Ins. Co. v. Matlock* (1997) 60 C.A.4th 583, 586, 70 C.R.2d 512 [P.C. 380, making it illegal to furnish cigarettes to minors, has nothing to do with fire suppression, but is intended to protect minors from cigarette addiction]; *Karen Kane v. Bank of America* (1998) 67 C.A.4th 1192, 1203, 79 C.R.2d 712, 4 Summary (10th), *Negotiable Instruments*, §98 [federal banking regulations requiring financial institutions to report large and suspicious transactions were designed as tool for locating large transfers of proceeds of unlawful transactions, not to prevent financial injury to businesses caused by faithless employees]; *Lopez v. Baca* (2002) 98 C.A.4th 1008, 1019, 120 C.R.2d 281 [nightclub patron shot by another patron could not rely on negligence per se theory based on defendant club owner's violation of morals statute prohibiting licensed alcohol sellers from hiring women to solicit sales of drinks]; *Rest.2d, Torts* §286(c), Comment i; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §734 et seq.)

In *Nunneley v. Edgar Hotel* (1950) 36 C.2d 493, 225 P.2d 497, plaintiff, a friend of a hotel guest, went up on the hotel roof through an open door, came to a mattress resting on what looked like a small roof, sat down, and fell to the bottom of an open shaft on which the mattress rested. The shaft was surrounded by a 27-inch parapet, instead of the 30-inch parapet then required by statute. Although a judgment for damages was affirmed on general negligence principles, it was held error for the trial judge to instruct on the statute and negligence per se. The statute was designed to protect against danger of a person walking or stumbling into the shaft. But even a wall 30 inches high in compliance with the statute would not have prevented a person from sitting on the covering; hence, it could not have been the legislative intent to guard against the danger of falling while sitting. (36 C.2d 498.) (For similar approach in terms of proximate cause, see infra, §895.)

In *Atkins v. Bisigier* (1971) 16 C.A.3d 414, 94 C.R. 49, the court held that a regulation requiring rope and buoys in public swimming pools was meant to prevent drowning rather than diving accidents. (16 C.A.3d 421.)

In *Lua v. Southern Pac. Trans. Co.* (1992) 6 C.A.4th 1897, 1903, 9 C.R.2d 116, the court held that a Public Utilities Commission order regulating the length of time that a train could block a public grade crossing was designed to prevent harm caused by delays of traffic, and hence could not be a basis for a railroad's per se liability to a pedestrian who was injured when he chose to climb on a train that was blocking an intersection. (6 C.A.4th 1904.)

On the other hand, in *Courtell v. McEachen* (1959) 51 C.2d 448, 334 P.2d 870, an ordinance made it unlawful to leave an unattended and unextinguished fire. Plaintiff, a child trespasser, sat down near the embers of defendants' rubbish fire and was burned. Defendants contended that the regulation was designed to protect only against the *spread of fire*. The court held, however, that reasonably construed, the statute was intended to protect against all perils that might arise from fires not properly extinguished, whether or not the danger materializes on the premises; and that the protection extended to a child trespasser who came within the attractive nuisance rule (infra, §1154). (51 C.2d 459.) (See *Olsen v. McGillicuddy* (1971) 15 C.A.3d 897, 903, 93 C.R. 530.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Urhausen v. Longs Drug Stores Calif.* (2007) 155 C.A.4th 254, 267, 65 C.R.3d 838 [negligence per se did not apply in action by disabled plaintiff who fell while walking with crutches in parking lot that had sudden slope near curb, which violated state and federal regulations governing configuration of disabled access parking spaces; regulations were intended to provide disabled, especially those in wheelchairs, with level area for entering and leaving vehicles, not to prevent type of injury plaintiff suffered].



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6 Witkin Sum. Cal. Law Torts § 894

[§ 894] Vehicle Cases.

Both of the foregoing concepts (duty and type of harm; supra, §§892, 893) are involved in several familiar types of vehicle accident cases, although the courts often use the older terminology and approach of proximate cause.

Failure of the defendant to register his or her motor vehicle as required by a statute or ordinance does not conclusively establish liability to a person injured in a collision. The purpose of the regulation is to safeguard the owner's title and to protect buyers, and it has no causal connection with injuries resulting from a collision. (See *Parsons v. Crown Disposal Co.* (1997) 15 C.4th 456, 484, 63 C.R.2d 291, 936 P.2d 70, supra, §911; *Shimoda v. Bundy* (1914) 24 C.A. 675, 682, 142 P. 109; 1 So. Cal. L. Rev. 300; 29 A.L.R.2d 963 [lack of proper registration or license as evidence of operator's negligence].)

This result is more debatable where a statute or ordinance requires that a car left in a public street be locked and the ignition key removed; the owner leaves it unlocked, with the ignition key in place; a thief steals it and, while operating it, negligently injures the plaintiff. One view is that the regulation is designed merely to prevent the theft of the vehicle, and that its violation has no causal connection with the negligent driving of the thief. The other is that the unlocked vehicle creates a foreseeable risk of meddling by children or by thieves who are less likely to operate it carefully than the owner or an authorized person; hence, the statute has as one of its purposes the protection of the public from negligent driving. (See *Richards v. Stanley* (1954) 43 C.2d 60, 271 P.2d 23, supra, §840; 43 Cal. L. Rev. 140; 2 U.C.L.A. L. Rev. 146; 45 A.L.R.3d 787 [stranger's operation of vehicle parked with key left in ignition]; 70 A.L.R.4th 276 [stranger's operation of vehicle parked with key removed from ignition].)

In *Hatch v. Ford Motor Co.* (1958) 163 C.A.2d 393, 329 P.2d 605, plaintiff, a 6-year-old child, while walking, collided with the sharp protruding radiator ornament of a parked car manufactured by defendant. *Veh.C.* 27601 (since repealed) makes it unlawful to sell or operate a new motor vehicle equipped with a radiator ornament protruding to the front of the face of the grill. *Held*, order sustaining demurrer affirmed. (a) In the absence of statute, a manufacturer owes no duty to design an automobile so as to preclude injuries of this type sustained while the car is not being operated; i.e., this is not a risk to be anticipated. Otherwise, liability could be imposed for injuries from any protruding functional parts, such as headlights or radio antenna. (163 C.A.2d 397.) (b) The statute was designed to protect those who might be injured as a result of driving the automobile. Thus, the lawful possessor is made liable only if *operating* it, and the

Legislature could not have intended to impose liability on the manufacturer under conditions that would not impose this liability on the possessor. (163 C.A.2d 399.)

In *Miglierini v. Havemann* (1966) 240 C.A.2d 570, 49 C.R. 795, the complaint alleged that defendants negligently collided with plaintiff's parked car, and failed to stop and leave information as required by *Veh.C. 20002*; that plaintiff pursued them on foot, calling on the driver to stop, and tripped and fell, sustaining personal injuries. *Held*, judgment for defendants on demurrer affirmed. *Veh.C. 20002* was designed to protect the owner of an unattended vehicle from financial loss by a hit-and-run driver, not to protect the owner from personal injuries sustained in chasing a suspect. Thus, plaintiff was in the protected class of persons, but the harm suffered was not that which the statute sought to prevent. (240 C.A.2d 573.)

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6 Witkin Sum. Cal. Law Torts § 895

[§ 895] Proximate Cause.

If the violation of the statute or other regulation was not a "substantial factor" in bringing about the harm, or, in more conventional terminology, was not a proximate cause of the harm, the defendant is not liable. (See *Ev.C. 669(a)(2)*, supra, §873; *Williams v. Southern Pac. Co.* (1916) 173 C. 525, 540, 160 P. 660; *Burt v. Bank of California* (1931) 211 C. 548, 551, 296 P. 68; *Petersen v. Lewis* (1935) 2 C.2d 569, 572, 42 P.2d 311; *Nunneley v. Edgar Hotel* (1950) 36 C.2d 493, 499, 225 P.2d 497, supra, §893; *Shimoda v. Bundy* (1914) 24 C.A. 675, 683, 142 P. 109; *Hilbert v. Olney* (1936) 17 C.A.2d 135, 137, 61 P.2d 941 [parking partly on traveled portion of highway]; *Sharick v. Galloway* (1937) 19 C.A.2d 693, 695, 66 P.2d 185 [pedestrian walking on right-hand side of highway]; *Hitson v. Dwyer* (1943) 61 C.A.2d 803, 808, 143 P.2d 952; *Martin v. Nelson* (1947) 82 C.A.2d 733, 735, 187 P.2d 78; *Fleckner v. Dionne* (1949) 94 C.A.2d 246, 251, 210 P.2d 530; *Jeanes v. Holtz* (1949) 94 C.A.2d 826, 829, 211 P.2d 925; *Rowe v. Edwards* (1957) 152 C.A.2d 648, 653, 313 P.2d 82 [Veh.C. 22504]; *Beaupre v. Nave* (1970) 13 C.A.3d 402, 406, 91 C.R. 473; *Fagerquist v. Western Sun Aviation* (1987) 191 C.A.3d 709, 723, 236 C.R. 633, infra, §1195; 57A Am.Jur.2d (2004 ed.), *Negligence* §737 et seq.; 23 So. Cal. L. Rev. 414, 420; BAJI, No. 3.45; on proximate cause generally, see infra, §1181 et seq.)

In *Moon v. Payne* (1950) 97 C.A.2d 717, 218 P.2d 550, a rubbish fire was maintained in a garden without a permit from the fire chief as required by an ordinance. *Held*, this was not the proximate cause of injuries to a child who, though warned away, came up to the fire. The child would have been burned by a permitted fire as well. (97 C.A.2d 719.)

DeArmond v. Southern Pac. Co. (1967) 253 C.A.2d 648, 61 C.R. 844, applied this rule to a statute making a railroad company liable for damages caused by its train where there is no compliance with the requirement of ringing a bell or sounding a whistle commencing a quarter mile from a crossing. Here, the finding that negligence of the driver of the colliding automobile was the "sole proximate cause" of the collision supported judgment for defendant. (253 C.A.2d 653.)

The facts may be such as to establish proximate cause as a matter of law. Thus, in *Whinery v. Southern Pac. Co.* (1970) 6 C.A.3d 126, 85 C.R. 649, decedent was a passenger in a truck crossing railroad tracks in a city. Defendant's train, traveling at 55 miles per hour in violation of an ordinance that limited the speed to 35 miles per hour, struck the truck, killing decedent. In this wrongful death action, the judge instructed the jury that defendant was guilty of negligence per se, but that violation of the ordinance was of no consequence unless they found it to be a proximate cause. The jury returned a defense verdict. *Held*, judgment reversed for retrial of damage issue alone; on causation, only

one inference could reasonably be drawn from the uncontroverted facts: (a) the ordinance was designed to prevent the type of injury suffered; (b) the violation continued to the moment of impact; and (c) the injury could not have occurred but for the violation. (6 C.A.3d 129.)

The fact that an automobile driver has failed to obtain or keep in force a driver's license is perhaps prima facie evidence of unfitness to drive, but it is not so clearly the cause of an accident as to justify application of the doctrine of negligence per se. (*Lehmuth v. Long Beach Unified School Dist.* (1960) 53 C.2d 544, 554, 2 C.R. 279, 348 P.2d 887; *Strandt v. Cannon* (1938) 29 C.A.2d 509, 517, 85 P.2d 160; *Wysock v. Borchers Bros.* (1951) 104 C.A.2d 571, 583, 232 P.2d 531; *Shmatovich v. New Sonoma Creamery* (1960) 187 C.A.2d 342, 344, 9 C.R. 630; see 12 So. Cal. L. Rev. 497.) The same is true of the failure of a physician or nurse to obtain a valid California license; e.g., proof that a nurse who administered drugs had only an out-of-state license does not establish negligence. (*McDonald v. Foster Memorial Hosp.* (1959) 170 C.A.2d 85, 92, 338 P.2d 607.)

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B. Standard of Due Care: Negligence Per Se.
6. Doctrine Is Inapplicable to Immature Children.

6 Witkin Sum. Cal. Law Torts § 896

[§ 896] Doctrine Is Inapplicable to Immature Children.

The conflict between the doctrine of negligence per se and the subjective standard of care applied to children (supra, §998) has been the subject of much discussion. In *Cummings v. Los Angeles* (1961) 56 C.2d 258, 263, 14 C.R. 668, 363 P.2d 900, plaintiff, a child of 7 walking on a highway, was struck by defendant's automobile, suffered retrograde amnesia, and did not testify. The evidence was conflicting on the chief factual issue, whether the point of impact was on the paved portion of the highway or the shoulder. The jury's verdict for defendant was therefore an implied finding that plaintiff was on the highway and guilty of contributory negligence. *Held*, judgment reversed, for error in instructing on the general rule of negligence per se in the language of *Veh.C. 21954* (crossing at other than crosswalks).

"The *per se* negligence instruction, taken alone, when applied to children, is totally inconsistent with the body of law that has grown up to protect children. The *per se* negligence instruction is predicated on the theory that the Legislature has adopted a statutory standard of conduct that no reasonable person would violate, and that all reasonable adults would or should know such standard. But this concept does not apply to children." (56 C.2d 263.) (See *Daun v. Truax* (1961) 56 C.2d 647, 654, 16 C.R. 351, 365 P.2d 407 [5-year-old child; following *Cummings*]; *Brown v. Connolly* (1962) 206 C.A.2d 582, 586, 24 C.R. 57 [6-year-old boy; same]; cf. *Ev.C. 669(b)(2)*, supra, §890 [doctrine is applicable to child engaged in adult activity]; BAJI, No. 3.45 [doctrine is applicable unless child proves he or she acted reasonably in light of his or her maturity, intelligence, and capacity].)

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1. Custom and Regulations.
a. Customary Conduct.

6 Witkin Sum. Cal. Law Torts § 897

[§ 897] Customary Conduct.

(1) *Evidence of Custom Is Admissible.* Evidence of custom or practice of others similarly situated is always admissible on the issues of due care and negligence, unless it is violative of a standard prescribed by statute. (See *Bullis v. Security Pac. Nat. Bank* (1978) 21 C.3d 801, 809, 148 C.R. 22, 582 P.2d 109, citing the text; Dobbs, *The Law of Torts* §162 et seq.; 57A Am.Jur.2d (2004 ed.), *Negligence* §701 et seq.; 31 So. Cal. L. Rev. 324 [admissibility of evidence of superior conduct to establish breach of duty].)

(2) *Custom Is Not Conclusive of Due Care.* A few questionable decisions go further and purport to hold that reasonable conduct for a prudent person to follow under particular circumstances may become established as a matter of law by long approved practice; i.e., that when one does what the great body of other prudent men do in the same situation, he or she cannot be considered negligent. (See *Webber v. Bank of Tracy* (1924) 66 C.A. 29, 33, 225 P. 41 [standard of care of bailee established by evidence of usual custom in particular business]; *Denman v. Pasadena* (1929) 101 C.A. 769, 775, 282 P. 820; CACI, No. 413.)

But a long line of California cases supports the general rule that custom, while relevant, is not conclusive on the issue; i.e., it cannot make due care out of conduct that is in fact negligent. (See *Rudd v. Byrnes* (1909) 156 C. 636, 642, 105 P. 957; *Neel v. Mannings* (1942) 19 C.2d 647, 655, 122 P.2d 576; *Sheward v. Virtue* (1942) 20 C.2d 410, 414, 126 P.2d 345; *Phoenix Assur. Co., Ltd., of London v. Texas Holding Co.* (1927) 81 C.A. 61, 74, 252 P. 1082; *Wolfsen v. Wheeler* (1933) 130 C.A. 475, 482, 19 P.2d 1004; *Milton v. Los Angeles Motor Coach Co.* (1942) 53 C.A.2d 566, 570, 128 P.2d 178; *Owen v. Rheem Mfg. Co.* (1947) 83 C.A.2d 42, 45, 187 P.2d 785 [custom of loading steel drums in boxcar, without bracing or other device to keep them from falling out when door opened]; *Reagh v. San Francisco Unified School Dist.* (1953) 119 C.A.2d 65, 70, 259 P.2d 43 [custom of chemistry teachers to keep dangerous chemicals on open shelves]; *Jensen v. Southern Pac. Co.* (1954) 129 C.A.2d 67, 73, 276 P.2d 703 [general practice of maintaining warning systems at grade crossings]; 57A Am.Jur.2d (2004 ed.), *Negligence* §§162, 165; 85 A.L.R.2d 1196 [custom as to loading, unloading, or storage of cargo]; BAJI, No. 3.16.)

In *Leonard v. Watsonville Community Hosp.* (1956) 47 C.2d 509, 305 P.2d 36, plaintiff sued for damages for malpractice in leaving a Kelly clamp (6-inch metal instrument) in his abdomen. Defendant C, superintendent of the hospital, testified that while hospitals generally maintain a sponge and needle count, there was no established practice of

instrument counting with respect to other implements, either before or after surgery. *Held*, this testimony, even if believed, did not dispel the inference of negligence of the hospital and nurse under the doctrine of *res ipsa loquitur*. "It is a matter of common knowledge ... that no special skill is required in counting instruments. Although under such circumstances proof of practice or custom is some evidence of what should be done and may assist in the determination of what constitutes due care, it does not conclusively establish the standard of care." (47 C.2d 519.)

It is not easy, however, to disassociate the ideas of due care and custom; "a practice that has been generally followed without incident is not transformed into negligence merely by the occurrence of a single accident not reasonably foreseeable." (Dissenting opinion in *Blumberg v. M. & T. (1949)* 34 C.2d 226, 231, 209 P.2d 1.) In *Blumberg*, defendant, in front of the elevators of its office building, maintained a large mat consisting of strips of rubber intersecting at right angles, leaving open spaces of varying sizes, the maximum being 5/8 by 11/16 inches. Plaintiff invitee caught the narrow heel of her shoe in one of the openings, and fell. There was evidence that many women wore these shoes, and that the bottom of the heel, though larger than the opening when laid flat, could enter the hole at an angle. *Held*, the jury could find defendant negligent in failing to inspect and to discover the danger of the mat, regardless of the asserted fact that the type of mat was in wide use. (34 C.2d 229.)

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b. Departure From Custom.

6 *Witkin Sum. Cal. Law Torts* § 898

[§ 898] Departure From Custom.

Just as proof of conformity to custom is not conclusive of due care (see *supra*, §897), so proof of departure from the usual custom does not establish negligence where the evidence in fact shows due care. (*Valentine v. Hayes* (1924) 67 C.A. 650, 653, 228 P. 57.) But evidence of departure from a custom relied on by the plaintiff may be admissible as tending to show negligence of the defendant or to refute the charge of contributory negligence of the plaintiff. (See *Scott v. Gallot* (1943) 59 C.A.2d 421, 426, 138 P.2d 685 [plaintiff working under truck, relied on custom of drivers to sound horn as warning before starting car].)

In *Fowler v. Key System Transit Lines* (1951) 37 C.2d 65, 67, 230 P.2d 339, plaintiff was a bus passenger. Her witnesses testified that the bus customarily stopped within a crosswalk at this particular crossing, where there was a flat space to alight; on this dark night, however, it stopped at another place and she stepped into a gutter and fell. *Held*, it was reversible error to strike out this testimony. The custom of a bus or streetcar, in stopping at a particular place, becomes a rule of conduct on which the public has a reasonable right to rely. (37 C.2d 68.) (On evidence of precautionary rules or regulations of railroad or other carrier, see 1 *Cal. Evidence* (4th), *Hearsay*, §114.)

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1. Custom and Regulations.
c. Compliance With Safety Regulations.

6 *Witkin Sum. Cal. Law Torts* § 899

[§ 899] Compliance With Safety Regulations.

Statutory and administrative regulations frequently prescribe minimum standards of care, and violation of them may be negligence as a matter of law. (See *infra*, §871 et seq.) But compliance is not due care as a matter of law; the circumstances may call for something more. Thus, in *Douglas v. Maloney* (1951) 105 C.A.2d 284, 233 P.2d 59, defendant contractor constructed a scaffold on the sidewalk in front of a store, in full compliance with the Industrial Accident Commission safety order. But the 2-inch by 4-inch sills at the base were covered with dust and of the same general color as the sidewalk. *Held*, the evidence supported a verdict for plaintiff, who tripped on the sill and fell. (105 C.A.2d 287.) (See *Nevis v. Pacific Gas & Elec. Co.* (1954) 43 C.2d 626, 630, 275 P.2d 761; *Campbell v. Fong Wan* (1943) 60 C.A.2d 553, 557, 141 P.2d 43; *Pennington v. Southern Pac. Co.* (1956) 146 C.A.2d 605, 613, 304 P.2d 22; *Amos v. Alpha Property Management* (1999) 73 C.A.4th 895, 901, 87 C.R.2d 34 [fact that window met all fire, building, and safety regulations did not, as matter of law, establish that landlord and manager had fulfilled duty to take reasonable precautions to prevent children from falling from window].)

The principle was summarized in *Jensen v. Southern Pac. Co.* (1954) 129 C.A.2d 67, 276 P.2d 703, where defendant maintained a warning device at a crossing, pursuant to an order of the Public Utilities Commission: "The state, in prescribing such safety regulations (whether done by legislative enactment expressed in a statute or by action of the commission expressed in an order), has never gone so far as to say to a utility company that compliance therewith constitutes a complete discharge of its duties toward the public. The state does not undertake to foresee and declare in advance what, under all circumstances, constitutes ordinary care. Regulations of this nature lay down minimum, not maximum, requirements." (129 C.A.2d 72.) (Cf. *Monreal v. Tobin* (1998) 61 C.A.4th 1337, 72 C.R.2d 168 [defendant traveling at posted speed limit in second or third lane was not negligent; he had no duty to move right, even though other traffic was traveling at greater speed].)

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See 36 A.L.R.6th 443 [civil liability arising from use of cell phone while driving].



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2. Emergency: Doctrine of Imminent Peril.
a. In General.

6 *Witkin Sum. Cal. Law Torts* § 900

[§ 900] In General.

"[A] person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in the calmer and more deliberate moments." (*Leo v. Dunham* (1953) 41 C.2d 712, 714, 264 P.2d 1.)

This "emergency doctrine" or "doctrine of imminent peril" is well established and frequently invoked. (See *Lawrence v. Goodwill* (1919) 44 C.A. 440, 448, 186 P. 781; *Drury v. Los Angeles Ry. Corp.* (1929) 102 C.A. 58, 64, 282 P. 525; *Alward v. Paola* (1947) 79 C.A.2d 1, 7, 179 P.2d 5 [instruction on doctrine was proper where brake failed and defendant lost control of car]; *Stickel v. Durfee* (1948) 88 C.A.2d 402, 406, 199 P.2d 16 [refusal of instruction was reversible error under circumstances]; *Schultz v. Mathias* (1970) 3 C.A.3d 904, 912, 83 C.R. 888; *Damele v. Mack Trucks* (1990) 219 C.A.3d 29, 36, 37, 267 C.R. 197; *Harris v. Oaks Shopping Center* (1999) 70 C.A.4th 206, 208, 82 C.R.2d 523 [doctrine applied where shopping mall employee, believing incorrectly that 30-foot sand sculpture was going to collapse, was injured while attempting to rescue customers]; *Rest.2d, Torts* §296; Dobbs, *The Law of Torts* §128 et seq.; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §198 et seq.; 4 California Affirmative Defenses (2d), §49:1 et seq.; 8 Proof of Facts 3d 399 [sudden emergency]; 80 *A.L.R.2d* 5 [instructions on sudden emergency in motor vehicle cases]; 41 *A.L.R.3d* 1124 [liability of motorist for collision as affected by attempts to avoid dog or other small animal in road]; 75 *A.L.R.3d* 327 [sudden emergency as exception to rule requiring motorist to maintain ability to stop within assured clear distance ahead]; 10 *A.L.R.5th* 680 [modern status of sudden emergency doctrine]; BAJI, No. 4.40; CACI, No. 452; *infra*, §901.)

The doctrine does not apply where the emergency is created by the actor's own negligence. But the actor's freedom from negligence up to the time of the emergency is a question of fact for the jury. (*Vedder v. Bireley* (1928) 92 C.A. 52, 60, 267 P. 724; *Yates v. Morotti* (1932) 120 C.A. 710, 716, 8 P.2d 519; see *Rest.2d, Torts* §296; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §208.)

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See 2 California Affirmative Defenses, §49:1 et seq.



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b. Illustrations.

6 Witkin Sum. Cal. Law Torts § 901

[§ 901] Illustrations.

In *Leo v. Dunham* (1953) 41 C.2d 712, 264 P.2d 1, plaintiff pedestrian started to cross a highway (not at a crosswalk or an intersection). Defendant truck driver, approaching from the right, had the right of way. When defendant was 300 feet distant, plaintiff looked, assumed that he had time to cross, and never looked again. Defendant saw him start, assumed that he would continue to take care, and did not conclude that danger was imminent until he was 60 or 80 feet away, when he braked, shouted, and swerved, but nevertheless struck plaintiff. *Held*, it was proper to instruct on imminent peril, and judgment on the verdict for defendant was affirmed. The evidence would have supported an inference of defendant's negligence before the emergency, but it also reasonably supported the jury's implied finding that he was not negligent until the time that he concluded that plaintiff was not going to look again (the emergency). (41 C.2d 715.)

In *Schultz v. Mathias* (1970) 3 C.A.3d 904, 83 C.R. 888, defendant driver saw a car ahead traveling very fast in the wrong lane of a two-lane highway. Defendant applied his brakes and swerved to the left, crossing the center line, in a vain attempt to avoid a collision (the other car swerved to the right at the last moment). *Held*, the doctrine applied as a matter of law; there was no substantial evidence that defendant's attempt to avoid a collision by swerving to his left was negligence. (3 C.A.3d 912.)

A related aspect of the emergency principle is presented where the defendant's property is in danger, and, in an attempt to rescue it, the defendant causes injury to property of another; e.g., where a backfire is started to save property from an approaching fire. In *Commercial Union Assur. Co. v. Pacific Gas & Elec. Co.* (1934) 220 C. 515, 31 P.2d 793, property of defendant was stored in a warehouse. The building caught fire, and defendant's employees broke in and removed the property. Plaintiffs, insurance companies, alleged that defendant's action caused the fire to flare up and destroy the warehouse and its remaining contents. *Held*, if defendant reasonably believed that its property was in danger, it was not negligence to take reasonable steps to protect it. (220 C. 520.)

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3. Unavoidable Accident.

6 Witkin Sum. Cal. Law Torts § 902

[§ 902] Unavoidable Accident.

The so-called defense of "unavoidable accident" has caused great confusion in negligence actions. (See 57A *Am.Jur.2d* (2004 ed.), *Negligence* §32 et seq.)

Earlier misconceptions were highlighted in *Parker v. Womack* (1951) 37 C.2d 116, 230 P.2d 823, involving a collision at an intersection with an obstructed view. *Held*, it was proper to instruct the jury as follows: "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it." (37 C.2d 120.) (See *Polk v. Los Angeles* (1945) 26 C.2d 519, 542, 159 P.2d 931; *Driver v. Norman* (1951) 106 C.A.2d 725, 727, 236 P.2d 6.)

Essentially, *Parker* stood for the proposition that such an instruction may be given not only where the *defendant* offers affirmative evidence to show that the accident was caused by circumstances beyond the control of an ordinarily prudent person, but also where the *plaintiff* has failed in his own proof of negligence; i.e., in any case except where the defendant is negligent as a matter of law. But, in *Butigan v. Yellow Cab Co.* (1958) 49 C.2d 652, 320 P.2d 500, the court reconsidered the problem and overruled *Parker*.

(a) *Nature of the defense.* "In reality, the so-called defense of unavoidable accident has no legitimate place in our pleading. It appears to be an obsolete remnant from a time when damages for injuries to person or property directly caused by a voluntary act of the defendant could be recovered in an action of trespass and when strict liability would be imposed unless the defendant proved that the injury was caused through 'inevitable accident.' Although exactly what was covered by this expression is not clear, it apparently included cases where the defendant was utterly without fault. 'Unavoidable accident' was then an affirmative defense to be pleaded and proved by the defendant." (49 C.2d 658.)

(b) *Instruction.* The defense is simply a denial of negligence or a contention that any negligence was not the proximate cause of the injury. "Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose." (49 C.2d 659.) Not only that, it is confusing, because the jury "may get the impression that unavoidability is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the

defendant." (49 C.2d 660.) Here, defendant taxi driver attempted to make a left turn into a driveway in order to turn around. His engine stopped while he was on the center line, and he was hit. The instruction obviously overemphasized defendants' case, in its tendency to induce the jury (1) to believe that stalling of engine was an unavoidable occurrence, and (2) to disregard the permissible inferences that the taxi company was negligent in maintaining the taxi and that the driver, with knowledge of previous stalling, failed to take proper precautions. (49 C.2d 661.) Accordingly, judgment for defendants, based on the jury's verdict, was reversed. (See *Rayner v. Ramirez* (1958) 159 C.A.2d 372, 377, 324 P.2d 83 [suggesting that Supreme Court should clarify its dictum on the "special situations" which may still call for the instruction]; 33 So. Cal. L. Rev. 72.)

Later cases follow *Butigan* in holding the instruction improper. (See *Bridgman v. Safeway Stores* (1960) 53 C.2d 443, 449, 2 C.R. 146, 348 P.2d 696 [error was not reversible in this case]; *Hidden v. Malinoff* (1959) 174 C.A.2d 845, 852, 345 P.2d 499; *Clarke v. Michals* (1970) 4 C.A.3d 364, 371, 84 C.R. 507; 57A Am.Jur.2d (2004 ed.), *Negligence* §36; 65 A.L.R.2d 12 [instructions on unavoidable accident in motor vehicle cases].)

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4. Lack of Necessary Skill or Care.

6 Witkin Sum. Cal. Law Torts § 903

[§ 903] Lack of Necessary Skill or Care.

An act may be negligent because it is not performed with the necessary care or skill that the circumstances require. (See *Rest.2d, Torts* §298.) Thus, an automobile is an instrumentality capable of inflicting death or serious injury, and a greater amount of care is required of the driver than of a pedestrian. (*Raymond v. Hill* (1914) 168 C. 473, 478, 143 P. 743.)

Veh.C. 22350 requires drivers of motor vehicles to operate them in a careful manner, having due regard for traffic and the surface and width of the highway. Accordingly, one may be guilty of negligence in driving too fast under certain circumstances, even though not exceeding the specific speed limit. (*Reaugh v. Cudahy Packing Co.* (1922) 189 C. 335, 340, 208 P. 125; *Dam v. Bond* (1926) 80 C.A. 342, 350, 251 P. 818; *Cannon v. Kemper* (1937) 23 C.A.2d 239, 241, 73 P.2d 268; see *infra*, §878.)

The effect of a physical disability or illness is to require a standard equal to that of a reasonable man under an equivalent disability. (See *Hammontree v. Jenner* (1971) 20 C.A.3d 528, 531, 97 C.R. 739 [epileptic automobile driver under regular medication had unanticipated seizure and lost control of car; principles of negligence govern, and proposed instruction on strict liability is properly refused]; *Rest.2d, Torts* §283C; 3 Harper, James & Gray 2d §16.7; 53 Proof of Facts 3d 67 [physical disability of driver]; 28 A.L.R.2d 12 [physical defect, illness, drowsiness, or falling asleep of vehicle driver as affecting liability].)

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SUPPLEMENT: [This section is current through the latest supplement]
Effect of physical disability or illness: See 3 Harper, James & Gray 3d §16.7.



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5. Lack of Preparation or Inspection.

6 *Witkin Sum. Cal. Law Torts* § 904

[§ 904] Lack of Preparation or Inspection.

Where the circumstances require careful preparation for an act, or reasonable inspection of a vehicle or other instrumentality, failure in these respects will constitute negligence. (See *Polk v. Los Angeles* (1945) 26 C.2d 519, 525, 159 P.2d 931 [duty of those maintaining electric wires to inspect and repair insulations at places where injury to person or property might occur]; *Lenahan v. Poole* (1952) 38 C.2d 392, 394, 240 P.2d 276 [failure to inspect awning in front of store]; *Benton v. Sloss* (1952) 38 C.2d 399, 404, 240 P.2d 575, *infra*, §1178 [used car dealer's failure to inspect car sold with defective brakes]; *Phillips v. Pickwick Stages, Northern Div.* (1927) 85 C.A. 571, 574, 259 P. 968 [failure to inspect brakes of automobile]; *Biondini v. Amship Corp.* (1947) 81 C.A.2d 751, 766, 185 P.2d 94 [failure to inspect planks used in scaffolds]; *Rest.2d, Torts* §300; 30 Proof of Facts 3d 199 [negligent placement or maintenance of guy wire]; 23 A.L.R.2d 539 [vehicle accident: break or defect in steering mechanism]; 27 A.L.R.2d 1040 [failure to provide vehicle with adequate rearview mirror]; 30 A.L.R.2d 1172 [preflight inspection and maintenance of aircraft].)

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6. Failure To Give Warning.
a. Warning Before Acts.

6 Witkin Sum. Cal. Law Torts § 905

[§ 905] Warning Before Acts.

Failure to give appropriate warning before doing certain acts may be negligent. (See *Rest.2d, Torts* §301.) The following are illustrative:

(1) Failure of a motorist to sound the horn in sufficient time to give notice to others of his or her approach. (See *Rush v. Lagomarsino* (1925) 196 C. 308, 319, 237 P. 1066; *Marston v. Pickwick Stages* (1926) 78 C.A. 526, 534, 248 P. 930; *Moore v. Miller* (1942) 51 C.A.2d 674, 680, 125 P.2d 576; 30 A.L.R.2d 5, 40 [driver's duty when approaching place where children are gathered]; 48 A.L.R.2d 252 [duty to following driver to give him or her signal to pass or warning of approaching danger]; cf. *Edelson v. Higgins* (1941) 43 C.A.2d 759, 761, 111 P.2d 668 [no duty to sound horn while in private driveway, despite knowledge that children habitually played on adjoining lawn].)

(2) Backing up a vehicle without a warning signal. (See *Adamson v. San Francisco* (1924) 66 C.A. 256, 259, 225 P. 875 [streetcar]; 85 A.L.R.2d 267 [train]; cf. *Armenta v. Churchill* (1954) 42 C.2d 448, 455, 267 P.2d 303 [construction safety order requiring warning when construction truck is backing up].)

(3) Throwing heavy objects into a place where others are lawfully present. (See *O'Callaghan v. Bode* (1890) 84 C. 489, 493, 24 P. 269; 31 Proof of Facts 3d 87 [errant golf ball shots].)

(4) Operating heavy equipment. (See *Welborn v. Dalzell Rigging Co.* (1960) 181 C.A.2d 268, 273, 5 C.R. 195 [mobile crane operator moved bucket load of concrete over place where plaintiff worker stood, violating safety orders requiring sounding of warning and against exposure of workers to hazard of overhead suspended loads]; 81 A.L.R.2d 456 [operation of bulldozer, earth grader, or other earthmoving equipment]; 81 A.L.R.2d 473 [operation of crane, derrick, etc.]; 83 A.L.R.4th 5 [snow removal operations and equipment].)

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6. Failure To Give Warning.
b. Warning of Conditions.

6 Witkin Sum. Cal. Law Torts § 906

[§ 906] Warning of Conditions.

Due care may also require a warning of dangerous conditions or materials. (See *Peri v. Los Angeles Junction Ry. Co.* (1943) 22 C.2d 111, 120, 137 P.2d 441 [railroad's duty to warn approaching traffic when train is blocking highway at night]; *McEvoy v. American Pool Corp.* (1948) 32 C.2d 295, 298, 195 P.2d 783 [defendant furnished dangerous chemicals for use by its employee, to be carried in employee's own car, with no warning of their nature and no instructions about safe methods of transportation]; *Johnson v. California* (1968) 69 C.2d 782, 785, 797, 73 C.R. 240, 447 P.2d 352, supra, §352 [duty of authorities placing child in foster home to warn of child's dangerous propensities]; *Connors v. Southern Pac. Co.* (1949) 91 C.A.2d 872, 878, 206 P.2d 31 [railroad's duty to warn approaching traffic when train is blocking highway at night]; *Negra v. L. Lion & Sons Co.* (1951) 102 C.A.2d 453, 458, 227 P.2d 916 [worker removed grate from floor furnace, failed to warn approaching plaintiff that she would fall into hole]; *Brown v. California Pension Administrators & Consultants* (1996) 45 C.A.4th 333, 346, 52 C.R.2d 788 [trustee and administrator of self-directed individual investment accounts had no duty to notify investors that borrower of their funds had defaulted in payments to other investors]; 4 Proof of Facts 3d 1 [failure to warn of dangerous condition of swimming pool]; 21 Proof of Facts 3d 353 [contractor's failure to warn of construction site hazard]; 72 Am.Jur. Trials 215 [actions against road contractors for inadequate warning of construction hazards]; 20 A.L.R.2d 8, 31 [conditions in store aisle]; 84 A.L.R.2d 813 [train blocking highway]; 40 A.L.R.5th 135 [object projecting into store aisle or passageway].)

In *Langley v. Pacific Gas & Elec. Co.* (1953) 41 C.2d 655, 262 P.2d 846, defendant contracted to furnish power to plaintiff for his fish hatchery, with knowledge that a sustained failure would cause damage unless he was notified in time to substitute a standby gasoline pump. The power failed without defendant's negligence, and it exercised due care in repairing the damage. *Held*, nevertheless, it was liable for neglecting to notify plaintiff of the interruption. (41 C.2d 661.)

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See *Ford v. Polaris Industries* (2006) 139 C.A.4th 755, 777, 43 C.R.3d 215, Supp., infra, §1344 [passenger on two-person jet skiing watercraft suffered severe injuries after falling overboard; owner-operator had no duty to call attention of passenger to warnings printed on watercraft and in owner's manual; in absence of special conditions,

owner-operator, as coparticipant with passenger, had no duty other than refraining from altering or removing warning label].



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6. Failure To Give Warning.
c. Signals at Railroad Crossing.

6 Witkin Sum. Cal. Law Torts § 907

[§ 907] Signals at Railroad Crossing.

Even where the law does not require it, if a railway company installs signals or other safety devices, so that the public is led to rely upon them, it is negligence to abandon them or to fail to operate them properly. (*Rest.2d, Torts* §301, Comment f; see 5 *A.L.R.2d* 112 [customary or statutory train signal as fulfilling railroad's duty to warn at highway crossing]; 90 *A.L.R.2d* 350 [failure of signaling device at crossing to operate as affecting railroad's liability].)

In *Mallett v. Southern Pac. Co.* (1937) 20 *C.A.2d* 500, 68 *P.2d* 281, defendant's automatic wig-wag signal was so constructed that the light and bell would operate until a southbound train had passed the crossing, but would stop while a northbound train still blocked it. Plaintiff, unaware of this lack of uniformity, drove her car with due care, relying on the motionless signal, and ran into a standing freight train that her lights did not reveal until too late. *Held*, defendant was liable. Defendant contended that the signals are intended to warn of *approaching* trains, and that upon arrival, the train itself is sufficient warning; but here, the signal operated in so peculiar a manner as to constitute a trap for those who relied on it. (20 *C.A.2d* 506.)

Another poorly devised wig-wag signal was the basis of liability in *Startup v. Pacific Elec. Ry. Co.* (1947) 29 *C.2d* 866, 869, 180 *P.2d* 896: If one train followed another within 600 feet, the wig-wag would cease operating when the first train cleared the crossing, notwithstanding the danger from the oncoming second train.

West's Key Number Digest, Railroads k.303

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7. Failure To Take Precautions.
a. Safety Belts.

6 Witkin Sum. Cal. Law Torts § 908

[§ 908] Safety Belts.

Failure to use a safety belt in an automobile may be negligence. (See *Twohig v. Briner* (1985) 168 C.A.3d 1102, 1108, 214 C.R. 729 [safety belts removed]; *Krawitz v. Rusch* (1989) 209 C.A.3d 957, 965, 966, 257 C.R. 610, [distinguishing *Twohig* before selling used vehicle, nondealer seller has no duty to either install seat belts or warn purchaser that they are missing]; 35 Am.Jur. Trials 349; 65 Proof of Facts 3d 1 [seat belt defense]; 102 Harv. L. Rev. 925; 17 Southwestern U. L. Rev. 597 [effect of mandatory safety belt law on safety belt defense].) (On child safety belt and passenger restraint requirements, see *Veh.C. 27360* et seq.)

The Motor Vehicle Safety Act (*Veh.C. 27315*, enacted in 1992, requires safety belts to be worn in motor vehicles. (See *People v. Coyle* (1988) 204 C.A.3d Supp. 1, 251 C.R. 80 [upholding *Veh.C. 27315* against right to privacy challenge].) "Motor vehicle" includes any passenger vehicle, motor truck, or truck tractor, but does not include motorcycles. (*Veh. C. 27315(c)(1)*.) "Motor vehicle" also means any farm labor vehicle, regardless of the date of certification. (*Veh. C. 27315(c)(2)*.)

It is an infraction to operate a motor vehicle on a highway unless the operator and all passengers 16 years of age or over are properly restrained by a safety belt. This provision does not apply to the operator of a taxicab, when the taxicab is driven on a city street and is engaged in the transportation of a fare-paying passenger. (*Veh. C. 27315(d)(1)*.) However, any front seat passenger in a taxi who is 6 years of age or over or who weighs 60 pounds or more must be properly restrained by a safety belt. (*Veh. C. 27315(d)(3)*.) In the case of a limousine for hire or an emergency vehicle, both the operator and any front seat passenger 6 years of age or over or weighing 60 pounds or more must wear a safety belt. (*Veh. C. 27315(d)(2)*.)

It is an infraction to be a passenger in a motor vehicle on a highway without wearing a safety belt (not applicable to a passenger occupying a sleeper berth) and for the owner of a motor vehicle, or the owner or operator of a taxicab or a limousine for hire, to fail to maintain safety belts for the use of occupants of the vehicle. (*Veh. C. 27315(e), (f)*.)

Veh. C. 27315 does not apply to: (1) a passenger or operator with a physical or medical condition that would prevent appropriate restraint in a safety belt; (2) to a public employee or a rear seat passenger when these parties are in an emergency vehicle (*Veh. C. 27315(g)*); and (3) assuming that a safety belt is worn before commencing and after

completing the task, a person actually engaged in delivery of newspapers to customers (*Veh. C. 27315(n)*), collection and delivery activities as a rural delivery carrier for the postal service (*Veh. C. 27315(o)*), or the collection of solid waste or recyclable materials along that driver's collection route (*Veh. C. 27315(p)*).

A violation of the Act "does not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation." (*Veh. C. 27315(i)*.) An identical provision is found in *Veh. C. 27315.3*, which makes it an infraction for a sheriff's department, city police department, or highway patrol to fail to "maintain safety belts in good working order for the use of occupants of any vehicle which it operates on a highway for the purpose of patrol." (*Veh.C. 27315.3(b), (c)*.)

In *Housley v. Godinez* (1992) 4 C.A.4th 737, 6 C.R.2d 111, plaintiff was injured when the vehicle in which he was riding as a passenger crashed into a land plane that was stuck in the middle of the highway. Based on plaintiff's failure to wear a seat belt, defendants raised the defense of contributory negligence, and the trial judge instructed the jury on *Veh.C. 27315* as part of the "seat belt defense." The judgment entered for plaintiff reflected the jury's finding that he was 30% negligent. Plaintiff argued that it was error to instruct on *Veh.C. 27315*, because *Veh.C. 27315(j)* established that the Legislature intended the statute to be used only in criminal matters. *Held*, judgment affirmed.

(a) While *Veh.C. 27315(j)* (now *Veh.C. 27315(i)*) precludes defense arguments that violation of the statute constitutes "negligence as a matter of law or negligence per se," nothing in the statute prohibits a jury from knowing and considering the statute's existence when determining the reasonableness of driving without a seat belt. Indeed, the second clause of the subdivision, which permits negligence to be proved as a fact, plainly contemplates that the effect of failure to wear a seat belt should be fully litigated as a question of fact. Furthermore, it is well established that juries may be instructed on criminal statutes even when the statute itself does not establish a presumption of negligence. (4 C.A.4th 744, citing *Vallas v. Chula Vista* (1976) 56 C.A.3d 382, 128 C.R. 469, *infra*, §877.)

(b) Allowing instructions on the seat belt statute will serve to accomplish the legislative goal of encouraging greater usage of existing seat belts for the purpose of public safety. These instructions underscore the value of seat belts by warning that a jury may reduce an injured party's recovery for injuries that would have been avoided by using a seat belt. (4 C.A.4th 746.)

(c) Had the Legislature intended to bar the use of the seat belt statute in civil proceedings, it could have stated this intention clearly, as it has done in other statutes. (4 C.A.4th 746, citing *Lab.C. 6304.5*.) Hence, the Legislature intended *Veh.C. 27315(j)* "only to preclude the *automatic and invariable* reduction of awards to plaintiffs injured while not wearing a seat belt. This construction is consistent with the language of the legislation. It permits the civil trial courts to instruct on the existence of the seat belt statute in appropriate cases, while allowing the jury to decide what weight, if any, to give the statute in determining the standard of reasonable care." (4 C.A.4th 747.)

SUPPLEMENT: [This section is current through the latest supplement]

Veh.C. 27315(n), (o), and (p) were renumbered *Veh.C. 27315(m)*, (n), and (o), respectively, in 2003.



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6 Witkin Sum. Cal. Law Torts § 909

[§ 909] Other Precautions.

The failure to adopt other proper precautions in doing certain acts or maintaining certain conditions may also be negligent. Examples are:

(1) Leaving an excavation in a street without guards, lights, or barriers. (*Carty v. Boeseke-Dawe Co.* (1906) 2 C.A. 646, 648, 84 P. 267.)

(2) Parking a car on a steep hill without setting the brakes properly. (*Latky v. Wolfe* (1927) 85 C.A. 332, 348, 259 P. 470.)

(3) Setting or leaving electric wires without insulation, or without safeguards against breaking. (*McCormick v. Great Western Power Co. of Calif.* (1932) 214 C. 658, 662, 8 P.2d 145; *Royal Indem. Co. v. Midland Counties Public Service Corp.* (1919) 42 C.A. 628, 632, 183 P. 960.)

(4) Failure of a street railway maintaining wooden poles at the curb to select poles sufficient to withstand ordinary strain of weather conditions. (*Gibson v. Garcia* (1950) 96 C.A.2d 681, 683, 216 P.2d 119.)

(5) Suspending a therapeutic light bulb over a patient without a screen. (*Crowe v. McBride* (1944) 25 C.2d 318, 320, 153 P.2d 727.)

(6) Failing to maintain a proper lookout for persons in the zone of danger. Thus, an automobile driver should be particularly watchful at intersections. (*Reaugh v. Cudahy Packing Co.* (1922) 189 C. 335, 340, 208 P. 125; *Truitner v. Knight* (1927) 83 C.A. 655, 661, 257 P. 447.) And the driver may be deemed negligent where he or she fails to see what is in plain sight. (*Nichols v. Nelson* (1927) 80 C.A. 590, 595, 252 P. 739; *Huetter v. Andrews* (1949) 91 C.A.2d 142, 146, 204 P.2d 655.) (See 40 Proof of Facts 2d 411 [driver's failure to maintain proper lookout]; 50 Proof of Facts 2d 595 [driver's negligence in hitting person lying in road]; 81 A.L.R.2d 456, 473, 519 [operation of bulldozer, earth grader, or similar equipment]; 84 A.L.R.2d 267 [engine backing or pushing train]; 98 A.L.R.2d 1169 [motorist's liability to person directing traffic]; 41 A.L.R.4th 303 [motorist's liability to person lying in road].)

(7) Failing to take measures to protect against injury on waxed floor. (See *Hatfield v. Levy Bros.* (1941) 18 C.2d

798, 805, 117 P.2d 841 [excessive amount of wax]; *Nicola v. Pacific Gas & Elec. Co.* (1942) 50 C.A.2d 612, 615, 123 P.2d 529 [composition floor]; *Lorenz v. Santa Monica City High School Dist.* (1942) 51 C.A.2d 393, 398, 124 P.2d 846 [painted concrete floor, wax not absorbed]; 62 A.L.R.2d 6 [business premises operator's liability for injury due to tracked-in or spilled water, oil, mud, snow, etc.]; 63 A.L.R.2d 591 [fall on floor made slippery by waxing or oiling].)

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8. Absence of Similar Occurrence.

6 Witkin Sum. Cal. Law Torts § 910

[§ 910] Absence of Similar Occurrence.

In *Schwerin v. H.C. Capwell Co.* (1934) 140 C.A. 1, 34 P.2d 1050, defendants operated an escalator in proper mechanical condition. *Held*, they were not bound to anticipate danger to passengers resulting from acts of children attempting to ascend against the downward movement of the machinery. There was no showing that these acts had been known to occur before; they were highly unusual and not reasonably to be anticipated. "The use of the thing must be dangerous according to *common experience*, at least to the extent that there is a manifest and appreciable chance of harm from what is done, in view of the actor's knowledge or of his conscious ignorance." (140 C.A. 4, quoting Massachusetts case.)

But the fact that there was no prior similar occurrence is not conclusive. In *Rocca v. Tuolumne County Elec. Power & Light Co.* (1926) 76 C.A. 569, 245 P. 468, high-tension electric wires were loosely hung near a tree, and a limb, broken in a storm, fell across them, causing a sag. Defendant was held liable for the death of a person coming in contact with them although no limb of the tree had previously broken. (76 C.A. 583.)

In *Beresford v. Pacific Gas & Elec. Co.* (1955) 45 C.2d 738, 290 P.2d 498, defendant maintained a power line. On adjacent land, a tall old tree fell across the line during a storm, bringing the wires in contact with telephone lines leading to plaintiff's lodge, and a fire resulted from contact of the high-voltage uninsulated wires with the telephone wires. *Held*, judgment for plaintiff affirmed. It was not unreasonable to require a power company to anticipate that in a high wind a tree might fall against high-voltage lines and cause a fire; and it was immaterial that the tree stood outside the right-of-way, on private property. (45 C.2d 746.) (See *Terrell v. Key System* (1945) 69 C.A.2d 682, 686, 159 P.2d 704 [carrier's foreseeability of assaults by passengers engaged in crap game]; *Kaukonen v. Aro* (1956) 142 C.A.2d 502, 505, 298 P.2d 611 [defendant, driving with passenger on road where there was slide danger, kept going despite one slide and was struck by another]; *Darnold v. Voges* (1956) 143 C.A.2d 230, 246, 300 P.2d 255 [foreseeable that cow or horse will react violently if frightened by flash bulb or other startling cause]; *Benson v. Honda Motor Co., Ltd.* (1994) 26 C.A.4th 1337, 1345, 32 C.R.2d 322 [action against car manufacturer for negligence, failure to warn, and defective product design; trial judge properly admitted evidence of absence of prior similar claims].)

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9. Operation of Machinery Near Horses.

6 Witkin Sum. Cal. Law Torts § 911

[§ 911] Operation of Machinery Near Horses.

In *Parsons v. Crown Disposal Co.* (1997) 15 C.4th 456, 481, 63 C.R.2d 291, 936 P.2d 70, a rider sustained injuries when thrown from his horse after it was frightened by loud noises from a garbage truck operating near a public bridle path. He sought recovery from the garbage company. The Supreme Court, reversing the judgment of the Court of Appeal, held that the trial court properly entered summary judgment for defendant; the record contained no evidence that defendant breached the limited duty of care it owed to plaintiff.

(a) The duty of care imposed by the common law with respect to the operation of machinery in the presence of horses is a limited one. For over 150 years, courts have recognized that the needs of a modern, industrial society often conflict with and generally must prevail over the delicate sensibilities of horses. Generally, a plaintiff whose horse causes damage because of the noise, sight, or odor from a defendant's regular and necessary conduct cannot state a cause of action for negligence, because the defendant has not breached any duty of care. (15 C.4th 467.) There are exceptions: A defendant breaches a duty of care if the defendant conducts or uses a vehicle, machine, or other device in a careless or imprudent manner or causes noises or emissions unnecessary to the regular operation of the machine; the defendant fails to take reasonable protective actions after it knows that the plaintiff's horse actually has become frightened; the defendant or its employees operate machinery in an unnecessary or malicious fashion designed to cause fright; or the defendant violates a safety statute designed to protect the class of which the plaintiff is a member. (15 C.4th 469.) Nevertheless, a driver or machine operator has no duty to stop or cease operation merely because he or she is aware that horses may be nearby or sees a horse. (15 C.4th 472.)

(b) Because there was no evidence that defendant operated its garbage truck in anything but the regular and necessary manner, and, further, no evidence that defendant knew that plaintiff's horse had become frightened, there is no basis on which to conclude that defendant breached the limited duty of care it owed to plaintiff. (15 C.4th 473.) Considerations of social policy--i.e., the social utility of defendant's conduct and the consequences to the community of imposing a duty to guard against frightening a horse--override any assumption that the garbage company should have foreseen this risk. (15 C.4th 475.) Also, none of the exceptions to the common law rule of nonliability is here applicable. (15 C.4th 477.)

(c) The Court of Appeal erroneously interpreted *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *infra*, §1339, a case discussing the implications of the assumption of risk doctrine, to support the proposition that

defendants generally have a duty to use due care not to increase the risks to a participant over and above those inherent in a sport or other recreational activity, regardless of the lack of relationship between the parties. This court imposed no such general duty in *Knight*. (15 C.4th 481.) On the contrary, *Knight* simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity. There are circumstances in which the relationship between defendant and plaintiff gives rise to a duty to use due care not to increase the risks inherent in the plaintiff's activity, e.g., the relationship between a purveyor of recreational activities and a patron. However, where, as here, parties have no relationship, and instead are independent actors, separately pursuing their own activities, a defendant generally has no duty to avoid increasing the risks inherent in the plaintiff's activity. (15 C.4th 482.)

(d) Moreover, there was no evidence to suggest that defendant violated *Veh.C. 21759*, which imposes a duty of care on a driver approaching a ridden animal, because defendant's truck was stationary as plaintiff approached the vehicle. Furthermore, plaintiff presented no evidence that defendant violated a county ordinance that prohibited operation of a compacting mechanism at a sound level in excess of a certain decibel rating. (15 C.4th 484.)

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10. Risk of Venereal Disease.

6 Witkin Sum. Cal. Law Torts § 912

[§ 912] Risk of Venereal Disease.

In *Doe v. Roe* (1990) 218 C.A.3d 1538, 267 C.R. 564, defendant Richard Roe had suffered three outbreaks of herpes prior to engaging in sexual relations with plaintiff Jane Doe. He did not inform her of this fact, and contended that he had no duty to do so because the lesions had healed and the risk of asymptomatic transmission (transmission without lesions) was not well known and was therefore not reasonably foreseeable. Plaintiff was nonsuited on her cause of action for intentional misrepresentation, but she prevailed at the trial on her cause of action for negligence. *Held*, affirmed.

(a) In cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required. (218 C.A.3d 1544, citing *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, *infra*, §1134.) "In the present case, it is beyond question that our state's policy of preventing the spread of venereal disease is great and that the burden of warning a prospective sex partner is small. Thus, only a slight degree of foreseeability was needed to warrant the imposition of a duty of due care in the present case." (218 C.A.3d 1544.)

(b) The record showed that defendant, with knowledge that he had herpes and that it could be transmitted by sexual conduct, did nothing to find out about its contagiousness or what steps could be taken to prevent giving it to a prospective partner; he elected to gamble with her health rather than inform her of his condition or educate himself about the disease. (218 C.A.3d 1544.)

(c) "A reasonable person should know that if he/she has a contagious, sexually transmissible disease like genital herpes, the disease is likely to be communicated through sexual contact. Thus people suffering from genital herpes generally have a duty either to avoid sexual contact with uninfected persons or, at least to warn potential sex partners that they have herpes before sexual contact occurs." (218 C.A.3d 1545, quoting Minnesota case.) (On tort liability for sexually transmitted disease generally, see 88 Am.Jur. Trials 153.)

SUPPLEMENT: [This section is current through the latest supplement]

In *John B. v. Superior Court* (2006) 38 C.4th 1177, 45 C.R.3d 316, 137 P.3d 153, plaintiff wife sued defendant husband on the theory that he negligently infected her with the human immunodeficiency virus (HIV). Plaintiff's pretrial discovery included the service of special interrogatories and requests for admission concerning defendant's sexual

history and his awareness of his HIV infection. She also subpoenaed defendant's medical and employment records. In discussing whether discovery may be limited on the ground that the negligent transmission of HIV required actual knowledge of the infection, the court made the following points:

(a) California has not yet decided whether negligent transmission of a sexually transmitted disease is a recognized tort, but other states have long imposed liability on individuals who have harmed others by transmitting communicable diseases. (38 C.4th 1188.)

(b) The tort of negligent transmission of HIV does not depend solely on actual knowledge of HIV infection, but instead extends to those situations where the actor, under the totality of the circumstances, has reason to know of the infection, i.e., possesses constructive knowledge. Under the "reason-to-know" standard, the actor must have knowledge of facts from which a reasonable person of ordinary intelligence or one with the superior intelligence of the actor would either infer the existence of the fact in question or regard its existence as so highly probable that his or her conduct would be predicated on the assumption that the fact did exist. (38 C.4th 1189.)

(c) Limiting tort defendants to those who have actual knowledge that they are infected with HIV would have perverse effects on the spread of the virus, because if only those who have been tested were subject to suit, there might be an incentive for some persons to avoid diagnosis and treatment in order to avoid knowledge of their own infection. On the other hand, extending liability to those with constructive knowledge of the disease would provide an incentive to use proper diagnostic techniques and to alter behavior and procedures in order to limit the likelihood of HIV transmission. (38 C.4th 1190.)

(d) Extending liability to those who have constructive knowledge of the disease comports with general principles of negligence, i.e., that all persons are required to use ordinary care to prevent others from being injured as a result of their conduct (see *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, text, §833). There is no reason to depart from this principle in cases of alleged transmission of HIV, where contracting a deadly disease is a reasonably foreseeable consequence of the negligence. (38 C.4th 1192.)

(e) Evidence that defendant engaged in unprotected sex outside the relationship and hid these encounters from plaintiff, even if insufficient to *establish* the requisite knowledge for a negligence claim, may reasonably lead to the discovery of evidence as to defendant's awareness of the HIV status of those partners (without even disclosing their identities) and thus may be relevant to whether defendant knew or had reason to know that he was infected with HIV. Similarly, evidence that defendant had symptoms consistent with HIV infection may be insufficiently distinctive to indicate HIV infection by itself but may be relevant to whether defendant knew or had reason to know that he was infected, when considered in combination with his alleged history of engaging in unprotected sex outside the relationship. (38 C.4th 1193.)

(f) Defendant contended that, because carriers of HIV may be asymptomatic, possible symptoms of HIV are irrelevant. However, many sexually transmitted diseases, such as chlamydia, gonorrhea, syphilis, and herpes, likewise commonly present asymptotically at the initial stages or have nonspecific symptoms that can be confused with other, more common diseases. And defendant has cited no decision that has invoked the possible difficulties of establishing the requisite knowledge of these diseases in some instances as a justification for categorically foreclosing recovery in all cases. (38 C.4th 1194.)

(g) Defendant also contended that the risk of transmission of HIV in any individual act of intercourse is so low as to make it unreasonable to impose a duty of care on someone who is not actually aware that he or she is infected. However, a low risk of transmission is insufficient to relieve the infected individual of a duty, where the harm itself is great and the duty of care to prevent that harm is not onerous. And medical advances in combating HIV do not relieve infected individuals of their duty to avoid transmitting what remains a very serious disease, nor should the efficacy of those advances necessarily determine what discovery is permissible. (38 C.4th 1195.)

(h) The argument that the Legislature, by criminalizing the intentional and knowing transmission of HIV (*Health & Saf.C. 120291*; 2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare*, §368), intended to limit tort liability to those individuals who have actual knowledge that they are infected misapprehends the respective roles of criminal and tort law. The Legislature typically intends a lowered standard for a civil action to recover damages than for a prosecution imposing substantial criminal penalties. Thus, the fact the Legislature did not attach criminal penalties to those persons who have reason to know they carry HIV and nonetheless take no steps to avoid infecting others in no way suggests that the Legislature intended to depart from ordinary negligence principles in a civil action for negligent transmission of HIV. (38 *C.4th* 1197.)

(i) It is not necessary to consider here whether a conflict exists between plaintiff's entitlement to discover relevant evidence and *Health & Saf.C. 120975*, which protects the identity of a person taking an HIV test (see 2 *Cal. Evidence (4th)*, *Discovery*, §245), because defendant waived this statutory protection by claiming in his answer that plaintiff infected him with HIV and by relying on a negative HIV test in support of his motion for summary judgment. Nor is it necessary to consider the extent of permissible discovery about the HIV status of third parties, because the discovery authorized does not include identifying information about defendant's sexual partners. (38 *C.4th* 1198.)



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11. False Diagnosis of Recovered Memory.

6 Witkin Sum. Cal. Law Torts § 913

[§ 913] False Diagnosis of Recovered Memory.

In *Trear v. Sills* (1999) 69 C.A.4th 1341, 82 C.R.2d 281, S sued plaintiff, her father, for sexual abuse that had allegedly occurred during her childhood years, but she claimed that she had no recollection until defendant psychiatrist diagnosed her (falsely according to plaintiff) as suffering from "body and cell memories" of childhood sexual abuse. Plaintiff, although never a patient of defendant, sued her for malpractice, alleging that, had she exercised reasonable care, she would have foreseen the harm to plaintiff. Defendant successfully demurred. *Held*, judgment for defendant affirmed.

(a) The theory that childhood sexual abuse may result in suppression of memory such that the victim may not remember it until many years later under the guidance of a psychotherapist is controversial, but the theory appears to have been adopted in many states by the passage of statutes of limitations implicitly accepting the idea that a victim of sexual abuse may not have reason to know of the abuse until many years later. In 1986, California joined these states by enacting *C.C.P. 340.1*, which allows a civil action for childhood sexual abuse within 3 years from the date the plaintiff discovers or should have discovered that psychological sickness occurring after the age of majority was caused by the childhood sexual abuse. However, at present, opposition to this theory is growing. (69 C.A.4th 1344.)

(b) One can easily see the horror resulting to a parent falsely accused of child molestation, and, not surprisingly, numerous cases from other jurisdictions, emphasizing simple foreseeability of harm to the plaintiff, have ruled in favor of allowing suits such as this one to go forward. However, California has emphasized that duty is not a function of simple foreseeability. (69 C.A.4th 1346, citing *Thing v. La Chusa* (1989) 48 C.3d 644, 257 C.R. 865, 771 P.2d 814, *infra*, §1009.) Furthermore, this case does not involve a patient's suit against his or her therapist, but a suit by a patient's parent. Thus, in the absence of a voluntary assumption of duty by the therapist, such as by agreement, any duty toward the parent must be imposed as a matter of policy. (69 C.A.4th 1346.)

(c) A therapist clearly owes a duty to the patient. However, holding that the therapist also owes a duty to the third-party abuser would create an intolerable situation. The therapist would have to choose between violating the duty to the patient (by ignoring possible childhood abuse), or fulfilling that duty, but violating the duty to the third-party abuser (by uncovering any repressed memory, whether true or false). (69 C.A.4th 1350.)

(d) It can be argued that no patient is well served by an incorrect diagnosis of repressed childhood sexual abuse and

that the correct solution is to use the law of negligence to require the therapist to make the correct diagnosis. However, therapy is inexact, and a duty to a potential abuser would afford the therapist no leeway in deciding whether the patient was really abused. A therapist would be like a juror required to make determinations according to well-established rules of evidence, rather than acting as a helping professional. The out-of-state cases that have allowed suits such as this have avoided dealing with the impossibility of verification and the conflicts of interest created by imposition of a duty to a third-party abuser. These cases assume a level of ascertainability and verifiability on the part of the therapist that is unrealistic and that courts would never consider imposing on judges and juries with respect to incorrect determinations concerning the factual merits of repressed memory claims. (69 C.A.4th 1351.)

(e) The traditional factors used in determining whether a duty should be imposed are all against liability. *James W. v. Superior Court* (1993) 17 C.A.4th 246, 21 C.R.2d 169, supra, §142 does not require otherwise. To say that *James W.* stands for the proposition that a therapist is liable for all false accusations of molestation is misleading. Rather, the case stands for the principle that the statutes designed to protect reporters of suspected child abuse do not shield family counselors from liability to those who hire them. (69 C.A.4th 1357.)

(f) Plaintiff has not alleged facts that constitute the following causes of action: intentional infliction of emotional distress (not outrageous for a therapist to act on the premise that repressed memories of sexual abuse cause later psychological problems); barratry (plaintiff alleged that defendant urged S to sue him as part of her therapy, but barratry requires three groundless lawsuits); abuse of process (requires abuse of legal *process*, not just filing suit); malicious prosecution (S's earlier suit against plaintiff had not yet been terminated at the time that this action was filed). (69 C.A.4th 1357.)

(g) The court cautioned that it was not commenting on any theory of malpractice that a *patient* might bring against a therapist based on false or implanted memories of childhood abuse, but was simply holding that the therapist's duty did not extend beyond the patient to include someone who the therapist in good faith (even if negligently) concluded abused the patient. (69 C.A.4th 1360.)

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12. Radio, Television, or Motion Picture Production.
a. Promotion.

6 Witkin Sum. Cal. Law Torts § 914

[§ 914] Promotion.

Weirum v. RKO General (1975) 15 C.3d 40, 123 C.R. 468, 539 P.2d 36, found foreseeability present in the following unusual facts: Defendant's Los Angeles radio station KHJ commanded 48% of the teenage listeners. To attract a larger audience, it inaugurated a promotion entitled "The Super Summer Spectacular." Its disc jockey, known as "The Real Don Steele," traveled to a number of locations in the Los Angeles metropolitan area in a conspicuous red automobile; the station broadcast the information of its whereabouts and the correct response to a question or some other condition, and the first to arrive received a cash prize (\$ 25 in a typical instance). Two defendants, Robert and Marsha, located Steele after someone had already claimed the prize. These two defendants, in separate cars, followed Steele on a freeway at high speeds to get the prize at the next stop, and in the pursuit one of their cars forced decedent's car onto the center divider, where it overturned, killing decedent. In this wrongful death action, Robert's carrier settled, and a verdict and judgment against Marsha was not appealed. Defendant station appealed from the judgment against it. *Held*, affirmed.

(a) Defendant's duty was established by the foreseeability of the risk, pursuant to the jury verdict supported by the evidence. The broadcast was in vacation time, and youthful listeners were attracted by the money and notoriety; it was foreseeable that some, finding the prize had eluded them at one location, would race to arrive first at the next site and disregard the demands of highway safety; and Steele himself testified that he had noticed vehicles following him from location to location. (15 C.3d 47.) Causation was also established by foreseeability of the negligent acts of third parties, under *Richardson v. Ham* (1955) 44 C.2d 772, 285 P.2d 269, *supra*, §842. (15 C.3d 47.)

(b) Defendants contended that the imposition of a duty here would lead to unwarranted extensions of liability, e.g., to an athletic department advertising a limited number of tickets, or a department store announcing a "while-they-last" sale. But this contest was not a commonplace invitation to an attraction available on a limited basis. "It was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit." (15 C.3d 48.)

(c) The contention that, under *Rest.2d, Torts* §315, defendants owed no duty to control the conduct of third parties, mistakenly assumed that the act here was mere nonfeasance. Defendant's act was one of misfeasance, i.e., it created the risk; and the standards of ordinary care governed. (15 C.3d 49.) (See criticism, 64 Cal. L. Rev. 617; and see 37 Proof of

Facts 2d 521 [broadcaster's personal liability in connection with broadcast]; 20 *A.L.R.4th* 328 [liability for personal injury or death allegedly resulting from television or radio broadcast].)

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12. Radio, Television, or Motion Picture Production.
b. Film Depicting Violence.

6 Witkin Sum. Cal. Law Torts § 915

[§ 915] Film Depicting Violence.

Olivia N. v. National Broadcasting Co. (1981) 126 C.A.3d 488, 178 C.R. 888, distinguished *Weirum v. RKO General* (1975) 15 C.3d 40, 123 C.R. 468, 539 P.2d 36, supra, §914, and sustained a First Amendment defense. On September 10, 1974, at 8 p.m., defendant NBC telecast nationwide, and defendant Chronicle Broadcasting Co. broadcast locally, a film entitled "Born Innocent." It contained a scene in which a young girl in a state-run home was attacked by four adolescent girls who abused her sexually with the wooden handle of a plunger. On September 14, 1974, plaintiff, age 9, was attacked in a similar manner by minors using a bottle. Plaintiff alleged that her assailants had viewed and discussed the "artificial rape" scene in "Born Innocent," and that this caused them to decide to commit a similar act on her. The complaint also alleged that the film was particularly likely to cause imitation and that it had been televised without proper warning. After denial of a defense motion for summary judgment, the case was set for trial, but the judge viewed the film, decided that it did not incite the crime against plaintiff, and gave judgment for defendants. This was reversed on the ground that it was a violation of plaintiff's right to trial by jury. (*Olivia N. v. National Broadcasting Co.* (1977) 74 C.A.3d 383, 141 C.R. 511.) On remand, a jury was picked, and plaintiff's counsel made his opening statement, in which he said that the action was based on negligence and recklessness, and that no attempt would be made to prove incitement by defendants. The judge then granted a nonsuit and rendered judgment of dismissal. *Held*, affirmed.

(a) Controlling decisions establish the First Amendment protection of material communicated by the public media, including fictional material such as that presented here. (126 C.A.3d 492.) Hence, the broadcast was protected speech unless it advocated or encouraged violent acts, amounting to an "incitement," under *Brandenburg v. Ohio* (1969) 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430, 7 Summary (10th), *Constitutional Law*, §470. (126 C.A.3d 494.)

(b) Plaintiff's theory that liability could be imposed on the basis of negligence is untenable. That liability would have a "chilling effect" on media broadcasting, leading to self-censorship, and "could reduce the U.S. adult population to viewing only what is fit for children." (126 C.A.3d 494.) Nor can liability be justified by distinguishing between the fictional presentation of "Born Innocent" and news programs and documentaries. "If a negligence theory is recognized, a television network or local station could be liable when a child imitates activities portrayed in a news program or documentary." (126 C.A.3d 495.)

(c) *Weirum*, which briefly disposed of the First Amendment defense, is distinguishable. Although the language of

the opinion "was broad" it must be understood in light of the fact that the *Weirum* broadcasts repeatedly encouraged listeners to speed to announced locations, and liability was imposed for urging listeners to act in an inherently dangerous manner. Here, plaintiff alleges only that the teenage viewers "acted on the stimulus of the broadcast rather than in response to encouragement of such conduct." (126 C.A.3d 496.) (See 52 So. Cal. L. Rev. 529 [commenting on first *Olivia N.* opinion].)

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c. Song About Suicide.

6 Witkin Sum. Cal. Law Torts § 916

[§ 916] Song About Suicide.

In *McCullum v. CBS* (1988) 202 C.A.3d 989, 249 C.R. 187, John, plaintiffs' decedent, was a 19-year-old youth suffering from emotional problems. He regularly listened to the broadcasts of defendant Osbourne, the "mad man" of rock and roll, whose songs included "Suicide Solution," in which the words "Get the gun and try it" appeared. One night, after listening to Osbourne, John shot himself.

The complaint alleged the following: Defendant Osbourne's music was directed to an audience including troubled adolescents and young adults; the target group was extremely susceptible to the directions of this cult figure and role model; a "special relationship" of kinship existed between Osbourne and his avid fans; defendants Osbourne and CBS knew or should have known that it was foreseeable that the music, lyrics, and hemisync tones would influence the emotions and behavior of susceptible listeners; defendants negligently and intentionally disseminated the music and intentionally aided or encouraged the resulting suicide. The trial court gave judgment for defendants on demurrer, on the ground that, irrespective of the theory of recovery, the action was barred by the First Amendment guarantee of free speech. *Held*, affirmed.

(a) Bar of First Amendment.

(1) Material communicated by the public media, including artistic expression such as the music and lyrics involved here, are generally to be accorded protection under the *First Amendment*. (202 C.A.3d 998; see 7 Summary (10th), *Constitutional Law*, §323.) One recognized exception is speech directed to inciting imminent lawless action, which is likely to incite or produce this action. (202 C.A.3d 1000, citing *Brandenburg v. Ohio* (1969) 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430, 7 Summary (10th), *Constitutional Law*, §470.) But to justify a claim under this exception the court must be satisfied that the speech (a) was directed or intended toward the goal of producing imminent lawless conduct, and (b) was likely to produce the imminent conduct. (202 C.A.3d 1000, citing *Hess v. Indiana* (1973) 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303, 7 Summary (10th), *Constitutional Law*, §458.)

(2) "We can find no such intent or likelihood here. Apart from the 'unintelligible' lyrics quoted above from 'Suicide Solution,' ... there is nothing in any of Osbourne's songs which could be characterized as a command to an immediate suicidal act. ... Merely because art may evoke a mood of depression as it figuratively depicts the darker side of human

nature does not mean that it constitutes a direct 'incitement to imminent violence.' The lyrics sung by Osbourne may well express a philosophical view that suicide is an acceptable alternative to a life that has become unendurable--an idea which, however unorthodox, has a long intellectual tradition." (202 C.A.3d 1001.) And musical lyrics and poetry are not intended to be and should not be read literally; they are figurative expressions, and no rational person would mistake them for commands or directives to immediate action. (202 C.A.3d 1002.)

(3) Although no California case has dealt directly with recorded music and lyrics, fictional depictions in the film and electronic media have been the subject of several decisions, and tort liability has been rejected on First Amendment grounds. (202 C.A.3d 1002, citing *Olivia N. v. National Broadcasting Co.* (1981) 126 C.A.3d 488, 178 C.R. 888, supra, §915.)

(4) "Musical composers and performers, as well as record producers and distributors, would become significantly more inhibited in the selection of controversial materials if liability for civil damages were a risk to be endured for publication of protected speech. The deterrent effect of subjecting the music and recording industry to such liability because of their programming choices would lead to a self-censorship which would dampen the vigor and limit the variety of artistic expression. Thus, the imposition here of postpublication civil damages, in the absence of an incitement to imminent lawless action, would be just as violative of the First Amendment as a prior restraint." (202 C.A.3d 1003.)

(b) *No legal duty to plaintiffs.*

(1) "The threshold and, in this case, dispositive question with respect to the assertion of a claim for negligence is whether any duty was owed to the plaintiffs." (202 C.A.3d 1003.) The foreseeability factor is adequately considered in *Olivia N.*, which placed *Weirum v. RKO General* (1975) 15 C.3d 40, 123 C.R. 468, 539 P.2d 36, supra, §914, in its proper perspective. Osbourne's music and lyrics had been recorded and produced years before the broadcast, and John's tragic self-destruction was not a reasonably foreseeable risk or consequence of defendants' remote artistic activities. (202 C.A.3d 1005.)

(2) "Plaintiffs' case is not aided by an examination of the other factors which are a part of the duty analysis. It cannot be said that there was a close connection between John's death and defendants' composition, performance, production, and distribution years earlier of recorded artistic musical expressions. Likewise, no moral blame for that tragedy may be laid at defendants' door. John's suicide, an admittedly irrational response to Osbourne's music, was not something which any of the defendants intended, planned or had any reason to anticipate. Finally, and perhaps most significantly, it is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy. No case has ever gone so far. We find no basis in law or public policy for doing so here." (202 C.A.3d 1005.)

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d. Unauthorized Viewing of Movie.

6 Witkin Sum. Cal. Law Torts § 917

[§ 917] Unauthorized Viewing of Movie.

In *Delgado v. American Multi-Cinema* (1999) 72 C.A.4th 1403, 85 C.R.2d 838, A, a 13-year-old, and two other minors viewed an R-rated film at defendant's theatre. Defendant had adopted the Motion Picture Association's voluntary system prohibiting those under 17 from seeing an R-rated film unless accompanied by an adult, but had failed to check the age of A and his friends. During the movie, which was particularly violent, A became very agitated and stated that he was going to have to shoot someone. Immediately after the movie ended, A walked to a street corner near the theatre and shot and killed plaintiffs' son. Plaintiffs sued defendant for negligence in admitting A to the movie unaccompanied by an adult. *Held*, judgment for defendant on demurrer affirmed.

(a) Plaintiffs argued that, in adopting the movie industry rating system, defendant had assumed a duty of care to the public at large. This argument is without merit. The purpose of the rating system is to advise parents in advance so that they may determine whether a particular film is appropriate for children, and the duty is not owed to the public at large, but to the parents of children planning to attend a specific film. Thus, defendant breached no duty to plaintiffs by allowing A to view a movie that he should not have seen without an adult. (72 C.A.4th 1406.)

(b) Plaintiff's reliance on *Weirum v. RKO General* (1975) 15 C.3d 40, 123 C.R. 468, 539 P.2d 36, *supra*, §914, is misplaced. In that case, it was foreseeable that defendant radio station's promotional stunt was one designed to encourage speeding. Here, on the other hand, plaintiffs did not allege that defendant encouraged A to commit violence, but merely that it failed to prevent him from watching an R-rated movie, that his parents (or any other adult) could have permitted had they been with him. Plaintiffs also argued that there was a "functional connection" between defendant's property and their son's death. This position too is unavailing, because the physical condition of defendant's theatre was not at issue and because defendant had no control over the deadly street corner more than a block away. (72 C.A.4th 1407.)

(c) Plaintiffs maintained that even if defendant was not liable for negligence, it was liable under the premises liability doctrine, which imposes liability for third-party criminal conduct where the defendant failed to exercise care over property that he or she owned or controlled. However, the cases supporting this doctrine, e.g., *Frances T. v. Village Green Owners Assn.* (1986) 42 C.3d 490, 229 C.R. 456, 723 P.2d 573, *supra*, §39, are inapposite, because defendant here did not own or control the street corner where plaintiffs' son was killed. (72 C.A.4th 1408.) (See 22 J. Juvenile Law

220 [*Delgado*].)

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1. Dangerous Activities or Devices.
a. In General.

6 Witkin Sum. Cal. Law Torts § 918

[§ 918] In General.

Whether expressed in terms of the "degree" or "amount" of care (see *supra*, 869), the law requires more care in dealing with dangerous devices or appliances and in other dangerous activities than in ordinary nondangerous activities. In other words, the care must be commensurate with and proportionate to the danger. (See *Fairbairn v. American River Elec. Co.* (1915) 170 C. 115, 118, 148 P. 788 [electricity; "Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it"]; *Polk v. Los Angeles* (1945) 26 C.2d 519, 525, 159 P.2d 931 [power line wires passing through branches of trees]; *Holmes v. Southern Calif. Edison Co.* (1947) 78 C.A.2d 43, 55, 177 P.2d 32 [destruction of house and personal property by negligent maintenance of electric wires; instructions on duty of "great" care and "highest degree of care practicable," though criticized, were upheld as having been approved in prior cases]; 57A Am.Jur.2d (2004 ed.), *Negligence* §295 et seq.)

A strong statement of the doctrine was made in *Been v. The Lummus Co.* (1946) 76 C.A.2d 288, 293, 173 P.2d 34, where defendant's negligence consisted of allowing a wire cable to project across a roadway where plaintiff drove his truck, the wire being slightly above his range of vision: "When human life is at stake the rule of due care and diligence requires that without regard to difficulties or expense every precaution be taken reasonably to assure the safety and security of any person lawfully coming into the immediate proximity of the dangerous agency or device which is a peril to others." *Warner v. Santa Catalina Island Co.* (1955) 44 C.2d 310, 317, 282 P.2d 12, contains similar language: "The risk incident to dealing with fire, firearms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids requires a great deal of care to be exercised. In other words, the standard of care required of the reasonable person when dealing with such dangerous articles is so great that a slight deviation therefrom will constitute negligence." (Cf. questionable decision in *Bartholomai v. Owl Drug Co.* (1940) 42 C.A.2d 38, 42, 108 P.2d 36 [welding done with flying sparks, in close proximity to paper-covered ceiling and paper pennants, was not sufficient evidence of negligence].)

Activities and devices within this class include electricity (see *infra*, §919), firearms (see *infra*, §920), explosives (see *infra*, §921), and gas and other inflammable materials (see *infra*, §922).

West's Key Number Digest, Negligence k.301 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See *Weaver v. Chavez* (2005) 133 C.A.4th 1350, 1354, 35 C.R.3d 514 [federal regulation requiring operators of commercial motor vehicles to use "extreme caution" when driving in inclement weather imposed higher duty of care than California's basic speed law; thus, failure to instruct jury on federal standard was prejudicial error].



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D. Degree or Kind of Care in Special Situations.

1. Dangerous Activities or Devices.

b. Electricity.

6 *Witkin Sum. Cal. Law Torts* § 919

[§ 919] Electricity.

A great amount of care, e.g., in insulation and continual inspection, is required of those placing electric wires along a highway or otherwise maintaining them where there is danger of injury to persons or property. (See *Fairbairn v. American River Elec. Co.* (1915) 170 C. 115, 119, 148 P. 788; *Dunn v. Pacific Gas & Elec. Co.* (1954) 43 C.2d 265, 273, 272 P.2d 745 [defendant was notified that level of ground had been raised but failed for 27 hours to take steps to raise high-tension wires]; *Austin v. Riverside Portland Cement Co.* (1955) 44 C.2d 225, 231, 282 P.2d 69; *Beresford v. Pacific Gas & Elec. Co.* (1955) 45 C.2d 738, 745, 290 P.2d 498; *Holmes v. Southern Calif. Edison Co.* (1947) 78 C.A.2d 43, 55, 177 P.2d 32; *Couch v. Pacific Gas & Elec. Co.* (1947) 80 C.A.2d 857, 864, 183 P.2d 91 [defendant was negligent in leaving uninsulated live wires hanging in house, after removing heater].)

However, in some instances, a public utility has been held to have exhibited the requisite increased amount of care. (See *Pascoe v. Southern Calif. Edison Co.* (1951) 102 C.A.2d 254, 257, 227 P.2d 555 [no negligence in maintaining uninsulated high tension wires across highway at sufficient height as not to endanger normal use for travel or other proper purposes]; *Krongos v. Pacific Gas & Elec. Co.* (1992) 7 C.A.4th 387, 397, 9 C.R.2d 124, *infra*, §1127 [public utility was not liable for construction worker's death by electrocution, where power line met applicable standards; citing *Pascoe*]; *White v. Southern Calif. Edison Co.* (1994) 25 C.A.4th 442, 448, 451, 30 C.R.2d 431 [public utility had no duty to driver injured in automobile accident to maintain streetlight in operable condition; citing *Krongos* and *Pascoe*].)

Commentary and practice works are numerous. (See 27A *Am.Jur.2d* (1996 ed.), *Energy and Power Sources* §215 et seq.; 47 *Proof of Facts* 2d 451 [defective wiring as cause of fire]; 11 *Loyola L.A. L. Rev.* 775 [Torts of Electric Utilities: Can Strict Liability Be Plugged In?]; 32 *A.L.R.2d* 244 [electric company's failure to shut off current]; 40 *A.L.R.2d* 1299 [electric wires passing near or through trees]; 97 *A.L.R.2d* 664 [fall of pole]; 82 *A.L.R.3d* 113 [liability of power company for injury or death resulting from contact of radio or television antenna with electrical line]; 91 *A.L.R.3d* 616 [injury to child from electric wire encountered while climbing tree]; 99 *A.L.R.3d* 628 [liability of telephone company for injury by noise or electric charge transmitted over line]; 14 *A.L.R.4th* 913 [injury or death resulting from contact of crane, derrick, or other movable machine with electric line]; 33 *A.L.R.4th* 809 [object manually brought into contact with, or near, electric line]; 46 *A.L.R.5th* 423 [electric company's liability for nonemployee's injury or death from commencement or resumption of service]; 91 *A.L.R.5th* 517 [recovery from electrical utility for injury or damage from stray voltage]; 95 *A.L.R.5th* 29 [electrical utility's negligence liability to nonemployee for injury or damage from

exposure of person or motor vehicle to sagging or downed power line]; BAJI, No. 3.42; CACI, No. 416.)

SUPPLEMENT: [This section is current through the latest supplement]
See *27A Am.Jur.2d (2008 ed.), Energy and Power Sources §178 et seq.*



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c. Firearms and Ammunition.

6 Witkin Sum. Cal. Law Torts § 920

[§ 920] Firearms and Ammunition.

One who handles or discharges firearms is bound to use extraordinary care or extreme caution to avoid injury to others. (*Rudd v. Byrnes* (1909) 156 C. 636, 640, 105 P. 957; *Jensen v. Minard* (1955) 44 C.2d 325, 328, 282 P.2d 7 [boy shot at bird in place where children just passed, and ricochet was slight possibility]; see 13 Proof of Facts 3d 315 [negligent shooting by hunter]; 15 Proof of Facts 3d 1 [injury to bystander resulting from use of firearm against fleeing criminal]; 26 A.L.R.3d 561 [hunter's liability for unintentionally shooting third person]; 47 A.L.R.3d 620 [standard for minor handling firearm]; 49 A.L.R.3d 762 [shooting contest or target practice]; 88 A.L.R.5th 1 [liability of firearm or ammunition manufacturer or seller for injuries from use of gun in commission of crime]; cf. *Tucker v. Lombardo* (1956) 47 C.2d 457, 462, 303 P.2d 1041 [person using firearms must exercise degree of care commensurate with and in proportion to danger involved]; *Miller v. Kennedy* (1987) 196 C.A.3d 141, 145, 241 C.R. 472 [police officer is not held to higher standard of care in handling firearms; following *Tucker v. Lombardo*].)

The same rule applies to the manufacture of ammunition. In *Warner v. Santa Catalina Island Co.* (1955) 44 C.2d 310, 282 P.2d 12, plaintiff, watching in a shooting gallery, was struck in the eye by a particle from a bullet that ricocheted from the metal backstop. Defendant O, manufacturer of the "Kant-Splash" bullets, designed to disintegrate into dust when striking the target or backstop, was held liable for negligence in manufacture and inspection. The evidence showed that test shooting had been done under ideal conditions (unpitted backstop and 90-degree angle), that no tests were made under actual shooting gallery conditions, and that even defendant's tests showed no complete disintegration but particles ricocheting the length of an ordinary gallery. (44 C.2d 317.) (On strict products liability, see *Kasel v. Remington Arms Co.* (1972) 24 C.A.3d 711, 101 C.R. 314, *infra*, §1500.)

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d. Explosives.

6 *Witkin Sum. Cal. Law Torts* § 921

[§ 921] Explosives.

Apart from situations giving rise to absolute liability (see *infra*, §1418), statutes *Health & Saf.C. 12000 et seq.* prescribe minimum standards for the care of explosives and emphasize the high degree of care required. (See *Marino v. Valenti* (1953) 118 C.A.2d 830, 848, 259 P.2d 84 [dynamite caps kept in unlabeled cardboard box in uninhabited shack near place where school bus discharged children]; 31A *Am.Jur.2d* (2002 ed.), *Explosions and Explosives* §§19, 24, 25, 162.)

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1. Dangerous Activities or Devices.

e. Gas and Other Flammable Materials.

6 *Witkin Sum. Cal. Law Torts* § 922

[§ 922] Gas and Other Flammable Materials.

Volatile gases that are highly inflammable or may explode must be handled with the utmost care. (See *Signorelli v. Potter* (1954) 43 C.2d 541, 543, 275 P.2d 449 [butane]; *Borenkraut v. Whitten* (1961) 56 C.2d 538, 545, 15 C.R. 635, 364 P.2d 467 [gasoline poured into carburetor to prime it, and engine started]; *Salas v. Whittington* (1946) 77 C.A.2d 90, 94, 174 P.2d 886 [can of shellac and alcohol, highly combustible, left accessible to children]; *Johnson v. Nicholson* (1958) 159 C.A.2d 395, 406, 324 P.2d 307 [gasoline furnished to clean concrete floor in vicinity of tile layer with blowtorch]; *Reynolds v. Natural Gas Equipment* (1960) 184 C.A.2d 724, 736, 7 C.R. 879, citing the text [explosion of gas burner used to dry sand and gravel for road paving mix]; 14 Am.Jur. Trials 343 [Liquefied Petroleum Gas Fires and Explosions]; 23 Proof of Facts 447 [gas explosions]; 96 A.L.R.2d 1007 [gas escaping from main]; 30 A.L.R.3d 685 [pipelines]; 41 A.L.R.3d 782 [bottled gas]; 70 A.L.R.3d 1060 [duty to odorize natural gas]; BAJI, Nos. 3.12, 3.41; CACI, No. 414.)

A gas company does not install pipes within the owner's premises, has no control over them or duty to repair, and consequently is not liable in the ordinary case for injuries caused by a leak in the interior pipes. But, because of its superior knowledge of dangers to be guarded against, it may become liable in two situations: (1) When gas is first turned on, it must exercise care to determine the conditions, and is liable if it fails to inspect for uncapped or otherwise defective pipes. (2) If, after service has commenced, it becomes aware of defects, such as rust or corrosion, that might result in the escape of gas, it must either cause repairs to be made by the person responsible for them or must shut off the gas. "Thus ownership of the pipes or appliances is not an indispensable requisite to liability of a gas company." (*Ambriz v. Petrolane Ltd.* (1957) 49 C.2d 470, 478, 319 P.2d 1; see *Mendoza v. Easton Gas Co.* (1988) 197 C.A.3d 781, 785, 243 C.R. 136 [gas company has duty to inspect before first releasing gas; following *Ambriz*]; *Salazar v. Southern Calif. Gas Co.* (1997) 54 C.A.4th 1370, 1375, 63 C.R.2d 522 [no duty to warn of danger of using flammable liquids near unelevated water heater or to disconnect service to heater; gas company's duty is limited to ensuring that gas lines and connections are safe; citing and distinguishing *Ambriz*]; 13 A.L.R.2d 1396 [duty of gas company after discontinuing service]; 26 A.L.R.2d 136 [defects in service lines; gas company's liability]; 71 A.L.R.3d 1174 [liability of gas company for failure to inspect or supervise work of contractors digging near gas pipes].)

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2. Carriers.

a. In General.

6 Witkin Sum. Cal. Law Torts § 923

[§ 923] In General.

Except where a passenger is carried gratuitously (see C.C. 2096), a *common* carrier of passengers is held to a high degree of care to its passengers. (C.C. 2100 ["utmost care and diligence for their safe carriage"]; see *Kline v. Santa Barbara Consol. Ry. Co.* (1907) 150 C. 741, 745, 90 P. 125; *Smith v. O'Donnell* (1932) 215 C. 714, 717, 12 P.2d 933; *Lopez v. Southern Calif. Rapid Transit Dist.* (1985) 40 C.3d 780, 785, 221 C.R. 840, 710 P.2d 907, *infra*, 930 [C.C. 2100 implies duty on carrier "to do all that human care, vigilance, and foresight reasonably can do under the circumstances"]; *Moeller v. Market Street Ry. Co.* (1938) 27 C.A.2d 562, 566, 81 P.2d 475; *Terrell v. Key System* (1945) 69 C.A.2d 682, 684, 159 P.2d 704 [duty to protect against assault by fellow passenger]; *Finley v. San Francisco* (1952) 115 C.A.2d 116, 120, 251 P.2d 687; *Berger v. Southern Pac. Co.* (1956) 144 C.A.2d 1, 6, 300 P.2d 170 [duty to protect against assault by employee]; *Cooper v. National R. Passenger Corp.* (1975) 45 C.A.3d 389, 395, 119 C.R. 541 [high degree of care of high-speed passenger train, and duty to furnish safe toilet facility]; *Nash v. Fifth Amendment* (1991) 228 C.A.3d 1106, 1111, 279 C.R. 465 *infra*, §926; *San Francisco v. Superior Court* (1994) 31 C.A.4th 45, 48, 36 C.R.2d 372, *infra*, §931; *McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 C.A.4th 1011, 1016, 67 C.R.2d 516 [no duty to assist inebriated passenger ordered off train; carrier-passenger relationship terminated once passenger exited train and was on platform]; *Vinnick v. Delta Airlines* (2001) 93 C.A.4th 859, 863, 113 C.R.2d 471 [plaintiff was struck by another passenger's carry-on bag; because claim did not relate to rates, routes, or services, federal Airline Deregulation Act did not preempt common carrier's duty of care]; *Ingham v. Luxor Cab Co.* (2001) 93 C.A.4th 1045, 1050, 113 C.R.2d 587 [taxi has duty to deliver passenger to address given to driver, and ejection at another place may be actionable even if it occurs at relatively safe place; distinguishing *McGettigan*]; cf. *DeRoche v. Commodore Cruise Line, Ltd.* (1994) 31 C.A.4th 802, 807, 46 C.R.2d 468 [duty of care of owner of cruise ship is matter of federal maritime law; that duty is "to exercise reasonable care under the circumstances," and owner ordinarily has no duty to insure health or safety of passengers].)

In *Greyhound Lines v. Superior Court* (1970) 3 C.A.3d 356, 83 C.R. 343, plaintiffs, passengers injured in a Greyhound bus collision, alleged negligence of Greyhound in failing to equip the bus with safety belts. Greyhound contended that a safety belt requirement could only be made by general legislation or administrative regulation. *Held*, the issue was one of fact for the jury.

(a) It is a matter of common knowledge that safety belts are effective in reducing fatalities and minimizing injuries

in motor vehicle collisions. (3 C.A.3d 358.)

(b) Carriers must keep pace with modern improvements; and, although there is no precedent for the requirements, "[t]he toll of highway injury and death is such that judicial policy should be against deferment to legislative inaction and in favor of having juries pass upon the question until such time as the Legislature may choose to adopt supervising safety regulations." (3 C.A.3d 360.) (See *McNeil v. Yellow Cab Co.* (1978) 85 C.A.3d 116, 118, 147 C.R. 733 [following *Greyhound*; whether failure to provide visible seatbelts in taxicab was negligence presented fact question of proximate cause for jury]; 49 A.L.R.3d 295 [liability of operator of vehicle or aircraft for failure to furnish or require use of seat belt].)

Where a dangerous condition is involved, the high degree of care required may impose a greater duty to inspect, but knowledge or notice must be shown. "To hold otherwise would be, in effect, to make the carrier an insurer of the safety of the passenger, contrary to the settled principles defining the degree of its legal responsibility and holding the carrier not to be an insurer." (*Gray v. San Francisco* (1962) 202 C.A.2d 319, 330, 20 C.R. 894 [plaintiff, boarding defendant's streetcar, slipped on metal strip of platform, which had some moisture on it].)

In *Rubin v. United Air Lines* (2002) 96 C.A.4th 364, 377, 117 C.R.2d 109, a passenger who, due to a mix-up, lost her first-class seat, entered the first-class area without authorization, refused to follow safety instructions, and caused other passengers to become upset and unruly. *Held*, the airline had power under the Federal Aviation Act to make her deplane.

Commentary and practice works on the liability of common carriers are numerous. (See 65 *Am.Jur.2d*, *Railroads* (2001 ed.) §364 et seq.; C.E.B., *Tort Guide* 3d, Chap. 5; Cal. Civil Practice, 2 Torts, Common Carriers, Chap. 28; 47 *Proof of Facts* 2d 577 [carrier's negligent maintenance of public area]; 51 *Proof of Facts* 3d 81 [liability for air crash]; 17 A.L.R.2d 1085 [duty to intoxicated passenger while en route]; 55 A.L.R.2d 766 [status of employee or family traveling on employer's interstate conveyance under provision of collective bargaining agreement]; 68 A.L.R.2d 667 [passenger injured through fall of baggage, etc.]; 77 A.L.R.2d 1336 [passenger injured from fall because of debris, etc., on floor of bus]; 92 A.L.R.2d 656 [sick passenger]; 8 A.L.R.3d 650 [ship fire drill]; 52 A.L.R.3d 669 [physical condition of driver]; 74 A.L.R.3d 1171 [carrier's liability for injury or death of child passenger in custody of parent or other adult]; 76 A.L.R.3d 1218 [carrier's liability based on serving intoxicants to passenger]; 99 A.L.R.3d 751 [carrier's liability for injury or death of passenger occasioned by inhalation of gases or fumes from exhaust]; 1 A.L.R.4th 1249 [motor carrier's liability for injury or death of passenger caused by debris, litter, or other foreign object on floor or seat]; 43 A.L.R.4th 189 [assault by fellow passenger]; 68 A.L.R.4th 14 [liability of ambulance service operator for injury to person being transported]; 32 A.L.R.5th 1 [liability of air carrier for passenger's injury from fall of object from overhead baggage compartment]; BAJI, No. 6.51; CACI, No. 902 et seq.)

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b. What Constitutes Carrier.

6 Witkin Sum. Cal. Law Torts § 924

[§ 924] What Constitutes Carrier.

In addition to the typical railroad, streetcar, bus, and taxi companies, carriers within the rule include the following:

(1) A sleeping car company. (*Berger v. Southern Pac. Co.* (1956) 144 C.A.2d 1, 6, 300 P.2d 170 [not technically a common carrier but subject to same obligations].)

(2) A passenger elevator. (*Champagne v. A. Hamburger & Sons* (1915) 169 C. 683, 690, 147 P. 954; *Parker v. Manchester Hotel Co.* (1938) 29 C.A.2d 446, 454, 85 P.2d 152; see 26 Am.Jur.2d (2004 ed.), *Elevators and Escalators* §12; 7 Am.Jur. Trials 377 [Elevator Accident Cases]; 77 A.L.R.2d 477 [what is "passenger elevator" within safety statute or regulation]; 99 A.L.R.5th 141 [liability of building owner, lessee, or manager for injury or death from use of automatic passenger elevator]; 115 A.L.R.5th 1 [liability of maintainer, repairer, or installer of automatic passenger elevator for injury from use of elevator].)

(3) An escalator. (*Hendershott v. Macy's* (1958) 158 C.A.2d 324, 327, 322 P.2d 596; see 26 Am.Jur.2d (2004 ed.), *Elevators and Escalators* §12; 1 A.L.R.4th 144 [liability for escalator injury]; BAJI, No. 6.50; CACI, Nos. 900, 901.)

(4) A scenic railway. (*Barr v. Venice Giant Dipper Co.* (1934) 138 C.A. 563, 564, 32 P.2d 980; see 66 A.L.R.2d 689 [scenic railway, roller coaster, miniature railway].)

(5) Ski resort chair lift. (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 C.A.4th 1499, 1508, 3 C.R.2d 897.)

(6) An airline. (*Smith v. O'Donnell* (1932) 215 C. 714, 718, 12 P.2d 933 [sightseeing flights]; *Marshall v. United Airlines* (1973) 35 C.A.3d 84, 110 C.R. 416, infra, §928; see 8A Am.Jur.2d (1997 ed.), *Aviation* §113 et seq.; 73 A.L.R.2d 346 [air carrier as common or private carrier and resulting duties as to passenger safety]; 73 A.L.R.2d 379 [injury or death of passenger due to downdraft, updraft, or turbulence]; 41 A.L.R.3d 455 [passenger on charter flight]; 72 A.L.R.3d 1299 [highjacking]; cf. *Dziura v. California Aviation Service* (1970) 4 C.A.3d 191, 197, 84 C.R. 191 [flight school not shown to have undertaken to carry all persons indifferently].)

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(7) (New) Roller coaster or similar amusement park ride: See *Gomez v. Superior Court* (2005) 35 C.4th 1125, 1128, 29 C.R.3d 352, 113 P.3d 41 [disapproving *St. Helena v. Public Util. Com.* (2004) 119 C.A.4th 793, 14 C.R.3d 713, 8 Summary (10th), *Constitutional Law*, §1096]; 36 Southwestern U. L. Rev. 59 [Gomez].



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c. Private Carrier for Hire.

6 *Witkin Sum. Cal. Law Torts* § 925

[§ 925] Private Carrier for Hire.

In *Webster v. Ebright* (1992) 3 C.A.4th 784, 4 C.R.2d 714, the issue was which standard of care is applicable to private carriers for hire (in this case a stable that rented horses for recreational riding). *Held*, the standard was ordinary care.

(a) C.C. 2100 imposes the more stringent duty of utmost care on a "carrier of persons for reward." The phrase is sufficiently broad to include both common carriers for reward, i.e., those bound to accept anyone who tenders the price of carriage, and private carriers for reward, i.e., those bound only to accept carriage pursuant to specific agreement. However, the statute is merely a codification of the common law. (3 C.A.4th 788, citing *Kline v. Santa Barbara Consol. Ry. Co.* (1907) 150 C. 741, 90 P. 125.) The common law imposes the more stringent standard on common carriers alone. Private carriers need exercise only ordinary care. (3 C.A.4th 789, citing *Gornstein v. Priver* (1923) 64 C.A. 249, 221 P. 396, *infra*, §1305, *Shannon v. Central-Gaither Union School Dist.* (1933) 133 C.A. 124, 23 P.2d 769, *infra*, §999, and *Carpena v. Los Angeles* (1960) 183 C.A.2d 541, 7 C.R. 889.)

(b) The statement in *Lopez v. Southern Calif. Rapid Transit Dist.* (1985) 40 C.3d 780, 785, 221 C.R. 840, 710 P.2d 907, *infra*, §930, that C.C. 2100 applies to public as well as private carriers meant "private carriers" in the sense of nongovernmental common carriers, and the phrase was used within the context of the court's rejection of the defendant's position that common carrier duties should not be applied to a governmental common carrier. (3 C.A.4th 791.)

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6 *Witkin Sum. Cal. Law Torts* § 926

[§ 926] Charterer of Excursion Boat.

In *Nash v. Fifth Amendment* (1991) 228 C.A.3d 1106, 279 C.R. 465, the court set forth the unusual facts and the issue raised as follows: "A bar charts an excursion ship for the purpose of having a Halloween party. The ship is owned and operated by a common carrier. During the party a passenger is killed by a bullet fired from a handgun that struck the deck after falling from beneath the costume of another passenger who is a peace officer authorized to carry a concealed weapon while not on duty. The question presented is whether a duty of care was owed by the bar to the passenger. Our answer is no." (228 C.A.3d 1109.)

(a) Plaintiff alleged that defendant bar failed to properly screen the persons who came aboard the ship. But the measures specified would naturally occur immediately before the ship was boarded; and even before its passengers were actually on board its ship, the carrier owed them a duty of care. (228 C.A.3d 1112.)

(b) The duty plaintiff would impose on defendant was substantially identical to that already required of common carriers. "There is little if any convenience in duplicating legal duties; the overlap could only confuse a system whose notable simplicity is founded upon easily comprehended common sense concepts of possession and control. That system already reflects a 'social judgment as to where the loss should fall'--on the carrier. Nor is this a situation where an injured party is denied all recovery; the carrier settled for \$ 150,000 and plaintiff obtained a large judgment against Clark" (the peace officer). (228 C.A.3d 1113.)

(c) "Accidents happen. Clark's handling of his weapon displayed an almost unbelievable stupidity. Defendant simply had the misfortune to charter the ship on which this freakish tragedy occurred. The current state of the law represents an established and sensible allocation of responsibility based upon the realities of social and commercial intercourse. ... We will not upset it." (228 C.A.3d 1115.)

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e. When Plaintiff Is Passenger.

1. In General.

6 Witkin Sum. Cal. Law Torts § 927

[§ 927] In General.

It has been held that a passenger retains this status not only while on a car, but while alighting, and until he or she has safely left it. (*Boa v. San Francisco-Oakland Terminal Rys.* (1920) 182 C. 93, 98, 187 P. 2; *McBride v. Atchison, Topeka & Santa Fe Ry. Co.* (1955) 44 C.2d 113, 116, 279 P.2d 966 [duty of porter to keep steps of car clean and to assist crippled or other incapacitated person to alight]; *Brandelius v. San Francisco* (1957) 47 C.2d 729, 735, 306 P.2d 432 [place of alighting had too narrow a clearance between cars]; *Parker v. San Francisco* (1958) 158 C.A.2d 597, 602, 323 P.2d 108 [bus discharged passengers into area of danger from other cars]; see 38 Proof of Facts 2d 677 [carrier's negligence in boarding or alighting]; 13 Proof of Facts 3d 475 [liability of school or school bus driver for injury to child going to or from school bus]; 33 So. Cal. L. Rev. 219 [prospective bus passenger]; 9 A.L.R.2d 938 [liability of motorbus to passenger injured when alighting from vehicle]; 58 A.L.R.2d 932 [liability of motor carrier for injury or death of passenger inflicted by vehicle from which he or she has alighted]; 61 A.L.R.2d 1113 [liability of air carrier to passenger injured while boarding or alighting]; 75 A.L.R.2d 988 [passenger injured while boarding taxi]; 98 A.L.R.3d 822 [passenger injured while alighting from taxi]; 7 A.L.R.4th 1031 [passenger alighting at place other than regular bus stop]; 28 A.L.R.4th 748 [injury from fall into space between loading platform and entrance]; 16 A.L.R.5th 1 [alighting bus passenger struck by another vehicle]; BAJI, Nos. 6.51, 6.53, 6.54.5, 6.55; CACI, No. 902 et seq.; cf. *Dayton v. Yellow Cab Co. of San Francisco* (1948) 85 C.A.2d 740, 743, 193 P.2d 959 [no error in instruction on "highest degree of care" where plaintiff, at end of taxi ride, got out, quarreled with driver, and was injured in fight]; *Orr v. Pacific Southwest Airlines* (1989) 208 C.A.3d 1467, 1473, 257 C.R. 18 [only ordinary care is required in scanning hand luggage at airport check point]; *DeRoche v. Commodore Cruise Line, Ltd.* (1994) 31 C.A.4th 802, 807, 46 C.R.2d 468 [no liability of cruise line predicated on substandard medical care available to passenger treated in port for injuries sustained there; applying federal maritime law requiring only "reasonable care under the circumstances"].)

However, it may not be negligence for a bus driver to stop away from an obstructed curb, and there is no duty as to the condition of the street that the passenger must traverse after safely alighting. (*MacLean v. San Francisco* (1954) 127 C.A.2d 263, 271, 273 P.2d 698.)

A narrow distinction has been made between two situations: (1) the plaintiff is on the platform or other premises of the carrier, waiting to board the car (ordinary care only): see *Falls v. San Francisco & North Pac. R. Co.* (1893) 97 C.

114, 119, 31 P. 901; *Sellars v. Southern Pac. Co.* (1917) 33 C.A. 701, 704, 166 P. 599); (2) the plaintiff, having purchased a ticket, is being conducted by the carrier's agent to the point of departure (passenger, full degree of care): see *Sanchez v. Pacific Auto Stages* (1931) 116 C.A. 392, 396, 2 P.2d 845.

It has also been held that the relationship of carrier and passenger may arise without boarding or purchasing a ticket, where a person goes to a designated place of departure, and the carrier indicates acceptance as a passenger. (*Lagomarsino v. Market Street Ry. Co.* (1945) 69 C.A.2d 388, 395, 158 P.2d 982 [plaintiff, while standing between tracks waiting to board standing streetcar, was struck by another passing car].)

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e. When Plaintiff Is Passenger.

2. Airline Passenger Changing Planes.

6 *Witkin Sum. Cal. Law Torts* § 928

[§ 928] Airline Passenger Changing Planes.

In *Marshall v. United Airlines* (1973) 35 C.A.3d 84, 110 C.R. 416, plaintiff had an airline ticket covering a flight from New York to Berkeley; defendant United provided the flight as far as the San Francisco Airport and defendant SFO provided a helicopter flight to Berkeley. Plaintiff arrived at the San Francisco Airport, and, while walking through the building on her way to the SFO facility, fell on a defective step. In her damage action against United for personal injuries, the court stated the major question as follows: "Does a common carrier airline company have a statutory or common law duty to a passenger to exercise care in the maintenance of an airport building area, over which it has no ownership or right of control, but which must be traversed by the passenger when changing planes to an independent connecting airline, passage on which has been arranged for by, and the fare for which has been paid to, the first airline as agent for the second." *Held*, summary judgment for defendants affirmed.

(a) The carrier's high duty of care to a passenger ends when he or she is discharged into a safe place, and this was the case here. Plaintiff had left the landing area with its hazards. (35 C.A.3d 87.)

(b) United was not the owner or lessee of the stairway where the accident occurred, and had no right of control over it; hence, it owed no duty of care as to its maintenance. (35 C.A.3d 88.)

(c) There was no duty to warn plaintiff. If the defect in the step was hidden, there could be no inference of United's knowledge of it; if it was obvious it was equally observable by plaintiff and there is no duty to warn in that case. (35 C.A.3d 90.)

(d) There was no implied contract to furnish plaintiff nonnegligent passage from New York to Berkeley; i.e., United did not hold itself out as a common carrier to a place beyond the limits of its own operation. (35 C.A.3d 90, 91.) (See 14 A.L.R.5th 662 [liability of air carrier for injury from condition of airport premises].)

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f. Carrier's Duty Owed to Stranger.

6 *Witkin Sum. Cal. Law Torts* § 929

[§ 929] Carrier's Duty Owed to Stranger.

A carrier may be negligent toward persons other than passengers. In *Brandenburg v. Pacific Gas & Elec. Co.* (1946) 28 C.2d 282, 169 P.2d 909, plaintiff, his wife, and children stepped off defendant's streetcar into a safety zone. Without warning, the motorman then turned the corner, the rear of the car overlapping the safety zone by two feet and striking plaintiff. *Held*, defendant was liable. Although the city and not defendant was responsible for the improper location of the safety zone, and although no general duty exists to warn adults of the swing of a turning streetcar, the danger of the improper safety zone under the circumstances was a foreseeable risk; hence, there was a duty on the part of the motorman to warn any person (not just a passenger), and there was a similar duty on the part of defendant company to instruct the motorman to give the warning. (28 C.2d 286.) (See 11 A.L.R.2d 1075 [liability to person boarding vehicle or ship for social or other purposes in connection with passenger]; 29 A.L.R.3d 1039 [liability to consignee or consignee's employee for injuries while unloading car]; BAJI, No. 6.45 et seq. [duty of railroad]; CACI, No. 800 et seq. [same].)

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1. Occurrence or Allegation of Prior Assault.

6 Witkin Sum. Cal. Law Torts § 930

[§ 930] Occurrence or Allegation of Prior Assault.

In *Lopez v. Southern Calif. Rapid Transit Dist.* (1985) 40 C.3d 780, 221 C.R. 840, 710 P.2d 907, defendant RTD was a public corporation operating buses as a common carrier. Plaintiffs, on board a bus as fare-paying passengers, were injured when a group of juveniles engaged in a fight. The complaint alleged that defendant negligently operated the bus by failing to take measures to protect passengers from assaults by fellow passengers, despite knowledge of many of these assaults. *Held*, a cause of action was stated.

(a) C.C. 2100, imposing a duty of care on carriers (supra, §923), applies to public as well as private carriers. (40 C.3d 785.) Although Govt.C. 815 makes public entity liability wholly statutory (see supra, §223), the statutes imposing liability need not be in the Government Code, and C.C. 2100 comes within the "otherwise provided by statute" language of Govt.C. 815. (40 C.3d 785, footnote 2.)

(b) The duty imposed by C.C. 2100 includes a duty to protect passengers from assaults by other passengers. This is the California rule under *Terrell v. Key System* (1945) 69 C.A.2d 682, 159 P.2d 704, and the overwhelming weight of authority. (40 C.3d 786, citing *Rest.2d, Torts* §§314A, 315, Comment c.) The dictum in *Taeleifi v. Southern Calif. Rapid Transit Dist.* (1982) 130 C.A.3d 366, 369, 181 C.R. 697, that a driver's only duty is to "drive the bus and collect fares," is disapproved. (40 C.3d 787, footnote 4.)

(c) The objections urged by defendant to imposition of this liability on *public* carriers are not persuasive.

(1) The asserted financial burden of providing an armed security guard on every bus assumes that this is the only way to perform the duty, but there are other steps that might be sufficient, i.e., warning unruly passengers to quiet down or get off the bus; alerting the police and summoning their assistance; ejecting unruly passengers; providing radio communication between the bus driver and local police or bus headquarters to enable the driver to call for assistance; equipping buses with alarm lights to alert nearby police of ongoing criminal activity; and training bus drivers to recognize and deal with potentially dangerous situations. (40 C.3d 787.)

(2) The contention that a public carrier has no duty to protect passengers from third-party assaults is based on a

mistaken interpretation of *Williams v. California* (1983) 34 C.3d 18, 192 C.R. 233, 664 P.2d 137, supra, §291, a case dealing with a police officer. "Implicit in our discussion in *Williams* is the recognition that some relationships by their very nature are 'special' ones giving rise to an 'initial duty' to come to the aid of others, regardless of whether there has been detrimental reliance in a particular case. The relationship between a common carrier and its passengers is just such a special relationship." In fact, the special relationship between passenger and carrier is especially strong. (40 C.3d 789.)

(3) The opinion in *Hernandez v. Southern Calif. Rapid Transit Dist.* (1983) 142 C.A.3d 1063, 191 C.R. 436, is unclear; but to the extent that it holds that there is no special relationship between a public carrier and its passengers, it is disapproved. (40 C.3d 790.)

(4) "In summary, we hold that *Civil Code* section 2100 imposes upon all common carriers--public or private--a duty of utmost care and diligence to protect their passengers from assaults by fellow passengers." However, carriers are not insurers of their passengers' safety and are thus liable for an assault by one passenger upon another only where, in the exercise of the required degree of care, the carrier has or should have knowledge from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury. (40 C.3d 791.)

(d) Defendant has no statutory immunity. *Govt.C. 845*, stating the immunity for failure to provide police protection (supra, §§290, 291, 302, 304), is inapplicable. The complaint did not plead negligence in failure to furnish police or armed guards, but merely alleged that the bus driver did nothing to protect plaintiffs. (40 C.3d 792.) *Govt.C. 820.2*, stating the immunity for discretionary acts (supra, §351 et seq.), is likewise inapplicable, because a bus driver must act to protect passengers, and the alternative measures available do not make the choice a policy decision. (40 C.3d 794.)

(e) Because liability under the Tort Claims Act is statutory, the facts material to the existence of liability must be pleaded with particularity. (40 C.3d 795.) However, the complaint was sufficient: "Plaintiffs allege the RTD is a common carrier, that plaintiffs were passengers on board one of RTD's buses, that RTD knew assaults regularly occurred on this bus route, and that the bus driver had been specifically notified that a violent argument had erupted among the passengers. These facts, if true, give rise to a duty of care on behalf of RTD to protect plaintiffs from assaults by fellow passengers." (40 C.3d 795.)

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6 Witkin Sum. Cal. Law Torts § 931

[§ 931] No Occurrence or Allegation of Prior Assault.

In *San Francisco v. Superior Court* (1994) 31 C.A.4th 45, 36 C.R.2d 372, a woman who was suddenly stabbed by another passenger without warning while riding on a city-operated bus brought a personal injury action against the city, alleging negligence in failing to prevent the stabbing. The trial judge denied the city's motion for summary judgment. *Held*, mandamus issued commanding the trial judge to grant the motion.

(a) Any liability of the city for failing to prevent the assault would stem from its duty of care as a common carrier to protect the safety of its passengers. Under C.C. 2100, a common carrier must use the utmost care and diligence for the safe carriage of its passengers, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill. *Lopez v. Southern Calif. Rapid Transit Dist.* (1985) 40 C.3d 780, 221 C.R. 840, 710 P.2d 907, *supra*, §930, construes this duty to require a common carrier to do all that human care, vigilance, and foresight reasonably can do under the circumstances. The duty includes protecting passengers from assaults by others, including fellow passengers. (31 C.A.4th 48.)

(b) Common carriers are not, however, insurers of their passengers' safety. Instead, the degree of care and diligence that they must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business of the carrier. Perhaps for this reason, the duty to protect passengers from assault lies only when the common carrier knows or should know that an assault is about to occur. (31 C.A.4th 48.)

(c) No California case has held a common carrier liable for a sudden assault that occurs without warning. There was no triable issue of fact whether the driver had or should have had warning of the attack, because the evidence showed that the attack came without warning. (31 C.A.4th 49.)

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6 Witkin Sum. Cal. Law Torts § 932

[§ 932] Carrier's Duty To Collect Evidence.

In *De Vera v. Long Beach Public Trans. Co.* (1986) 180 C.A.3d 782, 225 C.R. 789, plaintiff sustained injuries when defendant's bus was rear-ended by a third party's vehicle. The complaint alleged that defendant negligently lost or failed to obtain the identity of the vehicle and its driver, and that as a result, plaintiff was deprived of his opportunity to pursue a claim against the driver and other related parties. *Held*, judgment on jury verdict for plaintiff affirmed.

(a) "We find no case, and plaintiff cites none, in which a carrier's duty has been held to extend beyond the duty to protect its passengers from physical harm and to see that they are cared for if injured." (180 C.A.3d 793.) This case raises the question whether the carrier is under a duty to assist its passengers in pursuing civil litigation against third parties who cause them harm. (180 C.A.3d 794.)

(b) The relevant considerations of policy are strongly in favor of recognizing this duty. "A carrier can readily foresee the possibility of harm to its passengers by reason of its failure to collect and preserve information concerning a motorist involved in an accident with the carrier's vehicle, in that the passengers could be foreclosed, as was plaintiff, from recovery against such a motorist for any injuries they sustained in the accident. The duty to collect and preserve accident-related information imposes no undue burden upon a carrier, which would presumably, as did defendant, have a procedure in place for the reporting of accidents by its drivers, if only for its own benefit." (180 C.A.3d 795.)

(c) "Conversely, absent such a duty on the part of the carrier, each passenger would be obliged to alight from the carrier's vehicle and seek the requisite information for himself or herself. Such a practice would be unwieldy, unduly time-consuming, and possibly even dangerous. It would also require the cooperation of the carrier's driver in waiting for passengers to collect the information, a process that could seriously interfere with the carrier's schedule." (180 C.A.3d 795.)

(d) "We hold that, following an accident between its vehicle and that of another, a common carrier has a duty to collect and preserve information concerning the other vehicle and its driver for use by the carrier's passengers in future civil litigation." (180 C.A.3d 795.)

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1. Degree of Skill or Care.

6 Witkin Sum. Cal. Law Torts § 933

[§ 933] Degree of Skill or Care.

A physician, surgeon, or dentist must exercise that degree of skill or care usual in the profession in the place in which he or she practices; i.e., the standard is set by doctors of good standing practicing in that locality. (*Hesler v. California Hosp. Co.* (1918) 178 C. 764, 767, 174 P. 654; *Engelking v. Carlson* (1939) 13 C.2d 216, 220, 88 P.2d 695; *Trindle v. Wheeler* (1943) 23 C.2d 330, 333, 143 P.2d 932; *Sinz v. Owens* (1949) 33 C.2d 749, 753, 205 P.2d 3; *Moore v. Belt* (1949) 34 C.2d 525, 529, 212 P.2d 509; *Valdez v. Percy* (1950) 35 C.2d 338, 342, 217 P.2d 422; *Champion v. Bennetts* (1951) 37 C.2d 815, 820, 236 P.2d 155; *Walter v. England* (1933) 133 C.A. 676, 679, 24 P.2d 930; *Gluckstein v. Lipsett* (1949) 93 C.A.2d 391, 396, 209 P.2d 98; *Rainer v. Community Memorial Hosp.* (1971) 18 C.A.3d 240, 259, 95 C.R. 901; *Hubbard v. Calvin* (1978) 83 C.A.3d 529, 532, 147 C.R. 905; *Munro v. Regents of Univ. of Calif.* (1989) 215 C.A.3d 977, 983, 263 C.R. 878; *Alef v. Alta Bates Hosp.* (1992) 5 C.A.4th 208, 215, 6 C.R.2d 900; *Jacoves v. United Merchandising Corp.* (1992) 9 C.A.4th 88, 105, 11 C.R.2d 468; *Selden v. Dinner* (1993) 17 C.A.4th 166, 174, 21 C.R.2d 153, 1 Summary (10th), *Contracts*, §884; see 77 Cal. L. Rev. 1483 [Rational Health Policy and the Legal Standard of Care: A Call for Judicial Deference to Medical Practice Guidelines]; 34 Cal. Western L. Rev. 99 [standard of care of medical specialist as determined by local community, state, national, or other standards]; 99 A.L.R.3d 1133 [locality rule in malpractice action not involving specialist]; 18 A.L.R.4th 603 [standard of care of medical specialist as determined by local community, state, national, or other standards]; 42 A.L.R.5th 1 [physician's admission of negligence as establishing standard of care]; BAJI, No. 6.00 et seq.; *infra*, §§971, 975, 976.)

In *Osborn v. Irwin Memorial Blood Bank* (1992) 5 C.A.4th 234, 7 C.R.2d 101, *infra*, §1188, plaintiffs, whose son had contracted AIDS from blood supplied by defendant blood bank, argued that defendant was negligent in failing to conduct anti-HBC blood testing even though at that time (1983) no blood bank in the country was doing so. *Held*, this position was without merit; in effect, plaintiff was arguing that the entire blood banking industry was negligent. While custom and practice are not conclusive on the standard of care in cases of ordinary negligence, "professional prudence is defined by *actual or accepted* practice within a profession, rather than theories about what 'should' have been done." (5 C.A.4th 282.) (For other blood bank cases, see *Landeros v. Flood* (1976) 17 C.3d 399, 131 C.R. 69, 551 P.2d 389, *infra*, §972; *Wilson v. Irwin Memorial Blood Bank* (1993) 14 C.A.4th 1315, 1327, 18 C.R.2d 517; *Spann v. Irwin Memorial Blood Centers* (1995) 34 C.A.4th 644, 653, 40 C.R.2d 360; on difference between ordinary and professional negligence

generally, see *infra*, §§933, 934.)

"Mere *error of judgment*, in the absence of a want of reasonable care and skill in the application of his medical learning to the case presented, will not render a doctor responsible for untoward consequences in the treatment of his patient." (*Huffman v. Lindquist* (1951) 37 C.2d 465, 475, 234 P.2d 34.)

Several procedural aspects of this subject are governed by statutes or judicially established rules. (On certificate of merit as condition to filing malpractice actions, see 3 *Cal. Proc.* (4th), *Actions*, §204 et seq.; on statutory duty to report fact of person's infectious disease to local health officer, see *Derrick v. Ontario Community Hosp.* (1975) 47 C.A.3d 145, 151, 120 C.R. 566; 11 U.S.F. L. Rev. 517; on recovery for breach of warranty or contract, based on surgeon's promise of particular result, see *Depenbrok v. Kaiser Foundation Health Plan* (1978) 79 C.A.3d 167, 171, 144 C.R. 724; 1 *Summary* (10th), *Contracts*, §849; on statute of limitations, see 3 *Cal. Proc.* (4th), *Actions*, §532 et seq.; on pleading, see 4 *Cal. Proc.* (4th), *Pleading*, §§559, 560.)

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See *Ayala v. Arroyo Vista Family Health Center* (2008) 160 C.A.4th 1350, 1360, 73 C.R.3d 486 [in action based on failure to diagnose hyperglycemia, instruction on alternative method of medical care was not required; although defendants presented expert testimony that they acted within standard of care even though they failed to diagnose hyperglycemia, defendants did not present any evidence that method used (medical history and physical examination) was one of approved methods of diagnosing patient with patient's history].

On liability of medical practitioners for battery, see text, §388 et seq.

On liability of medical practitioners in connection with informed consent doctrine, see text §395 et seq. *Procedural aspects:*

Certificate of merit:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §209 et seq.

Statute of limitations:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §577 et seq.

Pleading:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §600.



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6 Witkin Sum. Cal. Law Torts § 934

[§ 934] Ordinary Versus Professional Negligence.

Only one standard of care applies, and the same breach of duty cannot give rise to distinct causes of action for both ordinary and professional negligence. (*Flowers v. Torrance Memorial Hosp. Med. Center* (1994) 8 C.4th 992, 1000, 1001, 35 C.R.2d 685, 884 P.2d 142 [patient's fall from emergency room gurney]; 22 *Pepperdine L. Rev.* 1752 [*Flowers*].)

The distinction between ordinary and professional negligence was discussed in *Bellamy v. Appellate Dept.* (1996) 50 C.A.4th 797, 57 C.R.2d 894, a patient's municipal court action against a hospital for injuries sustained in falling off an X-ray table. Defendant demurred to the complaint on the ground that the action was barred by the 1-year statute of limitations governing personal injury actions. Plaintiff opposed the demurrer, arguing that she was subject to the notice requirement for actions based on a health care provider's "professional negligence," that she served the required notice within 90 days of expiration of the limitations period, that her time for filing suit was thus extended 90 days after service of notice, and that her complaint was timely filed under C.C.P. 364(d) (infra, §953 et seq.). The municipal court found, however, that the action was based on ordinary, rather than professional, negligence and that C.C.P. 364 was inapplicable. It therefore sustained the demurrer and dismissed the action, and the appellate department of the superior court affirmed. *Held*, reversed. The complaint sufficiently alleged professional negligence, bringing it within C.C.P. 364 so as to extend the limitations period. The statutory definitions of "professional negligence" in C.C.P. 340.5(2) and 364(f)(2) focus on whether negligence occurs in rendering professional services, rather than whether a high or low level of skill is required. Thus, professional negligence is not restricted to a breach of the duty to provide professional skill, procedure, and diligence. Here, defendant was rendering professional services in taking X-rays, and, accordingly, any negligence arising in rendering those services was professional negligence. (50 C.A.4th 805.)

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3. Physician-Patient Relationship.

6 Witkin Sum. Cal. Law Torts § 935

[§ 935] Physician-Patient Relationship.

Liability for malpractice arises where there is a relationship of physician-patient between the plaintiff and the defendant doctor; the relationship gives rise to the duty of care. (*Keene v. Wiggins* (1977) 69 C.A.3d 308, 312, 313, 138 C.R. 3.) (See 40 U.C.L.A. L. Rev. 1617 [Expanding the Potential Tort Liability of Physicians: A Legal Portrait of "Nontraditional Patients" and Proposals for Change]; 17 A.L.R.4th 132 [what constitutes physician-patient relationship for malpractice purposes].)

In *Keene*, plaintiff was injured in an industrial accident. His employer's workers' compensation carrier sent him to defendant doctor to be examined for the purpose of rating the injury. Defendant examined him and reported to the carrier that no further treatment was necessary. Plaintiff alleged that he received a copy of the report and relied on it to his detriment. *Held*, summary judgment for defendant affirmed.

(a) The authorities uniformly hold that there is no physician-patient relationship where the doctor acts as an agent of the insurance carrier to examine the injured person and report to the carrier. (69 C.A.3d 313.)

(b) Although the modern approach in California stresses foreseeability of harm and other factors, the same conclusion must be reached here, for the physician could not reasonably expect the claimant to rely on his opinion. "[T]here are claimant's doctors and insurance company doctors and the claimant cannot assume the insurance company's physician will be as generous as his own physician when assessing the injury to be rated." (69 C.A.3d 314.) The situation would be different if the carrier's physician treated the claimant or otherwise sought to provide a benefit to him or her; but in the absence of special circumstances it is not foreseeable that a claimant would rely on medical reports of the employer's insurance carrier. (69 C.A.3d 314.)

(c) This position is supported by *Goodman v. Kennedy* (1976) 18 C.3d 335, 134 C.R. 375, 556 P.2d 737, *infra*, §1180, rejecting a claim of legal malpractice. (69 C.A.3d 315.)

In *Felton v. Schaeffer* (1991) 229 C.A.3d 229, 279 C.R. 713, an employer sent plaintiff job applicant to defendant medical center for a preemployment physical. Because of an allegedly erroneous opinion by defendant doctor that

plaintiff was not taking his antihypertension medication regularly, plaintiff did not get the job, and he sued defendants for negligence and medical malpractice. *Held*, judgment for plaintiff reversed; there was no physician-patient relationship between the parties.

(a) *Keene* is controlling. "In *Keene*, as here, the physician was hired by the employer rather than the examinee, and his role was to provide a report for the benefit of the employer rather than the examinee. In *Keene*, as here, the examinee neither received medical treatment or advice nor relied upon the report for medical treatment or advice. Most importantly, in both *Keene* and this case the physician's sole function was to provide information to aid the employer's decisionmaking process, not to serve either as an advocate for the employee or an impartial arbiter of a dispute. Under these circumstances we cannot perceive any reason to depart from *Keene*." (229 C.A.3d 236.)

(b) Plaintiff relied on *Coffee v. McDonnell-Douglas Corp.* (1972) 8 C.3d 551, 105 C.R. 358, 503 P.2d 1366, 3 Summary (10th), *Agency and Employment*, §127, and a federal decision, holding that when an employer voluntarily undertakes to protect an employee from physical harm, such as by ascertaining his physical fitness for a job, negligent failure to detect a disability that causes the employee physical harm is actionable negligence. However, plaintiff did not claim that defendants undertook but negligently failed to discover extant physical problems; he argued that they were negligent for failing to discover that he was *not* physically impaired. More importantly, plaintiff made no claim that he was *physically* damaged by reliance on the misdiagnosis. (229 C.A.3d 238.)

(c) Plaintiff would have suffered no harm except for defendants' publishing to the employer an injurious falsehood concerning his physical disability. Allowing a negligence claim under these facts would substantially undermine libel law, allowing plaintiffs to avoid the defenses applicable to libel claims merely by pleading that the defendant was negligent in believing the defamatory information to be true. (229 C.A.3d 239, citing *Flynn v. Higham* (1983) 149 C.A.3d 677, 197 C.R. 145, *Grimes v. Carter* (1966) 241 C.A.2d 694, 50 C.R. 808, *supra*, §655, and *Lerette v. Dean Witter Organization* (1976) 60 C.A.3d 573, 131 C.R. 592, *supra*, §577.) (Cf. *Mero v. Sadoff* (1995) 31 C.A.4th 1466, 1478, 37 C.R.2d 769 [employee, who was injured during examination, had cause of action for malpractice against doctor who checked him, although doctor was requested and paid for by employer; doctor had duty not to injure patient during examination; distinguishing *Keene* and *Felton*].)

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6 Witkin Sum. Cal. Law Torts § 936

[§ 936] Health Care Provider.

(1) *Scope of Liability.* C.C. 1714.8(a) clarifies the liability of health care providers: "No health care provider shall be liable for professional negligence or malpractice for any occurrence or result solely on the basis that the occurrence or result was caused by the natural course of a disease or condition, or was the natural or expected result of reasonable treatment rendered for the disease or condition. This section shall not be construed so as to limit liability for the failure to inform of the risks of treatment or failure to accept treatment, or for negligent diagnosis or treatment or the negligent failure to diagnose or treat." (See 10 Pacific L. J. 598.)

A plaintiff may claim punitive damages against a health care provider only if the court, on determining that there is a substantial probability that the plaintiff will prevail, *issues an order* allowing an amended pleading that includes the claim. (C.C.P. 425.13; see *infra*, §1600 et seq.)

(2) *Who Are Health Care Providers.* A "health care provider" is defined broadly in C.C. 1714.8(b) to include the following licensed or certified professionals:

- (1) Chiropractors. (B. & P.C. 1000 et seq.)
- (2) Clinical laboratory technologists. (B. & P.C. 1200 et seq.)
- (3) Dentists. (B. & P.C. 1600 et seq.)
- (4) Physicians and surgeons. (B. & P.C. 2000 et seq.)
- (5) Research psychoanalysts. (B. & P.C. 2529 et seq.)
- (6) Speech pathologists and audiologists. (B. & P.C. 2530 et seq.)
- (7) Opticians. (B. & P.C. 2550 et seq.)

- (8) Dietitians. (*B. & P.C.* 2585, 2586)
- (9) Physical therapists. (*B. & P.C.* 2600 et seq.)
- (10) Nurses. (*B. & P.C.* 2700 et seq.)
- (11) Vocational nurses. (*B. & P.C.* 2840 et seq.)
- (12) Psychologists. (*B. & P.C.* 2900 et seq.)
- (13) Optometrists. (*B. & P.C.* 3000 et seq.)
- (14) Hearing aid dispensers. (*B. & P.C.* 3300 et seq.)
- (15) Physicians' assistants. (*B. & P.C.* 3500 et seq.)
- (16) Osteopaths. (*B. & P.C.* 3600)
- (17) Respiratory therapists. (*B. & P.C.* 3700 et seq.)
- (18) Nursing home administrators. (*Health & S.C.* 1416 et seq.)
- (19) Pharmacists. (*B. & P.C.* 4000 et seq.)
- (20) Psychiatric technicians. (*B. & P.C.* 4500 et seq.)
- (21) Veterinarians. (*B. & P.C.* 4800 et seq.)
- (22) Acupuncturists. (*B. & P.C.* 4925 et seq.)
- (23) Marriage and family therapists. (*B. & P.C.* 4980 et seq.)
- (24) Social workers. (*B. & P.C.* 4990 et seq.)

The term also includes any certified county medical facility personnel (*Health & Saf.C.* 1440 et seq.) and any licensed clinic, health dispensary, or health facility (*Health & Saf.C.* 1200 et seq.). (*C.C.* 1714.8(b).) (See 29 *McGeorge L. Rev.* 323 [health maintenance organizations' inability to avoid malpractice liability through independent contracting with physicians]; 12 *A.L.R.5th* 1 [who is "health care provider" within statute governing medical malpractice actions]; on definition of "health care provider" for purposes of the Health Care Decisions Law (*Prob.C.* 4600 et seq., 14 *Summary* (10th), *Wills and Probate*, §876 et seq.), see *Prob.C.* 4621.)

Health care service plans and managed care entities (*infra*, §937) are not health care providers "under any provision of law." (*C.C.* 3428(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope of Liability.* See CACI, No. 501 [standard of care for health care professionals]; CACI, No. 502 [standard of care for medical specialists].

(2) *Who Are Health Care Providers.* See *Canister v. Emergency Ambulance Service* (2008) 160 *C.A.4th* 388, 395, 72 *C.R.3d* 792, Supp., *infra*, §957 [emergency medical technicians are health care providers]; *Prince v. Sutter Health Central* (2008) 161 *C.A.4th* 971, 975, 74 *C.R.3d* 750 [unlicensed social worker who registered with Board of Behavioral Sciences was "licensed or certified" for purposes of MICRA liability limits for professional negligence].



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a. In General.
5. HMO.

6 Witkin Sum. Cal. Law Torts § 937

[§ 937] HMO.

(1) *Action Against Health Maintenance Organization (HMO)*. In 1999, the Legislature provided a cause of action for HMO members against plans that negligently deny, delay, or modify medically necessary treatment. (C.C. 3428.) (See 66 Proof of Facts 3d 1 [liability of health maintenance organizations]; 21 California Lawyer 56 (August 2001) [right to sue HMOs].) In 2004, *Aetna Health v. Davila* (2004) 542 U.S. 200, 124 S.Ct. 2488, 159 L.Ed.2d 312, held that this and similar state statutes were preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA).

Plaintiffs, a participant and an unrelated beneficiary in employee benefit plans regulated by ERISA, sued their respective HMOs. Plaintiffs alleged that defendants' refusal to cover requested services (to pay for a prescribed drug and to extend a hospital stay) violated a duty imposed by a Texas statute to exercise ordinary care when making health care treatment decisions and that this violation proximately caused their injuries. Plaintiffs sued in state court, but defendants, arguing that the causes of action were preempted by ERISA, removed to federal court. The district court agreed and declined to remand the cases to state court. On appeal, the Court of Appeals for the Fifth Circuit reversed. *Held*, judgment of the Court of Appeals reversed.

(a) Congress enacted ERISA to protect the interests of participants in employee benefit plans and their beneficiaries by setting out comprehensive regulatory requirements for these plans and by providing for appropriate remedies, sanctions, and ready access to the federal courts. For example, essential to the purpose of creating comprehensive regulation is an integrated system of procedures for enforcement. ERISA §502(a) (29 U.S.C., §1132(a)), which contains six carefully integrated civil enforcement procedures, clearly indicates that Congress did not intend to authorize other remedies that it forgot to expressly incorporate. Hence, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive, and is thus preempted. (124 S.Ct 2495, 159 L.Ed.2d 326, citing *Pilot Life Ins. Co. v. Dedeaux* (1987) 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39, 7 Summary (10th), *Constitutional Law*, §14.)

(b) The preemptive force of ERISA is made still stronger by the fact that its language is similar to §301 of the Labor Management Relations Act of 1947 (LMRA; see 3 Summary (10th), *Agency and Employment*, §§537, 538). And because LMRA §301 is one of those provisions with "extraordinary preemptive power" that converts state causes of

action into federal ones for purposes of determining the propriety of removal (see *Avco Corp. v. Aero Lodge No. 735, Int. Assn. of Machinists & Aerospace Workers* (1968) 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126), so too does ERISA §502(a). (124 S.Ct. 2497, 159 L.Ed.2d 329.)

(c) ERISA §502(a)(1)(B) provides for a civil action to recover benefits due under the plan, to enforce plan rights, and to clarify the right to future rights. Under this provision, a participant or beneficiary who believes that benefits promised under the terms of the plan are not being provided may bring suit seeking those benefits. It follows that if an individual brings suit complaining of a denial of coverage, the cause of action falls within ERISA §502(a)(1)(B), at least where the individual is entitled to such coverage only because of the terms of the plan and where no legal duty independent of ERISA or the plan terms is violated. Here, by alleging that defendants failed to pay for a drug prescribed by a primary care physician and refused to authorize more than a single day of hospital care despite the advice of the treating physician, it is clear that plaintiffs are complaining only about denial of coverage. (124 S.Ct. 2497, 159 L.Ed.2d 329.)

(d) Upon the denial of rights, plaintiffs could have paid for the treatment themselves and then sought reimbursement through a §502(a)(1)(B) action, or sought a preliminary injunction. However, plaintiffs contended that (1) defendants' actions violated the duty to use ordinary care, a duty that allegedly arose under a state statute independent of ERISA; and (2) an action to enforce this duty was thus not within the scope of ERISA. This contention is without merit. If a managed care entity correctly concludes that a particular treatment is not covered, the entity's denial of coverage is not the proximate cause of any injuries resulting from that denial. Rather, the failure of the plan itself to cover the requested treatment is the proximate cause. Moreover, the relevant state statute clearly provides that the standards contained therein create no obligation on the part of an HMO to provide coverage that is not covered by the health plan. Hence, plaintiffs bring suit only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA. (124 S.Ct. 2498, 159 L.Ed.2d 330, following *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206, 3 Summary (10th), *Agency and Employment*, §551, and distinguishing *Caterpillar v. Williams* (1987) 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318, 3 Summary (10th), *Agency and Employment*, §553.)

(e) Besides the independent duty theory, the Court of Appeals based its conclusion on the following reasoning: (1) plaintiffs asserted a tort claim for tort damages rather than a contract claim for contract damages; and (2) *Rush Prudential HMO v. Moran* (2002) 536 U.S. 355, 122 S.Ct. 2151, 153 L.Ed.2d 375, said that the preemptive force of ERISA §502(a) was limited to situations in which a state cause of action "precisely" duplicated a cause of action under ERISA. Both contentions are without merit: (1) Distinguishing between preempted and nonpreempted claims based on the label affixed to them would elevate form over substance. Moreover, the mere fact that a state cause of action attempts to authorize remedies beyond those authorized by §502(a) does not put the cause of action outside the ERISA civil enforcement mechanism. (124 S.Ct. 2499, 159 L.Ed.2d 331, citing *Pilot Life, supra*, *Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474, 7 Summary (10th), *Constitutional Law*, §14), and *Metropolitan Life Ins. Co. v. Taylor* (1987) 481 U.S. 58, 107 S.Ct. 1542, 95 L. Ed.2d 55, 3 Summary (10th), *Agency and Employment*, §410.) (2) The part of the *Rush* decision relied on was meant to explain why a particular state cause of action was preempted (attempted to convert an equitable remedy into a legal remedy), not to require precise duplication between a state cause of action and one under ERISA. (124 S.Ct. 2499, 159 L.Ed.2d 331.)

(f) Plaintiffs argued that the applicable state statute, being one that regulates insurance, is saved from exemption by ERISA §514(b)(2)(A), which provides that ERISA does not exempt person from state statute regulating insurance. However, §514(b)(2)(A) must be interpreted in light of the congressional intent underlying the enactment of §502(a), i.e., to create an exclusive federal remedy. Hence, even if a state statute can arguably be characterized as regulating insurance, it will nevertheless be preempted if it provides a separate vehicle (one outside or in addition to ERISA's remedial scheme) to assert a claim for benefits. (124 S.Ct. 2500, 159 L.Ed.2d 332, citing *Pilot life*.)

(g) Plaintiffs' final contention is that, under *Pegram v. Hendrich* (2000) 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164, 3 Summary (10th), *Agency and Employment*, §408, causes of action such as theirs do not relate to an employee

benefit plan and hence are not preempted. However, in *Pegram*, the plaintiff sued a physician-owned and operated HMO, where the treating physician was also the person charged with administering the plaintiff's benefits. *Pegram* concluded that the physician eligibility and treatment decisions were inextricably mixed and that the defendant HMO was not acting as a fiduciary. However, a benefit determination under ERISA that is not mixed with treatment decisions, as here, is a fiduciary act, and *Pegram* is not controlling. The fact that a benefits determination is infused with medical judgments does not alter this result. (124 S.Ct. 2500, 159 L.Ed.2d 333.)

(2) *Independent Review*. Every health care service plan contract must provide enrollees, with the opportunity to seek external, independent medical review, under an Independent Medical Review System established in the Department of Managed Care, whenever health care services have been denied, modified, or delayed by the plan or one of its providers based on a finding that the services are not medically necessary. (See *Health & Saf.C. 1374.30* et seq.) The application for review may be based on a recommendation by an out-of-plan provider. (*Health & Saf.C. 1374.30(j)(1)(c)*.) Other enrollee grievances, including grievances relating to coverage, are eligible for review by the department. (*Health & Saf.C. 1374.30(d)(1)*.) (On similar legislation providing independent review of decisions by disability insurers, see *Ins.C. 10169* et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Action Against Health Maintenance Organization (HMO)*. See 118 Harv. L. Rev. 456 [*Aetna Health v. Davila*]. (2) *Independent Review*. See *California Consumer Health Care Council v. Department of Managed Health Care* (2008) 161 C.A.4th 684, 692, 74 C.R.3d 215 [procedure for resolving health care service disputes satisfied due process, even though HMOs were permitted to see and rebut filings but enrollees were not; enrollees were able to state claims accompanied by their own and their providers' records, there was sufficient time for consideration of claims by independent medical review organization, and enrollees were informed of nature of action taken; requiring review organization to provide enrollees with all records would slow down review process]. *Corrections:* Page 177, first line of paragraph (g), "*Pegram v. Hendrich*" should be "*Pegram v. Hordrich*". Page 177, fourth line from bottom of page, "*Health & Saf.C. 1374.30(j)(1)(c)*" should be "*Health & Saf.C. 1374.30(j)(1)(C)*".



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6 *Witkin Sum. Cal. Law Torts* § 938

[§ 938] In General.

(1) *Treatises*. The legal literature on medical malpractice is enormous and covers all aspects of the subject. (See 3 Harper, James & Gray 2d §16.6; Dobbs, *The Law of Torts* §242 et seq.; 61 *Am.Jur.2d* (2002 ed.), *Physicians, Surgeons, and Other Healers* §188 et seq.; Cal. Civil Practice, 3 Torts, Medical Malpractice, Chap. 32; C.E.B., Tort Guide 3d, Chap. 9.)

(2) *Trial Practice*. See 7 Proof of Facts 479 [proof of malpractice]; 1 Proof of Facts 2d 373 [failure of general practitioner to seek consultation with or refer patient to specialist]; 3 Proof of Facts 2d 117 [physician's abandonment of patient]; 4 Proof of Facts 2d 689 [ophthalmologist malpractice]; 15 Proof of Facts 2d 711 [physician's failure to obtain informed consent to innovative practice or medical research]; 19 Proof of Facts 2d 285 [physician's failure to perform timely cesarean section]; 26 Proof of Facts 2d 183 [negligence in postoperative care]; 36 Proof of Facts 2d 637 [negligent infusion or injection]; 38 Proof of Facts 2d 589 [causing patient's drug addiction]; 42 Proof of Facts 2d 405 [failure to disclose diagnosis or treatment]; 44 Proof of Facts 2d 499 [electroconvulsive therapy]; 47 Proof of Facts 2d 1 [emergency room physician malpractice]; 6 Proof of Facts 3d 1 [anesthesiologist malpractice]; 51 Proof of Facts 3d 1 [malpractice in diagnosis of diabetes or complications of diabetes]; 70 Proof of Facts 3d 229 [malpractice resulting in injury to male genitalia]; 30 *Am.Jur. Trials* 237 [misdiagnosis of cancer]; 33 *Am.Jur. Trials* 467 [pathologist malpractice]; 40 *Am.Jur. Trials* 1 [obstetrical malpractice]; 51 *Am.Jur. Trials* 375 [negligent pediatric care]; 55 *Am.Jur. Trials* 1 [cosmetic silicone breast implant litigation]; 64 *Am.Jur. Trials* 1 [gynecological malpractice]; 68 *Am.Jur. Trials* 151 [cardiological malpractice]; 70 *Am.Jur. Trials* 101 [anesthesiology malpractice]; 80 *Am.Jur. Trials* 1 [cosmetic liposuction malpractice].

(3) *Law Review Commentary*. See 33 *Cal. L. Rev.* 248 [general summary of malpractice law]; 40 *Cal. L. Rev.* 159 [liability for experimentation]; 12 *Cal. Western L. Rev.* 197 [Symposium: The Law and Medicine]; 77 *Harv. L. Rev.* 333 [malpractice and medical testimony]; 108 *Harv. L. Rev.* 381 [proposal for shift of liability from individual physicians to health care organizations]; 9 *Pacific L. J.* 107 [medical competence]; 25 *Pepperdine L. Rev.* 597 [HMOs and medical malpractice]; 5 *Santa Clara Lawyer* 405 [medical review committee]; 26 *Santa Clara L. Rev.* 429 [damages recoverable for loss of chance to recover from illness]; 23 *So. Cal. L. Rev.* 138 [standard of care; competency of expert witnesses]; 9 *Stanf. L. Rev.* 731 [malpractice controversy]; 6 *U.C. Davis L. Rev.* 255 [birth control and liability of

physicians]; 7 *U.C. Davis L. Rev.* 1 et seq. [Problems in Law and Medicine; entire issue]; 22 *U.C. Davis L. Rev.* 267 [Symposium on Law and Medicine]; 17 *U.C.L.A. L. Rev.* 758 [patient's right to know: empirical study]; 28 *U.C.L.A. L. Rev.* 52 [duty to disclose medical mistakes]; 50 *U.C.L.A. L. Rev.* 425 [tort law emphasis on fault of individual caregiver as impeding improvements in patient safety]; 8 *U.S.F. L. Rev.* 227 et seq. [Symposium on Medical Malpractice in California].

(4) *Annotations*. See 52 *A.L.R.2d* 1084 [expert evidence on duty of disclosure of risks]; 85 *A.L.R.2d* 889 [liability of one doctor for malpractice of another]; 49 *A.L.R.3d* 501 [failure to notify patient of unfavorable diagnosis or test]; 17 *A.L.R.4th* 1128 [failing to prevent suicide]; 42 *A.L.R.4th* 586 [liability to third person for prescribing drug for known drug addict]; 43 *A.L.R.4th* 153 [failure to disclose driving-related impediment]; 47 *A.L.R.4th* 18 [withdrawal of life supports from comatose patient]; 19 *A.L.R.5th* 563 [treatment of skin disease or disorder]; 31 *A.L.R.5th* 1 [negligent catheterization]; 47 *A.L.R.5th* 433 [malpractice in administering or prescribing drugs]; 48 *A.L.R.5th* 575 [malpractice in diagnosis and treatment of male urinary disorders]; 51 *A.L.R.5th* 271 [liability of health maintenance organization for member physician's negligence]; 84 *A.L.R.5th* 619 [contributory or comparative negligence based on patient's failure to follow instructions as defense in medical malpractice action]; 108 *A.L.R.5th* 385 [contributory negligence, comparative negligence, or assumption of risk, other than failing to reveal medical history or follow instructions, as defense in medical malpractice action].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Treatises*. See 3 Harper, James & Gray 3d §16.6.

(2) *Trial Practice*. See 98 Am.Jur. Trials 1 [hip replacement malpractice]; 101 Am.Jur. Trials 109 [botox injection malpractice]; 103 Am. Jur. Trials 237 [urology malpractice].

(3) *Law Review Commentary*. See 121 *Harv. L. Rev.* 1192 [fixing malpractice through health insurer enterprise liability]; 48 *Santa Clara L. Rev.* 473 [full disclosure as alternative to litigation]. (4) *Annotations*. See 124 *A.L.R.5th* 623 [appropriateness of "hindsight" charge in medical malpractice action]; 6 *A.L.R.6th* 311 [appropriateness of "error in judgment" charge in medical malpractice action].



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6 *Witkin Sum. Cal. Law Torts* § 939

[§ 939] Related Fields and Peripheral Matters.

(1) *Related Fields*. Many articles and notes deal with the liability of persons in related fields. (See 26 Proof of Facts 2d 363 [psychiatric nurse]; 36 Proof of Facts 2d 1 [dental malpractice]; 37 Proof of Facts 2d 1 [blood bank's liability for hepatitis from transfusion]; 23 Proof of Facts 3d 1 [opticians]; 25 Proof of Facts 3d 1 [sperm bank's liability for transmission of AIDS]; 25 Proof of Facts 3d 117 [psychotherapists]; 29 Proof of Facts 3d 345 [orthodontists]; 31 Proof of Facts 3d 203 [hospital emergency room nurse]; 55 Proof of Facts 3d 1 [chiropractic malpractice]; 51 Am.Jur. Trials 375 [negligent pediatric care]; 78 Am.Jur. Trials 1 [chiropractic malpractice]; 78 Am.Jur. Trials 407 [pharmacist malpractice]; 85 Am.Jur. Trials 189 [podiatry malpractice]; 89 Am.Jur. Trials 1 [periodontal malpractice]; 90 Am.Jur. Trials 99 [hair transplantation malpractice]; 8 Cal. Western L. Rev. 341 [pharmacist's liability for dispensing tranquilizer instead of birth control pills]; 9 Cal. Western L. Rev. 260 [psychiatric malpractice]; 12 Santa Clara Lawyer 107 [health care assistants]; 45 So. Cal. L. Rev. 768 [health care assistants]; 33 Southwestern U. L. Rev. 553 [coroners]; 3 *Stanf. L. Rev.* 453 [chiropractors, naturopaths, spiritual healers, etc.]; 6 *U.C. Davis L. Rev.* 255 [birth control and liability of pharmacist]; 19 *A.L.R.2d* 1188 [drugless practitioners and healers]; 80 *A.L.R.2d* 1278 [chiropractors]; 83 *A.L.R.2d* 7 [dentists]; 51 *A.L.R.3d* 1273 [optometrists]; 58 *A.L.R.3d* 590 [chiropractor; failure to refer patient to physician]; 73 *A.L.R.4th* 24 [osteopaths]; 77 *A.L.R.4th* 222 [dental malpractice in providing dentures]; 77 *A.L.R.4th* 273 [chiropractors and other drugless practitioners]; 81 *A.L.R.4th* 632 [orthodontists]; 30 *A.L.R.5th* 571 [ophthalmologists]; 33 *A.L.R.5th* 619 [sports medicine care providers]; BAJI, No. 6.25 [nurses]; CACI, No. 504 [same].)

(2) *Peripheral Matters*. Numerous articles concern matters peripheral to medical malpractice. (See 24 Proof of Facts 3d 123 [unauthorized disclosure of patient information by psychotherapist]; 29 Proof of Facts 3d 1 [managed care organization professional malpractice]; 75 *Cal. L. Rev.* 1719 [cost containment and standard of medical care]; 98 *Harv. L. Rev.* 1004 [effect on malpractice law of Medicare cost-cutting]; 21 *Hastings L. J.* 35 [medical genetics]; 21 *San Diego L. Rev.* 455 [Medi-Cal negotiated health care; implications for malpractice liability]; 66 *So. Cal. L. Rev.* 1 [privatizing health care]; 11 Southwestern U. L. Rev. 1371 [economics of medical malpractice]; 15 *U.C.L.A. L. Rev.* 267 [legal aspects of biomedical advances]; 22 *U.C.L.A. L. Rev.* 925 ["claims made" dilemma in professional liability insurance]; 5 *U.S.F. L. Rev.* 283 [definition of irreversible coma]; 8 *U.S.F. L. Rev.* 386 [contributory negligence]; 11 *U.S.F. L. Rev.* 599 [constitutionality of compulsory malpractice insurance]; 20 *A.L.R.2d* 1109 [unauthorized disclosure

of confidential information about patient]; 84 *A.L.R.2d* 555 [malicious prosecution suit by doctor against malpractice plaintiff or attorney]; 36 *A.L.R.3d* 1341 [injury caused by physical condition of doctor's premises]; 80 *A.L.R.3d* 583 [reform statutes]; 99 *A.L.R.3d* 469 [wrongful cancellation of malpractice insurance]; 100 *A.L.R.3d* 1205 [applicability of strict liability principles]; 33 *A.L.R.4th* 14 [malpractice insurance]; 56 *A.L.R.5th* 737 [failure of third-party health care payor to authorize required treatment]; 87 *A.L.R.5th* 277 [construction and application of patient bill of rights statutes]; 100 *A.L.R.3d* 723 [patient's failure to return as directed].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Related Fields.* See 33 *Pepperdine L. Rev.* 275 [improper expert witness testimony as negligent practice of medicine]; 100 *Am. Jur. Trials* 1 [oral surgery malpractice]; 102 *Am. Jur. Trials* 1 [endodontic malpractice]; 105 *Am. Jur. Trials* 403 [prosthodontic malpractice]; 107 *Am. Jur. Trials* 1 [dental anesthetics and malpractice]; 110 *Am. Jur. Trials* 1 [nursing home negligence]; 11 *A.L.R.6th* 695 [medical negligence in extraction of tooth, established through lay testimony or doctrine of *res ipsa loquitur*]; 18 *A.L.R.6th* 325 [medical negligence in extraction of tooth, established through expert testimony]; 19 *A.L.R.6th* 793 [clinical laboratories].



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c. Medical Injury Compensation Reform Act (MICRA).
1. Nature and Purpose of Act.

6 Witkin Sum. Cal. Law Torts § 940

[§ 940] Nature and Purpose of Act.

The Medical Injury Compensation Reform Act (MICRA), enacted in 1975, was a response to the medical malpractice "crisis" of that year. The Legislature found that "there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future." (Stats. 1975, Second Extraordinary Session, Chap. 2, §1(b).) (See *Barme v. Wood* (1984) 37 C.3d 174, 178, 207 C.R. 816, 689 P.2d 446, *infra*, §957; *Roa v. Lodi Med. Group* (1985) 37 C.3d 920, 930, 211 C.R. 77, 695 P.2d 164, *infra*, §943; *Fein v. Permanente Med. Group* (1985) 38 C.3d 137, 158, 211 C.R. 368, 695 P.2d 665, *infra*, §957; *Barris v. Los Angeles* (1999) 20 C.4th 101, 112, 83 C.R.2d 145, 972 P.2d 966, *infra*, §963 [MICRA's purpose is to keep medical care accessible]; *Preferred Risk Mut. Ins. Co. v. Reiswig* (1999) 21 C.4th 208, 215, 87 C.R.2d 187, 980 P.2d 895, 3 Cal. Proc. (4th), Actions, Supp., §656 [MICRA should be construed liberally to promote legislative interest in negotiated resolution of medical malpractice disputes and to reduce malpractice insurance premiums]; *Herrera v. Superior Court* (1984) 158 C.A.3d 255, 259, 204 C.R. 553, *infra*, §951; *Hathaway v. Baldwin Park Community Hosp.* (1986) 186 C.A.3d 1247, 1249, 231 C.R. 334.)

In *American Bank & Trust Co. v. Community Hosp.* (1984) 36 C.3d 359, 204 C.R. 671, 683 P.2d 670, *infra*, §941, the court said: "In broad outline, the act (1) attempted to reduce the incidence and severity of medical malpractice injuries by strengthening governmental oversight of the education, licensing and discipline of physicians and health care providers, (2) sought to curtail unwarranted insurance premium increases by authorizing alternative insurance coverage programs and by establishing new procedures to review substantial rate increases, and (3) attempted to reduce the cost and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation." (36 C.3d 363.)

The Act regulates three general areas of law: (1) medical malpractice litigation; (2) the practice of medicine; and (3) the insurance industry. (See 7 *Pacific L. J.* 544 *et seq.*) (On provisions to ensure quality medical services, see 7

Pacific L. J. 552; on insurance regulations, see 7 *Pacific L. J.* 555.) To expedite resolution of questions raised by the Act, a special statute was enacted in 1976 as an emergency measure. It authorizes insurers, health care providers, and "potentially aggrieved" persons to bring declaratory actions to determine their rights, duties, or obligations. (Stats. 1976, Chap. 207, §1; see 8 *Pacific L. J.* 399.)

Commentary on MICRA issues is extensive. (See Dobbs, *The Law of Torts* §253; C.E.B., 21 *Civil Litigation Reporter* 125 (June 1999) [statutory intent in MICRA]; Cal. Civil Practice, 1 Torts, *MIRCA Provisions*, Chap. 8; C.E.B., *Tort Damages* 2d, §15.41 et seq.; 8 *Hastings Const. L. Q.* 125 [equal protection standard for medical malpractice legislation]; 17 *Pacific L. J.* 553 [extension of MICRA liability limitations to all negligence actions]; 23 *San Diego L. Rev.* 171 [need for legislative reform of MICRA]; 52 *So. Cal. L. Rev.* 829 [comprehensive analysis and discussion of constitutional objections]; 11 *Southwestern U. L. Rev.* 1392; 20 *Southwestern U. L. Rev.* 41 [medical liability tort reform: proposed administrative model]; 14 *U.S.F. L. Rev.* 439; 88 *A.L.R.4th* 358 [what nonpatient claims against health care providers are not subject to statutes governing medical malpractice actions]; 89 *A.L.R.4th* 887 [what patient claims against health care providers are not subject to statutes governing medical malpractice actions].)

West's Key Number Digest, Physicians and Surgeons k.12

SUPPLEMENT: [This section is current through the latest supplement]

Preferred Risk case:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §724. *Commentary on MICRA issues:* See 38 *Loyola L.A. L. Rev.* 1217 [Medical Malpractice Lawsuits: An Essay on Patient Interests, the Contingency Fee System, Juries, and Social Policy]; 38 *Loyola L.A. L. Rev.* 1267 [The Medical Malpractice Debate: The Jury as Scapegoat].



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6 Witkin Sum. Cal. Law Torts § 941

[§ 941] Constitutionality of Act.

American Bank & Trust Co. v. Community Hosp. (1984) 36 C.3d 359, 204 C.R. 671, 683 P.2d 670, involved a constitutionality challenge to the periodic payments provision of the Act (C.C.P. 667.7, *infra*, §966 et seq.). The Supreme Court first declared it unconstitutional in a 4-3 opinion, and then, on rehearing, upheld the statute in another 4-3 opinion.

Plaintiff admitted to defendant hospital for removal of a brain tumor, fell in a shower stall and suffered severe burns as a result of overheated water. The burns caused months of disability and inability to work, and at the time of trial--14 months after the accident--plaintiff still suffered residual disability, had a permanent cosmetic deformity, and would probably require future surgery. Plaintiff's complaint alleged that defendant's negligence had led to her fall and the burns, and the jury rendered a general verdict for \$ 198,069.88. Defendant hospital moved for an order of periodic payment of future damages, and the trial judge denied the motion on the ground that C.C.P. 667.7 was an unconstitutional denial of equal protection and due process. *Held*, the statute is constitutional.

(a) *Common law and reform proposals.* Under the common law rule, a plaintiff is compensated for both past and future damages through a lump sum judgment. But in the past 30 years, scholars, noting that lump sum awards are often dissipated by improvident expenditures or investments, have advocated the legislative adoption of a periodic payment procedure as a reform measure that would benefit both plaintiffs and defendants. Many states have enacted these provisions in a variety of tort fields, and in 1980, a Model Periodic Payment of Judgments Act was approved by the National Conference of Commissioners on Uniform State Laws. C.C.P. 667.7 represents the California Legislature's initial adoption of this concept into our tort law. (36 C.3d 366.)

(b) *No violation of due process.* The due process attack is based on the contention that the periodic payment procedure diminishes the value of malpractice actions without providing an adequate quid pro quo. This is unsound:

(1) It is both unnecessary and inappropriate for a court to balance relative benefits and detriments of legislation. A plaintiff has no vested property right in a particular measure of damages, and the Legislature has broad authority to modify their scope and nature. "So long as the measure is rationally related to a legitimate state interest, policy

determinations as to the need for, and desirability of, the enactment are for the Legislature." (36 C.3d 369.)

(2) The provision is rationally related to a legitimate state interest. (a) The Legislature could conclude that it furthers the fundamental goal of matching losses with compensation by helping to ensure that the money paid will in fact be available when the plaintiff incurs the anticipated expenses or losses in the future. (b) The Legislature could also determine that the public interest would be served by eliminating the "windfall" obtained by a plaintiff's heirs when they inherit a portion of the lump sum judgment intended to compensate him for losses that he or she in fact never sustained. (36 C.3d 369.)

(3) The additional argument is made that the provision violates the vested community property right of the victim's spouse by authorizing termination of a portion of the award on the plaintiff's death. But the rights of a surviving spouse are contingent on the nature of the judgment and the statutory measure of damages; the spouse has no greater constitutional right than the victim to a damage award that continues beyond the victim's life. (36 C.3d 369.)

(c) *No denial of equal protection.* The equal protection challenge is based on the legislative singling out of medical malpractice cases, providing a special benefit to one class of negligent tortfeasors, and withholding the benefits of lump sum awards from one class of persons suffering negligently inflicted injury. This too is unsound:

(1) Virtually every state has passed one or more statutory provisions to deal with the medical malpractice insurance problem, and the overwhelming majority of state and federal courts have rejected this constitutional challenge. (36 C.3d 370.)

(2) A periodic payment of damages could reasonably be applied across the entire tort spectrum, but the Legislature may implement a reform measure one step at a time and strike at the evil where it is felt most. (36 C.3d 371; see 8 *Summary* (10th), *Constitutional Law*, §979.)

(3) The periodic payment provision is rationally related to the objective of reducing insurance costs. The legislative history indicates that one of the factors contributing to high costs was the need to retain large reserves to pay out sizable lump sum awards; the periodic payment procedure permits insurers to retain fewer liquid reserves and to increase investments. In addition, the provision for termination of a significant portion of the remaining future damage payments in the event of the plaintiff's death is obviously related to the goal of reducing insurance costs. (36 C.3d 372, 373.)

(4) Amici curiae contend that C.C.P. 667.7 (and by logical inference all of MICRA) should be held unconstitutional because statistics indicate that the overall costs of medical and hospital care rose considerably in the years since the enactment of MICRA. (a) The Legislature did not intend to hold down overall costs of medical care, but rather to reduce the cost of medical malpractice insurance, which amount to only a small percentage of overall medical costs. (36 C.3d 373.) (b) The rise in medical costs could not properly be attributed to a failure of C.C.P. 667.7, for that section, pending the decision on the constitutional challenge, has never been fully implemented. (36 C.3d 373.) (c) The constitutionality of a measure does not depend on the court's assessment of the empirical success or failure of its provisions. (36 C.3d 374.)

(5) The legislative choice of a \$ 50,000 threshold for the periodic payment procedure was properly based on a determination that the administrative costs involved would not justify applying the procedure to smaller future damage claims. (36 C.3d 374.)

(d) *No denial of constitutional right to jury trial.*

(1) C.C.P. 667.7 is ambiguous on the roles that the jury and court are to play in formulating a periodic payment judgment; in particular, it does not make clear whether the jury or the court determines the amount of the "future damages" component of the overall award. (36 C.3d 374, 375.) However, the court in *Jehl v. Southern Pac. Co.* (1967) 66 C.2d 821, 59 C.R. 276, 427 P.2d 988, upholding the additur procedure (see *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §130), indicated that new procedures can change the common law jury practice if there is no impairment of

the substantial features of a jury trial or improper interference with the jury's decisions. (36 C.3d 375, 376.)

(2) Construing *C.C.P.* 667.7 to avoid unconstitutionality, the section "should be interpreted to require the jury to designate the portion of its verdict that is intended to compensate the plaintiff for future damages." (36 C.3d 376.) This future damage figure plays a number of crucial roles: "(1) it identifies the amount that the jury has determined as attributable to past and present damages, an amount that the plaintiff will be entitled to receive in an immediate lump sum payment at the time of judgment, and (2) it determines whether the periodic payment procedure will be applicable to the case or not--depending on whether future damages are found to equal or exceed \$ 50,000." (36 C.3d 376.) If the finding were left solely to the court, the judge might seriously underestimate the award the jury intended as compensation for losses already incurred, and significantly undermine the statutory purpose of affording a fair correlation between sustaining of losses and payment of damages. (36 C.3d 376.)

(3) Once the jury has designated the amount of future damages, the court's authority to fashion the details of a periodic payment schedule does not infringe on the constitutional right to jury trial. (36 C.3d 376.)

(4) "[T]rial courts would be well advised to permit liberal use of the special verdict procedure so that the individual components of the jury's future damage award can be ascertained and the periodic payment schedule can be knowledgeably established." (36 C.3d 377.) And "it would generally be wise to have the jury designate the portion of the future damage award which is intended to compensate the plaintiff for the loss of *future earnings*." This figure becomes important if the plaintiff dies before the judgment is fully paid, because *C.C.P.* 667.7(c) provides that those damages must continue to be paid to dependents after the plaintiff's death. (36 C.3d 377, footnote 14.)

In two elaborate dissenting opinions, three justices disagreed with the reasoning and holding of the majority and concluded that the periodic payment provision should have been declared unconstitutional. (36 C.3d 378, 36 C.3d 387.) (See 41 A.L.R.4th 275 [validity of statute providing for periodic payment of future damages].)

SUPPLEMENT: [This section is current through the latest supplement]

Additur procedure:

Cross-Reference: 8 Cal. Proc. (5th), *Attack of Judgment in Trial Court*, §120.



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3. Limitations on Attorney's Compensation.

aa. Statutory Provisions.

6 *Witkin Sum. Cal. Law Torts* § 942

[§ 942] Statutory Provisions.

(1) *Maximum Amount.* Contingent fee contracts are limited by *B. & P.C. 6146*. The limits are 40% of the first \$ 50,000 recovered; 33 1/3% of the next \$ 50,000; 25% of the next \$ 500,000; and 15% of any excess over \$ 600,000. (See *Wienholz v. Kaiser Foundation Hosp. (1989) 217 C.A.3d 1501, 1504, 1507, 267 C.R. 1* [1987 amendment increasing maximum contingency fee was not retroactive, and contingency fee agreement entered into prior to its effective date (January 1, 1988) is governed by statute's prior provisions]; *26 A.L.R.5th 245* [validity, construction, and application of state laws limiting amount of recovery in medical malpractice actions].) These limits apply "whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom recovery is made is a responsible adult, an infant, or a person of unsound mind." (*B. & P.C. 6146(a)*; see *19 Pacific L. J. 694*.) "Recovered" is defined as the net sum recovered after deducting disbursements and costs, but neither the costs of medical care nor the attorney's office-overhead costs may be deducted. (*B. & P.C. 6146(c)(1)*.)

(2) *Scope of Limitation.* The limits apply to actions against a "health care provider" for "professional negligence." (*B. & P.C. 6146(a)*.) "Health care provider" is defined in *B. & P.C. 6146(c)(2)*, and includes legal representatives. (On similar definition in *C.C. 1714.8*, see *supra*, §936.) (See *Coe v. Superior Court (1990) 220 C.A.3d 48, 53, 269 C.R. 368* [blood bank is health care provider].) "Professional negligence" is defined by *B. & P.C. 6146(c)(3)* as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." It has been suggested that actions on the theory of battery for lack of informed consent may not be subject to the limits. (See *7 Pacific L. J. 546*.)

(3) *Future Damages.* If periodic payments of future damages are ordered under *C.C.P. 667.7* (see *infra*, §966 et seq.), the court must "place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated." (*B. & P.C. 6146(b)*.) (See *7 Pacific L. J. 549*.)

(4) *Excess Recovery Prohibited*. The statute contains no provision authorizing an award of fees in excess of the prescribed limits, and the trial court cannot grant a client's petition for "extraordinary attorneys' fees." (*Hathaway v. Baldwin Park Community Hosp.* (1986) 186 C.A.3d 1247, 1253, 231 C.R. 334.) Nor does MICRA contain a provision on attorneys' fees, and the ordinary rule that each party bears the cost of his or her own attorneys' fees prevails. (*Salgado v. Los Angeles* (1998) 19 C.4th 629, 650, 80 C.R.2d 46, 967 P.2d 585, *infra*, §964.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Future Damages*. See *Padilla v. Greater El Monte Community Hosp.* (2005) 129 C.A.4th 667, 670, 28 C.R.3d 636 [requirement in B. & P.C. 6146(b) that trial judge place total value on periodic payments did not require judge to recompute award 2 years after final judgment; judge discharged that duty when he entered judgment on jury verdict without objection].



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bb. Constitutionality.

6 *Witkin Sum. Cal. Law Torts* § 943

[§ 943] Constitutionality.

In *Roa v. Lodi Med. Group* (1985) 37 C.3d 920, 211 C.R. 77, 695 P.2d 164, plaintiffs sued defendants medical group, hospital, and doctor for injuries suffered as a result of negligent treatment and care during the birth of plaintiff child. A settlement agreement with the medical group and doctor provided for payment of \$ 500,000, the total policy limits of their insurance coverage. The trial judge approved the settlement and awarded the attorneys for plaintiffs fees in the amount of \$ 90,800 under the schedule in *B. & P.C. 6146*. The attorneys, who had a contingency fee agreement for 25% of the child's net recovery, asked for \$ 122,800, challenging the constitutionality of the statute. *Held*, the statute is constitutional and the award was proper.

(a) *No violation of due process.*

(1) The right to counsel is protected by the constitutional guarantee of due process, but the validity of statutory limits on attorneys' fees has been established by decisions in a number of jurisdictions. (37 C.3d 926, noting regulations applicable to workers' compensation proceedings and probate matters as well as medical malpractice.) Plaintiffs assert that the limits of *B. & P.C. 6146* are so low that injured persons will be unable to obtain counsel; but other statutory schemes indicate that the limits are not unusually low. (37 C.3d 928.)

(2) The contention that the sliding scale nature of the fee schedule creates a conflict of interest between attorney and client, reducing the attorney's incentive to pursue a higher award (with its decreasing percentage), is simply answered. Potential conflicts of interest are inherent in all contingent fee arrangements. And the American Bar Association report in 1977 recommended a sliding scale, "reasonably generous in the lower recovery ranges and thus unlikely to deny potential plaintiffs access to legal representation." (37 C.3d 929.)

(3) The final contention, that the fee limits statute will drive the most competent attorneys out of medical malpractice litigation into other areas of personal injury practice, is unsupported by any factual showing; and the same challenge could be made against any of the statutes that limit attorneys' fees in a particular field. (37 C.3d 930.)

(b) *No denial of equal protection.*

(1) The selection of the medical malpractice field for regulations to meet the "crisis" in this area was held proper in *American Bank & Trust Co. v. Community Hosp.* (1984) 36 C.3d 359, 204 C.R. 671, 683 P.2d 670, supra, §941, and *Barme v. Wood* (1984) 37 C.3d 174, 207 C.R. 816, 689 P.2d 446, infra, §957. (37 C.3d 930.)

(2) The contention that limitations on contingency fees will not reduce the costs of medical malpractice defendants and their insurers is unsound. The Legislature could reasonably have believed that unregulated contingency fee contracts play at least some part in pursuit of malpractice claims that ultimately prove unsuccessful. (37 C.3d 931.) Also, in view of other provisions of MICRA that may tend to reduce a plaintiff's recovery (e.g., limitation on recovery for noneconomic losses, admission of evidence of collateral source benefits; infra, §956 et seq.), the Legislature may reasonably have concluded that a limitation on contingency fees was an appropriate means of protecting the already diminished compensation from further reduction. (37 C.3d 932.)

(3) The contention that equal protection is denied because the statute places no limits on defense counsel fees is unpersuasive. The Legislature could have determined that there was a special need to protect plaintiffs from having their recoveries diminished by high-contingency fees; and many similar statutes have been upheld in other jurisdictions. (37 C.3d 932.)

(4) The final contention, that the decreasing sliding scale component discriminates against seriously injured malpractice victims, and makes it more difficult to obtain counsel willing to undertake the additional effort required to obtain high awards, is likewise unpersuasive. "[T]he Legislature could reasonably have concluded that the sliding-scale approach in fact produces more equitable fees than the traditional flat contingency fee, helping to ensure that an attorney does not obtain a 'windfall' simply because his client is very seriously injured and guaranteeing that the most seriously injured plaintiffs will retain the lion's share of any recovery secured on their behalf." (37 C.3d 933.)

(c) *No violation of separation of powers doctrine.* The contention that the question of appropriateness of attorneys' fees is a matter committed solely to the judicial branch has been answered by California cases upholding the legislative power to impose limits on these fees in a variety of fields. (37 C.3d 933.)

Three justices joined in a strong dissent.

SUPPLEMENT: [This section is current through the latest supplement]



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6 *Witkin Sum. Cal. Law Torts* § 944

[§ 944] Hybrid Action.

In *Waters v. Bourhis* (1985) 40 C.3d 424, 220 C.R. 666, 709 P.2d 469, plaintiff engaged defendant attorney to sue Dr. S, her psychiatrist, for medical malpractice consisting of coercion to participate in sexual conduct with him. The complaint alleged negligence and intentional misconduct, and the action was eventually settled for \$ 200,000, the limits of Dr. S's insurance policy. Defendant attorney claimed fees of 40% of the net recovery, based on the usual tort action contingency fee agreement. Plaintiff contended that the MICRA limits of *B. & P.C. 6146* applied. The trial judge gave summary judgment for defendant on the ground that most of the damage was outside the scope of professional negligence and hence not covered by the statute. In reversing the judgment for a determination of the triable issues of defendant's advice and plaintiff's consent, the court made the following points:

(a) The record shows that the complaint in the first action was a hybrid, seeking recovery both on theories of negligence and intentional tort. Even if the allegations of intentional misconduct had been established, it would not follow that recovery was based solely on an intentional tort theory; it could have rested in part on negligence, within the generally insured risks of a doctor's policy. (40 C.3d 434, 435.)

(b) MICRA does not specifically address the question of how a hybrid proceeding should be treated; but there is no legislative history to indicate that the statute requires an election between MICRA and non-MICRA theories of recovery. (40 C.3d 436.) For a plaintiff, there are both potential benefits and detriments in proceeding on a non-MICRA theory when a MICRA action may also be maintained. (40 C.3d 437, listing the relevant statutory provisions.)

(c) Where, as here, a hybrid proceeding is settled without specifying the theory on which recovery is based, it is impossible to determine with certainty what role the non-MICRA liability played. However, it is reasonable to assume that the possibility of recovery in excess of MICRA's limits will have some effect on the amount of the settlement; and it would be inequitable for a plaintiff who obtained a larger settlement award on a non-MICRA theory to insist that his attorney's fee should be limited by the statute. "For this reason, we conclude that when a plaintiff knowingly chooses to proceed on both non-MICRA and MICRA causes of action, and obtains a recovery that may be based on a non-MICRA theory, the limitations of section 6146 should not apply." (40 C.3d 437.)

(d) Because of the potential conflict of interest, an attorney who seeks a larger fee than that authorized by *B. & P. C. 6146* "must specifically advise the client or potential client of the pros and cons of alternative litigation strategies, including potential attorney fees, and obtain the client's consent to pursue and settle a non-MICRA action as well as a MICRA claim." (*40 C.3d 438.*)

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dd. Computation of Fee.

6 *Witkin Sum. Cal. Law Torts* § 945

[§ 945] Computation of Fee.

(1) *Contingent and Appellate Fees.* In *Yates v. Law Offices of Samuel Shore* (1991) 229 C.A.3d 583, 280 C.R. 316, defendant attorney, in computing his fee for a \$ 452,887 judgment obtained in a wrongful death action based on medical malpractice, used the percentages set forth in *B. & P.C. 6146*. However, rather than applying the percentages to the entire net recovery, he divided the amount into six shares (one for each plaintiff) and applied the percentages to each. For example, instead of applying a 40% factor to only the first \$ 50,000 of the judgment, defendant applied this factor to each plaintiff's first \$ 50,000, so that the resulting fee of \$ 157,813 was nearly twice what it would have been had the statutory percentages been applied to the judgment as a whole. In addition, in submitting his statement of reimbursable costs, defendant deducted from the judgment \$ 9,175 that he had paid to an outside attorney engaged at an hourly rate to handle the appeal. In this action by the heirs to recover the alleged excessive fees, the trial judge, after finding that defendant had erred in both instances, awarded summary judgment for plaintiffs in the aggregate sum of \$ 87,523. *Held*, judgment affirmed.

(a) *The contingent fee calculation.*

(1) The language of *B. & P.C. 6146* is not clear on the issue of what fees are permitted for representing multiple heirs in a single wrongful death action; e.g., it refers to contingency fees for representing "any person," as well as to the "net sum recovered." On a consideration of the statute as a whole, its purposes, and their relation to kindred statutes, and the factual situation in question, the most reasonable construction is one requiring that the percentage contingent fee limitations apply to the overall recovery in a wrongful death action based on professional negligence. (229 C.A.3d 588, 590.)

(2) In reducing the award rendered in the underlying action from \$ 1,603,560 to \$ 353,560, the Court of Appeal held that C.C. 3333.2, another section of MICRA, permitted plaintiffs to recover only *one* award of \$ 250,000 for noneconomic damages. (229 C.A.3d 589, citing *Yates v. Pollock* (1987) 194 C.A.3d 195, 239 C.R. 383, *infra*, §958.) There are important similarities between *B. & P.C. 6146* and C.C. 3333.2, e.g., *B. & P.C. 6146* fixes contingent fees in connection with an action against a health care provider based on "professional negligence," a term defined identically

in both statutes. "These specifications parallel the related legal reality that a wrongful death, caused by an incident of medical malpractice, necessarily gives rise to one action only." (229 C.A.3d 589.)

(3) The Legislature may reasonably have concluded that a limitation on contingency fees in this area was appropriate in view of other statutes limiting the amount of a plaintiff's recovery. "This is not to say that plaintiffs' loss of more than 75 percent of their ... jury award" because of C.C. 3333.2 compels that their lawyer's calculated fee also be cut. "What it does mean is that the perceived legislative purpose of section 6146, independently and in relation to ... section 3333.2, substantially favors construing the former to limit the overall contingent fee a lawyer may charge for a single action that is subject to the constraints of both statutes." (229 C.A.3d 590.)

(4) Given the statute's limitation on noneconomic damages, together with the traditional limit of a major part of pecuniary damages to the decedent's earning capacity, the potential recovery in a wrongful death action is relatively stable regardless of the number of plaintiffs. Under plaintiff's attorney's approach, "the size of the attorney's fee would largely turn on how many close relatives the decedent left. This is not a rational intention to attribute to the Legislature." (229 C.A.3d 590.)

(b) *The appellate fee.*

(1) *B. & P.C. 6146* limits the contingent fee that may be charged in connection with an *action*, which, under *C.C.P. 1049*, includes an appeal taken after judgment (see 9 *Cal. Proc.* (4th), *Appeal*, §1). Hence, the statute fixes the maximum allowable contingent fee for a medical malpractice action *as a whole*, including an appeal, and this limitation may not be avoided by charging separate fees for parts of the case or by charging both contingent and hourly fees. (229 C.A.3d 591.)

(2) This conclusion is not affected by the subsequently enacted *B. & P.C. 6147(a)(3)* (1 *Cal. Proc.* (4th), *Attorneys*, §206) which, with respect to contingent fee agreements generally, requires that they state to what extent the plaintiff may be required to pay compensation for related matters not covered by the agreement. Whatever the meaning of this provision, it does not affect agreements subject to *B. & P.C. 6146*. These agreements retain their original inclusivity and exclusivity, as recognized by *B. & P.C. 6147(a)(5)*, requiring that agreements subject to *B. & P.C. 6146* state that the rates set forth in that statute are the maximum allowed. (229 C.A.3d 591.)

(3) Defendant was not entitled to recover the appellate fee simply by characterizing it as part of the costs plaintiffs agreed to pay. Such a fee is not generally within the scope of chargeable costs, and it does not appear in the definition of costs in the agreement itself. (229 C.A.3d 592.) Rather, the fee appears to come within the provision in the agreement authorizing defendant to associate any other attorney in his discretion, but at no expense to plaintiffs. Another provision purporting to exclude appellate work from the scope of defendant's engagement fails to comport with the statutory regulation of contingent fees for a medical malpractice "action," and hence is not controlling. (229 C.A.3d 592.)

(2) *Periodic Payments.* In *Nguyen v. Los Angeles County Harbor/UCLA Med. Center* (1995) 40 C.A.4th 1433, 48 C.R.2d 301, *infra*, §970, the court discussed the computation of fees in cases where periodic payments (*infra*, §966 et seq.) have been awarded: In determining maximum attorneys' fees allowable under *B. & P.C. 6146(b)* (*supra*, §942), the trial court must place a "total value" on periodic payments based on the plaintiff's life expectancy and include this value in computing the fee award. In resolving how the periodic payments of future damages should be valued for these purposes, the court may treat the cost of an annuity as the presumptive value of the periodic payments. The total value of periodic payments of future damages is then calculated as the present value of the product of the periodic payments multiplied by the number of years remaining in the plaintiff's projected life expectancy. (40 C.A.4th 1448.) The fact that this "cost" approach (i.e., presuming the cost of the annuity to be the total value of the periodic payments) generally yields a lower value than the "present value" approach (i.e., applying a discount rate to the total sum of future payments to reduce that sum to its value in today's dollars) is not ground for rejecting the cost approach. However, plaintiff's attorneys must be given the opportunity to show that the cost of the annuity does not reflect the reasonable present cash value of the periodic payments. (40 C.A.4th 1453.)

SUPPLEMENT: [This section is current through the latest supplement]

Appeal taken after judgment:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §1.

B. & P.C. 6147 :

Cross-Reference: 1 Cal. Proc. (5th), *Attorneys*, §180.



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aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 946

[§ 946] In General.

C.C.P. 1295 authorizes compulsory arbitration agreements in medical service contracts. These agreements must be the first article of the contract, and must follow the prescribed wording of the statute. (*C.C.P. 1295(a)*.)

C.C.P. 1295(b) requires the following notice immediately before the signature line in at least 10-point bold red type: "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT." (See *Engalla v. Permanente Med. Group* (1997) 15 *C.4th* 951, 973, 982, 64 *C.R.2d* 843, 938 *P.2d* 903, 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, Supp., §§502, 504 [petition to compel arbitration may not be granted where there is fraud in inducement of arbitration agreement or waiver of power to compel arbitration]; *Rosenfield v. Superior Court* (1983) 143 *C.A.3d* 198, 202, 191 *C.R.* 611 [arbitration provision lacking advisements required by *C.C.P. 1295(a)*, (b) was unenforceable; these advisements are mandatory]; *Nogueiro v. Kaiser Foundation Hosp.* (1988) 203 *C.A.3d* 1192, 1196, 250 *C.R.* 478 [even if arbitrator failed to apply limit for noneconomic loss imposed by *C.C. 3333.2* (infra, §958), award must be upheld, because error did not appear on its face]; 7 *Pacific L. J.* 550.) (On arbitration of malpractice claims, see 51 *So. Cal. L. Rev.* 401 [urging extension of arbitration to wrongful death actions]; 24 *A.L.R.5th* 1.)

The agreement may be rescinded in writing within 30 days of signature, but once signed governs "all subsequent open-book account transactions for medical services." (*C.C.P. 1295(c)*.)

A contract signed by a minor's parent or legal guardian for medical services to the minor is not subject to disaffirmance. (*C.C.P. 1295(d)*; see *Michaelis v. Schori* (1993) 20 *C.A.4th* 133, 137, 24 *C.R.2d* 380 [in medical malpractice action arising from childbirth, 17-year-old could not disaffirm, even though agreement was not signed by parent or guardian; *C.C. 34.5* (unemancipated minor may consent to pregnancy care) carves out exception to *C.C.P. 1295*].) The contract is "not a contract of adhesion, nor unconscionable nor otherwise improper," where it complies with the requirements of *C.C.P. 1295(a)-(c)*. (*C.C.P. 1295(e)*; see *Bolanos v. Khalatian* (1991) 231 *C.A.3d* 1586, 1590, 283 *C.R.* 209 [woman who read "only limited Spanish" could not avoid arbitration agreement that was printed in Spanish

and complied with *C.C.P. 1295*].)

In *Ramirez v. Superior Court* (1980) 103 C.A.3d 746, 163 C.R. 223, 1 Summary (10th), *Contracts*, §328, the court held that the statute must be interpreted to require a knowing and voluntary assent to the arbitration provision, and that a challenge on the ground of lack of knowledge must be permitted to avoid constitutional infirmity. (103 C.A.3d 749, 755.)

West's Key Number Digest, Arbitration k.2, 3.1

SUPPLEMENT: [This section is current through the latest supplement]

Engalla case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §§542, 545.



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bb. Subsequent Medical Services.

6 Witkin Sum. Cal. Law Torts § 947

[§ 947] Subsequent Medical Services.

Hilleary v. Garvin (1987) 193 C.A.3d 322, 238 C.R. 247, involved the issue whether an arbitration agreement entered into when plaintiff first visited defendant to determine whether she was pregnant extended to a follow-up operation to remove fibroid tumors that might cause future miscarriages. Defendant's motion to compel arbitration of a malpractice claim arising out of the follow-up surgery was denied on the ground that the arbitration agreement failed to delineate a specific course of treatment, and hence was ambiguous. *Held*, this was erroneous.

(a) Plaintiff's argument that *C.C.P. 1295* contemplates only underlying contracts that are reduced to writing is untenable. The clear meaning of the statute is that, with the exception of certain licensed health care service plans covered in *C.C.P. 1295(f)*, it covers any contract for health care, whether written or oral, express or implied. (193 C.A.3d 327.)

(b) "To impose upon a physician, during a continuous doctor-patient relationship, the extra burden of having to renew the arbitration agreement each time there is a variation in treatment or ailment would be impractical, and would frustrate the purpose of the statute, which is to facilitate, not emasculate, the arbitration process." (193 C.A.3d 326.)

In *Cochran v. Rubens* (1996) 42 C.A.4th 481, 49 C.R.2d 672, the issue was whether a 1990 arbitration agreement between the parties governed allegedly negligent surgery that defendant performed on plaintiff in 1993. Plaintiff was referred to defendant for consultation and evaluation by his family physician in 1990, at which time the agreement was executed, but plaintiff failed to return for a recommended follow-up visit and did not see defendant again until 1993 on a second referral by the family physician. The trial court denied defendant's petition to compel arbitration. *Held*, affirmed; the 1993 treatment was not, as required by *C.C.P. 1295(c)* (*supra*, §946 et seq.), an *open book account* transaction for medical services for which the contract was signed.

(a) Whether a book account exists, and whether it is open or closed, are questions of fact. While an open book account has been defined as an account with one or more items unsettled, it also includes an account with dealings still continuing. Thus, the open or closed nature turns not on the account balance per se, but on whether the parties expect

possible future transactions, which is a question of fact. In the physician-patient context, this depends on whether there is a continuing physician-patient relationship. Because the outcome of the petition to compel arbitration turns on whether plaintiff's book account closed before he returned to the physician in 1993, the issue on appeal is whether substantial evidence supported the trial court's finding on that question of fact. (42 C.A.4th 485.)

(b) There was sufficient evidence to support the trial court's finding that there was no continuing physician-patient relationship between the parties, and therefore, no expectation of future medical transactions between them. The parties had no contact between 1990 and 1993. Plaintiff had an ongoing physician-patient relationship with his family doctor, and only saw defendant when his family doctor referred him. Implicit in the court's finding is the finding that the book account established in 1990 between the parties was no longer open at the time of the second referral in 1993. (42 C.A.4th 486.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Reigelsperger v. Siller* (2007) 40 C.4th 574, 577, 53 C.R.3d 887, 150 P.3d 764 [arbitration agreement signed when chiropractor first treated patient applied to claim arising from treatment for different condition 2 years later; agreement stated that it was intended to bind patient and health care provider "who now or in the future treats the patient"; regardless of whether patient had present intention to return for treatment, he agreed that if he did do so, arbitration provision would apply to future dispute].



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cc. Persons Who Did Not Sign: In General.

6 *Witkin Sum. Cal. Law Torts* § 948

[§ 948] Persons Who Did Not Sign: In General.

In *Baker v. Birnbaum* (1988) 202 C.A.3d 288, 248 C.R. 336, the court held that an arbitration agreement signed only by plaintiff's wife was not binding on plaintiff's claim for loss of consortium: "A party cannot be compelled to arbitrate a dispute it has not elected to submit." (202 C.A.3d 291, following *Rhodes v. California Hosp. Med. Center* (1978) 76 C.A.3d 606, 143 C.R. 59.

The opposite position was taken in later decisions. In *Gross v. Recabaren* (1988) 206 C.A.3d 771, 253 C.R. 820, the court, applying the reasoning of *Herbert v. Superior Court* (1985) 169 C.A.3d 718, 215 C.R. 477, made the following points:

(a) "It is true a physician may inquire into, and if honestly answered ascertain, a patient's marital status at the time of the initial visit, but relationships change. Consequently, to insure the inviolability of an arbitration agreement a doctor, at a minimum, would be required to reinterrogate the patient at every visit, and postpone further treatment if a recently acquired spouse is not present to join in the execution of a new agreement. We have previously rejected such a potential solution as unworkable and undesirable ... and one which would appear certain to have a deleterious effect on the physician-patient relationship." (206 C.A.3d 781.)

(b) "Among the factors which have been identified as contributing to the growth in patients' suits against their doctors is the increasing depersonalization in their relationships. ... This unfortunate trend could only be exacerbated by injecting the specter of litigation, even indirectly, into each contact between doctor and patient." (206 C.A.3d 781.) "In addition, were patients to be less than candid concerning their marital status, should their duplicity be permitted to involuntarily expose to the expense and trauma inherent in a civil suit those whom they ask to minister to their medical needs? On the other hand, were we to protect the physician from such deception, would we not be allowing mendacity to achieve that which integrity could not, i.e., the binding of a nonsignatory to an arbitration agreement?" (206 C.A.3d 781.)

(c) "Finally, and in our view the most significant consideration, to authorize an intrusion into a patient's

confidential relationship with a physician as the price for guaranteeing a third person, even a spouse, access to a jury trial *on matters arising from the patient's own treatment*, poses problems of a particularly serious nature. One might hope that spouses will voluntarily communicate with each other regarding their respective medical treatment, whether it involves a routine matter or a most intimate and sensitive procedure such as a vasectomy or the termination of a pregnancy. Nonetheless, it would be impermissible to adopt a rule that would require them, or their physicians, to do so, or that would permit one spouse to exercise a type of veto power over the other's decisions. Yet construing section 1295 to require a spouse's concurrence in an arbitration agreement would, in certain situations at least, have exactly that effect." (206 C.A.3d 782.)

Subsequent decisions have followed *Gross*. (See *Bolanos v. Khalatian* (1991) 231 C.A.3d 1586, 1590, 283 C.R. 209; *Michaelis v. Schori* (1993) 20 C.A.4th 133, 139, 24 C.R.2d 380 [following *Bolanos* and *Gross*]; *Mormile v. Sinclair* (1994) 21 C.A.4th 1508, 1513, 1514, 26 C.R.2d 725 [following *Bolanos*, *Gross*, and *Michaelis*, and rejecting the rule of *Baker*, that a party cannot be required to arbitrate if it has not agreed to do so].)

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dd. Persons Who Did Not Sign: Cross-Complainants.

6 *Witkin Sum. Cal. Law Torts* § 949

[§ 949] Persons Who Did Not Sign: Cross-Complainants.

In *Contra Costa v. Kaiser Foundation Health Plan* (1996) 47 C.A.4th 237, 54 C.R.2d 628, the court held that an agreement to arbitrate between a patient and a defendant health care provider does not bind a cross-complainant who was not a party to the agreement and who seeks equitable indemnity from the health care provider. Plaintiff, a pedestrian who was struck by a vehicle while crossing an intersection to reach a bus stop, brought an action against the driver of a vehicle that struck that vehicle, the county, and the county's transit authority under various theories, and also sued her health care provider under a malpractice theory. The other defendants cross-complained against the health care provider for equitable indemnity. The trial judge denied its motion to compel arbitration under an arbitration agreement with plaintiff. *Held*, affirmed.

(a) The California cases binding nonsignatories to arbitrate their medical malpractice claims fall into two categories. In some cases, a nonsignatory is required to arbitrate a claim because a benefit was conferred on the nonsignatory as a result of the contract, making the nonsignatory a third-party beneficiary of the arbitration agreement. In other cases, the nonsignatory is bound to arbitrate the dispute because there was a preexisting relationship between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim. (47 C.A.4th 242.) These cases are all distinguishable here. (47 C.A.4th 243.)

(b) While public policy favors arbitration as an expedient and economical method of resolving disputes, thus relieving crowded civil court calendars, arbitration assumes that the parties have elected to use it as an alternative to the judicial process. (47 C.A.4th 244.) Even the strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement or who have not authorized others to act for them in executing an agreement. The right to arbitration depends on a contract. In essence, an action to compel arbitration is a suit in equity to compel specific performance of that contract. Lacking a written agreement, or a preexisting relationship or authority to contract for another that might substitute for an arbitration agreement, courts sitting in equity may not compel third-party nonsignatories to arbitrate their disputes. (47 C.A.4th 245.)

(c) To hold the cross-complainants bound by the arbitration agreement would be to ignore the constitutional and

procedural rights of nonsignatory third parties who had no prior connection to the signatory party. In addition, policy considerations that prompted other appellate courts to compel nonsignatories to arbitration are not present in this case. First, unlike loss of consortium cases (see *Gross v. Recabaren* (1988) 206 C.A.3d 771, 253 C.R. 820, supra, §948), there is no judicially declared preference for joining direct negligence claims with related indemnity claims. (47 C.A.4th 245.) A cause of action for equitable indemnity does not even accrue for statute of limitations purposes until the party seeking indemnity has suffered an actual loss by being compelled to pay damages. Second, as the cross-complainants have no preexisting relationship with plaintiff or defendant, there is no risk that they might interfere with the patient-physician relationship or with plaintiff's privacy rights. Third, in contrast to *Harris v. Superior Court* (1986) 188 C.A.3d 475, 478, 233 C.R. 186, the cross-complainants were not third-party beneficiaries of the arbitration agreement who by benefiting from the agreement should also be bound by it. For all these reasons, the trial court properly concluded that the cross-complainants were not required to arbitrate their cross-claims and thus properly denied defendant's motion to compel arbitration. (47 C.A.4th 246.)

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ee. Retroactive Agreements.

6 *Witkin Sum. Cal. Law Torts* § 950

[§ 950] Retroactive Agreements.

In *Coon v. Nicola* (1993) 17 C.A.4th 1225, 21 C.R.2d 846, plaintiff was treated by defendant physician for injuries sustained in a fall down a mine shaft. On a subsequent office visit, plaintiff signed a physician-patient arbitration agreement that included a clause making the agreement applicable to disputes stemming from the care provided by defendant prior to the date the agreement was executed. *Held*, retroactive agreements are valid.

(a) Defendant argued that the wording in *C.C.P. 1295(c)* referring to "subsequent open-book transactions" precluded any authorization of a retroactive application of an arbitration agreement. However, although *C.C.P. 1295* states that medical malpractice arbitration agreements must include certain provisions, there is nothing in the statute stating expressly or implicitly that these agreements may not also include additional provisions. Indeed, the possibility of additional provisions is supported by the wording of *C.C.P. 1295(a)*, which requires certain mandatory language to be set forth in the "first article of the contract," thereby implying that other articles may be added depending upon the needs of the parties. (17 C.A.4th 1232.)

(b) The question then becomes whether parties may contract to submit precontractual claims to arbitration. *C.C.P. 1281* validates agreements to submit to arbitration "an existing controversy or a controversy thereafter arising," subject to the right to revoke upon such grounds as exist for the revocation of any contract (see 13 *Summary* (10th), *Equity*, §36). However, *C.C.P. 1281* et seq. apply to medical malpractice arbitration agreements only to the extent that they do not conflict with the specific provisions of *C.C.P. 1295*. (17 C.A.4th 1233, citing *Rosenfield v. Superior Court* (1983) 143 C.A.3d 198, 191 C.R. 611, supra, §946.) Hence, "[i]t would follow that as long as the provisions of section 1295 are met as to a medical malpractice arbitration agreement, parties may legally agree to arbitrate pre-agreement claims subject to the same grounds for revocation as exist for any contract, as stated in section 1281 et seq." (17 C.A.4th 1233.)

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ff. Intentional Torts.

6 *Witkin Sum. Cal. Law Torts* § 951

[§ 951] Intentional Torts.

In *Herrera v. Superior Court* (1984) 158 C.A.3d 255, 204 C.R. 553, the court was faced with the issue whether the statute compelled arbitration of a malpractice case alleging an intentional tort. Plaintiff's complaint, originally based on misdiagnosis and improperly performed surgery, was amended to allege causes of action for battery and fraud (wrong surgery, failure to inform; see *supra*, §§395, 396). *Held*, arbitration was required.

(a) Plaintiff's contention was based on the language of *C.C.P. 1295(a)*, referring to a dispute as to "professional negligence," defined in *C.C.P. 1295(g)(2)* as "a negligent act or omission." But *C.C.P. 1295(b)*, states that a patient who signs an arbitration provision is agreeing to arbitrate "any dispute as to medical malpractice, that is as to whether any medical services rendered under his contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered." (158 C.A.3d 260, 261.)

(b) The language of *C.C.P. 1295(a)* was designed to "set the threshold" of the type of action; but the language of *C.C.P. 1295(b)*, which the Legislature specified must be included in the arbitration provision, shows that the Legislature intended arbitration "to extend beyond negligence." (158 C.A.3d 262.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Titolo v. Cano* (2007) 157 C.A.4th 310, 317, 68 C.R.3d 616 [patient's claims against physician for breach of fiduciary duty, violation of privacy rights, intentional interference with prospective economic advantage, and negligence, based on telling patient's disability insurer that patient was "scam artist," and giving insurer patient's medical file, were within scope of arbitration clause; language applying agreement to disputes relating to alleged negligence of "any medical services rendered" encompassed negligence claim, and language providing that all claims based on same incident would be arbitrated in one proceeding encompassed other claims].



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gg. Punitive Damages.

6 *Witkin Sum. Cal. Law Torts* § 952

[§ 952] Punitive Damages.

In *Baker v. Sadick* (1984) 162 C.A.3d 618, 208 C.R. 676, plaintiff employed defendant doctor to perform breast reduction surgery, and on admission to the hospital, signed an arbitration agreement in the form prescribed by C.C.P. 1295. Serious post-injury problems developed, requiring extensive corrective surgery, and she made her medical malpractice claim pursuant to the arbitration agreement. Without objection by either party, issues of liability and compensatory and punitive damages were submitted, and the arbitrator awarded compensatory damages of \$ 300,000 (reduced by the superior court to the statutory limit of \$ 250,000) and punitive damages of \$ 300,000. The judge rejected defendant's contention that the arbitrators had no authority to award punitive damages, and confirmed the award. *Held*, judgment confirming award affirmed.

(a) An arbitration agreement is subject to the rules of interpretation of contracts, including the rule that in a standard form agreement, ambiguities are to be resolved against the drafter. (162 C.A.3d 624, 625, 626.) Also, arbitration agreements are favored, and ambiguities in the scope of arbitration are resolved in favor of coverage. (162 C.A.3d 623, 624.)

(b) Defendant contended that C.C.P. 1295 applies only to claims for "professional negligence" as the term is defined in C.C.P. 1295(g)(2). But the statute also covers "any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered," and the required notice refers to "any issue of medical malpractice." (162 C.A.3d 624, 625, 626.) Thus, the agreement presents an ambiguity, which should be construed in favor of the plaintiff (nondrafter), and as so construed, covers the issue of punitive damages. (162 C.A.3d 626.)

(c) Plaintiff's charges of malpractice were based in part on intentional tort principles. The surgery was unnecessary, she was fraudulently induced to consent to it, defendant falsified her medical records, and defendant failed to administer post-operative treatment. These charges were appropriate factual bases for punitive damages. (162 C.A.3d 625.)

(d) C.C. 3333.2, limiting the amount of general compensatory damages to \$ 250,000, refers only to negligence, and

does not preclude an award of punitive damages on proof of fraud, wilful neglect, or malicious acts. (162 C.A.3d 626, 627.)

(e) C.C. 3294 provides for punitive damages in "an action." *McRae v. Superior Court* (1963) 221 C.A.2d 166, 34 C.R. 346, held that an arbitration proceeding is not an "action" for the purposes of ordering depositions. But the rationale of *McRae* was that judicial interference with arbitration proceedings by ordering depositions was incompatible with the strong public policy favoring speedy settlement of disputes. This rationale has no application here. (162 C.A.3d 628.) Moreover, arbitration is designed to serve as a substitute for court proceedings; and "arbitration would not be encouraged by a decision which effectively holds a claim which may otherwise be asserted in a court of law may not be asserted in arbitration." (162 C.A.3d 628.)

(f) Punitive damages awards in civil actions are subject to judicial review, while arbitration awards are not; hence, defendant argues that agreements to arbitrate will be discouraged. A holding that punitive damages may be awarded under an arbitration agreement as broad as the one involved here "does not divest the parties of their power to control the scope of arbitration by the terms of their agreement." (162 C.A.3d 630.) (See 20 Cal. Western L. Rev. 312; 35 A.L.R.5th 145 [allowance of punitive damages in medical malpractice action].)

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5. Notice of Intent To Sue.
aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 953

[§ 953] In General.

(1) *Notice of At Least 90 days.* No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action. (*C.C.P. 364(a)*.) However, this requirement does not apply to unknown defendants sued by fictitious names. (*C.C.P. 364(e)*.) The notice may be served in the manner authorized by *C.C.P. 1010* et seq. (*C.C.P. 364(c)*.)

No special form of notice is prescribed, but it must inform the defendant "of the legal basis of the claim and the type of loss sustained, including *with specificity* the nature of the injuries suffered." (*C.C.P. 364(b)*); see *Anson v. Merced* (1988) 202 C.A.3d 1195, 1203, 249 C.R. 457 [claim against public entity under *Govt.C. 910*, which did not state type of injuries or name of doctors, was insufficient to fulfill specificity requirement of *C.C.P. 364(b)*]; *Derderian v. Dietrick* (1997) 56 C.A.4th 892, 899, 65 C.R.2d 800 [notice mailed to, but not received by, billing service for which defendant had worked as independent contractor at time of alleged malpractice was insufficient; plaintiff has "burden of taking adequate steps likely to accomplish actual notice"].)

(2) *Effect of Noncompliance.* Failure to comply with *C.C.P. 364* does not affect the validity of the proceedings, but is grounds for professional discipline of the plaintiff's attorney. (*C.C.P. 365*.)

(3) *Increasing Cost of Insurance Is Prohibited.* *Ins.C. 11589* prohibits an insurer from increasing the premium, imposing a surcharge, or instituting or increasing a deductible amount payable by the insured, or otherwise requiring additional compensation, because a notice under *C.C.P. 364* has been filed, "unless a complaint has been served on the physician and surgeon or dentist with respect to such action." (See *11 Pacific L. J. 669*.)

West's Key Number Digest, Physicians and Surgeons k.18.20

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice of At Least 90 Days.* *Form of notice:* See *Jones v. Catholic Healthcare West* (2007) 147 C.A.4th 300, 305, 54 C.R.3d 148 [patient's notice of intent to sue medical center for negligence, faxed to president of center on last day under

parties' tolling agreement, was valid and effective, even though it did not comply with service statute requiring written agreement to accept service by fax].



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bb. Extension of Applicable Statute of Limitations.

6 *Witkin Sum. Cal. Law Torts* § 954

[§ 954] Extension of Applicable Statute of Limitations.

When the notice is served within 90-days of the running of the applicable statute of limitations (*C.C.P.* 340.5), the time is extended 90 days from the service of the notice. (*C.C.P.* 364(d); see *Anson v. Merced* (1988) 202 C.A.3d 1195, 1204, 249 C.R. 457 [6-month period mandated by Govt.C. 945.6 for initiating action after public entity's denial of claim was extended by *C.C.P.* 364(d)]; *Mero v. Sadoff* (1995) 31 C.A.4th 1466, 1479, 37 C.R.2d 769 [action against doctor requested and paid for by employer for allegedly injuring employee during examination was action for medical malpractice, subject to 90-day extension under *C.C.P.* 364]; *Camarillo v. Vaage* (2003) 105 C.A.4th 552, 560, 130 C.R.2d 26, 3 Cal. Proc. (4th), Actions, Supp., §656 [sending notice in last 90 days before statute of limitations runs tolls statute for 90 days against both known and unknown defendants; notice to unknown defendant is not required before amending complaint to add fictitiously named defendant]; 7 *Pacific L. J.* 547; on *C.C.P.* 340.5, see 3 Cal. Proc. (4th), Actions, §533 et seq.)

Despite the literal meaning of the statutory language, it has been held that the statute of limitations is *tolled* for 90 days and not merely extended by 90 days from the date of service of the notice. Hence, when the notice of intent to sue has been given within the last 90 days of the limitations period, the plaintiff has 90 days from the expiration of the period in which to file the lawsuit. (*Woods v. Young* (1991) 53 C.3d 315, 325, 279 C.R. 613, 807 P.2d 455, 3 Cal. Proc. (4th) Actions, §657 [construction adopted to resolve conflict between several statutes]; see *Hanooka v. Pivko* (1994) 22 C.A.4th 1553, 1559, 1560, 28 C.R.2d 70, 3 Cal. Proc. (4th), Actions, §656.) The *Woods* tolling rule applies not only to the 1-year "discovery" period of *C.C.P.* 340.5, but also to the 3-year "outside" period of that statute. (*Russell v. Stanford University Hosp.* (1997) 15 C.4th 783, 788, 64 C.R.2d 97, 937 P.2d 640, 3 Cal. Proc. (4th), Actions, Supp., §657, disapproving *Rewald v. San Pedro Peninsula Hosp.* (1994) 27 C.A.4th 480, 487, 32 C.R.2d 411.) The rule also applies to the 3-year period for minors set forth in the statute. (*Newman v. Burnett* (1997) 54 C.A.4th 722, 724, 62 C.R.2d 175, 3 Cal. Proc. (4th), Actions, Supp., §657.)

Moreover, *C.C.P.* 364(d) applies to equitable indemnity actions based on professional negligence. This is true even though the actions are governed by non-MICRA statutes of limitations, such as the general limitations period for personal injury actions. (*Preferred Risk Mut. Ins. Co. v. Reiswig* (1999) 21 C.4th 208, 214, 87 C.R.2d 187, 980 P.2d

895, 3 Cal. Proc. (4th), Actions, Supp., §656.)

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See *Smith v. Ben Bennett* (2005) 133 C.A.4th 1507, 1522, 35 C.R.3d 612 [MICRA tolling provision for action based on health care provider's "professional negligence" did not apply to widow's action against skilled nursing facility seeking enhanced remedies under Elder Abuse and Dependent Adult Civil Protection Act (text, §147 et seq.); elder abuse claim involved reckless neglect or intentional abuse, and thus was not encompassed within "professional negligence"]; *Vazquez de Mercado v. Superior Court* (2007) 148 C.A.4th 711, 716, 55 C.R.3d 889 [C.C.P. 340.5 did not apply to plaintiffs who sued veterinarian for allegedly failing to advise them of horse's physical problems before they purchased it; C.C.P. 340.5 requires that "professional negligence" cause personal injury or wrongful death, and, although complaint alleged that veterinarian caused economic damage, it did not allege that his negligence resulted in "personal" injury]; *Unruh-Haxton v. Regents of Univ. of Calif.* (2008) 162 C.A.4th 343, 355, 76 C.R.3d 146 [claims for fraud, conversion, and intentional infliction of emotional distress, arising from allegations that doctors providing fertility treatments stole patients' eggs and pre-embryos and sold them for financial gain, related to wrongful intentional conduct and thus were not governed by statute of limitations in MICRA for actions against health care provider based upon professional negligence]. *Camarillo case*:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §722.

C.C.P. 340.5:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §578 et seq.

Woods case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §728.

Hanooka case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §727.

Russell case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §§723, 728.

Newman case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §§723, 728.

Preferred Risk case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §724.



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cc. Government Tort Claim Is Not Notice of Intent To Sue.

6 *Witkin Sum. Cal. Law Torts* § 955

[§ 955] Government Tort Claim Is Not Notice of Intent To Sue.

A government tort claim, although allegedly containing the same information as that required in a notice of intent to sue, does not, in the absence of evidence that the claimant intended otherwise, constitute the required notice so as to render a subsequent notice of intent to sue a nullity. The claims filing requirements of the Tort Claims Act (*supra*, §216 et seq.) and *C.C.P.* 364 are similar in purpose, inasmuch as both were designed to encourage settlements. However, filing a tort claim does not necessarily evidence an intent to sue, and a notice of intent to sue, given after a tort claim has been denied, will further the purposes of MICRA by offering the parties a second opportunity to resolve the claim. Thus, the 6-month period of *Govt.C.* 945.6 for initiating action after denial of a government tort claim is extended by the 90-day period of *C.C.P.* 364(d). (*Wurts v. Fresno* (1996) 44 *C.A.4th* 380, 383, 51 *C.R.2d* 689.)

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6 *Witkin Sum. Cal. Law Torts* § 956

[§ 956] In General.

(1) *Nature of Statute.* Under C.C. 3333.1, evidence of certain benefits payable to the plaintiff may be introduced by the defendant at the trial: social security payments, state or federal disability or compensation payments, health or income disability payments, and benefits received under group health plans. If this evidence is introduced, however, the plaintiff may prove the cost of the benefits. (C.C. 3333.1(a); see 29 Western State L. Rev. 173 [case for repealing C.C. 3333.1(a)].)

"No source of collateral benefits introduced ... shall recover any amount against the plaintiff nor shall it become subrogated to the rights of the plaintiff against a defendant." (C.C. 3333.1(b).) (See 7 *Pacific L. J.* 547.)

In *California Physicians' Service v. Superior Court* (1980) 102 C.A.3d 91, 162 C.R. 266, the court observed that C.C. 3333.1 was enacted as part of a legislative response to a "crisis" in the field of medical malpractice coverage, and added: (1) The first objective (C.C. 3333.1(a)) is to eliminate double recovery of special damages; (2) the second objective (C.C. 3333.1(b)) "is to shift the cost of the special damages ... from the malpractice insurance carriers to the providers of medical and hospital insurance, leaving to the malpractice insurance carriers the cost of general damages." (102 C.A.3d 97.)

(2) *No Credit in Workers' Compensation Case.* C.C. 3333.1 overrides the right to credit when an employee settles a malpractice action and the settlement excludes workers' compensation benefits. In *Graham v. Work. Comp. App. Bd.* (1989) 210 C.A.3d 499, 258 C.R. 376, the court said: "To harmonize *Civil Code* section 3333.1 with the Labor Code credit provisions, we interpret section 3333.1 as impliedly creating an exception to the credit provisions whenever an injured party has demonstrably had his recovery reduced to reflect collateral source contributions. A more restrictive construction would shift a portion of the costs of medical malpractice to the injured party, contrary to the purposes of both MICRA and the workers' compensation statutes. In this case, the parties in the underlying medical malpractice case made an adequate factual record that Graham's settlement was reduced to exclude any recovery for collateral source benefits." (210 C.A.3d 508.) (For full discussion of *Graham*, see 2 *Summary* (10th), *Workers' Compensation*, §74.)

(3) *Taxability*. While evidence that the plaintiff is receiving disability insurance benefits is admissible under C.C. 3333.1, evidence of the tax treatment of those benefits is not. The statute makes admissible "evidence of any amount payable as a benefit to the plaintiff," but there is no language in the statute suggesting an intent to allow the trier of fact to consider whether that amount is also taxable. (*Cox v. Superior Court* (2002) 98 C.A.4th 670, 673, 120 C.R.2d 45 [vacation of order denying plaintiff's motion to preclude evidence that income disability payments were not taxable].)

West's Key Number Digest, Physicians and Surgeons k.18.70

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bb. Constitutionality and Construction.

6 Witkin Sum. Cal. Law Torts § 957

[§ 957] Constitutionality and Construction.

Fein v. Permanente Med. Group (1985) 38 C.3d 137, 211 C.R. 368, 695 P.2d 665, upheld the constitutionality of C.C. 3333.1(a) (allowing evidence of collateral source payments).

(a) *Construction of statute.* As originally drafted, C.C. 3333.1(a) required deduction of collateral source benefits in computing damages; as enacted, it merely provides that the defendant may introduce evidence of these benefits, and, if the defendant does so, the plaintiff may introduce evidence of the amounts he or she has paid (e.g., in insurance premiums) to secure the benefits. The statute does not specify how the jury should use the evidence, but "the Legislature apparently assumed that in most cases the jury would set plaintiff's damages at a lower level because of the awareness of plaintiff's 'net' collateral source benefits." (38 C.3d 164.)

(b) *Constitutionality.* The plaintiff has no vested right in a particular measure of damages; and the statute is rationally related to the legitimate state interest of reducing the costs incurred by malpractice defendants and their insurers. (38 C.3d 137.) *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 84 C.R. 173, 465 P.2d 61, *infra*, §1632, recognized that legal commentators criticize the collateral source rule as affording the plaintiff a double recovery, and that many jurisdictions had either restricted or repealed it; but the opinion stated that a change, if desirable, would be more effectively accomplished through legislative reform. (38 C.3d 167.) And California is only one of many states to include a modification of the collateral source rule as a part of medical malpractice reform. (38 C.3d 167.) (See 74 A.L.R.4th 32 [validity and construction of statute abrogating collateral source rule in medical malpractice actions].)

Barme v. Wood (1984) 37 C.3d 174, 207 C.R. 816, 689 P.2d 446, upheld the constitutionality of C.C. 3333.1(b) (precluding subrogation by provider of medical expense or other benefits). The general constitutional challenges were rejected for the reasons set forth in *American Bank & Trust Co. v. Community Hosp.* (1984) 36 C.3d 359, 204 C.R. 671, 683 P.2d 670, *supra*, §941. The court also answered the charge that the legislation is arbitrary because it shifts some of the cost of medical malpractice from *negligent* health care providers to *nonnegligent* employers or insurers:

(a) Insurers who are burdened by the provision have been paid a fee or premium to provide the health or other benefits covered by their policies. Employers who are self-insured, "presumably have decided that it is in their self-interest to do so in order to save the insurance premium they would otherwise incur." (37 C.3d 181.)

(b) The Legislature may well have determined that "only by shifting some of the costs of malpractice from a negligent defendant to the victim's own 'first party' insurers, would the victim retain a realistic opportunity to obtain any damages from malpractice insurance. Insistence on having malpractice defendants and their insurers bear all of the loss might have meant that no malpractice insurance would have been offered or that many doctors would have practiced uninsured." (37 C.3d 181.) (See *Miller v. Sciaroni* (1985) 172 C.A.3d 306, 312, 313, 218 C.R. 219 [following *Barme*].)

SUPPLEMENT: [This section is current through the latest supplement]

In *Canister v. Emergency Ambulance Service* (2008) 160 C.A.4th 388, 72 C.R.3d 792, plaintiff police officer, while accompanying an arrestee in the back of defendant's ambulance, alleged that defendant caused him injury when the ambulance hit a curb. At the time of the injury, one employee of defendant was driving, and another was attending to the arrestee. Each was a licensed Emergency Medical Technician-1 (EMT) acting within the scope of employment. The trial judge ruled that plaintiff's action was subject to MICRA. Based on this ruling, defendant was permitted to introduce evidence that plaintiff's medical expenses and lost earnings were paid by a collateral source. Based on evidence that the driver hit the curb to avoid a vehicle that had crossed into the driver's lane and that plaintiff was not using a seat belt, judgment was entered for defendant. Plaintiff appealed, contending that the trial court's ruling that the action was subject to MICRA was erroneous. *Held*, affirmed.

(a) *Introduction.* By its terms, C.C. 3333.1 applies to a personal injury action against a health care provider based upon professional negligence. Thus, the main issues in this case are whether defendant's EMTs were *health care providers* and whether the case was based on *professional negligence*. (160 C.A.4th 394.)

(b) *EMTs are health care providers under MICRA.*

(1) C.C. 3333.1(c)(1) defines "health care provider" as someone licensed under Chapter 2.5 of Division 2 of the Health and Safety Code (*Health & Saf.C. 1440 et seq.*). However, the EMTs were licensed under Division 2.5 of the Health and Safety Code (*Health & Saf.C. 1797.1 et seq.*), the *Emergency Services (EMS) Act*. (160 C.A.4th 392.)

(2) When the MICRA provisions were enacted in 1975, they included paramedics licensed under former Health & Saf.C. 1480 to provide emergency services for people being transported to the hospital. However, the EMS Act, which created a comprehensive system to govern prehospital emergency medical services, repealed former Health & Saf.C. 1480, thereby raising an issue whether the repeal was intended to remove those persons licensed under the former statute from MICRA. *It was not.* (160 C.A.4th 398.)

(3) In 1988, the Legislature enacted *Health & Saf.C. 1797.4*, providing that any reference in any provision to mobile intensive care paramedics subject to former Health & Saf.C. 1480 was deemed to be a reference to persons holding valid certificates under the EMS Act as EMTs. Defendant correctly argued that the Legislature added this provision to assure that all EMTs would be treated the same as mobile intensive care paramedics, who were originally covered by MICRA, a conclusion supported by both the statute's language and its legislative history. (160 C.A.4th 399.) Moreover, this conclusion is supported by *Belton v. Bowers Ambulance Service* (1999) 20 C.4th 928, 86 C.R.2d 107, 978 P.2d 571, 3 Cal. Proc. (5th), Actions, §585. (160 C.A.4th 403.)

(c) *Negligent operation of an ambulance constitutes professional negligence.*

(1) C.C. 3333.1(c)(2) defines "professional negligence" as that negligence that occurs while the health care provider is providing services that are within the scope of services for which the provider is licensed. The relevant test is not the degree of skill required, but whether the negligence occurred in the rendering of services for which a provider is licensed. Although the act of operating an ambulance may be performed by someone without special knowledge, skill,

or care as a member of the medical profession, this does not mean that the employees here were not acting as health care providers in transporting the patient to a medical facility. (160 C.A.4th 404.)

(2) The EMS Act defines "emergency medical services" in terms of the services utilized in responding to a medical emergency. And the Act's definition of "emergency" encompasses the situation where emergency medical personnel perceive that the need for immediate medical attention might *potentially* arise. Accordingly, "emergency ambulance service" includes all services rendered by emergency ambulances, even if the ambulance is engaged in nonemergency interfacility transfers, as was the case here. (160 C.A.4th 405.)

(3) Plaintiff argued that an EMT's "professional services" can extend only to those services for which the EMT is licensed, and that the only services for which EMTs are licensed as professionals are medical services, such as basic life support and CPR. This argument is without merit. EMTs *are* licensed to provide transport to patients. Further, the term "professional services" encompasses more than the distinct services that a health care provider is licensed to perform. Courts have broadly construed "professional negligence" to mean negligence occurring during the rendering of services for which the health care provider is licensed (see, e.g., *Bellamy v. Appellate Dept.* (1996) 50 C.A.4th 797, 57 C.R.2d 894, text, §934). Thus, an EMT's operation of an ambulance qualifies as "professional negligence" when the EMT is rendering services for which the EMT is licensed or when a claim for damages is directly related to the provision of ambulance services by the EMT. (160 C.A.4th 406.)

(4) That plaintiff was not a patient does not affect application of MICRA. By its statutory terms, MICRA applies to negligent conduct by a health care provider in rendering professional services and is not limited to actions by the recipient of professional services. (160 C.A.4th 407.)



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aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 958

[§ 958] In General.

C.C. 3333.2 permits recovery for noneconomic losses, i.e., "pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages," but limits the amount of this recovery to \$ 250,000. (C.C. 3333.2(a), (b).) (See *Pressler v. Irvine Drugs* (1985) 169 C.A.3d 1244, 1248, 215 C.R. 807; 67 So. Cal. L. Rev. 1609 [evaluation of effectiveness of C.C. 3333.2]; 27 Southwestern U. L. Rev. 99 [right of jury to reject MICRA ceiling on noneconomic damages].)

The \$ 250,000 limit on recovery of noneconomic damages applies only to "clinics," "health dispensaries," and "health facilities" licensed under Division 2 of the Health and Safety Code; a residential care facility, even though licensed under Division 2, does not fit into one of these categories. (*Kotler v. Alma Lodge* (1998) 63 C.A.4th 1381, 1390, 74 C.R.2d 721; see *Lathrop v. HealthCare Partners Med. Group* (2004) 114 C.A.4th 1412, 1419, 8 C.R.3d 668 [unincorporated medical group was not "health care provider"].)

In *Yates v. Pollock* (1987) 194 C.A.3d 195, 239 C.R. 385, the court rejected the contentions that the statute did not apply to wrongful death actions, and that the limitation should be applied to each of several plaintiffs individually. (a) "Its plain language unequivocally manifests a desire to place a \$ 250,000 cap on awards for noneconomic damages in all medical malpractice litigation, whether recovery is sought by patients who have themselves suffered personal injuries or by the survivors of such victims who initiate suits for wrongful death." (194 C.A.3d 199.) (b) Because the cause of action for wrongful death is single and indivisible, use of the word "action" in the statute represents a legislative intent to limit the total recovery in these suits to \$ 250,000. (194 C.A.3d 201.)

When a medical employer's liability rests on respondeat superior, it is entitled to the protection of C.C. 3333.2. (*Lathrop v. HealthCare Partners Med. Group*, *supra*, 114 C.A.4th 1421 [limiting damages imposed on vicariously liable employer to exact amount that could be recovered from employee ensures that employee is not required to reimburse employer for more than employee's own liability].)

In *Flores v. Natividad Med. Center* (1987) 192 C.A.3d 1106, 238 C.R. 24, the court held that C.C. 3333.2 did not

apply to a prisoner's action against the state under *Govt.C. 845.6* for failure to summon medical assistance (see *supra*, §295).

(a) Although the failure to summon medical assistance could have established professional negligence on the part of the state's doctors, this does not change the true nature of the action against the State into one for professional negligence. (*192 C.A.3d 1116.*)

(b) C.C. 3333.2 applies to actions against a "health care provider," which is defined to include the provider's *legal representatives*. The purpose of this provision was to extend the protections of the statute to the heirs of a physician in an action against his or her estate, not to make the state the legal representative of its employees. (*192 C.A.3d 1116*, footnote 3.)

(c) Even if plaintiff's complaint were construed to be based, in the alternative, on negligence, the holding of *Waters v. Bourhis* (1985) 40 C.3d 424, 220 C.R. 666, 709 P.2d 469, *supra*, §944, that the limitations of MICRA do not apply where recovery might be based on a non-MICRA theory, would preclude application of C.C. 3333.2 in this case. (*192 C.A.3d 1115.*)

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bb. Constitutionality.

6 *Witkin Sum. Cal. Law Torts* § 959

[§ 959] Constitutionality.

Fein v. Permanente Med. Group (1985) 38 C.3d 137, 211 C.R. 368, 695 P.2d 665, upheld the constitutionality of C.C. 3333.2 (supra, §958) on reasoning similar to that set forth in the other cases dealing with the constitutionality of MICRA provisions (supra, §§941, 943, 957).

(a) *No violation of due process.*

(1) A plaintiff has no vested property right in a particular measure of damages. (38 C.3d 157.) Although C.C. 3333.2 differs from the periodic payment provision in that it places a dollar limit on the amount of damages, this does not alter the due process standard of review: The Legislature has broad control over the *measure* as well as the *timing* of damages. (38 C.3d 158.)

(2) The statute is rationally related to the legitimate state interest in reducing the costs of malpractice defendants and their insurers. (38 C.3d 158, 159.) Although the statute will result in recovery of a lower judgment than before its enactment, the Legislature placed no limits on the right to recover for all of the economic, pecuniary damages, and allowed a recovery of up to \$ 250,000 for the noneconomic damages. (38 C.3d 159.) Although the general propriety of noneconomic damages is "firmly imbedded in our common law jurisprudence," no California case has "suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision." (38 C.3d 159.)

(b) *No denial of equal protection.*

(1) The contention that the statute impermissibly discriminates between medical malpractice victims and other tort victims has previously been answered (see supra, §§941, 943, 957). (38 C.3d 162.)

(2) The contention that it improperly discriminates within the class of medical malpractice victims by denying complete recovery only to those plaintiffs with noneconomic damages exceeding \$ 250,000 is equally unavailing. "The

equal protection clause certainly does not require the Legislature to limit a victim's recovery for out-of-pocket medical expenses or lost earnings simply because it has found it appropriate to place some limit on damages for pain and suffering and similar noneconomic losses." (38 C.3d 162.)

(3) The assertion that the Legislature could have realized its hoped-for cost savings by mandating a fixed-percentage reduction of all noneconomic damage awards does not constitute a constitutional objection. The Legislature could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates, and that a fixed limit would promote settlements by eliminating the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble. Or the Legislature simply may have felt that it was fairer to reduce only the very large noneconomic damage awards rather than to diminish the more modest recoveries in the great bulk of cases. (38 C.3d 163.) (See 29 West L.A. L. Rev. 357 [MICRA cap on noneconomic damages as equal protection violation].)

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cc. Comparative Negligence.

6 *Witkin Sum. Cal. Law Torts* § 960

[§ 960] Comparative Negligence.

In *McAdory v. Rogers* (1989) 215 C.A.3d 1273, 264 C.R. 71, the jury found that plaintiff suffered noneconomic damages of \$ 370,000 and economic damages of \$ 30,000, and that she was 22% comparatively negligent. The trial judge reduced the \$ 370,000 to the MICRA limit of \$ 250,000, added the \$ 30,000 to make a total of \$ 280,000, and then reduced it by \$ 61,000 (representing the 22% comparative negligence), leaving a net judgment of \$ 218,400. *Held*, reversed with directions to award plaintiff the full limit of \$ 250,000 in noneconomic damages. The reduction for comparative fault should have been made before applying the limits on C.C. 3333.2, *not after*. (215 C.A.3d 1276, 1277; see *Atkins v. Strayhorn* (1990) 223 C.A.3d 1380, 1392, 1393, 273 C.R. 231 [following *McAdory*]; BAJI, No. 16.01.)

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See *Francies v. Kapla* (2005) 127 C.A.4th 1381, 1386, 26 C.R.3d 501 [plaintiff's one-third fault was to be deducted from total amount of noneconomic damages before applying MICRA limit; following *McAdory v. Rogers* (1989) 215 C.A.3d 1273, 264 C.R. 71, text, p. 208].



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 - dd. Action by Spouse for Loss of Consortium.

6 *Witkin Sum. Cal. Law Torts* § 961

[§ 961] Action by Spouse for Loss of Consortium.

In *Atkins v. Strayhorn* (1990) 223 C.A.3d 1380, 273 C.R. 231, judgment was awarded to the plaintiff husband for his injuries and to the plaintiff wife for loss of consortium. Defendant doctor contended that a single \$ 250,000 limit should have been applied to this single injury-causing act of professional negligence. In rejecting this contention, the court pointed out that, although joinder in one action is the preferred method for asserting a claim for loss of consortium, the action can be maintained independently of the action by the physically injured spouse (see *infra*, §1679); and that, if the wife had brought a separate action, there would be no doubt of her entitlement to a separate \$ 250,000 limit. "Where, as here, a claim for loss of consortium is joined with a spouse's claim for physical injuries in an action for medical malpractice, each spouse is entitled to recover up to \$ 250,000 for his or her separate noneconomic losses." (223 C.A.3d 1394.)

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6 *Witkin Sum. Cal. Law Torts* § 962

[§ 962] Action for Equitable Indemnity.

In *Western Steamship Lines v. San Pedro Peninsula Hosp.* (1994) 8 C.4th 100, 32 C.R.2d 263, 876 P.2d 1062, a steamship company settled an action brought against it under federal maritime law by an employee who had been attended for several days at sea by the company's medical staff and then suffered irreversible brain damage after being rushed to a hospital on land. The steamship company brought an action seeking indemnification from the hospital and the doctor who had treated the employee there. Before trial, the doctor settled, and the jury fixed the relative fault of the doctor at 50%, the hospital at 30%, and the steamship company at 20%. The trial judge determined that MICRA did not apply, and entered judgment against the hospital for \$ 1.8 million (30% of the \$ 6 million paid by the steamship company to settle the underlying action). The Court of Appeal affirmed. *Held*, reversed.

(a) C.C. 3333.2 limits the recovery of noneconomic damages by an injured party against a health care provider to \$ 250,000, and a health care provider may invoke this limit in an action for partial equitable indemnity based on professional negligence. To the extent the statute precludes recovery for noneconomic damages against health care providers in excess of \$ 250,000, it concomitantly limits their joint liability irrespective of proportionate fault. Concurrent tortfeasors therefore have no right of indemnification beyond that amount. (8 C.4th 111, 116.)

(b) Application of the statute in this case neither contravenes nor implicates the Supremacy Clause. Allowing the hospital to invoke C.C. 3333.2 does not impair the company's rights or interests under federal maritime law; "it simply leaves one concurrent tortfeasor to pay more of the loss than its proportionate fault." (8 C.4th 117, footnote 13.)

(c) The hospital was not a party to the underlying action, and the record does not show that it received notice of the proposed settlement. Nevertheless, the trial judge accepted the settlement amount as a reasonable basis for fixing liability. On remand, plaintiff must carry the burden of proving the amount of the employee's damages, including an allocation of economic and noneconomic loss. (8 C.4th 118.) (See 22 *Pepperdine L. Rev.* 1308 [*Western Steamship Lines*].)

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6 *Witkin Sum. Cal. Law Torts* § 963

[§ 963] Action Under Federal Patient-Dumping Statute.

In *Barris v. Los Angeles* (1999) 20 C.4th 101, 83 C.R.2d 145, 972 P.2d 966, plaintiff sued defendant county under the Emergency Medical Treatment and Active Labor Act (EMTALA) (42 U.S.C., §1395dd), a federal statute enacted to prevent "patient dumping." The jury returned a special verdict for plaintiff after finding that a county hospital had failed to stabilize the emergency medical condition of plaintiff's infant daughter before transferring her to another hospital, where she died. The trial judge reduced the jury's \$ 1.35 million noneconomic damages award to \$ 250,000, pursuant to the MICRA cap on noneconomic damages in actions "based upon professional negligence." *Held*, affirmed. The damages cap of C.C. 3333.2 applied, because plaintiff's statutory claim was based on professional negligence.

(a) EMTALA expressly incorporates state substantive limits on "damages available for personal injury" (see 42 U.S.C., §1395dd(d)(2)(A)). Congress' choice of the term "personal injury" was intended to be inclusive, i.e., to incorporate not only any general provisions for personal injury damages, but also any specific provisions, such as limits applicable to malpractice damages. Congress was not required to refer specifically to malpractice damages caps or limitations on noneconomic damages, or to use other explicitly limiting language in order to incorporate these limits. (20 C.4th 112.)

(b) The court's task in determining whether the MICRA cap applies to a particular kind of EMTALA claim, such as a claim for failure to stabilize, properly involves examining the legal theory underlying the particular claim and the nature of the conduct challenged to determine whether, under California law, it would constitute professional negligence subject to C.C. 3333.2. Here, MICRA applies. (20 C.4th 113.) Professional negligence, for purposes of California law, constitutes medical treatment falling below the professional standard of care. Although not identical to a state malpractice claim because it includes additional requirements, an EMTALA claim for failure to stabilize is based on professional negligence. A plaintiff must prove that the hospital did not, within its available staff and facilities, provide a patient known to be suffering from an emergency medical condition with medical treatment necessary to assure, within reasonable medical probability, that no deterioration of the condition would likely occur. The standard of "reasonable medical probability" is an objective one, inextricably interwoven with the professional standard for rendering medical treatment. (20 C.4th 114.)

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6 Witkin Sum. Cal. Law Torts § 964

[§ 964] Periodic Payments.

In *Salgado v. Los Angeles* (1998) 19 C.4th 629, 80 C.R.2d 46, 967 P.2d 585, a medical malpractice case, plaintiff sought both economic and noneconomic damages, i.e., recovery for medical costs and for pain and suffering. The jury was instructed that there was no definite standard or method for determining noneconomic damages. They were also charged that they were to arrive at the present cash value for economic damages but were not informed that they were to determine the present cash value of noneconomic damages. For plaintiff's noneconomic injuries, the jury awarded \$ 10,000 for past and \$ 550,000 for future pain and suffering. The trial court applied the MICRA statutory cap of \$ 250,000 and, subtracting the \$ 10,000 award, reduced the award for future pain and suffering to \$ 240,000. On motion by defendant, it ordered the \$ 240,000 to be paid in periodic installments over the course of plaintiff's life expectancy of 66.8 years, funded by a \$ 61,785 annuity purchased by defendant. The Court of Appeal generally affirmed. *Held*, reversed.

(a) This matter involves the application of two provisions of MICRA. C.C.P. 667.7 allows the court, at the request of either party, to order that an award for future damages exceeding \$ 50,000 in an action against a health care provider be paid on a periodic basis rather than in a lump sum. C.C. 3333.2 places a cap of \$ 250,000 on the liability of a health care provider in an action based on professional negligence. (19 C.4th 638.)

(b) The "present value rule"--that future damages must be reduced to the present value if awarded in a lump sum--does not apply to pain and suffering damages. A jury award for future pain and suffering has generally been regarded as the jury's rough estimate of the amount of money paid at the time of judgment that would compensate the plaintiff for all future pain and suffering, rather than as an amount, like future lost earnings or other future economic loss, that should be discounted to present value. It follows, in the absence of any legislative history to the contrary, that when the Legislature capped medical malpractice awards at \$ 250,000, it meant the limit to apply to a lump sum paid at the time of the judgment, or the present value of periodic future payments, and not to the gross sum of all of these future payments that would be funded by an annuity in a smaller amount. The record in the present case indicates that the jury calculated the value of noneconomic losses in current dollars; they were not instructed to discount the award or told that the award might be disbursed in periodic payments. Thus, plaintiff was entitled to the equivalent of a \$ 240,000 lump

sum as of the date of judgment, not a total of \$ 240,000 over the course of his lifetime. (19 C.4th 643.)

(c) "[W]hen future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (19 C.4th 646.) (See BAJI, No. 14.13 [measure of damages for pain and suffering from medical malpractice]; BAJI, No. 16.01 [special verdict in medical malpractice case]; CACI, Nos. 3905A and VF-500 [same].)

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6 *Witkin Sum. Cal. Law Torts* § 965

[§ 965] Intentional Torts.

In *Perry v. Shaw* (2001) 88 C.A.4th 658, 106 C.R.2d 70, following a substantial loss of weight, plaintiff asked defendant doctor to surgically remove excess skin. Various types of breast enlargement and lifting were also discussed, but, four times, plaintiff declined to undergo these procedures. Plaintiff finally signed a form that included consent to breast lifting, but only after she was medicated, taken to the operating room, and reassured by defendant that he would not perform breast surgery. Nevertheless, when plaintiff awoke from the skin removal surgery, she found that defendant had augmented her breasts from a 34B to a 40DD. Plaintiff sued, alleging both negligence and battery, and obtained an award of \$ 1,030,000. *Held*, affirmed; C.C. 3333.2, limiting recovery for noneconomic losses to \$ 250,000, does not apply to intentional torts.

(a) When a doctor obtains consent for one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, a battery has occurred. However, if an undisclosed, but known-to-be-possible complication results that requires deviation from the treatment consented to, the authorities are divided. The prevailing view is that the resulting action is one for negligence. In the present case, however, it is clear that defendant performed a battery. (88 C.A.4th 663, citing *Cobbs v. Grant* (1972) 8 C.3d 229, 104 C.R. 505, 502 P.2d 1, *supra*, §397.)

(b) Based on the legislative history and slight variations in language, courts have held that some provisions of MICRA apply to intentional torts and some do not. For example, *Noble v. Superior Court* (1987) 191 C.A.3d 1189, 237 C.R. 38, 3 Cal. Proc. (4th), Actions, §656, held that C.C.P. 364 applies only to causes of action based on negligence, but *Herrera v. Superior Court* (1984) 158 C.A.3d 255, 204 C.R. 553, *supra*, §951, concluded that C.C.P. 1295 encompasses all theories that might be included in a medical malpractice action, including intentional torts. (88 C.A.4th 664.)

(c) Although the cap on noneconomic damages, which is an integral part of MICRA, could arguably be construed broadly in order to effectuate the Act's purpose of controlling the size of medical malpractice awards, C.C. 3333.2 states that the cap applies to actions based on "professional negligence," and there is nothing in the legislative history of MICRA generally or C.C. 3333.2 specifically suggesting that the Legislature intended to extend the \$ 250,000

limitation to intentional torts. In fact, *Cobbs* was decided 3 years before the enactment of MICRA, and the Legislature thus knew, when it defined "professional negligence," that there existed a species of battery that the California Supreme Court had held was not negligence. Given the draconian nature of C.C. 3333.2, it must be narrowly construed. (88 C.A.4th 668.)

(d) Defendant contended that he was entitled to an allocation of the noneconomic damages between negligence and battery. This contention is without merit. *Waters v. Bourhis* (1985) 40 C.3d 424, 220 C.R. 666, 709 P.2d 469, supra, §944, supports the rule that when a plaintiff knowingly chooses to proceed on both a non-MICRA and a MICRA cause of action, and obtains a recovery that may be based on a non-MICRA theory, the limitations of the MICRA statutes do not apply. This rule is applicable in the present case. (88 C.A.4th 669.)

(e) Defendant further contended that limiting the cap on noneconomic damages to negligence cases would defeat MICRA's policy of cost containment. However, in the 26 years since MICRA was enacted, this is the first time that this issue has reached the appellate level. "If the floodgates are there, they are holding back droplets, not a deluge." (88 C.A.4th 671.)

SUPPLEMENT: [This section is current through the latest supplement]
Noble case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §725.



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aa. Authorization.

6 Witkin Sum. Cal. Law Torts § 966

[§ 966] Authorization.

(1) *In General.* The court, on request of either party, must order periodic payments for future damages when the damages equal or exceed \$ 50,000. (C.C.P. 667.7(a).) (See 7 *Pacific L. J.* 548.) "Future damages" include damages for future medical treatment, care, or custody, loss of future earnings, loss of bodily function, and future pain and suffering. (C.C.P. 667.7(e)(1).) "Periodic payments" means payment of money or delivery of property "at regular intervals." (C.C.P. 667.7(e)(2).) (On meaning of total value of payments for purpose of computing contingent fees, see *Schneider v. Kaiser Foundation Hosp.* (1989) 215 C.A.3d 1311, 1317, 264 C.R. 227, 1 Cal. Proc. (4th), Attorneys, §213; for rejection of award of interest on periodic payments, see *Schiernbeck v. Haight* (1992) 7 C.A.4th 869, 9 C.R.2d 716, infra, §969; on use of gross award in fashioning periodic payments and the duration of these payments, see *Holt v. Regents of Univ. of Calif.* (1999) 73 C.A.4th 871, 876, 881, 86 C.R.2d 752; on propriety of crediting bulk of settlement to past lost wages and past expenses, rather than to apportioning it between past and future expenses, see *Deocampo v. Ahn* (2002) 101 C.A.4th 758, 771, 125 C.R.2d 79, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §81.)

The statute is mandatory not discretionary. (*Fein v. Permanente Med. Group* (1985) 38 C.3d 137, 211 C.R. 368, 695 P.2d 665 (supra, §957.)) (On rejection of constitutional challenges to C.C.P. 667.7, see *American Bank & Trust Co. v. Community Hosp.* (1984) 36 C.3d 359, 204 C.R. 671, 683 P.2d 670, supra, §941.)

(2) *Earnings During Lost Years.* In *Hurlbut v. Sonora Community Hosp.* (1989) 207 C.A.3d 388, 254 C.R. 840, involving brain injury to plaintiff child resulting from defendant hospital's failure to perform a timely cesarean section, the jury returned a special verdict for plaintiff for \$ 350,000 for loss of future earnings. Defendant's request that the judgment provide for monthly payments of \$ 36,892 commencing at age 18 and payable through plaintiff's life expectancy of 27.5 years was denied. *Held*, this was correct procedure in view of defendant's failure to propose sufficient special findings.

(a) Although C.C.P. 667.7 ordinarily requires the trial judge, when requested, to order periodic payment of an award for loss of future earnings, *Fein* recognized a limited exception for an award for loss of earnings during a plaintiff's "lost years," i.e., the time by which his life expectancy was diminished by the defendant's negligence. (207

C.A.3d 405.) Only that portion of such an award that would likely be spent on the plaintiff's dependents is subject to periodic payment, and the defendant has the burden of establishing this portion. (*207 C.A.3d 406.*)

(b) Here, plaintiff was entitled to lost earnings resulting from disability during her lifetime, i.e., from age 18 through age 27.5, as well as lost years damages, but only the portion of the award stemming from disability is subject to periodic payment. However, defendant, although obtaining a special verdict as to the amount of lost future earnings, neither presented evidence nor sought special findings on apportionment of those earnings. And it is impossible to determine whether the jury awarded damages for losses during plaintiff's shortened life expectancy only, or for the entire period of her normal expected work life. (*207 C.A.3d 406.*)

(c) Trial judges should permit extensive use of the special verdict procedure so that the individual components of future damages can be ascertained and the periodic payment schedule knowledgeably established. (*207 C.A.3d 407.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Schneider case:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §186.

Deocampo case:

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §89.



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bb. Purpose.

6 *Witkin Sum. Cal. Law Torts* § 967

[§ 967] Purpose.

"It is the intent of the Legislature in enacting this section to authorize the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the Legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at some future time which might alter the specifications of the original judgment." (*C.C.P.* 667.7(f).)

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cc. Procedure.

6 Witkin Sum. Cal. Law Torts § 968

[§ 968] Procedure.

(1) *In General.* A request for periodic payments must be made prior to entry of judgment. (*Craven v. Crout* (1985) 163 C.A.3d 779, 784, 209 C.R. 649.) After a timely request, the court must make a specific finding of the dollar amount of periodic payments that will compensate for future damages, and, if the defendant is not adequately insured, the court must require the posting of adequate security as a condition to the payments. (C.C.P. 667.7(a).)

The judgment must specify the recipient or recipients, the dollar amount, the interval between payments, and the number or period of payments. Payments may be modified only on the death of the judgment creditor. (C.C.P. 667.7(b)(1).) But in this event, payments must continue to those to whom the judgment creditor owed a duty of support immediately prior to his or her death. (C.C.P. 667.7(c).)

The Insurance Code specifies certain provisions that may not be included in an agreement to transfer periodic payment rights of the plaintiff. Inclusion of a prohibited provision makes the agreement void and unenforceable, and these requirements may not be waived. (See *Ins.C.* 10134(i), 10134(o), 10138; on structured settlements, see 7 *Cal. Proc.* (4th), *Judgment*, §31.)

In *Hrimnak v. Watkins* (1995) 38 C.A.4th 964, 45 C.R.2d 514, defendant doctor failed to timely diagnose and treat plaintiff, then 10 months old, for meningitis. The jury, by a special verdict, awarded plaintiff damages that included future damages over \$ 50,000. Defendant moved to schedule periodic payments under C.C.P. 667.7. The trial judge ordered most of the judgment paid over 15 years annually "on [a certain date] commencing in January 15, 1994 ... including interest at the legal rate [10 percent] until the 15th year in which all remaining sums ... shall be paid in full." *Held*, reversed in part; in applying C.C.P. 667.7, the trial judge made the following errors:

(a) The trial judge failed to specify the amount of the periodic payments. C.C.P. 667.7 specifically requires that "the dollar amount of the payments" be specified. (38 C.A.4th 974.)

(b) The trial judge erred by periodizing the present value of future economic damages instead of their gross amount.

If the present value award is periodized, a plaintiff may not be fully compensated for future losses. In effect, the judgment will be discounted twice: first, by reducing the gross amount to present value, and second, by deferring payment. (38 C.A.4th 974.)

(c) The trial judge erred in awarding interest at the legal rate on the future damages. Through this award of interest, the trial judge tried to counteract the double discount factor. The proper approach, however, is for the jury to determine the gross amount and the judge to determine a periodic payment schedule for that amount. "This approach more accurately reflects future damages, is more in tune with the respective roles for the jury and the court in implementing section 667.7, and does not implicate the problem of interest being awarded on periodic payments that are not yet due." (38 C.A.4th 974.)

(d) In structuring a periodic payment schedule, a trial judge is guided by the evidence of future damages introduced at trial. The basic goal is to match losses with compensation. However, by ordering annual installments for 15 years, beginning in 1994, the trial judge ignored the fact that plaintiff was just 4 years old at the time of trial in 1993. In other words, she would be just starting her working life when her periodic payments would end. (38 C.A.4th 975, citing *American Bank & Trust Co. v. Community Hosp.* (1984) 36 C.3d 359, 204 C.R. 671, 683 P.2d 670, supra, §941.)

(e) The trial judge also did not fairly correlate the evidence of plaintiff's future economic needs with their periodic payment. The 15-year periodic payment schedule did not correlate these future economic needs with the evidence of when they would arise. Although a precise match between future losses and compensation is not required, a periodic payment schedule must, nevertheless, have evidence to support it. (38 C.A.4th 976, citing *American Bank & Trust Co.*) (See *Salgado v. Los Angeles* (1998) 19 C.4th 629, 643, 80 C.R.2d 46, 967 P.2d 585 [MICRA limit on noneconomic damages applies to present value of periodic payments, not to gross sum of those payments].)

(2) *Period Less Than Plaintiff's Life Expectancy.* In *Atkins v. Strayhorn* (1990) 223 C.A.3d 1380, 273 C.R. 231, the jury found plaintiff's life expectancy to be 6 years, and defendant doctor argued that the payments should be uniform over a 6-year period. Instead, the judge ordered payments over 4 years, "implicitly finding" that plaintiff's anticipated expenses and losses in the future would be incurred in a shorter period of time than his projected life expectancy. *Held*, this determination was a proper exercise of discretion. "Nowhere in the statutory scheme or legislative history is the court's periodic payment schedule necessarily dependent on, nor must it directly correspond to, a plaintiff's life expectancy. Instead, life expectancy is one of several factors for the court to consider in structuring a periodic payment schedule 'for whatever period is necessary.' ... The fact periodic payments may cease before a plaintiff's death does not defeat the statutory purposes of providing sufficient compensation to meet the plaintiff's needs and preventing a windfall in the event of the plaintiff's early death." (223 C.A.3d 1397.)

(3) *Failure To Make Payments.* If the court finds a "continuing pattern" of failure to make payments, it must find the judgment debtor in contempt, and order payment of all damages caused by the failure to make payments, including costs and attorneys' fees. (C.C.P. 667.7(b)(2).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Agreements to transfer periodic payment rights: See 27 A.L.R.6th 323 [construction and application of state statutes regulating transfer of structured settlement payment rights].

Structured settlements:

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §31.



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 dd. No Interest on Periodic Payments.

6 *Witkin Sum. Cal. Law Torts* § 969

[§ 969] No Interest on Periodic Payments.

In *Schiernbeck v. Haight* (1992) 7 C.A.4th 869, 9 C.R.2d 716, plaintiff brought a malpractice action against defendant doctor and obtained a verdict that included \$ 178,000 for future economic damages and \$ 100,000 for future noneconomic damages. On defendant's motion under C.C.P. 667.7, the trial judge ordered that a lump sum payment of \$ 50,000, to be taken equally from both future economic damages and future noneconomic damages, be paid within 30 days. The balance of the future economic damages (\$ 153,000) was to be paid in equal monthly installments over 16 years, and the balance of the future noneconomic damages (\$ 75,000) was to be paid in equal annual installments over 10 years. On the assumption that the verdict reflected an award of future damages in present value terms, the trial judge ordered that the periodic payments bear interest at 10% annually. *Held*, judgment modified to strike the award of interest and, as modified, affirmed.

(a) *Interest is not constitutionally mandated.* Cal. Const., Art. XV, §1, specifying the rate of interest on judgments (7 Cal. Proc. (4th), Judgment, §273), does not apply to the question presented here, i.e., *when*, instead of *whether*, interest should accrue. "The California Constitution does not say interest must accrue before the judgment or any part of it is due. Where a party will suffer no loss until a future date, constitutional considerations do not require interest to accrue on such sum *before* the damages are sustained, even though the party may have a judgment to enforce the future loss when and if the installments due under the judgment are not timely paid. We therefore hold the interest award here cannot be supported on the basis of" Cal. Const., Art. XV, §1. (7 C.A.4th 873.)

(b) *No interest on payments for future losses not reduced to present value.* An unpaid balance reflecting future loss that has not been reduced to present cash value should not bear interest. If the future damages provision of the award is not paid when judgment is entered, the plaintiff suffers no detriment, because the injury for which the payment is intended to compensate has not yet occurred. In other words, a periodic payment due on some future date is not unpaid until that date. Hence, interest, which is only awarded to compensate a *delay* in payment, is inappropriate, because compensation for future needs involves no delay. Although there is considerable appeal to the argument that interest is proper where the award for future damages has been reduced to present value, there is no need to address this matter, because the verdict here contained no reduction. (7 C.A.4th 874.)

(c) *Award for future economic damages was not reduced to present value.* Plaintiff produced three witnesses to support his future economic damage claim, but none of them indicated that he was calculating damages in present value terms. Without this evidence, there was no basis for the trial judge's conclusion that the future economic damages award had been reduced to present value. (7 C.A.4th 875.) Plaintiff argued that, based on the ambiguity of the verdict and the record in the case, the trial judge correctly interpreted the verdict in his favor. This position is without merit. Although, with respect to future economic losses, the trial judge instructed the jury to award the present cash value of future medical expenses and of lost earning capacity, he did not, based on agreement of counsel for both parties, give the instruction (BAJI, No. 14.70) explaining the meaning of "present cash value." Furthermore, there was also no evidence on how to determine the present value of future loss, such as evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. (7 C.A.4th 876.) And, except for a brief ambiguous reference by plaintiff's attorney, the present value concept was not presented in either counsel's closing argument. Under these circumstances, the jury would have been forced to engage in sheer speculation in determining the present sum of money that would pay to plaintiff the equivalent of his future economic loss. (7 C.A.4th 877.)

(d) *No waiver of right to complain about trial judge's interpretation of verdict.*

(1) Plaintiff argued that defendant, as the drafter of the special verdict form, waived his right to complain about the trial judge's interpretation of the verdict in present value terms. This argument was based on the contract principle that ambiguities are to be resolved against the drafting party. However, the rule is inapplicable to the preparation of a special verdict form where, as here, the form was prepared under the trial judge's supervision, each party had equal power to object to any portion of the form, and the trial judge specifically approved the form before he submitted it to the jury. (7 C.A.4th 878.)

(2) Defendant did not waive his right to object to the trial judge's interpretation by failing to submit present value instructions or evidence. When a party requests periodic future payments under C.C.P. 667.7, the trial judge must fashion the payments based on the *gross* amount of future damages. (7 C.A.4th 878, citing *Gorman v. Leftwich* (1990) 218 C.A.3d 141, 266 C.R. 671, 7 Cal. Proc. (4th), Trial, §353.) "Thus, where as here, the evidence will probably result in a verdict of at least \$ 50,000 in future damages, the defendant has no obligation to present evidence, request instructions, or submit a special verdict form regarding present value." (7 C.A.4th 878.) And no such duty is imposed by *Hurlbut v. Sonora Community Hosp.* (1989) 207 C.A.3d 388, 254 C.R. 840, supra, §966. That decision, which involved the defendant's failure to request special findings to clarify which part of lost future earnings was based on reduced life expectancy and hence was not subject to periodic payments, is not applicable to the present case, which involves no allegations of a shortened life span. (7 C.A.4th 878.)

(3) There is also no merit to plaintiff's contention that defendant's failure to seek clarification of the verdict before the jury was dismissed constituted a waiver. A party adversely affected by an ambiguous verdict waives the right to complain only where the failure to object is designed to reap a technical advantage or engage in a litigious strategy. (7 C.A.4th 879, citing *Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 C.2d 452, 459, 72 C.R. 217, 445 P.2d 881, 7 Cal. Proc. (4th), Trial, §379.) Here, given the lack of evidence and instructions on the subject of present value, defendant could not have known that the verdict was ambiguous at the time that it was rendered. It was only after plaintiff began arguing that the verdict was stated in present value terms that the issue arose. (7 C.A.4th 879.)

(e) *No interest on future noneconomic damages.*

(1) The rationale for denying interest on periodic payments of future economic awards does not apply where the jury awards future noneconomic damages capped at \$ 250,000 under C.C. 3333.2 (supra, §958). If the actual amount of the damages is, for example, \$ 3 million rather than \$ 250,000, the periodic payments, which are based on the latter figure, will not compensate the plaintiff for his or her suffering. In that situation, an award of interest on the periodic payments would not overcompensate the plaintiff, because it would not represent payment for damages to be suffered in the future. (7 C.A.4th 880.)

(2) This unfairness can be reduced or possibly eliminated if the jury is not told of the \$ 250,000 ceiling for noneconomic damages. Then if the jury verdict is substantially greater than this ceiling, the trial judge can tailor the amount and timing of the periodic payments so that the compensation the plaintiff will be receiving periodically will more accurately mirror his or her pain and suffering. For example, if the jury finds that the plaintiff will suffer noneconomic damages of at least \$ 250,000 during the first year following the trial, the trial judge can periodicize the \$ 250,000 over that relatively brief period of time, thereby preventing the plaintiff from being denied compensation for noneconomic damages already incurred. (7 C.A.4th 881.)

(3) The potential unfairness resulting from the statutory ceiling on noneconomic damages does not require an award of interest in this case. After being instructed on the statutory ceiling, the jury awarded the maximum of \$ 250,000 (\$ 150,000 for past noneconomic damages and \$ 100,000 for future noneconomic damages). Although it is impossible to determine for certain whether the award for future noneconomic damages would have been greater had the jury not been so constrained, it is probable that the award would not have exceeded the \$ 150,000 requested by plaintiff's attorney, i.e., \$ 3,600 annually for his life expectancy of 50 years. However, under the 10-year payment schedule, plaintiff will receive \$ 7,500 annually (\$ 100,000 minus the lump sum payment of \$ 25,000 divided by 10), thereby recouping his loss for pain and suffering over a shorter period and in greater annual amounts than would have been the case had the jury awarded the amount of \$ 150,000. Hence, because each installment will fully compensate plaintiff for his future noneconomic damages, no unfairness resulted, and the award of interest was improper. (7 C.A.4th 881.)

SUPPLEMENT: [This section is current through the latest supplement]

Rate of interest:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §327.*Gorman case:*

Cross-Reference: 7 Cal. Proc. (5th), *Trial*, §344.

Woodcock case:

Cross-Reference: 7 Cal. Proc. (5th), *Trial*, §370.



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6 *Witkin Sum. Cal. Law Torts* § 970

[§ 970] Attorneys' Fees When Periodic Payments Are Awarded.

In *Nguyen v. Los Angeles County Harbor/UCLA Med. Center* (1995) 40 C.A.4th 1433, 48 C.R.2d 301, plaintiff's attorneys requested future damages in periodic payments under C.C.P. 667.7. The request made no mention of how attorneys' fees were to be paid from the judgment. The trial court granted this request and provided in the judgment for a cash payment for past damages plus periodic payments of future damages. The attorneys, thereafter realizing that their fees might exceed the cash payment, requested the court to determine fees under B. & P.C. 6146 (supra, §942) and amend the judgment to have defendant pay the fee award directly to the attorneys and offset it against the periodic payments. In this way, the attorneys would recover the full amount of their fees at present, instead of receiving a small percentage out of each future periodic payment to the plaintiff. *Held*, order denying attorneys' request affirmed; the trial court lacked jurisdiction to amend the periodic payments portion of the final judgment.

(a) Generally, the preferable approach when a damage award is split between a current cash payment and periodic payments of future damages is to satisfy the attorneys' fees immediately out of the cash payment. (40 C.A.4th 1444.) The plaintiff's attorney has done what he or she was retained to do once the judgment has been entered. If the fee is to be paid over time out of periodic payments, the attorney may never receive it, should the plaintiff die before the fee is recovered. Under C.C.P. 667.7, periodic payments ordinarily cease on the plaintiff's death. If the plaintiff's expected life span is cut short, the tortfeasor whose negligence was responsible for the plaintiff's injury receives a windfall at the expense of the attorney whose labor produced the judgment. This was clearly not the intent of the Legislature in enacting C.C.P. 667.7. (40 C.A.4th 1445.)

(b) Situations may occur in which it would be contrary to the client's best interests to allow full recovery of attorneys' fees out of the cash payment, e.g., where the plaintiff has fallen deeply in debt due to substantial medical bills and inability to work, and payment of attorneys' fees would eat up virtually all of the cash payment under the judgment. (40 C.A.4th 1445.) In that situation, at least a portion of the attorneys' fees would have to be deferred and paid out of the future periodic payments awarded to the client. One approach that allows the full amount of attorneys' fees to be paid immediately is to reduce all or a part of the periodic payments by an amount sufficient to cover the balance of attorneys' fees and add that sum to the cash payment under the judgment. This is permissible under C.C.P. 667.7(a), which gives

the trial court authority to order future damages to be paid "in whole or in part by periodic payments." (40 C.A.4th 1446.)

(c) Under the "pay-and-recoup" plan suggested by plaintiff's attorneys, the defendant would pay the plaintiff an advance against future periodic payments in an amount sufficient to meet the plaintiff's attorneys' fees in full; the defendant would then recover this advance by reducing the future periodic payments to the plaintiff by a percentage to be determined by the court until the amount of the advance has been recouped. The first advantage to this approach is that the plaintiff's attorneys receive the full fee immediately rather than having to wait years for its payment. The second is that the tortfeasor defendant, rather than plaintiffs' attorneys, bears the risk of the plaintiff's death, at least as to the fees for the legal work that held the tortfeasor accountable. This is an appropriate allocation of risk. (40 C.A.4th 1447.)

(d) Unfortunately, plaintiffs' attorneys failed to appreciate and deal with the dilemma faced in collecting their fees at a time when they had the opportunity to do so. By requesting future damages by means of periodic payments, the attorneys are now locked into that judgment. The judgment is final, and it may not be amended to alter the provision regarding periodic payments. The time had long passed to amend the pleadings under C.C.P. 473 (5 Cal. Proc. (4th), *Pleading*, §1126 et seq.), and the modification could not be justified as the correction of a clerical error in the judgment. Furthermore, the modification would conflict with C.C.P. 667.7(f), which states that a judgment ordering periodic payments is not "subject to modification at some future time which might alter the specifications of the original judgment." (40 C.A.4th 1447.) While the judgment may be amended to reflect the *correct amount* of attorneys' fees, it may not be amended to alter the periodic payment provisions. (40 C.A.4th 1448.)

(e) Even experienced attorneys may encounter pitfalls in collecting fees in a MICRA case. Attorneys like counsel here should request the trial court to stay entry of judgment, under C.C.P. 664 (7 Cal. Proc.(4th), *Trial*, §438), until the amount and method of payment of attorneys' fees have been determined. The court can then enter judgment dividing future damages between lump sum and periodic payments as appropriate; and the plaintiff, if dissatisfied with the judgment, will have a clear path to appellate review. (40 C.A.4th 1448.) (See *Deocampo v. Ahn* (2002) 101 C.A.4th 758, 774, 125 C.R.2d 79, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §81 [trial judge did not err in refusing to use portion of periodic payments of future damages to pay plaintiff's attorney fee; following *Nguyen*].)

SUPPLEMENT: [This section is current through the latest supplement]
C.C.P. 473:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1194 et seq.

C.C.P. 664:

Cross-Reference: 7 Cal. Proc. (5th), *Trial*, §439.

Deocampo case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §89.



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1. In General.

6 Witkin Sum. Cal. Law Torts § 971

[§ 971] In General.

Negligent diagnosis and treatment, separately or in combination, are frequently the basis for malpractice suits. (See *Valdez v. Percy* (1950) 35 C.2d 338, 341, 217 P.2d 422 [improper diagnosis resulted in unnecessary surgery]; *Tresemmer v. Barke* (1978) 86 C.A.3d 656, 669, 672, 150 C.R. 384 [duty to warn of dangers of Dalkon Shield]; *Brownfield v. Daniel Freeman Marina Hosp.* (1989) 208 C.A.3d 405, 414, 256 C.R. 240 [failure to offer rape victim information about morning-after pill]; *James v. St. Elizabeth Community Hosp.* (1994) 30 C.A.4th 73, 76, 35 C.R.2d 372, 3 Cal. Evidence (4th), Presentation at Trial, §193 [failure to treat fractured finger]; *Espinosa v. Little Co. of Mary Hosp.* (1995) 31 C.A.4th 1304, 1312, 37 C.R.2d 541 [negligent treatment of plaintiff's mother during pregnancy and delivery]; *Klein v. Children's Hosp. Med. Center* (1996) 46 C.A.4th 889, 897, 54 C.R.2d 34, infra, §1055 [misdiagnosis of cancer]; 11 Cal. Western L. Rev. 347 [sale and insertion of Dalkon Shield]; 24 Stanf. L. Rev. 439 [blood transfusions causing hepatitis]; 51 Stanf. L. Rev. 1703 [reconciling religious health care providers' beliefs and patients' rights]; 7 U.C. Davis L. Rev. 56 [standard of care in administering nontraditional psychotherapy]; 8 U.S.F. L. Rev. 283 [liability of physician and prosthetist for injury due to malfitting prosthetic appliances]; 8 U.S.F. L. Rev. 405 [liability of psychotherapist].)

West's Key Number Digest, Physicians and Surgeons k.19

SUPPLEMENT: [This section is current through the latest supplement]

See *Hahn v. Mirda* (2007) 147 C.A.4th 740, 746, 54 C.R.3d 527 [complaint stated cause of action for negligence against physicians who, after performing radical mastectomy, learned from postoperative pathology report that patient had never had breast cancer, but did not so inform her].



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2. Diagnosis of Battered Child Syndrome.

6 Witkin Sum. Cal. Law Torts § 972

[§ 972] Diagnosis of Battered Child Syndrome.

In *Landeros v. Flood* (1976) 17 C.3d 399, 131 C.R. 69, 551 P.2d 389, plaintiff, a minor, brought this action in 1971 against F, a doctor, and S Hospital, for damages for failure to diagnose the condition of battered child syndrome and take appropriate action. The complaint alleged that plaintiff had been badly beaten by her mother and her mother's common law husband, who then took her to the hospital; Dr. F negligently failed to take X-rays that would have revealed a skull fracture and the true condition, and negligently released her to the mother and husband who beat her again; later, she was brought to a different hospital where her condition was diagnosed and a report made to the authorities; and thereafter, the mother and husband were convicted of child abuse, and plaintiff was placed with foster parents. *Held*, judgment for defendants on demurrer reversed.

(a) *Standard of care.* Medical and legal literature in recent years has recognized the battered child syndrome (injuries not inflicted by accidental means) as one that can be medically diagnosed. However, the court cannot declare, as a matter of law, that a reasonably prudent physician in 1971 would have made this diagnosis. The question is one of fact to be decided on the basis of expert testimony, and the trial court erred in concluding as a matter of law that the standard of professional care did not include this diagnostic and treatment procedure. (17 C.3d 409, 410.)

(b) *Foreseeable intervening cause.* The continued beating of plaintiff after her original release from the hospital was an intervening act. It would not be a superseding cause if it was reasonably foreseeable. (17 C.3d 411; see *infra*, §1215.) But foreseeability, both as to duty and causation, is generally a question of fact, and the trial judge erred in concluding as a matter of law that the further beating was not foreseeable. Plaintiff is entitled to prove that defendants should reasonably have foreseen that plaintiff's caretakers were likely to inflict further injuries on her. (17 C.3d 412.)

(c) *Suspected Child Abuse.* Plaintiff also pleaded a "cause of action" for failure to report suspected child abuse, as required by the Penal Code (see *supra*, §250 et seq.). The purpose of this alternative theory was to raise the presumption of negligence per se under *Ev.C.* 669 (*supra*, §871 et seq.) (17 C.3d 413.) But to rely on the statute, plaintiff must prove the state of mind of the doctor; and, although the statute is ambiguous on this, the proper construction is to resolve the ambiguity in favor of the offender and require a showing that it actually appeared to him or her that the injuries were intentionally inflicted on the child. (17 C.3d 415.) (See 73 A.L.R.4th 782 [validity and effect of state statute requiring

doctor or other person to report child abuse].)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 224, line 3 of paragraph (c), cross-reference to §250 et seq. should be to §140 et seq.



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3. Sexual Relations With Patient.

6 Witkin Sum. Cal. Law Torts § 973

[§ 973] Sexual Relations With Patient.

In *Atienza v. Taub* (1987) 194 C.A.3d 388, 239 C.R. 454, the complaint alleged that plaintiff sought treatment from defendant physician for a physical disorder, and that he initiated and maintained a sexual relationship with her during the course of treatment. *Held*, no cause of action was stated.

(a) An action for professional negligence arises out of breach of the duty of care owed to the patient within the scope of the patient-physician relationship; and the cases uphold recovery where the patient is induced to have sexual relations on the pretext that this is a necessary part of the treatment. (194 C.A.3d 393; see *supra*, §416.)

(b) Here, there was no allegation that an inducement; the only basis for the complaint was that the treatment and sexual relations took place over the same period of time. "Essentially, appellant complains that she had an unhappy affair with a man who happened to be her doctor." (194 C.A.3d 393.)

Under the rule denying recovery unless the patient is induced to have sexual relations on the pretext that the relations are a necessary part of the treatment, the term "pretext" has been defined broadly to refer to "all the surrounding circumstances that would lead a reasonable person, given his or her peculiar situation, to interpret the doctor's conduct to be a part of the treatment for the patient's particular injury or illness." Thus, the rule does not mean that the doctor must directly inform the patient that the sexual conduct is a part of the therapy. (*McNall v. Summers* (1994) 25 C.A.4th 1300, 1313, 30 C.R.2d 914 [nonsuit was improperly granted; patient testified that she thought sexual intercourse with him was part of treatment, and expert testified that patient acted under compulsion of regressive sexual transference resulting from mishandled therapy].)

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4. Delayed Diagnosis.

6 Witkin Sum. Cal. Law Torts § 974

[§ 974] Delayed Diagnosis.

In *Dumas v. Cooney* (1991) 235 C.A.3d 1593, 1 C.R.2d 584, plaintiff brought a malpractice action against defendant doctors based on their alleged failure in 1984 to discover his lung cancer. The diagnosis was not made until 1986, at which time plaintiff had the tumor and part of his right lung removed. There was a reoccurrence in 1989, and plaintiff died 6 days after the jury rendered a verdict in his favor. At trial, plaintiff's expert, after opining that plaintiff's tumor was at stage 3A in 1986 but only at stage 1 in 1984, testified that the chances for surviving disease-free for 5 years were 67% for stage 1, 33% for stage 2, and 15% for stage 3. The jury was instructed that damages for medical malpractice could be based on evidence that it was a reasonable medical probability that plaintiff would have benefited by possible cure, lengthening of life, or improved personal comfort from more prompt diagnosis or treatment. *Held*, judgment for plaintiff reversed; the instruction, which incorporated the theory of lost chance, was prejudicial error.

(a) *Reasonable probability versus lost chance.*

(1) Under the traditional rule of causation in malpractice cases, causation must be proved within a reasonable medical probability based on competent expert testimony. And malpractice as a possible cause of an injury becomes a probable cause when, in the absence of other reasonable causal explanation, it becomes more likely than not that the injury was a result of its action. (235 C.A.3d 1603.)

(2) The most fundamental argument against this traditional rule of causation is that, through negligence, a physician can reduce a patient's chances of survival from as high as 50% to, for example, 10%, and yet remain unanswerable in the law of tort. Faced with a lost chance and this traditional "all or nothing" prospect, some courts in other jurisdictions have allowed recovery by adopting a relaxed standard of causation that permits recovery when the plaintiff establishes a substantial possibility of causation. Other courts have adopted the lost chance theory. (235 C.A.3d 1604.)

(3) Under the lost chance approach, the injury to be redressed is not the plaintiff's death or failure to have a better result, but rather the loss of a *chance* at survival or better result. Where the testimony establishes a probability of a better result absent a doctor's negligence, a finding for the plaintiff is consistent with existing principles of proximate cause. On the other hand, where the evidence indicates that there is less than a probability that proper conduct by the

doctor would have produced a better result, i.e., a 50% possibility or a mere chance, there can be no recovery under the traditional approach. Nevertheless, under the lost chance theory, damages may be recovered for the loss of chance of a better result where that chance is substantial and can be identified and quantified without resort to conjecture. (235 C.A.3d 1605.)

(b) *Rejection of lost chance theory.*

(1) There are several arguments against expanding damages in medical malpractice cases to include damages for loss of chance. The lost chance theory produces more statistical errors than the traditional analysis. " 'To compare the two rules, assume a hypothetical group of 99 cancer patients, each of whom would have had a 33 1/3% chance of survival. Each received negligent medical care, and all 99 died. Traditional tort law would deny recovery in all 99 cases because each patient had less than a 5[1]% chance of recovery and the probable cause of death was the pre-existing cancer not the negligence. Statistically, had all 99 received proper treatment, 33 would have lived and 66 would have died; so the traditional rule would have statistically produced 33 errors by denying recovery to all 99. The loss of chance rule would allow all 99 patients to recover, but each would recover 33 1/3% of the normal value of the case. Again, with proper care 33 patients would have survived. Thus the 33 patients who statistically would have survived with proper care would receive only one-third of the appropriate recovery, while the 66 patients who died as a result of the pre-existing condition, not the negligence, would be overcompensated by one-third. The loss of chance rule would have produced errors in all 99 cases.' " (235 C.A.3d 1608, quoting a Maryland case.)

(2) Applying the lost chance rule in medical malpractice actions would lead to its application in actions involving other professions, including the legal profession. For example, if an unsuccessful litigant could show that there was a 40% chance of winning the case, but that his or her lawyer's negligence reduced that chance by some degree, the litigant would be able to pursue an action based on the lost chance doctrine. (235 C.A.3d 1609.)

(3) Although the lost chance approach is based on the theory that the lost chance is the *injury*, in reality it focuses on causation rather than injury and damages. A lost chance of survival or better result cannot be proved unless and until the death or adversity occurs. Otherwise, a court could be placed in a position of awarding damages with no injury, as in the case of a patient who miraculously recovers despite the negligence and unfavorable odds. Hence, the recognition of a lost chance as a cognizable injury is necessarily based on the reasoning that, but for the defendant's negligence, the plaintiff might have avoided an adverse result. And redefining lost chance as a new form of injury, as plaintiff attempted to do by placing a damage label on the instruction given here, does not diminish the fact that the theory radically alters the meaning of causation. (235 C.A.3d 1610.)

(4) *Simmons v. West Covina Med. Clinic* (1989) 212 C.A.3d 696, 260 C.R. 772, *infra*, §978, rejected the lost chance theory within the context of an action for wrongful birth and wrongful life. The reasoning of that case is equally applicable to the preexisting condition arena of medical malpractice and is adopted here. (235 C.A.3d 1608.) The debate on lost chance is a vigorous one that should be settled by the Legislature, rather than the courts. (235 C.A.3d 1611.)

(c) *Error was prejudicial.* Plaintiff argued that the lost chance instruction was not prejudicial, because the verdict in his favor was based on his expert's testimony of a 67% chance of long-term survival for a stage 1 tumor, and hence, did not implicate the lost chance concept, but rather was consistent with the traditional rule of causation. This position is without merit. Plaintiff's expert also conceded that very few lung cancer patients are diagnosed at stage 1 and testified about the less-than-even chances for a long-term survival of patients diagnosed at stages 2 and 3. Hence, the jury could have concluded that plaintiff's cancer was actually at a more advanced stage that offered a less-than-even chance of long-term survival and still found for him under the lost chance theory. Because the probable effect of the instruction was to mislead the jury, it constituted prejudicial error. (235 C.A.3d 1612.) (See *Bromme v. Pavitt* (1992) 5 C.A.4th 1487, 1506, 7 C.R.2d 608, *infra*, §1188; *Duarte v. Zachariah* (1994) 22 C.A.4th 1652, 1658, 1660, 28 C.R.2d 88; 54 A.L.R.4th 10 [loss of chance causality in medical malpractice]; 81 A.L.R.4th 485 [medical malpractice: measure and elements of damages in actions based on loss of chance].)

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5. Annotations and Practice Works.

6 *Witkin Sum. Cal. Law Torts* § 975

[§ 975] Annotations and Practice Works.

Annotations and practice works are available on almost every situation that might arise in this area of medical fault.

(1) *Pregnancy, Labor, and Childbirth*. (See 15 Proof of Facts 169 [malpractice--blood incompatibility in the newborn]; 7 Proof of Facts 2d 579 [physician's failure to diagnose pregnancy]; 1 Proof of Facts 3d 1 [physician's negligence in using oxytocin to stimulate labor]; 22 Proof of Facts 3d 1 [liability for brain-damaged infants]; 52 Am.Jur. Trials 347 [Medical Malpractice: Brain Damaged Infant]; 99 *A.L.R.2d* 1336 [pregnancy and childbirth cases]; 86 *A.L.R.4th* 126 [gynecological malpractice not involving hysterectomies or oophorectomies]; 1 *A.L.R.5th* 243 [use of drugs to stimulate labor]; 1 *A.L.R.5th* 269 [improper use of, or failure to use, anesthesia or tranquilizers, or similar drugs, during labor and delivery]; 2 *A.L.R.5th* 769 [incorrectly diagnosing existence or nature of pregnancy]; 2 *A.L.R.5th* 811 [death or injury to child caused by improper postdelivery diagnosis, care, and representations]; 3 *A.L.R.5th* 123 [failure to contact physician or keep him or her informed concerning mother's status during pregnancy, labor, and childbirth]; 3 *A.L.R.5th* 146 [death or injury to mother or child caused by inadequate attendance or monitoring of patient during and after pregnancy, labor, and delivery]; 4 *A.L.R.5th* 148 [improper choice between, or timing of, vaginal or cesarean delivery]; 4 *A.L.R.5th* 210 [improper procedures during vaginal delivery]; 6 *A.L.R.5th* 490 [improper treatment during labor]; 6 *A.L.R.5th* 534 [death or injury to mother caused by improper postdelivery diagnosis, care, and representations]; 7 *A.L.R.5th* 1 [improper diagnosis during pregnancy].)

(2) *Drugs*. (See 23 *A.L.R.3d* 1334 [mistakenly administering drug]; 36 *A.L.R.3d* 1358 [aspirin poisoning]; 1 *A.L.R.4th* 236 [liability for administering or prescribing drugs for weight control]; 9 *A.L.R.4th* 372 [liability for administering or prescribing birth control pills or devices]; 16 *A.L.R.4th* 998 [liability for causing patient to become addicted to drugs]; 1 *A.L.R.5th* 243 [use of drugs to stimulate labor]; 1 *A.L.R.5th* 269 [improper use of, or failure to use, anesthesia or tranquilizers, or similar drugs, during labor and delivery]; 47 *A.L.R.5th* 433 [malpractice in administering or prescribing drugs].)

(3) *Other Medical Conditions: Diagnosis, Treatment, and Liability*. (See 25 Proof of Facts 567 [negligent and deceptive practices--cancer]; 28 Proof of Facts 213 [negligent and deceptive practices--diabetes]; 29 Proof of Facts 305 [negligent and deceptive practices--tuberculosis]; 30 Proof of Facts 275 [negligent and deceptive practices--mental

disease]; 10 Proof of Facts 2d 265 [physician's misdiagnosis of appendicitis]; 12 Proof of Facts 2d 603 [physician's failure to X-ray]; 1 Proof of Facts 3d 691 [failure to diagnose heart attack]; 4 Proof of Facts 3d 689 [ophthalmic malpractice]; 6 Proof of Facts 3d 1 [anesthesia malpractice]; 51 Proof of Facts 3d 1 [malpractice in diagnosis of diabetes or complications of diabetes]; 58 Am.Jur. Trials 1 [litigation concerning transfusion-associated AIDS]; 68 Am.Jur. Trials 151 [cardiological malpractice]; 70 Am.Jur. Trials 101 [anesthesiology malpractice]; 54 A.L.R.2d 200 [fractures and dislocations]; 75 A.L.R.2d 814 [tuberculosis]; 76 A.L.R.2d 783 [ears]; 88 A.L.R.2d 297 [gastroscopic examination causing injury to internal organs]; 88 A.L.R.2d 309 [male urinary tract and related organs]; 94 A.L.R.2d 1006 [appendicitis]; 99 A.L.R.2d 599 [mental diseases]; 5 A.L.R.3d 916 [rectal and anal diseases]; 19 A.L.R.3d 825 [cardiovascular diseases]; 28 A.L.R.3d 1364 [tetanus]; 30 A.L.R.3d 988 [epilepsy]; 35 A.L.R.3d 349 [failure to send patient to specialist]; 45 A.L.R.3d 731 [hypodermic injections]; 51 A.L.R.3d 1273 [optometrist or optician malpractice]; 53 A.L.R.3d 1250 [liability for injuries or death resulting from physical therapy]; 58 A.L.R.3d 590 [chiropractor's liability for failure to refer patient to medical practitioner]; 79 A.L.R.3d 915 [diagnosis of cancer]; 94 A.L.R.3d 317 [electroshock treatment]; 99 A.L.R.3d 901 [liability for injury resulting from instruction as to exercise or use of injured member]; 12 A.L.R.4th 41 [duty to warn of subsequently discovered danger from treatment previously given]; 20 A.L.R.4th 136 [liability for injury or death resulting from blood transfusion]; 24 A.L.R.4th 1310 [negligence in conducting or reporting physical examination as rendering physician liable to third person]; 28 A.L.R.4th 712 [treatment of mental disorder relating to patient's criminal conviction]; 38 A.L.R.4th 900 [failure to inform patient of alternative modes of diagnosis or treatment]; 42 A.L.R.4th 543 [misrepresentation of nature and hazards of treatment]; 64 A.L.R.4th 1232 [failure to diagnose incurable disease that caused death]; 86 A.L.R.4th 18 [hysterectomies and oophorectomies]; 30 A.L.R.5th 571 [ophthalmological malpractice]; 31 A.L.R.5th 1 [negligent catheterization]; 43 A.L.R.5th 87 [improper diagnosis or treatment of diabetes]; 48 A.L.R.5th 575 [negligent diagnosis or treatment of male urinary disorders]; 51 A.L.R.5th 301 [negligent diagnosis or treatment of meningitis].)

(4) *Miscellaneous Situations*. (See 14 Proof of Facts 3d 319 [psychotherapist's sexual contact with client]; 10 A.L.R.3d 1071 [liability for examination of patient under doctor's contract with patient's employer or insurer]; 41 A.L.R.3d 1351 [duty to assist patient in dressing and undressing]; 43 A.L.R.3d 1221 [contract to achieve cure].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Drugs*. See 87 Proof of Facts 3d 1 [injuries from Vioxx]; 87 Proof of Facts 3d 119 [injuries from antidepressant medication]; 100 Proof of Facts 3d 1 [injuries from off-label use of prescription medication].

(3) *Other Medical Conditions: Diagnosis, Treatment, and Liability*. See 7 A.L.R.6th 357 [root canal procedures]; 107 Am.Jur. Trials 69 [prostate cancer malpractice].



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e. Surgery.

6 Witkin Sum. Cal. Law Torts § 976

[§ 976] Surgery.

(1) *In General.* Negligently performed surgery is another common foundation for a malpractice suit. (See *Valdez v. Percy* (1950) 35 C.2d 338, 342, 217 P.2d 422 [removal of breast as result of misdiagnosis]; *Gluckstein v. Lipsett* (1949) 93 C.A.2d 391, 396, 209 P.2d 98 [plastic surgery].)

In *Custodio v. Bauer* (1967) 251 C.A.2d 303, 59 C.R. 463, plaintiff sued three doctors for malpractice. Her complaint alleged that they recommended a sterilization operation because of her physical condition, she gave them a written agreement, they operated negligently and she became pregnant. *Held*, a cause of action was stated for negligent performance of the operation and for postoperative negligent failure to advise or prescribe for her to prevent conception. (251 C.A.2d 312.) The pleading also supported recovery on the theory of breach of contract. (251 C.A.2d 315.) Proximate cause was shown--the reasonably foreseeable sexual relations between plaintiff and her husband. (251 C.A.2d 316, citing the text.)

In *Clark v. Gibbons* (1967) 66 C.2d 399, 58 C.R. 125, 426 P.2d 525, plaintiff fractured her ankle and was operated on by Dr. G, an orthopedic surgeon, with Dr. S as anesthesiologist. She was given a spinal anesthetic because of having eaten a few hours before. Dr. G expected the operation to take 2 to 3 hours. The anesthetic selected could have been made by additions to last over 4 hours, but the anesthetic began to wear off too soon, Dr. G terminated the operation prematurely, and plaintiff suffered from permanent arthritis that concededly could have been a result of the failure to complete the operation. *Held*, independently of *res ipsa loquitur* (see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §114 et seq.), the evidence was sufficient to support the verdict for plaintiff. The court listed the possible elements of negligence as follows: (a) Dr. S, selecting an anesthetic designed to last for a time insufficient for that estimated for the operation. (b) Dr. S, administering the anesthetic without noting its progress. (c) Dr. G, failing to warn Dr. S of the need for an anesthetic sufficient for an unusually long operation. (d) Dr. G, terminating the operation with knowledge of the danger involved and without considering the possibility of extending the anesthesia. (66 C.2d 406.)

(2) *"Captain of the Ship" Doctrine.* Under the "captain of the ship" doctrine, a surgeon is responsible for the acts and omissions of persons who assist the surgeon in the operating room under his or her direction. (See *Ales v. Ryan* (1936) 8 C.2d 82, 104, 64 P.2d 409; *Ybarra v. Spangard* (1944) 25 C.2d 486, 154 P.2d 687, *infra*, §1194; *Armstrong v. Wallace* (1935) 8 C.A.2d 429, 439, 47 P.2d 740; BAJI, No. 6.06; CACI, No. 510.)

In *Thomas v. Intermedics Orthopedics* (1996) 47 C.A.4th 957, 962, 55 C.R.2d 197, the doctrine was held inapplicable to the failure of a prosthetic supplier's agent to make available the correct prosthetic during a hip replacement operation. The doctrine requires that the negligence for which the surgeon is sought to be held liable (a) occur during the surgical procedure, and (b) be by a medical professional who is actively assisting the surgeon in carrying out the operation. The doctrine has never been applied to persons other than "medical personnel lending hands-on assistance within the surgical arena during the medical procedure." (47 C.A.4th 966.) (On liability of principal for torts of agent, see 3 *Summary* (10th), *Agency and Employment*, §163 et seq.)

(3) *Annotations and Practice Works*. (See 18 Proof of Facts 187 [obstetrical malpractice]; 8 Proof of Facts 2d 145 [failure to inform patient of nature and hazards of surgery]; 8 Proof of Facts 2d 579 [surgeon's failure to exercise supervision and control over anesthetist]; 10 Proof of Facts 2d 605 [surgeon's failure to discover breakage of surgical equipment]; 11 Proof of Facts 2d 319 [negligent performance of biopsy]; 22 Proof of Facts 2d 721 [plastic surgeon's liability in cosmetic surgery cases]; 4 Proof of Facts 3d 689 [eye surgery malpractice]; 34 Proof of Facts 3d 77 [wisdom tooth extractions]; 34 Proof of Facts 3d 117 [jaw surgery by dental professional]; 40 Proof of Facts 3d 1 [unnecessary surgery--hysterectomy]; 55 Am.Jur. Trials 1 [cosmetic silicone breast implantation]; 67 Am.Jur. Trials 57 [reduction mammoplasty]; 80 Am.Jur. Trials 1 [cosmetic liposuction]; 88 Am.Jur. Trials 265 [laser eye surgery]; 5 U.S.F. L. Rev. 223 [organ transplants]; 76 A.L.R.2d 783 [ear surgery]; 94 A.L.R.2d 1006 [appendicitis]; 10 A.L.R.3d 9 [foreign object left in patient]; 14 A.L.R.3d 967 [prosthetic or other corrective devices inserted in body]; 17 A.L.R.3d 796 [heart attack during unrelated medical procedures]; 35 A.L.R.3d 1068 [doctor's liability for injury caused by hospital equipment]; 37 A.L.R.3d 464 [injury of organ other than one operated on]; 53 A.L.R.3d 142 [liability of anesthetist]; 54 A.L.R.3d 1255 [liability of physician or hospital for performance of cosmetic surgery on face]; 76 A.L.R.3d 890 [liability of physician or hospital for organ or tissue transplant]; 90 A.L.R.3d 775 [liability of anesthetist for injuries from spinal anesthetics]; 20 A.L.R.4th 1179 [instrument breaking in course of surgery or treatment]; 39 A.L.R.4th 1034 [surgery by wrong doctor]; 69 A.L.R.4th 875 [legal abortion]; 75 A.L.R.4th 710 [circumcision]; 76 A.L.R.4th 1112 [cesarean delivery]; 30 A.L.R.5th 571 [eye surgery].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Tortorella v. Castro* (2006) 140 C.A.4th 1, 11, 43 C.R.3d 853 [mere fact that unnecessary operation was performed establishes causation, because unnecessary surgery constitutes harm even if executed flawlessly]. (2) *"Captain of the Ship" Doctrine*. See *Baumgardner v. Yusuf* (2006) 144 C.A.4th 1381, 1396, 51 C.R.3d 277 [in malpractice action against surgeon arising from sponge left in patient after surgery, trial court erred by refusing to instruct jury, under "captain of the ship" doctrine, that surgeon is responsible for negligence of persons assisting, and instead instructing that surgeon is liable if surgeon has direct control over how assistants perform their duties]. (3) *Annotations and Practice Works*. See 82 Proof of Facts 3d 1 [injury from liposuction surgery]; 104 Am.Jur. Trials 103 [gastric bypass malpractice]; 106 Am.Jur. Trials 1 [vascular surgery malpractice]; 108 Am.Jur. Trials 1 [lasik eye surgery malpractice].



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1. In General.

6 Witkin Sum. Cal. Law Torts § 977

[§ 977] In General.

(1) *Wrongful Birth of Impaired Child*. Originally, courts were reluctant to recognize any cause of action for negligent birth because of the public policy extolling the sanctity of fetal life. But the recognition of the constitutional right of a person to use contraceptives or procure an abortion (see 7 *Summary* (10th), *Constitutional Law*, §560 et seq.) undermined the public policy objection, and courts today recognize an action by the parent of an impaired child against a doctor or medical laboratory for negligent failure to prevent conception or to terminate pregnancy. Typical examples of alleged negligence are unsuccessful vasectomies, sterilizations, and abortions, failure to advise the parent of the risks of bearing a deformed child, and improperly prescribed birth control drugs. (See Dobbs, *The Law of Torts* §288 et seq.; C.E.B., *Tort Damages* 2d, §5.10 et seq.; 49 *Proof of Facts* 2d 125 [drugs capable of causing birth defect]; 11 *Cal. Western L. Rev.* 136 [failure of oral contraceptives and sterilization]; 100 *Harv. L. Rev.* 2017 [case against legislative curtailment]; 17 *Hastings L. J.* 400; 36 *Loyola L.A. L. Rev.* 1677 [compensation for wrongful birth]; 18 *Stanf. L. Rev.* 530 [same]; 74 *A.L.R.4th* 798 [liability for tortiously causing another's birth].)

(2) *Wrongful Birth of Unwanted Healthy Child*. In *Stills v. Gratton* (1976) 55 C.A.3d 698, 127 C.R. 652, plaintiff, an unmarried and unemployed woman with a history of emotional problems, consulted defendant Dr. G about a suspected pregnancy. He confirmed it and performed a therapeutic abortion that was unsuccessful, and plaintiff gave birth to a healthy child. This action was brought by both the mother and the child against Dr. G and one other doctor, based on alleged negligence in performing the operation and in postoperative care. *Held*, the mother had a cause of action, and was improperly nonsuited; the child did not.

(a) The courts of some jurisdictions deny the mother's claim, assuming that the benefits of a child as a matter of law outweigh the burdens, or they limit the recovery to actual expenses and anxieties attending the unexpected pregnancy. (55 C.A.3d 707.)

(b) Other courts allow damages to the mother in accordance with ordinary tort principles; and *Custodio v. Bauer* (1967) 251 C.A.2d 303, 312, 59 C.R. 463, supra, §976, on similar facts, approves this view. (55 C.A.3d 708.)

In *Morris v. Frudenberg* (1982) 135 C.A.3d 23, 37, 185 C.R. 76, plaintiff sued defendant doctor for negligence in

performing a tubal ligation, causing plaintiff's pregnancy and eventually the delivery of a healthy daughter. Plaintiff sought damages for loss of earnings and the cost of raising the child to age 18; the jury awarded only \$ 1,708, the medical expenses in connection with the delivery. *Held* affirmed; the jury acted properly, in accordance with instructions, in taking into account the special benefits inherent in the parent-child relationship as an offset to the award of damages to plaintiff. (135 C.A.3d 37.) (See *Foy v. Greenblott* (1983) 141 C.A.3d 1, 190 C.R. 84, *infra*, §983 [no cause of action for wrongful birth where incompetent mother (conservatee) alleged only that defendants should have taken proper methods to prevent her from bearing child]; 89 A.L.R.4th 632 [recoverability of cost of raising normal healthy child born as result of physician's negligence or breach of contract or warranty].)

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2. Proximate Cause.

6 Witkin Sum. Cal. Law Torts § 978

[§ 978] Proximate Cause.

In *Simmons v. West Covina Med. Clinic* (1989) 212 C.A.3d 696, 260 C.R. 772, plaintiffs, a mother and infant child, brought this action against defendant doctor and a hospital, alleging that defendants negligently failed to provide the mother with appropriate genetic testing and counseling; that the child was born with Down's syndrome; and that, had she learned of the abnormality, the mother would have terminated the pregnancy. The mother's action was for wrongful birth, the child's was for wrongful life. (212 C.A.3d 699, footnote 1; on wrongful life actions, see *infra*, §979 et seq.) The trial judge gave summary judgment for defendants on the ground that, assuming negligence, proximate cause was not established, because the AFP test identifies only 20% of pregnant women who are at risk with respect to Down's syndrome. *Held*, affirmed.

(a) *Proximate cause was not established. Jones v. Ortho Pharmaceutical Corp.* (1985) 163 C.A.3d 396, 209 C.R. 456, *infra*, §1195, points out that there is an obvious distinction between a reasonable medical probability and a medical possibility. A possible cause only becomes probable when, "in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." (212 C.A.3d 702.) Here, the 20% chance did not establish a reasonably probable causal connection. (212 C.A.3d 702.)

(b) *Lost chance theory of recovery rejected.*

(1) A number of cases in other jurisdictions have adopted the "lost chance theory" of recovery in medical malpractice cases where the defendants' negligence deprived the plaintiffs of a less than even chance of survival. (212 C.A.3d 704.) Many of these cases rely on *Rest.2d, Torts* §323, stating that one who undertakes to render services necessary for the protection of another is liable for physical harm resulting from failure to exercise reasonable care if the failure "increases the risk of such harm." (212 C.A.3d 705.)

(2) There is, however, a fundamental distinction between negligently reducing a patient's chance of survival and negligently depriving a woman of the chance to abort a genetically defective child. "[I]n the case of a genetically deformed child, it cannot be said that the hereditary condition was caused by the medical practitioner's negligence when no degree of medical intervention would have worked a cure. And where, as here, the probability of predicting the

genetic defect is only 20 percent, we think established tort principles fairly impose liability only where there is a reasonable medical probability of predicting the outcome of the pregnancy." (212 C.A.3d 705.)

(3) To establish a more lenient standard of causation would be contrary to sound logic, legal precedent, and public policy. "It would unwisely encourage costly and unreasonable overtesting and overtreatment for defensive purposes. Physicians would find it necessary to place the requirements of the legal system before the needs and the finances of the patient. In addition, the physicians' increased exposure to liability would adversely impact already high medical malpractice premiums, resulting in an upward spiral of consumer costs. The uncertainty fostered by such a ruling would undoubtedly open the proverbial floodgates of our overburdened judicial system." (212 C.A.3d 706.)

(4) It is up to the Legislature to decide whether to provide a remedy for genetically defective children and their parents who are unable to prove to a reasonable medical certainty that medical negligence deprived the mother of the chance to terminate her pregnancy. (212 C.A.3d 706.) (See 12 *Pepperdine L. Rev.* 873; 54 *A.L.R.4th* 10; 81 *A.L.R.4th* 485 [medical malpractice: measure and elements of damages in actions based on loss of chance].)

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6 *Witkin Sum. Cal. Law Torts* § 979

[§ 979] In General.

An action for "wrongful life" is brought by an injured child against a doctor or medical institution on the theory that the child's very existence is wrongful and that he or she is entitled to recover damages from the defendant whose negligence resulted in the birth. A typical example is the failure of a pregnant woman's doctor to inform her that her illness--German measles--could cause defects in her child. Recovery by the child has been denied on the dual grounds that (1) a legal remedy contradicts the fundamental belief that human life has value, and (2) measuring damages by comparison of an impaired life with nonexistence is impossible. (See C.E.B., *Tort Damages* 2d, §5.1 et seq.; 22 *Proof of Facts* 3d 83 [brain-damaged infants]; 52 *Am.Jur. Trials* 347 [same]; 90 *Cal. L. Rev.* 1345 [parental liability based on genetic composition of their children]; 42 *Hastings L.J.* 505 ["genetic counseling torts"]; 36 *Loyola L.A. L. Rev.* 1677 [compensation of wrongful life plaintiff]; 23 *Santa Clara L. Rev.* 847; 31 *U.C.L.A. L. Rev.* 473; 18 *U.S.F. L. Rev.* 77; 10 *West L.A. L. Rev.* 53; 74 *A.L.R.4th* 798 [liability for tortiously causing another's birth].)

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SUPPLEMENT: [This section is current through the latest supplement]
See CACI, No. 513 [wrongful life--essential factual elements].



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2. Cause of Action Recognized.

6 Witkin Sum. Cal. Law Torts § 980

[§ 980] Cause of Action Recognized.

Curlender v. Bio-Science Laboratories (1980) 106 C.A.3d 811, 165 C.R. 477, dealt with a question of first impression in California. "What remedy, if any, is available in this state to a severely impaired child--genetically defective--born as the result of defendants' negligence in conducting certain genetic tests of the child's parents--tests that, if properly done, would have disclosed the high probability that the actual, catastrophic result would occur?" (106 C.A.3d 814.)

Plaintiff, a baby girl, suing by her father as guardian ad litem, alleged that her parents retained defendant laboratories to administer tests to discover whether her parents were carriers of genes that would result in the conception and birth of a child with Tay-Sachs disease (amaurotic familial idiocy, a hereditary degenerative disease of the nervous system); that the tests were negligently performed, and incorrect information was given to plaintiff's parents; and that the parents, relying on these incorrect results, failed to avail themselves of amniocentesis (drawing of amniotic fluid to determine whether the child would be born with the disease) and a eugenic abortion. The complaint further alleged mental retardation, disability, physical suffering, and emotional distress, and sought compensatory damages for deprivation of life (based on an actuarial life expectancy of 70 years and actual expectancy of only 4 years). (106 C.A.3d 830.) Punitive damages of \$ 3 million were also sought on allegations that defendants (the laboratory and doctor) knew that the test procedures were substantially inaccurate and that a false negative result would have catastrophic consequences to plaintiff, and therefore acted "in conscious disregard of the health, safety and well-being" of plaintiff. *Held*, judgment for defendants on demurrer reversed; the complaint stated a cause of action.

(a) *Existing law rejecting action for wrongful life.* These actions have been unsuccessfully brought in various jurisdictions on behalf of healthy children born illegitimate, and by genetically injured children. (106 C.A.3d 819.) Despite strong dissenting opinions challenging both of the grounds for denying recovery (106 C.A.3d 819, discussing New Jersey cases), the law of other states and California remains opposed to recovery. (106 C.A.3d 824, citing *Stills v. Gratton* (1976) 55 C.A.3d 698, 127 C.R. 652, *supra*, §977; on grounds for denying recovery, see *supra*, §979.)

(b) *No action for birth of illegitimate or unwanted child.* This action should not be recognized. In present society, illegitimacy may or may not prove to be an overwhelming obstacle to a normal life; hence, a necessary element of a tort cause of action--injury and damage resulting from that injury--is missing. (106 C.A.3d 825.)

(c) *New approach to action for birth of impaired child.* (1) There has been a gradual retreat from the position that impossibility of measuring damages is the sole ground for barring the infant's right of recovery--as seen in the cases allowing the parents of the impaired child to recover. (106 C.A.3d 826.) (2) There is no universal acceptance of the metaphysical or religious notion that the respect for "sanctity of life" calls for denial of recovery. The dissenting opinions in the child's action cases "have emphasized that considerations of public policy should include regard for social welfare as affected by careful genetic counseling and medical procedures." (106 C.A.3d 826.) (3) *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, 7 Summary (10th), *Constitutional Law*, §561, determining that parents have a constitutional right to obtain an abortion, is of considerable significance in wrongful-life litigation. (106 C.A.3d 820, 826.) Another important factor is the increase in medical knowledge and skill needed to avoid genetic disaster. (106 C.A.3d 826.)

(d) *New rule on birth of impaired child.*

(1) Under the basic principles of duty laid down in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086, a cause of action was stated. "We have no difficulty in ascertaining and finding the existence of a duty owed by medical laboratories engaged in genetic testing to parents and their as yet unborn children to use ordinary care in administration of available tests for the purpose of providing information concerning potential genetic defects in the unborn. The public policy considerations with respect to the individuals involved and to society as a whole dictate recognition of such a duty." (106 C.A.3d 828.)

(2) "The real crux of the problem is whether the breach of duty was the proximate cause of *an injury cognizable at law*." That injury is not the particular defect with which the plaintiff is afflicted, but the birth of plaintiff with that defect. (106 C.A.3d 828.) "The reality of the 'wrongful-life' concept is that such a plaintiff both *exists* and *suffers*, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights." (106 C.A.3d 829.)

(3) These considerations, together with the general statutes on damages for detriment from wrongful acts or omissions (C.C. 3281, 3282), and the principle that there should be a remedy for every wrong (C.C. 3523; see 3 *Cal. Proc.* (4th), *Actions*, §5), support the conclusion that a cause of action should be recognized. (106 C.A.3d 829, 830.)

(e) *Damages recoverable.*

(1) Plaintiff is not entitled to damages based on a normal life expectancy; her right must be considered on the basis of her mental and physical condition at birth and her expected condition during the short anticipated life span. (106 C.A.3d 830.)

(2) There can be no evaluation of a claimed right not to be born; damages are recoverable for the pain and suffering to be endured during the limited life span and any special pecuniary loss resulting from the impaired condition. (106 C.A.3d 831.) Costs of care are an appropriate item if no action is brought by the parents to recover for this pecuniary loss; but if the parents also sue, the trial court should consider consolidation of the action to prevent duplication of effort and possible double recovery. (106 C.A.3d 831.)

(3) Plaintiff has adequately pleaded a claim for punitive damages. "We see no reason in public policy or legal analysis for exempting from liability for punitive damages a defendant who is sued for committing a 'wrongful-life' tort." (106 C.A.3d 832.)

SUPPLEMENT: [This section is current through the latest supplement]

Remedy for every wrong:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §5.



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6 Witkin Sum. Cal. Law Torts § 981

[§ 981] No Cause of Action Against Parent.

Curlender v. Bio-Science Laboratories (1980) 106 C.A.3d 811, 165 C.R. 477, supra, §980, stated in dicta that an action by the child against his or her parents would be maintainable only when the parents deliberately disregarded advice not to become parents. (106 C.A.3d 829.) The dictum in *Curlender* was repudiated by the 1981 Legislature.

(1) *No Action Against Parents*. "No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive." (C.C. 43.6(a).)

(2) *Parents' Failure To Act Is Not a Superseding Cause*. "The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action." (C.C. 43.6(b).) (See 13 Pacific L. J. 781.)

(3) *Scope of Statute*. *Turpin v. Sortini* (1982) 31 C.3d 220, 182 C.R. 337, 643 P.2d 954, infra, §982, rejected the contention that C.C. 43.6(b) impliedly created a cause of action against *third parties*: "Although subdivision (b) of the provision implicitly recognizes that, under *Curlender*, a wrongful life action may lie against a 'third party,' we do not think that the statute can properly be viewed as a legislative codification of the *Curlender* holding, transforming the common law tort perceived in *Curlender* into a statutory cause of action. ... [T]he purpose of the legislation was simply to eliminate any liability or other similar economic pressure which might induce potential parents to abort or decline to conceive a potentially defective child. Nothing in the statutory language or legislative history suggests that the new provision was intended to impose liability on any party. Under these circumstances, the section cannot properly be read as creating a *statutory* wrongful life cause of action against third parties." (31 C.3d 229.)

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CHAPTER IX - Torts

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X. NEGLIGENCE: GENERAL DUTY TO EXERCISE DUE CARE
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3. Medical Practitioners.
g. Wrongful Life: Action by Child.
4. Recovery Limited to Special Damages.

6 Witkin Sum. Cal. Law Torts § 982

[§ 982] Recovery Limited to Special Damages.

Turpin v. Sortini (1982) 31 C.3d 220, 182 C.R. 337, 643 P.2d 954, rejected the holding in *Curlender v. Bio-Science Laboratories* (1980) 106 C.A.3d 811, 165 C.R. 477, supra, §980, allowing a child to recover *general damages* in a wrongful life action, but held that the child could obtain *special damages*. In so doing, the case questioned the sanctity-of-life basis for denying recovery of general damages, but relied on the difficulty-in-assessing-damages ground. (See supra, §979.)

The complaint alleged the following: Mr. and Mrs. T brought their daughter H to defendant rehabilitation center for testing of a hearing defect, and defendant doctor S negligently failed to diagnose it as an hereditary affliction. Relying on S's diagnosis, Mr. and Mrs. T conceived a second child, born totally deaf from the same hereditary affliction. The parents and J sued defendants for "wrongful birth" and "wrongful life." The trial judge, on demurrer, entered judgment of dismissal as to the child's action. *Held*, the child's action could be maintained for special damages (medical expenses necessary to treat the ailment), but not for general damages.

(a) *General law prior to Curlender*. The courts have permitted parents to recover some elements of damages but have uniformly rejected the claims of children, either on the ground that no legally cognizable injury was sustained or that appropriate damages are impossible to ascertain. (31 C.3d 225, 226.) In California, *Stills v. Gratton* (1976) 55 C.A.3d 698, 127 C.R. 652, supra, §977, relying on other state decisions, rejected a claim of damages for wrongful life where the child was born healthy. (31 C.3d 226.)

(b) *Legislative response to Curlender*. The enactment of C.C. 43.6 (supra, §980) did not create a *statutory* wrongful life cause of action. Rather, the issue is "whether, and to what extent, such a cause of action should be recognized as a matter of California common law." (31 C.3d 229.)

(c) *Analysis of Curlender reasoning on legally cognizable injury*.

(1) "The basic fallacy of the *Curlender* analysis is that it ignores the essential nature of the defendants' alleged wrong and obscures a critical difference between wrongful life actions and the ordinary prenatal injury cases noted

above. In an ordinary prenatal injury case, if the defendant had not been negligent, the child would have been born healthy; thus, as in a typical personal injury case, the defendant in such a case has interfered with the child's basic right to be free from physical injury caused by the negligence of others. In this case, by contrast, the obvious tragic fact is that plaintiff never had a chance 'to be born as a whole, functional human being without total deafness'; if defendants had performed their jobs properly, she would not have been born with hearing intact, but--according to the complaint--would not have been born at all." (31 C.3d 231.)

(2) A plaintiff's remedy in tort is compensatory in nature, and damages are generally intended to restore an injured person as nearly as possible to the position he or she would have been in had the wrong not been done. (31 C.3d 232, citing the text.) "Because nothing defendants could have done would have given plaintiff an unimpaired life, it appears inconsistent with basic tort principles to view the injury for which defendants are legally responsible ... without taking into consideration the fact that if defendants had not been negligent she would not have been born at all." (31 C.3d 232.)

(3) If the relevant injury is that the child has been born with a hereditary ailment rather than not being born at all, some courts have concluded that he or she has suffered no legally cognizable injury because public policy dictates that life, even with the most severe of impairments, is always preferable to nonlife. This view is questionable: (a) "[I]t is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life." (31 C.3d 233.) (b) California public policy does not establish as a matter of law that impaired life is preferable to nonlife; e.g., statutes recognize the right of an adult to terminate life-sustaining procedures. (31 C.3d 233.) (c) Although the unborn child cannot personally make a choice about the relative value of life or death, parents may do so, considering both their interests and those of the future child. (31 C.3d 233.) (d) In the instant case, in which plaintiff's only affliction is deafness, it is unlikely that a jury would conclude that life with such a condition is worse than not being born at all; but in other cases (e.g., *Curlender*), the conditions have been far more serious. "Considering the short life span of many of these children and their frequently very limited ability to perceive or enjoy the benefits of life, we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all." (31 C.3d 234.)

(4) Thus, it "seems doubtful" that a child's claim for general damages should be denied on the theory that the value of impaired life, as a matter of law, always exceeds the value of nonlife. (31 C.3d 234.)

(d) Rejection of Curlender reasoning and holding on recovery of general damages.

(1) "[T]here is a profound qualitative difference between the difficulties faced by a jury in assessing general damages in a normal personal injury or wrongful death action, and the task before a jury in assessing general damages in a wrongful life case. In the first place, the problem is not ... simply the fixing of damages for a conceded injury, but the threshold question of determining whether the plaintiff has in fact suffered an injury by being born with an ailment as opposed to not being born at all." (31 C.3d 235.)

(2) The practical problems are exacerbated when it comes to the matter of arriving at an appropriate award of damages. In the ordinary personal injury action, jurors have some frame of reference in general experience to appreciate what the plaintiff has lost: normal life without pain and suffering. In the wrongful life action, plaintiff has lost the "unknowable status" of never having been born. "In this context, a rational, nonspeculative determination of a specific monetary award in accordance with normal tort principles appears to be outside the realm of human competence." (31 C.3d 236.)

(3) The difficulty of measuring an appropriate award is also reflected in the application of the "benefit" doctrine in tort damages (see *Rest.2d, Torts* §920), calling for offset of benefits conferred by the defendant's conduct. Here, the harmed interest is the child's general physical, emotional, and psychological well-being; but as an incident of defendant's negligence, plaintiff has obtained a physical existence with the capacity both to receive and give love and pleasure as well as to experience pain and suffering. "Because of the incalculable nature of both elements of this harm-benefit equation, we believe that a reasoned, nonarbitrary award of general damage is simply not obtainable." (31

C.3d 237.)

(e) *Child's right to recover special damages for expenses in teaching and training during her lifetime.*

(1) The parents may recover for the extraordinary expenses incurred during the child's minority, and both cannot recover for the same expenses. However, to restrict the cause of action to the parents might make the afflicted child's receipt of necessary medical expenses depend on whether the parents are available to sue or whether they are incurred at a time when the parents remain legally responsible for this care (normally only during minority). (31 *C.3d 238.*)

(2) A defendant's negligence in failing to diagnose an hereditary ailment places a significant medical and financial burden on the whole family unit. And, unlike the child's claim for general damages, the damage here is both certain and readily measurable. Hence, it is consistent with the basic liability principles of C.C. 1714 "to hold defendants liable for the cost of such care, whether the expense is to be borne by the parents or by the child." (31 *C.3d 238.*) And permitting plaintiff to recover is consistent with the "benefit" doctrine: "[D]efendants' negligence has conferred no ... offsetting benefit to this interest of plaintiff [economic loss involved in extraordinary expenses]." (31 *C.3d 239.*)

Two justices joined in a dissent, arguing that *Curlender* was correct, and that there was "no persuasive reason to either abandon its doctrine, or to dilute its effectiveness by limiting recovery to special damages." (31 *C.3d 240.*) (See 71 *Cal. L. Rev.* 1278; 13 *Southwestern U. L. Rev.* 369; 15 *U.C. Davis L. Rev.* 445.)

In *Andalon v. Superior Court* (1984) 162 *C.A.3d 600*, 208 *C.R.* 899, the court attempted to give concrete meaning to the *Turpin* statement that the child may not recover "general damages." (162 *C.A.3d 612.*) The child was born with Down's syndrome allegedly not diagnosed by the doctor, and sought recovery for loss of earning capacity attributable to this genetic defect. *Held*, the reasoning of *Turpin* was a bar. "There is no loss of earning capacity caused by the doctor in negligently permitting the child to be born with a genetic defect that precludes earning a living. One cannot lose what one never had. The plaintiff-child never had a wage-earning capacity that was taken away by the conduct of the doctor and cannot, therefore, claim compensation for its loss. His inability to earn wages is attributable to his genes and, for the present at least, it is meaningless to speak of a doctor altering or ameliorating this circumstance." (162 *C.A.3d 614.*) (See *Call v. Kezirian* (1982) 135 *C.A.3d 189*, 185 *C.R.* 103 [child with Down's syndrome should have been permitted to amend prayer to limit damages to kind of damages authorized by *Turpin*].)

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aa. Failure To Prevent Birth.

6 Witkin Sum. Cal. Law Torts § 983

[§ 983] Failure To Prevent Birth.

Foy v. Greenblott (1983) 141 C.A.3d 1, 190 C.R. 84, deals with unusual aspects of both wrongful birth (supra, §977) and wrongful life (supra, §979). Plaintiff V had been adjudicated a gravely disabled and incompetent person under the Lanterman-Petris-Short Act (see 3 Cal. Proc. (4th), Actions, §29 et seq.). The court appointed the county public guardian her conservator, and placed her in a licensed private mental health facility. This action was brought by V and her child R against the doctors, the facility, and the county. The complaint alleged that defendants, aware of V's medical history of irresponsible sexual behavior, failed to supervise her or to provide her with contraceptives or counseling; that she became pregnant, and defendants failed to diagnose her pregnancy until 2 weeks before she delivered; that she gave birth to R; and that defendants' negligence in failing to prevent the birth deprived the mother and child of "fully knowing, caring for, loving and enjoying" one another. *Held*, judgment for defendants on demurrer affirmed as to all but one of the causes of action stated.

(a) *Immunity of county*. The conservator's selection of the facility was immune as a discretionary decision Under Govt.C. 820.2 (see supra, §351). The conservator's continuing responsibility to see that V received adequate care involved ministerial acts not immunized by Govt.C. 820.2, but did come within Govt.C. 854.8(a)(2) (injury to inpatient of mental institution, see supra, §317). (141 C.A.3d 6.)

(b) *No liability for deprivation of normal parent-child relationship*. Under *Borer v. American Airlines* (1977) 19 C.3d 441, 138 C.R. 302, 563 P.2d 858, *infra*, §1683, and *Baxter v. Superior Court* (1977) 19 C.3d 461, 138 C.R. 315, 563 P.2d 871, *infra*, §1684, neither a parent nor a child may recover for loss of consortium; and under the reasoning of *Turpin v. Sortini* (1982) 31 C.3d 220, 182 C.R. 337, 643 P.2d 954, *supra*, §982, damages cannot be awarded for the creation of an impaired parent-child relationship in place of no relationship at all. (141 C.A.3d 7, 8.)

(c) *Liability to mother for wrongful birth*.

(1) A mother may hold medical personnel liable for their negligent failure to prevent or to terminate a pregnancy. (141 C.A.3d 8, citing *Custodio v. Bauer* (1967) 251 C.A.2d 303, 312, 59 C.R. 463, *supra*, §976, and *Stills v. Gratton*

(1976) 55 C.A.3d 698, 127 C.R. 652, supra, §977.) Here, however, plaintiff mother did not allege that she sought from defendants contraceptive or gynecological care; her theory was that defendants should have taken the necessary precautionary measures to prevent her--an incompetent--from bearing a child. (141 C.A.3d 8, 9.) This contention is unsound: A conservatee or other institutionalized mental patient has the same fundamental rights as other persons (except as specifically denied by law or court order); and "courts have been unwilling to give conservators and other guardians free rein to substitute their own judgment for that of mentally disabled patients in matters affecting reproductive rights, such as sterilization operations." (141 C.A.3d 9, citing many leading cases.)

(2) This does not mean that mental health personnel can never restrict consensual sexual activities of a patient, or that a conservator is precluded from obtaining court authorization for an abortion in a non-life-threatening situation. But the statutes and cases "express a public policy of maximizing patients' individual autonomy, reproductive choice, and rights of informed consent." And mental health professionals "are expected to opt for the treatments and conditions of confinement least restrictive of patients' personal liberties." (141 C.A.3d 11.)

(3) The complaint did allege omissions of defendants that could be actionable: failure to make contraceptive counseling and medication available to her, and failure to diagnose her condition until too late to abort the pregnancy. (141 C.A.3d 12.) However, she must prove causation; i.e., that had contraceptive care been available, she would have taken advantage of it and that it would have been effective; and on failure to diagnose, that she would have consented to an abortion or that her conservator would have been able to make the necessary showing for a court authorization of it. (141 C.A.3d 13.)

(d) *No liability to child for wrongful life.* The complaint does not show that R has suffered any legally cognizable injury. Thus, there is no allegation of an hereditary trait or other physiological condition that should have led defendants to predict that a child conceived by V would be born impaired, and R does not allege that he actually was born impaired. It appears that the injury of which R complains is simply that of being born to an incompetent mother who is unable to care properly for him. That injury is not actionable. (141 C.A.3d 14.) (See *Johnson v. Superior Court* (2002) 101 C.A.4th 869, 886, 124 C.R.2d 650 [action against sperm bank and two physician employees by parents of child born with birth defect was one for wrongful life, and, under *Turpin*, general damages or damages for lost earnings were not recoverable].)

SUPPLEMENT: [This section is current through the latest supplement]
Lanterman-Petris-Short Act:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §80 et seq.

See *Ermoian v. Desert Hosp.* (2007) 152 C.A.4th 475, 513, 61 C.R.3d 754 [treating physicians were not negligent in failing to advise mother to have elective abortion, after ultrasound test taken when fetus was approximately 26 weeks old suggested minimal prominence of lateral ventricles in fetal head, where expert testified that, given age of fetus, recommending or performing abortion would fall below standard of care, and that ultrasound test results raised possibility that child would be born normal].

In *Barragan v. Lopez* (2007) 156 C.A.4th 997, 68 C.R.3d 73, plaintiff twins were born prematurely with cerebral palsy. Through their guardian ad litem, they filed a wrongful life action against Dr. L, their mother's obstetrician-gynecologist, claiming that he should have advised their mother that she had the right to abort her pregnancy. From February 22 to March 26, the mother was examined regularly, and her pregnancy had progressed normally, without serious complaints and without evidence of preterm labor or other complications. On March 27, after being told she was leaking fluid, L immediately sent her to the hospital, where it was determined that one of the amniotic sacs had spontaneously ruptured. The mother remained in the hospital on bed rest until April 30, and, during this time, there was no evidence of infection, abnormally low amniotic fluid levels, pregnancy-induced hypertension, or fetal distress. On April 30, when plaintiffs' estimated gestational age was just over 29 weeks, the mother began having contractions, and L performed a cesarean section delivery of plaintiffs. The trial court granted L's motion for summary

judgment, finding that, in view of the normalcy of the pregnancy, L did not owe the mother a duty to advise her of the right to an abortion. Citing the declaration of their expert, Dr. W, that the premature delivery caused their cerebral palsy, plaintiffs appealed, contending that this declaration established that L breached a duty to advise the mother of her right to terminate her pregnancy under *Health & Saf.C. 123462. Held*, summary judgment affirmed.

(a) Here, there was no alleged failure to perform any genetic test that might have revealed hereditary defects. Nor was there any indication, during the time in which the mother had a right to voluntarily abort plaintiffs, that plaintiffs had any defects that were substantially certain to occur. L thus had no duty to advise the mother that she had a right to abort plaintiffs. (156 C.A.4th 1005.)

(b) Under *Health & Saf.C. 123468*, performance of an abortion is not authorized if the fetus is viable and continuation of the pregnancy poses no risk to the life or health of the pregnant woman. It would thus have been improper for L to have advised the mother that she had a right to an abortion, because plaintiffs were viable fetuses, a fact established by expert medical testimony. (156 C.A.4th 1006.)

(c) Once L met his burden of establishing that he did not owe the mother a duty to advise her of the right to an abortion, it was incumbent upon plaintiffs to demonstrate that there remained triable issues of material fact as to the duty element. They attempted to do so by showing that (1) the mother was at greater risk of complications because her last pregnancy was more than 120 months earlier; (2) the record stated that she had a vaginal discharge, a condition that was much more serious than the "questionable discharge" testified to by L; and (3) the American College of Obstetrician and Gynecologists Abortion Policy stated that a pregnant woman should be fully informed by the clinician about all options, including abortion. However, the mother's vaginal bleeding, which according to the medical records was not serious and may have been from a scratch, did not trigger a duty by L to advise the mother of the right to an abortion. Moreover, the abortion policy was also of little, if any, import here, because it concerned what a physician should discuss when providing informed consent to a patient considering terminating her pregnancy. (156 C.A.4th 1006.)



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bb. Failure To Diagnose Spina Bifida.

6 *Witkin Sum. Cal. Law Torts* § 984

[§ 984] Failure To Diagnose Spina Bifida.

In *Gami v. Mullikin Med. Center* (1993) 18 C.A.4th 870, 22 C.R.2d 819, defendants negligently failed to inform N's pregnant mother of the need for a second blood sample for AFP testing. As a result, her mother did not have the opportunity to learn that N could have been afflicted with a neural tube defect, commonly known as spina bifida. Subsequently, N was born with this condition and instituted the present action for wrongful life, in which defendants moved for judgment on the pleadings. The trial judge granted the motion, without leave to amend, on the ground that N was unable to state a cause of action for wrongful life under *Turpin v. Sortini* (1982) 31 C.3d 220, 182 C.R. 337, 643 P.2d 954, supra, §982, because that case applies only to preconception, rather than postconception, torts. *Held*, reversed; N might be able to state a cause of action for wrongful life even though her condition resulted from postconception negligence.

(a) Defendants argued that the only injury resulting from their alleged negligence was the loss of the mother's right, under *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, 7 Summary (10th), *Constitutional Law*, §561), to choose an abortion, and that, therefore, only she had standing to seek damages. This position is without merit. Even though other jurisdictions do not recognize a cause of action for wrongful life, the California Supreme Court has done so in *Turpin*, where a defendant's negligence is the proximate cause of the child's need for extraordinary medical care and training (special damages). (18 C.A.4th 882.)

(b) Claims for wrongful life are essentially actions for malpractice based on negligent genetic counseling. The counseling may be (1) preconception counseling, which is related to fertility and to the chance for conceiving a child with a genetic defect; or (2) postconception counseling, which relates to tests conducted while the child is in utero to determine if the fetus suffers from a genetic defect. "In either situation, negligence by a medical provider results in the birth of an afflicted child who must exist with that impairment. Defendants' argument that a child should only be able to recover for injuries caused by preconception negligence is a distinction without a difference. And we cannot find a legal justification for that distinction." (18 C.A.4th 883.)

(c) Although *Turpin* involved preconception negligence, it recognized a child's right to recover for injury resulting

from postconception negligence. *Turpin* was ultimately concerned with compensating injured children, not with the timing of the negligence that caused the injury. (18 C.A.4th 881.)

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cc. Failure To Secure Consent of Husband for Artificial Insemination.

6 Witkin Sum. Cal. Law Torts § 985

[§ 985] Failure To Secure Consent of Husband for Artificial Insemination.

In *Alexandria S. v. Pacific Fertility Med. Center* (1997) 55 C.A.4th 110, 64 C.R.2d 23, a child conceived by artificial insemination by a donor filed a complaint against the fertility clinic and doctors for failing to certify the signatures of the mother and her then husband on the consent form pursuant to *Family C. 7613(a)* (see 10 Summary (10th), *Parent and Child*, §43), which resulted in a ruling in a separate dissolution of marriage proceeding that the former husband had no legal duty toward plaintiff. The trial judge sustained defendants' demurrers without leave to amend and entered a judgment of dismissal. *Held*, affirmed.

(a) *Public policy mandates finding of no cognizable injury.* Plaintiff premised her claim of negligence on essentially two theories: (1) defendants deprived her of a legal father, and (2) defendants' negligence resulted in her being born.

(1) Regarding the "no legal parent" claim, policy reasons do not permit plaintiff to sue for being deprived of a legal parent. The result of recognizing a tort for deprivation of a legal parent has the potential of vastly expanding the tort law to permit children to sue physicians, single parents, lesbian and gay parents, or sexual partners of their parent for causing them to have only one or no legal parent. (55 C.A.4th 121.) Also, it cannot be presumed that a child without two legal parents suffers an injury from that occurrence; illegitimacy is a status that may or may not prove to be a hindrance to one so born, depending on a multitude of other facts. (55 C.A.4th 122.)

(2) Regarding the "wrongful life" claim, although courts do recognize a wrongful life claim by an "impaired" child for special damages, no court has expanded tort liability to include wrongful life claims by children born without mental or physical impairment. Courts have disallowed these claims, finding no legally cognizable injury or no rationally ascertainable damages. (55 C.A.4th 122.) Whether plaintiff's claim is for denying her (a) a legal parent, (b) child support, or (c) any other attribute uniquely related to the parent/child relationship, the claim is akin to a wrongful life claim by a healthy child and is not cognizable. (55 C.A.4th 123.)

(b) *Defendants' acts were not proximate cause of any injury.* Moreover, the dissolution court's finding that plaintiff was not entitled to child support because the documents were not certified as required by *Family C. 7613(a)* is

erroneous. Certification is not required to establish consent under the statute, and defendants' failure to certify was thus not the proximate cause of plaintiff's alleged damage. (55 C.A.4th 123.) Nothing in the language of the statute, or in its legislative history suggests that a failure to certify should defeat the objective of the statute, which is to establish two legal parents. *Family C. 7613(a)* specifically states that the failure to certify "does not affect the father and child relationship." Plaintiff's proper remedy, which she unfortunately neglected to pursue, was to appeal the erroneous ruling of the dissolution court. (55 C.A.4th 126.)

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4. Hospitals.

a. In General.

6 Witkin Sum. Cal. Law Torts § 986

[§ 986] In General.

On principles of respondeat superior (see 3 *Summary* (10th), *Agency and Employment*, §165 et seq.) and corporate negligence (see *infra*, §1255), a hospital may be held liable for its employees' negligent conduct. (See Dobbs, *The Law of Torts* §252; 40 *Am.Jur.2d* (1999 ed.) *Hospitals and Asylums* §27 et seq.; 31 *A.L.R.3d* 1114 [administration of anesthetics]; 21 *Hastings L. J.* 1; 7 *U.C. Davis L. Rev.* 1 et seq. [Problems in Law and Medicine]; BAJI, Nos. 6.20, 6.21; CACI, Nos. 514, 515, 516; 3 *Summary* (10th), *Agency and Employment*, §§39, 40.)

A hospital operated for the care of alcoholics has a higher duty of care than that owed by land occupiers generally. It must exercise such reasonable care as the patient's known condition may require. (*Emerick v. Raleigh Hills Hosp.* (1982) 133 *C.A.3d* 575, 581, 184 *C.R.* 92, discussing *Wood v. Samaritan Institution* (1945) 26 *C.2d* 847, 161 *P.2d* 556, *infra*, §987.) And rest homes have the same general duty as hospitals. (*Mast v. Magpusao* (1986) 180 *C.A.3d* 775, 778, 225 *C.R.* 689 [plaintiff injured by another resident whose aggressive tendencies were known to defendant proprietors; nonsuit reversed].) (See 83 *A.L.R.3d* 871 [negligence of rest, convalescent, or nursing home].)

Health & Saf.C. 1317.2 et seq. prescribe the procedures governing the transfer of emergency patients from one hospital to another. (See 19 *Pacific L. J.* 624.) Persons and medical facilities harmed by a violation of the procedures may recover damages from the transferring or receiving hospital. (*Health & Saf.C.* 1317.6(j).)

The following types of conduct illustrate areas giving rise to liability:

(1) *Negligent Emergency Room Care.* (See 67 *Am.Jur.* Trials 271 [liability of emergency room provider for injury to patient or visitor]; 47 *Proof of Facts* 2d 1 [liability for negligence of emergency room physician]; 31 *Proof of Facts* 3d 203 [negligence by hospital emergency room nurse]; 22 *Santa Clara L. Rev.* 791 [liability for independent emergency room service]; 15 *U.C. Davis L. Rev.* 1047 [duty to provide emergency care]; 58 *A.L.R.5th* 613 [emergency room patients].)

(2) *Negligent Diagnosis or Treatment.* (See 22 *Proof of Facts* 3d 1 [brain-damaged infants]; 29 *Am.Jur.* Trials 591 [nursing medication errors]; 52 *Am.Jur.* Trials 347 [brain-damaged infant]; 58 *Am.Jur.* Trials 1 [litigation concerning transfusion-associated AIDS]; 14 *Pacific L. J.* 55 [duty to regulate quality of patient care]; 20 *U.C. Davis L. Rev.* 441

[AIDS treatment]; 72 *A.L.R.2d* 408 [injury from handling of drugs]; 14 *A.L.R.3d* 1254 [defective equipment]; 31 *A.L.R.3d* 1114 [administration of anesthetics]; 37 *A.L.R.3d* 1284 [obstetrical cases]; 42 *A.L.R.3d* 736 [improper diet]; 50 *A.L.R.3d* 1141 [absence of equipment]; 12 *A.L.R.4th* 57 [failure to review or supervise treatment given by doctor, or to require consultation]; 43 *A.L.R.5th* 87 [negligent treatment of diabetes]; on improper restraints, see *infra*, §987; on postoperative care, see *infra*, §988.)

(3) *Staffing Issues*. (See 14 Proof of Facts 3d 433 [negligent selection of staff physician]; 15 Proof of Facts 3d 181 [negligent retention of staff physician]; 9 Cal. Western L. Rev. 429 [relationship with staff physician]; 51 *A.L.R.3d* 981 [selection of staff doctors]; 62 *A.L.R.4th* 692 [failure to have properly qualified staff]; 2 *A.L.R.5th* 286 [failure to have sufficient number of nurses on duty].)

(4) *Miscellaneous Situations*. (See *Flowers v. Torrance Memorial Hosp. Med. Center* (1994) 8 *C.4th* 992, 999, 1000, 35 *C.R.2d* 685, 884 *P.2d* 142 [failure to put rails up on emergency room gurney]; *Wilson v. Irwin Memorial Blood Bank* (1993) 14 *C.A.4th* 1315, 1327, 18 *C.R.2d* 517 [same]; *Bellamy v. Appellate Dept.* (1996) 50 *C.A.4th* 797, 805, 57 *C.R.2d* 894, *supra*, §934 [fall off rolling X-ray table left unsecured and unattended]; 22 *Pepperdine L. Rev.* 1752 [*Flowers*]; 80 Proof of Facts 3d 1 [failure of emergency medical equipment]; 31 *A.L.R.2d* 1118 [defective wheel chair]; 16 *A.L.R.3d* 1237 [injury due to physical condition of premises]; 17 *A.L.R.3d* 796 [liability where patient suffers heart attack while undergoing unrelated medical procedure]; 35 *A.L.R.3d* 841 [refusal to admit or treat patient]; 48 *A.L.R.3d* 1288 [assault by patient]; 77 *A.L.R.3d* 501 [giving erroneous notification of patient's death].)

West's Key Number Digest, Hospitals k.801

SUPPLEMENT: [This section is current through the latest supplement]

See 40A *Am.Jur.2d* (2008 ed.), *Hospitals and Asylums* §25 et seq.(4) *Miscellaneous Situations*. See 24 *A.L.R.6th* 721 [defective wheelchair; superseding 31 *A.L.R.2d* 1118, text, p. 247]; 38 *A.L.R.6th* 399 [nondefective wheelchair].



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b. Improper Restraints.

6 *Witkin Sum. Cal. Law Torts* § 987

[§ 987] Improper Restraints.

In *Wood v. Samaritan Institution* (1945) 26 C.2d 847, 161 P.2d 556, plaintiff, a chronic alcoholic, voluntarily entered defendant's sanitarium in the early evening for a course of treatment. Although attendants observed that she was suffering from the delusion that she was in an insane asylum and wanted to get out, no physical restraint was placed on her, no nurse was in close attendance, and no measures were taken to secure her windows. Some 27 hours after her admission, she was found in the courtyard beneath the window of her second-story room; apparently, she had pushed open the windows, and had either jumped or fallen. *Held*, the trial court's order directing a verdict for defendant was improper. A sufficient showing was made that means of harm were at hand (the physical surroundings), and defendant had knowledge or notice of the likelihood that plaintiff would injure herself unless precautions were taken to prevent the harm. (26 C.2d 853.) (See *Gin Non Louie v. Chinese Hosp. Assn.* (1967) 249 C.A.2d 774, 788, 57 C.R. 906 [fall from bed despite presence of side rails]; 9 Proof of Facts 2d 223 [failure to protect patient from self-inflicted harm]; 35 Proof of Facts 2d 75 [failure to prevent patient from falling]; 25 A.L.R.3d 1450 [injuries due to restraint of movement]; 36 A.L.R.3d 1235 [injuries occurring while patient going to bathroom]; 60 A.L.R.3d 880 [liability of hospital, other than mental institution, for suicide of patient]; 8 A.L.R.4th 464 [liability for physical measures undertaken in treatment of mentally disordered patient]; 9 A.L.R.4th 149 [liability for patient's injury or death as result of fall from bed]; 19 A.L.R.4th 7 [liability of mental care facility for suicide of patient or former patient]; 36 A.L.R.4th 117 [mental patient's self-inflicted injuries]; 37 A.L.R.4th 200 [injury or death from escape].)

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6 Witkin Sum. Cal. Law Torts § 988

[§ 988] Negligent Postoperative Care.

In *Thomas v. Seaside Memorial Hosp. of Long Beach* (1947) 80 C.A.2d 841, 183 P.2d 288, plaintiff's baby, age 8 months, underwent a minor operation under anesthetic, and then was returned to her room and left alone without regular observation for over an hour. She died from collapse of the lung (atelectasis). *Held*, it was negligent to fail to maintain a frequent check on the child's condition. (80 C.A.2d 848.)

In *Valentin v. La Societe Francaise De Bienfaisance Mutuelle De Los Angeles* (1946) 76 C.A.2d 1, 172 P.2d 359, plaintiff's 20-year-old son underwent a successful hernia operation. While recuperating in the hospital, he developed alarming pathological symptoms, but the attending nurses delayed calling a doctor for several days. The diagnosis was tetanus, but the antitetanic treatments were given late. *Held*, it was negligent for the nurse to permit the patient to suffer these symptoms without procuring medical attention. (76 C.A.2d 7.)

In *Rice v. California Lutheran Hosp.* (1945) 27 C.2d 296, 163 P.2d 860, plaintiff, a woman of 60, a few days after a major operation, was in bed in a weakened physical condition and still under the effects of a narcotic for relief of pain. Defendant's employee, on instructions of plaintiff's doctor, served her with tea by leaving a tray with teapot of hot water, cup, and tea bag on a bedside table. In an unexplained manner, plaintiff was burned by the spilling of the water. *Held*, the jury could find it negligent to leave her alone in that manner, without an attendant. (27 C.2d 301.)

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See 102 Am.Jur. Trials 55 [post-anesthesia recovery room accidents].



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6 Witkin Sum. Cal. Law Torts § 989

[§ 989] Scope of Immunity Statute.

In *Jacobs v. Grossmont Hosp.* (2003) 108 C.A.4th 69, 133 C.R.2d 9, plaintiff attempted suicide by overdosing on medication. The medical staff of defendant hospital's emergency room determined that she posed a danger to herself and placed her on 72-hour hold under Welf.C. 5150 of the Lanterman-Petris-Short (LPS) Act (Welf.C. 5000 et seq.). During the hold and pursuant to a doctor's orders, a nurse assisted plaintiff as she walked down a hospital corridor. Plaintiff's slipper caught on the floor, causing her to fall and fracture a bone in her leg. Plaintiff sued for negligence and premises liability, but defendant's demurrer was sustained on the ground that plaintiff's causes of action were barred by the immunity provisions of Welf.C. 5278 (see supra, §448). *Held*, summary judgment for defendant reversed.

(a) Welf.C. 5278 provides in part that individuals authorized to detain a person for 72-hour treatment and evaluation are not criminally or civilly liable for "exercising this authority" in accordance with the law. Clearly this statute grants immunity to those authorized to detain a person for a 72-hour hold. However, it is not certain whether the immunity pertains only to the decision to detain (as plaintiff maintains), to the detention itself and its inherent attributes, or to anything that may occur in the course of the evaluation or treatment (as defendant maintains). (108 C.A.4th 74.)

(b) Defendant relied on *Heater v. Southwood Psychiatric Center* (1996) 42 C.A.4th 1068, 49 C.R.2d 880, supra, §429, which held that a psychiatric center that forcibly medicated a 72-hour detainee was not liable for false imprisonment, battery, or malpractice. *Heater* stands for the proposition that Welf.C. 5278 immunity extends to claims based on circumstances that are *inherent* in an involuntary detention. Thus, a malpractice claim based not on the applicable standard of care but on the facts of involuntary detention and treatment without consent is barred. In other words, the statute was intended to provide immunity for claims expressly authorized by the LPS Act that would otherwise constitute a civil or criminal wrong, such as kidnapping, false imprisonment, or battery. (108 C.A.4th 76.)

(c) However, *Heater* does not support an interpretation of Welf.C. 5278 that would confer blanket immunity for any act that might occur during a 72-hour hold, no matter how negligent, wrongful, or criminal. Defendant's invitation to limit liability to outrageous acts not rationally related to treatment or detention is not helpful, because this interpretation would still expose the mentally ill to the possibility of grossly negligent or intentional mistreatment, with no legal recourse, and thus would subvert the intent of the LPS Act to protect the mentally ill. Thus, Welf.C. 5278 does not provide immunity for injuries proximately caused by negligence or other wrongful acts or omissions that may occur

during the course of an otherwise valid detention. (108 C.A.4th 78.)

(d) The trial judge incorrectly assumed that under Welf.C. 5278 defendant was exempt from all liability for any negligence that may have occurred during the 72-hour stay. However, the relevant inquiry is whether defendant is liable for plaintiff's injuries proximately caused by its failure to use due care in administering her course of treatment. (108 C.A.4th 80.) (See *Cruze v. National Psychiatric Services* (2003) 105 C.A.4th 48, 53, 129 C.R.2d 65 [term "individual," as used in Welf.C. 5278, applies to hospitals, as well as to natural persons]; *Gonzalez v. Paradise Valley Hosp.* (2003) 111 C.A.4th 735, 739, 3 C.R.3d 903 [Welf.C. 5278 did not apply to negligent failure to treat patient's psychosis during 72-hour hold, but extended only to claims based on facts inherent in involuntary detention; relying on *Jacobs*].)

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a. In General.

6 *Witkin Sum. Cal. Law Torts* § 990

[§ 990] In General.

Accountants "have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence." (*Lindner v. Barlow, Davis & Wood* (1962) 210 C.A.2d 660, 665, 27 C.R. 101.) (See *National Med. Trans. Network v. Deloitte & Touche* (1998) 62 C.A.4th 412, 428, 72 C.R.2d 720 [in professional negligence action against defendant accounting firm, which resigned before issuing financial audit, trial judge erred in giving instruction that made defendant's ability to resign subordinate to client's interest and that ignored defense theory of good cause to resign]; 16 Proof of Facts 2d 641 [accountant's negligent performance of duties]; 57 *Cal. L. Rev.* 281; 8 *Cal. Western L. Rev.* 368 [unaudited financial statements]; 34 *Golden Gate L. Rev.* 325 [public accounting firms and conflicts of interest]; 15 *Hastings L. J.* 436; 42 *Hastings L. J.* 249 [Liability of Attorneys, Accountants, Appraisers, and Other Independent Contractors Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989]; 20 *San Diego L. Rev.* 233; 25 *San Diego L. Rev.* 757 [unaudited historical and prospective financial statements]; 69 *So. Cal. L. Rev.* 1883 [imputation of officer's or director's wrongdoing to corporation in suit against accountant]; 47 *A.L.R.3d* 1286 [errors in income tax returns]; 81 *A.L.R.3d* 1119 [tax preparer's liability to taxpayer in connection with preparation of tax return]; 92 *A.L.R.3d* 396 [accountant's malpractice liability to client].)

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See 52 *U.C.L.A. L. Rev.* 413 [financial statement insurance as alternative to auditor liability].



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1. Former Foreseeability Approach.

6 Witkin Sum. Cal. Law Torts § 991

[§ 991] Former Foreseeability Approach.

In *International Mortg. Co. v. John P. Butler Accountancy Corp.* (1986) 177 C.A.3d 806, 223 C.R. 218, the court was asked "to declare, for the first time that a certified public accountant (CPA) owes a duty of care to *reasonably foreseeable plaintiffs* who rely on alleged negligently prepared and issued unqualified audited financial statements." (177 C.A.3d 809.)

Westside was a mortgage company that arranged financing for real property, and sold its loans to other mortgage bankers. Defendant Butler audited Westside's financial statement showing a corporate net worth of \$ 175,036, in major part based on a \$ 100,000 note receivable that in fact was worthless. Westside used the financial statement to negotiate an agreement with plaintiff IMC to buy and sell FHA loans. Butler knew at the time of the audit that Westside needed a net worth of \$ 100,000 to qualify for FHA business. Westside defaulted on its obligations to IMC, and IMC sued Butler, alleging negligence and negligent misrepresentation, relied on by plaintiff in doing business with Westside. Butler's defense was that it had no knowledge of IMC at the time of the audit and was unaware of IMC's reliance on the financial statement. The lower court granted summary judgment on the ground that a CPA owes no duty of care to a third party not specifically known as an intended recipient of the financial statement. *Held*, reversed.

(a) *Ultramares case*. Beginning with Justice Cardozo's seminal opinion in *Ultramares Corp. v. Touche* (1931) 255 N.Y. 170, 174 N.E. 441, certified public accountants have been shielded from liability for negligence in the preparation and issuance of unqualified audited financial statements when the plaintiff was only a member of a foreseeable class. Liability, based on a duty analysis, was limited to those in privity with the accountant and more recently to those intended recipients of the information. (177 C.A.3d 811.)

(b) *Analysis and criticism of Ultramares*. The "tide of precedent" has washed away the "privity" protection for all other professions, "leaving accountancy as some ennobled species specially protected by the 'citadel.'" (177 C.A.3d 812.) *Rest.2d, Torts* §552 rejects the *Ultramares* requirement of privity, and adopts the reasoning of the earlier New York case of *Glanzer v. Shepard* (1922) 233 N.Y. 236 135 N.E. 275, in requiring "knowing reliance." "When the harm that is caused is only pecuniary loss, the courts have found it necessary to adopt a more restricted rule of liability, because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of the

losses which may follow from reliance upon it." (177 C.A.3d 816, and footnote 3, quoting *Rest.2d, Torts* §552, Comment a.)

(c) *Role of the independent certified public accountant.* Butler argues that basic differences between the accounting profession and others requires a more limited rule of liability; e.g., manufacturers, attorneys, architects, and doctors control their products and records, while the accountant does not control either the client's records or the client's use of the audit product. (177 C.A.3d 816.) This is a misconception of the accountant's role:

(1) "An independent auditor (as opposed to an in-house accountant) is employed to analyze a client's financial status and make public the ultimate findings in accord with recognized accounting principles. This undertaking is imbued with considerations of public trust, for the accountant must well realize the finished product, the unqualified financial statement, will be relied upon by creditors, stockholders, investors, lenders or anyone else involved in the financial concerns of the audited client." (177 C.A.3d 817.)

(2) "Under a foreseeability standard, the auditor would be liable only to those third-parties who reasonably and foreseeably rely on the audited statements. The accountant's lack of control over ultimate users is not prejudicial; the foreseeability standard holds everyone, including accountants, liable to only reasonably foreseeable users." (177 C.A.3d 818.)

(d) *California rule declared.* The protectionist rule of privity announced in *Ultramares* "is no longer viable" in view of the change in the role of the accountant; and the Restatement limitation of liability to those to whom the information is intended to be supplied "does not meet California's concept of tort liability for negligence." (177 C.A.3d 820.) (See 20 Proof of Facts 3d 289 [liability to third party for negligence]; 45 Am.Jur. Trials 113 [accountant's third-party liability involving prospective financial statements used in securities offerings]; 46 A.L.R.3d 979 [liability to third person]; 48 A.L.R.5th 389 [independent accountant's liability to investors or shareholders].)

The general negligence rule and foreseeability approach of *International Mortg. Co. v. Butler* was disapproved by *Bily v. Arthur Young & Co.* (1992) 3 C.4th 370, 11 C.R.2d 51, 834 P.2d 745, *infra*, 992.)

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2. Liability Limited to Client.

6 Witkin Sum. Cal. Law Torts § 992

[§ 992] Liability Limited to Client.

Bily v. Arthur Young & Co. (1992) 3 C.4th 370, 11 C.R.2d 51, 834 P.2d 745, answers the question "whether and to what extent an accountant's duty of care in the preparation of an independent audit of a client's financial statements extends to persons other than the client." (3 C.4th 375.) Since *Ultramares Corp. v. Touche* (1931) 255 N.Y. 170, 174 N.E. 441, supra, §991, this issue has been frequently considered and debated by courts and commentators. (3 C.4th 376.)

The Osborne Computer Corporation began a series of transactions and sought to raise capital by warrants entitling investors to purchase blocks of stock at favorable prices. The company then retained defendant Arthur Young, a public accounting firm, to perform accounting services, and defendant issued a number of "clean" audit opinions, on which plaintiff investors relied in purchasing warrants. Thereafter, the company's business sharply declined, the public offering of stock never materialized, the company filed for bankruptcy, and plaintiffs lost their investments.

The present actions were based on three theories: fraud, negligent misrepresentation, and professional negligence. The jury exonerated defendant on the allegations of intentional fraud and negligent misrepresentation, but returned a verdict of \$ 4.3 million in compensatory damages for professional negligence. The Court of Appeal affirmed the resulting judgment, but the Supreme Court reversed with directions to enter judgment in favor of defendant.

(a) *The audit function in public accounting.* The end product of an audit is the audit report or opinion, generally expressed in a letter addressed to the client. The body of the report refers to the specific client-prepared financial statements that are attached. (3 C.4th 380.) "[A]udits of financial statements and the resulting audit reports are very frequently (if not almost universally) used by businesses to establish the financial credibility of their enterprises in the perceptions of outside persons." (3 C.4th 382.)

(b) *Approaches to problem of liability to third persons.*

(1) *Privity of relationship.* The privity rule arose in *Ultramares* and was further developed in later New York cases, such as *Credit Alliance Corp. v. Arthur Andersen & Co.* (1985) 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435. "As

one moves from privity of contract to privity of relationship ... ,the auditor is placed on notice of a specific risk of liability that accompanies the audit engagement. Yet, under the *Credit Alliance* test, the auditor appears to have no liability in this situation in the absence of further, distinct conduct 'linking' the auditor to the third party in a manner that 'evinces [auditor] understanding' of third party reliance." (3 C.4th 387.)

(2) *Foreseeability*. Justice Howard Wiener of the California Court of Appeal, in a law review article, argued that accountants should be liable to third persons on the same basis as other tortfeasors; and he proposed a rule based on foreseeability of injury to third persons. (3 C.4th 389.) A few state courts have endorsed foreseeability rules. (3 C.4th 389.) However, in the nearly 10 years since it was formally proposed, this approach has not attracted a substantial following; and four state supreme courts have explicitly rejected it. (3 C.4th 391.)

(3) *Intent to benefit third persons*. *Rest.2d, Torts* §552 (see supra, §825) states a general principle that one who negligently supplies false information for the guidance of others in their business transactions is liable for economic loss suffered by the recipients in justifiable reliance on the information. But the supplier is liable only if he or she intends to supply the information for the benefit of one or more third parties in a specific transaction or type of transaction identified to the supplier. (3 C.4th 392.) Under the Restatement rule, an auditor retained to conduct an annual audit and to furnish an opinion for no particular purpose generally undertakes no duty to third parties. (3 C.4th 393.)

(4) *Federal securities law*. Several federal statutes dealing with securities impose liability on accountants. Under these statutes, "an auditor's liability to third persons on theories akin to common law negligence is limited to those situations in which the third party suffers a loss in the purchase or sale of a security in reliance on an auditor's misstatement in a public registration statement or other public document filed with the SEC for use in connection with an identified securities registration." (3 C.4th 396.)

(c) *Negligence*.

(1) *Factors to consider in assessing duty*. The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. (3 C.4th 397.) The court has employed a checklist of factors to consider in assessing legal duty in the absence of privity of contract. (3 C.4th 397, discussing *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *infra*, §1179.) In light of these factors, "we decline to permit all merely foreseeable third party users of audit reports to sue the auditor on a theory of professional negligence. Our holding is premised on three central concerns: (1) Given the secondary 'watchdog' role of the auditor, the complexity of the professional opinions rendered in audit reports, and the difficult and potentially tenuous causal relationships between audit reports and economic losses from investment and credit decisions, the auditor exposed to negligence claims from all foreseeable third parties faces potential liability far out of proportion to its fault; (2) the generally more sophisticated class of plaintiffs in auditor liability cases (e.g., business lenders and investors) permits the effective use of contract rather than tort liability to control and adjust the relevant risks through 'private ordering'; (3) the asserted advantages of more accurate auditing and more efficient loss spreading relied upon by those who advocate a pure foreseeability approach are unlikely to occur; indeed, dislocations of resources, including increased expense and decreased availability of auditing services in some sectors of the economy, are more probable consequences of expanded liability." (3 C.4th 398.)

(2) *Liability out of proportion to fault*. The following factors tend to limit the auditor's fault: (a) Audits are performed in a client-controlled environment. (b) The client has interests in the audit that may not be consonant with those of the public. (c) Client control predominates in the dissemination of the audit report. (d) Although the auditor's role in the financial reporting process is secondary, the liability it faces in a negligence suit by a third party is primary and personal, because the other parties are usually in government-supervised liquidation or the bankruptcy court. (3 C.4th 399,400.)

(3) *The prospect of private ordering*. Courts advocating unlimited auditor liability often analogize the auditor's opinion to a consumer product, but this analogy lacks persuasive force: (a) The maker of a consumer product has

complete control over the design and manufacture; the auditor merely expresses an opinion about its client's financial statements. (b) The class of third persons is different: Investors, creditors, and other sophisticated persons who rely on audit reports are not the equivalent of ordinary consumers. (3 C.4th 403.)

(4) *The effect on auditors of negligence liability to third persons.* Courts and commentators advocating negligence liability predict that it might deter auditor mistakes, promote more careful audits, and result in a more efficient spreading of the risk of inaccurate financial statements. No empirical data on these prognostications has been offered, and deleterious economic effects appear at least as likely to occur. Auditors may rationally respond to increased liability by simply reducing audit services in fledgling industries where the business failure rate is high, reasoning that they will inevitably be singled out and sued when their client goes into bankruptcy, regardless of the care or detail of their audits. (3 C.4th 404.) For these reasons, "an auditor's liability for general negligence in the conduct of an audit of its client financial statements is confined to the client, i.e., the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory." (3 C.4th 406.)

(d) *Negligent misrepresentation.*

(1) This is a separate tort, a species of the tort of deceit, distinct from the tort of negligence. (3 C.4th 407, citing and quoting the text.) But the class of persons entitled to rely upon the representations is restricted to those to whom or for whom the misrepresentations were made. (3 C.4th 408, quoting the text.)

(2) The *Rest.2d Torts*, §552(b) is most consistent with the elements and policy foundations of the tort of negligent misrepresentation, and thus represents a reasoned approach to the problem. (3 C.4th 408, 409.) The "intent to benefit" language of the Restatement creates an objective standard that looks to the specific circumstances (e.g., supplier-client engagement and supplier's communications with third party) "to ascertain whether a supplier has undertaken to inform and guide a third party with respect to an identified transaction or type of transaction." (3 C.4th 410.) The Restatement approach is also the only one that achieves consistency in the law of negligent misrepresentation among the various professionals. (3 C.4th 410.)

(3) "By allowing recovery for negligent misrepresentation (as opposed to mere negligence), we emphasize the indispensability of justifiable reliance on the statements contained in the report." (3 C.4th 413.)

(e) *Intentional misrepresentation.* There is no authority for immunizing auditors from liability to third parties for intentional misrepresentation; the auditor's actual knowledge of the false or baseless character of its opinion is not required. If the defendant has no belief in the truth of the statement, and makes it recklessly, the element of scienter is satisfied. (3 C.4th 415.)

(f) *Disapproval.* The contrary general negligence rule and foreseeability approach of *International Mortg. Co. v. John P. Butler Accountancy Corp.* (1986) 177 C.A.3d 806, 223 C.R. 218, supra, §991, is rejected. (3 C.4th 415.)

Two justices joined in a strong dissent, asserting that "[t]he effect of these holdings is to give negligent accountants broad immunity for their professional malpractice in rendering audit opinions." (3 C.4th 417.) (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 C.4th 26, 58, 77 C.R.2d 709, 960 P.2d 513; *Industrial Indem. Co. v. Touche Ross & Co.* (1993) 13 C.A.4th 1086, 1093, 17 C.R.2d 29 [applying *Bily* retroactively]; *Software Design & Application, Ltd. v. Price Waterhouse* (1996) 49 C.A.4th 464, 469, 57 C.R.2d 36; *Mariani v. Price Waterhouse* (1999) 70 C.A.4th 685, 696, 82 C.R.2d 671; *Sanchez v. Lindsey Morden Claims Services* (1999) 72 C.A.4th 249, 252, 84 C.R.2d 799; *Michelson v. Camp* (1999) 72 C.A.4th 955, 962, 85 C.R.2d 539; 34 Cal. Western L. Rev. 245 [application of *Bily* to suit by shareholders of closely held corporation]; 45 *Hastings L. J.* 147; 26 *Loyola L.A. L. Rev.* 1335; 22 *Western State L. Rev.* 37; 48 *A.L.R.5th* 389 [independent accountant's liability to investors or shareholders]; BAJI No. 12.501.1.)

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SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 257, second line from last of section, "BAJI, No. 12.501.1" should be "BAJI, No. 12.50.1".



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6 Witkin Sum. Cal. Law Torts § 993

[§ 993] Audit Filed With Insurance Commissioner.

In *Arthur Andersen v. Superior Court* (1998) 67 C.A.4th 1481, 79 C.R.2d 879, defendant, a major international accounting firm, audited an insurance company. As required by *Ins.C. 900.2*, the audit was filed with the Insurance Commissioner, whose staff relied on it in concluding that the insurance company's financial statements showing it to be solvent fairly presented its financial position. In fact, the insurance company was insolvent; its financial statements misrepresented its true financial condition by failing to disclose that a significant portion of its assets were encumbered as a result of related party transactions. By the time the commissioner had discovered the company's true condition, its insolvency had increased, and liquidation proceedings were instituted. The commissioner then sued defendant for negligence and negligent misrepresentation. After its motion for summary judgment was denied, defendant petitioned for mandamus. *Held*, denied.

(a) The commissioner is not attempting to recover damages for the benefit of the policyholders. There is a significant distinction between pursuing a claim of negligent misrepresentation on behalf of the liquidation estate versus pursuing the idiosyncratic claims of numerous policyholders. Here, some policyholders had claims against the insurance company's estate, and the commissioner was simply assembling funds to pay these claims. Although the commissioner was suing for the benefit of policyholders in the sense that he was attempting to recover for the liquidation estate and because funds in that estate would be used to pay policyholder claims, it was clear that the commissioner was not asserting the claim of any particular individual for a negligent misrepresentation made directly to that individual. (67 C.A.4th 1497.)

(b) *Ins.C. 900.2* requires insurers doing business in this state to have an annual audit and to file the audit report with the Insurance Commissioner. When this statute was enacted, case law held that an auditor owed a duty of care to all reasonably foreseeable users of the audit report, and with the enactment of *Ins.C. 900.2*, the commissioner became such a user. Hence, consistent with the presumption that the Legislature knows the law, it may be concluded that the Legislature intended to bring the commissioner into the universe of potential plaintiffs to whom an auditor would owe a duty of care when auditing an insurance company. Although *Bily v. Arthur Young & Co.* (1992) 3 C.4th 370, 11 C.R.2d 51, 834 P.2d 745, supra, §992, constricted this universe, it did nothing to controvert the conclusion that the commissioner remained inside this universe. *Bily* held that, consistent with *Rest.2d, Torts* §552, an auditor's liability on

a professional misrepresentation theory is limited to parties whom the auditor intends to influence or whom the auditor knows will rely on the audit report. Hence, if an insurance company commissions an audit report to satisfy its filing requirement under *Ins.C. 900.2*, the auditor can be liable to the Insurance Commissioner if the report contains negligent misrepresentations. (67 C.A.4th 1501.)

(c) Defendant claimed that it could not be liable to the Insurance Commissioner under *Rest.2d, Torts §552*, because it did not "intend" or "know" that the audit report would be supplied to the commissioner. In other words, it pleaded ignorance of *Ins.C. 900.2*. This argument erroneously equates factual knowledge with legal knowledge. While defendant is correct in stating that, under *Rest.2d, Torts §552*, lack of factual knowledge that an audit report will be supplied to a particular third party will generally preclude auditor liability to that third party, a lack of legal knowledge is quite another matter. Ignorance of the law does not excuse its consequences. A firm such as defendant is charged with knowledge of the law pertaining to insurance company audits whether it was actually aware of the law or not. (67 C.A.4th 1505.)

(d) "[W]e hold that an auditor, when auditing an insurance company, owes a duty of due care not to make negligent misrepresentations to the Insurance Commissioner in his capacity as the representative of policyholders and creditors. ... If the Insurance Commissioner relies on negligent misrepresentations in ... an audit report, and if the claims-paying ability of the insurance company is damaged as a consequence, an award of damages may be made to the Insurance Commissioner and against the auditor on behalf of the policyholders and other creditors." (67 C.A.4th 1507.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Accountants.
c. Litigation Support.

6 *Witkin Sum. Cal. Law Torts* § 994

[§ 994] Litigation Support.

In *Mattco Forge v. Arthur Young & Co.* (1997) 52 C.A.4th 820, 60 C.R.2d 780, plaintiff sued an accounting firm for malpractice, alleging that defendants' negligence in providing accounting litigation support services led to dismissal of plaintiff's federal lawsuit against a third party. The trial judge instructed the jury that it had only to determine if defendant's actions caused plaintiff to suffer harm, and that no definite standard or method of calculation was prescribed by law by which to fix reasonable compensation for the loss of a legal claim. Judgment was entered on verdicts in favor of plaintiff. *Held*, reversed. The "trial-within-a-trial" standard for attorney malpractice (see 1 *Cal. Proc.* (4th), *Attorneys*, §334) applied.

(a) Plaintiff's cause of action is analogous to a malpractice case in which an attorney is accused of losing a plaintiff's case through negligence, and the same evidentiary burden applies. Accordingly, plaintiff has the burden to establish that, had defendant properly handled the underlying case, plaintiff would have prevailed against the third party. (52 C.A.4th 831.) While some arguments of its critics have merit, the trial-within-a-trial burden is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually caused by a professional's malfeasance. Certainly to date, no other approach has been accepted by the courts. (52 C.A.4th 834.) Accountants and other litigation support professionals often play as great a role in organizing and evaluating a client's case as do lawyers. Thus, in situations where alleged negligent conduct is analogous to an attorney's mishandling litigation, a plaintiff should be held to the same burden. (52 C.A.4th 835.)

(b) The instructions given were wrong and misleading. There is a definite standard and a method of calculation for the loss of a legal claim, and those elements are ascertained by the trial-within-a-trial approach. The trial-within-a-trial approach avoids the specter that the damages claimed by a plaintiff are a matter of pure speculation and conjecture. Also, to enable a plaintiff merely to assign value to a case would render professionals liable as guarantors, because almost all cases have some value. (52 C.A.4th 841.)

(c) The following instruction on liability, based on BAJI, No. 6.37.5, is appropriate on retrial: "In order to recover damages from a professional for negligence in the handling of a lawsuit, which negligence resulted in the plaintiff's loss of the prior lawsuit, the plaintiff must establish: (1) the professional was negligent in the handling of the prior lawsuit;

(2) the professional's negligence was a substantial factor in the plaintiff's loss of the prior lawsuit; and (3) the proper handling of the prior lawsuit by the professional would have resulted in a collectible judgment in plaintiff's favor." (52 C.A.4th 844.)

BAJI, No. 6.37.5, which had been limited to attorney malpractice, was revised in 1997 to extend the trial-within-a-trial standard to professional negligence generally. However, the BAJI instruction is expressly limited to actions in which the plaintiff claims that the professional's negligence caused the loss of a prior case. (BAJI, No. 6.37.5, Use Note; see 25 *Pepperdine L. Rev.* 1 [misapplication of attorney malpractice paradigm to accounting firm performing litigation services].)

SUPPLEMENT: [This section is current through the latest supplement]
"Trial-within-a-trial" standard:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §310 et seq.



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a. In General.

6 *Witkin Sum. Cal. Law Torts* § 995

[§ 995] In General.

The standard of care of other professionals is stated in much the same terms as those used in relation to medical practitioners (*supra*, §§933, 934); i.e., a professional is required to make reasonable use of his or her superior knowledge, skills, and experience within the area of expertise. (See *KPFF v. California Union Ins. Co. (1997)* 56 *C.A.4th* 963, 974, 66 *C.R.2d* 36, citing the text; *Rest.2d, Torts* §289, Comment m; 3 Harper, James & Gray 2d §16.6; *Cal. Civil Practice*, 3 Torts, Other Professional Malpractice, Chap. 34; 33 *San Diego L. Rev.* 137 [liability of professional person to third party for negligent performance of contract]; 33 *U.S.F. L. Rev.* 205 [what constitutes professional]; *BAJI*, No. 6.37; *CACI*, No. 600; on certificate of merit as condition to filing malpractice action against architect, professional engineer, or land surveyor, see 3 *Cal. Proc. (4th), Actions*, §204.)

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Harper, James & Gray 3d §16.6.

Certificate of merit:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §209.



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b. Architects.

6 Witkin Sum. Cal. Law Torts § 996

[§ 996] Architects.

"[A]n architect who plans and supervises construction work, as an independent contractor, is under a duty to exercise ordinary care in the course thereof for the protection of any person who foreseeably and with reasonable certainty may be injured by his failure to do so, even though such injury may occur after his work has been accepted by the person engaging his services." (*Montijo v. Swift* (1963) 219 C.A.2d 351, 353, 33 C.R. 133.) (See *Mallow v. Tucker, Sadler & Bennett* (1966) 245 C.A.2d 700, 702, 54 C.R. 174 [failure to delineate on plans location of buried high-voltage lines despite possessing means of doing so]; *Cooper v. Jevne* (1976) 56 C.A.3d 860, 868, 128 C.R. 724 [liability of architects for economic loss suffered by purchasers of defectively designed condominiums]; 33 Proof of Facts 3d 57 [architect's negligence]; 19 Am.Jur. Trials 231 [Architectural Malpractice Litigation]; 48 Cal. L. Rev. 151; 55 Cal. L. Rev. 1361; 92 Harv. L. Rev. 1075 [Architectural Malpractice: A Contract-Based Approach]; 15 Hastings L. J. 579; 30 Hastings L. J. 729 [duty of "design professionals" (designers of habitable structures) to inform]; 2 San Diego L. Rev. 123; 59 A.L.R.3d 869 [failure to carry out supervisory responsibilities]; 65 A.L.R.3d 249 [liability of project architect for economic damages suffered by contractor]; 97 A.L.R.3d 455 [liability for injury or death from improper or defective plans or design]; 3 A.L.R.4th 1023 [necessity of expert testimony on negligence].)

B. & P.C. 5536.3 requires that any architect who has prepared a plan for residential real property damaged in a natural disaster must furnish a copy of the plan to the homeowner or his or her insurer to verify the fact and amount of damage for insurance purposes. (B. & P.C. 5536.3(a); see 24 Pacific L. J. 639.) Unless the architect gives written consent allowing the plan to be used to rebuild all or part of the property, he or she may not be held liable to any person if the plans are subsequently used for this purpose. (B. & P.C. 5536.3(b), (c); on certificate of merit as condition to filing malpractice action against architect, professional engineer, or land surveyor, see 3 Cal. Proc. (4th), Actions, §204.)

SUPPLEMENT: [This section is current through the latest supplement]
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c. Miscellaneous Professionals.

6 *Witkin Sum. Cal. Law Torts* § 997

[§ 997] Miscellaneous Professionals.

The following cases and other sources may be consulted for liability of persons in particular professions:

Art experts: See 44 *U.C.L.A. L. Rev.* 1947.

Asbestos-abatement consultants: See 63 *Proof of Facts* 3d 349.

Attorneys: See 1 *Cal. Proc.* (4th), *Attorneys*, §311 et seq.

Automobile driving teachers: See 5 *A.L.R.3d* 271.

Bankers: See 69 *Am.Jur. Trials* 119.

Barbers and cosmetologists: See 10 *Am.Jur.2d* (1997 ed.) *Barbers and Cosmetologists* §19 et seq.

Clergy: See 47 *Am.Jur. Trials* 271; 19 *Cal. Western L. Rev.* 507; 30 *Loyola L.A. L. Rev.* 177; 14 *Pepperdine L. Rev.* 137.

Computer professionals: See 32 *Proof of Facts* 3d 1.

Druggists: See 34 *Proof of Facts* 2d 199; 58 *A.L.R.3d* 828 [liability for suicide consummated with drugs furnished]; 3 *A.L.R.4th* 270 [negligently filling prescription]; 44 *A.L.R.5th* 393.

Engineers: See *Gagne v. Bertran* (1954) 43 *C.2d* 481, 275 *P.2d* 15, supra, §820; *Stuart v. Crestview Mut. Water Co.* (1973) 34 *C.A.3d* 802, 809, 110 *C.R.* 543; 17 *Proof of Facts* 3d 49 [design and construction engineer]; 43 *A.L.R.4th* 911 [negligence in highway or bridge construction or maintenance].

Educational agencies and school districts: See 92 *Cal. L. Rev.* 1119.

Environmental consultants: See *Mission Oaks Ranch, Ltd. v. Santa Barbara* (1998) 65 *C.A.4th* 713, 725, 77 *C.R.2d* 1 [environmental impact report consultant owed duty to county that hired it, not to developer harmed by its findings]; 64

So. Cal. L. Rev. 1143 [environmental consultants].

Escrow holder and title insurance company: See *Amen v. Merced County Title Co.* (1962) 58 C.2d 528, 532, 25 C.R. 65, 375 P.2d 33; *Karras v. Title Ins. & Guaranty Co.* (1953) 118 C.A.2d 659, 665, 258 P.2d 866; *Seeley v. Seymour* (1987) 190 C.A.3d 844, 860, 237 C.R. 282.)

Executors: See *Estate of Beach* (1975) 15 C.3d 623, 631, 125 C.R. 570, 542 P.2d 994, 14 *Summary* (10th), *Wills and Probate*, §465.

Funeral directors: See *Cohen v. Groman Mortuary* (1964) 231 C.A.2d 1, 41 C.R. 481; 15 *Hastings L. J.* 464; 48 A.L.R.3d 240; 48 A.L.R.3d 261.

Garage and gas station owners or operators: See 38 *Am.Jur.2d* (1999 ed.), *Garages, and Filling and Parking Stations* §20 et seq.

House movers: See 9 A.L.R.3d 1436.

Insurance adjusters: See 50 A.L.R.4th 900.

Insurance agents and brokers: See 30 *West L.A. L. Rev.* 17; 121 A.L.R.5th 365; 155 A.L.R.5th 681.

Investment advisers: See C.C. 3372 [anyone damaged by reliance on adviser's services can recover compensation paid and damages, unless adviser proves that services were performed "with the due care and skill reasonably to be expected of a person who is such an expert"].

Mortgage brokers: See 8 *Proof of Facts* 3d 559.

Nurses: See 26 *Proof of Facts* 2d 363 [malpractice of psychiatric nurse]; 22 *Proof of* 31 *Proof of Facts* 3d 203 [negligence by hospital emergency room nurse].

Pest exterminators or inspectors: See 29 A.L.R.4th 987, 32 A.L.R.4th 682.

Real estate appraisers: See 66 *So. Cal. L. Rev.* 2251; 21 A.L.R.4th 867.

Real estate broker, dealer, or salesperson: See C.C. 2079 et seq., 3 *Summary* (10th), *Agency and Employment*, §66; *Health & Saf.C.* 18064, 18046.1; 35 A.L.R.5th 83 [real estate agents and brokers].

Social workers: See 58 A.L.R.4th 977.

Sports referees: See 12 *Pacific L. J.* 937.

Stockbrokers, see 89 *Am.Jur* Trials 1.

Surveyors: See 117 A.L.R.5th 23; 59 *Proof of Facts* 3d 375.

Veterinarians: See 55 *Hastings L. J.* 1009 [doctrinal exclusivity of bailment and veterinary malpractice]; 7 *U.C. Davis L. Rev.* 400; 71 A.L.R.4th 881; 32 *Proof of Facts* 3d 351.

SUPPLEMENT: [This section is current through the latest supplement]
Attorneys:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §285 et seq.

Druggists: See 80 *So. Cal. L. Rev.* 865 [argument in support of wrongful conception cause of action against

pharmacists refusing to provide emergency contraception]. *Insurance agents and brokers*: See *Business to Business Markets v. Zurich Specialties London Ltd.* (2005) 135 C.A.4th 165, 37 C.R.3d 295, 2 Summary (10th), *Insurance*, Supp., §70. *Correction*: Page 262, paragraph beginning "Mortgage brokers:", "8 Proof of Facts 3d 559" should be "18 Proof of Facts 3d 559".



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a. Duty Owed by Child.

1. General Principle.

6 Witkin Sum. Cal. Law Torts § 998

[§ 998] General Principle.

Before adoption of the comparative negligence doctrine (see *infra*, §1327 et seq.), the question of a child's duty of care was usually presented in connection with a plea of contributory negligence as a bar to recovery, but the test is identical whether the issue is negligence or contributory negligence. A child of immature years is not held to the same standard of conduct as an adult, but only to the degree of care ordinarily exercised by children of similar age, mental capacity, and experience. (See *Ellis v. D'Angelo* (1953) 116 C.A.2d 310, 315, 253 P.2d 675; *Olsen v. McGillicuddy* (1971) 15 C.A.3d 897, 903, 93 C.R. 530, quoting the text; Dobbs, *The Law of Torts* §124 et seq.; 57A Am.Jur.2d (2004 ed.), *Negligence* §183; 32 A.L.R.4th 56 [modern trends as to children's contributory negligence]; BAJI, No. 3.35; CACI, No. 402.) The same rule applies where the child's act is a violation of statute, which would be negligence per se if the child were an adult. (See *infra*, §896.)

There are no particular ages at which a child is deemed either wholly without capacity or fully accountable, and the question of capacity is usually for the jury. (*Courtell v. McEachen* (1959) 51 C.2d 448, 454, 334 P.2d 870 [reversible error for judge to determine it as matter of law]; *Todd v. Orcutt* (1919) 42 C.A. 687, 690, 183 P. 963; *Moeller v. Packard* (1927) 86 C.A. 459, 467, 261 P. 315; *Patania v. Yellow-Checker Cab Co.* (1929) 102 C.A. 600, 603, 283 P. 295; *Shannon v. Central-Gaither Union School Dist.* (1933) 133 C.A. 124, 132, 23 P.2d 769; *Ross v. San Francisco Unified School Dist.* (1953) 120 C.A.2d 185, 191, 260 P.2d 663; see *Rest.2d, Torts* §283, 464; 26 So. Cal. L. Rev. 335; 30 So. Cal. L. Rev. 552; 42 A.L.R.2d 930, 935 [injury to or death of child from burns caused by hot ashes, cinders, or other hot waste material]; 67 A.L.R.2d 570 [child of tender years]; 11 A.L.R.3d 1168 [child climbing over or through train blocking crossing]; on duty owed by older child, see *Calandri v. Ione Unified School Dist. of Amador* (1963) 219 C.A.2d 542, 547, 33 C.R. 333, *infra*, §999; on duty owed by child automobile driver, see *infra*, §1000.)

However, children under 4 are almost universally held incapable of contributory negligence, and children over 5 have frequently been held capable. (See *Conroy v. Perez* (1944) 64 C.A.2d 217, 225, 148 P.2d 680 [2-year-old child is conclusively presumed incapable of foreseeing danger, and submitting issue of contributory negligence to jury was error]; *Ellis v. D'Angelo* (1953) 116 C.A.2d 310, 315, 253 P.2d 675 [4-year-old does not possess mental capacity to foresee harm; hence, may not be liable for negligence but may be liable for battery, *supra*, §25].) In *Christian v. Goodwin* (1961) 188 C.A.2d 650, 10 C.R. 507, the court, dealing with the period between 4 and 5 years, followed the

weight of authority and prior California dicta in holding the child not capable and therefore not barred by contributory negligence. (188 C.A. 2d 652.) (See *Untalan v. Glass* (1961) 190 C.A.2d 474, 476, 12 C.R. 1 [children under 4 have insufficient capacity to be guilty of negligence]; *Greene v. Watts* (1962) 210 C.A.2d 103, 105, 26 C.R. 334.)

A special rule applies to a child acting in obedience to the parent's directions; the child cannot be found negligent. (*Haft v. Lone Palm Hotel* (1970) 3 C.3d 756, 777, 91 C.R. 745, 478 P.2d 465.)

West's Key Number Digest, Negligence k.535(3) et seq.

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2. Illustrations.

6 Witkin Sum. Cal. Law Torts § 999

[§ 999] Illustrations.

In *Bolar v. Maxwell Hardware Co.* (1928) 205 C. 396, 271 P. 97, a 15 year-old boy purchased gunpowder from defendant, constructed a toy cannon, and was injured when it exploded. *Held*, he was old enough to appreciate the danger of firearms and explosives, and was guilty of contributory negligence as a matter of law. (205 C. 398.) (See *Mathews v. Albany* (1939) 36 C.A.2d 147, 148, 97 P.2d 266 [12-year-old boy was contributorily negligent when he ignited powder taken from unexploded fireworks bomb]; and 47 A.L.R.3d 630 [application of adult standard of care to child handling firearms].)

Bolar was distinguished in *Calandri v. Ione Unified School Dist. of Amador* (1963) 219 C.A.2d 542, 33 C.R. 333. Plaintiff, a 15-year-old boy, constructed a bronze cannon 53/4 inches long, with a 1/4-inch bore, as a manual training project under the supervision of defendant G, the teacher. G knew that this and other cannons made by students were to be fired, and plaintiff obtained information from G about purchasing gunpowder. Nevertheless, G never warned plaintiff or the other boys of the dangers, and gave no instruction on a safe type of fuse or its application. Plaintiff, having had some hunting experience, took a shotgun shell apart, loaded the cannon with powder, wadding, and shot, then mixed powder with match heads and worked this combination into the touchhole. The cannon fired and injured his hand. *Held*, judgment for defendants, G, and the school district, reversed for refusing to instruct the jury on the duty of care owed by an adult to a child. On the issue of contributory negligence, a crucial fact was deemed sufficient to make the *Bolar* decision inapplicable: The boy in *Bolar* worked in secret, having knowledge of the danger and having been warned of it. (219 C.A.2d 550.)

In *Moeller v. Packard* (1927) 86 C.A. 459, 261 P. 315, an 8-year-old girl was held guilty of contributory negligence as a matter of law when, to retrieve some article, she suddenly ran from the side of a highway directly into the path of an automobile. (86 C.A. 460.) (See *Raggio v. Mallory* (1938) 10 C.2d 723, 728, 76 P.2d 660 [boy of 12 who jumped back in path of approaching automobile to escape discovery by victim of mischief was contributorily negligent].)

In *Shannon v. Central-Gaither Union School Dist.* (1933) 133 C.A. 124, 23 P.2d 769, plaintiff, a 10-year-old boy alighted from a school bus in a rural district and ran across the highway toward his home, without looking for oncoming vehicles. The driver of the bus had not warned him, and another car obstructed his view. He was struck by a passing car.

Held, the question of contributory negligence was for the jury. (133 C.A. 130.) (See *Ross v. San Francisco Unified School Dist.* (1953) 120 C.A.2d 185, 191, 260 P.2d 663 [contributory negligence of high school student operating machine was question for jury; nonsuit reversed]; *Singer v. Marx* (1956) 144 C.A.2d 637, 643, 301 P.2d 440 [whether 9-year-old boy, throwing rocks at people, had requisite capacity was question for jury].)

All of these contributory negligence cases should now be treated as comparative negligence cases (see *infra*, §1329).

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3. Child Vehicle Driver.

6 *Witkin Sum. Cal. Law Torts* § 1000

[§ 1000] Child Vehicle Driver.

In *Neudeck v. Bransten* (1965) 233 C.A.2d 17, 43 C.R. 250, defendant driver, 16 years old, failed to stop at an intersection at the top of a steep hill, and plaintiff was injured in the resulting accident. The trial judge refused defendant's proposed instruction that a child, though violating a statute or ordinance, is not held to the same standard of conduct as an adult. *Held*, refusal was proper.

(a) "We hold that when a minor engages in an activity such as driving, which is normally undertaken by adults and for which adult qualifications are required, an exception to the general rule arises, and the minor should be held to the ordinary standard of care." (233 C.A.2d 21.)

(b) "A person observing children at play with toys, throwing balls, operating tricycles or velocipedes, or engaged in other childhood activities may anticipate conduct that does not reach an adult standard of care or prudence. However, one cannot know whether the operator of an approaching automobile, airplane, or powerboat is a minor or an adult, and usually cannot protect himself against youthful imprudence even if warned." (233 C.A.2d 22.)

(c) "A member of the traveling public has the right to expect that others using our highways, regardless of their age and experience, will obey the traffic laws and exercise the adult standard of ordinary care. To permit minors a more lenient standard is unrealistic, contrary to expressed legislative policy and inimical to the public safety." (233 C.A.2d 23.) (See 6 Santa Clara Lawyer 97.)

The same view was taken in *Prichard v. Veterans Cab Co.* (1965) 63 C.2d 727, 47 C.R. 904, 408 P.2d 360, disapproving contrary rulings in several earlier cases. Plaintiff, a 17-year-old motorcycle delivery boy, approached a familiar busy intersection at 15-20 miles per hour, and saw a taxicab about to make a left turn into his path. With ample time to avoid a collision, he continued straight ahead and struck the cab. *Held*, the trial judge properly refused to give the ordinary instruction on the lesser duty of care of a minor. (63 C.3d 732.) (See *Ev.C.* 669(b)(2), *supra*, §§873, 874; 97 A.L.R.2d 872 [age of minor operator of motor-powered vehicle as affecting negligence]; BAJI, No. 3.45; CACI, Nos. 418, 421.)

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b. Duty Owed to Child.

1. General Principle.

6 Witkin Sum. Cal. Law Torts § 1001

[§ 1001] General Principle.

The same underlying consideration, namely, the child's lack of capacity to appreciate risks and to avoid danger (see *supra*, §998), leads to the imposition of a greater degree of care on the part of others to children. (See *Hilyar v. Union Ice Co.* (1955) 45 C.2d 30, 36, 286 P.2d 21 [duty of motorist to exercise care to discover presence of children and look out for their safety]; *Fowler v. Seaton* (1964) 61 C.2d 681, 688, 39 C.R. 881, 394 P.2d 697 [duty of nursery school to supervise children]; *Schwartz v. Helms Bakery Ltd.* (1967) 67 C.2d 232, 243, 60 C.R. 510, 430 P.2d 68, *infra*, §1062; *Brizzolari v. Market Street Ry. Co.* (1935) 7 C.A.2d 246, 248, 46 P.2d 783 [duty of carrier to child passenger]; *Marino v. Valenti* (1953) 118 C.A.2d 830, 842, 259 P.2d 84 [duty of possessor of explosives to avoid injury to children who might have access to them]; *Grant v. Mueller* (1958) 160 C.A.2d 804, 808, 325 P.2d 680 [driver's obligation to exercise extra care towards children]; *Raymond v. Paradise Unified School Dist. of Butte* (1963) 218 C.A.2d 1, 10, 31 C.R. 847, *supra*, §861; *Calandri v. Ione Unified School Dist. of Amador* (1963) 219 C.A.2d 542, 545, 33 C.R. 333, *supra*, §999; *Wright v. Arcade School Dist.* (1964) 230 C.A.2d 272, 277, 40 C.R. 812; *Casas v. Maulhardt Buick* (1968) 258 C.A.2d 692, 697, 66 C.R. 44 [criticizing inaccurate instructions]; 57A Am.Jur.2d (2004 ed.), *Negligence* §189; 2 Proof of Facts 3d 439 [negligent sale or entrustment of toy]; 4 Proof of Facts 3d 579 [negligence of private nursery school or day-care center]; 13 Proof of Facts 3d 475 [school's liability for injury to child going to or from school bus]; 41 Am.Jur. Trials 1 [social worker's malpractice for failing to protect foster children]; 20 A.L.R.2d 8, 24 [proprietor's liability for injury to patron caused by pushing of other patrons]; 30 A.L.R.2d 5 [duty of motorist approaching place where children are gathered]; 31 A.L.R.2d 789 [railroad's duty to children walking along railroad tracks]; 26 A.L.R.3d 317 [duty to warn child of danger]; 35 A.L.R.3d 9 [railroad's liability to child trespasser on train]; 88 A.L.R.3d 1236 [liability of youth camp for injury to child participant in program]; 58 A.L.R.4th 240 [liability of private nursery school or day care center for injury to child while attending]; BAJI, No. 3.38; CACI, No. 412.)

This rule is occasionally applied to minor children approaching adult years. (See *Hernandez v. Murphy* (1941) 46 C.A.2d 201, 208, 115 P.2d 565 [boy of 15]; *Satariano v. Sleight* (1942) 54 C.A.2d 278, 283, 129 P.2d 35 [boy of 18; "even boys of seventeen and eighteen years ... are not accustomed to exercise the same amount of care for their own safety as persons of more mature years"]; *Ross v. San Francisco Unified School Dist.* (1953) 120 C.A.2d 185, 191, 260 P.2d 663.)

Statutes sometimes deal with specific hazards; e.g., P.C. 402b makes it a misdemeanor to abandon a refrigerator, icebox, or freezing locker with a latching mechanism that may entrap a child. (See 2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare*, §394.)

West's Key Number Digest, Negligence k.216, 237, 256, 402

SUPPLEMENT: [This section is current through the latest supplement]

A homeowner's duty of supervision to a visiting child may be removed by the presence of the child's parent. (See *Padilla v. Rodas* (2008) 160 C.A.4th 742, 747, 73 C.R.3d 114, Supp., infra, §1058 [homeowners had no duty to supervise child who drowned in their backyard pool, where child was accompanied by his mother].)



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7. Children.

b. Duty Owed to Child.

2. Illustrations.

6 *Witkin Sum. Cal. Law Torts* § 1002

[§ 1002] Illustrations.

In *Wishart v. Claudio* (1962) 207 C.A.2d 151, 24 C.R. 398, defendant P, an instructor in a summer day camp, took some of the boys on a nature walk. They met three boys out hunting, one carrying his rifle awkwardly. P, aware of the danger of shooting in the area, did not warn the hunters, or observe them to see if they went a safe distance; and he did not remove his own boys to a place of safety after he heard the gun fired twice. A third shot struck plaintiff, one of his own group. *Held*, judgment for plaintiff affirmed; the trial judge could infer the foreseeability of a careless firing, which reasonable precautions could have prevented. (207 C.A.2d 155.)

In *Suess v. Westwood* (1966) 246 C.A.2d 849, 55 C.R. 269, defendants parked their automobile in a trailer park. The radio antenna, dull in color and difficult to see at night, extended into the pedestrian area at eye level. Plaintiffs' 15-year-old son, a resident of the area, ran into it while playing and was killed. *Held*, a cause of action for wrongful death was stated. Cases dealing with encroachments of windows, automobiles, or loads onto a public sidewalk are equally applicable to this projection on private property. The allegation that decedent was a resident justified the inference that he was entitled to play there and that defendants should have anticipated his presence. This being so, the trier of fact could conclude that parking in that place would subject persons in his class to an unreasonable risk of harm. (246 C.A.2d 850.)

Childish curiosity and propensity to intermeddle must be taken into account. In *Kataoka v. May Dept. Stores Co.* (1943) 60 C.A.2d 177, 140 P.2d 467, a 4-year-old boy caught his finger in an escalator, when accompanying his mother on a shopping trip to defendant's store. *Held*, the jury could find negligence in failure to provide an attendant or guard. (60 C.A.2d 182.) And in *Crane v. Smith* (1943) 23 C.2d 288, 296, 144 P.2d 356, the same holding was made where a 3-year-old child caught his finger in the unguarded spout of a coffee grinder left standing in an aisle of defendant's market. (See *Roberts v. Del Monte Properties Co.* (1952) 111 C.A.2d 69, 73, 243 P.2d 914 [furniture and mattresses piled near open window in hall of hotel; 7-year-old boy, son of tenant, played on them and fell out window]; *Amos v. Alpha Property Management* (1999) 73 C.A.4th 895, 898, 87 C.R.2d 34 [landlord and manager of apartment building had duty to take reasonable precautions to prevent infant from falling from window in second-floor hallway; citing *Roberts*].)

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8. Person With Mental or Physical Disability.

6 Witkin Sum. Cal. Law Torts § 1003

[§ 1003] Person With Mental or Physical Disability.

(1) *Mental Deficiency*. Unless the actor is a child (see *supra*, §998 et seq.), insanity or other mental deficiency does not relieve the actor from liability for conduct that does not conform to the standard of a reasonable person under like circumstances. (Rest.2d, §283B; see 57B Am.Jur.2d (2004 ed.), *Negligence* §§863, 864.) Thus, mental deficiency does not excuse conduct that would otherwise be negligence. (*Fox v. San Francisco* (1975) 47 C.A.3d 164, 169, 173, 120 C.R. 779.)

In *De Martini v. Alexander Sanitarium* (1961) 192 C.A.2d 442, 13 C.R. 564, plaintiff, suffering from depression, voluntarily entered defendant hospital, on the recommendation of his psychiatrist, for shock treatment. To overcome his aversion to hospitalization and this treatment, his doctor recommended, and he and his wife approved, a minimum security facility. While in the hospital patio with the nurse temporarily absent, plaintiff climbed the 6-foot wall, jumped down, and fractured his ankle. *Held*, judgment for defendant affirmed.

(a) The principal contention is that the jury should have been instructed that plaintiff was incapable of contributory negligence as a matter of law. This is incorrect. There is a dearth of authority, but Prosser suggests that the same test should be applied to an insane person as to a child: "[T]he issue of contributory negligence of a mentally disturbed person is a question of fact; unless, of course, the evidence discloses that the person whose actions are being judged is completely devoid of reason. If he is so mentally ill that he is incapable of being contributorily negligent, he would be entitled to have the jury so instructed, since his position would be comparable to the child of tender years that is incapable of contributory negligence as a matter of law." (192 C.A.2d 447.)

(b) Here, plaintiff had never been adjudicated mentally ill or incompetent, and his actions, though impulsive and irrational, were voluntary. Under the circumstances, reasonable minds might differ on his accountability, and the question was one of fact for the jury. (192 C.A.2d 448.) (See 3 Harper, James & Gray 2d §16.7; 57A Am.Jur.2d (2004 ed.), *Negligence* §186; 91 A.L.R.2d 392 [contributory negligence of mentally incompetent or emotionally disturbed].)

(2) *Physical Disability*. If the actor is ill or otherwise physically disabled, the standard of conduct to which he or she must conform to avoid being negligent is that of a reasonable person under like disability. So far as physical characteristics are concerned, the hypothetical reasonable person may be said to be identical with the actor. Physical infirmities, such as blindness or deafness, or the weaknesses of age, as well as physical illnesses are treated merely as

part of the "circumstances" under which a reasonable person must act. Thus, the standard of conduct for a blind person becomes that of a reasonable person who is blind. This is not a different standard from that of the reasonable person, but an application of it to the special circumstances of the case. (Rest.2d, 283C, Comments a, b; see *Jones v. Bayley* (1942) 49 C.A.2d 647, 654, 122 P.2d 293; *Conjorsky v. Murray* (1955) 135 C.A.2d 478, 482, 287 P.2d 505; 57B Am.Jur.2d (2004), *Negligence* §860 et seq.)

West's Key Number Digest, Negligence k.535(11) et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Mental Deficiency*. See 3 Harper, James & Gray 3d §16.7.



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a. Nature of Tort.

6 *Witkin Sum. Cal. Law Torts* § 1004

[§ 1004] Nature of Tort.

(1) *In General.* The problem of recovery for "fright and shock" or, in the modern terminology, for emotional distress, arises in several branches of the law of torts. (See generally 3 Harper, James & Gray 2d §18.4; Dobbs, *The Law of Torts* §308 et seq.; 38 *Am.Jur.2d* (1999 ed.), *Fright, Shock, and Mental Disturbance* §1 et seq.; C.E.B., 2 *Business Litigation*, §11.81 et seq.; 29 *Loyola L.A. L. Rev.* 343 [analysis of negligent infliction of emotional distress cases in California]; 91 *A.L.R.5th* 545 [recovery for emotional distress due to treatment of pets and animals]; BAJI, No. 12.80; on construction of insurance policy to cover emotional distress under "bodily injury" clause, see *Employers Cas. Ins. Co. v. Foust* (1972) 29 *C.A.3d* 382, 386, 105 *C.R.* 505.)

(2) *Distinctions.*

(a) *Damage.* Emotional distress is a common additional element of damages for various intentional torts and for negligence, subject usually to the limitation that there must have been either some physical impact or a physical injury without impact. (See >*Long v. PKS* (1993) 12 *C.A.4th* 1293, 16 *C.R.2d* 103 [driver injured in collision could recover damages for emotional distress arising out of witnessing injury and death of passenger, her foster daughter]; *infra*, §1671.)

(b) *Intentional Tort.* The intentional causing of emotional distress is recognized as an *independent tort* for which damages can be recovered without proof of (1) a conventional tort, or (2) physical impact or injury. (See *supra*, §450.)

(c) *Negligence.* The negligent causing of emotional distress is not an independent tort but the tort of negligence, involving the usual duty and causation issues. Recovery is generally allowed where there is physical impact. (See, e.g., *Di Mare v. Cresci* (1962) 58 *C.2d* 292, 297, 300, 23 *C.R.* 772, 373 *P.2d* 860 [fall injuring hip and leg, leaving plaintiff suspended in air and causing emotional trauma]; *Brewer v. Teano* (1996) 40 *C.A.4th* 1024, 1029, 47 *C.R.2d* 348, *infra*, §1218) [physical impact]; *Macy's Calif. v. Superior Court* (1995) 41 *C.A.4th* 744, 748, 48 *C.R.2d* 496 [traditional negligence elements of duty, breach of duty, causation, and damages apply]; *Lawson v. Management Activities* (1999) 69 *C.A.4th* 652, 656, 81 *C.R.2d* 745 [policy of designating tort as negligent infliction of emotional distress often incorrectly results in its being treated as independent tort].) And some jurisdictions, including California, recognize liability where, even though there is no impact, there is physical injury. (See *infra*, §1005 et seq.)

Recovery for negligent causing of emotional distress is in some jurisdictions denied in the absence of either impact or physical injury (see *infra*, §1022), but is allowed in California (see *infra*, §1022).

(3) *Categories of Claims*. Negligent infliction of emotional distress cases are generally divided into two categories:

(a) *Direct Victim*. A "direct victim" claim alleges emotional distress from defendant's conduct directed at plaintiff. (See *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, *infra*, §1022; *Steven F. v. Anaheim Union High School Dist.* (2003) 112 C.A.4th 904, 911, 6 C.R.3d 105 [student's parents could not recover on direct victim theory based on negligence of school district teachers in not discovering sexual relationship between student and teacher]; 47 *Hastings L. J.* 551 [accused in false recovered memory case as "direct victim"].)

(b) *Bystander*. A "bystander" claim alleges emotional distress from witnessing negligently inflicted injury on a person closely related to plaintiff. (See *Thing v. La Chusa* (1989) 48 C.3d 644, 257 C.R. 865, 771 P.2d 814, *infra*, §1009; *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *infra*, §1008.)

(4) *Restatement*. Some difficulty in analysis has resulted from the *Rest.2d, Torts* §312, which states that "intentionally and unreasonably" subjecting the plaintiff to emotional distress when the likelihood of illness or other physical harm is foreseeable, is a form of *negligence*, i.e., the actor intends to inflict only the mental suffering, but his or her intentional act creates an unreasonable risk of an *unintended result*--the physical harm. Although his or her conduct amounts to something less than extreme outrage, the actor should recognize that bodily harm will result from the unreasonable risk. (*Rest.2d, Torts* §312, Comment b.) The Restatement rule, however, "does not give protection to mental and emotional tranquillity in itself." (*Rest.2d, Torts* §312, Comment a.) (See 44 *Cal. L. Rev.* 55; 23 *So. Cal. L. Rev.* 142.)

(5) *Claims Against Public Policy*. With respect to certain claims, courts have concluded that allowing a remedy in tort for infliction of emotional distress would be contrary to public policy. (See *Dunkin v. Boskey* (2000) 82 C.A.4th 171, 193, 98 C.R. 44 [allowing nonbiological parent to recover damages for developing close relationship with child misrepresented to be his and performing parental acts "is not 'damage' that should be compensable under the law"].)

West's Key Number Digest, Damages k.49

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 C.A.4th 1228, 1264, 29 C.R.3d 521 [in action by employee of animal testing lab against person protesting lab's activities, employee could not show probability of proving negligent infliction of emotional distress, where there was no special relationship that imposed duty on defendants not to cause employee emotional distress]; 3 *Harper, James & Gray* 3d §18.4.(3) *Categories of Claims*.

(b) *Bystander*. See CACI, No. 1621 [Negligent Infliction of Emotional Distress--Bystander--Essential Factual Elements]. *Correction:* Page 270, line 6 of paragraph (c), year of *Brewer v. Teano* should be 1995.



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b. Injury Without Impact.

6 *Witkin Sum. Cal. Law Torts* § 1005

[§ 1005] Injury Without Impact.

Even where there is no physical impact, recovery is usually allowed if the fright results in a physical injury or illness. (See *Dillon v. Legg* (1968) 68 C.2d 728, 746, 69 C.R. 72, 441 P.2d 912, *infra*, §1008; *Cook v. Maier* (1939) 33 C.A.2d 581, 584, 92 P.2d 434 [automobile collision on plaintiff's land causing fright for her own safety]; *Medeiros v. Coca-Cola Bottling Co. of Turlock* (1943) 57 C.A.2d 707, 714, 135 P.2d 676 [nausea and sickness from discovery of disgusting object in bottled beverage]; *Vanoni v. Western Airlines* (1967) 247 C.A.2d 793, 795, 56 C.R. 115, *infra*, §1020, citing the text; *Rest.2d, Torts* §436; 3 Harper, James & Gray 2d §18.4; 38 *Am.Jur.2d* (1999 ed.), *Fright, Shock, and Mental Disturbance* §14; 18 Proof of Facts 3d 103 [infliction of emotional distress by schoolteacher or administrator]; 27 *Cal. L. Rev.* 201; 6 *A.L.R.5th* 162 [emotional distress from toxic exposure]; BAJI, No. 12.81.) California allows recovery where there is neither impact nor physical injury. (See *Molien v. Kaiser Foundation Hosp.* (180) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, *infra*, §1022.)

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Harper, James & Gray 3d §18.4.



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6 *Witkin Sum. Cal. Law Torts* § 1006

[§ 1006] Imputation of Negligence.

When a plaintiff "asserts a claim that derives from the defendant's tort against a third person, negligence of the third person is imputed to the plaintiff with respect to that claim." (*Rest.3d, Torts: Apportionment of Liability* §6(a); on imputation of negligence to the plaintiff generally, see *infra*, §1324 et seq.) This rule extends to "claims for emotional distress based on the fact that the defendant caused personal injury to a person other than the plaintiff." (*Rest.3d, Torts: Apportionment of Liability* §6(a), Comment b.) The recovery is also reduced by the plaintiff's own negligence. (*Rest.3d, Torts: Apportionment of Liability* §6(a).)

The negligence of one plaintiff asserting an emotional distress claim is not imputed to another plaintiff unless it otherwise meets the standards of imputed negligence. For example, the negligence of one parent who witnesses the defendant causing injury to a child is not imputed to the other parent who also witnesses the accident. (*Rest.3d, Torts: Apportionment of Liability* §6(a), Comment f.)

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2. Physical Trauma Present: Third Person Injured.
a. Former Law: No Recovery.

6 Witkin Sum. Cal. Law Torts § 1007

[§ 1007] Former Law: No Recovery.

California, following the majority view, formerly denied recovery where the fear or shock resulted from danger to someone other than the plaintiff. In *Reed v. Moore* (1957) 156 C.A.2d 43, 319 P.2d 80, plaintiff wife alleged that she suffered shock, fright, and a miscarriage as a result of witnessing a collision between defendant's automobile and the one in which her husband was riding. The court approved the following rule: "[N]o recovery is permitted for a mental or emotional disturbance, or for a bodily illness resulting therefrom, in the absence of a contemporaneous bodily contact or independent cause of action, or an element of wilfulness, wantonness or maliciousness, in cases in which there is no injury other than one to a third person, even though recovery would have been permitted had the wrong been directed against the plaintiff." (156 C.A.2d 45.) (See *Clough v. Steen* (1934) 3 C.A.2d 392, 393, 39 P.2d 889 [plaintiff's shock from learning of death of her son]; *Rest.2d, Torts* §313(2); 38 *Am.Jur.2d* (1999 ed.), *Fright, Shock, and Mental Disturbance* §24 et seq.; 16 *Cal. L. Rev.* 550; 24 *Cal. L. Rev.* 229; 27 *Cal. L. Rev.* 201; 11 *So. Cal. L. Rev.* 381; 29 *A.L.R.3d* 1337 [right to recover damages in negligence for fear of injury to another, or shock or mental anguish at witnessing injury].)

The issue was reexamined and the majority view again followed by a 4-3 decision in *Amaya v. Home Ice, Fuel & Supply Co.* (1963) 59 C.2d 295, 29 C.R. 33, 379 P.2d 513. Plaintiff alleged that while pregnant, she observed defendant's negligently driven truck run over her 17-month-old son, and suffered shock and injury to her nervous system. *Held*, no cause of action was stated. The court found no American cases squarely supporting recovery for shock induced solely by apprehension of danger to a third person, and pointed out that the Second Torts Restatement followed this overwhelming weight of authority. Approving these decisions, the court emphasized the danger of opening the way to fraudulent claims, and the virtual impossibility of placing logical or practical limitations on the classes of third persons, the time of the shock, or the presence of the plaintiff at the scene. (59 C.2d 299.) (See 15 *Stanf. L. Rev.* 740; 36 *So. Cal. L. Rev.* 299.) *Amaya* was later overruled. (See *infra*, §1008.)

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2. Physical Trauma Present: Third Person Injured.
b. Current Law: Recovery Allowed.

6 *Witkin Sum. Cal. Law Torts* § 1008

[§ 1008] Current Law: Recovery Allowed.

Dillon v. Legg (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, overruled *Amaya v. Home Ice, Fuel & Supply Co.* (1963) 59 C.2d 295, 29 C.R. 33, 379 P.2d 513, supra, §1007, and established a broad rule of liability. Defendant, allegedly driving negligently, ran over and killed a young child. Plaintiff mother sued on three causes of action: (1) wrongful death of the child; (2) emotional distress resulting in pain and physical injury of the mother, in close proximity and having witnessed the accident; (3) emotional distress resulting in pain and injury of another infant daughter, also in close proximity and having witnessed the accident. *Held*, judgment for defendant reversed.

(a) *Legal duty analysis rejected*. The court first reexamined the conventional legal duty approach and found it no longer acceptable (see supra, §839); the new approach looks to foreseeability of the risk. (68 C.2d 739.)

(b) *New factors as guidelines*. In lieu of fixed categories of liability and nonliability, the court set forth general guidelines to resolve the issue: "In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship." (68 C.2d 740.) Evaluation of these factors indicates the degree of defendant's foreseeability; the court will then determine whether the accident and harm were reasonably foreseeable. (68 C.2d 741.)

(c) *Guidelines applied*. These factors, present here, established a prima facie case; i.e., a negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will on witnessing the accident suffer emotional trauma. (68 C.2d 741.)

(d) *Conclusion*. The holding rests on general concepts of negligence, proximate cause, and foreseeability, which work successfully in other situations involving emotional trauma, and should not be regarded as unworkable in "the most egregious case of them all." (68 C.2d 747.)

The three dissenters observed that the *Amaya* court considered every argument advanced here and rejected all of them, and that every American jurisdiction denied liability. They further described the guidelines as arbitrary and calling for inexplicable distinctions, and insisted that the matter should have been left to the *Legislature*. (68 C.2d 752.)

The *Dillon* rule and the factors determining its proper application have been applied in many subsequent cases (see *infra*, §1010 et seq.), and the decision has been the subject of extensive comment. (See 3 Harper, James & Gray 2d §18.4; C.E.B., 2 Business Litigation, §11.83; 35 Proof of Facts 2d 1 [bystander recovery for negligently inflicted mental distress]; 16 Proof of Facts 3d 189 [negligent infliction of emotional distress by health care provider]; 58 Cal. L. Rev. 105, 321; 5 Cal. Western L. Rev. 206; 25 *Hastings L. J.* 1248; 33 *Hastings L. J.* 583 [general review of California cases]; 17 *Pacific L. J.* 1027; 6 *San Diego L. Rev.* 148; 54 *So. Cal. L. Rev.* 847 [Bystander Recovery]; 17 *Southwestern U.L. Rev.* 65; 4 *U.S.F. L. Rev.* 116; 20 *U.S.F. L. Rev.* 361; 10 *West L.A. L. Rev.* 177 [California cases]; 29 *A.L.R.3d* 1337 [recovery of damages for fear of injury to another, or emotional distress at witnessing injury]; 77 *A.L.R.3d* 447 [injury to or death of member of plaintiff's family arising from physician's or hospital's wrongful conduct]; 89 *A.L.R.5th* 255 [recovery under state law requiring bystander plaintiff seeking to recover for negligent infliction of emotional distress to suffer physical impact or be in zone of danger]; 90 *A.L.R.5th* 179 [bystander recovery for emotional distress from witnessing another's injury in products liability context]; 96 *A.L.R.5th* 107 [recovery for negligent infliction of emotional distress under rule of *Dillon* or refinements of that rule]; 98 *A.L.R.5th* 609 [relationship between victim and bystander plaintiff as affecting right to recover for negligent infliction of emotional distress due to witnessing injury to another where plaintiff is not member of victim's immediate family]; 99 *A.L.R.5th* 301 [immediacy of observation of injury as affecting right to recover for shock or mental anguish from witnessing injury to another]; BAJI, No. 12.83.)

The United States Supreme Court has rejected the "relative bystander" test of *Dillon* in the context of an action for negligent infliction of emotional distress under the Federal Employers' Liability Act (45 U.S.C., §51 et seq.). (See *Consolidated Rail Corp. v. Gottshall* (1994) 512 U.S. 532, 114 S.Ct. 2396, 2411, 129 L.Ed.2d 427, 448.)

West's Key Number Digest, Damages k.49.10, 51

SUPPLEMENT: [This section is current through the latest supplement]
Subsequent cases: See 3 Harper, James & Gray 3d §18.4.



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c. Dillon Guidelines Are Binding.

6 *Witkin Sum. Cal. Law Torts* § 1009

[§ 1009] Dillon Guidelines Are Binding.

In *Thing v. La Chusa* (1989) 48 C.3d 644, 646, 257 C.R. 865, 771 P.2d 814, the fundamental issue was whether the "guidelines" enunciated in *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, see supra, §1008, are adequate, or if they should be refined to create greater certainty in this area of the law.

Plaintiff mother was nearby when her son was struck by defendant's automobile. She neither saw nor heard the accident, but was told of it by her daughter, and then rushed to the scene where she saw her bloody and unconscious child, who she believed was dead. The trial judge granted summary judgment for defendant on the ground of lack of contemporaneous sensory perception of the accident. The Court of Appeal, relying on *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, supra, §1013, reversed, holding that contemporaneous awareness of a sudden accident was not a prerequisite to recovery. *Held*, Court of Appeal judgment reversed. The *Dillon* guidelines are binding.

(a) Originally emotional distress was merely an aggravation of damages sought under intentional tort theories; e.g., assault, abuse of process, false imprisonment, libel, invasion of privacy. (48 C.3d 649, citing the text.) Later it was recognized as a distinct tort. (48 C.3d 650, and footnotes 2, 3.)

(b) Recovery for emotional distress in negligence actions initially was recognized where the victim (1) was injured, and emotional distress was a "parasitic" item of damages, or (2) was in the zone of danger and, despite lack of impact, suffered physical injury. (48 C.3d 651.) *Amaya v. Home Ice, Fuel & Supply Co.* (1963) 59 C.2d 295, 29 C.R. 33, 379 P.2d 513, supra, §1007, refused to burden the rule to allow recovery by a bystander. (48 C.3d 651, 652.) It was overruled 5 years later in *Dillon* but the *Dillon* court, to give some initial definition of the expansion of the cause of action for NIED, enunciated "guidelines." (48 C.3d 654.) However, the parameters of third-party NIED actions remain uncertain. (48 C.3d 655.) The case-to-case approach that misled the Court of Appeal in this case has provoked inconsistent rulings in the lower courts and much critical comment by scholars. (48 C.3d 661, 662, citing law review articles and notes.)

(c) In *Elden v. Sheldon* (1988) 46 C.3d 267, 250 C.R. 254, 758 P.2d 582, supra, §1020, the issue (nonmarital cohabitant plaintiff) was too narrow to create a "bright line" for all NIED actions. The present case presents a broader

question and thus affords the court a better opportunity to create a clear rule. "In so doing we balance the impact of arbitrary lines which deny recovery to some victims whose injury is very real against that of imposing liability out of proportion to culpability for negligent acts. We also weigh in the balance the importance to the administration of justice of clear guidelines under which litigants and trial courts may resolve disputes." (48 C.3d 664.)

(d) Among the concerns of the *Amaya* court was the social cost of imposing liability on a negligent tortfeasor for all foreseeable emotional distress suffered by relatives who witness the injury. (48 C.3d 664.) In *Borer v. American Airlines* (1977) 19 C.3d 441, 138 C.R. 302, 563 P.2d 858, *infra*, §1683, denying a child's right to recovery for loss of a parent's consortium, multiplication of the defendant's liability was an additional concern. (48 C.3d 665.) "In identifying those persons and the circumstances in which the defendant will be held to redress the injury, it is appropriate to restrict recovery to those persons who will suffer an emotional impact beyond the impact that can be anticipated whenever one learns that a relative is injured, or dies, or the emotion felt by a 'disinterested' witness. The class of potential plaintiffs should be limited to those who because of their relationship suffer the greatest emotional distress." (48 C.3d 667.)

(e) "[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim, and (3) as a result suffers serious emotional distress--a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." (48 C.3d 667.)

(f) "The dictum in *Ochoa* suggesting that the factors noted in the *Dillon* guidelines are not essential in determining whether a plaintiff is a foreseeable victim of defendant's negligence should not be relied on. The merely negligent actor does not owe a duty the law will recognize to make monetary amends to all persons who may have suffered emotional distress on viewing or learning about the injurious consequences of his conduct. To the extent they are inconsistent with this conclusion, *Nazaroff v. Superior Court* ... and *Archibald v. Braverman* ... are disapproved. Experience has shown that, contrary to the expectation of the *Dillon* majority, and with apology to Bernard Witkin, there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." (48 C.3d 668.) (On *Nazaroff v. Superior Court* (1978) 80 C.A.3d 553, 145 C.R. 657, and *Archibald v. Braverman* (1969) 275 C.A.2d 253, 79 C.R. 723, see *supra*, §1011.)

One justice concurred and two justices dissented. (48 C.3d 670.) (See *Wright v. Los Angeles* (1990) 219 C.A.3d 318, 350, 268 C.R. 309 [only family member present was not aware that victim was being injured by paramedic's negligence; following *Thing*]; *Fife v. Astenius* (1991) 232 C.A.3d 1090, 1092, 284 C.R. 16 [plaintiffs heard sound of vehicle collision, but did not learn that family member was involved until several seconds thereafter; following *Thing*]; 24 *Loyola L.A. L. Rev.* 89.)

In *Wilks v. Hom* (1992) 2 C.A.4th 1264, 3 C.R.2d 803, an explosion in plaintiff's home due to a negligently installed propane system severely injured her daughter. At the time of the explosion, plaintiff was in the living room and the daughter was in her bedroom. Plaintiff felt the force of the explosion, which was strong enough to propel her out the front door, saw a flash emanate from a bedroom immediately adjacent to her daughter's and heard her daughter scream. *Held*, in accordance with the *Dillon* principles as refined in *Thing*, plaintiff was entitled to recover damages for emotional distress. Following *Krouse v. Graham* (1977) 19 C.3d 59, 137 C.R. 863, 562 P.2d 1022, *supra*, §1012, "it is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (2 C.A.4th 1271.)

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d. Nearness of Plaintiff.

6 *Witkin Sum. Cal. Law Torts* § 1010

[§ 1010] Nearness of Plaintiff.

The first *Dillon* factor is set forth in the opinion: "Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it." (*Dillon v. Legg* (1968) 68 C.2d 728, 740, 69 C.R. 72, 441 P.2d 912, supra, §1008.) (See *Archibald v. Braverman* (1969) 275 C.A.2d 253, 256, 79 C.R. 723, infra, §1011; *Arauz v. Gerhardt* (1977) 68 C.A.3d 937, 949, 137 C.R. 619 ["[S]ince plaintiff was not at the scene of the accident at the time of the impact and not near enough to the scene to have any sensory perception of the impact, it cannot be said that any injuries she may have suffered were caused by the direct emotional impact of her sensory and contemporaneous observance of the accident"]; *Meighan v. Shore* (1995) 34 C.A.4th 1025, 1044, 40 C.R.2d 744 [wife, who was not at hospital when her husband had heart attack because hospital employees had told her to go home, could not recover for negligent infliction of emotional distress].)

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1. Condition Met: Recovery Allowed.

6 *Witkin Sum. Cal. Law Torts* § 1011

[§ 1011] Condition Met: Recovery Allowed.

The second *Dillon* factor considers whether the shock and emotional impact arose from a sensory and contemporaneous observance of the accident. In *Archibald v. Braverman* (1969) 275 C.A.2d 253, 79 C.R. 723, defendant illegally sold gunpowder to plaintiff's 13-year-old son. It exploded and caused serious injuries. Within moments afterward, plaintiff mother arrived, observed her son's condition, and suffered shock. *Held*, the contemporaneous observance criterion of *Dillon v. Legg* (1968) 68 C.2d 728, 740, 69 C.R. 72, 441 P.2d 912, *supra*, §1008 was met. Observance in a strict sense was lacking, for the mother was not present at the scene; but the emotional trauma was fairly contemporaneous with the accident. "Manifestly, the shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself." (275 C.A.2d 256.)

In *Nazaroff v. Superior Court* (1978) 80 C.A.3d 553, 145 C.R. 657, plaintiff's declaration stated that she had been standing in front of property adjacent to defendants' home when she heard a scream, that she ran to defendants' yard and saw her 3-year-old son being pulled from the pool, and that she aided in unsuccessful attempts to revive him. *Held*, summary judgment for defendants was improper.

(a) The attempts to revive the child and the observation of his degenerating physical condition were like the subsequent sensory perceptions found too remote in *Justus v. Atchison* (1977) 19 C.3d 564, 139 C.R. 97, 565 P.2d 122, *infra*, §1012, and *Arauz v. Gerhardt* (1977) 68 C.A.3d 937, 949, 137 C.R. 619, *infra*, §1012, but *Archibald* suggests a different result. (80 C.A.3d 565, 566.)

(b) Hence, there were triable issues of fact "whether the alleged physical harm to the mother resulted from an emotional shock proximately caused by the direct emotional impact from the contemporaneous observation of the immediate consequences of the defendants' negligent act, which was the proximate cause of the injury and death." (80 C.A.3d 566.) In other words, the scream from the pool area may have permitted plaintiff to reconstruct the scene as well as the plaintiff in *Archibald*; thus, her knowledge of what had occurred would be derived from her own senses and not from another's recital. (80 C.A.3d 566.)

(c) A swimming pool is dangerous because of the inability of an unattended infant to appreciate the inherent danger; but *Dillon* requires a contemporaneous observance, and if the shocked mother were present, she could have prevented the accident. (80 C.A.3d 567.) (See *Thing v. La Chusa* (1989) 48 C.3d 644, 646, 668, 257 C.R. 865, 771 P.2d 814, supra, §1009 [contemporaneous observation "guideline" of *Dillon* is binding rule].)

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e. Contemporaneous Observance.
2. Condition Not Met: Recovery Denied.

6 *Witkin Sum. Cal. Law Torts* § 1012

[§ 1012] Condition Not Met: Recovery Denied.

In *Krouse v. Graham* (1977) 19 C.3d 59, 137 C.R. 863, 562 P.2d 1022, plaintiff husband was seated in his car parked at a curb, and his wife was shutting the car door. Defendant, approaching from the rear, straddled the curb, hit plaintiff's car, injuring plaintiff, and killing his wife. In addition to his cause of action for wrongful death (see *infra*, §1691), plaintiff sought to recover for emotional trauma incident to witnessing his wife's death. The judge instructed the jury that he could recover for emotional distress suffered "as a result of being present" at the time. *Held*, the instruction was incorrect in part, and the defect, in view of the conflict in the evidence, was reversible error.

(a) *Element of sensory and contemporaneous observance.* This, as pointed out in *Archibald v. Braverman* (1969) 275 C.A.2d 253, 79 C.R. 723, *supra*, §1011, does not require a visual perception of the impact. Hence, although plaintiff did not see his wife hit, he perceived the fact because he knew her position, observed defendant's vehicle approach her at a high speed, and realized that she had been struck. Hence, he was "a percipient witness to the impact." (19 C.3d 76.)

(b) *Element of physical injury.* The traumatic shock must result in some form of physical injury, and there was substantial evidence of a gastric disturbance for which plaintiff was treated. But the evidence was conflicting whether it was caused by witnessing his wife's death (recovery proper), or by feelings of anger against defendant or grief and sorrow over the loss of his wife (recovery improper). The instruction to the jury incorrectly permitted plaintiff to recover because of his mere presence at the scene, without regard to the cause of his emotional distress, and this was prejudicial error. (19 C.3d 77.)

In *Deboe v. Horn* (1971) 16 C.A.3d 221, 94 C.R. 77, Mr. D was seriously injured in an automobile accident. Mrs. D was summoned to the hospital to which he had been taken, observed him there, and was told that he was totally paralyzed. Both sued defendant, the negligent driver. *Held*, the wife could not maintain a cause of action for emotional distress. The facts, established by stipulation, showed that she was neither an actual witness to the accident nor a person in close proximity in time, but was merely advised of its occurrence by others. (16 C.A.3d 223.)

In *Jansen v. Children's Hosp. Med. Center of East Bay* (1973) 31 C.A.3d 22, 106 C.R. 883, plaintiff mother alleged that her 5-year-old daughter was admitted to defendant hospital; that due to defendant's negligence, the child died

painfully from a gastrointestinal hemorrhage; and that the mother was with the child during her last hours and suffered emotional trauma from witnessing the death. *Held*, judgment for defendant on demurrer affirmed. *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *supra*, §1008, "contemplates a sudden and brief event causing the child's injury." (31 C.A.3d 24.) Also, the *event* must be one that can be the subject of sensory perception; i.e., visibility of the tortious act itself, not merely the result, is essential. To extend the *Dillon* rule to the entire area of injury to a parent by improper diagnosis of a child's ailment is contrary to that opinion's counsel of moderation. (31 C.A.3d 24, 25.) (For disapproval of *Jansen* requirement of sudden occurrence, see *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, *infra*, §1013.)

In *Hair v. Monterey* (1975) 45 C.A.3d 538, 119 C.R. 639, the court took note of *Dillon*'s counsel of "moderation," and observed that "[w]e choose to heed that caution." (45 C.A.3d 544.) Recovery was denied where plaintiff mother was in a waiting room while surgery was being performed on her child, and serious permanent injury did not develop until 2 days later. (45 C.A.3d 543.)

In *Justus v. Atchison* (1977) 19 C.3d 564, 139 C.R. 97, 565 P.2d 122, *infra*, §1382, plaintiff husband alleged that he was in a hospital delivery room where plaintiff wife was in labor, witnessed disturbing developments and emergency procedures and his wife's pain, and was present when the attending doctor announced that the fetus had died. *Held*, judgment for defendants on demurrer affirmed. The allegations of the complaint show only physical presence; they do not allege a shock resulting from a "sensory and contemporaneous observance of the accident." The event, by its very nature, was hidden from his perception: He did not see the injury to the victim or otherwise sense it. (19 C.3d 584.) The disturbing developments induced a sense of anxiety, but it did not become shock until he was actually informed of the death by the doctor. "In short, the impact derived not from what he saw and heard during the attempted delivery, but from what he was told after the fact." (19 C.3d 585.)

In *Scherr v. Hilton Hotels Corp.* (1985) 168 C.A.3d 908, 214 C.R. 393, plaintiff alleged that she watched a live news coverage of a fire at defendant's hotel, with knowledge that her husband was there at the time, and that he suffered injuries in the fire. *Held*, judgment for defendant on demurrer affirmed. Her contemporaneous observance was only of the fire; she did not witness her husband's injuries as they were being inflicted and could not plead that she suffered shock from doing so. (168 C.A.3d 910.) (See 17 Southwestern U. L. Rev. 65.)

In *Hurlbut v. Sonora Community Hosp.* (1989) 207 C.A.3d 388, 254 C.R. 840, plaintiffs, mother, father, and child, sued for medical malpractice in performance of a cesarean section resulting in the child being born with severe brain damage. Because plaintiff father was not present, and plaintiff mother was unconscious during the delivery, neither could meet the requirement, and recovery was precluded by *Justus*. (217 C.A.3d 399, 400, 401.)

Many other cases stress the requirement of contemporaneous observance in denying recovery. (See *Powers v. Sissoev* (1974) 39 C.A.3d 865, 874, 114 C.R. 868; *Arauz v. Gerhardt* (1977) 68 C.A.3d 937, 949, 137 C.R. 619; *Parsons v. Superior Court* (1978) 81 C.A.3d 506, 512, 146 C.R. 495 [following *Krouse* and *Arauz*; "there has been no showing that real parties saw, heard, or otherwise sensorily perceived the injury-producing event"]; *Cortez v. Macias* (1980) 110 C.A.3d 640, 649, 650, 167 C.R. 905 [following *Justus*]; *Hathaway v. Superior Court* (1980) 112 C.A.3d 728, 734, 169 C.R. 435 ["A steady flow of Court of Appeal cases have continued to strictly apply a contemporaneous sensory perception requirement of *Dillon*"]; *Madigan v. Santa Ana* (1983) 145 C.A.3d 607, 610, 193 C.R. 593; *Wiggins v. Royale Convalescent Hosp.* (1984) 158 C.A.3d 914, 917, 206 C.R. 2; *Ebarb v. Woodbridge Park Assn.* (1985) 164 C.A.3d 781, 784, 786, 210 C.R. 751; *Campanano v. California Med. Center* (1995) 38 C.A.4th 1322, 1326, 45 C.R.2d 606, 3 Cal. Proc. (4th) Actions, §530; *Fluharty v. Fluharty* (1997) 59 C.A.4th 484, 493, 69 C.R.2d 244 [plaintiff could not recover for negligent infliction of emotional distress as bystander to incident resulting in injury to his wife where he was unaware of her injury for 2 hours]; *Ess v. Eskaton Properties* (2002) 97 C.A.4th 120, 126, 118 C.R.2d 240 [plaintiff whose sister, while nursing home patient, developed pressure ulcer and was raped by unknown intruder could not recover for negligent infliction of emotional distress on bystander theory because she was not present when those events occurred]; *Steven F. v. Anaheim Union High School Dist.* (2003) 112 C.A.4th 904, 910, 6 C.R.3d 105 [student's parents could not recover for emotional distress caused by affair between student and teacher, where affair was kept secret from

them]; cf. *Johnson v. Superior Court* (1981) 123 C.A.3d 1002, 1007, 177 C.R. 63 [mother was not entitled to recovery under *Dillon* rule for sensory perception of death of her stillborn child, but could recover for emotional distress as part of her own cause of action for malpractice in delivery].) (See 5 A.L.R.4th 833 [immediacy of observation of injury to another].)

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See *Ra v. Superior Court* (2007) 154 C.A.4th 142, 149, 64 C.R.3d 539 [while shopping with husband, wife heard loud sound, turned around, and saw husband in another section of store with his hands to his head; she did not have contemporaneous awareness of injuries, where she was not reasonably certain that loud noise was connected to injury and did not perceive impact of falling sign until she saw husband holding his head].*Campanano case:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §574.



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 3. Event Need Not Be Sudden.

6 Witkin Sum. Cal. Law Torts § 1013

[§ 1013] Event Need Not Be Sudden.

In *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, R, a 13-year-old boy in the custody of Santa Clara Juvenile Hall, became ill on March 23. Plaintiffs, his parents, visited him in the infirmary, found him in great pain, and repeatedly requested increased medical care, which was not given. He died of pneumonia on March 26. Plaintiffs filed a complaint in several causes of action against defendant county and four alleged agents and employees, and the lower court sustained demurrers to the chief causes of action. *Held*, mandamus granted to compel vacation of the order.

(a) Plaintiffs clearly satisfied the first and last requirements of *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *supra*, §1008 (located near the scene, closely related to the victim). The issue here is whether, in order to state a cause of action, "the child's injury must have been the result of a brief and sudden occurrence viewed contemporaneously by the plaintiff." *Dillon* and many cases following it involve this fact situation. (39 C.3d 167.) *Jansen v. Children's Hosp. Med. Center of East Bay* (1973) 31 C.A.3d 22, 106 C.R. 883, *supra*, §1012, stated it as a requirement, and *Justus v. Atchison* (1977) 19 C.3d 564, 139 C.R. 97, 565 P.2d 122, *supra*, §1014, approved *Jansen's* statement. (39 C.3d 167, 168.)

(b) A review of other cases, however, leads to the conclusion that the "sudden occurrence" requirement "is an unwarranted restriction on the *Dillon* guidelines." "Such a restriction arbitrarily limits liability when there is a high degree of foreseeability of shock to the plaintiff and the shock flows from an abnormal event, and, as such, unduly frustrates the goal of compensation--the very purpose which the cause of action was meant to further." (39 C.3d 168.) The cases allowing recovery have applied the *Dillon* criteria with some degree of flexibility; e.g., *Krouse v. Graham* (1977) 19 C.3d 59, 137 C.R. 863, 562 P.2d 1022, *supra*, §1012, and *Archibald v. Braverman* (1969) 275 C.A.2d 253, 79 C.R. 723, *supra*, §1011, indicate that *Dillon* does not require a visual perception of the impact causing the death or injury; and *Nazaroff v. Superior Court* (1978) 80 C.A.3d 553, 145 C.R. 657, *supra*, §1011, held a complaint sufficient where the shock resulted from the contemporaneous observation of the immediate consequences of the defendants' act. (39 C.3d 168, 169.)

(c) Plaintiffs' position is similar to that of the plaintiffs in these cases, and *Jansen* is distinguishable: "Here Mrs.

Ochoa was aware of and observed conduct by the defendants which produced injury in her child. She was aware of the fact that her child was in need of immediate medical attention. To her knowledge the defendants had failed to provide the necessary care. As her complaint alleges, she 'experienced extreme mental and emotional distress and concern for her son ... while she was present.' Like the parents in both *Nazaroff* and *Archibald*, she was able to perceive, and suffered shock from, the connection between defendants' conduct and her child's injury. By contrast, in *Jansen*, the mother's distress stemmed only from the sight of her child's suffering. Any distress she may have suffered as a result of perceiving the impact of defendant's conduct upon her child was the result of 'learning of the accident from others after its occurrence.' ... In this regard, the mother's situation in *Jansen* was no different from that of any parent who witnessed the pain and suffering of his or her child due to illness or injury and is unaware that the defendant's conduct is a contributing factor to the continued pain and suffering." (39 C.3d 169.)

(d) Although *Jansen* may be distinguished on the ground that in that case, the plaintiff there did not perceive defendant's tortious conduct, "we by no means suggest," as the court did in *Hair v. Monterey* (1975) 45 C.A.3d 538, 544, 119 C.R. 639, that the plaintiff must be aware of the tortious nature of the defendant's actions. As the court observed in *Mobaldi v. Regents of Univ. of Calif.* (1976) 55 C.A.3d 573, 583, 127 C.R. 720, that requirement would lead to the anomalous result that a mother who saw her child struck by a car could not recover because she did not realize that the driver was intoxicated. (39 C.3d 170.) "[W]hen there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted." (39 C.3d 170.) (See 17 Pacific L. J. 1027; 27 Santa Clara L. Rev. 91; 20 U.S.F. L. Rev. 361; 17 Southwestern U. L. Rev. 65.)

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4. Plaintiff May Be Voluntarily Present.

6 *Witkin Sum. Cal. Law Torts* § 1014

[§ 1014] Plaintiff May Be Voluntarily Present.

In *Justus v. Atchison* (1977) 19 C.3d 564, 139 C.R. 97, 565 P.2d 122, supra, §1012, the court, in a strong dictum, laid down a special limitation on a cause of action under the guidelines of *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, supra, §1008: A plaintiff voluntarily at the scene of a traumatic event cannot recover. This dictum was repudiated in *Ochoa v. Superior Court* (1985) 39 C.3d 159, 171, 216 C.R. 661, 703 P.2d 1, supra, §1013).

The court in *Ochoa* declared that the rule undercuts the foundation on which *Dillon* rests: "A distinction between the involuntary and voluntary presence of the close relative of the injured or dead person thus appears to relieve the defendant of liability for the very risk which should have been foreseen. While in a proper case it may be said that a bystander assumed the risk of traumatic shock, we cannot say that in the ordinary course of events the voluntary or involuntary presence of the plaintiff should be a decisive factor in determining whether plaintiff has stated a *Dillon* cause of action. To the extent that *Justus* makes a contrary suggestion, it is disapproved." (39 C.3d 171.)

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5. Seriousness of Event Must Be Apparent.

6 *Witkin Sum. Cal. Law Torts* § 1015

[§ 1015] Seriousness of Event Must Be Apparent.

In *Bird v. Saenz* (2002) 28 C.4th 910, 123 C.R.2d 465, 51 P.3d 324, one of the plaintiffs took her mother, a cancer patient, into the hospital to undergo an outpatient surgical procedure--the insertion of a catheter to be used during chemotherapy. The procedure was to take only 21 minutes, but after an hour elapsed, there was an urgent call for a thoracic surgeon (which plaintiff believed was related to her mother's surgery). After another hour, plaintiff was told by one of defendant doctors that the operating team thought that plaintiff's mother had had a mild stroke. (This proved to be incorrect.) One more hour passed, at which time plaintiff observed her mother being rushed to the critical care unit. She was a blue color, her feet were elevated, and her head was almost touching the floor. Shortly thereafter, a doctor told plaintiff that an artery or vein had been nicked during the operation, causing the patient's blood to go into her chest, and that they planned to insert a drainage tube to keep her alive until the arrival of a vascular surgeon. About 10 minutes later, plaintiff saw the same doctor running down the hall with multiple units of blood. By this time, the other plaintiff, also a daughter of the patient, had arrived and was given the same information, with the additional fact that her mother's angle was designed to keep her blood moving toward the heart. Plaintiffs then witnessed their mother, in the same condition as before, being rushed to an operating room, accompanied by about 10 doctors and nurses. (The patient survived, but succumbed to cancer about a year later.) Based on these events, plaintiffs alleged negligent infliction of emotional distress. Defendants successfully moved for summary judgment, relying on the holding in *Thing v. La Chusa* (1989) 48 C.3d 644, 668, 257 C.R. 865, 771 P.2d 814, supra, §1009, that one of the three requirements for pleading a bystander's negligent infliction of emotional distress action (the only requirement at issue in this case) is that the plaintiff be "present" at the scene of the injury-producing event and be aware that it is causing injury to the victim. *Held*, summary judgment for defendants was proper.

(a) Plaintiffs cannot base their negligent infliction of emotional distress claim solely on the transection of their mother's artery, because it is undisputed that no plaintiff was in the operating room when this event occurred. The requirement in *Thing* that the plaintiff be contemporaneously aware has not been interpreted as requiring *visual* perception of the injury-producing event. For example, a plaintiff who hears an explosion in a room known to be occupied by a relative can recover. (28 C.4th 916, citing *Wilks v. Hom* (1992) 2 C.A.4th 1264, 3 C.R.2d 803, supra, §1009.) However, plaintiffs in this case had no sensory perception whatsoever of the transection when it occurred (the

emergency call for a thoracic surgeon carried no clear information to a bystander in the waiting room as to the operation's progress). (28 C.4th 917.)

(b) Plaintiffs seek to redefine the injury-producing event as including defendants' failure to diagnose and treat the damaged artery. The problem with this definition is that plaintiffs, being laypersons, could not meaningfully perceive any such failure. In other words, plaintiffs knew that their mother was in serious condition, but they were not *then aware* that the treatment that she was receiving was inadequate. This does not mean that a layperson can never perceive medical malpractice. Witnessing a relative's sound limb being amputated is but one example of a doctor's conduct that is not beyond a layperson's understanding and that will thus support a claim for negligent infliction of emotional distress, but the same cannot be said for medical malpractice generally. (28 C.4th 917, citing *Golstein v. Superior Court* (1990) 223 C.A.3d 1415, 273 C.R. 270, *infra*, §1016.)

(c) Plaintiffs' reliance on *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, *supra*, §1013, does not support their position, because the injury-producing event in that case, i.e., the failure of custodial authorities to *respond* to obviously serious symptoms, was not hidden from the understanding of a layperson. This is not true for misdiagnosis, unsuccessful treatment, or treatment that turns out, only in retrospect, to have been inappropriate. Plaintiff's reliance on *Mobaldi v. Regents of Univ. of Calif.* (1976) 55 C.A.3d 573, 127 C.R. 720, *infra*, §1019, is also misplaced. That case suggested that the bystander's contemporaneous observation of the *results* of the defendant's infliction of harm was enough to support a negligent infliction of emotional distress cause of action. However, *Mobaldi* was decided before *Thing*, is irreconcilable with it, and does not survive that decision. (28 C.4th 919, citing *Golstein*.)

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6 *Witkin Sum. Cal. Law Torts* § 1016

[§ 1016] Event Must Be Visible.

In *Golstein v. Superior Court* (1990) 223 C.A.3d 1415, 273 C.R. 270, D, 8 years old, was undergoing treatment for curable cancer in defendant hospital. In this action by his parents for wrongful death, the complaint alleged that, as a result of the negligence of defendant Dr. C, D was given an overdose of radiation that resulted in his death; that plaintiffs thereafter witnessed the results of the radiation poisoning (the "grotesque alteration" of D's appearance), and suffered emotional distress. Plaintiffs were not present at the time of the radiation, and were obviously unable to meet the condition of contemporaneous observance of the injury-causing event; but they contended that where, as here, the injury-causing event (overdose) was not capable of observation by the senses, a cause of action could be stated because they did witness the results of the injury-causing event. *Held*, the complaint did not state a cause of action.

(a) "The *Dillon* cause of action has undergone a tortuous development. ... Like many new causes of action, *Dillon* recovery expanded beyond its initial source as a stream broadens to a river; but like a river flowing over rocks, the law of *Dillon* recovery encountered various contexts and fact patterns and resulted in an irregular mosaic of currents and depths. In *Thing* the Supreme Court dammed much of the river's flow and attempted to channel *Dillon* recovery into the order and predictability of a man-made canal. Unfortunately, the *Thing* opinion did not discuss or resolve the troublesome side-current of the traumatic but invisible injury-causing event, an event which either cannot be perceived or cannot be perceived with meaningful understanding. California law remains analytically confused regarding bystander recovery for injury-causing events which are themselves invisible, but which leave visible manifestations witnessed by distressed family members." (223 C.A.3d 1419, citing *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *supra*, §1008 and *Thing v. La Chusa* (1989) 48 C.3d 644, 257 C.R. 865, 771 P.2d 814, *supra*, §1009.)

(b) Much of the inconsistency in the cases on the factor of contemporaneous observance arises from "positing the opposite poles of direct contemporaneous observance versus learning of an accident after the fact." (223 C.A.3d 1420.) *Archibald v. Braverman* (1969) 275 C.A.2d 253, 79 C.R. 723, *supra*, §1011, permitted recovery by a mother who came upon the scene "within moments" to observe her child lying wounded; subsequent decisions refused to extend beyond a few moments in time the *Archibald* exception to contemporaneous observation. (223 C.A.3d 1420.) "The confusion was exacerbated by the problem of the injury-causing event which--unlike the paradigmatic accident, such as a traffic collision or explosion--is essentially invisible to the plaintiff, either because it is incapable of sensory perception or it

cannot be meaningfully perceived by a layperson." (223 C.A.3d 1422.)

(c) This latter problem arose when the second *Dillon* factor was applied to the medical setting as opposed to the standard accident scenario. (223 C.A.3d 1421 et seq., discussing *Justus v. Atchison* (1977) 19 C.3d 564, 139 C.R. 97, 565 P.2d 122, supra, §1012, *Jansen v. Children's Hosp. Med. Center of East Bay* (1973) 31 C.A.3d 22, 106 C.R. 883, supra, §1012, and *Mobaldi v. Regents of Univ. of Calif.* (1976) 55 C.A.3d 573, 127 C.R. 720, infra, §1019.) Then, in *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, supra, §1013, the court "apparently" approved *Archibald v. Braverman* (1969) 275 C.A.2d 253, 79 C.R. 723, supra, §1011, *Nazaroff v. Superior Court* (1978) 80 C.A.3d 553, 145 C.R. 657, supra, §1011, *Mobaldi*, and *Krouse v. Graham* (1977) 19 C.3d 59, 137 C.R. 863, 562 P.2d 1022, supra, §1012, "all examples of flexible *Dillon* application." (223 C.A.3d 1424.) But "*Ochoa* left unresolved the problem of the essentially invisible injury-causing event." (223 C.A.3d 1425.)

(d) However, *Thing* makes it clear that understanding perception of the injury-causing event is essential, and that where an event cannot be perceived distress recovery is not allowed. (223 C.A.3d 1427.)

(e) "Petitioners argue that since radiation is invisible its fatal dosage cannot be seen, and it is unjust to deny them recovery based on rules having their origins in fact patterns involving visible events such as accidents. Were it not for *Thing*, petitioners would have a compelling case. However, we interpret *Thing's* policy statement as a requirement that *Dillon* plaintiffs experience a contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury." (223 C.A.3d 1427.)

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7. Observation May Be While Event Is Occurring.

6 Witkin Sum. Cal. Law Torts § 1017

[§ 1017] Observation May Be While Event Is Occurring.

Thing v. La Chusa (1989) 48 C.3d 644, 646, 668, 257 C.R. 865, 771 P.2d 814, supra, §1009, stated the requirement that a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third party only if the plaintiff was present at the scene of the injury-producing event at the time it occurred and was then aware that it was causing injury to the victim.

In *Ortiz v. HPM Corp.* (1991) 234 C.A.3d 178, 285 C.R. 728, Mr. and Mrs. O worked for their employer on plastic injection molding machines. Mr. O was a foreman responsible for keeping the machines running, and Mrs. O went to tell him to fix a machine that had stopped. However, she found that her husband, in an attempt to repair another machine, had become trapped inside the mold area of that machine while it was still running. After seeing his limp body and dripping blood, she summoned help. In this action, Mrs. O sought recovery for negligent infliction of emotional distress. The trial judge, relying on *Thing*, granted a nonsuit. *Held*, reversed.

(a) *Thing* is distinguishable; in that case the plaintiff did not contemporaneously observe the injury-producing event. Here, Mrs. O observed her husband trapped in the machine, with his skin discolored, his body limp, no appearance of breathing, and blood flowing from his arm. This evidence supports the inference that Mr. O was being deprived of oxygen during the time that she observed him. (234 C.A.3d 184.)

(b) A footnote in *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, supra, §1013, quoted with approval in *Thing*, distinguishes contemporaneous observation from merely receiving news. And in the present case, as in *Ochoa*, plaintiff personally observed the event while it was still occurring. "We do not believe that the bright line drawn in *Thing v. La Chusa* was intended to deny recovery to a plaintiff who personally observes an injury-producing event in progress. The limitation, instead, excludes those plaintiffs who come upon the scene *after* the event, and whose observation is solely of the consequences of the occurrence." (234 C.A.3d 185.)

(c) Defendant, citing *Golstein v. Superior Court* (1990) 223 C.A.3d 1415, 273 C.R. 270, supra, §1016, argued that if oxygen deprivation was the permanent injury suffered by Mr. O, it could not be perceived and therefore did not meet the requirement of *Thing*. But, unlike the parents in *Golstein*, Mrs. O saw the occurrence that caused her husband's

injury. "Even if she could not 'perceive' the full extent of the damage resulting from oxygen deprivation, she was clearly aware that his body was limp, that blood was running down his arm, and that he did not respond when she spoke to him." (234 C.A.3d 186.) This evidence would have supported a finding that "the injury-producing event was still occurring at the time Mrs. [O] discovered Mr. [O] trapped in the machine, and that she was then aware that it was causing injury to him, so as to meet the contemporaneous observation requirement." (234 C.A.3d 186.) (Cf. *Johnson v. Ventura* (1994) 29 C.A.4th 1400, 1405, 35 C.R.2d 150, supra, §319 [plaintiffs, who did not see victim being stabbed by hospital patient, but who witnessed her suffering, were not entitled to recover].)

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f. Close Relationship.
1. Family Relationship.

6 *Witkin Sum. Cal. Law Torts* § 1018

[§ 1018] Family Relationship.

One of the guidelines of *Dillon v. Legg* (1968) 68 C.2d 728, 741, 69 C.R. 72, 441 P.2d 912, *supra*, §1008, is "[w]hether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship." This guideline has been usually regarded as requiring a close family relationship, e.g., husband and wife or parent and child. (See *Drew v. Drake* (1980) 110 C.A.3d 555, 557, 168 C.R. 65, *infra*, §1020; *Kately v. Wilkinson* (1983) 148 C.A.3d 576, 583, 195 C.R. 902.)

In *Trapp v. Schuyler Construction* (1983) 149 C.A.3d 1140, 1142, 197 C.R. 411, plaintiff minors alleged that they had a close relationship with their first cousin, and witnessed his drowning in defendant's swimming pool. *Held*, judgment for defendant on demurrer affirmed. The cases limit reasonable foreseeability to persons related by law to the victim; there is no authority for extending the concept of "close relationship" to include first cousins. (149 C.A.3d 1142, 1143; see *Moon v. Guardian Postacute Services* (2002) 95 C.A.4th 1005, 1009, 116 C.R.2d 218 [son-in-law did not fulfill "closely related" requirement, even though he alleged that decedent stayed with him from time to time before going into nursing facility and that emotional bond between them was strong].)

In *Kriventsov v. San Rafael Taxicabs* (1986) 186 C.A.3d 1445, 229 C.R. 768, plaintiff's action was based on his observation of the hit-and-run death of his nephew. The complaint alleged that he lived with his nephew and the latter's parents and grandmother "in the intimate and mutual interdependence of a single home," and that they had "a close, warm and loving relationship, analogous to that of parent and child." *Held*, a cause of action was stated.

(a) *Kately v. Wilkinson* (1983) 148 C.A.3d 576, 195 C.R. 902, *infra*, §1021, and *Trapp, supra*, 149 C.A.3d 1142, are distinguishable. "In *Kately* the relationship was not based on blood, marriage or a functioning family unit. In *Trapp* a blood relationship was present, but the plaintiffs and the decedent did not live together. ... In contrast, plaintiff herein was not only the natural uncle of the decedent, but had been and was living with him in the same household as part of the family unit." (186 C.A.3d 1449.)

(b) "[T]hese facts satisfy *Dillon's* close relationship guideline and that the resulting harm was reasonably foreseeable. The membership of many family units extends beyond parents and children to grandparents, stepparents,

aunts and uncles, all of whom may be expected to have assumed responsibilities for child rearing and the attendant emotional relationships with children that normally accompany such circumstances." (186 CA.3d 1449.)

In *Quesada v. Oak Hill Imp. Co.* (1989) 213 C.A.3d 596, 261 C.R. 769, following the death of L, his body was taken by the coroner's office for an autopsy and was later transferred to Oak Hill pursuant to burial arrangements made by his widow. Plaintiffs, decedent's sister and niece, filed a complaint against the county and Oak Hill to recover for emotional distress, alleging that the defendants negligently handled the body so as to bury another man instead of L; and ridiculed and mocked plaintiffs and the widow when they saw the body of a stranger and informed Oak Hill of the fact. The stranger's body was buried, but 5 days later the county admitted the mix-up to the widow, Oak Hill exhumed the body, and L's body was buried in its proper place. Defendants settled with the widow, and the trial court sustained demurrers to the complaints of the sister and niece. *Held*, judgment for defendants on demurrer reversed.

(a) Defendants and the trial court relied on *Cohen v. Groman Mortuary* (1964) 231 C.A.2d 1, 41 C.R. 481, in which a brother and sister and other relatives sought recovery against a mortuary that substituted the body of another for their sister at her funeral. *Cohen* denied recovery because the brother and sister were not parties to the contract with the mortuary, and had no legal right to dispose of the deceased's remains, and therefore the mortuary owed them no duty. (213 C.A.3d 601.)

(b) *Cohen* relied on the reasoning in *Amaya v. Home Ice, Fuel & Supply Co.* (1963) 59 C.2d 295, 29 C.R. 33, 379 P.2d 513, *supra*, §840), which was overruled by *Dillon* in an opinion rejecting the restrictive duty analysis of *Amaya* (213 C.A.3d 603, 604), and stressing the factor of foreseeability of risk in establishing duty. "[T]he restrictive analysis of *Cohen* is no longer applicable. Rather, the extent of respondents' duty must be based on the test of foreseeability." (213 C.A.3d 605.)

(c) "The facts before us clearly support a finding of foreseeability of injury to close friends and relatives flowing from respondents' mishandling of the corpse." (213 C.A.3d 605.) (1) Parties charged with care of the remains of a deceased reasonably should know that the surviving friends and relatives are emotionally vulnerable. (213 C.A.3d 605.) (2) The nature of a funeral makes it not only foreseeable but inevitable that close friends and family members will be present. (213 C.A.3d 606.) (3) The allegations of Oak Hill's ridicule makes that defendant's behavior more than simple negligence. (213 C.A.3d 606.)

(d) Recent Supreme Court decisions indicate the court's concern about expanding imposition of liability for intangible injuries such as emotional distress, and the caution that foreseeability alone is not enough: the determination is tempered by policy considerations. (213 C.A.3d 607, 608, citing *Thing v. La Chusa* (1989) 48 C.3d 644, 257 C.R. 865, 771 P.2d 814, *supra*, §1009.) "Applying these considerations ... it appears appropriate to limit the class of potential plaintiffs to close family members in order to avoid expansive liability and to be assured that those claiming damages by way of the negligent handling of a corpse truly suffered serious emotional distress." (213 C.A.3d 608.)

(f) The deceased's sister clearly falls within this class; the niece does not, but is not necessarily excluded: "[T]he deceased, usually aged, frequently will leave few, if any, family members of close blood relationship; death may rob us of those naturally closest to us. One cousin may stand at the funeral of another or a niece may sit alone at her aged aunt's funeral. The simple expedient of calculation of the degree of consanguinity in order to assess liability is not, of itself, a sufficient basis to reject the niece's claim. Whether the niece can plead and prove her relationship to the decedent was one falling within the category of 'exceptional circumstances' remains to be demonstrated." (213 C.A.3d 610.) (See 98 A.L.R.5th 609 [relationship between victim and bystander plaintiff as affecting right to recover for negligent infliction of emotional distress due to witnessing injury to another where plaintiff is not member of victim's immediate family].)

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2. Foster Parent.

6 *Witkin Sum. Cal. Law Torts* § 1019

[§ 1019] Foster Parent.

In *Mobaldi v. Regents of Univ. of Calif.* (1976) 55 C.A.3d 573, 127 C.R. 720, plaintiffs Mr. and Mrs. R were the foster parents of John, a young child who suffered from a congenital kidney ailment. Mrs. R took him to U.C.L.A. Medical Center for a pyelogram, and at the request of the attending physician, held the frightened child in her arms while an injection of glucose solution and dye was made. The doctor negligently used 50% instead of 5% glucose, and the child became spastic, convulsant, and finally comatose, and suffered permanent injuries. Mrs. R's shock resulted in depression and the need for psychiatric treatment. *Held*, a cause of action was stated. The rule of *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *supra*, §1008, is not confined to relationship by blood, marriage, or adoption. Mrs. R and John held themselves out to the public as mother and child, the child was treated as a filial member of the family, and the doctor treated the two as mother and child. "Because the relationship possesses all of the incidents of parent and child except those flowing as a matter of law and because the latter incidents such as inheritance are essentially irrelevant to considerations limiting recovery in tort directly damaging the plaintiff, the relationship is analogous to that existing in *Dillon*." (55 C.A.3d 583.)

Mobaldi was distinguished on its special facts (doctor's knowledge of the foster parent relationship) in *Kately v. Wilkinson* (1983) 148 C.A.3d 576, 584, 195 C.R. 902, *infra*, §1020. Further, language in *Mobaldi* inconsistent with the conclusion in *Elden v. Sheldon* (1988) 46 C.3d 267, 250 C.R. 254, 758 P.2d 582, was disapproved in that opinion.

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3. Unmarried Cohabitant.

6 Witkin Sum. Cal. Law Torts § 1020

[§ 1020] Unmarried Cohabitant.

(1) *In General.* The right of an unmarried cohabitant to recover on a cause of action under *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, supra, §1008, for negligent infliction of emotional distress, or for loss of consortium (see infra, §1685) had been the subject of much comment and conflicting decisions of the Courts of Appeal. (See 26 Cal. Western L. Rev. 175; 41 Hastings L. J. 477; 15 Pacific L. J. 925.)

In *Drew v. Drake* (1980) 110 C.A.3d 555, 168 C.R. 65, plaintiff alleged that she and M had lived together as "de facto spouses" for 3 years, and that she suffered emotional distress when she witnessed M's death in an automobile collision. The court observed that no reported decision holds that "friends or housemates" meet the *Dillon* test of "close relationship." (110 C.A.3d 557.) There was a strong dissent.

In *Ledger v. Tippitt* (1985) 164 C.A.3d 625, 210 C.R. 814, Jennifer, aged 15, began cohabiting with Richard, aged 19, in 1981, and they planned to be married December 6, 1981. Just prior to their wedding date, Richard was injured in an automobile accident; on his recovery, the two went to Nevada to be married, but failed to bring necessary papers, and returned to California. Their son was born, they lived together as a family, and Richard provided the sole support. In March 1983, the three were in their automobile and narrowly avoided a collision with defendant's car. The cars stopped, the drivers got out and engaged in a verbal altercation, and then defendant without warning stabbed Richard. Jennifer saw what happened, rushed to Richard's aid, and he died in her arms 20 minutes later. In this action by Jennifer for loss of consortium and negligent infliction of emotional distress, the trial judge gave judgment on demurrer for defendant. *Held*, judgment affirmed on loss of consortium (infra, §1685), but reversed on emotional distress. (164 C.A.3d 646.)

In *Coon v. Joseph* (1987) 192 C.A.3d 1269, 237 C.R. 873, plaintiff male alleged that he and his male friend E had been living in a stable and emotionally significant relationship as exclusive life partners; that they attempted to board a municipal bus driven by defendant, but defendant denied plaintiff entry and verbally abused E and struck his face; and that plaintiff observed the assault and suffered great emotional distress. In this action against the bus driver and the city for intentional and negligent infliction of emotional distress, judgment on demurrer was rendered for defendants. *Held*, affirmed.

(a) "To include the 'emotionally significant,' 'stable,' and 'exclusive' relationship pled by appellant as a 'close relationship' within the meaning of *Dillon v. Legg*, would invite inconsistent results because recovery would be dependent upon the personal, completely subjective viewpoints of the trier of fact. For this reason, among others, California courts have denied liability for *loss of consortium* absent a legal husband-wife relationship at the time of the occurrence of the injury." (192 C.A.3d 1276.)

(b) In *Ledger*, the complaint pleaded facts establishing a "de facto" marital relationship; here, plaintiff and E were both males, and "the Legislature has made a determination that legal marriage is between a man and a woman." (192 C.A.3d 1277.)

In *Elden v. Sheldon* (1988) 46 C.3d 267, 250 C.R. 254, 758 P.2d 582, plaintiff R was a passenger in a car driven by L when it was struck by a car driven by defendant. Plaintiff was injured and L was killed. Plaintiff filed a complaint seeking recovery in three causes of action: (1) negligent injury to himself, (2) negligent infliction of emotional distress suffered as a result of witnessing the injury to L, and (3) loss of consortium. The complaint referred to L as his "de facto spouse," and alleged that he had an "unmarried cohabitation relationship" with her "which was both stable and significant and parallel to a marital relationship." The trial court sustained a demurrer, and the parties settled the personal injury claim and stipulated to entry of judgment against plaintiff in order to preserve his right to appeal from the dismissal of his other two causes of action. *Held*, judgment affirmed.

(a) *Negligent infliction of mental distress.*

(1) The third prong of the foreseeability test set forth in *Dillon*--whether plaintiff and the victim were closely related--has not been extended to cover friends or distant relatives, but a few cases have allowed recovery where the plaintiff and victim shared a relationship that was the functional and emotional equivalent of a family relationship. (46 C.3d 271, citing *Leong v. Takasaki*, a Hawaii case involving a stepfather's mother; *Mobaldi v. Regents of Univ. of Calif.* (1976) 55 C.A.3d 573, 127 C.R. 720, *supra*, §1019, involving a foster mother, and *Ledger* involving an unmarried cohabitant.)

(2) Plaintiff, relying on *Ledger* and *Mobaldi*, argued that the marked increase in the number of unmarried cohabitants makes it foreseeable that two persons occupying the same vehicle may be such cohabitants whose relationship parallels that of a legally married couple. However, as *Dillon* recognized, policy considerations may justify rejection of the cause of action. (46 C.3d 274.)

(3) The state has a strong interest in the marriage relationship, and to the extent that unmarried cohabitants are granted the same rights as married persons that interest is inhibited. (46 C.3d 274.) "Our emphasis on the state's interest in promoting the marriage relationship is not based on anachronistic notions of morality. ... Formally married couples are granted significant rights and bear important responsibilities toward one another which are not shared by those who cohabit without marriage. ... Plaintiff does not suggest a convincing reason why cohabiting unmarried couples, who do not bear such legal obligations toward one another, should be permitted to recover for injuries to their partners to the same extent as those who undertake these responsibilities." (46 C.3d 275.)

(4) Allowance of the cause of action would impose a difficult burden on the courts. It would require an inquiry into the relationship to determine whether the "emotional attachments of the family relationship" existed, and whether the relationship was "stable and significant" under the test set forth in *Butcher v. Superior Court* (1983) 139 C.A.3d 58, 188 C.R. 503, *infra*, §1685. Authorities in this state and elsewhere have rejected the *Butcher* test as inviting "mischief and inconsistent results." (46 C.3d 275, 276, citing *Ledger*, and out-of-state cases.) The determination would call for "a massive intrusion into the private life of the partners," and would not provide a definite and predictable test. (46 C.3d 276.)

(5) It is necessary to limit the number of persons to whom a negligent defendant owes a duty of care. As Prosser observes: "It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one

man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends. And obviously the danger of fictitious claims, and the necessity of some guarantee of genuineness, are even greater here than before." (46 C.3d 276.)

(6) "The need to draw a bright line in this area is essential. ... The temptation to give legal effect to close emotional ties between unrelated or distantly related persons is often strong, for it cannot be denied that in some cases such relationships offer as much affection, support and solace as is provided by immediate family members, and that the emotional trauma suffered as the result of injury to a person in such a relationship may be as devastating as that suffered by a member of the immediate family. Yet we cannot draw a principled distinction between an unmarried cohabitant who claims to have a de facto marriage relationship with his partner and de facto siblings, parents, grandparents or children. The 'problems of multiplication of actions and damages' that would result from such an extension of liability ... would place an intolerable burden on society." (46 C.3d 277.) Hence, plaintiff has failed to state a cause of action for negligent infliction of emotional distress. (46 C.3d 277, disapproving the holding of *Ledger* and language in *Mobaldi* inconsistent with this conclusion.)

(b) *Loss of consortium*. Nearly all cases subsequent to *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669, *infra*, §1679, have refused to extend the cause of action to unmarried cohabitants. (46 C.3d 278.) *Butcher* is the sole exception in this state. And, in addition to the virtual absence of authority to support plaintiff's position, some of the factors recited above in the discussion of the cause of action for emotional distress apply equally to this claim for loss of consortium. "[T]he state's interest in promoting the responsibilities of marriage and the difficulty of assessing the emotional, sexual and financial relationship of cohabiting parties to determine whether their arrangement was the equivalent of a marriage, reinforce our conclusion." (46 C.3d 279, disapproving *Butcher* insofar as it is *contra*.)

(2) *Domestic Partner*. If an unmarried cohabitant qualifies as a "domestic partner" as defined in *Family C. 297* (see 11 *Summary* (10th), *Husband and Wife*, §27, he or she is entitled to recover damages for negligent infliction of emotional distress "to the same extent that spouses are entitled to do so under California law." (C.C. 1714.01.)

SUPPLEMENT: [This section is current through the latest supplement]



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f. Close Relationship.
4. Other Relationships.

6 Witkin Sum. Cal. Law Torts § 1021

[§ 1021] Other Relationships.

In *Kately v. Wilkinson* (1983) 148 C.A.3d 576, 195 C.R. 902, cross-complainant Kately purchased a boat from Gateway that had been manufactured by Marine, for use in waterskiing. Kately, her daughter Rebecca, age 14, and Rebecca's friend Rhonda, also age 14, took the boat out to ski. While Rhonda was being towed as a skier, the steering column on the boat locked, the boat circled and struck Rhonda, causing serious injuries from which she died. Kately and Rebecca alleged that they regarded Rhonda as a "filial member" of the Kately family, and suffered great emotional distress from the accident. *Held*, no cause of action under *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *supra*, §1008, was stated. The relationship was only that of a friend, and to hold that sufficient would be to abandon the *Dillon* admonition that the courts exclude the remote and unexpected. (148 C.A.3d 585.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Rodriguez v. Kirchhoefel* (2005) 128 C.A.4th 427, 26 C.R.3d 891, plaintiff, who was 14 years old at the time of the accident, alleged that she suffered severe emotional distress as a result of seeing defendant's car hit decedent. To establish the necessary close relationship, plaintiff submitted evidence that (1) she and her mother had lived with decedent and her family "on and off" for "several extended periods of time"; (2) she had been living with decedent for 2 or 3 years at the time of her death; (3) she and decedent shared a bedroom when they lived together; and (4) she and decedent had known each other since plaintiff was 6 years old, and were very close, regularly referring to themselves as sisters. *Held*, summary judgment for defendant affirmed.

(a) A blood or marital relationship is required. (128 C.A.4th 430.)

(b) *Thing v. La Chusa* (1989) 48 C.3d 644, 668, footnote 10, 257 C.R. 865, 771 P.2d 814, text, §1009, states that "[a]bsent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." Rather than indicating that a marital or blood relationship is not required in exceptional circumstances, this means that recovery is limited to persons who are (1) parents, siblings, children, or grandparents of the victim, regardless of whether they reside with the victim; (2) other relatives of the victim if they reside with the victim; or (3) other relatives of the victim, even if they do not reside with the victim, if exceptional circumstances are present. (128 C.A.4th 432.)



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6 Witkin Sum. Cal. Law Torts § 1021A

[§ 1021A] (New) Defective Product as Source of Emotional Distress.

In *Gu v. BMW of North America, LLC* (2005) 132 C.A.4th 195, 33 C.R.3d 617, plaintiff purchased a vehicle from defendant distributor. It was involved in a one-car collision while being driven by plaintiff's sister, L, who lost control and was killed. Plaintiff did not observe the accident. Nevertheless, claiming that the vehicle's head protection system afforded inadequate protection in a side-impact collision case and that, as the purchaser, she was the "direct victim" of this negligence, plaintiff brought an action for negligent infliction of emotional distress. Plaintiff alleged that defendant breached its duty to her to use reasonable care in the vehicle's manufacture, design, and assembly and that it was foreseeable that she would suffer emotional injury if the purchased vehicle malfunctioned and killed a member of her family. Defendant alleged that the contemporaneous observation requirement was not satisfied. *Held*, judgment for defendant on demurrer affirmed.

(a) In California, the law of negligent infliction of emotional distress is typically analyzed under the bystander theory or the direct victim theory. Only the latter theory is involved here. In its decisions addressing the direct victim theory (see, e.g., *Burgess v. Superior Court* (1992) 2 C.4th 1064, 9 C.R.2d 615, 831 P.2d 1197, text, §1029; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 C.4th 965, 25 C.R.2d 550, 863 P.2d 795, text, §1036), the California Supreme Court emphasized that there is no independent tort of negligent infliction of emotional distress; the tort involved is negligence, an essential element of which is a duty to the plaintiff. The *Potter* case established that there is no duty to avoid negligently causing emotional distress to another. Thus, for plaintiff to recover, there must be some other legal duty, the breach of which proximately caused her emotional distress. A legal duty may exist by virtue of a special relationship, may be imposed by law or may be assumed by the defendant. In asserting that defendant was liable, plaintiff contended that a duty arose from a special relationship and also was imposed by the laws of negligence. (132 C.A.4th 204, citing *Erlich v. Menezes* (1999) 21 C.4th 543, 87 C.R.2d 886, 981 P.2d 978, text, §1037.)

(b) Plaintiff argued that, because she was a purchaser of defendant's product, a special relationship existed between them that created a duty of care. This argument is without merit for the following reasons. (1) Defendant's duty to use reasonable care in the design of the vehicle extended only to persons using the vehicle as intended, such as the driver and passengers, or to other persons within the range of potential danger from the vehicle. Because plaintiff was not present at the time of the accident (and thus was outside the range of potential danger), defendant owed no duty of care to her. For the same reason, plaintiff's contention that defendant's duty arose because plaintiff was using the car in a

foreseeable manner by lending it to her family on the belief that it was safe to do so is rejected. Lending a vehicle to others "does not constitute use of the vehicle for its intended purpose of transportation." (132 C.A.4th 206.) (2) No special relationship arose by virtue of the purchase agreement. When the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress. However, plaintiff did not allege a breach of the purchase agreement, which, in any event, was not a contract with her mental or emotional well-being as its express object. (132 C.A.4th 206.) In short, cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal relationships, such as that of physician-patient (see *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, text, §1022) or psychotherapist-patient (see *Marlene F. v. Affiliated Psychiatric Med. Clinic* (1989) 48 C.3d 583, 257 C.R. 98, 770 P.2d 278, text, §1024). (132 C.A.4th 207.)

(c) With respect to a duty imposed by law, plaintiff contended that under C.C. 1714, defendant owed her a duty not to cause her emotional distress (unless public policy clearly dictated otherwise) and that *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, text, §1086, required recognition of this duty. However, the factors listed in *Rowland* as determining the existence of a duty (text, §833) do not support plaintiff's position: (1) Plaintiff suffered foreseeable emotional distress as a result of her sister's death, but the mere presence of a foreseeable risk of injury to third persons is not sufficient, standing alone, to impose liability for negligent conduct (see *Bily v. Arthur Young & Co.* (1992) 3 C.4th 370, 11 C.R.2d 51, 834 P.2d 745, text, §992). (2) Plaintiff did not allege that defendant committed any morally reprehensible act in connection with the head protection system, such as failing to include a head protection system of any kind or intentionally failing to provide an adequate head protection system. (3) To deter the manufacture and sale of defective products, it is not necessary to impose a duty to avoid negligently causing emotional distress to product owners who lend a defective product to a family member, because the manufacturers and sellers of defective products are already liable for damages resulting from the injuries suffered by the users of those defective products. (4) Currently, manufacturers and sellers are exposed to claims of emotional distress suffered by persons injured while using a defective product (see *Kately v. Wilkinson* (1983) 148 C.A.3d 576, 195 C.R. 902, text, §1509). Allowing their close relatives, who were not present at the injury-producing event, also to recover emotional distress damages would inevitably increase both insurance costs and the demands for payment from the pool of available insurance funds. (132 C.A.4th 207.)

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a. Development of Rule.

6 *Witkin Sum. Cal. Law Torts* § 1022

[§ 1022] Development of Rule.

In this borderland of tort liability, the California law was in accord with the majority view that no liability is incurred where neither physical injury nor impact is shown. (See *Espinosa v. Beverly Hosp.* (1952) 114 C.A.2d 232, 249 P.2d 843 [no recovery for mental suffering in absence of physical injury]; *Gautier v. General Tel. Co.* (1965) 234 C.A.2d 302, 307, 44 C.R. 404 [following *Espinosa*]; *Quezada v. Hart* (1977) 67 C.A.3d 754, 761, 136 C.R. 815, *infra*, §1031; 38 *Am.Jur.2d* (1999 ed.), *Fright, Shock, and Mental Disturbance* §14; 38 *A.L.R.4th* 998 [intentional infliction of emotional distress as independent tort].) (See *Allen v. Jones* (1980) 104 C.A.3d 207, 216, 163 C.R. 445 [concurring opinion; ridiculing traditional rule].)

In *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, the court, citing *Allen*, abrogated the rule. Plaintiff husband's complaint against defendant hospital and a staff physician set forth two causes of action. (1) *Mental suffering*: The doctor negligently examined the wife and erroneously advised her that she had contracted syphilis; she underwent treatment including massive doses of penicillin, and suffered injury to her body and nervous system; defendants instructed her to advise plaintiff of the diagnosis, and he was required thereafter to undergo blood tests to ascertain whether he was the source of his wife's purported infection; as a result of the negligently erroneous diagnosis, his wife suspected him of extramarital sexual activities, and the resulting tension caused a breakup of their marriage; as a consequence, he suffered extreme emotional distress, and incurred medical expenses for counseling in an effort to save the marriage. (2) *Loss of consortium*: As a consequence of these acts, plaintiff was deprived of the love, companionship, etc., of his wife. *Held*, both causes of action were maintainable. (For holding on loss of consortium, see *infra*, §1676.)

(a) *Duty of care owed to husband*. In *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *supra*, §1008, plaintiff was not directly injured: she was a witness to injury to a third person (her child), and *Dillon* sets forth guidelines to limit recovery in that kind of situation. In the instant case, plaintiff was a *direct victim* of the negligent act, and the guidelines of *Dillon* are inapplicable; instead, the general principle of foreseeability of harm, set forth in *Dillon*, applies. It was reasonably foreseeable that the erroneous diagnosis and its probable source would produce marital discord and resultant emotional distress to the married patient's spouse; and the doctor's advice to have the husband examined made plaintiff a foreseeable victim of the negligent diagnosis, for it was to be anticipated that both parties would experience suspicion and hostility when confronted with medical evidence of a particularly noxious infidelity.

(27 C.3d 923.)

(b) *Recovery for emotional distress without physical injury.*

(1) *Traditional rule.* The courts and commentators have debated the issue since the turn of the century, but the general rule, as declared in *Sloane v. Southern Calif. Ry. Co.* (1896) 111 C. 668, 680, 44 P. 320, limits recovery for emotional distress to "parasitic damages." *Vanoni v. Western Airlines* (1967) 247 C.A.2d 793, 56 C.R. 115, supra, §1022, *Espinosa v. Beverly Hosp.* (1952) 114 C.A.2d 232, 249 P.2d 843, supra, §1022, and other cases hold that there can be no recovery for negligent infliction of emotional distress unaccompanied by physical injury. (27 C.3d 924, 925.)

(2) *Analysis and criticism of rule.* The primary justification for the requirement of physical injury is that it serves as a screening device to minimize a presumed risk of feigned injuries and false claims. (27 C.3d 925.) While most courts adhere to this view, scholars consider that the artificial barrier to recovery is unnecessary. The problem is one of proof, and the remedy should not be denied in all cases because some claims may be false. (27 C.3d 926.) In California, our courts have devised various means for giving compensation for infliction of emotional distress where there is some assurance of the validity of the claim: (a) where physical injury occurs contemporaneously with or is a consequence of emotional distress; (b) where the plaintiff asserts an independent cause of action apart from personal injury, e.g., where an insurer wrongfully refuses to settle a claim (*Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 58 C.R. 13, 426 P.2d 173, 2 Summary (10th), *Insurance*, §258); (c) where the defendant intentionally engages in extreme and outrageous conduct (*Alcorn v. Anbro Engineering* (1970) 2 C.3d 493, 86 C.R. 88, 458 P.2d 216, supra, §461, and *State Rubbish Collectors Assn. v. Siliznoff* (1952) 38 C.2d 330, 240 P.2d 282, supra §461). (27 C.3d 926, 927.)

(3) *Repudiation of rule.* The traditional rule is unnecessary to guard against fraudulent claims. (a) The unqualified requirement of physical injury is both overinclusive and underinclusive. It permits recovery where there is any physical injury, no matter how trivial; and it mechanically denies claims that could be proved valid. (27 C.3d 928.) (b) It encourages extravagant pleading and distorted testimony--exaggeration of symptoms of headache, nausea, insomnia, etc., to make out a technical case of bodily injury on which to predicate a parasitic recovery for the more grievous emotional distress suffered. (27 C.3d 929.) (c) The attempted distinction between physical and psychological injury is unclear, and the essential question whether the plaintiff has suffered a serious injury should not turn on that classification. (27 C.3d 929, 930.)

(4) *Cause of action stated.* "The negligent examination ... and the conduct flowing therefrom are objectively verifiable actions by the defendants that foreseeably elicited serious emotional responses in the plaintiff and hence serve as a measure of the validity of plaintiff's claim for emotional distress. As yet another corroborating factor, we note the universally accepted gravity of a false imputation of syphilis: by statute it constitutes slander per se." (27 C.3d 930.)

Two justices dissented, asserting that it is for the Legislature to create new causes of action and to fix the limits of recovery; and that the court should not have created this new, independent tort of recovery for emotional distress without physical injury: "The fundamental problem is not foreseeing (by unguided hindsight) the consequences of unintentional conduct, but rather realistically limiting liability for those consequences." (27 C.3d 936.) (See 69 Cal. L. Rev. 1142; 33 Hastings L. J. 291; 33 Hastings L. J. 583, 601; 35 Hastings L. J. 494; 13 Pacific L. J. 179; 14 Pacific L. J. 1215 [arguing that DES daughters may sue manufacturers for negligent infliction of emotional distress resulting from fear of cancer]; 8 Pepperdine L. Rev. 534, 817; 19 Pepperdine L. Rev. 1283 [A Proposal for a Consistent Theory of Tort Recovery for Bystanders and Direct Victims]; 22 Santa Clara L. Rev. 181; 18 U.S.F. L. Rev. 145; 30 U.S.F. L. Rev. 277 [Molien rule]; 1 A.L.R.4th 218. [telephone company's liability for negligent disclosure of number or address of subscriber holding unlisted number]; 69 A.L.R.5th 411 [physical injury requirement for emotional distress claim based on misdiagnosis of illness due to false positive conclusion on medical test].)

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1. In General.

6 Witkin Sum. Cal. Law Torts § 1023

[§ 1023] In General.

A number of Court of Appeal decisions have applied the rule of *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, supra, §1022, in favor of plaintiffs. (See *Marlene F. v. Affiliated Psychiatric Med. Clinic* (1989) 48 C.3d 583, 257 C.R. 98, 770 P.2d 278, infra, §1024; *Accounts Adjustment Bureau v. Cooperman* (1984) 158 C.A.3d 844, 848, 204 C.R. 881, 4 Cal. Proc. (4th), Pleading, §542; *Slaughter v. Legal Process & Courier Service* (1984) 162 C.A.3d 1236, 1250, 209 C.R. 189; *Holliday v. Jones* (1989) 215 C.A.3d 102, 264 C.R. 448, infra, §1025.)

In *Wooden v. Raveling* (1998) 61 C.A.4th 1035, 71 C.R.2d 891, plaintiff was standing in her front yard when defendant's vehicle was propelled into the yard after negligently colliding with another vehicle. Plaintiff was not struck, but feared for her life. She brought an action for negligent infliction of emotional distress, to which defendant successfully demurred. *Held*, reversed.

(a) Negligent infliction of emotional distress cases are of two main categories: "bystander" cases in which the plaintiff was not physically impacted or injured, but instead witnessed someone else being injured because of the defendant's negligence; and direct victim cases in which the plaintiff's claim of emotional distress was based on the violation of a duty owed directly to the plaintiff. "Direct victim" cases do not require physical injury, and the present case is in that category. (61 C.A.4th 1037.)

(b) In direct victim cases that do not involve impact, *Bro v. Glaser* (1994) 22 C.A.4th 1398, 27 C.R.2d 894, imposed two requirements: (1) a consensual preexisting relationship; and (2) outrageous conduct. However, neither requirement is mandated by the relevant decisions. The requirement of a preexisting relationship was derived from *Burgess v. Superior Court* (1992) 2 C.4th 1064, 9 C.R.2d 615, 831 P.2d 1197, infra, §1029. Although *Burgess* did factually involve a consensual preexisting relationship, it actually stated that the requisite duty could have three origins: (1) a duty assumed by the defendant, (2) a duty imposed on the defendant by law, or (3) a duty arising out of a preexisting relationship between the plaintiff and the defendant. Thus, a preexisting relationship is not a sine qua non of a direct victim claim. (61 C.A.4th 1038.)

(c) With respect to the outrageous conduct element, no recent case has required that the defendant's conduct rise to

the level of being "outrageous," and this element was specifically rejected by *Mercado v. Leong* (1996) 43 C.A.4th 317, 50 C.R.2d 569. (61 C.A.4th 1046.) The relevant precedents simply treat an emotional distress claim as a species of negligence in which damages caused by a breach of duty are compensable. The duty may arise in one of the aforementioned three ways, and the conduct need only be "negligent," not "outrageous." (61 C.A.4th 1042.)

In *Andalon v. Superior Court* (1984) 162 C.A.3d 600, 208 C.R. 899, plaintiffs, father and mother, sued defendant doctor for medical malpractice, consisting of improper prenatal care of the mother that resulted in the unwanted birth of a child afflicted with Down's syndrome. *Held*, mandamus issued directing the trial court to vacate its order granting defendant's motion for partial summary judgment. The distinction between direct victims and bystanders may be made on an application of the factors in *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *infra*, §1179:

(a) "What flows from viewing *Molien* as a *Biakanja* case? Importantly, the issue of 'direct' or 'bystander' modality is informed by the *Biakanja* criteria which condition foreseeability as the measure of actionability. It removes the cause of action in *Molien* from the amorphous nether realm of negligent infliction of emotional distress to medical malpractice. The root problem with viewing a tort, the gist of which is negligent infliction of mental distress, from the perspective of a new cause of action is that foreseeability of the harm looms as the paramount criterion. But foreseeability, without more, provides what *Borer* would describe as an unworkable delineation of the extent of a tortfeasor's liability. This problem is alleviated if the analysis is recharted from within the established doctrines of recognized torts that address the question of the foreseeable victim. Then the focus shifts to the policy calculus by which an exiting duty is extended." (162 C.A.3d 610; on *Borer v. American Airlines* (1977) 19 C.3d 441, 138 C.R. 302, 563 P.2d 858, see *infra*, §1683.)

(b) "In this case we perceive both parents to be direct victims of the malpractice alleged. Mrs. Andalon was a party to the contract with the defendant and no issue of his duty to advise her concerning mongolism is tendered at this stage of the action. Mr. Andalon's interest in the receipt of information and advice on this topic mirrors hers. His injury is not merely derivative of Mrs. Andalon's injury but flows from his role as a participant in the reproductive life of the marital couple and its lawful choices. The burden of parental responsibility falls directly upon his shoulders. The tort duty arising from the contract, between defendant and Mrs. Andalon, runs to him, not merely because of the foreseeability of emotional harm to him, but because of the nexus between his significant interest and the 'end and aim' of the contractual relationship. He is manifestly a direct beneficiary of tort-duty imposed by virtue of the doctor-patient relationship." (162 C.A.3d 611.)

In *Newton v. Kaiser Foundation Hosp.* (1986) 184 C.A.3d 386, 229 C.R. 890, plaintiffs Rebecca and Robert were the parents of a child born with a paralysis of the upper arm resulting from improper use of forceps during delivery. In this action against defendant hospital, the lower court, applying the guidelines of *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *supra*, §1008, sustained a demurrer on the ground that, at the time of the birth, Rebecca was unconscious and Robert was not present; hence, neither perceived the wrongful act. *Held*, judgment on demurrer reversed; plaintiffs were direct victims under the *Molien* theory.

(a) Defendant contended that plaintiffs were not direct victims because the malpractice was aimed at the child, not the parents. But *Andalon* furnishes the answer: "[I]n both *Molien* and *Andalon* the doctor-patient relationship with the wife directly implicated the interest of the husband." (184 C.A.3d 391.)

(b) In the present case, an obstetrician-patient relationship existed. The mother was a direct victim of the negligence committed in the execution of this relationship, which resulted in injuries to her child; and the relationship between defendant and the mother implicated the reproductive efforts of the couple, which personally interested the father. (184 C.A.3d 392.) (See 18 *Pacific L. J.* 1303.)

SUPPLEMENT: [This section is current through the latest supplement]
Accounts Adjustment Bureau case:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §581.



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2. Counseling.

6 Witkin Sum. Cal. Law Torts § 1024

[§ 1024] Counseling.

In *Marlene F. v. Affiliated Psychiatric Med. Clinic* (1989) 48 C.3d 583, 257 C.R. 98, 770 P.2d 278, the court, in three separate opinions with a majority consisting of only three regular justices, made some difficult conceptual distinctions. Plaintiff mother and her minor sons came to defendant's clinic for counseling. Defendant's therapist treated the mother as well as the children, believing that each child's psychological problems arose in part from difficulties in the mother-son relationship. Nearly 2 years later, the mother discovered that the therapist had sexually molested her sons, and so advised defendant clinic; the director told them that the therapist had done nothing illegal, but that he would no longer be assigned minor patients; and the therapist wrote plaintiffs stating that he would undergo psychotherapy.

The present action for negligent infliction of emotional distress resulted in judgment for defendants on demurrer. The Court of Appeal affirmed on the ground that no cause of action was stated either under the "bystander" theory of *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, supra, §1008 or the "direct victim" theory of *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, supra, §1022 (because the mother was neither present at the time the acts occurred nor the target of the therapist's unprofessional conduct). *Held*, judgment of Court of Appeal reversed.

(a) Negligent causing of emotional distress is not an independent tort but the tort of negligence, and the traditional elements of duty and causation apply. (48 C.3d 588, citing the text.)

(b) In *Molien*, this court pointed out that the *Dillon* factors were not the sole means of determining a duty of care, but applied only in the context of a bystander witness. (48 C.3d 589, footnote 4.) Damages for severe emotional distress are recoverable "when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two." (48 C.3d 590.) By directing that the husband be told of a diagnosis that would disrupt the marital relationship, the doctor in *Molien* assumed a duty to convey accurate information, and the husband was accordingly a direct victim of the doctor's negligence. (48 C.3d 590.)

(c) In the present case, "the counseling was not directed simply at each mother and son as individuals, but to both in

the context of the family relationship." (48 C.3d 590.) And the therapist knew or should have known that his sexual molestation of the child would directly injure and cause severe emotional distress to his other patient, the mother, as well as to the parent-child relationship that was also under his care. "His abuse of the therapeutic relationship and molestation of the boys breached his duty of care to the mothers as well as to the children." (48 C.3d 591.)

(d) In *Richard H. v. Larry D.* (1988) 198 C.A.3d 591, 243 C.R. 807, supra, §724, plaintiff husband, consulting a psychotherapist for marital counseling, stated a claim for negligent infliction of emotional distress where the therapist had sexual relations with plaintiff's wife. "It is no less foreseeable that a mother who consults a therapist for purposes of stabilizing and improving her relationship with her son, and who commits herself and her son to the therapist's care, would feel betrayed and suffer emotional distress upon learning that the therapist had, during the course of the treatment, sexually molested her son." (48 C.3d 591.)

A concurring opinion by the author of the main opinion, with another justice concurring, advanced an additional theory: "I believe that what we have before us is a case of outrageous conduct, atrocious and offensive acts committed within a relationship of trust, that might permit the imposition of liability for the intentional infliction of emotional distress." (48 C.3d 592, discussing cases and Restatement of Torts.)

An additional concurring opinion of three justices disagreed with the majority's theory that plaintiff mother was a direct victim under *Molien*, and offers a different theory of recovery:

(a) "The majority's reliance on *Molien* in this case, and its suggestion that permitting recovery is somehow novel although not a 'dramatic step' are inexplicable. The explanation in *Molien* that the plaintiff was a 'direct victim' did no more than distinguish and explain why the *Molien* plaintiff had not stated a cause of action as a 'bystander' victim whose emotional distress injury was caused by observation of an injury to another. ... Identification of the plaintiff as a 'direct victim' of the defendant's negligence did not, however, explain the source of the duty which obligated the defendant for emotional distress damages--recovery which is normally permitted only as an interim of 'parasitic' damages when the defendant is liable for another injury. The majority's explanation here that the therapist's 'tortious conduct' was directed at both the children and their mothers suffers from the same defect. It does not identify any tort other than negligence that supports the recovery of damages for emotional distress, and thus supports negligent infliction of emotional distress as an independent cause of action." (48 C.3d 600.)

(b) "Neither reliance on, nor analogy to, *Molien* is appropriate in this case. Each of the members stated a cause of action for professional malpractice. When a professional relationship involves counseling or therapy for the purpose of treating an emotional or psychiatric condition, the right to recover for malpractice which worsens that condition and in so doing causes severe emotional distress is clear. Indeed, the majority cite ample authority for such recovery, but for reasons that are unclear, refuse to acknowledge that professional malpractice is the sole basis for holding that the mother stated a cause of action in their complaint." (48 C.3d 600.) (See *Jacoves v. United Merchandising Corp.* (1992) 9 C.A.4th 88, 110, 11 C.R.2d 468 [parents whose son committed suicide after being released from defendant hospital were direct victims, where they were treated as patients in therapy sessions and utilized as active instrumentalities of their son's treatment]; 22 *Pacific L. J.* 189.)

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6 *Witkin Sum. Cal. Law Torts* § 1025

[§ 1025] Legal Malpractice.

In *Holliday v. Jones* (1989) 215 C.A.3d 102, 264 C.R. 448, plaintiff H was convicted of involuntary manslaughter related to the killing of his wife. His conviction was reversed on the ground of incompetency of defendant J, his defense counsel, and he was acquitted on retrial. He brought the present action against Jones, for himself and his minor children, seeking damages for professional negligence and negligent infliction of emotional distress. The trial judge found defendant J liable as a matter of law, based on the facts set forth in the unpublished opinion reversing H's conviction, and awarded \$ 6,173.53 general and special damages. *Held*, judgment for H affirmed. (For the portion of the opinion reversing the judgment for the children, see *infra*, §1028.)

(a) Defendants, conceding that H suffered severe emotional distress, nevertheless contended that *Quezada v. Hart* (1977) 67 C.A.3d 754, 136 C.R. 815, *infra*, §1031, follows the American majority rule that damages for emotional distress cannot be recovered in a legal malpractice action except upon a showing of affirmative misconduct or bad faith. (215 C.A.3d 112.)

(b) *Quezada* was based on the former rule requiring physical injury in order to recover emotional distress damages. This rule was abrogated in *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, *supra*, §1022, and the *Molien* theory was applied to a legal malpractice case in *Betts v. Allstate Ins. Co.* (1984) 154 C.A.3d 688, 717, 201 C.R. 528, although the opinion in *Betts* does not refer to *Quezada*. (215 C.A.3d 113, 114.) To reject the *Betts* holding would create a special rule benefiting only negligent lawyers. "If as a result of improper psychiatric diagnosis an individual is mistakenly committed to a mental hospital, *Molien* plainly allows recovery of emotional distress damages against the negligent psychiatrist. If the same individual is mistakenly committed as a result of the negligence of his lawyer and suffers the same damages, defendants' argument would require that recovery be denied." (215 C.A.3d 114.)

(c) In most of the out-of-state cases cited for the majority rule, the only interest harmed by the attorney's malpractice was a *property interest*; and recovery was denied primarily for that reason, i.e., that the interest invaded was solely "an economic one." (215 C.A.3d 114, 115, 116.) Where, as here, the interest is in liberty--a more fundamental and personal right--and the emotional distress is not only foreseeable but "virtually a guaranteed result," the U.S. Court of

Appeals decision in *Wagenmann v. Adams* (1st Cir. 1987) 829 F.2d 196, distinguishes *Quezada* and supports recovery. (215 C.A.3d 117, 118, 119.)

(d) "[R]ecover of damages for emotional distress in a legal malpractice case--if it is to be limited at all--should turn on the nature of plaintiff's interest which is harmed and not merely on the reprehensibility of the defendant's conduct." In light of the liberty interest here, the general rule of damages applies and J should be liable for emotional distress damages he caused." (215 C.A.3d 119.)

(e) The court added the following observation on problems not resolved by its opinion:

(1) The holding involves privately retained counsel, and the question whether it applies to a defendant represented by appointed counsel or a public defender is best left to the *Legislature*. (215 C.A.3d 119.)

(2) The possible chilling effect of the decision on the quality of legal representation of defendants cannot be considered in the absence of evidence on this issue; it cannot be said as a matter of law that the elimination of this single element of damages would improve legal representation by privately retained counsel, or that failure to limit damages will decrease the quality of this representation. (215 C.A.3d 119.)

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1. In General.

6 Witkin Sum. Cal. Law Torts § 1026

[§ 1026] In General.

Ochoa v. Superior Court (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, supra, §1013, involved a child who died of pneumonia after allegedly not receiving proper care. The court held that a cause of action was stated under *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, supra, §1008, but that the attempt to state a cause of action under *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, supra, §1022, could not be sustained: "In *Molien* defendant's misdiagnosis was, by its very nature, directed at both the wife and the husband. ... By contrast, here the defendants' negligence in the instant case was directed primarily at the decedent, with Mrs. Ochoa looking on as a helpless bystander as the tragedy of her son's demise unfolded before her. While she was a foreseeable plaintiff to whom the defendants owed a duty of care pursuant to our holding in *Dillon*, the duty was owed to her as a percipient witness, not as a direct victim of negligence." (39 C.3d 172.)

In *Budavari v. Barry* (1986) 176 C.A.3d 849, 222 C.R. 446, plaintiff alleged that defendant doctors did not investigate indications of her husband's possible cancer until it had reached a terminal state, and that she suffered emotional distress while her husband was dying and after his death. *Held*, judgment for defendants on demurrer sustained. In *Molien*, there was an inaccurate diagnosis of a frightening disease and a communication of the diagnosis to a family member who would foreseeably suffer emotional harm from hearing it. Here, the negligence consisted of a failure to diagnose cancer; there was no communication of distressing false information directly to plaintiff; hence, she was not a direct victim. Because damages recoverable for wrongful death do not include compensation for grief or sorrow (see *infra* §1690), plaintiff's case "amounts to an effort to recover this nonrecoverable element by filing a complaint for negligent infliction on emotional distress rather than for wrongful death." (176 C.A.3d 854.)

In *Kossel v. Superior Court* (1986) 186 C.A.3d 1060, 231 C.R. 183, the issue was whether a plaintiff can state a *Molien* cause of action "where she first learns of a favorable but erroneous diagnosis about her spouse's physical condition then learns he has a fatal illness." (186 C.A.3d 1062.) The complaint alleged that in November 1983, defendant doctor diagnosed the condition of plaintiff's husband as a benign tumor; that in March 1984, it was determined that he was suffering from Hodgkin's disease, which had progressed from a curable to an incurable condition, and caused his death in September 1984; that plaintiff, after being informed of the original misdiagnosis, suffered continual emotional distress. *Held*, no cause of action was stated.

(a) "This case is a nearly perfect illustration of the arbitrariness of the 'rules' courts have imposed on claims of negligent infliction of emotional distress and the confusion which reigns in their wake. It also highlights the tension found *within* the leading Supreme Court opinions in this field." (186 C.A.3d 1063.) These opinions contain language suggesting that emotional distress claims are to be judged by flexible application of the general principles of foreseeability; but they also established "narrow, rigid tests--sometimes labeled 'guidelines'--for what can be deemed to create a foreseeable risk of emotional distress." (186 C.A.3d 1064.) And most Courts of Appeal have treated the guidelines as fixed criteria. (186 C.A.3d 1064, listing cases.)

(b) "Thus, for most California courts it is not enough that a plaintiff demonstrates a defendant could reasonably foresee his negligence would cause significant emotional distress among persons in the plaintiff's class. The claimant must also show she or he fits into one of two narrowly defined classes of emotional injurees--either a 'bystander' to a traumatic incident injuring a close relative or a 'direct victim' who was a target of the defendant's negligent conduct." (186 C.A.3d 1064.)

(c) Although some of the broad language in *Molien* suggests that recovery could be had on the broad foreseeability theory (186 C.A.3d 1065), *Ochoa* underscores the limiting language of *Molien* (186 C.A.3d 1066), which governs here. "Dr. Judkins' misdiagnosis was directed at Edward Kossel not the petitioner. Indeed the doctor did not even mention the misdiagnosis to Mrs. Kossel in this case while the doctors did tell Mrs. Ochoa her son only had a slight infection. But this direct communication from doctor to the patient's mother was not enough to make her a direct victim. Although it was foreseeable Mr. Kossel would tell his wife the good news about the benign tumor, petitioner does not allege Dr. Judkins asked Mr. Kossel to tell his wife of the diagnosis. Neither was the diagnosis of her husband's benign tumor one that would directly affect the physical health of Mrs. Kossel in the same way as the diagnosis his wife had a communicable disease like syphilis affected the husband in *Molien*." (186 C.A.3d 1067.)

A number of other decisions also deny recovery. (See *Goodwin v. Reilley* (1985) 176 C.A.3d 86, 221 C.R. 374 [*Molien* doctrine did not apply to emotional distress suffered by parents on observing their son in hospital after vehicle collision caused by drunken driver]; *Martinez v. Los Angeles* (1986) 186 C.A.3d 884, 890, 891, 892, 231 C.R. 96 [following *Ochoa* and *Budavari*]; *Krupnick v. Hartford Acc. & Indem. Co.* (1994) 28 C.A.4th 185, 196, 34 C.R.2d 39 [plaintiffs settled auto injury claim and then brought action against other driver's insurer based on manner in which defendant had conducted settlement negotiations; judgment on the pleadings for defendant affirmed]; *Klein v. Children's Hosp. Med. Center* (1996) 46 C.A.4th 889, 897, 54 C.R.2d 34 [parents of child who was misdiagnosed as having terminal cancer had no action for negligent infliction of emotional distress]; *Fluharty v. Fluharty* (1997) 59 C.A.4th 484, 496, 69 C.R.2d 244 [son struggled with father causing father's shotgun to fire, injuring son's wife; family relationship alone is insufficient basis for imposing duty of care to refrain from negligently causing emotional distress]; *Aguirre-Alvarez v. Regents of Univ. of Calif.* (1998) 67 C.A.4th 1058, 1067, 79 C.R.2d 580 [where hospital owed no common law or statutory duty to patient's relatives to notify them of patient's death, it was not liable when patient's body was cremated by coroner without relatives' knowledge; citing *Huggins v. Longs Drug Stores Calif.* (1993) 6 C.4th 124, 24 C.R.2d 587, 862 P.2d 148, *infra*, §1030]; *Spates v. Dameron Hosp. Assn.* (2003) 114 C.A.4th 208, 212, 7 C.R.3d 597 [for purposes of direct victim theory, hospital that gave patient's body to county for cremation owed no duty to patient's daughter; 9 months before patient died, daughter gave hospital new contact address; nor did it owe duty by virtue of *Health & Safety C. 7104*, because statute was designed to protect county treasury, not responsible parties].)

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2. Airplane Crash.

6 Witkin Sum. Cal. Law Torts § 1027

[§ 1027] Airplane Crash.

In *Lawson v. Management Activities* (1999) 69 C.A.4th 652, 81 C.R.2d 745, plaintiffs witnessed an airplane crash nearby. The crash was so close that for a brief instant they feared that the plane would hit them. Although no one was injured in the crash, plaintiffs sued various parties connected with the aircraft for emotional damages caused by the fear in which they had been placed. The trial court sustained defendants' demurrer without leave to amend. *Held*, affirmed.

(a) *Rowland factors*. In order to determine whether the duty of care imposed on airline operators extends to the emotional distress sustained by spectators of plane crashes who are physically untouched, but who reasonably fear for their own safety, it is necessary to apply the factors set forth in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086. These factors, on balance, weigh against liability. The factors that tilt in the direction of liability do not tilt very far, and the factors against liability weigh decidedly against. (69 C.A.4th 657.)

(1) With respect to the *foreseeability of harm to the plaintiff*, it takes no imagination to realize that people on the ground who are close to an airplane crash are going to be very frightened. However, while it is foreseeable that the fright will be intense, though short-lived, a person's psychological reaction to the crash is not foreseeable. Thus, emotional distress is actuarially imprecise and inherently limitless. In short, foreseeability does not count for much, one way or the other, on the question under discussion. (69 C.A.4th 657.)

(2) *Certainty of injury* is a factor that squarely weighs against liability. Although one can always worry oneself sick, the reality of psychological injury remains a subject of intense philosophical debate. Also, psychological symptoms are much more susceptible to being faked than are the more palpable effects. Suffice it to say that for purposes of this case, certainty of injury is not present. (69 C.A.4th 658.)

(3) The *closeness of the connection between the defendant's conduct and the injury suffered* tilts in the direction of liability. There is no reasonable doubt that the fear for one's safety caused by being near a plane crash is going to be traumatic. However, how traumatic it will be to people with different psychological makeups is uncertain. Some people will "fall to pieces," and others will act heroically. (69 C.A.4th 659.)

(4) In favor of no liability is *the moral blame attached to the defendant's conduct*. Airplane crashes are usually caused by some error in the maintenance or operation of the plane, not by any kind of moral indifference to the possibility of injury, and thus nothing is to be gained by extending liability to the emotional distress of ground spectators. (69 C.A.4th 659.)

(5) The *policy of preventing future harm* is similar to moral blame in that little would be gained by extending liability for plane crashes to emotionally distressed bystanders. The high likelihood of death, the inevitable liability of the responsible parties, and the extensive regulation of air safety are more than sufficient to deter future harm. (69 C.A.4th 659.)

(6) The final two factors--*the extent of the burden to the defendant and the consequences to the community if the duty under consideration is imposed*--also weigh against liability. To hold airlines responsible for all nonpassengers flown over would expose the airlines to virtually limitless tort liability. Moreover, extending liability in this manner would dilute the recovery pool and make air transportation harder to insure. (69 C.A.4th 660.)

(b) *Zone of danger*.

(1) *In re Air Crash Disaster Near Cerritos, Calif.* (9th Cir. 1992) 973 F.2d 1490, 1491, concluded that California law would permit recovery of emotional distress when a bystander was frightened, but unharmed, by a plane crash. This is incorrect, because (a) permitting a lawsuit whenever anyone was frightened would completely overwhelm the courts, and (b) the cases on which the Ninth Circuit relied, *Sloane v. Southern Calif. Ry. Co.* (1896) 111 C. 668, 44 P. 320, 3 Cal. Proc. (4th), Actions, §140, and *Cook v. Maier* (1939) 33 C.A.2d 581, 92 P.2d 434, supra, §1005, were based on the principle that all stimuli generating an emotional effect also led to a physical effect and thus constituted a physical injury. (69 C.A.4th 660.)

(2) The "nervous shock equals physical injury" rationale destroys the distinction between what the ordinary person would think of as emotional distress and palpable damages (like an ensuing heart attack). This is recognized by the insurance cases, such as *Waller v. Truck Ins. Exchange* (1995) 11 C.4th 1, 44 C.R.2d 370, 900 P.2d 619, 2 Summary (10th), Insurance, §277, holding that "bodily injury" does not include the emotional distress produced by some trauma-producing event, such as losing one's life savings in an investment scam, even though physical manifestations may have occurred. In other words, the attempted distinction between physical and psychological injury is artificial, so duty must be analyzed in terms of foreseeability and various policy considerations. There are no shortcuts. (69 C.A.4th 665, 666.)

(3) *Wooden v. Raveling* (1998) 61 C.A.4th 1035, 71 C.R.2d 891, supra, §1023, reached the opposite conclusion in a case involving bystanders to an automobile collision. It is distinguishable. There is a difference between car crashes and airplane accidents, as they relate to bystanders; automobile drivers must necessarily be aware of the surrounding area, while airplane operators need not. Moreover, *Wooden* did not analyze a bystander's fear for his or her safety in terms of the *Rowland* factors, and thus hardly stands for the proposition that these factors mandate a broad fear-for-one's-safety or zone of danger rule. (69 C.A.4th 667, 668.)

SUPPLEMENT: [This section is current through the latest supplement]
Sloane case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §145.



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6 *Witkin Sum. Cal. Law Torts* § 1028

[§ 1028] Legal Malpractice.

In *Holliday v. Jones* (1989) 215 C.A.3d 102, 264 C.R. 448, after plaintiff H was convicted of involuntary manslaughter related to the killing of his wife, his conviction was reversed on the ground of incompetency of defendant J, his defense counsel, and he was acquitted on retrial. He then brought the present action against J for himself and his minor children, seeking damages for negligent infliction of emotional distress. The trial judge found defendant J liable as a matter of law based on the facts set forth in the unpublished opinion reversing H's conviction, and awarded general and special damages. *Held*, judgment for children reversed. (For the portion of the opinion affirming the judgment for H, see *supra*, §1025.)

(a) The evidence clearly establishes that defendant's negligence caused the children to suffer emotional distress, and that this distress was foreseeable. (215 C.A.3d 106.) But recent cases and some commentators have "expressed concern over potential costs, particularly when it appeared that on a clear judicial day courts could foresee forever." (215 C.A.3d 107, citing *Thing v. La Chusa* (1989) 48 C.3d 644, 257 C.R. 865, 771 P.2d 814, *supra*, §1009.)

(b) *Marlene F. v. Affiliated Psychiatric Med. Clinic* (1989) 48 C.3d 583, 257 C.R. 98, 770 P.2d 278, *supra*, §1024, emphasizes that *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, *supra*, §1022, did not purport to create a cause of action based solely on foreseeability of emotional distress. (215 C.A.3d 107.) *Thing* likewise observes that foreseeability "provides virtually no limit on liability for non-physical harm." (215 C.A.3d 108.) *Thing* refers to *Borer v. American Airlines* (1977) 19 C.3d 441, 138 C.R. 302, 563 P.2d 858, *infra*, §1683, in which the court refused to recognize a child's right to recover for loss of a parent's consortium, on the grounds that damages were difficult to measure, of questionable recompense, and resulted in inordinate costs. (215 C.A.3d 108.)

(c) "Perhaps the resolution of this issue would be more difficult if [H] had been wrongfully convicted of murdering his children, and his wife sought to recover for her emotional distress." (215 C.A.3d 109, citing *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669, *infra*, §1679.) Under *Borer*, however, children are not entitled to recover loss of consortium damages resulting from injury to a parent. And here the emotional distress suffered by the children was not wholly caused by the tortfeasor's negligence: A substantial part of their anguish was their awareness that their father had been tried on a charge of murdering their mother, and that distress would have been

suffered even if H had been represented by competent counsel. (215 C.A.3d 109.)

(d) *Hedlund v. Superior Court* (1983) 34 C.3d 695, 194 C.R. 805, 669 P.2d 41, is an application of *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, supra, §1008, and its references to *Molien* do not support the children's claim, for under *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, supra, §1013, the *Molien* theory applies only where the defendant's tortious conduct is in some sense directed at both the plaintiff and the primary victim. (215 C.A.3d 110.)

(e) "We are frank to admit that *Dillon*, *Molien* and to a lesser extent *Hedlund* can be read to suggest an expansive new rule in which the only limitation on the recovery of negligently inflicted emotional distress damages is the principle of foreseeability. In such a legal environment, the categories of 'direct victims' and 'bystanders' would be unnecessary. They are, in a sense, arbitrary limitations on the recovery of compensation for damages which, to the individual plaintiff involved, are very real. Clearly, however, our emotional distress vistas have been restricted by recent cases such as *Ochoa*, *Marlene F.* and *Thing*. As both *Marlene F.* (a 'direct victim' case) and *Thing* (a 'bystander' case) make clear, foreseeability is not the only consideration. The Supreme Court has made a policy determination that the costs associated with attempting to compensate intangible losses are socially significant and can no longer be ignored. The lines are being drawn; the question is simply one of location." (215 C.A.3d 111.)

(f) "If the results in these cases can be synthesized, it would appear that in order to recover for negligently inflicted emotional distress damages, a plaintiff must either have a special relationship to the defendant (*Marlene F.*), be the direct object of some aspect of the defendant's conduct (*Molien*) or personally witness a negligently caused physical injury to a closely related primary victim (*Dillon*; *Ochoa*; *Thing*). Beyond these categories, the only exception seems to be the recovery by spouses of loss of consortium damages." (215 C.A.3d 111.)

(g) Here, the Holliday children have no contractual or other relationship with Jones, his malpractice was not directed at them, and they did not witness a physical injury to their father. As to loss of consortium, they are barred by *Borer*. "We cannot see how a rational standard could exist which would award emotional distress damages to the [H] children and at the same time deny them to children of parents who are physically injured." (215 C.A.3d 111.)

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6 Witkin Sum. Cal. Law Torts § 1029

[§ 1029] Childbirth.

In *Burgess v. Superior Court* (1992) 2 C.4th 1064, 9 C.R.2d 615, 831 P.2d 1197, the court commenced its opinion with a statement of the issue and holding: "Can a mother recover damages for negligently inflicted emotional distress against a physician who entered into a physician-patient relationship with her for care during labor and delivery if her child is injured during the course of the delivery? Because the professional malpractice alleged in this case breached a duty owed to the mother as well as the child, we hold that the mother can be compensated for emotional distress resulting from the breach of the duty. For public policy reasons that have been previously articulated by this court, however, these damages do not extend to emotional distress due to loss of affection, society, companionship or similar harm that the mother may incur in adjusting to and living with the child's impairments." (2 C.4th 1069.)

Plaintiff Julia Burgess was admitted to a hospital under the care of defendant Dr. Gupta, her obstetrician. At 12:50 p.m., Gupta artificially ruptured Burgess' membranes. She suffered a prolapsed cord, and preparations were begun for a cesarean section. About 21 minutes later, Burgess was taken to emergency surgery, having heard the doctor's excited warnings that the baby was not getting enough oxygen, and being told that "something" was wrong with her boy. Joseph, the child, was deprived of sufficient oxygen through his umbilical cord for 44 minutes before delivery, and sustained permanent brain and nervous system damage.

This action was brought by Joseph, Burgess, and Moody (the father) against Dr. Gupta and the hospital. Burgess and Moody sought recovery for emotional distress suffered as a result of defendants' negligence. Moody's claim was dismissed for failure to comply with discovery requests, and the right of a father to recover was no longer in issue. The trial court, relying on *Thing v. La Chusa* (1989) 48 C.3d 644, 257 C.R. 865, 771 P.2d 814, supra, §1009, granted defendants' motion for summary adjudication. The Court of Appeal issued mandamus to vacate the order, holding that *Thing* was not controlling because Burgess was a direct victim under *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, supra, §1022. *Held*, judgment of Court of Appeal modified to direct reversal of the order of summary adjudication.

(a) *Doctor's duty of care to mother.* The law of negligent infliction of emotional distress in California is typically analyzed by reference to the bystander theory and the direct victim theory; but "confusion has reigned" as to the

applicable theory. (2 C.4th 1071, and footnote 5, listing cases.)

(1) The distinction between the bystander and direct victim cases is found in the source of the duty: (a) The bystander cases all arose in the context of negligent conduct of a defendant with whom the plaintiff had no preexisting relationship, and to whom the defendant had not previously assumed a duty of care beyond that owed to the public. (2 C.4th 1072.) Because the class of potential plaintiffs could be limitless, this court has circumscribed the class of bystanders. (2 C.4th 1073.) (b) In contrast, the direct victim cases are those in which there is a breach of duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two; and well-settled principles of negligence determine whether the elements of a cause of action are present. (2 C.4th 1073, citing *Marlene F. v. Affiliated Psychiatric Med. Clinic* (1989) 48 C.3d 583, 257 C.R. 98, 770 P.2d 278, supra, §1024.)

(2) "The broad language of the *Molien* decision coupled with its perceived failure to establish criteria for characterizing a plaintiff as a 'direct victim' rather than a 'bystander,' has subjected *Molien* to criticism from various sources, including this court. ... The great weight of this criticism has centered upon the perception that *Molien* introduced a new method for determining the existence of a duty, limited only by the concept of foreseeability. To the extent that *Molien* ... stands for this proposition, it should not be relied upon and its discussion of duty is limited to its facts." (2 C.4th 1074.)

(3) "Nevertheless, other principles derived from *Molien* ... are sound: (1) damages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact, and (2) a cause of action to recover damages for negligently inflicted emotional distress will lie, notwithstanding the criteria imposed upon recovery by bystanders, in cases where a duty arising from a preexisting relationship is negligently breached. ... In fact, it is this later principle which defines the phrase 'direct victim.' That label signifies nothing more." (2 C.4th 1074.)

(4) Gupta, relying on *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, supra, §1013, contends that Burgess' damages are derivative, because Gupta owed no duty of care to her to avoid injuring her child, hence, that her only basis for recovery was as a bystander. (2 C.4th 1074.) This contention is unsound. "The origin of these mutually exclusive duties to Burgess and Joseph is apparently Gupta's unsupported assertion that Burgess and Joseph were two separate patients, because his actions could physically injure one and not the other." (2 C.4th 1075.)

(5) To accept Gupta's argument "would require us to ignore the realities of pregnancy and childbirth." (2 C.4th 1076.) [D]uring pregnancy and delivery it is axiomatic that any treatment for Joseph necessarily implicated Burgess's participation since access to Joseph could only be accomplished with Burgess's consent and with impact to her body." (2 C.4th 1076.) In addition to the physical connection between a woman and her fetus, there is an emotional relationship. "[T]he mother's emotional well-being and the health of the child are inextricably intertwined." (2 C.4th 1076.)

(6) Thus, the Court of Appeal correctly determined that the alleged negligent actions resulting in physical harm to Joseph breached a duty owed to both *Joseph and Burgess*. (2 C.4th 1076.) As in *Marlene F.*, Burgess' claim for emotional distress may simply be viewed as an ordinary professional malpractice claim, which seeks as an element of damage compensation for her serious emotional distress. (2 C.4th 1077.) And this holding has been foreshadowed by several decisions of the *Courts of Appeal*. (2 C.4th 1077, listing cases.)

(7) The issue of a father's recovery is not involved in this case. However, "the physician-patient relationship critical to a mother's cause of action is almost always absent in a father's claim. It, therefore, appears that a father must meet the criteria set forth in *Thing* ... , if he is to state a viable claim." (2 C.4th 1078, footnote 8.)

(b) *Lack of physical injury is no bar to claim.* Gupta argued that Burgess did not suffer any physical injury wholly unrelated to the emotional distress stemming from Joseph's injuries, and that this fact relegated her to bystander status. This argument is unpersuasive. (1) Burgess pleaded injury to her "nervous system and person." (2) Even if she had failed to allege physical injuries, physical injury is not a prerequisite for recovery of damages for *serious* emotional

distress, when, as here, there is a "guarantee of genuineness in the circumstances of the case." (2 C.4th 1079, quoting *Molien*.)

(c) *Public policy considerations*. Recognition of liability in this case is consistent with the doctrine of *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, and with the factors that should be considered in determining the existence of a duty. (2 C.4th 1079.)

(1) *Foreseeability and certainty of mother's injury in labor and delivery cases*. It is obvious that, during pregnancy, the mother and child are a unique physical unit, and that a mother has formed a sufficiently close bond with her fetus that injury to the fetus during labor and delivery will cause her severe emotional distress. (2 C.4th 1080.)

(2) *Closeness of connection between the conduct and the injury*. An obstetrician's negligent delivery of a child, resulting in the child's injury, "is closely (even inextricably) related to any emotional distress incurred by the mother upon her realization of the injury to her child." (2 C.4th 1081.)

(3) *Moral blame*. Liability is not found unless there is some deviation by the physician from the legal standard of care; and the plaintiff must convince the trier of fact "that the physician's peers would consider his act to be blameworthy." (2 C.4th 1081.)

(4) *Prevention of future harm*. (a) In the area of birth injury, it is possible that the child's cause of action may be an adequate deterrent of future similar harm. (2 C.4th 1081.) (b) However, relegating mothers to the status of bystanders could create incentives for physicians unrelated to the standard of care. "Thus, an alert mother would pose a higher risk of a successful lawsuit for an obstetrician than a heavily or completely sedated mother. The incentives established by such a rule, therefore, could undermine advances in obstetrical care related to reducing the use during labor and delivery of sedative and anesthetic drugs that are potentially damaging to the fetus." (2 C.4th 1082.) (c) Also, the failure to find a duty of care owed to the mother would be inconsistent with prior decisions upholding a claim against an obstetrician whose negligence results in stillbirth of, rather than injury to, the child. (2 C.4th 1082, citing *Justus v. Atchison* (1977) 19 C.3d 564, 139 C.R. 97, 565 P.2d 122, and *Johnson v. Superior Court* (1981) 123 C.A.3d 1002, 177 C.R. 63, supra, §1012.) Because an action by a stillborn child is barred (on the ground that a child's cause of action for prenatal injuries is contingent upon live birth), failure to recognize the obstetrician's duty to the mother might mean that a doctor could escape all civil liability for negligence that caused a stillbirth. (2 C.4th 1082, and footnote 9.)

(5) *Consequences of imposition of liability*. This decision "will not unduly burden the community or health care providers in the field of obstetrics or result in the imposition of damages disproportionate to fault." (2 C.4th 1083.) (a) The Legislature, in enacting the Medical Injury Compensation Reform Act (MICRA, see supra, §940), has taken action to ameliorate the impact of increasing costs of liability coverage for health care providers. (2 C.4th 1083.) (b) MICRA has established a restrictive statute of limitations for medical malpractice claims brought by adults. Thus, in the context of labor and delivery, the potential for long-delayed liability for emotional distress is slight. (2 C.4th 1084.) (c) The class of potential plaintiffs is limited to pregnant women with whom the defendant established a physician-patient relationship; hence, there is no possibility of unlimited liability. (2 C.4th 1084.)

(d) *Limitations on recovery of damages for emotional distress*. Public policy concerns support the California rule that parents may not recover damages for loss of filial consortium. (2 C.4th 1084, quoting *Baxter v. Superior Court* (1977) 19 C.3d 461, 138 C.R. 315, 563 P.2d 871, infra, §1684.) However, while some portion of Burgess' emotional distress may have arisen from her loss of Joseph's consortium, other portions may have distinct origins that would not subject them to the bar mandated by the policy concerns underlying the prohibition of the loss of filial consortium claim. "Thus, we hold that damages arising from loss of Joseph's affection, society, companionship, love and disruption of Burgess's 'normal' routine of life to care for Joseph cannot be recovered by Burgess no matter how her claim for these damages is denominated. ... We further hold to the extent, however, that Burgess's emotional distress arose from the 'abnormal event' of participating in a negligent delivery and reacting to the unexpected outcome of her pregnancy with resulting 'fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical

pain' ... resulting from defendant's breach of duty, then Burgess's emotional distress is of the type for which we have previously recognized recovery should be provided." (2 C.4th 1084.) (See *Bro v. Glaser* (1994) 22 C.A.4th 1398, 1411, 27 C.R.2d 894 [review of emotional distress cases postdating *Molien*, including *Burgess*]; *Mercado v. Leong* (1996) 43 C.A.4th 317, 327, 50 C.R.2d 569 [following *Burgess*]; *Zavala v. Arce* (1997) 58 C.A.4th 915, 68 C.R.2d 571 [following *Burgess* even though there was no live birth]; 20 *Pepperdine L. Rev.* 864 [*Burgess*].)

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6 *Witkin Sum. Cal. Law Torts* § 1030

[§ 1030] Incorrect Prescription.

In *Huggins v. Longs Drug Stores Calif.* (1993) 6 C.4th 124, 24 C.R.2d 587, 862 P.2d 148, the issue arose as follows: "In filling a prescription for plaintiffs' 2-month-old son, defendant pharmacy wrote directions for five times the dosage ordered by the doctor. Plaintiffs seek to hold the pharmacy liable for their emotional distress from having unwittingly injured their son by administration of the overdose." (6 C.4th 126.) Plaintiffs initially urged both a "bystander" theory and a "direct victim" theory. The Court of Appeal rejected bystander recovery but held that plaintiffs could state a claim as direct victims. On review in the Supreme Court plaintiffs relied solely on the direct victim theory. *Held*, judgment of Court of Appeal reversed.

(a) The Court of Appeal concluded that a pharmacist automatically assumes a duty of care toward a patient's closely related caregivers simply by filling a prescription with actual or constructive knowledge that the patient is an infant or is otherwise helpless. "That conclusion comports neither with California case law nor with sound public policy." (6 C.4th 130.)

(1) "Since *Molien* was decided, we have made clear that despite its broad references to foreseeability, the opinion should be read as basing the defendant doctor's direct-victim liability only upon his assumption of a direct duty toward the husband." (6 C.4th 130, citing *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, *supra*, §1022.) That limitation was confirmed in *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, *supra*, §1013, and *Burgess v. Superior Court* (1992) 2 C.4th 1064, 9 C.R.2d 615, 831 P.2d 1197, *infra*, §1029. (6 C.4th 130, 131.)

(2) Where the plaintiff is not the defendant's patient, the courts have not extended the *Molien* direct victim cause of action to emotional distress derived solely from a reaction to another's injury. (6 C.4th 131, citing *Martinez v. Los Angeles* (1986) 186 C.A.3d 884, 231 C.R. 96.) As pointed out in *Burgess*, the physician-patient relationship critical to a mother's cause of action is almost always absent in a father's claim. (6 C.4th 131, citing *Schwarz v. Regents of Univ. of Calif.* (1990) 226 C.A.3d 149, 276 C.R. 470.) In the present case, the prescription was to provide medical treatment for plaintiffs' infant son. "He, not plaintiffs, was the only patient being served by the transaction." (6 C.4th 132.)

(b) "There is no material distinction between the professional duties of pharmacists and the duties of other health providers that allows the parent of a child patient for whom a prescription is negligently filled to recover from the pharmacist as a direct victim." (6 C.4th 132.) Although recent regulations require the pharmacist to provide oral consultation to the patient "or the patient's agent," the obvious purpose of requiring consultation with the agent has nothing to do with the agent's personal welfare; the purpose is simply to assure that the pharmacist's advice is put to good use for the benefit of the patient even in situations in which the patient would be unable to understand the advice. (6 C.4th 132.)

(c) Plaintiffs sought to differentiate their claims from those of other parents who contract for a health care provider's services on the ground that the medical care for which they contracted (filling of a prescription) necessarily involved their personal participation. The Court of Appeal agreed, but the theory is unacceptable, for it would apply to practically all outpatient care of an infant. "A pediatrician typically prescribes routines of diet, hygiene, medication, etc., all of which must be administered by the parent or other home caregiver. Even in the doctor's office, the parent may be asked to physically restrain a child who is to receive a 'shot' from the doctor or nurse." (6 C.4th 133.)

(d) If a child is seriously injured by negligent medical treatment, the parent is practically certain to suffer correspondingly serious emotional distress. "But even if it were deemed reasonably foreseeable to a pediatrician, or a pharmacist, that a parent's realization of unwitting participation in the child's injury would itself be a source of significant emotional distress from guilt, anxiety, or otherwise, that foreseeability would not warrant our establishing a new right of recovery for intangible injury." (6 C.4th 133.)

(e) "The duty that the Court of Appeal would impose upon pharmacists would inevitably enlarge the potential liabilities of practically all providers of medical goods and services obtained by parents solely for the treatment of their children, or by other caregivers solely for the treatment of dependent family members. All those providers, unlike the providers of care to competent adult patients, would be exposed to new claims of emotional distress allegedly incurred in *administering* the prescribed medication or treatment to the patient. That expansion of potential liability not only would increase medical malpractice insurance costs but also would tend to 'inject undesirable self-protective reservations' impairing the provision of optimal care to the patient." (6 C.4th 133.)

Two justices joined in two separate dissenting opinions, both expressing agreement with the judgment of the Court of Appeal. (6 C.4th 133, 135.) (See *Moon v. Guardian Postacute Services* (2002) 95 C.A.4th 1005, 1014, 116 C.R.2d 218 [*Huggins* direct victim theory did not apply to son-in-law who admitted mother-in-law to nursing home, where she later died due to its neglect]; *Ess v. Eskaton Properties* (2002) 97 C.A.4th 120, 127, 118 C.R.2d 240 [under *Huggins* theory, incidental emotional distress felt by plaintiff when her sister developed pressure ulcer in nursing home and was raped by unknown intruder could not support direct victim cause of action for negligent infliction of emotional distress]; 22 *Pepperdine L. Rev.* 897 [*Huggins*].)

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a. Financial Injury.

6 Witkin Sum. Cal. Law Torts § 1031

[§ 1031] Financial Injury.

In limited circumstances, recovery for infliction of emotional distress has been allowed for financial injury in the absence of a physical trauma. (See *Gruenberg v. Aetna Ins. Co.* (1973) 9 C.3d 566, 108 C.R. 480, 510 P.2d 1032, 2 Summary (10th), Insurance, §247; *Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 58 C.R. 13, 426 P.2d 173, 2 Summary (10th), Insurance, §258; *Jarchow v. Transamerica Title Ins. Co.* (1975) 48 C.A.3d 917, 938, 122 C.R. 470, 12 Summary (10th), Real Property, §361; BAJI No. 12.85.)

Broad language in *Jarchow* was given a restricted interpretation in *Quezada v. Hart* (1977) 67 C.A.3d 754, 136 C.R. 815. Plaintiffs sued defendant attorneys for malpractice, alleging that they had negligently allowed the 5-year period to run on a quiet title action that was then dismissed for lack of prosecution. The trial judge found that plaintiffs would have prevailed in the quiet title action, and that by reason of defendants' negligence they lost the family home. Damages were awarded for this loss, but damages for emotional distress was denied. *Held*, this ruling was correct.

(a) The general rule allows damages for negligent infliction of emotional distress only where there is physical impact or physical injury. (67 C.A.3d 761.) But recovery has been allowed "when the tortfeasor's conduct, although negligent as a matter of law, contains elements of intentional malfeasance or bad faith." (67 C.A.3d 761, citing *Jarchow*, *Crisci*, *Gruenberg*, and other cases.) *Jarchow* states that negligent infliction of emotional distress is actionable, but that case involved a wilful refusal of the title company to take action to clear a title, and thus was an act of bad faith. (67 C.A.3d 762.)

(b) "To the extent that the court in *Jarchow* purported to extend the doctrine of the foregoing cases to allow recovery for emotional suffering damages in cases involving *negligence without bad faith and without physical injury*, the extension was unwarranted by California law, for all prior cases contain some element of intentional or affirmative wrongdoing by defendant." (67 C.A.3d 762, citing *Fuentes v. Perez* (1977) 66 C.A.3d 163, 136 C.R. 275, *supra*, §451.) The instant case involves only negligence without affirmative wrongdoing, and emotional suffering damages were not recoverable. (67 C.A.3d 763.)

In *Branch v. Homefed Bank* (1992) 6 C.A.4th 793, 8 C.R.2d 182, plaintiff, who was induced by defendant's negligent misrepresentation to leave his former job and accept a position with defendant, was awarded \$ 45,163 in

economic damages and \$ 60,000 in emotional distress damages. *Held*, the award of emotional distress damages was improper.

(a) Because the damages recoverable for fraud in property transactions are governed by C.C. 3343, which does not allow recovery of emotional distress damages (see *infra*, §1714), plaintiff argued that where the fraud does not relate to the purchase or sale of property as here, the situation is subject to the broad measure of damages provided by C.C. 3333, i.e., the amount that will compensate for all detriment proximately caused thereby (see *infra*, §1553). This position is supported by the holding in *Sprague v. Frank J. Sanders Lincoln Mercury* (1981) 120 C.A.3d 412, 174 C.R. 608, *infra*, §1714, that damages for mental pain and suffering are recoverable in a tort action of "deceit," which is defined by C.C. 1710 as including both intentional and negligent misrepresentation (see *supra*, §767). But the critical determination is whether the tort is intentional or negligent, rather than whether it fits within the broad definition of deceit. (6 C.A.4th 799.)

(b) The inclusion of both negligent and intentional misrepresentation in the definition of deceit does not signal uniformity in the availability of damages for the two torts. For example, although C.C. 3294(c)(3) permits the recovery of punitive damages for deceit (see *infra*, §1540), the cases uniformly hold that punitive damages are not recoverable in that branch of deceit that is mere negligence. (6 C.A.4th 799, citing *Delos v. Farmers Group* (1979) 93 C.A.3d 642, 155 C.R. 843, *infra*, §1563, and *Reid v. Moskovitz* (1989) 208 C.A.3d 29, 255 C.R. 910, *infra*, §1587.) *Sprague* and other decisions upholding damages for emotional distress involved intentional, rather than negligent, misrepresentation. Hence, on the principle that the recovery for negligent misrepresentation should match that available in negligence actions generally, plaintiff, "incurring neither physical impact nor physical damage, and whose loss (other than emotional distress) is solely economic, is entitled neither to punitive damages nor to a recovery for emotional distress." (6 C.A.4th 799, citing *Quezada*.)

(c) Recovery of emotional distress damages has been allowed, without impact or physical injury, in certain specialized classes of cases, such as where the negligence causes highly unusual distress or arises in a situation involving breach of fiduciary duties, or where the plaintiff witnesses an injury to a close relative. (6 C.A.4th 800, citing *Allen v. Jones* (1980) 104 C.A.3d 207, 163 C.R. 445, *supra*, §1022, *Gruenberg*, *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *supra*, §1008, and other cases.) But this case fits into none of these exceptions to the general rule: Plaintiff suffered no physical impact that caused injury; while damages as the result of plaintiff's reliance on defendant's negligent misrepresentations could have been anticipated, nothing in the case suggests any peculiarly sensitive emotional trauma; and defendant's conduct, while blameworthy, in no sense can be described as extreme or outrageous. Hence, the consequential injury in terms of emotional distress resulting from plaintiff's direct economic loss is not compensable. (6 C.A.4th 801.)

A number of other decisions deny recovery. (See *Erlich v. Menezes* (1999) 21 C.4th 543, 552, 87 C.R.2d 886, 981 P.2d 978, *infra*, §1037 [preexisting contractual relationship, without more, will not support recovery for emotional distress where tortious conduct has resulted only in economic loss]; *Merenda v. Superior Court* (1992) 3 C.A.4th 1, 11, 4 C.R.2d 87 [legal malpractice; damages for emotional distress were not recoverable]; *Smith v. Superior Court* (1992) 10 C.A.4th 1033, 1038, 1339, 13 C.R.2d 133 [discussing *Merenda* and *Branch*, and rejecting argument for recovery of damages for emotional distress]; *Pleasant v. Celli* (1993) 18 C.A.4th 841, 853, 22 C.R.2d 663, 1 Cal. Proc. (4th), Attorneys, §339 [same]; *Sutherland v. Barclays Amer. Mortg. Corp.* (1997) 53 C.A.4th 299, 316, 61 C.R.2d 614 [citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C.4th 503, 28 C.R.2d 475, 869 P.2d 454 (*supra*, §746), and holding that breach of contract, which need not be accomplished in "polite or administratively efficient" manner, does not allow recovery of damages for negligent infliction of emotional distress]; 6 A.L.R.5th 297 [liability of insurer, insurance agent, or insurance adjuster for infliction of emotional distress].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Butler-Rupp v. Lourdeaux* (2005) 134 C.A.4th 1220, 1226, 36 C.R.3d 685 [award of damages to commercial tenants in action against landlords was predicated solely on economic injury to tenants, precluding recovery of damages for negligent infliction of emotional distress in absence of physical injury to tenants or intentional conduct on part of

landlords; citing *Erlich v. Menezes* (1999) 21 C.4th 543, 87 C.R.2d 886, 981 P.2d 978, text, §1037].*Pleasant case:*

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §323.



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b. Injury to Property.

6 *Witkin Sum. Cal. Law Torts* § 1032

[§ 1032] Injury to Property.

In *Cooper v. Superior Court* (1984) 153 C.A.3d 1008, 200 C.R. 746, plaintiff alleged that, while she and her children were away from their home, defendants negligently allowed an excavator's tractor to roll away from its parking place and run into plaintiff's home, causing damage to the house, grounds, and swimming pool. She attempted to state a cause of action for damages for emotional distress, alleging such matters as the necessity of moving to a hotel, and psychological trauma. *Held*, no cause of action was stated.

(a) The vast majority of cases decided after *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *supra*, §1008, and *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, *supra*, §1022, arose out of witnessing human injury. No California case has allowed recovery for emotional distress arising solely out of property damage, unless there was a threshold showing of some preexisting relationship or intentional tort. (153 C.A.3d 1012.)

(b) Decisions allowing recovery include *Jarchow v. Transamerica Title Ins. Co.* (1975) 48 C.A.3d 917, 938, 122 C.R. 470, 12 *Summary* (10th), *Real Property*, §361, involving a preexisting insurer-insured relationship as well as bad faith on the part of the insurer; *Windeler v. Scheers Jewelers* (1970) 8 C.A.3d 844 88 C.R. 39, 1 *Summary* (10th), *Contracts*, §885, arising out of the negligent loss of property by a bailee; and *Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 58 C.R. 13, 426 P.2d 173, 2 *Summary* (10th), *Insurance*, §258, involving bad faith of an insurer. (153 C.A.3d 1013.) (See *Erlich v. Menezes* (1999) 21 C.4th 543, 552, 87 C.R.2d 886, 981 P.2d 978, *infra*, §1037 [preexisting contractual relationship, without more, will not support recovery for emotional distress where tortious conduct has resulted only in property damage]; *Lubner v. Los Angeles* (1996) 45 C.A.4th 525, 531, 53 C.R.2d 24 [artists had no cause of action for emotional distress from destruction of paintings caused by city truck that crashed into their home, absent threshold showing of preexisting relationship or intentional tort; following *Cooper*].)

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c. Report Causing Arrest.

6 *Witkin Sum. Cal. Law Torts* § 1033

[§ 1033] Report Causing Arrest.

In *Pool v. Oakland* (1986) 42 C.3d 1051, 232 C.R. 528, 728 P.2d 1163, plaintiff, cashed a paycheck at a bank, received several \$ 100 bills, and used one of them to buy groceries at defendant Safeway, a supermarket. Safeway had been receiving an inordinate number of counterfeit \$ 100 bills, and had instructed its employees to screen these bills. The assistant manager, finding the bill lacking the motto "In God We Trust," called the police. Despite plaintiff's protests, and without explaining the nature of the charge, police officers arrested plaintiff, handcuffed him, searched him in public view, and took him to the station where he was fingerprinted, photographed, and subjected to a strip search. Within minutes after his arrival at the station, the police ascertained that the bill was one of a series that omitted the motto. Nevertheless, they held plaintiff overnight on unsubstantiated charges of interfering with a police investigation, and did not release him until the following afternoon. In this action against Safeway, on the cause of action for negligent infliction of emotional distress, the jury returned a verdict for \$ 45,000. *Held*, judgment on the verdict affirmed.

(a) Safeway owed its customers a duty of due care to avoid exposing them to foreseeable harms; and, except in rare cases, the jury determines whether the defendant's conduct satisfies the applicable standard of care. (42 C.3d 1061, and footnote 8, citing the text.) The jury could have found that an innocent customer suspected of counterfeiting would be subjected to a police investigation, and perhaps arrested, and would suffer emotional distress as a result. (42 C.3d 1062.) The jury could likewise have found that Safeway could have instructed its employees to telephone the Treasury Department (as the police eventually did) to verify the legitimacy of the bill. (42 C.3d 1062.)

(b) Safeway contended that even if it acted unreasonably, the negligence of the police officers in failing to ascertain the validity of the bill before arresting plaintiff was a superseding cause. But foreseeability, like reasonableness, is also a question of fact for the jury. (42 C.3d 1063.) And accusing an innocent customer of felonious conduct and calling in the police could foreseeably lead to a police investigation and arrest, causing emotional distress. (42 C.3d 1064.)

(c) Safeway's status as a merchant under P.C. 490.5 (supra, §432) only justified detention; it did not give protection from liability for summoning the police. (42 C.3d 1065, 1066.)

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6 *Witkin Sum. Cal. Law Torts* § 1034

[§ 1034] Wrongful Termination of Employment.

In *Anderson v. Northrop Corp.* (1988) 203 C.A.3d 772, 250 C.R. 189, plaintiff alleged negligent infliction of emotional distress based on defendant's wrongful termination of her husband's employment while they were stationed in Saudi Arabia. *Held*, judgment for defendant on demurrer affirmed. Although it was foreseeable that plaintiff would be upset when she learned of her husband's termination, this foreseeability could not impose a duty on defendant to protect her from harm unless there was also tortious conduct directed at plaintiff. This requirement was not met here, because defendant did nothing to include plaintiff within the scope of its allegedly improper actions, i.e., it did not expressly or impliedly advise plaintiff's husband to inform plaintiff of his termination. (203 C.A.3d 777.) Because plaintiff was unable to establish a legal duty, the fact that she was living in Saudi Arabia, which would go to the degree and certainty of damages, was irrelevant. (203 C.A.3d 778.)

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6 Witkin Sum. Cal. Law Torts § 1035

[§ 1035] Assisting in Removal of Child.

In *Schwarz v. Regents of Univ. of Calif.* (1990) 226 C.A.3d 149, 276 C.R. 470, plaintiff and his wife had undergone a bitter divorce, and their son M suffered from an adjustment disorder. Plaintiff agreed to pay for therapy by defendants with the hope of improving M's relationships with his parents. Although the parents had joint legal and physical custody, the therapist recommended that M live solely with his mother. Later M's mother advised the therapist that she was moving with M to England and that she did not wish plaintiff to know their whereabouts. Plaintiff's complaint alleged that the therapist assisted the mother in implementing her plan; that plaintiff after a prolonged search learned that M was residing in England and attempted without success to gain custody; and that the therapist, by assisting in removal of M from California, had disrupted the family relationships, causing plaintiff to suffer severe emotional distress. *Held*, judgment for defendants on demurrer affirmed.

(a) "It is clear from the general tenor of the discussion in *Thing v. La Chusa* ... that the Supreme Court intends to dismantle entirely the 'direct victim' distinction drawn in *Molien v. Kaiser Foundation Hosp.* ... and further expounded in *Ochoa v. Superior Court*. ... The majority opinion expresses open scorn for the distinction." (226 C.A.3d 159, citing *Thing v. La Chusa* (1989) 48 C.3d 644, 257 C.R. 865, 771 P.2d 814, *supra*, §1009, *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, *supra*, §1022, and *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, *supra*, §1013.) However, in *Thing*, the plaintiff was not in the immediate vicinity, and the defendant's conduct obviously was not directed at her. Thus, "whatever clear signal" the court may have sent in *Thing* concerning the viability of a direct victim theory of recovery, "this dictum is not controlling precedent." (226 C.A.3d 160.) "As matters stand now, we deem it wise to assume a 'direct victim' theory, as illuminated and limited by *Marlene F.* and *Ochoa* ... , remains viable." (226 C.A.3d 160, citing *Marlene F. v. Affiliated Psychiatric Med. Clinic* (1989) 48 C.3d 583, 257 C.R. 98, 770 P.2d 278, *supra*, §1024.)

(b) There is a clear contrast between the allegations considered dispositive in *Marlene F.* and those of plaintiff's complaint. He alleged that defendants, as psychotherapists and mental health care providers for M owed legal duties to provide therapy and counseling to M; and the complaint described therapy sessions with M. These allegations leave no basis for determining that plaintiff was himself a patient being treated jointly with M. (226 C.A.3d 162.) The treatment was directed at improving M's mental health and resolving his particular problems *not* at treating the general dysfunction in the family unit. "Even in the absence of negligence, the treatment of the emotional problems of one

family member well may have an adverse effect on the relationship of the patient with one or more other members of the family. Distancing the patient from some or all other family members may be the only available route to mental health. That a third party thus suffers an adverse consequence does not mean the defendant's conduct is directed at the third party." (226 C.A.3d 163.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

Witkin Summary of California Law
X. NEGLIGENCE: GENERAL DUTY TO EXERCISE DUE CARE
E. Negligent Causing of Emotional Distress.
4. Physical Trauma Not Present.
f. Fear of Contracting Disease.

6 *Witkin Sum. Cal. Law Torts* § 1036

[§ 1036] Fear of Contracting Disease.

(1) *Fear of Developing Cancer.* In *Potter v. Firestone Tire & Rubber Co.* (1993) 6 C.4th 965, 25 C.R.2d 550, 863 P.2d 795, the principal issue was "whether emotional distress engendered by a fear of cancer or other serious physical illness or injury following exposure to a carcinogen or other toxic substance is an injury for which damages may be recovered in a negligence action in the absence of physical injury." (6 C.4th 973.)

From 1963 until 1980, defendant Firestone operated a tire manufacturing plant near Salinas. In 1967, Firestone contracted with the Salinas Disposal Service (SDS), which operated the Crazy Horse landfill, for disposal of its industrial wastes. Crazy Horse is a Class II landfill, which prohibits toxic substances and liquids because of the danger that they will leach into the groundwater; and SDS informed Firestone that no solvents, cleaning fluids, oils, or liquids were permitted. Despite assurances of compliance, Firestone sent large quantities of toxic wastes to Crazy Horse to avoid the high cost of sending the materials to a Class I landfill.

In 1984, plaintiffs, owners of property adjacent to Crazy Horse discovered that toxic chemicals had contaminated their domestic water wells. In 1985, they filed suits against Firestone stating causes of action for negligence, negligent and intentional infliction of emotional distress, and strict liability/ultrahazardous activity. The trial judge found in favor of plaintiffs on nearly all of their claims, and awarded damages as follows: (a) for lifelong fear of cancer and resultant emotional distress, \$ 800,000; (b) for the cost of periodic medical monitoring to detect the onset of disease and increase the chances of effective treatment, \$ 142,975, the present value of the costs based on plaintiffs' life expectancies; (c) for psychiatric illness and the cost of treating it, \$ 269,500; (d) for general disruption of plaintiffs' lives and invasion of their privacy, \$ 108,110; and (e) for Firestone's conscious disregard for the rights and safety of others, punitive damages of \$ 2.6 million.

The Court of Appeal reversed the awards for medical monitoring costs, but otherwise affirmed the judgment. Because of its conclusion that the negligence and intentional infliction of emotional distress causes of action supported the damage awards, the Court of Appeal did not reach the issue of ultrahazardous activity. The Supreme Court granted review, and addressed the following issues: (a) whether the fear of cancer component of the emotional distress award, the award for medical monitoring costs, and the award for punitive damages were proper; (b) whether Firestone may be held liable for intentional infliction of emotional distress; (c) whether comparative fault principles regarding plaintiffs'

smoking are properly invoked. Not at issue was the award for the general disruption of plaintiffs' lives, which was not challenged by *Firestone*. (6 C.4th 980.)

(a) *Negligence: Fear of cancer.*

(1) *Parasitic recovery.* Recovery for emotional distress caused by injury is available in California as an item of parasitic damages; i.e., where a plaintiff can show a physical injury, anxiety specifically due to a reasonable fear of a future harm attributable to the injury may constitute a proper element of damages. (6 C.4th 981, citing *Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 58 C.R. 13, 426 P.2d 173, 2 Summary (10th), *Insurance*, §258, and *Merenda v. Superior Court* (1992) 3 C.A.4th 1, 4 C.R.2d 87, *infra*, §1555.)

Although the availability of parasitic damages for emotional distress engendered by a fear of developing cancer appears to be an issue of first impression in California, other jurisdictions have held that parasitic damages are recoverable when they are derivative of a claim for serious physical injuries. (6 C.4th 981.) In these cases, the existence of a present physical injury, rather than the degree of probability that the disease may actually develop, is determinative. (6 C.4th 982.)

Whether impairment of the immune system response and cellular damage constitute physical injury is an issue on which courts of other jurisdictions have reached differing conclusions. (6 C.4th 982 et seq.) Because the statement of decision in this case made no mention of immune system response, cellular system, or cells, "we lack an appropriate factual record for resolving whether impairment to the immune response system or cellular damage constitutes a physical injury for which parasitic damages for emotional distress ought to be available." (6 C.4th 984.)

(2) *Nonparasitic recovery.* There is no independent tort of negligent infliction of emotional distress; the tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. That duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship. (6 C.4th 984, 985.) "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." (6 C.4th 985.) Here, however, *Firestone* did violate a duty imposed by law to dispose of toxic waste only in a Class I landfill. Thus, plaintiffs' fear of cancer was proximately caused by *Firestone's* conduct. (6 C.4th 985.)

Damages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact, where there exists a guarantee of genuineness in the circumstances of the case. (6 C.4th 986.) *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, *supra*, §1022, pointed out the significant difficulties with the physical injury requirement, including the encouragement of extravagant pleading and distorted testimony. (6 C.4th 987.) "Our reasons for discarding the physical injury requirement ... remain valid today and are equally applicable in a toxic exposure case. That is, the physical injury requirement is a hopelessly imprecise screening device--it would allow recovery for fear of cancer whenever such distress accompanies or results in any physical injury, no matter how trivial, yet would disallow recovery in all cases where the fear is both serious and genuine but no physical injury has yet manifested itself." (6 C.4th 988.)

The question whether recovery for emotional distress caused by fear of cancer should depend on a showing that there is a probable likelihood of developing cancer is a matter of hot debate. The Court of Appeal erred in concluding that reasonableness is established by the mere fact of an exposure or a significant increase in the risk of cancer. That approach attaches undue significance to the mere ingestion of a carcinogen, and focuses on the increased risk of cancer in isolation. (6 C.4th 989.) Emotional distress caused by the fear of a cancer that is not probable should generally not be compensable in a negligence action for the following public policy reasons:

(a) First, we all are potential fear-of-cancer plaintiffs, and a single class action may involve hundreds, if not

thousands, of claims. The tremendous societal cost of this demonstrates the necessity of imposing some limits on the class. (6 C.4th 991.)

(b) Second, unrestricted fear liability would have an unduly detrimental impact in the health care field. The threat of many large awards and the cost of insuring against liability could diminish the availability of new drugs or increase their price beyond the reach of those who need them most. (6 C.4th 991.) And the fear-of-cancer liability in the context of physicians prescribing drugs will exacerbate the medical malpractice crisis. (6 C.4th 992.)

(c) Third, allowing recovery to all victims who have a fear of cancer may work to the detriment of those who sustain actual physical injury and those who ultimately develop cancer as a result of toxic exposure; i.e., defendants and their insurers might be unable to ensure compensation for the latter. (6 C.4th 993.)

(d) Fourth, supporting the imposition of a more-likely-than-not limitation is the need for a sufficiently definite and predictable threshold for recovery to permit consistent application from case to case. Without this threshold, the likelihood of inconsistent results increases, because juries may differ over the point at which a plaintiff's fear is genuine and reasonable. (6 C.4th 993.)

(e) Finally, a more-likely-than-not limitation is sometimes necessary to limit the class of potential plaintiffs. Thus, restricting the liability of a negligent tortfeasor for emotional loss may be warranted in consideration of the factors of intangible nature of the loss, inadequacy of monetary damages, difficulty of measuring the damage, and societal cost of attempting to compensate the plaintiff. "These considerations are equally relevant to fear of cancer claims in toxic exposure cases." (6 C.4th 994.)

In summary, "with respect to negligent infliction of emotional distress claims arising out of exposure to carcinogens and/or other toxic substances: Unless an express exception to this general rule is recognized, in the absence of a present physical injury or illness, damages for fear of cancer may be recovered only if the plaintiff pleads and proves that (a) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; *and* (b) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure. Under this rule, a plaintiff must do more than simply establish knowledge of a toxic ingestion or exposure and a significant increased risk of cancer. The plaintiff must further show that based upon reliable medical or scientific opinion, the plaintiff harbors a serious fear that the toxic ingestion or exposure was of such magnitude and proportion as to likely result in the feared cancer." (6 C.4th 997.)

(3) *Oppressive, fraudulent, or malicious conduct.* Aggravated conduct of the defendant calls for an exception to the general rule, focusing on the totality of circumstances in evaluating a defendant's conduct. (6 C.4th 999.) "[I]n the absence of a physical injury or illness, a plaintiff may recover damages for negligently inflicted emotional distress engendered by a fear of cancer without meeting the more-likely-than-not threshold if the plaintiff pleads and proves that: (a) as a result of the defendant's negligent breach of a duty owed to the plaintiff, he or she is exposed to a toxic substance which threatens cancer; (b) the defendant, in breaching its duty to the plaintiff, acted with oppression, fraud or malice as defined in *Civil Code section 3294*; *and* (c) the plaintiff's fear of cancer stems from a knowledge, corroborated by reliable medical or scientific opinion, that the toxic exposure caused by the defendant's breach of duty has significantly increased the plaintiff's risk of cancer *and* has resulted in an actual risk of cancer that is significant." (6 C.4th 999, 1000.) Firestone's conduct brings this case within the exception. (6 C.4th 1000.)

(b) *Intentional infliction of emotional distress.* The trial judge ruled that Firestone's continued dumping of its hazardous wastes at Crazy Horse amounted to outrageous conduct, and that plaintiffs suffered severe emotional distress as a result of Firestone's intentional acts. The Court of Appeal agreed; but after rendition of its decision, *Christensen v. Superior Court* (1991) 54 C.3d 868, 2 C.R.2d 79, 820 P.2d 181, supra, §460, was decided, and the issue on review is the impact of that opinion on the award for intentional infliction of emotional distress.

It is not enough that the conduct be intentional and outrageous; it must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware. Here, knowledge of these particular plaintiffs is lacking. "For guidance of the lower courts should the Court of Appeal determine that a retrial on this claim is appropriate, we hold that recovery of fear of cancer damages in actions for intentional infliction of emotional distress should not depend on a showing of a medically corroborated belief that it is more likely than not that the plaintiff will develop the feared cancer as a result of the toxic exposure." (6 C.4th 1003.)

The reasons for not applying the more-likely-than-not threshold are: (1) intentional infliction requires a high degree of culpability justifying recovery of greater damages by a broader group of plaintiffs than in negligence actions; (2) where a defendant engages in extreme and outrageous conduct toward the plaintiff, the concern that liability will be imposed out of proportion to fault is not present; and (3) the requirement of outrageous conduct places adequate limitations on the class of potential plaintiffs. (6 C.4th 1003.) "[I]t must nevertheless be established that the plaintiff's fear of cancer is reasonable, that is, that the fear is based upon medically or scientifically corroborated knowledge that the defendant's conduct has significantly increased the plaintiff's risk of cancer and that the plaintiff's actual risk of the threatened cancer is significant." (6 C.4th 1004.)

(c) *Medical monitoring costs.* The trial judge awarded medical monitoring damages to plaintiffs. The Court of Appeal reversed on the ground that C.C. 3283 requires proof that the occurrence of the disease is reasonably certain. But the analysis in *Miranda v. Shell Oil Co.* (1993) 17 C.A.4th 1651, 26 C.R.2d 655, stressing policy considerations, supports the award. (6 C.4th 1005.) "[T]he cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable. In determining the reasonableness and necessity of monitoring, the following factors are relevant: (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chance of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis. Under this holding, it is for the trier of fact to decide, on the basis of competent medical testimony, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring." (6 C.4th 1009.)

(d) *Smoking and comparative fault.* Plaintiffs were longtime cigarette smokers, and defendant Firestone argued that comparative fault principles should reduce or entirely preclude a recovery for fear of cancer. The Court of Appeal rejected the argument on the ground that comparative fault is applicable only if the plaintiff's negligence is a proximate cause of the injury. The Court of Appeal erred in its *reasoning*. Under comparative fault principles, damages are apportioned based upon the various causes contributing to a plaintiff's *harm*, as opposed to a particular defendant's *negligence*. Therefore, the fact that plaintiffs' smoking did not contribute to the contamination of their well water is not determinative. (6 C.4th 1011.) Nevertheless, the Court of Appeal reached the proper *conclusion*, that Firestone failed to establish a causal link between plaintiffs' smoking and the harm they suffered--their fear of a significantly increased risk of cancer. (6 C.4th 1011.) However, when a defendant demonstrates that a portion of the plaintiff's fear of developing cancer is attributable to smoking, comparative fault principles may be applied to reflect the proportion of the damages for which the plaintiff should properly bear the responsibility. (6 C.4th 1011.) "[E]vidence of smoking by a plaintiff is relevant to whether the plaintiff's fear is reasonable and genuine. Thus, if a plaintiff had smoked heavily for 20 years without fearing cancer, the trier of fact may consider that evidence in assessing the legitimacy of the plaintiff's fear of cancer claim." (6 C.4th 1011, 1012.)

The majority opinion was signed by four justices. Concurring and dissenting opinions were filed by three justices. (6 C.4th 1025.) (See 25 Proof of Facts 3d 313 [medical monitoring damages resulting from exposure to toxic substances]; 30 *Lincoln L. Rev.* 37 [Potter]; 22 *Pepperdine L. Rev.* 358 [Potter]; 41 *Santa Clara L. Rev.* 661 [emotional distress issues raised by release of toxic and other hazardous materials]; 35 *U.C. Davis L. Rev.* 965 [recovery for fear of disease]; 41 *U.C.L.A. L. Rev.* 1337 [injury requirement in claim for fear of future consequences]; 22 *Western State L.*

Rev. 191 [*Potter*].)

(2) *Fear of Developing AIDS/HIV*. The reasoning in the cancer cases applies to AIDS and HIV. (See *Herbert v. Regents of Univ. of Calif.* (1994) 26 C.A.4th 782, 784, 31 C.R.2d 709 [rules relating to recovery for fear of cancer apply to fear of AIDS]; *Kerins v. Hartley* (1994) 27 C.A.4th 1062, 33 C.R.2d 172 [same; there was only speculative possibility that plaintiff would develop AIDS]; *Macy's Calif. v. Superior Court* (1995) 41 C.A.4th 744, 751, 48 C.R.2d 496 [same; *Potter* "more likely than not" standard was not met where chance of contracting HIV from needle stick, assuming contamination, was only 1 in about 200,000]; 16 J. Juvenile Law 347 [*Herbert*]; 28 *Loyola L.A. L. Rev.* 1099 [*Kerins*]; 36 *Santa Clara L. Rev.* 751 [health care worker's right to recover for fear of contracting HIV from patient]; 25 *Southwestern U. L. Rev.* 205 [*Kerins*]; 59 *A.L.R.5th* 535 [recovery for emotional distress from fear of contracting HIV or AIDS]; see also *Duarte v. Zachariah* (1994) 22 C.A.4th 1652, 1660, 1661, 28 C.R.2d 88 [question whether negligence cause of action may be based on injury to immune system; citing *Potter*]; BAJI, Nos. 12.80.1, 12.80.2.)

SUPPLEMENT: [This section is current through the latest supplement]



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g. Negligent Construction.

6 *Witkin Sum. Cal. Law Torts* § 1037

[§ 1037] Negligent Construction.

In *Erlich v. Menezes* (1999) 21 C.4th 543, 87 C.R.2d 886, 981 P.2d 978, a homeowners' action against the contractor who built their house, plaintiffs testified that they suffered emotional distress as a result of the defective condition of the house and defendant's invasive and unsuccessful repairs. The jury found that defendant breached his construction contract by negligently constructing the house and awarded plaintiffs not only the cost of repairs but also damages for emotional distress. *Held*, reversed. Emotional distress damages are not recoverable for the negligent breach of a construction contract alone.

(a) A contractual obligation may create a legal duty and the breach of that duty may support an action in tort. However, conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract and arising from principles of tort law. An omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. Tort damages have been permitted in contract cases where a breach of duty directly causes physical injury, for breach of the covenant of good faith and fair dealing in insurance contracts, for wrongful discharge in violation of fundamental public policy, or where the contract was fraudulently induced. In each of these cases, the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct that is both intentional and intended to harm. Mere negligent breach of a contract is not sufficient to support tort damages for violation of an independent tort duty. (21 C.4th 550.)

(b) Even assuming that defendant's negligence constituted a breach of a sufficient independent duty to plaintiffs, that finding would not entitle them to emotional distress damages on the facts alleged. The breach--the negligent construction of the house--did not cause physical injury. The only physical injury alleged was one plaintiff's heart disease, which flowed from the emotional distress and not directly from the negligent construction. A preexisting contractual relationship, without more, will not support a recovery for mental suffering where the defendant's tortious conduct has resulted only in economic injury to the plaintiff. (21 C.4th 552.)

(c) Not only are tort damages unavailable, but damages for emotional distress may not be recovered here as consequential or special damages in a contract claim. In California, damages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract. Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind

that serious emotional disturbance was a particularly likely result. Breach of a contract to build a home is not such a case. (21 C.4th 558.) (On recovery of contract damages for mental or physical suffering, see 1 *Summary* (10th), *Contracts*, §884 et seq.)

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CHAPTER IX - Torts

Witkin Summary of California Law XI. NEGLIGENCE: AFFIRMATIVE DUTIES ARISING FROM SPECIAL RELATIONSHIPS

A. In General.

1. Necessity of Relationship.

a. General Principle.

6 *Witkin Sum. Cal. Law Torts* § 1038

[§ 1038] General Principle.

A person who has not created a peril is ordinarily not liable in tort merely for failure to take affirmative action to assist or protect another, no matter how great the danger in which the other is placed, or how easily he or she could be rescued, unless there is some relationship between them that gives rise to a duty to act. (See *Richards v. Stanley* (1954) 43 C.2d 60, 65, 271 P.2d 23; *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *infra*, §1050; *Zelig v. Los Angeles* (2002) 27 C.4th 1112, 1128, 119 C.R.2d 709, 45 P.3d 1171; *Schauf v. Southern Calif. Edison Co.* (1966) 243 C.A.2d 450, 463, 52 C.R. 518; *California Body & Trailer Mfrs. v. Albrecht* (1971) 16 C.A.3d Supp. 1, 3, 94 C.R. 238; *McGarvey v. Pacific Gas & Elec. Co.* (1971) 18 C.A.3d 555, 562, 95 C.R. 894; *Winkelman v. Sunnyvale* (1976) 59 C.A.3d 509, 512, 130 C.R. 690, quoting the text; *Totten v. More Oakland Residential Housing* (1976) 63 C.A.3d 538, 541, 134 C.R. 29, *infra*, §1143, citing the text; *Harland v. California* (1977) 75 C.A.3d 475, 480, 142 C.R. 201; *Beauchene v. Synanon Foundation* (1979) 88 C.A.3d 342, 347, 151 C.R. 796; *Clarke v. Hoek* (1985) 174 C.A.3d 208, 215, 217, 219 C.R. 845, *infra*, §1064, citing the text; *Olson v. Children's Home Soc. of Calif.* (1988) 204 C.A.3d 1362, 1366, 252 C.R. 11, citing the text; *Chaney v. Superior Court* (1995) 39 C.A.4th 152, 157, 46 C.R.2d 73, *infra*, §1058; *Seo v. All-Makes Overhead Doors* (2002) 97 C.A.4th 1193, 1205, 119 C.R.2d 160; *Rest.2d, Torts* §314; 3 Harper, James & Gray 2d §18.6; Dobbs, *The Law of Torts* §314 et seq.; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §81; 26 *Pepperdine L. Rev.* 353 [no duty to rescue rule]; 30 *San Diego L. Rev.* 187 [arguing that child abuse statutes do not create special relationship between county welfare department and abused children]; 10 *A.L.R.3d* 619 [private person's duty and liability for failing to protect another against criminal attack by third person]; 33 *A.L.R.3d* 301 [duty of one other than carrier or employee to render assistance to one for whose initial injury he or she is not liable].)

Legal scholars have strongly criticized the refusal of courts to recognize the moral obligation to aid another in peril when the aid may be given without danger and at little cost in effort. (See *Soldano v. O'Daniels* (1983) 141 C.A.3d 443, 447, 190 C.R. 310, *infra*, §1081; 3 Harper, James & Gray 2d §18.6; 15 *Pacific L. J.* 1261 [argument for general legal duty to rescue]; 25 *Stanf. L. Rev.* 51 [Vermont statute]; 19 *Southwestern U. L. Rev.* 1113 [special relationship doctrine reconsidered]; 19 *U.C. Davis L. Rev.* 807 [argument for general legal duty to rescue]; 31 *U.C.L.A. L. Rev.* 252 [same].) And the *Rest.2d, Torts* §314, Comment c declares: "[i]t appears inevitable that, sooner or later, such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule."

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Harper, James & Gray 3d §18.4.



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A. In General.

1. Necessity of Relationship.

b. Illustrations: Situations Where No Duty Arises.

1. Probation Department.

6 *Witkin Sum. Cal. Law Torts* § 1039

[§ 1039] Probation Department.

In *J.A. Meyers & Co. v. Los Angeles County Probation Dept.* (1978) 78 C.A.3d 309, 144 C.R. 186, K, a convicted embezzler, was placed on probation. He obtained employment with plaintiff on representations of his business skill and experience, and business references verified his previous satisfactory employment. Pursuant to the terms of his probation, K notified his probation officers and they verified the fact of his employment with plaintiff, but did not reveal to plaintiff the facts of K's criminal record and probationary status. K embezzled \$ 100,000, and plaintiff sued defendant county probation department and the probation officers, relying on *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, supra, §352, and *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, infra, §1050. *Held*, judgments for defendants on demurrer affirmed.

(a) The unique status of a probationer distinguishes both of the cited cases. (1) The individual defendants were bound by the terms of probation determined by the judge and by the statutory requirements of privacy in the rehabilitative program. The effort would be self-defeating if they, on their own initiative, advised an employer of K's criminal record. (2) A different result might be required if the probation officers had sought to place K in plaintiff's employ. There was no act of placement here, as there was in *Johnson*. (78 C.A.3d 314, and footnote 7.)

(b) The special relationship situations generally involve some kind of dependency or reliance. Here there was none. Plaintiff did not rely on defendants in any way, but hired K directly, and, by investigation, security bond, or other procedure, was in the best position to protect itself from the hazards complained of. (78 C.A.3d 315.)

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1. Necessity of Relationship.

b. Illustrations: Situations Where No Duty Arises.

2. Intoxicated Patron of Business Establishment.

6 Witkin Sum. Cal. Law Torts § 1040

[§ 1040] Intoxicated Patron of Business Establishment.

In *Andrews v. Wells* (1988) 204 C.A.3d 533, 251 C.R. 344, decedent, plaintiff's son, often stopped at defendant's bar for a drink. Defendant W, the bartender, knew that decedent could not hold liquor well, and on two occasions, at decedent's request, he was able to find another patron to drive him home. On the night of the accident, decedent appeared to be intoxicated and W refused to serve him more than one drink. Decedent then asked W to get him a ride, W was too busy to do so, and decedent walked across a state road and was struck and killed by a vehicle. Because the cause of action for serving liquor to an intoxicated person was abrogated by the Legislature (see *infra*, §1070), plaintiff attempted to state a cause of action for breach of a duty of care in failing to act on an inebriated customer's request to arrange transportation by a ride with a patron or a taxicab. *Held*, summary judgment for defendants affirmed.

(a) Actionable negligence involves the breach of a legal duty of care that proximately causes injury. (204 C.A.3d 538, citing and quoting the text and *Rest.2d*, *Torts* §314.) The situation here is one of nonfeasance. Defendants did not create a risk of harm to decedent by any affirmative action, and the question is whether they had a duty to save him from the risks of his intoxication. (204 C.A.3d 539.)

(b) Such a duty depends on the existence of a special relationship, and a number of cases reject liability in the absence of a showing of expectation that assistance would be provided and reliance on that expectation, or a showing that the victim was otherwise dependent on the defendant for assistance. (204 C.A.3d 540, citing *Clarke v. Hoek* (1985) 174 C.A.3d 208, 219 C.R. 845, *infra*, §1064, and other cases.)

(c) The refusal to give legal recognition to a moral obligation to aid another in peril has been criticized. (204 C.A.3d 541, quoting *Soldano v. O'Daniels* (1983) 141 C.A.3d 443, 190 C.R. 310, *infra*, §1081, and citing *Rest.2d*, *Torts* §314, Comment c.) But in the present case plaintiff's assertion of a duty fails. "There is no sufficient showing of special factors giving rise to a duty of assistance, nor is there any evidence of morally outrageous and indefensible conduct. The evidence ... showed that decedent had been going to the Timberlanes bar for two or three months prior to his death. He had never requested defendants to call a taxicab for him and they had never done so. On four or five occasions decedent requested W to arrange a ride for him and on two occasions W had succeeded in asking another patron to drive decedent

home. The mere fact that defendants had accommodated decedent in the past does not mean that they had a continuing duty to do so." (204 C.A.3d 541.)

In *Knighten v. Sam's Parking Valet* (1988) 206 C.A.3d 69, 253 C.R. 365, plaintiffs were hit by V, a drunk driver. In their action against El Torito Restaurants, which served the driver alcohol, and Valet, which returned her car to her, the primary issue was whether a restaurant or valet service has a duty to withhold automobiles from intoxicated patrons. *Held*, no duty exists.

(a) This situation is analogous to cases holding police officers not liable for injuries caused by drunk drivers whom they stopped and detained, but then allowed to proceed. (206 C.A.3d 74, citing *Jackson v. Clements* (1983) 146 C.A.3d 983, 194 C.R. 553, *supra*, §307, *Lehto v. Oxnard* (1985) 171 C.A.3d 285, 217 C.R. 450, *supra*, §307, and *Sunnyvale v. Superior Court* (1988) 203 C.A.3d 839, 250 C.R. 214.) "If police officers have no special relationship with intoxicated citizens under such circumstances, El Torito and Valet can hardly be said to have any such relationship with [V]. Similarly, if police officers have no duty to protect the general public by preventing drunk driving, restaurants and parking services can hardly be charged with such a duty." (206 C.A.3d 74.)

(b) The fact that defendants withheld keys from intoxicated patrons on previous occasions does not establish a special relationship with either plaintiffs or V. Plaintiffs alleged no previous incident involving V, or any reliance by her or plaintiffs on previous incidents involving other drivers. And even an allegation that defendants withheld V's car on a previous occasion would not establish a duty to withhold it on every occasion. (206 C.A.3d 75.)

(c) Because all California citizens have a right to interfere with an attempt to commit a crime (such as drunk driving), defendants could have lawfully retained the vehicle under the circumstances alleged here. "The *right* to act, however, is far different from a *duty* to act. The two should not be confused." (206 C.A.3d 76.)

(d) Defendants, as *bailees* of the car, did not "entrust" it upon returning it to V, and hence cannot be held liable for negligent entrustment. (206 C.A.3d 75.) *Blake v. Moore* (1984) 162 C.A.3d 700, 208 C.R. 703, *infra*, §1075, holding a host who supplied a guest with both alcohol and the host's car liable for negligent entrustment, specifically stated that the host would have been immune from liability had the guest been driving his own car. (206 C.A.3d 78.)

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1. Necessity of Relationship.

b. Illustrations: Situations Where No Duty Arises.

3. Knowledge of Another's Violent Tendencies.

6 Witkin Sum. Cal. Law Torts § 1041

[§ 1041] Knowledge of Another's Violent Tendencies.

In *Hansra v. Superior Court* (1992) 7 C.A.4th 630, 9 C.R.2d 216, Joginder shot and killed his wife, Juanita, and then killed himself. Plaintiffs, the children and estate of Juanita, brought a wrongful death action against defendants, the mother and brother of Joginder, who allegedly knew that Joginder was prone to violence, but failed to warn Juanita. The complaint alleged (a) that defendants disapproved of Juanita because she had caused the dissolution of Joginder's previous marriage, which had been arranged by defendants, and because of her race, her four children by previous relationships, her lack of independent financial means, and her unwillingness to work in the family business; (b) that defendants attempted to undermine the marriage by speaking derogatorily of Juanita and by pressuring Joginder to divest himself of certain real estate and to take steps to obtain child support from the father of one of Juanita's four children; (c) that defendants knew that Joginder was mentally unstable, had a weapon, and had been both disciplined at work and involved with law enforcement officials because of threatened violence; (d) that, when informed of Juanita's decision to terminate the marriage, Joginder informed defendants of his hostility towards Juanita and of his intention to prevent her departure by any means at his disposal; and (e) that despite this knowledge defendants failed to warn Juanita so that she could take steps to protect herself, thereby proximately causing her death. The trial judge denied defendants' motion for summary judgment, and they sought mandamus. *Held*, writ granted, directing the trial judge to treat the summary judgment motion as one for judgment on the pleadings, and to grant the motion without leave to amend.

(a) *No duty under general negligence principles.* *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086, lists the criteria for determining the existence of a duty of care, the primary one being the foreseeability of harm. Here, the allegation that Joginder informed defendants that he intended to prevent Juanita's departure at any cost implies that Joginder would take action against those who were attempting to assist Juanita's departure, i.e., defendants, rather than against Juanita herself, who was the object of his desires. (7 C.A.4th 642.) Hence, this allegation does not establish the foreseeability of Juanita's murder. (7 C.A.4th 642.) The complaint also fails to establish the requisite connection between defendants' conduct and the injury suffered. "It is one thing to allege that defendants undertook a campaign designed to foment marital discord and hasten a separation, but quite another to conclude therefrom that the separation would be effected by murder rather than the less drastic means commonly used

by estranged spouses." (7 C.A.4th 643.)

(b) *No duty based on relationships between defendants and Juanita.* These relationships, of mother-in-law and daughter-in-law and brother-in-law and sister-in-law, do not give rise to an independent duty of care. "[T]o say that a 'special relationship' exists is to say nothing other than the factors favoring imposition of a duty of care in particular circumstances outweigh the countervailing factors (one of which is that the harm was caused by a third person). The existence of a 'special relationship' does not create the duty. 'Special relationship,' rather, is simply a label expressing the conclusion that the facts, considered in light of the pertinent legal considerations, support the existence of a duty of care." (7 C.A.4th 646.) "The only difference between the general negligence claim and the special relationship claim is the so-called special relationship itself. Yet this fact is not really new at all, since our analysis of the general negligence claim necessarily considered defendants' conduct and knowledge in light of the relationship between defendants and Juanita." (7 C.A.4th 646.) Furthermore, treating the special relationship claim independently would not change the conclusion that the absence of either foreseeability of harm or a close causal connection between defendants' conduct and the injury suffered is dispositive of the duty question. (7 C.A.4th 646.)

(c) *No duty based on relationships between defendants and Joginder.* These relationships, based on the blood relationships of mother and son and brother and brother, would give rise only to a duty to control Joginder, rather than a duty to warn Juanita. However, the complaint contains no allegations that defendants had the ability to control Joginder; rather, the allegations make it clear that he was uncontrollable. (7 C.A.4th 645.)

In *Koepke v. Loo* (1993) 18 C.A.4th 1444, 23 C.R.2d 34, plaintiff broke up with L, and L told defendant that he was going to kill plaintiff. Defendant, who was L's employer and who had lived with L approximately 9 years earlier, warned plaintiff of L's threat. Shortly thereafter, L confronted plaintiff and held a gun to her head, but her screams frightened him away. Upon learning of this assault, defendant convinced L to join Alcoholics Anonymous and to commence psychiatric treatment. She also obtained L's gun and ammunition and informed plaintiff of this fact. Approximately 1 month later, defendant, without informing plaintiff, returned the gun and ammunition to L because he appeared stable and was not making any threats against plaintiff. Two days later, L shot and severely injured plaintiff, and she instituted this negligence action against defendant. *Held*, summary judgment for defendant affirmed; defendant had no duty to warn plaintiff that L again had possession of his gun and ammunition.

(a) *No duty based on relationship between defendant and L.* Because L's actions were in no way related to his employment by defendant, the employer-employee relationship that existed between them could not impose on defendant a duty to warn plaintiff. Nor could the duty to warn be based on the past sexual relationship between L and defendant. A primary characteristic of these casual relationships is their potential of termination without regard to consequences. Finally, defendant's undertaking to assist L in his rehabilitation may evidence some sort of continuing concern for him, but does not impose an obligation upon defendant in terms of duty to either plaintiff or L. (18 C.A.4th 1452.)

(b) *No duty based on relationship between defendant and plaintiff.*

(1) There is a duty to warn persons in peril when the actor has done something to cause the imperiled person to rely on the future care of the actor and the actor is in a position of peculiar authority or knowledge such as to make the performance of this duty to warn reasonable. This principle is best illustrated in cases involving governmental authority or health care professionals. (18 C.A.4th 1453.)

(2) "[W]hile professionals may have a duty to warn or take precautions to prevent injury to known, or even unknown, victims of their dangerous patients, this duty is based upon special professional expertise and is not extended to nonprofessionals attempting to assist friends or subjects with problems." (18 C.A.4th 1457.) Hence, even though defendant undertook significant efforts to assist L in his rehabilitation, as a nonprofessional volunteer she should not be held to have assumed a duty of continued assistance with respect to either L or plaintiff. (18 C.A.4th 1457.)

(3) Similarly, when defendant volunteered information to plaintiff, originally in the form of a warning and later with the advice that the danger had subsided, she should not be held to have assumed a duty to provide future warnings if and when circumstances changed. Imposing a duty to warn under these circumstances, where there is no aspect of professional or governmental control and no familial, commercial, agency, or other relationship, would be contrary to the strong public policy favoring the encouragement of voluntary acts of assistance. (*18 C.A.4th 1457.*)

(4) The public policy of encouraging voluntary acts of assistance is especially strong in the area of domestic disputes, such as was involved here. These disputes are increasingly common, and it is natural for friends of the parties to attempt to be of some assistance. "We should not dissuade people from trying to help those in domestic distress by fastening upon them ... the obligation of continued tries just because they made one effort to assist." (*18 C.A.4th 1458.*)

(5) It can be argued that when defendant told plaintiff of her possession of L's gun, plaintiff reasonably became reliant upon defendant for any new information to the contrary. However, this argument would be meritless. Defendant's only action supporting any continuing obligation to act was a fleeting communication designed to assist in a domestic dispute. "Even though this communication related to what might be thought a very important matter, it would be unreasonable for the beneficiary of that service to expect that the person volunteering such information had undertaken *any* continuing obligation to warn." (*18 C.A.4th 1458.*)

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4. Faith Healer.

6 Witkin Sum. Cal. Law Torts § 1042

[§ 1042] Faith Healer.

In *Quigley v. First Church of Christ, Scientist* (1998) 65 C.A.4th 1027, 76 C.R.2d 792, plaintiff's 12-year-old son was in the care and custody of her ex-husband J. Around December 11, the boy became sick, but did not complain until around December 16. J made the decision to care for his son with Christian Science treatment, rather than with conventional medicine. Several persons of that faith administered to the boy, but his condition only worsened, until it reached the point that J called 911. However, on arrival at the hospital, the boy was pronounced dead of juvenile diabetes. Plaintiff then sued the church and the participating members, alleging that they had breached a duty of due care by failing to refer decedent to conventional medical care until it was too late. *Held*, judgment for defendants on demurrer affirmed.

(a) Defendants had no duty of care to the decedent. *Nally v. Grace Community Church* (1988) 47 C.3d 278, 253 C.R. 97, 763 P.2d 948, *infra*, §1043, held that there was no special relationship in the spiritual counselor situation, and thus no duty of care even though the counselor was aware that the person counseled might commit suicide. That decision is controlling here. Plaintiff's attempts to distinguish *Nally* are unpersuasive. (65 C.A.4th 1034.)

(b) Plaintiff asserts that decedent was a mere child who, unlike the deceased in *Nally*, was not able to exercise choice in his treatment options, and that the doctrine of *parens patriae* requires that higher standards be imposed on those who render services to a child. However, this doctrine, which refers to the *state's* obligation to act as guardian for children, does not create a general duty of care owed by all persons to all children. The courts should be hesitant to impose new tort duties when to do so would involve complex policy decisions better left to the Legislature. Moreover, as in the case with virtually all children, the decedent's treatment was chosen by a qualified adult who had the legal duty to do so. (65 C.A.4th 1034.)

(c) Plaintiff asserts that the Christian Science healers had much more control over the decedent's treatment than did the spiritual adviser in *Nally*. This position is undercut by the involvement of the decedent's father. Plaintiff claims that the decedent was dependent on the healers and thus developed a relationship with them. However, the evidence established that his dependency was on his father who, as a healthy adult, was free to arrange the decedent's affairs as he

saw fit. (65 C.A.4th 1035.)

(d) Plaintiff asserts that imposing a duty on Christian Science healers to refer patients to medical care would not have a chilling effect on religious freedom. According to plaintiff's complaint, it is considered unethical to provide Christian Science treatment to any patient receiving medical care. Thus, requiring healers to encourage medical care would directly interfere with their own religious practices. (65 C.A.4th 1035.)

(e) Plaintiff argued that defendants voluntarily assumed a duty of due care regarding decedent's illness, in that the decedent's *physical well-being* was entrusted to the church's nationally coordinated system for treating seriously ill children. However, as plaintiff expressly acknowledged, Christian Science treatment, which perceives disease to be an error of the mind, is intended to address only a spiritual, not a physical, problem. And the fact that decedent's problem turned out not to be spiritual, but was physical in nature, did not change the fact that defendants undertook no responsibility to evaluate the severity of, or otherwise address, the decedent's physical condition or medical needs. (65 C.A.4th 1035.)

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5. Suicide Prevention.

aa. Clergy.

6 Witkin Sum. Cal. Law Torts § 1043

[§ 1043] Clergy.

In *Nally v. Grace Community Church* (1988) 47 C.3d 278, 253 C.R. 97, 763 P.2d 948, plaintiffs' son, committed suicide after a long period of depression and religious counseling by defendant pastors of defendant Protestant Church. Plaintiffs brought this action for "clergyman malpractice," i.e., negligence and outrageous conduct in failing to prevent the suicide. Defendants offered evidence to show that they held themselves out as *pastoral* counselors, not as professional, medical, or psychiatric counselors. The trial judge granted a nonsuit, and the Court of Appeal reversed. *Held*, judgment of the Court of Appeal reversed with directions to enter judgment affirming the judgment of nonsuit.

(a) A tort involves the violation of a legal duty (47 C.3d 292, citing the text), and one is ordinarily under no duty to protect another from harm in the absence of a special relationship of custody or control (47 C.3d 293).

(b) Prior cases have imposed a duty to prevent a foreseeable suicide when a special relationship existed between the suicidal individual and the defendant or its agents. (47 C.3d 293, citing *Vistica v. Presbyterian Hosp. & Med. Center of San Francisco* (1967) 67 C.2d 465, 62 C.R. 577, 432 P.2d 193, and *Meier v. Ross General Hosp.* (1968) 69 C.2d 420, 71 C.R. 903, 445 P.2d 519, *supra*, §319.) But the duty recognized in these cases was severely circumscribed: (1) In both cases, the patient was in the care of hospital physicians who were aware of his unstable condition; (2) in both, the suicide occurred while the patient was confined in a hospital psychiatric ward; (3) liability was imposed because the defendants failed to take precautions to prevent the suicide even though the medical staff knew that the patient was likely to attempt to take his own life. (47 C.3d 294.) Neither case suggested extending the duty to nonprofessional personal or religious counseling relationships. (47 C.3d 294.)

(c) *Bellah v. Greenson* (1978) 81 C.A.3d 614, 146 C.R. 535, *infra*, §1045, does not support plaintiffs' theory. That court there concluded that licensed medical professionals have no duty to disclose to third persons manifestations of suicidal tendencies on the part of a person treated as an outpatient. (47 C.3d 295.) *Bellah* recognized that a cause of action may exist for *professional malpractice* when a psychiatrist's (or hospital's) treatment of a suicidal patient falls below the standard of care for the profession, thus giving rise to a traditional malpractice action. "*Bellah* held that courts

should not extend *Tarasoff* to require psychiatrists to disclose the confidences of their patients when harm to a third party is not contemplated." (47 C.3d 296; on *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, see *infra*, §1050.)

(d) Factors of foreseeability and closeness of causal connection enunciated in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §833, were not established. The contention that mere knowledge on the part of defendants that decedent may have been suicidal should give rise to a duty to refer "necessarily would imply a general duty on all nontherapists to refer all potentially suicidal persons to licensed medical practitioners." (47 C.3d 297.) And mere foreseeability of the harm or knowledge of the danger is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm. (47 C.3d 297.)

(e) Public policy is opposed to the imposition of a duty to prevent suicide. (1) Neither the Legislature nor the courts have ever imposed an obligation on persons to take affirmative steps to prevent the suicide of one who is not under the care of a physician in a hospital. (2) The Legislature has exempted the clergy from the licensing requirements applicable to marriage, family, child, and domestic counselors. (3) The legislative trend is to encourage private assistance efforts. (47 C.3d 298.) And, even assuming that workable standards of care could be established, it would be difficult to identify with precision those to whom the duty should apply. "Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity." (47 C.3d 299.) (See 37 *Santa Clara L. Rev.* 467 [Nally]; 75 *A.L.R.4th* 750 [cause of action for clergy malpractice].)

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5. Suicide Prevention.

bb. Police Officer.

6 *Witkin Sum. Cal. Law Torts* § 1044

[§ 1044] Police Officer.

In *Adams v. Fremont* (1998) 68 C.A.4th 243, 80 C.R.2d 196, plaintiffs sued defendant city and numerous police officers, claiming that the officers had negligently caused decedent to commit suicide. Decedent, who had a history of depression and threatening suicide, especially when drunk, became belligerent after attending a party, terrorized family members, and ended up in a closet with a gun. Plaintiffs called the police after hearing decedent fire a shot. When the police arrived, they knew that decedent was armed, but did not know whether he was injured. Using a dog, they located decedent in the backyard and tried unsuccessfully to convince him to surrender his weapons. Plaintiffs claimed negligence in the fact that at least eight armed officers were nearby, that a dog was used to locate decedent, that only 16 minutes had elapsed from the time that decedent was located to the time that he shot and killed himself, and that the officers' allegedly confrontational conduct caused decedent to become more, rather than less, agitated. *Held*, judgment for plaintiffs reversed; "police officers responding to a crisis involving a person threatening suicide with a loaded firearm have no legal duty under tort law that would expose them to liability if their conduct fails to prevent the threatened suicide from being carried out." (68 C.A.4th 248.)

(a) Duty.

(1) The legal question whether a duty exists and the factual question whether a particular defendant was negligent are not coterminous. Fulfilling the court's responsibility to determine if a legal duty exists necessarily requires consideration and balancing of sometimes competing public policies that may be irrelevant to the jury's factual determination whether the challenged conduct fell below the prevailing standard of care. These different roles are best reflected with respect to foreseeability. On the one hand, foreseeability is part of the calculus to which a court looks in defining the boundaries of duty. On the other hand, the jury considers "foreseeability" in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury. (68 C.A.4th 265.)

(2) Because of these distinct roles of court and jury, an appellate court is not constrained by factual evidence submitted on a specific issue. Thus, the opinions of plaintiffs' expert witnesses, who testified that the police had caused decedent's suicide and had violated the applicable standard of care by increasing the anxiety level or by rushing the situation, were irrelevant to the determination whether a legal duty existed. (68 C.A.4th 265.)

(3) In assessing the question of duty in cases challenging the conduct of law enforcement personnel, appellate courts have usually applied the multifactor duty analysis first articulated in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086. Other courts have relied on the more amorphous "special relationship" doctrine to explain cases that imposed a duty on police officers to protect individual members of the public in some contexts. Although the California Supreme Court has sometimes engaged in a duty analysis under both standards, the interrelationship between the traditional duty analysis and the special relationship doctrine has never been clearly defined. Moreover, the Supreme Court has yet to determine whether, or to what extent, a common law duty of care to control another's conduct is owed to individual members of the public by public safety professionals engaged in tactical field operations resulting from a citizen's request for crisis intervention. (68 C.A.4th 266.)

(b) *Application of Rowland factors.*

(1) *Foreseeability.* When police officers respond to an armed person threatening suicide, it is foreseeable that an actual suicide will result. However, hindsight reveals that practically every alternative is also "foreseeable." Because the "bar of foreseeability" is thus set so low, foreseeability alone is insufficient to create a legal duty to prevent harm. (68 C.A.4th 268.)

(2) *Degree of certainty that plaintiff suffered injury and closeness of causal connection.* The nexus between the acts or omissions of defendants and the harm suffered by plaintiffs contemplated by a duty analysis is significantly different from that needed to satisfy a factual determination of proximate cause. Proximate causation requires simply that the act or omission of the defendant be a "substantial factor" in causing the harm suffered. Determining the existence of a legal duty, on the other hand, requires an assessment not only of the fact that a causative relationship exists, but also a quantification of that connection in balance with the other *Rowland* factors. Decedent in this case suffered injury. The more troubling question is, to what extent was it inexorably linked to the conduct of defendants? Undisputed testimony established that decedent had been depressed and had considered suicide in the past. Immediately preceding the arrival of the police officers, decedent had a significant altercation with his wife, secreted himself in a closet with a gun, and responded to his stepdaughter's efforts at communication by discharging his weapon. When the police located decedent, he was clad only in his underwear, sitting in his backyard with a gun clutched to his chest. To the extent that the actions of defendants were linked to the decedent's tragic decision to end his life, they were indirect and inferential. None of the evidence demonstrated that the police suggested or encouraged decedent to turn the gun on himself. Thus, the degree of certainty between the manner in which the police officers responded to the incident and decedent's suicide is weak, and the closeness of the connection is remote. (68 C.A.4th 269.)

(3) *Moral blame.* To avoid redundancy with the other *Rowland* factors, the moral blame that attends ordinary negligence is generally not sufficient to tip the balance in favor of liability. Instead, courts have required a higher degree of moral culpability. The conduct of the police officers in this case was not morally blameworthy, as this term is understood in its legal context. The police officers promptly responded to a citizen's call for help. Knowing little about the circumstances they would be facing, they went to the scene and encountered decedent, who was armed with a loaded firearm, who had been engaging in behavior that was decidedly both suicidal and assaultive, and who adamantly refused to do the one thing that would have alleviated the police officers' safety concerns--surrender his weapon. Although defendants could have responded in a less confrontational manner, there was certainly no evidence that they intended or planned to cause the decedent's suicide or had actual or constructive knowledge that their behavior would lead to a suicide. Nor could the officers' attempts to investigate the situation, disarm decedent, and dissuade him from attempting suicide be described as inherently harmful acts. (68 C.A.4th 270.)

(4) *Burden and costs of preventing future harm.* Imposing liability for the negligent handling of a threatened suicide

would improperly elevate the interests in preserving the life of the person threatening suicide over the interests of public safety and the physical safety of police officers. (68 C.A.4th 271.) Moreover, imposition of a tort duty on public safety officers engaged in disarming suicidal persons would be likely to result in a more tentative police response to these crises, or it could prevent them from responding at all. Certainly, the risk of inhibiting law enforcement intervention necessary for the preservation of community welfare and peace outweighs the importance of ensuring nonnegligent treatment of persons threatening suicide. (68 C.A.4th 272.)

(5) *Availability of insurance.* Insurance may be available to cover public entities for the negligence of their employees, yet this factor has little relevance where significant policy considerations militate against the imposition of a duty of care. The risk of liability will affect police conduct regardless of whether an adverse judgment is covered by insurance, because only the most irresponsible police officers would ignore the possibility of a judgment holding them personally liable for another's suicide solely because monetary damages were covered by insurance. Moreover, an inordinate amount of public time, and thus money, would be consumed in the litigation of private claims that otherwise could be utilized in increasing the quality of police services. (68 C.A.4th 274.)

(6) *Agency's powers and limitations.* Law enforcement's public safety function imposes no duty on police officers to protect individual constituents as opposed to the general public. Admittedly, law enforcement largely acts to preserve the peace by its interactions with individual members of the public. Nevertheless, the role of law enforcement in society is to act in the general public interest. Permitting potential suicide victims and their families to hold police officers personally liable for the negligent handling of a suicide crisis conflicts with the public nature of protection services police officers provide to the community at large (public duty rule). (68 C.A.4th 274.) Moreover, imposing a duty on law enforcement to take reasonable steps to prevent a threatened suicide would have significant budgetary implications and improperly insinuate the civil justice system into the allocation of law enforcement resources. (68 C.A.4th 276.)

(7) *Balancing.* "On balance, the relevant public policy considerations militate against imposing a legal duty on police officers to take reasonable steps to prevent a threatened suicide from being carried out. The foreseeability and certainty of harm suffered are factors which favor imposing a duty. The absence of moral blame, the remoteness of the connection between the conduct of appellants and the harm suffered, the policy of preventing future harm, consequences to the community, the role of law enforcement in society, and the potential detriment to the public in imposing judicial allocation of resources all heavily favor shielding law enforcement personnel from tort liability in instances such as this." (68 C.A.4th 276.)

(c) *Duty of care analysis under special relationship exception.*

(1) The "public duty" rule is subject to a narrow exception for unusual police conduct that creates a special relationship between the police officer and an individual member of the public, and plaintiffs contend that such a relationship arose between decedent and defendants. In the area of suicide prevention, however, *Nally v. Grace Community Church* (1988) 47 C.3d 278, 253 C.R. 97, 763 P.2d 948, supra, §1043, holding that the special relationship creating a duty to use due care to prevent suicide has been limited to hospital-patient relationships, refused to extend the duty to nonprofessional counseling relationships where the counselor had no control over the person being counseled. (68 C.A.4th 276.)

(2) Many cases have held that a special relationship with a person in peril is not established merely because police officers respond to a call for assistance. (68 C.A.4th 279.) In fact, only a few courts have actually imposed a duty of care on law enforcement officers under the special relationship exception, and those cases involved police officers who had made misrepresentations that induced detrimental reliance. The conduct challenged in these decisions did not involve deliberate tactical choices made by police officers while intervening in an unfolding life-threatening crisis. (68 C.A.4th 279.) Here, defendants made no express or implied promises that they would prevent decedent's suicide or that they would approach him in a nonconfrontational manner. Nor have plaintiffs alleged that detrimental reliance occurred. While a promise and reliance thereon are not indispensable elements of a special relationship, the plaintiff must still plead and prove that police conduct in a situation of dependency lulled the plaintiff into a false sense of security,

inducing detrimental reliance on the police for protection. *Defendants did not do this.* (68 C.A.4th 297, distinguishing *Johnson v. Los Angeles* (1983) 143 C.A.3d 298, 191 C.R. 704, supra, §301.)

(3) Plaintiffs, citing *McCorkle v. Los Angeles* (1969) 70 C.2d 252, 74 C.R. 389, 449 P.2d 453, supra, §356, and *Mann v. California* (1977) 70 C.A.3d 773, 139 C.R. 82, supra, §309, argued that the special relationship exception imposes a duty of care whenever a law enforcement officer's affirmative conduct increases a *preexisting* risk of harm. However, the cited cases involved a *changed* risk, and *Mann* additionally emphasized the individual's situation, reliance on the officer's conduct, and the fact that the officer lulled the individual into a false sense of security. While defendants' conduct arguably increased the preexisting risk that the decedent would commit suicide, none of the other factors was present. (68 C.A.4th 282.) Moreover, even if the creation of a special relationship bears some association to the degree to which the conduct increases a risk of harm, no authority exists for imposing a duty where police conduct only incrementally increases the risk to which the injured person was already exposed. In volatile situations, one can always argue that the arrival of police officers causes an incremental increase in tension at the scene, and thus increases the risk of injury occurring. Yet, despite the fact that basic police work often involves anxiety-producing conduct, the social utility of involving police in suicidal standoffs weighs against the imposition of liability. (68 C.A.4th 284.)

(4) If a duty of care were imposed in each case where there was some progressive, increased chance of injury stemming from a preexisting harm, the special relationship doctrine would be in irremediable conflict with the traditional duty analysis derived from *Rowland*. Accordingly, where police conduct results in some increase in a preexisting risk of harm, but an analysis of the traditional *Rowland* factors weighs against the imposition of a duty, no special relationship duty may be imposed. (68 C.A.4th 285.)

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5. Suicide Prevention.

cc. Mental Health Practitioner.

6 Witkin Sum. Cal. Law Torts § 1045

[§ 1045] Mental Health Practitioner.

The holding in *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *infra*, §1050, i.e., that a psychotherapist has a duty to warn if a patient threatens violence, was given a restricted scope in *Bellah v. Greenson* (1978) 81 C.A.3d 614, 146 C.R. 535. Plaintiffs, parents of decedent daughter, who committed suicide while being treated in an outpatient setting, brought an action against defendant, her psychiatrist. The complaint alleged that defendant knew that the daughter was disposed to suicide and failed to warn plaintiffs of her condition and her consorting with heroin addicts in plaintiffs' home during their absence. Recovery was sought for wrongful death and thefts from the home by the addicts. *Held*, judgment for defendant on demurrer affirmed.

(a) Cases involving patients confined in a hospital are distinguishable. The hospital has an institutional duty of care different from that of a psychiatrist treating on an out-patient basis. (81 C.A.3d 620.)

(b) Defendant had a duty to take appropriate measures to prevent the daughter's suicide; but the nature and extent of the measures were factual questions not before the court on the demurrer. The theory of the complaint was that, under *Tarasoff*, defendant was required to breach the doctor-patient confidential relationship by disclosure of the danger of suicide. This is not correct. *Tarasoff* holds that disclosure is required where the risk is the danger of violent assault, not where the risk is of self-inflicted harm or mere property damage. (81 C.A.3d 621, 622.) The imposition of a duty to disclose "vague or even specific manifestations of suicidal tendencies" of a patient being treated in an outpatient setting could destroy confidentiality and inhibit psychiatric treatment. (81 C.A.3d 621.) (See *Kockelman v. Segal* (1998) 61 C.A.4th 491, 71 C.R.2d 552, *infra*, §1056 [no reasonable basis for distinguishing between outpatient and hospitalized patient]; 7 A.L.R.4th 1128 [liability of doctor, psychiatrist, or psychologist for failure to take steps to prevent patient's suicide].)

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aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1046

[§ 1046] In General.

In *Jacqueline R. v. Household of Faith Family Church* (2002) 97 C.A.4th 198, 118 C.R.2d 264, plaintiffs, who were experiencing marital problems, went to defendant church for marriage counseling. Before their first joint session, defendant pastor made sexual advances to plaintiff wife. She halfheartedly resisted, but indicated that the reason for her resistance was that she was afraid that they would be caught. Subsequently, the sexual contact between plaintiff and defendant increased for a short period before it ended. Plaintiffs then sued defendants for fraud, negligence, sexual harassment, and other torts, and the trial judge granted the defendants' motion for summary judgment. *Held*, affirmed.

(a) This suit is one for alienation of affections, but that cause of action was abolished by the enactment of C.C. 43.5 (see *supra*, §§723, 724). Nevertheless, *Smith v. Pust* (1993) 19 C.A.4th 263, 23 C.R. 364, *supra*, §724, and *Richard H. v. Larry D.* (1988) 198 C.A.3d 591, 243 C.R. 807, *supra*, §724, recognize that, even when the substance of a suit is alienation of affections, a cause of action may exist based on an independent duty of care, if a plaintiff can show that there was a professional relationship and a connection between the purpose of that relationship and the wrongful conduct. Here, plaintiff husband first sought counseling and revealed that there were sexual problems in the marriage. Defendant pastor then purportedly used that information to interfere with plaintiffs' marriage while continuing to provide them with marriage counseling. Under these facts, and in light of the cases just mentioned, one could argue that an independent duty of care existed on the part of defendant to refrain from engaging in behavior harmful to plaintiffs' marriage. However, the cases cited involved claims against *licensed* professionals, and thus are not dispositive of the issue here, i.e., whether a duty to refrain from sexual conduct that is harmful to the person being counseled exists in the context of pastoral counseling. (97 C.A.4th 203, citing the text.)

(b) For policy reasons, *Nally v. Grace Community Church* (1988) 47 C.3d 278, 253 C.R. 97, 763 P.2d 948, *supra*, §1043, held that pastoral counselors should not be held to the same standard of care that might apply to a licensed therapist under similar circumstances. *Nally* dealt with the duty to prevent a suicide, and sexual misconduct is tangibly different from suicide counseling in that licensed professionals are prohibited by *B. & P.C. 6146(c)(3)* (*supra*, §942) and C.C. 43.93 (*supra*, §416) from engaging in sexual misconduct with their clients. However, it is undisputed that

defendant was not a licensed marriage counselor and that pastoral counselors are expressly exempt from state licensing requirements under *B. & P.C. 4980.01(b)* (see 11 *Summary* (10th), *Husband and Wife*, §16). (97 *C.A.4th* 205.) (97 *C.A.4th* 206.)

(c) Plaintiffs relied on two federal cases recognizing a cause of action against a pastor for professional negligence. However, both cases are factually distinguishable, because the defendants there explicitly held themselves out as having the education and training of licensed marriage counselors. Here, there is no evidence that defendant did or said anything that would subject him to professional counseling standards. Consequently, he did not owe plaintiffs the same independent duty of care required of licensed professionals. (97 *C.A.4th* 206.) (See *Roman Catholic Bishop of San Diego v. Superior Court* (1996) 42 *C.A.4th* 1556, 50 *C.R.2d* 399, *infra*, §1190 [no special relationship creating heightened duty of care results from priest-parishioner relationship].)

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bb. Duty Provable, but Not Established.

6 Witkin Sum. Cal. Law Torts § 1047

[§ 1047] Duty Provable, but Not Established.

In *Richelle L. v. Roman Catholic Archbishop* (2003) 106 C.A.4th 257, 130 C.R.2d 601, plaintiff alleged that defendant priest had sexual relations with her in the rectory of the church in which he was the priest and she was a parishioner. She claimed that she acceded to his wishes due to his persistent sexually suggestive phone calls, his denial of ever having had sexual relations with other women, which was false, and his stated desire to retire in the area of their parish so that he could remain near her. Plaintiff further alleged that she was deeply religious and thus readily subject to manipulation and control by clergy. Plaintiff's complaint stated numerous causes of action including breach of fiduciary duty, negligent and intentional infliction of emotional distress, and fraud. On demurrer, the trial judge entered judgment for defendant. *Held*, affirmed, but not before concluding that there are circumstances in which a clergyman's sexual misconduct with a parishioner will result in tort liability for breach of a fiduciary duty, but that these circumstances are not present in this case.

(a) All of plaintiff's causes of action stem from conduct that could fairly be termed "sexual seduction." However, C.C. 43.5(c) provides that there is no cause of action for "seduction of a person over the age of legal consent" (see *supra*, §723). Thus, because this statute means that it is no longer possible for two consenting adults in California to engage in illicit intercourse, plaintiff cannot prevail on her causes of action unless she can establish that defendant's alleged conduct breached a duty of care independent of that cause of action. In other words, plaintiff cannot plead an abolished cause of action by simply renaming it; the question is whether the essence of the pled cause of action is something other than seduction. Here, plaintiff argued that defendant breached a duty independent of any duty not to seduce her, because, as a clergyman, he stood in a *special relationship* with her comparable to the doctor-patient or lawyer-client relationship. She also claimed that he stood in a *fiduciary relationship* with her and that his conduct breached the fiduciary duty arising out of that relationship. (106 C.A.4th 266.)

(b) *Richard H. v. Larry D.* (1988) 198 C.A.3d 591, 243 C.R. 807, *supra*, §724, *McDaniel v. Gile* (1991) 230 C.A.3d 363, 281 C.R. 242, *supra*, §461, and other cases in which a cause of action for sexual seduction is based on a *special relationship* are inapposite, because they involve malpractice against physicians, attorneys, and psychotherapists, and

there is no such thing as clerical malpractice. As explained in *Nally v. Grace Community Church* (1988) 47 C.3d 278, 253 C.R. 97, 763 P.2d 948, supra, §1043 because of the differing theological views espoused by the myriad religions in California, it would be impracticable to impose a duty of care on pastoral counselors. The fact that no state or federal court recognizes a cause of action for clerical malpractice reflects widespread acceptance of the *Nally* view that this malpractice cannot be reconciled with either of the constitutional religion clauses (free exercise of religion or prohibition against the establishment of religion). (106 C.A.4th 268.)

(c) Courts in other jurisdictions are split on the question whether the First Amendment confers immunity from tort liability on members of the clergy who allegedly breach their *fiduciary relationship* with their parishioners by engaging in sexual misconduct. No California court has dealt with this question, but, without discussing the constitutional question, California has recognized that a priest and parishioner may have a confidential relationship giving rise to tort liability for breach of a fiduciary relationship. (106 C.A.4th 273, citing *Vai v. Bank of America* (1961) 56 C.2d 329, 15 C.R. 71, 364 P.2d 247, 11 Summary (10th), *Husband and Wife*, §353.) *Molko v. Holy Spirit Assn. for the Unification of World Christianity* (1988) 46 C.3d 1092, 252 C.R. 122, 762 P.2d 46, although not involving a fiduciary relationship, analyzed the extent to which the religion clauses permit a religious organization to be exposed to tort liability. It expressed views far more consistent with the courts that have allowed actions against religious officers whose sexual conduct was alleged to have breached a fiduciary duty than with the courts finding these actions barred by the First Amendment. *Molko* endorsed the view that religious organizations may be held liable where liability can be adjudicated on the basis of neutral principles requiring no inquiry into the validity of a religious belief. "Accordingly, we conclude that a pastor may be subject to tort liability for sexually inappropriate and injurious conduct that breaches a fiduciary duty arising out of a confidential relation with a parishioner, *provided* the alleged injurious conduct was not dictated by a sincerely held religious belief or carried out in accordance with established beliefs and practices of the religion to which the pastor belongs, and there is no other reason the issues cannot be framed for the trier of fact in secular rather than sectarian terms." (106 C.A.4th 273.)

(d) In this case, plaintiff failed to allege that defendant's claimed exploitation of her arose in the context of a *counseling relationship*, such as one for marital, family, or financial advice, and it is the existence of a counseling relationship that usually obviates the need for a constitutionally impermissible inquiry into religious beliefs. Also, instead of alleging any of the reasons usually relied on to show that a party to a confidential relation is in a vulnerable position, such as age, ill health, or lack of education, plaintiff alleged that her vulnerability rested solely on her deeply held religious beliefs. Thus, the questions whether plaintiff was vulnerable to defendant and unable to protect herself would focus on the nature and depth of her religious beliefs, and their basis, if any, in Roman Catholic doctrine. These are, of course, profoundly religious questions as to which the courts may not constitutionally inquire. (106 C.A.4th 280.)

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7. Other Illustrations.

6 *Witkin Sum. Cal. Law Torts* § 1048

[§ 1048] Other Illustrations.

(1) *Driver*. In *California Body & Trailer Mfrs. v. Albrecht* (1971) 16 C.A. 3d Supp. 1, 94 C.R. 238, defendant drove down a one-way street and parked his car on the left side of the street. His guest opened the door on his side, into the path of oncoming traffic, and plaintiff's car struck it. *Held*, defendant had no duty to control the acts of his guest, in the absence of facts to put him on notice that the guest was incompetent to act in this situation; hence, defendant was not negligent toward plaintiff. (16 C.A.3d Supp. 3.)

In *McGarvey v. Pacific Gas & Elec. Co.* (1971) 18 C.A.3d 555, 95 C.R. 894, H, an employee of defendant company, was driving to work. He made a U-turn and struck plaintiff motorcyclist. Plaintiff sued defendant company on the theory that the company failed to provide adequate parking space for all employees, and that this accident occurred while H was seeking a parking place on the street. *Held*, no cause of action was stated; there is no duty of the type alleged toward persons using the streets.

(2) *Private Rehabilitation Institution*. In *Beauchene v. Synanon Foundation* (1979) 88 C.A.3d 342, 151 C.R. 796, plaintiff alleged that defendant was a voluntary private rehabilitation institution for drug addicts and others with character disorders; that courts sometimes sent convicted persons to Synanon rather than to jail or prison; that B, a convicted burglar with a long history of behavioral difficulties and escape attempts, was given probation on condition that he enter the Synanon program; that he escaped from Synanon and went on a "crime spree," killing several people and injuring plaintiff. The theory of the suit was that defendant had a duty to exercise due care in accepting convicted persons, or a duty to prevent B from leaving. *Held*, judgment on demurrer affirmed. A public entity is immune from liability in these circumstances under *Govt.C. 845.8* (supra, §298); and the same public policy--to encourage rehabilitation programs--should give immunity to private institutions of this kind. (88 C.A.3d 348.) (See *Cardenas v. Eggleston Youth Center* (1987) 193 C.A.3d 331, 334, 335, 238 C.R. 251 [following *Beauchene*].)

(3) *Police*. (See *Stout v. Porterville* (1983) 148 C.A.3d 937, 942, 196 C.R. 301, citing the text [police officer had no duty to take intoxicated person into custody to protect him from dangers of street traffic]; *Benavidez v. San Jose Police Dept.* (1999) 71 C.A.4th 853, 859, 84 C.R.2d 157 [police owe duty of care only to public at large, and, except where

they enter into special relationship, have no duty to offer affirmative assistance to anyone in particular].)

(4) *Insurer*. (See *California Service Station & Auto. Repair Assn. v. American Home Assur. Co.* (1998) 62 C.A.4th 1166, 1173, 73 C.R.2d 182 [no special relationship between insurer and potential insured requiring disclosure of dividend calculation information during arm's-length negotiation for insurance contracts].)

(5) *Real Estate Broker*. (See *Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 C.A.4th 158, 164, 11 C.R.3d 564 [statutory inspection and disclosure duties of real estate brokers did not impose on seller's broker duty of care toward child of mother who purchased house to disclose exposure of mold; inspection and disclosure duties applied exclusively to prospective buyers].)

(6) *School Crossing Guard*. (See *Scott v. Farrar* (1983) 139 C.A.3d 462, 466, 188 C.R. 823, citing the text [child, injured while crossing street at 7 a.m. to attend school, was denied recovery against school crossing guard who was in parked automobile and had neither duty nor authority to begin work until 7:30 a.m.].)

(7) *Homeowners Association*. (See *Titus v. Canyon Lake Property Owners Assn.* (2004) 118 C.A.4th 906, 911, 13 C.R.3d 807 [homeowners association and security company did not have special relationship to passenger killed in accident on association property caused by intoxicated driver; citing *Hansra v. Superior Court* (1992) 7 C.A.4th 630, 9 C.R.2d 216, *supra*, §1041].)

(8) *Medical Technician*. (See *Hernandez v. KWPH Enterprises* (2004) 116 C.A.4th 170, 175, 10 C.R.3d 137 [medical technicians transporting mentally ill woman to hospital at her request assumed no special relationship requiring them to protect her from suicidal conduct causing her death by car when she ran away from ambulance after its arrival at hospital].)

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(2) *Private Rehabilitation Institution*. See *Rice v. Center Point* (2007) 154 C.A.4th 949, 955, 65 C.R.3d 312 [no special relationship existed between residential drug rehabilitation treatment facility and inmates residing at facility so as to impose duty on facility to victims of escaped inmates, even if facility violated safety procedures set forth in agreement with state; proximity to facility of park where victims were stabbed did not render victims identifiable or separate from other members of general public so as to impose duty on facility].

(5) *Real Estate Broker*. See 35 *Golden Gate L. Rev.* 259 [*Coldwell Banker* as ending evolution of broker liability].



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1. Necessity of Relationship.

c. Illustrations: Relationships Giving Rise to Duty.

1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1049

[§ 1049] In General.

A number of relationships have been recognized as giving rise to affirmative duties. (See *Rest.2d, Torts*, §314B; *Rest.2d, Agency* §512, and Appendix, Rep. Note, p. 740; *57A Am.Jur.2d (2004 ed.)*, *Negligence* §83 et seq.; *22 So. Cal. L. Rev.* 63; *infra*, §1077 [statutory duty]; *infra*, §§1078, 1179 [contractual duty].) The following are of note:

- (1) Landowner or possessor and person coming on the land. (See *infra*, §1082 et seq.)
- (2) Manufacturer or other supplier of goods and buyer or user. (See *infra*, §1168 et seq.)
- (3) Vendor, lessor, or contractor and purchaser, lessee or owner of real property. (See *infra*, §1158 et seq.)
- (4) Common carrier and passenger. (See *supra*, §§923, 925.)
- (5) Innkeeper and guest. (See *Gray v. Kircher (1987) 193 C.A.3d 1069, 1073, 236 C.R. 891*, citing the text [hotel keeper]; *12 Summary (10th)*, *Real Property*, §513.)
- (6) Product endorser and consumer. (See *supra*, §§823 824.)
- (7) Negligent person and rescuer. (See *infra*, §1306.)

The liability of an employer to an employee is now almost entirely covered by workers' compensation and employers' liability legislation. (See *2 Summary (10th)*, *Workers' Compensation*, §§24, 118.) But there may be situations not arising out of the employment in which ordinary tort principles apply. *Anderson v. Atchison, Topeka & Santa Fe Ry. Co. (1947) 31 C.2d 117, 126, 187 P.2d 729*, was an action for wrongful death under the Federal Employers' Liability Act. Plaintiff alleged that decedent, a conductor on defendant's passenger train, fell from the rear vestibule while working, and lay in a helpless condition on the right-of-way; that defendant's other employees negligently failed to take prompt steps to search for him; and that he died of exposure to the cold weather. The California Supreme Court upheld judgment for defendant on the theory that the federal courts had not established a

legal duty on the part of the carrier employer without notice of the injury to exercise ordinary care to ascertain the whereabouts of a missing employee. (31 C.2d 126.) On certiorari, the United States Supreme Court reversed the decision in a brief opinion declaring that the pleaded facts set forth defendant's failure to do what a reasonable and prudent person would ordinarily have done under the circumstances. (333 U.S. 821, 68 S.Ct. 854, 92 L.Ed. 1108.) The Court thus recognized a legal duty, which the California court had thought not yet established as controlling federal law.

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2. Psychotherapist's Duty To Warn.

aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1050

[§ 1050] In General.

In *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, P, a mental outpatient receiving therapy at C Hospital of the University of California, informed M, his therapist, that he was going to kill a girl (readily identifiable as Tatiana), when she returned home from Brazil. M notified the police, requesting assistance in confining P. Defendant officers took him into custody, but released him, relying on his rational appearance and promise to stay away from Tatiana. Defendant, director of the hospital's department of psychiatry, then ordered M's letter to the police returned and all notes on M's therapy destroyed, and that no action to place P in confinement be taken. No warning of Tatiana's danger was given to plaintiffs, her mother and father. When Tatiana returned, P killed her. *Held*, a cause of action could be stated for negligent failure to warn, against defendants M, the director, other staff therapists and the Regents, but not against the police officers.

(a) *Affirmative duty to warn based on relationship.* The general rule is that one person owes no duty to control the conduct of another or to warn those endangered by the conduct, but the rule is subject to exceptions. The exception applicable in this case is that a person in a *special relationship* may be under a duty to warn. Here, the relationship of therapist and patient between defendants and P gave rise to a duty, similar to that of a hospital to exercise care to control a patient, or of a doctor to warn his or her patient if the patient's condition or medication makes certain conduct dangerous to others. (17 C.3d 436, 437.) A relationship to the victim is not essential; e.g., a doctor is liable to persons infected by his or her patient if the doctor negligently fails to diagnose a contagious disease, or, having diagnosed it, fails to warn members of the patient's family. And a federal case held the Veterans Administration liable for wrongful death when it arranged for a mental patient to work on a local farm without warning of his dangerous history, and he killed his wife. (17 C.3d 436, 437.)

(b) *Answers to defendants' arguments.*

(1) Defendants asserted that therapy patients often express thoughts of violence but rarely carry them out; and that the therapist has a difficult judgment to make. However, though evaluation is difficult, the therapist is only held to the

normal professional standard of care. (17 C.3d 438.) Here, the complaint alleges that defendants did in fact predict that P would kill. (17 C.3d 438.)

(2) Defendants contended that even though the therapist does determine, or under applicable professional standards should have determined, that a patient poses a serious danger of violence to others, the therapist nevertheless has no duty to act to protect the victim. This is unsound. While discharge of the duty of care will necessarily vary with the facts of each case, the adequacy of the therapist's conduct must be measured against the traditional negligence standard of reasonable care under the circumstances. (17 C.3d 439.)

(3) *People v. Burnick* (1975) 14 C.3d 306, 328, 121 C.R. 488, 535 P.2d 352, does not call for a contrary conclusion. The court there took note of the uncertain character of therapeutic prediction and held that a person cannot be committed as a mentally disordered sex offender except by proof beyond a reasonable doubt. The issue here, however, is not whether the patient should be incarcerated, but whether the therapist should take any steps at all to protect the threatened victim; e.g., by a warning. (17 C.3d 439.) "The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved." (17 C.3d 440.)

(4) Defendants contended that giving a warning would constitute a breach of trust in revelation of confidential communications, and endanger the free communication essential to psychotherapy. But the interest in safeguarding the confidential character of the communication must be weighed against the public interest in safety from violent assault; and the Legislature has done so in establishing the "dangerous patient" exception of *Ev.C. 1024* (see 2 *Cal. Evidence* (4th), *Witnesses*, §226). (17 C.3d 440, 441.) Moreover, the American Medical Association has stated that no breach of professional ethics is involved where the physician reveals confidences in accordance with the requirements of law or where this is necessary to protect the welfare of the individual or of the community. (17 C.3d 441.) Thus, "[t]he protective privilege ends where the public peril begins." (17 C.3d 442.)

(5) The provisions of the Lanterman-Petris-Short Act (see 3 *Cal. Proc.* (4th), *Actions*, §29) governing release of confidential information apply only to proceedings under the Act. (17 C.3d 443.)

(c) *Immunity from liability for failing to confine P.* *Govt.C. 856* creates a broad immunity of public entities and their employees from liability for injury resulting from determining "in accordance with any applicable enactment" whether to confine a person for mental illness. (See *supra*, §319.) "[T]he scope of the immunity extends not only to the final determination to confine or not to confine the person for mental illness, but to all determinations involved in the process of commitment." (17 C.3d 448.)

(d) *No immunity from liability for failure to warn.* *Govt.C. 820.2*, stating the immunity for discretionary acts (see *supra*, §351 et seq.) does not protect defendant therapists. Under the tests of *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, *supra*, §352, a failure to warn of dangers is not a basic policy decision giving absolute immunity. The publicly employed therapist must exercise the same quantum of care as a private therapist. (17 C.3d 447.)

(e) *Police defendants are not liable.* (1) The police officers were in no special relationship to either T or P to impose on them a duty to warn. (17 C.3d 444.) (2) They are also free from liability for failure to confine P, under *Welf.C. 5154*, which provides an immunity for a peace officer responsible for detainment of a person for the 72-hour treatment and evaluation under the statute. (17 C.3d 449.)

One justice issued a concurring and dissenting opinion, and two justices dissented. (17 C.3d 452.) (See *Gross v. Allen* (1994) 22 C.A.4th 354, 362, 27 C.R.2d 429 [psychiatrist who knew patient was likely to attempt suicide had duty to take preventive measures]; *Johnson v. Ventura* (1994) 29 C.A.4th 1400, 35 C.R.2d 150, *supra*, §319 [citing *Tarasoff* and holding that peace officer releasing mental patient covered by *Welf.C. 5154* was immune from liability]; *Bragg v. Valdez* (2003) 111 C.A.4th 421, 430, 433, 3 C.R.3d 804 [psychotherapists owed duty to anyone injured by person released from involuntary confinement, even though he was released because he had no medical insurance rather than

because he was no longer danger to self or others; because case did not involve failure to warn known victim, *Tarasoff* was inapplicable]; 43 Proof of Facts 2d 657 [physician's liability for failing to protect third person from nonpsychiatric patient]; 2 Proof of Facts 3d 327 [liability of psychotherapist for failing to protect third person]; 14 Cal. Western L. Rev. 153; 14 Cal. Western L. Rev. 241; 6 *Golden Gate L. Rev.* 229; 90 *Harv. L. Rev.* 358 [strong criticism of final decision]; 103 *Harv. L. Rev.* 1192 [note on case holding psychiatrist liable for negligent release of involuntarily committed mental patient]; 9 *Hastings L. J.* 179; 12 *San Diego L. Rev.* 932 [original *Tarasoff* decision]; 15 *San Diego L. Rev.* 265 [discovery of psychotherapist-patient communications]; 35 *Santa Clara L. Rev.* 825 [extension of *Tarasoff* liability to attorneys]; 31 *Stanf. L. Rev.* 165; 49 *U.C.L.A. L. Rev.* 917 [extension of *Tarasoff* liability to school officials knowing of student threats]; 83 *A.L.R.3d* 1201 [liability of one treating mentally ill patient for failing to warn third persons threatened by patient]; BAJI, No. 6.00.2.)

SUPPLEMENT: [This section is current through the latest supplement]

See CACI, No. 503A [Psychotherapist's Duty to Protect Intended Victim From Patient's Threat]; CACI, No. 503B [Affirmative Defense--Psychotherapist's Warning to Victim and Law Enforcement]. *Lantermann-Petris-Short Act*:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §80 et seq.



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2. Psychotherapist's Duty To Warn.

bb. Statutory Limitation.

6 *Witkin Sum. Cal. Law Torts* § 1051

[§ 1051] Statutory Limitation.

The psychiatrist's duty to warn and protect, as declared in *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, supra, §1050, was limited by the enactment of C.C. 43.92 in 1985. The statute provides as follows:

(1) No cause of action arises except where the patient has communicated to the psychotherapist "a serious threat of physical violence" against "a reasonably identifiable victim or victims." (C.C. 43.92(a).)

(2) If there is a duty to warn and protect under these limited circumstances, the duty is discharged by the psychotherapist making "reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency." (C.C. 43.92(b).)

In *Barry v. Turek* (1990) 218 C.A.3d 1241, 267 C.R. 553, defendant provided psychological services to J, a 17-year-old Afghani war veteran who was admitted to the hospital for reconstructive surgery. J, who was 5 feet 4 inches tall and weighed approximately 105 pounds, was permitted to roam freely on the seventh floor of the hospital and, on numerous occasions over a 10-day period, had followed the nurses in "inappropriately close ways" and attempted to grab and kiss them. Approximately 10 days after these incidents, he sexually assaulted plaintiff, who worked on the seventh floor as an office manager. In plaintiff's action for negligence and negligent infliction of emotional distress, the trial judge granted defendant's motion for summary judgment on the ground that plaintiff failed to meet her burden of proving that the case was within the exception to the immunity provided by C.C. 43.92(a). *Held*, judgment affirmed.

(a) Plaintiff established that she was part of a group of reasonably identifiable victims. Based on J's pattern of conduct, any female working full-time on the seventh floor, whether as a nurse or in any other capacity, was reasonably identifiable as a victim of J's inappropriate sexual behavior. (218 C.A.3d 1245.) *Thompson v. Alameda* (1980) 27 C.3d 741, 167 C.R. 70, 614 P.2d 728, supra, §299, is distinguishable, because there an entire neighborhood would have had to be alerted, while here only the female employees on one floor were involved. Furthermore, a warning could have

been given to these employees effectively at minimal cost and with little chance of causing undue alarm. (218 C.A.3d 1245, footnote 5.)

(b) However, plaintiff failed to show that defendant ought to have been aware that J presented a serious threat of physical violence. J never made verbal threats of violence within the hearing of defendant or his assistants, and when defendant instructed J not to touch the nurses, he, on at least one occasion, nodded affirmatively. (218 C.A.3d 1243.) Although the nurses found J's behavior annoying, there was no physical violence involved, and the nurses' notes suggested that, rather than being frightened by J's conduct, they attempted to correct the problem by setting limits that he could understand. (218 C.A.3d 1246.)

A number of other decisions are illustrative. (See *Tilley v. Schulte* (1999) 70 C.A.4th 79, 85, 82 C.R.2d 497 [C.C. 43.92 did not prevent application of firefighter's rule even though psychiatrist failed to warn supervisor and police of patient's feelings of hostility toward his supervisor, where plaintiff police officer, who had never been mentioned by patient, was shot; thus, there was no duty to warn plaintiff]; *Bragg v. Valdez* (2003) 111 C.A.4th 421, 434, 3 C.R.3d 804 [immunity of C.C. 43.92 applies to *treatment setting*, and thus had no applicability where patient was released from involuntary confinement for improper reason]; *Ewing v. Goldstein* (2004) 120 C.A.4th 807, 817, 15 C.R.3d 864 [communication from patient's family member to patient's therapist, made for purpose of advancing patient's therapy, is "patient communication" within meaning of C.C. 43.92, notwithstanding that statute refers only to patient's communication to his or her psychotherapist]; *Ewing v. Northridge Hosp. Med. Center* (2004) 120 C.A.4th 1289, 1296, 16 C.R.3d 591 [it is irrelevant that communicating family member is not patient of psychotherapist]; on immunity of psychiatrist for acts of person released early under LPS Act, see *Michael E. L. v. San Diego* (1986) 183 C.A.3d 515, 530, 228 C.R. 139; *Ford v. Norton* (2001) 89 C.A.4th 974, 979, 107 C.R.2d 776.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Calderon v. Glick* (2005) 131 C.A.4th 224, 231, 31 C.R.3d 707 [where psychotherapists directly asked patient, who suffered from delusion that former girlfriend had given him fatal disease, if he had any intention to harm her, and patient's negative response was not contradicted by his body language, they had no duty under C.C. 43.92 to warn former girlfriend's family members, who were later harmed during shooting spree by patient]; 36 *Golden Gate L. Rev.* 293 [*Ewing v. Goldstein*].



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3. Medical Consultant.

6 *Witkin Sum. Cal. Law Torts* § 1052

[§ 1052] Medical Consultant.

An extraordinary extension of the reasoning of *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, supra, §1050, was applied to different facts in *Brousseau v. Jarrett* (1977) 73 C.A.3d 864, 141 C.R. 200.

Plaintiff minor suffered personal injuries when struck by an uninsured hit-and-run motorist. He was an insured under his father's Allstate policy, and was entitled to compensation for damages up to the policy limit of \$ 15,000. Defendant doctor was consulted by plaintiff to diagnose and treat the injury, and to prepare reports containing a prognosis about residual disability. Plaintiff brought this action against defendant doctor, alleging that Allstate requested such a report; that defendant furnished one in which he stated that he believed that plaintiff would have no residual disability; that he knew or should have known that plaintiff's injuries were more serious than the report stated; that as a result Allstate offered only \$ 7,500 in settlement, and that plaintiff incurred attorneys' fees and litigation costs of \$ 3,897.11 before obtaining a settlement for the full policy limit. Plaintiff prayed for \$ 3,897.11 in actual damages and \$ 250,000 in punitive damages. *Held*, judgment for defendant on demurrer reversed.

The pleading was insufficient to justify an award of punitive damages (73 C.A.3d 872) but sufficient to state a cause of action for negligence. "When the word 'consulted' is liberally construed in a contractual sense, these allegations sufficiently plead a duty on defendant's part to use reasonable care to furnish an objective prognosis, a duty which arose from defendant's employment to perform the specific professional service." (73 C.A.3d 871.)

A lengthy dissenting opinion asserted that this decision on a point of first impression in the country improperly extends the scope of recovery of financial damages without considering the socio-economic consequences (73 C.A.3d 876); that "there is no duty on the part of a physician to his patient to write a nonnegligent medical report" (73 C.A.3d 878); that the guidelines set forth in the *Tarasoff* do not support the court's conclusion (73 C.A.3d 886). The dissenting justice also criticized the majority for treating the complaint as one based on general negligence instead of medical malpractice, thus allowing the jury to determine whether the defendant was negligent, applying lay standards instead of the standard established by expert medical witnesses. (See 47 Proof of Facts 2d 525 [wrongful claim review by physician]; 49 Proof of Facts 2d 331 [wrongful medical evaluation]; 32 U.S.F. L. Rev. 105 [physician's duty to disclose

presence of genetic disease to patient's relatives].)

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4. Private Security Guard.

6 *Witkin Sum. Cal. Law Torts* § 1053

[§ 1053] Private Security Guard.

In *Marois v. Royal Investigation & Patrol* (1984) 162 C.A.3d 193, 208 C.R. 384, F was the owner of a drive-in restaurant located in an area where there was loitering and beer-drinking in the parking lot. F contracted with defendant R, a private security service, to provide security guards to give protection under F's guidelines. While guards P and M were on duty, H, his face and clothes bloody, entered the restaurant and was told to leave. H left, but later, in the parking lot, struck plaintiff with a baseball bat despite verbal attempts by P and M to dissuade him from the attack. In this action against the security service and the guards, the trial judge granted a nonsuit. *Held*, reversed.

(a) The relationship between a business and its customers requires the business to take affirmative action to control the wrongful acts of third persons toward invitees where there is reasonable cause to anticipate the acts. (162 C.A.3d 199, citing *Taylor v. Centennial Bowl* (1966) 65 C.2d 114, 52 C.R. 561, 416 P.2d 793, *infra*, §1137.) A security guard hired by the business should be similarly liable. "By contracting with the business to provide security services, the security guard creates a special relationship between himself and the business' customers. This relationship, in and of itself, is sufficient to impose on the guard the obligation to act affirmatively to protect such customers while they are on the business premises." (162 C.A.3d 200.)

(b) The evidence on the issue whether P and M failed to act in a reasonable and appropriate manner was sufficient to go to the jury. "Where an individual is being physically assaulted, or where another individual is approached by a bat-wielding assailant, it requires no mastery of metaphysical philosophy or economic risk analysis to appreciate the strong possibility of serious injury." (162 C.A.3d 202.) (See *Trujillo v. G.A. Enterprises* (1995) 36 C.A.4th 1105, 1108, 43 C.R.2d 36 [youth injured in riot in fast-food restaurant stated good cause of action against private guard, who failed to protect him, and against guard's employer; following *Marois*]; *Lopez v. Baca* (2002) 98 C.A.4th 1008, 1017, 120 C.R.2d 281 [hiring security guards on weekend did not create duty to hire them during week; distinguishing *Trujillo* on ground that case held only that guard, once hired, could not act negligently].)

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5. School District.

6 *Witkin Sum. Cal. Law Torts* § 1054

[§ 1054] School District.

In *Phyllis P. v. Superior Court* (1986) 183 C.A.3d 1193, 228 C.R. 776, plaintiff's 8-year-old daughter Ciera was sexually molested at her school by a 13-year-old male student. The school authorities provided counseling for Ciera and warned the male student that his parents would be notified if he continued to bother Ciera, but plaintiff was not notified of the incidents. In this action against the school district and school authorities for intentional and negligent infliction of emotional distress, the court held that a cause of action was stated. "While Ciera attended school, her care was entrusted to defendants. Defendants stood in loco parentis and owed a duty of care not only to Ciera, but under the circumstances of this case, to Ciera's mother as well. When defendants first learned of the sexual assaults upon Ciera, they took it upon themselves to withhold that information from petitioner, then dealt with the perpetrator of the assaults with what amounted to a slap on the wrist. ... Petitioner's emotional distress was compounded when she learned of the rape, which she felt could have been prevented, and when she thereafter witnessed the physical and emotional deterioration of her child." (183 C.A.3d 1196.)

In *Rodriguez v. Inglewood Unified School Dist.* (1986) 186 C.A.3d 707, 230 C.R. 823, the court, finding a special relationship between a school district and a student, relied on a series of recent statutory pronouncements:

(a) The Compulsory Education Law, making school attendance compulsory. (186 C.A.3d 714.)

(b) Cal. Const., Art. I, §28(c), part of Proposition 8, giving students and staff of public primary schools "the inalienable right to attend campuses which are safe, secure and peaceful." (186 C.A.3d 714.)

(c) P.C. 627, stating the legislative intent to implement Cal. Const., Art. I, §28(c) by restricting access of unauthorized persons to school campuses. (186 C.A.3d 714.)

(d) The Interagency School Safety Demonstration Act (*Educ.C.* 32260 et seq.), reiterating the legislative recognition of the right to safe schools. (186 C.A.3d 715.)

The opinion states the effect of these statutes and prior case law as follows: "[A] special relationship is formed between a school district and its students so as to impose an affirmative duty on the district to take all reasonable steps to protect its students." (186 C.A.3d 715; on holding that no statutory liability was shown, see *supra*, §§267, 268.) (See *Virginia G. v. ABC Unified School Dist.* (1993) 15 C.A.4th 1848, 1853, 19 C.R.2d 671 [following *Rodriguez*]; 49 U.C.L.A. L. Rev. 917 [imposing on school officials duty to warn of student threats]; 86 A.L.R.5th 1 [school's liability for employee's or student's sexual misconduct toward student].)

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6. Suicide Prevention.

aa. Care Facility for Elderly.

6 *Witkin Sum. Cal. Law Torts* § 1055

[§ 1055] Care Facility for Elderly.

In *Klein v. Bia Hotel Corp.* (1996) 41 C.A.4th 1133, 49 C.R.2d 60, a duty to prevent foreseeable suicide was recognized on the part of a residential care facility for the elderly. In this wrongful death action brought by the survivors of a facility resident who died in a fall from the roof, plaintiffs alleged negligence per se premised on defendant's violation of state regulations. Defendant asserted that the decedent had committed suicide, that she had a constitutionally protected right to do so, and that defendant had no duty to prevent her from doing so. *Held*, summary judgment for defendant reversed.

(a) This defense would have more meaning if defendant owned, for example, a parking facility, a mall, an athletic stadium, or an office building, and the decedent had taken her life there. However, she took her life at a facility where defendant was required by law to monitor her health and well-being, to inform certain persons of changes in her condition, and to determine whether the facility would be able to continue to care for her because of those changes. The obligations imposed on defendant were obviously designed to prevent decedent's mental and physical problems from going unnoticed and untreated, so that harm to her could be avoided. When one puts oneself in the care of another to that extent, one is impliedly saying that she desires the care facility to prevent harm from coming to her, even self-inflicted harm of the type that occurred in this case. Thus, while decedent may have otherwise had a per se right to end her life, a question not relevant here, under the circumstances of this case, her act of placing her mental health in the observatory care of defendant indicated that she wanted to have that right impacted. (41 C.A.4th 1140.)

(b) Defendant was not a guarantor of decedent's health and well-being; it had no absolute duty to prevent her suicide. However, defendant had duties under regulations that, if followed, might have prevented her death. Decedent was a member of the class of persons designed to be protected by the regulations. Clearly, the regulations were designed to protect residents of residential care facilities for the elderly from, among other things, harm such as decedent experienced. Clearly plaintiff's loss resulted from "an occurrence of the nature which" the regulations were designed to prevent under *Ev.C.* 669 (supra, §§873, 874). By taking decedent as a resident at its care facility, defendant agreed, for her benefit, to abide by the regulations. (41 C.A.4th 1141.)

(c) *Nally v. Grace Community Church* (1988) 47 C.3d 278, 253 C.R. 97, 763 P.2d 948, supra, §1043, imposed a duty to prevent a foreseeable suicide only when a special relationship existed between the suicidal individual and the defendant or its agents. (41 C.A.4th 1141.) Defendant here did, in fact, assume a special relationship with decedent when it agreed to have her as a resident in its facility and thereby expressly, or at least impliedly, agreed to execute the duties imposed on it to monitor her and report changes and conditions in her physical and mental health. Obviously, besides simply monitoring the decedent and reporting changes and conditions, defendant would also have the duty to exercise reasonable care to prevent her from harming herself if it had knowledge or notice of facts from which it might reasonably conclude that harm was likely unless protective measures were taken. (41 C.A.4th 1142.)

(d) Thus, triable issues of fact, precluding summary judgment, remain to be determined. For example: Did defendant live up to its obligations as defined in the regulations? Did defendant have knowledge or notice of facts from which it could reasonably conclude it needed to take protective measures on decedent's behalf? Did defendant exercise reasonable care to prevent decedent from harming herself? Was any dereliction of duty by defendant a substantial factor in causing the death? Those questions can be answered on remand. (41 C.A.4th 1142.)

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6. Suicide Prevention.

bb. Mental Health Practitioner.

6 *Witkin Sum. Cal. Law Torts* § 1056

[§ 1056] Mental Health Practitioner.

In *Kockelman v. Segal* (1998) 61 C.A.4th 491, 71 C.R.2d 552, the court recognized an affirmative duty in a psychiatrist to prevent a patient's suicide, even though he was only an outpatient. A depressed individual being treated as an outpatient at a clinic committed suicide. His wife filed a wrongful death action against the clinic and the treating psychiatrist. The trial court granted summary judgment for defendants on the ground that a psychiatrist has no duty to prevent the suicide of an outpatient. *Held*, reversed; the decedent's status as an outpatient did not decide the issue of duty as a matter of law.

(a) Under traditional tort law principles, a person is not ordinarily liable for the actions of another and is under no duty to protect another person from harm. An affirmative duty to protect may arise, however, where a special relationship exists. A special relationship typically occurs where the plaintiff is particularly vulnerable and dependent on the defendant who, correspondingly, has some control over the plaintiff's welfare. The relationship between a therapist and a patient satisfies this requirement. The parameters of a therapist's duty of care and the adequacy of the diagnosis and treatment of the particular patient under particular circumstances will necessarily vary with the facts, measured against professional standards of reasonableness. These determinations require expert testimony. (61 C.A.4th 498.)

(b) Psychiatrists owe an affirmative duty of care, consistent with professional standards, to provide appropriate treatment for a potentially suicidal patient. This duty exists whether the patient is hospitalized or not. There is no reasonable basis for such a distinction; doctors must use reasonable care with *all* of their patients in diagnosing suicidal intent and implementing treatment plans. If those who are caring for and treating mentally disturbed patients know of facts from which they could reasonably conclude that the patients would be likely to inflict harm on themselves in the absence of preventative measures, then those caretakers must use reasonable care under the circumstances to prevent this harm from occurring. Whether the decedent's psychiatrist acted within the duty of care under the circumstances involves factual determinations that must be resolved by the opinions and specialized knowledge of experts in the field. (61 C.A.4th 501.) (For case treating outpatient differently than hospitalized patient, see *Bellah v. Greenson* (1978) 81

C.A.3d 614, 146 C.R. 535, supra, §1045.)

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7. Party Endangering Unidentified Victim.

6 *Witkin Sum. Cal. Law Torts* § 1057

[§ 1057] Party Endangering Unidentified Victim.

In *Myers v. Quesenberry* (1983) 144 C.A.3d 888, 193 C.R. 733, defendant doctors were treating A for diabetes and pregnancy. They advised an abortion, and directed A to drive immediately to a hospital. A, emotionally upset, had a diabetic attack while driving, and struck plaintiff as he was standing by the side of the road. Plaintiff brought this action on the theory that defendant doctors were negligent in failing to warn their patient of the foreseeable and dangerous consequences of driving in an irrational and uncontrolled diabetic condition, and that this negligence was a proximate cause of injuries to him. The trial judge entered judgment of dismissal for defendants on demurrer. *Held*, reversed.

(a) *General rule on liability for nonfeasance.* The law imposes this liability where the defendant bears some special relationship to the dangerous person or to the potential victim. And a dictum in *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, supra, §1050, is directly on point: A doctor must warn a patient if the patient's condition or medication renders such conduct as driving a car dangerous to others. (144 C.A.3d 892.)

(b) *Foreseeability.* The fact that plaintiff was not a readily identifiable victim of A's driving does not preclude liability: The danger to plaintiff and others along the way to and from the hospital was foreseeable. And, though the doctors could not have effectively warned plaintiff, they could have warned A, and she would presumably have followed their advice in this as in other professional recommendations. (144 C.A.3d 892, 893.)

(c) *No policy objections to imposition of negligence liability.* Concerns over governmental immunity and the impairment of public functions are not relevant here, and there are no significant problems in requiring physicians to warn patients not to engage in foreseeably dangerous conduct. They are already obligated to do this for the *protection of the patient*. "Thus, even though it may appear that the scope of liability has been expanded to include injuries to foreseeable victims *other than the patient*, the standard of medical care to the patient remains the same." (144 C.A.3d 894.)

(d) *Reasonable steps doctors should take.* "When a physician furnishes medicine causing drowsiness, he should warn his patient not to drive or engage in other activities which are likely to cause injury. ... Similarly, if a physician

knows or should know a patient's condition will impair her mental faculties and motor coordination, a comparable warning is appropriate." (144 C.A.3d 894.) (See *Reisner v. Regents of Univ. of Calif.* (1995) 31 C.A.4th 1195, 1198, 37 C.R.2d 518 [following *Tarasoff* and *Myers*; defendant physicians, who knew patient to be HIV-positive for 5 years but did not tell her, could be sued by plaintiff, who got AIDS from patient, even though plaintiff was unknown to them; defendants had duty to warn patient that she was HIV-positive and of proper precautions to take]; cf. *Thompson v. Alameda* (1980) 27 C.3d 741, 751, 167 C.R. 70, 614 P.2d 728, supra, §299 [county has no duty to warn of release of prisoner who has made generalized threats against large segment of population, rather than against designated individuals]; 15 U.S.F. L. Rev. 563 [*Thompson*].)

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8. Person Inviting Child into Home.

6 *Witkin Sum. Cal. Law Torts* § 1058

[§ 1058] Person Inviting Child into Home.

In *Pamela L. v. Farmer* (1980) 112 C.A.3d 206, 169 C.R. 282, plaintiffs, three minor girls, were sexually assaulted by defendant husband while defendant wife was at work. The complaint alleged that defendant wife knew of her husband's record as a child molester, and knew that the children were invited to swim in their pool while she was at work, but did not warn the children or their parents or notify the police. *Held*, a cause of action was stated against the wife. The trend has been to expand the list of special relationships; and defendant wife, in inviting the children to her home and assuring their parents that they would be safe, assumed such a special relationship. (112 C.A.3d 211.)

Chaney v. Superior Court (1995) 39 C.A.4th 152, 46 C.R.2d 73, agreed with the holding in *Pamela L.* that a special relationship arises from inviting children into the home but found insufficient evidence of negligence. Plaintiff alleged (a) that a close personal friend of her family sexually assaulted her while she was in his home over an 8-year period beginning when she was 10 years of age, (b) that the assailant's wife caused plaintiff to suffer damages by negligently supervising her while she was in their home, and (c) that her assailant paid "excessive attention" to her and was "excessive" in his gift-giving. The wife's alleged negligence consisted of failing to recognize these "signs" as indicative of the possibility that her husband was sexually molesting plaintiff, causing her to fail to investigate the situation. As a result, the wife "unintentionally provided unchecked access" to plaintiff. *Held*, no cause of action was stated against the wife.

(a) Where a complaint alleges injuries resulting from the criminal acts of third persons, the common law, reluctant to impose liability for nonfeasance, generally does not impose a duty on a defendant to control the conduct of another or to warn of that conduct unless the defendant stands in some special relationship either to the person whose conduct needs to be controlled, or to the foreseeable victim. *Pamela L.* recognized that where a wife invites a child into her home she assumes such a special relationship based on the child's dependence on her. (39 C.A.4th 157.)

(b) However, the wife's duty of reasonable care to the injured child depends on whether the husband's behavior was reasonably foreseeable. Without knowledge of her husband's deviant propensities, a wife will not be able to foresee that he poses a danger and thus will not have a duty to take measures to prevent the assault. Although a wife's knowledge

may be proven by circumstantial evidence, that inference must reflect the wife's actual knowledge and not merely constructive knowledge or notice. (39 C.A.4th 157.) The facts alleged by plaintiff, standing alone, were insufficient to show that the wife had knowledge of her husband's deviant propensities such that it would cause her to take measures to prevent the sexual abuse alleged. (39 C.A.4th 158.)

In *Romero v. Superior Court* (2001) 89 C.A.4th 1068, 107 C.R.2d 801, defendants' son, with their permission, invited 13-year-old R and 16-year-old J to spend the afternoon at defendants' house. R was dropped off by her mother, who was told by defendants that, because they would be gardening, the teenagers would be supervised. As promised, defendants checked on the minors several times, before leaving for about an hour to buy food. During this time, J sexually assaulted R. R and her mother then sued defendants for negligent supervision, and the trial judge, concluding that defendants owed a duty of care to R, denied their summary judgment motion. *Held*, mandamus issued directing summary judgment for defendants.

(a) *Types of misconduct.* Nonfeasance exists when the defendant, by failing to act as a Good Samaritan, does not give aid to the plaintiff through beneficial intervention. In this situation, liability is largely limited to circumstances in which some special relationship can be established. However, if the act complained of is one of misfeasance, i.e., the improper performance of an act that is otherwise proper, the question does not depend on the existence of a special relationship, but is governed by the standards of ordinary care. (89 C.A.4th 1079.)

(b) *Nonfeasance.*

(1) By inviting R into their home, defendants assumed a special relationship towards her, which carried with it a general duty to use due care. (89 C.A.4th 1080.) However, the primary issue is whether the scope of that duty includes an adult's duty to prevent one minor invitee from being sexually assaulted by another minor invitee, and no decisional authority addresses this issue. "We believe, however, that sound public policy requires that where one invitee minor sexually assaults another in the defendant's home, the question of whether the defendant owed a duty of reasonable care to the injured minor depends on whether the assailant minor's conduct was *reasonably foreseeable*, but that conduct will be deemed to have been reasonably foreseeable only if the defendant had *actual knowledge* of the assaultive propensities of the teenage assailant." (89 C.A.4th 1081.)

(2) Under *Chaney, supra*, actual knowledge can be proved by circumstantial evidence, but this knowledge will not be inferred unless the evidence establishes that the defendant *must have known*, not *should have known*, of the assailant's violent tendencies. In other words, constructive knowledge is inadequate. The *Chaney* duty rule is adopted here. (89 C.A.4th 1082.)

(3) In addition to incorrectly relying on defendants' constructive knowledge, plaintiffs presented no evidence that defendants had actual knowledge that J had engaged in numerous acts of misconduct at school, including sexual harassment of female students. Plaintiffs claimed that because one defendant had experience as a mother, adoptive parent, and foster parent of 23 teenage children, she *must have known* that R and J would be likely to have sexual relations if they were left unsupervised. However, there is no authority requiring adults to assume that a male teenager will sexually assault a female teenager simply because the adults are away from the house for an hour. It is not enough to plead that this occurrence is conceivable. (89 C.A.4th 1086.)

(4) Although, as a matter of law, plaintiffs' evidence was insufficient to show that defendants owed a duty to R to protect her from sexual assault by J, plaintiffs further contended that defendants' *assumption* of such a duty was shown by R's mother's statement that she would not leave her child anywhere unsupervised and by defendants' statement that they would be gardening in the backyard. At most, this evidence only established that defendants, at the moment in question, had no other plans than backyard gardening. That it did not constitute a promise to supervise R every moment of her visit is shown by the additional evidence that R's mother had consented to allowing the teenagers to walk to the local drugstore without adult supervision. (89 C.A.4th 1089.)

(c) *Misfeasance.*

(1) By alleging that defendants represented to plaintiffs that their home was safe and by further alleging that defendants knew that J was engaging in abnormal sexual behavior, plaintiffs pleaded the theory of defendants' misfeasance. These allegations indicate that plaintiffs were claiming that defendants did not merely fail to prevent J from harming R, but that by their own acts they increased the risks that this harm would occur. (89 C.A.4th 1090.)

(2) Hence, the question of duty is governed by the standards of ordinary care as measured by the factors specified in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086. The most crucial factor is that of foreseeability, and, as discussed above, plaintiffs presented no evidence to support a reasonable inference that defendants were aware of any facts to put a reasonable person on notice that J posed a threat of sexual assault to R. Imposition of a duty to protect a teenage invitee from an unforeseeable assault by another teenager would place parents in the untenable position of either excluding teenagers from their home or ensuring that at least one parent was physically present in close proximity to the teens at all times. In addition, it would place all teens under a cloud of suspicion and force them to congregate in unsupervised locations. (89 C.A.4th 1092.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Margaret W. v. Kelley R.* (2006) 139 C.A.4th 141, 152, 42 C.R.3d 519 [mother who hosted teenage sleepover was not responsible for alleged sexual assault of 15-year-old girl who voluntarily left sleepover in drunken state with boys while mother was out, because criminal assault was not foreseeable].

In *Padilla v. Rodas* (2008) 160 C.A.4th 742, 73 C.R.3d 114, plaintiff and her 2-year-son were invited to defendants' home for an overnight visit. The home had a backyard swimming pool; plaintiff knew that her son did not know how to swim. On the following day, he was playing in the front yard with two children, ages 7 and 9. Plaintiff and one defendant were present. On receiving a call on his cordless phone, defendant moved to an open iron gate that led to the swimming pool area, a location from which he could not observe the children. On being asked by one of the children for a glass of water and after requesting the children to watch her son, plaintiff entered the house for about 5 minutes. When she returned, neither the children nor defendant, who was still at the iron gate, knew where her son was. He was found face down in the pool. Plaintiff brought an action for wrongful death and an action for negligence against defendants, asserting two theories of liability: negligent supervision and premises liability based on an allegedly defective gate. Defendants' motion for summary judgment was granted. *Held*, affirmed.

(a) *Defendants had no duty to supervise plaintiff's son.*

(1) With respect to the theory of liability based on negligent supervision, plaintiff contended that defendants assumed a joint parental duty to supervise her son while he was on their premises. This is incorrect. Whether defendants owed a duty of care under these circumstances is a question of law to be decided on the basis of the factors enumerated in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *text*, §833. (160 C.A.4th 747.)

(2) The following criteria in *Rowland* militate against the imposition of a duty of supervision on defendants: (a) It was not reasonably foreseeable that plaintiff would leave her son outside unattended, or under the supervision of other young children, while she went inside the house. (b) Assuming for the purpose of argument that the defendant at the house had accepted the joint responsibility of supervising the son at the time of the accident, he abandoned that undertaking when he left the front yard to talk on the telephone, leaving plaintiff watching her son. (c) Plaintiff knew that defendant had abandoned any supervisory responsibility before she went into the house, because she saw him walk to the side of the house to talk on the telephone, was aware that he was not watching the children, and asked the other children to make sure that her son did not run into the street. (d) There was no indication that defendant knew that plaintiff had gone into the house and was no longer supervising her son. (e) Under these circumstances, moral blame could not attach to either defendant. (160 C.A.4th 747.)

(3) Imposing a duty under the circumstances of this case would unreasonably burden social and family relationships

by requiring homeowners to provide babysitting services for their guests' young children when the children's parents are also on the premises. Imposition of such a duty on homeowners would make them insurers of their guests' children's safety even when the parents are also present, a burden that is beyond all reasonable expectations of both homeowners and their guests. (160 C.A.4th 748.)

(b) *Plaintiff cannot establish causation element for premises liability theory.* Where there is evidence that the harm could have occurred even in the absence of the defendant's negligence, proof of causation cannot be based on mere speculation, conjecture, and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence. Here, plaintiff was unable to show that it was more probable than not that a self-latching gate would have prevented the drowning. The probabilities were evenly balanced whether the son gained entrance to the pool through the iron gate or through one of the other entrances to the pool. Accordingly, plaintiff could not establish that defendants' failure to provide a self-latching gate was a substantial factor in causing the drowning. (160 C.A.4th 752.)



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CHAPTER IX - Torts

Witkin Summary of California Law XI. NEGLIGENCE: AFFIRMATIVE DUTIES ARISING FROM SPECIAL RELATIONSHIPS

A. In General.

1. Necessity of Relationship.

c. Illustrations: Relationships Giving Rise to Duty.

9. Other Relationships.

6 *Witkin Sum. Cal. Law Torts* § 1059

[§ 1059] Other Relationships.

(1) *Mortuary*. In *Draper Mortuary v. Superior Court* (1982) 135 C.A.3d 533, 185 C.R. 396, plaintiff entrusted the remains of his deceased wife to defendant mortuary where, due to its failure to lock a door, the body was sexually assaulted by an intruder. In plaintiff's action for negligent interference with his right to dispose of the remains, defendant contended that it owed plaintiff no duty of care. *Held*, a duty existed as a matter of law. "Once a mortuary ... undertakes to accept the care, custody and control of the remains, a duty of care must be found running to the members of decedent's bereaved family." (135 C.A.3d 538.) Whether this duty was breached by defendant's failure to lock the door is a question of fact for the jury. (135 C.A.3d 538.) (See 28 Proof of Facts 3d 319 [cemetery's liability in interring body].)

(2) *Restaurant*. Restaurants have a legal duty to come to the assistance of customers who become ill or need medical attention. (*Breaux v. Gino's* (1984) 153 C.A.3d 379, 382, 200 C.R. 260.) But in *Breaux*, the court considered the new question of what physical acts they and their personnel are required to perform. Defendant restaurant owner had posted the notice required by former Health & Saf.C. 28689 (now *Health & Saf.C. 114180*) of state-approved first aid instructions for removal of food stuck in a person's throat; and when decedent choked, an assistant manager called an ambulance. But no one attempted to give first aid to decedent, who was alive when the ambulance arrived. In this action for wrongful death, summary judgment was entered for defendant. *Held*, affirmed. The statute provides that "Nothing in this section shall impose any obligation on any person to remove food which has become stuck in another person's throat." This statute "establishes as a matter of law that a restaurant meets its legal duty to a patron in distress when it summons medical assistance within a reasonable time." (153 C.A.3d 382.) (See 2 A.L.R.5th 966 [duty to assist patron choking on food].)

(3) *County and Dependent Child*. In *Ronald S. v. San Diego* (1993) 16 C.A.4th 887, 20 C.R.2d 418, R, a dependent child of defendant county, was placed with M and K, who eventually sought to adopt him. Defendant approved the adoption, and R was later sexually assaulted by M. *Held*, there was a special relationship between R and defendant that imposed upon defendant a duty to exercise due care in selecting adoptive parents.

(a) As a dependent child, R's disposition was totally in defendant's control. If defendant failed adequately to investigate the qualifications of proposed foster or adoptive parents, it was foreseeable that harm would come to R, who was wholly dependent upon the good offices of defendant to supervise his placement. (16 C.A.4th 895, citing *Johnson v. California* (1968) 69 C.2d 782, 73 C.R. 240, 447 P.2d 352, supra, §352, *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, supra, §1050, *Carpenter v. Los Angeles* (1991) 230 C.A.3d 923, 281 C.R. 500, and *Lopez v. Southern Calif. Rapid Transit Dist.* (1985) 40 C.3d 780, 221 C.R. 840, 710 P.2d 907, supra, §930.)

(b) The special relationship between R and defendant existed only during the period prior to adoption when he was solely dependent upon defendant. It did not extend to the period after adoption when R became dependent upon the adoptive parents. After the adoption, defendant's relationship to R was the same as its relationship to any child and was governed by the rules requiring special circumstances to exist in order to establish the "special relationship" needed to create a duty of care. (16 C.A.4th 895, footnote 4.)

(4) *Miscellaneous Relationships*. (See *Doe 1 v. Murrieta* (2002) 102 C.A.4th 899, 913, 126 C.R.2d 213 [under *Juarez v. Boy Scouts of America* (2000) 81 C.A.4th 377 97 C.R.2d 12, infra, §1190, city had duty to girls participating in youth explorer program to prevent sexual molestation by adviser, where supervisor was aware of girls' infatuation with adviser]; 2 A.L.R.5th 369 [franchisor's liability for injuries caused by assault or other criminal activity on or near franchise premises]; 2 A.L.R.5th 396 [liability of travel publication or agent for personal injury or death of traveler]; 46 A.L.R.5th 821 [liability of nursing home for violating statutory duty to notify third party concerning patient's medical condition].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Restaurant. Health & Saf.C. 114180* was repealed in 2006.



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CHAPTER IX - Torts

Witkin Summary of California Law XI. NEGLIGENCE: AFFIRMATIVE DUTIES ARISING FROM SPECIAL RELATIONSHIPS

A. In General.

2. Exceptions: Affirmative Duty Without Relationship.

a. Voluntary or Gratuitous Undertaking.

1. Liability for Negligent Performance.

6 *Witkin Sum. Cal. Law Torts* § 1060

[§ 1060] Liability for Negligent Performance.

An exception to the rule that there is no affirmative duty in the absence of a special relation (*supra*, §1038) is found in the Good Samaritan rule. A person not required to perform services for another may sometimes do so in a voluntary or gratuitous undertaking, and in that case, is under a duty to exercise due care in performance. (See *Perry v. D.J. & T. Sullivan* (1933) 219 C. 384, 389, 26 P.2d 485; *Schwartz v. Helms Bakery Ltd.* (1967) 67 C.2d 232, 238, 60 C.R. 510, 430 P.2d 68, *infra*, §1062; *Coffee v. McDonnell-Douglas Corp.* (1972) 8 C.3d 551, 557, 105 C.R. 358, 503 P.2d 1366, 3 *Summary* (10th), *Agency and Employment*, §127, citing the text [employer's assumption of duty to ascertain prospective employee's fitness for job]; *Biondini v. Amship Corp.* (1947) 81 C.A.2d 751, 763, 185 P.2d 94; *Valdez v. Taylor Auto. Co.* (1954) 129 C.A.2d 810, 817, 278 P.2d 91, 2 *Summary* (10th), *Insurance*, §23; *Johnston v. Orlando* (1955) 131 C.A.2d 705, 708, 281 P.2d 357; *Burke v. Zanes* (1961) 193 C.A.2d 773, 776, 778, 14 C.R. 619; *Walnut Creek Aggregates Co. v. Testing Engineers* (1967) 248 C.A.2d 690, 695, 56 C.R. 700, citing the text; *Bloomberg v. Interinsurance Exchange* (1984) 162 C.A.3d 571, 575, 207 C.R. 853 [defendant Auto Club dispatched tow truck for emergency assistance to stranded driver, failed to locate car, and car was later struck by intoxicated driver]; *AIM Ins. Co. v. Culcasi* (1991) 229 C.A.3d 209, 215, 280 C.R. 766, citing the text; *Rest.2d, Torts* §323, 324; 3 Harper, James & Gray 2d §57; Dobbs, *The Law of Torts* §320; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §104 et seq.; 64 *So. Cal. L. Rev.* 1645 [possible liability of employer for negligent referral of employee]; 68 *A.L.R.3d* 1196 [liability of automobile collision insurer undertaking to repair damaged vehicle, for negligence or delay in making repairs]; 13 *A.L.R.5th* 289 [liability to third party of one who assumes duty to inspect property].)

A typical example is the case of the landlord who, in the absence of a covenant or other obligation to repair, nevertheless voluntarily makes repairs and is negligent. (See *Janofsky v. Garland* (1941) 42 C.A.2d 655, 657, 109 P.2d 750; *McDaniel v. Sunset Manor Co.* (1990) 220 C.A.3d 1, 10, 269 C.R. 196 [landlord that voluntarily erected fence between its property and nearby creek had duty to maintain reasonably sturdy or defect-free fence]; 12 *Summary* (10th), *Real Property*, §641.) Likewise, one who voluntarily takes charge of a helpless person must exercise care for his or her safety. (*Rest.2d, Torts* §324; see *Griffin v. Colusa* (1941) 44 C.A.2d 915, 923, 113 P.2d 270 [nurses neglected delirious patient]; *Hitson v. Dwyer* (1943) 61 C.A.2d 803, 806, 143 P.2d 952; 13 *Proof of Facts* 2d 709 [failure to use reasonable

care in aiding injured person in peril].) (On possible liability of private hospital maintaining emergency ward for refusal to admit patient, see *14 Stanf. L. Rev.* 910.)

In *Merrill v. Buck* (1962) 58 C.2d 552, 25 C.R. 456, 375 P.2d 304, defendant realtor and defendant saleswoman showed plaintiff, a prospective tenant, a dwelling house owned by defendant owner. Defendants did not advise plaintiff of a dangerous flight of stairs leading to the basement, and plaintiff was injured in a fall. Defendant owner was held liable as a landlord who failed to warn of a known hazard. (See 12 *Summary* (10th), *Real Property*, §642.) The other defendants had no landowners' duties, but were also held liable on the theory that they were engaged in a business transaction to earn a commission by inducing plaintiff to become a tenant, and thereby assumed the duty to warn plaintiff of any latent hazard known to them that might foreseeably result in injury. (58 C.2d 562, 563.)

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Harper, James & Gray 3d §18.7; CACI, No. 450 [Good Samaritan].



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A. In General.

2. Exceptions: Affirmative Duty Without Relationship.

a. Voluntary or Gratuitous Undertaking.

2. Conditions for Liability.

6 *Witkin Sum. Cal. Law Torts* § 1061

[§ 1061] Conditions for Liability.

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." (*Rest.2d, Torts* §324A.)

In *Artiglio v. Corning* (1998) 18 C.4th 604, 76 C.R.2d 479, 957 P.2d 1313, silicone breast implant recipients sued the implant manufacturer's parent corporation, alleging that defendant negligently discharged an undertaking to provide silicone toxicology research to the manufacturer, making it directly liable for injuries suffered by plaintiffs under the "negligent undertaking" theory of *Rest.2d, Torts* §324A. Defendant conducted and reported the research to the manufacturer many years before plaintiffs' implantation procedures. *Held*, the trial court properly granted summary judgment to defendant; defendant, as a matter of law, owed no duty of care to plaintiffs.

(a) Under the negligent undertaking theory of liability, sometimes referred to as the Good Samaritan rule, one who, having no initial duty to do so, undertakes to come to the aid of another has a duty to exercise due care and is liable if his or her failure to exercise care increases the risk of harm, or if harm is suffered because of the other's reliance. Under *Rest.2d, Torts* §324A, a negligent undertaking claim of liability to third parties requires evidence that (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of its undertaking; (4) the failure to exercise reasonable care resulted in physical harm to the third persons; and (5) either the actor's carelessness increased the risk of physical harm, or the undertaking was to perform a duty owed by the other to the third persons, or the harm was suffered because of the reliance of the other or the third persons on the undertaking. (18 C.4th 613.)

(b) The duty of a Good Samaritan is thus limited. Recovery requires proof of each of the well-known elements of

any negligence cause of action, i.e., duty, breach of duty, proximate causation, and damages. In addition, a Good Samaritan who has performed a voluntary act is not required to continue to render aid indefinitely. The foundational requirement of the Good Samaritan rule is that the actor must specifically have undertaken to perform the task that he or she is charged with having performed negligently. Whether the alleged actions, if proven, would constitute an undertaking sufficient to give rise to an actionable duty of care is a legal question for the court. (18 C.4th 614.)

(c) Plaintiffs failed to establish that a duty of care running to them under *Rest.2d, Torts* §324A arose from defendant's undertaking. That undertaking was not sufficient to create an actionable duty to ensure the safety of all of the manufacturer's silicone products. Moreover, many years elapsed between defendant's toxicology research activities on behalf of the manufacturer and plaintiffs' alleged injuries. When defendant conducted and reported the silicone toxicology research for the manufacturer, any risk of harm to plaintiffs--who years later allegedly received medical treatments traceable to its influence--from negligent performance of that undertaking was unforeseeable. Thus, it could not be reasonably concluded that defendant should have recognized that those services were necessary for the protection of plaintiffs; therefore, no duty of care could be imposed. (18 C.4th 615.)

In *Paz v. California* (2000) 22 C.4th 550, 93 C.R.2d 703, 994 P.2d 975, plaintiff, who was injured in a traffic accident at an intersection controlled by a single stop sign, asserted that the intersection was dangerous because of obstructed sight lines. Defendants, a developer and two contractors, were to design and install traffic signals at the intersection as a condition of approval of a new condominium development, but failed to obtain the permits necessary to complete the installation until after plaintiff's accident. Plaintiff alleged that they negligently delayed providing the traffic lights that would have negated the intersection's dangerous condition before his accident. *Held*, summary judgment for defendants was proper.

(a) As stated in *Artiglio*, the Good Samaritan rule of *Rest.2d, Torts* §324A is a settled principle firmly rooted in the common law of negligence. Section 324A prescribes the conditions under which a person who undertakes to render services for another may be liable to third persons for physical harm resulting from a failure to act with reasonable care. Liability may exist if (1) the failure to exercise reasonable care increased the risk of harm, (2) the undertaking was to perform a duty the other person owed to the third persons, or (3) the harm was suffered because the other person or the third persons relied on the undertaking. (22 C.4th 553.)

(b) In this case, none of these conditions for liability was present, and plaintiff thus failed to state a cause of action for negligent undertaking. First, the evidence failed to support an inference that defendants' conduct increased the risk of physical harm to plaintiff beyond that which existed at the intersection. Plaintiff alleged that the intersection was dangerous because of restricted sight lines. However, nothing suggests that defendants did anything that increased the risk to motorists that existed because of those sight lines. Instead, defendants simply did not succeed in completing a project that might have reduced the preexisting hazard at the intersection. Second, in agreeing to install the traffic signal, defendants did not undertake to perform a duty that the city owed to plaintiff; cities generally have no affirmative duty to install traffic control signals. Third, there was no evidence that plaintiff was harmed because either he or the city relied on defendants' timely installation of traffic control signals. (22 C.4th 561.)

Williams v. Saga Enterprises (1990) 225 C.A.3d 142, 274 C.R. 901 reached the opposite result. C, driving a car while intoxicated, struck a car in which plaintiff was riding, and plaintiff suffered serious injuries. Plaintiff filed this action against C, and joined defendant S, the owner of a restaurant at which C had been drinking. The restaurant employees had received C's car keys before serving him drinks, and had returned the keys to him after he had become intoxicated. Defendant's motion for summary judgment was granted. *Held*, reversed.

(a) Under *B. & P.C. 25602* (infra, §1070), furnishing alcoholic beverages to a person is not the proximate cause of injuries resulting from his intoxication; hence "the furnishing of an intoxicated driver's keys to him cannot logically be the cause of such injuries either." (225 C.A.3d 148.)

(b) This was not a case of liability of an owner for negligent entrustment of a vehicle to an incompetent driver (see

infra, §1222); the vehicle driven by C belonged to him, not to defendant or his employees. (225 C.A.3d 153.) But there was evidence to present a triable issue of liability under *Rest.2d, Torts* §324A, of a person who voluntarily undertakes to render necessary services to another and fails to exercise reasonable care to protect his or her undertaking. (225 C.A.3d 151.)

(c) The evidence to make §324A applicable was the testimony of N, defendant's manager for the restaurant on the night of the accident, given at the criminal prosecution of C. N testified that C was a customer of the restaurant who constantly drank to excess; that C would turn his keys over to N every time he came to the restaurant; that on the night of the accident, C, in N's presence, gave the keys to the bartender; and that he (N) would not have returned the keys to C if the latter had been intoxicated. "I felt it was my duty and responsibility as a friend, not only as the manager of the establishment, to make sure that he was able to drive before I was able to give him his keys." (225 C.A.3d 150.) This testimony would support the inference that C had an arrangement or agreement on the night of the accident that N would determine whether C was able to safely drive the car, and would not return the keys if C was intoxicated. (225 C.A.3d 150, 153.) (See 40 Santa Clara L. Rev. No. 4 [symposium on Good Samaritan laws]; 40 Santa Clara L. Rev. 957 [debate over duty to rescue]; 40 Santa Clara L. Rev. 971 ["Bad Samaritan" laws]; 40 Santa Clara L. Rev. 991 [imposition of duty to help endangered persons and abused children]; 40 Santa Clara L. Rev. 1027 [Good Samaritan laws as fitting within American legal/political framework]; 40 Santa Clara L. Rev. 1033 [news media and Good Samaritan statute controversy]; 40 Santa Clara L. Rev. 1053 [compelling Good Samaritan duties].)

West's Key Number Digest, Negligence k.218, 234

SUPPLEMENT: [This section is current through the latest supplement]

See *Mukthar v. Latin American Sec. Service* (2006) 139 C.A.4th 284, 288, 42 C.R.3d 563 [factual question whether security company was liable, under negligent undertaking doctrine, for injury to store cashier who was struck by patron precluded summary judgment for company in cashier's negligence action; no guard was posted at door at time of incident despite contract between store and company, harm was type that company was hired to prevent, and issue remained whether assault would have occurred in guard's presence].



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A. In General.

2. Exceptions: Affirmative Duty Without Relationship.

a. Voluntary or Gratuitous Undertaking.

3. Illustration: Street Vendor's Duty to Child.

6 Witkin Sum. Cal. Law Torts § 1062

[§ 1062] Illustration: Street Vendor's Duty to Child.

A street vendor who sells ice cream, pastry, or similar products to children on the street owes a high duty of care for their safety. The principles underlying this liability were discussed at length in *Schwartz v. Helms Bakery Ltd.* (1967) 67 C.2d 232, 60 C.R. 510, 430 P.2d 68. Defendant's truck, with an assortment of pastries, passed plaintiff 4-year-old boy. Plaintiff dashed over to the truck and asked the driver to wait while he went home and got a dime for a doughnut. The driver told him to meet him on his route up W Street. Plaintiff got his money, came to the place, and ran out from behind a parked car into the path of another car. *Held*, judgment of nonsuit reversed.

(a) When the driver arranged to meet the boy up the street, he assumed a duty of care toward him; i.e., he undertook to direct plaintiff's activities, and could be found negligent in giving directions that exposed the child to an obvious danger without adequate warning or protection. (67 C.2d 242.)

(b) The driver also was in the position of an invitor to a business invitee, for he solicited the child's business and arranged to sell him his product at an appointed location. (67 C.2d 242.) Normally, the duty to an invitee concerns conditions or activities on private property, not a public street; but in this case defendant's business consisted of selling bakery goods from a truck. "In coming to the truck for the convenience of defendants, patrons used the public streets and sidewalks as means of access for the special benefit of defendants' business. Defendants may therefore be held liable for an injury occurring to their customer in the immediate vicinity of the truck if the circumstances causing the injury are within the range of defendants' reasonable supervision and control." (67 C.2d 243, footnote 10.)

(c) From the point of view of either negligence (breach of duty) or proximate cause, the jury could find that the driver should have anticipated the result; i.e., he was aware of the normal characteristics of a 4-year-old, had actual knowledge of plaintiff's heedlessness when he first came to the truck, and could have foreseen that the child would carelessly run into the street and that a motorist driving in gathering twilight would fail to see him coming from behind a parked car in the middle of the block. (67 C.2d 244.) (See 8 Proof of Facts 3d 477 [liability of mobile vendor for injuring child]; 56 Cal. L. Rev. 1769; 5 Cal. Western L. Rev. 209; 84 A.L.R.3d 826 [liability of vendor for attracting into street child injured by another's motor vehicle].)

The street vendor theories of invitation and control do not apply to a store in a shopping center. In *Nevarez v. Thriftmart* (1970) 7 C.A.3d 799, 87 C.R. 50, defendant's chain grocery was in a building set back about 75-85 feet from the street, with parking space in the intervening area. For its grand opening defendant provided such carnival attractions as a Ferris wheel and merry-go-round and free ice cream and candy. Plaintiff 3-year-old child, who lived across the street, left his home and ran into the street where he was struck and injured by a passing motorist. *Held*, defendant was not liable. It did not invite children to do business in a particular place or over a predictable route, and it did not bring wares into the street. Because small children are notoriously curious and attracted to anything, there would be no limits on a duty of care such as that sought to be imposed. "Retail establishments would be cast in the role of a modern-day Pied Piper and, as such, obligated to act as parent or babysitter for every tot in the neighborhood who might decide to dash across a public street in order to bask in the store's allure. The attractions offered by appellant and the generalized invitation to enjoy them, thus do not analogize to the conduct of a street vendor." (7 C.A.3d 806.)

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Witkin Summary of California Law XI. NEGLIGENCE: AFFIRMATIVE DUTIES ARISING FROM SPECIAL RELATIONSHIPS

A. In General.

2. Exceptions: Affirmative Duty Without Relationship.

a. Voluntary or Gratuitous Undertaking.

4. Distinction: Casual Advice.

6 *Witkin Sum. Cal. Law Torts* § 1063

[§ 1063] Distinction: Casual Advice.

In *Bland v. Reed* (1968) 261 C.A.2d 445, 67 C.R. 859, the complaint alleged that plaintiff, a union steelworker, was injured in the course of his employment and received an award from the Industrial Accident Commission; that defendant R was defendant Union's representative to advise members on compensation claims; and that R negligently and fraudulently gave advice that caused plaintiff to omit filing a suit against a third-party tortfeasor until the statute of limitations had run. *Held*, judgment for defendants on demurrer affirmed.

Plaintiff's theory was that R undertook to protect plaintiff's interest by advising him concerning his injury, and either negligently or intentionally represented to him that filing a third-party suit would hurt his compensation claim. A dissenting justice agreed. (261 C.A.2d 455.) But the majority found this theory unconvincing. (a) Plaintiff knew that R was not a lawyer, and that the union had not authorized him to give legal advice, but only to file compensation claims for union members. (b) There was no showing that R knew anything about the particulars of the accident or the third party's alleged negligence. (c) Because the Legislature has authorized nonlawyer practice before the Commission, with knowledge of its dangers, it is improper to hold a nonlawyer to a lawyer's degree of care, particularly when the negligence charged does not relate to a claim before the Commission. (d) The complaint did not allege any kind of promise or undertaking by R other than the filing of a claim before the *Commission*. (261 C.A.2d 452.)

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a. Voluntary or Gratuitous Undertaking.

5. Distinction: Medical Proctor.

6 *Witkin Sum. Cal. Law Torts* § 1064

[§ 1064] Distinction: Medical Proctor.

In *Clarke v. Hoek* (1985) 174 C.A.3d 208, 219 C.R. 845, defendant, a member of the joint credentials committee of two hospitals, functioned as a proctor in observing a surgical operation performed by Dr. L and reporting on his competence as a candidate for membership on a hospital medical staff. Defendant had no contact with the patient, did not "scrub in" but remained outside "the sterile field," and took no part in the operation. Plaintiff, alleging injuries resulting from the alleged negligence of Dr. L, sued defendant on the theory that defendant had a duty to intervene in the operation to ensure that the surgical treatment met the proper standard of care. *Held*, summary judgment for defendant affirmed.

(a) Proctoring is an established procedure at hospitals throughout California, and the role of the proctor is not to supervise but to observe and report. Defendant never entered into any contractual relation with the patient or the proctored surgeon, was not requested to act as a consultant and did not volunteer to do so, and was not authorized to supervise or control the actions of the surgeon. Thus, there was no special relationship to give rise to a duty. (174 C.A.3d 216, 217.)

(b) Defendant's proctoring did not constitute a voluntary undertaking to come to plaintiff's aid. Indeed, he might have been liable to plaintiff had he intervened, for he was not plaintiff's doctor, had never examined her, and was not prepared to perform surgery; hence, participation in the operation without consent of the plaintiff could constitute a battery. (174 C.A.3d 218, citing the text; see *supra*, §394.)

(c) Important considerations of public policy weigh heavily against imposition of a duty of care on medical proctors. There is a strong public interest in supporting medical peer review programs, and the Legislature has made this clear in enacting various statutes providing protection for activities aimed at maintaining professional standards on medical staffs. (174 C.A.3d 220, citing C.C. 43.7(b), *supra*, §155, and *Ev.C. 1157, 1 Cal. Evidence (4th), Circumstantial Evidence*, §9 et seq.) (See *Armato v. Baden* (1999) 71 C.A.4th 885, 894, 84 C.R.2d 294 [under *Clarke*, physicians who were retained as independent contractors by medical group, but did not treat plaintiff and were not consulted regarding her treatment, had no special relationship with plaintiff so as to support liability for failure to supervise physician

assistant's treatment of plaintiff].)

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a. Voluntary or Gratuitous Undertaking.

6. No Liability for Failure To Perform.

6 *Witkin Sum. Cal. Law Torts* § 1065

[§ 1065] No Liability for Failure To Perform.

The mere failure to perform a promised gratuitous undertaking is ordinarily not actionable. There is no contract liability in the absence of consideration or promissory estoppel (see 1 *Summary* (10th), *Contracts*, §§202, 244), and there is no tort liability where the defendant has not actually commenced performance. (See 3 Harper, James & Gray 2d §18.6; 64 *Harv. L. Rev.* 913.)

On the other hand, nonfeasance may give rise to tort liability where a person, in reasonable reliance, suffers harm, as by refraining from securing other necessary assistance. (See *Morgan v. Yuba* (1964) 230 C.A.2d 938, 944, 41 C.R. 508, *supra*, §299, quoting the text; *Rest.2d, Torts* §323(b); 64 *Harv. L. Rev.* 913.)

The extent of the duty to render future aid arising from the past, voluntary rendering of aid was considered in *Baker v. Los Angeles* (1986) 188 C.A.3d 902, 233 C.R. 760. In January 1977, plaintiff B had a quarrel with her husband M, who, while intoxicated, threatened her with a gun. She called police, and officer W confiscated the gun. M was later convicted of an assault on a police officer, and was sentenced to 10 days in jail, with 3 years' probation on the condition that he not possess a dangerous weapon. Nevertheless, M picked up his confiscated gun at the police station. After a separation the parties were reconciled, but had another argument in September 1977, at which time plaintiff told the officers that M had the gun, and asked them to take it. The officers suggested that plaintiff leave the apartment, but she decided to stay, and, after the police left, M shot her, inflicting serious injuries. In this action against defendant city, the trial judge decided that a special relationship existed, and that the duty was breached by returning the gun to M. *Held*, there was no breach of duty.

(a) When he took the gun, officer W entered into a special relationship with plaintiff "for the limited purpose of protecting her from the potential harm that threatened her at the moment." He did not become a guarantor of her future safety, and his duty ended when he left the gun at the police station, in accordance with established police procedures. (188 C.A.3d 907, 908.). He had no duty to check the record for conditions attached to the probation. (188 C.A.3d 908.)

(b) There was no detrimental reliance on an implied promise to render further aid. Officer W made no

representations to plaintiff about when and under what circumstances the gun would be returned to M, and she knew that he had the gun but nevertheless remained in the apartment with him. (188 C.A.3d 909.)

Santee v. San Diego (1989) 211 C.A.3d 1006, 259 C.R. 757, involved an injury to a bicyclist that was allegedly the result of a nonfunctioning streetlight at a city intersection. The city's cross-complaint against the county was based on the theory that voluntary acts by county deputy sheriffs in reporting light outages in the past had established a special relationship between the parties that brought the county within the Good Samaritan rule, and imposed on it a duty to continue rendering this assistance into the indefinite future. *Held*, no duty existed.

(a) *No continuing duty from past acts.*

(1) All of the cases that have imposed a "special relationship" duty on an officer to aid an imperiled citizen have involved a single, discrete transaction, where the officer's conduct either increased the risk to which the citizen was exposed during that episode, or induced the citizen to forego taking protective measures in reliance on the officer's assistance. (211 C.A.3d 1013, citing *Williams v. California* (1983) 34 C.3d 18, 192 C.R. 233, 664 P.2d 137, *supra*, §291, and *Mann v. California* (1977) 70 C.A.3d 773, 139 C.R. 82, *supra*, §309.) By imposing liability in these instances, the courts have held that an officer who starts a protective undertaking must finish it. However, it is a far different matter to require an officer to *commence* a protective undertaking merely because he previously provided similar aid, and the courts have declined to impose this duty on law enforcement officers. (211 C.A.3d 1014, citing *Baker v. Los Angeles*.)

(2) The county's failure to report the light outage did not *increase* the risk of harm; it merely failed to *decrease* the risk. (211 C.A.3d 1015.) "[N]onfeasance which results in failure to eliminate a preexisting risk is not equivalent to nonfeasance which increases a risk of harm." (211 C.A.3d 1016, citing *Von Batsch v. American Dist. Tel. Co.* (1985) 175 C.A.3d 1111, 222 C.R. 239, *supra*, §291.)

(3) The county's reporting of light outages in the past did not entitle the city to detrimentally rely on the county to confer future benefits. "A voluntary, discretionary protective undertaking by an officer on one occasion may, if unreasonably abandoned, leave the victim in a worse position through the victim's detrimental reliance on the conduct of the officer if such conduct induces the victim to refrain from protecting himself on that occasion. In that context, the officer's actions have begun (in Prosser's words) to 'adversely affect' the plaintiff's interests. However, if the same victim is exposed to a similar plight in the future, and no officer ever arrives on the scene to offer assistance, there is nothing which dissuades the victim from protecting himself on that subsequent occasion. While the victim ... might hope for police aid in a time of peril, the mere fact that police (in the exercise of their discretion) had rendered similar aid in the past does not entitle the victim to expect, or detrimentally rely on an officer for, aid on later occasions. In that latter context, the officer has done nothing more than (in Prosser's words) failed to 'confer a benefit.' " (211 C.A.3d 1016.)

(b) *Special relationship obligates only party who volunteered.* The city argued that the voluntary act of one or two deputies in reporting outages entitled it to expect the same assistance from all deputies. However, there is no authority holding that the voluntary act of one officer allows the victim to conscript all other officers into an army of *Good Samaritans*. (211 C.A.3d 1017.) "This distinction is sound. The volunteer can reasonably be expected to use due care once he has elected to provide aid to the victim. However, to expand the network of obligated Good Samaritans (who may be unaware of either the nature of the aid rendered or the identity of the beneficiary who received the aid) would result in imposing potential liability on entirely blameless individuals and/or agencies for nonfeasance merely because they are employed by the same agency which employs the Good Samaritan." (211 C.A.3d 1018.)

(c) *Public policy precludes extending Good Samaritan rule to future aid.* "If future obligations to assist can be imposed based on past acts, the natural consequence will be to discourage volunteers from coming to the aid of imperiled fellow citizens." (211 C.A.3d 1018.) This result would be particularly inappropriate if applied to law enforcement officers. Police departments would order their officers to never provide aid, "since one officer's act of kindness could forever become an obligatory function of all officers, enforceable through tort liability." (211 C.A.3d

1019.)

In *Weissich v. Marin* (1990) 224 C.A.3d 1069, 274 C.R. 342, the complaint alleged that in 1955 decedent W, while district attorney of defendant county, prosecuted S for arson. S was convicted and sentenced to 20 years in prison, and at the time he threatened the lives of W and others. In the years following his release on parole, S continued his threats and engaged in continuing criminal behavior including possession of firearms. During this period representatives of the state Department of Justice and the Department of Corrections, together with county law enforcement officials, "undertook, impliedly promised and agreed to coordinate and share information" with W concerning S's continuing threat, but on a number of occasions they failed to warn W of events that indicated that the danger still existed. In 1986 S shot and killed W, and then committed suicide.

Based on these factual allegations, the complaint alleged that defendants voluntarily assumed a duty to warn W of S's continuing criminal behavior; and that as a proximate result of W's dependence on defendants' assurances, he failed to take additional measures to protect himself. The trial court rendered judgment for defendants on demurrer. *Held*, affirmed.

(a) Generally one has no duty to warn persons endangered by the conduct of another; but the duty may arise when it is voluntarily assumed. (224 C.A.3d 1076, 1077.) The complaint sufficiently alleged a voluntary assumption of some protective duty toward W. (224 C.A.3d 1077.)

(b) The critical issue is the scope and duration of this duty. "[T]he duty of a Good Samaritan is of limited duration; a person who has performed a voluntary duty is not required to render aid indefinitely. ... The relationship established by the voluntary act of a Good Samaritan is also limited; thus the voluntary conduct of one police officer may obligate that officer, but does not impose a duty of care on all other officers in the employing police department." (224 C.A.3d 1077, 1078.)

(c) Unlike *Baker* and *Santee*, this case involves allegations that unnamed representatives of defendants *impliedly* promised future action; "no *express* promise of open-ended duration is alleged." (224 C.A.3d 1079.) "We do not consider it reasonably foreseeable that a convicted felon who has threatened those involved in his prosecution will wait over 30 years after his conviction, including over 11 years after his release from prison, before attempting to carry out fatal revenge." (224 C.A.3d 1079.)

(d) "[T]he practical obstacles to imposing an open-ended duty on all members of a police agency to the potential victims of a vengeful released felon are obvious and significant. Ordinary personnel changes alone would make the administration of any such extended and prolonged obligation extremely complicated and difficult, if not impossible. The burden on the community of imposing that duty would be substantial, as police agencies might well entirely forego any promises to warn rather than risk potential perpetual liability." (224 C.A.3d 1080.) (For holding against liability for negligent misrepresentation, see *supra*, §4821, 822.)

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See *Rotolo v. San Jose Sports & Entertainment, LLC* (2007) 151 C.A.4th 307 335, 59 C.R.3d 770 [operators of hockey facility furnishing of automatic external defibrillators (AEDs) but failing to notify users of facility of their existence and location did not invoke negligent undertaking doctrine; possession of AEDs did not increase risk of harm, and, because participants did not know about AEDs, it cannot be said that they reasonably relied on operators' conduct]; 3 Harper, James & Gray 3d §18.6.



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2. Exceptions: Affirmative Duty Without Relationship.

b. Furnishing Liquor to Intoxicated Person.

1. Common Law Rule of Nonliability.

6 Witkin Sum. Cal. Law Torts § 1066

[§ 1066] Common Law Rule of Nonliability.

(1) *Common Law and Statutes.* At common law, no action would lie against the seller of liquor to an intoxicated customer where the latter injured himself or herself, or a third person. The theory was that the consumption, not the sale, was the proximate cause of the injury. (See Dobbs, *The Law of Torts* §332; 45 *Am.Jur.2d* (1999 ed.), *Intoxicating Liquors* §501; 43 *Am.Jur. Trials* 527 [liquor provider's liability]; 57 *Cal. L. Rev.* 1000; 97 *A.L.R.3d* 528 [sale or gift of liquor or habit-forming drug]; 98 *A.L.R.3d* 1230 [furnishing liquor].)

A number of states enacted laws ("Dram-Shop Acts") that created a duty and imposed liability for furnishing liquor under certain conditions, e.g., to an already intoxicated person. (See 23 *So. Cal. L. Rev.* 420; 6 *A.L.R.2d* 798 ["injury in person or property"]; 78 *A.L.R.2d* 998 [settlement or release as releasing liability under civil damage act]; 4 *A.L.R.3d* 1332 ["injury to means of support"]; 8 *A.L.R.3d* 1412 [selling or furnishing liquor otherwise than in operation of regularly established liquor business]; 18 *A.L.R.3d* 1323 ["owner" of premises on which liquor is sold]; 26 *A.L.R.3d* 1112 [third person's participating in or encouraging drinking as barring recovery under dram shop act]; 31 *A.L.R.3d* 438 [right of one liable under dram shop act to contribution or indemnity from intoxicated person]; 64 *A.L.R.3d* 849 [contributory negligence]; 64 *A.L.R.3d* 882 [causation]; 64 *A.L.R.3d* 922 [consumption by third person]; 78 *A.L.R.3d* 1199 [recovery for mental anguish, embarrassment, loss of affection or companionship, or the like].) Other states rejected the narrow view of causation and held that the sale, rather than the consumption, may be the proximate cause of harm to a third person. (See *Rest.2d, Torts* §696, 697, 705; 14 *So. Cal. L. Rev.* 91; 36 *A.L.R.3d* 900 [wife's right for loss of consortium].)

(2) *California's Adoption of Common Law Rule.* *Cole v. Rush* (1955) 45 *C.2d* 345, 289 *P.2d* 450, held that no duty arises in the absence of legislation. Plaintiff widow and minor children sued defendants, owners of a bar, alleging that decedent husband was normally a quiet person but quarrelsome when intoxicated, that this was known to defendants, that plaintiff had repeatedly requested defendants not to sell liquor to him sufficient to cause intoxication, that defendants refused, and that on one occasion decedent, intoxicated, engaged in a fist fight, was struck, fell, hit his head on the pavement, and died. *Held*, on demurrer, no cause of action was stated.

The court followed the earlier cases of *Fleckner v. Dionne* (1949) 94 C.A.2d 246, 248, 210 P.2d 530 (sale to an intoxicated person knowing he was going to drive a car; plaintiffs injured by his negligent driving), and *Hitson v. Dwyer* (1943) 61 C.A.2d 803, 807, 143 P.2d 952 (sale to an intoxicated plaintiff who fell off a bar stool and was injured). The analysis was in terms of causation rather than duty: "[I]t is established both by the common law and by the decisional law in this state (a) that as to a competent person it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the *proximate cause* of injury from its use; (b) that the competent person voluntarily consuming intoxicating liquor contributes directly to any injury caused thereby; and (c) that contributory negligence of the decedent bars recovery by his heirs or next of kin in a wrongful death action." (45 C.2d 356.) (See 6 *Hastings L. J.* 402; 3 *U.C.L.A. L. Rev.* 272.)

(3) *Criticisms and Distinctions.* Anticipating *Vesely v. Sager* (1971) 5 C.3d 153, 95 C.R. 623, 486 P.2d 151, *infra*, §1067, the court in *Fuller v. Standard Stations* (1967) 250 C.A.2d 687, 694, 58 CR. 792, suggested that *Fleckner* and *Cole* were based on outmoded reasoning and might be "ripe" for disapproval. (See 5 *Cal. Western L. Rev.* 214; 5 *San Diego L. Rev.* 253.)

Liability of a bar owner was recognized in two distinguishable situations:

(a) A bar operator, like an innkeeper, restaurateur, or other person whose premises are open to the public, owes a duty to invitees to exercise reasonable care in maintaining order for their safety. (See *infra*, §1129.) If liquor is knowingly furnished to a person dangerous when drunk, and the latter injures a peaceful guest, an action will lie. (See *Cole v. Rush*, *supra*, 45 C.2d 352; *Thomas v. Bruza* (1957) 151 C.A.2d 150, 153, 311 P.2d 128 [common law liability of person furnishing intoxicating liquor for injury or death of consumer].)

(b) A duty may be voluntarily assumed (see *supra*, §1060 et seq.). In *Brockett v. Kitchen Boyd Motor Co.* (1968) 264 C.A.2d 69, 70 C.R. 136, plaintiff pleaded facts sufficient to overcome the general rule of nonliability. The complaint alleged that defendant was the employer of H, a 19-year-old minor; that H came to an employees' Christmas party given by defendant; that defendant served liquor and solicited drinking by those present; that H became grossly intoxicated, but nevertheless defendant put him in his automobile and directed him to drive home through traffic; and that he struck plaintiffs' car, causing injuries. *Held*, judgment on demurrer for defendant reversed. The additional facts alleged were: (1) The relationship between H and defendant: the latter assumed responsibility for the conduct of the minor, not only for his protection but for the protection of the general public. This was a voluntary undertaking, carrying with it a duty of care. (264 C.A.2d 72.) (2) The acts of defendant: furnishing liquor to a minor, a crime; aiding and abetting the crime of driving while drunk; placing the intoxicated minor in the car and ordering him to go home through traffic, which "activated the tort." (264 C.A.2d 72.) (See 5 *Cal. Western L. Rev.* 243.)

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2. Former Judicial Rule of Liability.

aa. Liability to Third Person.

6 *Witkin Sum. Cal. Law Torts* § 1067

[§ 1067] Liability to Third Person.

In *Vesely v. Sager* (1971) 5 C.3d 153, 95 C.R. 623, 486 P.2d 151, the causation approach was rejected, and the analysis in terms of duty established the dramshop theory of liability. The complaint alleged the following: S owned and operated a roadhouse selling liquor to the public. At 10 p.m., he began serving drinks to defendant O, and continued to do so after the 2 a.m. closing time, until 5:15 a.m., with knowledge of O's intoxication and O's intention to drive away on a steep and narrow mountain road. O drove and struck plaintiff's vehicle, and plaintiff sustained personal injury and property damage. *Held*, judgment for S on demurrer reversed.

(a) *Causation*. The negligent act of the intoxicated driver was foreseeable. "Insofar as proximate cause is concerned, we find no basis for a distinction founded solely on the fact that the consumption of an alcoholic beverage is a voluntary act of the consumer and is a link in the chain of causation from the furnishing of the beverage to the injury resulting from intoxication. Under the above principles of proximate cause, it is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person. If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes such furnishing negligent." (5 C.3d 164.)

(b) *Duty*. A duty may be imposed by a criminal statute (see *supra*, §875), and B. & P.C. 25602 is such a statute: It provides that "[e]very person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor." (5 C.3d 165.) The legislative purpose was to promote the safety of people generally, and plaintiff was a member of the protected class. Hence, if the allegations of the complaint were true, *Ev.C.* 669 applied and defendant's conduct was negligence per se. (5 C.3d 165.)

(c) *Inconsistent Decisions*. To the extent inconsistent, *Cole v. Rush* (1955) 45 C.2d 345, 289 P.2d 450, *Fleckner v. Dionne* (1949) 94 C.A.2d 246, 248, 210 P.2d 530, and *Hitson v. Dwyer* (1943) 61 C.A.2d 803, 807, 143 P.2d 952, *supra*,

§1066, were disapproved. (See 60 Cal. L. Rev. 1034.)

Vesely was followed in *Brockett v. Kitchen Boyd Motor Co.* (1972) 24 C.A.3d 87, 100 C.R. 752. (See 3 Proof of Facts 3d 697 [liability of social host for negligent driving of intoxicated adult guest]; 5 Loyola L.A. L. Rev. 441 [*Vesely*]; 5 Pacific L. J. 186 [proposed legislation]; 14 Santa Clara Lawyer 46 [review of prior law and recent cases]; 14 Santa Clara Lawyer 66 [*Brockett*]; 62 A.L.R.4th 16 [social host's liability for injuries incurred by third parties as result of intoxicated guest's negligence].)

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2. Former Judicial Rule of Liability.

bb. Liability to Intoxicated Person.

6 *Witkin Sum. Cal. Law Torts* § 1068

[§ 1068] Liability to Intoxicated Person.

Vesely v. Sager (1971) 5 C.3d 153, 95 C.R. 623, 486 P.2d 151, supra, §1067, left open the question of liability to the intoxicated person or his or her heirs for the intoxicated person's own injuries or death. In subsequent cases, the Courts of Appeal denied liability. (See *Carlisle v. Kanaywer* (1972) 24 C.A.3d 587, 591, 101 C.R. 246; *Sargent v. Goldberg* (1972) 25 C.A.3d 940, 944, 102 C.R. 300; *Cooper v. National R. Passenger Corp.* (1975) 45 C.A.3d 389, 393, 119 C.R. 541; *Venzor v. Santa Barbara Elks Lodge* (1976) 56 C.A.3d 209, 215, 216, 128 C.R. 353; *Kindt v. Kauffman* (1976) 57 C.A.3d 845, 852, 129 C.R. 603; *Rose v. International Brotherhood of Electrical Workers* (1976) 58 C.A.3d 276, 279, 129 C.R. 736; 5 *Pepperdine L. Rev.* 1; 14 *Santa Clara Lawyer* 71 [*Carlisle*]; 17 *Santa Clara L. Rev.* 469 [*Kindt*]; 76 *A.L.R.3d* 1218 [*Cooper*].)

In *Ewing v. Cloverleaf Bowl* (1978) 20 C.3d 389, 143 C.R. 13, 572 P.2d 1155, prior decisions were disapproved, and a broad rule of liability was declared for injuries to the intoxicated person or for his or her wrongful death. Decedent, having just reached his 21st birthday, accepted an invitation from a friend to go to defendant's bowling alley for a drink. The two, accompanied by other guests, arrived in the evening. Decedent's friend told L, the bartender, to give decedent the strongest drink in the house. L then served decedent full shot glasses of 151 proof rum. Decedent, despite warnings from other guests, drank 10 glasses and two beer chasers during a period of less than an hour and a half, and died sometime later. The present action for wrongful death was brought by his two children against defendant, the employer of the bartender. The case was tried before *Li v. Yellow Cal Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, *infra*, §1329, and hence was governed by the former rule of contributory negligence. The trial judge granted defendant's motion for a nonsuit, and plaintiffs appealed from the judgment. *Held*, reversed. Under the rule governing review of a judgment of nonsuit, the evidence most favorable to the plaintiffs must be accepted as true; and, on the record before the court, the jury could have reasonably determined the issues of fact in favor of recovery.

(a) *General duty of bartender and employer.* The earlier holdings that the furnisher of liquor to an intoxicated customer was not liable as a matter of law were repudiated in *Vesely*, and the questions of causality, foreseeability, and reasonableness, as well as the defenses of contributory negligence and assumption of risk, are for the jury. (20 C.3d

400.)

(b) *Duty to patron.* Defendant contended that the doctrine of *Vesely* does not apply where the patron or his or her representatives sue; i.e., that insofar as the patron is concerned, the consumption and not the sale is the sole cause of injury or death. This is unsound; *Vesely's* repudiation of the proximate cause fiction applies equally in both contexts. "We hold that *Vesely* and *Bernhard* govern regardless of whether a third party injured by an intoxicated customer or a customer himself sues a bartender: the bartender's liability in both circumstances depends upon the application of the principle that an individual is liable for foreseeable injuries caused by his failure to exercise reasonable care." (20 C.3d 400.) "To the extent that the decisions in *Rose* and *Cooper* rest on the obsolete proximate cause fiction, we disapprove of them. We also disapprove of *Kindt v. Kauffman* ... insofar as dicta in the majority opinion ... suggest that bartenders owe no duty of care to their patrons." (20 C.3d 401, footnote 8.) (On *Bernhard v. Harrah's Club* (1976) 16 C.3d 313, 128 C.R. 215, 546 P.2d 719, see *supra*, §192.)

(c) *Bartender's wilful misconduct.* Viewing plaintiffs' evidence in its most favorable light, thereby viewing L's conduct as unfavorably as the evidence will permit, the jury could reasonably conclude that L was guilty of wilful misconduct, i.e., an intentional or reckless act (see *supra*, §870). (1) He intentionally selected and served 151 proof rum. (2) He knew that it had more than twice the potency of ordinary liquors. (3) He knew that decedent was a young and inexperienced drinker, not fully aware of the radical difference in potency of the rum. (4) He knew that decedent intended to get drunk, and that his warning to "take it easy" after pouring the third round had been without effect. (5) As an experienced bartender, he knew or should have known that consumption of alcohol beyond a certain level creates an immediate health hazard, and should have concluded that decedent might consume this amount. (6) He acted in violation of two rules of practice of his employer: he filled the shot glasses beyond the seven-eighths line, and he continued to serve decedent after decedent was manifestly intoxicated. (20 C.3d 403.) Although this is not the only interpretation that a jury could attach to L's conduct it is "one reasonable interpretation." (20 C.3d 404.)

(d) *Decedent's ordinary negligence.* Again viewing plaintiffs' evidence in the light most favorable to them: (1) Decedent intended to get drunk, not to consume a fatal overdose of alcohol. (2) He was inexperienced and had no reason to know of the possibility of alcohol poisoning; and his failure to inquire into the consequences of the differences in proof was not reckless. Hence, a reasonable jury could conclude that he was merely negligent, and contributory negligence would not bar recovery from a defendant guilty of wilful misconduct. (20 C.3d 407.) The holding in *Kindt*, that a patron is guilty of wilful misconduct as a matter of law when he or she consumes sufficient liquor to reach a state of intoxication, is disapproved. (20 C.3d 404, footnote 10.)

(e) *No assumption of risk.* The jury could reasonably conclude that decedent did not assume the risk of L's wilful misconduct. (1) *Rose* and *Cooper* are not controlling, for they misinterpreted the rules governing assumption of risk. The evidence must show that the victim appreciated the specific danger involved (see *infra*, §1289), in this case the danger of acute alcohol poisoning. (20 C.3d 406.) (2) The evidence presented by plaintiffs did not show this knowledge; decedent's inexperience and naivete' were recognized by both the waitress and the bartender. (20 C.3d 407.) (3) The evidence did not necessarily call for the conclusion, as a matter of law, that all consumers of great quantities of 151 proof rum know the peril involved. (20 C.3d 407.)

A single justice dissented. (See *Paula v. Gagnon* (1978) 81 C.A.3d 680, 684, 146 C.R. 702 [wrongful death; following *Ewing*]; cf. *Sissle v. Stefenoni* (1978) 88 C.A.3d 633, 636, 152 C.R. 56 [recovery was denied where decedent customer was guilty of wilful misconduct]; *Trenier v. California Inv. & Dev. Corp.* (1980) 105 C.A.3d 44, 47, 164 C.R. 156 [following *Sissle*]; and see 12 *Loyola L.A. L. Rev.* 387; 16 *San Diego L. Rev.* 355; 11 *Southwestern U. L. Rev.* 1451.)

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SUPPLEMENT: [This section is current through the latest supplement]

Correction: Line 13 of second paragraph of section, "*Li v. Yellow Cal Co.*" should be "*Li v. Yellow Cab Co.*"



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2. Former Judicial Rule of Liability.

cc. Liability to Social Guest.

6 Witkin Sum. Cal. Law Torts § 1069

[§ 1069] Liability to Social Guest.

In *Coulter v. Superior Court* (1978) 21 C.3d 144, 145 C.R. 534, 577 P.2d 669, plaintiff Mr. C was injured while riding as a passenger in a car driven by W. In this action by Mr. and Mrs. C against defendant owner and defendant manager of an apartment complex, plaintiffs alleged that defendant manager had served W large quantities of liquor in a recreation room; that he knew or should have known that W was becoming excessively intoxicated, that she customarily drank to excess, and that she intended to drive after drinking. *Held*, a cause of action was stated.

(a) *Liability based on statute.* B. & P.C. 25602 and B. & P.C. 25658 prohibit persons from furnishing liquor to habitually or obviously intoxicated persons and to minors. The cases have given the word "person" in both statutes a broad interpretation. (See 21 C.3d 150, citing *Brockett v. Kitchen Boyd Motor Co.* (1972) 24 C.A.3d 87, 100 C.R. 752, *supra*, §§1066, 1067.) This justifies the holding that it is not limited to commercial suppliers but includes social hosts. (21 C.3d 150.) Moreover, the Legislature, put on notice by *Vesely v. Sager* (1971) 5 C.3d 153, 95 C.R. 623, 486 P.2d 151, *supra*, §1067, failed to amend the statute to exclude this liability. (21 C.3d 151.)

(b) *Liability based on common law principles: alternative ground of decision.* *Vesely* rested on the statute alone; but *Bernhard v. Harrah's Club* (1976) 16 C.3d 313, 128 C.R. 215, 546 P.2d 719, *supra*, §192, explained that "the clear import" of *Vesely* was that "there was no bar to civil liability under modern negligence law." (21 C.3d 152.) Furnishing liquor to an obviously intoxicated person with knowledge that he or she intends to drive a motor vehicle constitutes a violation of a duty of reasonable care: (1) The primary factor, reasonable foreseeability of the risk of injury to those on the highway, is clear. (21 C.3d 152.) (2) The other factors, as set forth in *Rowland v. Christian* 1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086, are also present under the facts alleged in the complaint. (21 C.3d 153.)

(1) The degree of certainty that the plaintiff suffered injury: The allegations of substantial injury are sufficient. (21 C.3d 153.)

(2) The close connection between the defendant's conduct and the injury is likewise clear from the circumstances

alleged.

(3) The moral blame attached to the defendant's conduct: "While, traditionally, no moral blame attaches to the social host who entertains his guests by serving cocktails to them, it is not unfair to ascribe such blame to anyone who increases the obvious intoxication of a guest under conditions involving a reasonably foreseeable risk of harm to others. In this connection, we further note that it is small comfort to the widow whose husband has been killed in an accident involving an intoxicated driver to learn that the driver received his drinks from a hospitable social host rather than by purchase at a bar. The danger of ultimate harm is as equally foreseeable to the reasonably perceptive host as to the bartender. The danger and risk to the potential victim on the highway is equally as great, regardless of the source of the liquor." (21 C.3d 153.)

(4) The policy of preventing future harm. The enormous cost and personal and economic impact of automobile accidents incident to alcohol abuse are shown by statistics; and the policy is served by requiring the exercise of reasonable restraint by the social host. (21 C.3d 154.)

(5) The extent of the burden to the defendant and consequences to the community of imposing the duty. These are not so serious as to justify a contrary holding. "Doubtless, the spectre of civil liability may temper the spirit of conviviality at some social occasions, especially when reasonably observant hosts decline to serve further alcoholic beverages to those guests who are obviously intoxicated and perhaps becoming hostile. Nonetheless, in this context, we must surely balance any resulting moderation of hospitality with the serious hazard to the lives, limbs and property of the public at large, and the great potential for human suffering which attends the presence on the highways of intoxicated drivers." (21 C.3d 154.)

(6) The availability, cost, and prevalence of insurance for the risk involved. "[W]e may assume that insurance coverage (doubtless increasingly costly) will be made available to protect the social host from civil liability in this situation." (21 C.3d 153.)

Two justices joined in a concurrence with qualifications, and one justice dissented. (See 12 *Loyola L. Rev.* 396; 10 *Pacific L. J.* 95; 16 *San Diego L. Rev.* 361.)

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aa. Statutory Rules.

6 *Witkin Sum. Cal. Law Torts* § 1070

[§ 1070] Statutory Rules.

(1) *In General.* The 1978 Legislature, by amendments to *B. & P.C. 25602* and *C.C. 1714*, abrogated the judicial rule establishing liability. (See *16 Pepperdine L. Rev. 21* [California Liquor Liability: A Decade After *Coulter v. Superior Court*]; *54 A.L.R.5th 313* [social host's liability for injuries incurred by person served alcohol]; *supra*, §1067 et seq.) Selling or furnishing alcohol to an obviously intoxicated person is a misdemeanor (*B. & P.C. 25602(a)*.) It may be enjoined in a proceeding brought by the Director of Alcoholic Beverage Control. (*B. & P.C. 25602.2*.) However, imposition of *civil liability* for furnishing liquor to an adult was expressly prohibited, and the original California rule of no liability, i.e., the rule prior to *Vesely v. Sager* (1971) 5 *C.3d* 153, 95 *C.R.* 623, 486 *P.2d* 151, see *supra*, §1066, was reinstated.

(2) *No Civil Liability.* "No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage" under *B. & P.C. 25602(a)* "shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage." (*B. & P.C. 25602(b)*.)

B. & P.C. 25602(b) bars suit against persons who simply permit alcoholic beverages to be consumed on their premises, as well as against those who supply the alcohol. (*Leong v. San Francisco Parking* (1991) 235 *C.A.3d* 827, 834, 1 *C.R.2d* 41, citing *Andre v. Ingram* (1985) 164 *C.A.3d* 206, 210 *C.R.* 150, and *De Bolt v. Kragen Auto Supply* (1986) 182 *C.A.3d* 269, 227 *C.R.* 258, *infra*, §1076.) However, this statute does not preclude all actions against innkeepers merely because they furnish alcohol. The proprietor of a place where liquors are dispensed owns a duty of reasonable care to protect patrons from injury at the hands of fellow guests. (*Cantwell v. Peppermill* (1994) 25 *C.A.4th* 1797, 1801, 31 *C.R.2d* 246.)

(3) *Prior Case Law Restored.* *B. & P.C. 25602* "shall be interpreted so that the holdings in cases such as *Vesely v. Sager* (5 *Cal.3d* 153), *Bernhard v. Harrah's Club* (16 *Cal.3d* 313) and *Coulter v. Superior Court* (21 *Cal.3d* 144) be abrogated in favor of prior judicial interpretation, finding the consumption of alcoholic beverages rather than the

serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person." (*B. & P.C. 25602(c)*.) (See *C.C. 1714(b)* [same effect].)

(4) *Social Host*. "No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages." (*C.C. 1714(c)*.) (See *Fosgate v. Gonzales* (1980) 107 C.A.3d 951, 959, 166 C.R. 233 [1978 amendments operate prospectively]; *Sagadin v. Ripper* (1985) 175 C.A.3d 1141, 1148, 1156, 221 C.R. 675 [same]; *Bass v. Pratt* (1986) 177 C.A.3d 129, 134, 137, 222 C.R. 723 [social host immune]; 12 *Loyola L.A. L. Rev.* 404; 10 *Pacific L. J.* 108, 591; 16 *San Diego L. Rev.* 355; 11 *Southwestern L. Rev.* 1451; 12 *U.C. Davis L. Rev.* 191; 25 *U.C. Davis L. Rev.* 463; 62 *A.L.R.4th* 16 [social host's liability for injuries incurred by third party as result of intoxicated guest's negligence].)

In *Cully v. Bianca* (1986) 186 C.A.3d 1172, 231 C.R. 279, the court rejected an attempt to impose liability on the nondriving passengers in a car operated by an intoxicated driver by alleging a "conspiracy" or "concerted action." The allegations that the two passengers went to the liquor store and jointly purchased the liquor were held insufficient to establish the "substantial assistance or encouragement" constituting a breach of duty under *Rest.2d, Torts §876*. (186 C.A.3d 1176, 1178.)

In *Biles v. Richter* (1988) 206 C.A.3d 325, 253 C.R. 414, plaintiff alleged that defendants failed to supervise their intoxicated social guests who smoked, one of whom started a fire that caused injuries to plaintiff while he was sleeping after having been "put to bed" by defendants. *Held*, judgment for defendants on demurrer affirmed.

(a) Even assuming that defendants (as the owners of the land where the accident occurred or as Good Samaritans for having put plaintiff to bed) had a duty to protect plaintiff, they were immune from liability by *C.C. 1714(c)* to the extent that plaintiff's injuries were caused by the guests' consumption of alcohol furnished by defendants. "If a plaintiff could hold a social host liable for failure to supervise those to whom he had furnished alcohol, the immunity afforded by subdivision (c) of section 1714 would be seriously eroded. This is because the duty of supervision is premised upon the need to look after those whose coordination and judgment have been adversely affected by the consumption of alcohol. If allowed, the duty would appear to exist in many if not most cases where alcohol is furnished by social hosts." (206 C.A.3d 331.)

(b) If the allegations concerning consumption of alcohol are disregarded, defendants are still not liable, because they had no obligation to fulfill their duty to plaintiff by supervising sober guests merely because they smoke. Sober adult smokers do not pose so great a risk that a social host can fulfill his or her duty to a sleeping guest only by personally supervising the guests who smoke. (206 C.A.3d 332.)

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bb. Constitutionality of Statutes.

6 *Witkin Sum. Cal. Law Torts* § 1071

[§ 1071] Constitutionality of Statutes.

The immunity statutes (see *supra*, §1070) were construed and upheld against constitutional challenge in *Cory v. Shierloh* (1981) 29 C.3d 430, 174 C.R. 500, 629 P.2d 8. Defendant S, a minor, hosted a party at which he furnished liquor to plaintiff C, who was also a minor. C became intoxicated, attempted to drive home, and was injured when he lost control of his car. He brought this action on various theories. *Held*, no cause of action was stated.

(a) *Construction of immunity statutes.* (1) *B. & P.C. 25602(b)* immunizes the furnisher of liquor from liability to *any person* injured as a result of intoxication by the consumer of the liquor. (2) C.C. 1714(b) and *B. & P.C. 25602(c)* apply only to injuries inflicted on a *third person* by the intoxicated consumer. These provisions are not substantive grants of immunity but mere descriptions of the prior judicial view of liability of the furnisher. (3) Hence, *B. & P.C. 25602(b)*, reasonably construed, "bars a suit by the intoxicated consumer as well as by third persons injured by him. Any other construction would produce a singularly anomalous result, permitting a tort recovery against the provider by the intoxicated consumer, while barring recovery against the same provider by an innocent third person who was injured by the same consumer." (29 C.3d 437.)

(b) *Constitutionality of general rule of immunity: rational basis reasonably related to legitimate state purpose.* (1) The Legislature may have acted upon the premise that it is unfair to require the provider (and his or her insurer) to share both the supervisory responsibility and the legal blame with the consumer whose consumption "is perhaps the more direct and immediate cause" of the injuries. This is a rational position, consistent with the judicially established rule prior to *Vesely v. Sager* (1971) 5 C.3d 153, 95 C.R. 623, 486 P.2d 151, *supra*, §1067. (2) The Legislature also reasonably might have assumed that imposition of sole liability on the consumer "would encourage some heightened sense of responsibility in the drinker for his acts, thereby ultimately reducing the frequency of alcohol-caused injuries." (29 C.3d 440.)

(c) *Constitutionality of special rule of liability for licensed providers serving intoxicated minors.* The legislation contains inconsistencies and anomalies; e.g., a licensed seller is liable but a nonlicensed, presumably illegal seller, is

not; and the intoxicated minor and those injured by him or her have a cause of action against the seller, but an adult consumer and those injured by him or her do not. (*B. & P.C. 25602.1.*) "Accordingly, whether or not the selling or supplying of the liquor is a tortious *cause* of a resultant injury turns on the *license* status of the supplier and the *age* of the consumer. Causation in a common law sense, whether actual or physical, proximate or legal, has never pivoted on such a perilous and seemingly irrelevant fulcrum." (*29 C.3d 440.*) Nevertheless, a reasonable basis for the statutes exists:

(1) Limiting liability to licensed commercial providers may be reasonable, because presumably these persons are experienced and can more readily detect signs of intoxication among patrons. It is also probable that licensed commercial providers are in a better position to defray the costs of liability and insurance than a social host or other unlicensed provider. (*29 C.3d 440, 441.*)

(2) Limiting the class of protected consumers to minors might reasonably have been based on the determination that, because of comparative inexperience in both drinking and driving, they are more in need of safeguarding from intoxication than adults. This determination might justify suspending the theory of the other statutes that consumption of the liquor, not furnishing, is the proximate cause of any injury. (*29 C.3d 441.*) (See *Knighten v. Sam's Parking Valet* (1988) 206 C.A.3d 69, 78, 253 C.R. 365, supra, §1040 [rejecting contention that *B. & P.C. 25602(b)* violated Cal. Const., Art. I, §28(b), establishing right to restitution for crime victims].)

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cc. Furnishing Liquor to Intoxicated Minor.

6 Witkin Sum. Cal. Law Torts § 1072

[§ 1072] Furnishing Liquor to Intoxicated Minor.

(1) *In General.* *B. & P.C. 25602.1* retains civil liability for one type of case: An action may be brought by or on behalf of any person who has suffered injury or death proximately caused by the furnishing of alcohol to an *obviously intoxicated minor*. As originally enacted in 1979, the exception applied only where the provider of the alcoholic beverage was licensed: hence, where defendants held a social gathering at their home, they could not be held liable even though they charged admission and sold liquor to persons attending. (See *Zieff v. Weinstein* (1987) 191 C.A.3d 243, 248, 236 C.R. 536.)

The statute was amended in 1986, and the action may now be maintained against (a) any person licensed, or required to be licensed, under California law to sell alcohol, or authorized to sell alcohol on a military base, who sells, furnishes, or gives alcohol to an obviously intoxicated minor, and (b) any other person who sells alcohol to an obviously intoxicated minor. (See *Baker v. Sudo* (1987) 194 C.A.3d 936, 943, 240 C.R. 38 [1986 amendments were not retroactive]; 10 *Pacific L. J.* 111, 592; 16 *San Diego L. Rev.* 375.)

B. & P.C. 25602.1 authorizes an action by "any person" for injuries sustained by "such person." In *Chalup v. Aspen Mine Co.* (1985) 175 C.A.3d 973, 221 C.R. 97, the court, giving these words their ordinary and usual meaning, held that the minor is included. Plaintiff, an 18-year-old girl, was served a number of drinks at defendant's bar, left while intoxicated, ran across the street against the traffic signal, and was struck by a passing vehicle. *Held*, a cause of action could be stated under *B. & P.C. 25602.1*. (175 C.A.3d 979.)

The words "obviously intoxicated" are different in meaning from "driving under the influence," as that phrase is used in the Vehicle Code. In *Jones v. Toyota Motor Co.* (1988) 198 C.A.3d 364, 369, 243 C.R. 611, the jury was instructed to consider such outward manifestations of obvious intoxication as "incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior." This instruction was correct. (198 C.A.3d 370.) (See *Schaffield v. Abboud* (1993) 15 C.A.4th 1133, 1140, 19 C.R.2d 205

[following *Jones*, and upholding instruction defining "obvious intoxication" as sufficient exhibition of specified outward signs of intoxication to cause reasonable person to believe minor was intoxicated]; *Elizarraras v. L.A. Private Sec. Services* (2003) 108 C.A.4th 237, 241, 133 C.R.2d 302 [exception from immunity for sale to intoxicated minors is limited to providers of alcohol; it does not extend to security guards even though guards may have special relationship with business patrons in some circumstances]; BAJI, No. 4.50.)

(2) *No Liability for Injury From Intoxication of Person to Whom Intoxicated Minor Gives Liquor.* In *Salem v. Superior Court* (1989) 211 C.A.3d 595, 259 C.R. 447, G and M, both minors, had drunk a good deal of beer, and then came to defendant's store. G, who was "obviously intoxicated," bought a 12-pack of beer from which he gave a bottle to M, which he drank; then both got into M's car, which M drove. An accident resulted in death of the victim, and blood tests showed that M was legally intoxicated. In this action against defendant S and others, the trial court denied their motions for summary judgment. *Held*, mandamus issued to compel granting the motions. *B. & P.C. 25602.1* should be strictly construed "to require that the negligence resulting in liability of the alcohol purveyor be that of the *very person* who purchased the beverage." (211 C.A.3d 600.) The insertion of the "proximate cause" limitation must have been intended to restrict, rather than to expand, potential application of this one exception to liability. "It is indeed foreseeable that the furnishing of liquor to an intoxicated minor will result in his increased or continued inebriation, which may result in damage to someone else. It is clearly *less* foreseeable that the intoxicated minor will give the liquor so purchased to someone else, whose subsequent intoxication will cause injury. ... The misuse of the alcohol by the third party (whether he be a minor or an adult) is at least arguably, to use proximate cause language, 'remote' and not the 'natural and probable consequence' of the sale to the minor." (211 C.A.3d 603.)

(3) *No Liability by Owner of Building in Which Alcohol Is Served.* In *Hernandez v. Modesto Portuguese Pentacost Assn.* (1995) 40 C.A.4th 1274, 48 C.R.2d 229, a wrongful death action arising out of an intoxicated minor's automobile accident was brought against the owner of the building rented by the sponsor of a dance at which alcohol was served to the minor on the evening of the accident. Plaintiffs contended that *B. & P.C. 25602.1*, imposing liability on any person who "causes to be sold" any alcoholic beverage to an obviously intoxicated minor, could fairly be read to support the imposition of liability on a landlord who leases property to a third person for the sale of alcohol and who takes no action to prevent alcohol from being sold there to intoxicated minors. *Held*, summary judgment for defendant affirmed.

(a) *Strict construction.* *B. & P.C. 25602.1* is a narrow exception to the Legislature's enactment of what California Supreme Court has termed "sweeping civil immunity" from liability for injuries to third persons resulting from furnishing alcohol to another. (40 C.A.4th 1281, quoting *Strang v. Cabrol* (1984) 37 C.3d 720, 724, 209 C.R. 347, 691 P.2d 1013, *infra*, §1073.) As the sole exception to statutory immunity, *B. & P.C. 25602.1* must be strictly construed to effect the Legislature's intent. (40 C.A.4th 1281.)

(b) *Malfeasance required; mere inaction is insufficient.* In their ordinary sense, the words "causes to be sold" imply some type of *affirmative act* by the person causing alcohol to be sold that is directly related to the act of selling alcohol. This ordinary usage of the phrase, and the fact that *B. & P.C. 25602.1* articulates no duty to act affirmatively to prevent others from selling alcohol to an obviously intoxicated minor, compels the construction that the statute requires *malfeasance*, not *acquiescence*. In other words, the phrase "causes to be sold" requires an affirmative act directly related to sale of alcohol, which necessarily brings about the resultant action to which the statute is directed, i.e., the sale of alcohol to an obviously intoxicated minor. (40 C.A.4th 1282.) Neither defendant's rental of the ballroom nor its acquiescence in the liquor license application is sufficiently related directly to the sale of alcohol to warrant imposition of liability. Defendant was not in a position to detect signs of intoxication among the consumers of alcohol at the dance or to control the sale of alcohol to an obviously intoxicated minor. (40 C.A.4th 1283.)

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dd. Furnishing Liquor to Sober Minor.

6 *Witkin Sum. Cal. Law Torts* § 1073

[§ 1073] Furnishing Liquor to Sober Minor.

Burke v. Superior Court (1982) 129 C.A.3d 570, 181 C.R. 149, declared a narrow exception to the legislative abrogation of liability: An action would lie for furnishing liquor to a sober minor who later consumed the liquor and drove while intoxicated. (129 C.A.3d 578.)

Burke was disapproved in *Strang v. Cabrol* (1984) 37 C.3d 720, 209 C.R. 347, 691 P.2d 1013. The complaint alleged that defendant liquor store sold alcoholic beverages to P, a sober minor, who in turn furnished them to B, another minor; B became intoxicated, and plaintiff, a passenger in B's vehicle, was injured as a result of his driving. *Held*, no cause of action was stated under *B. & P.C. 25658*.

(a) *B. & P.C. 25602(a)* makes it a misdemeanor to furnish liquor to a drunkard or obviously intoxicated person, but *B. & P.C. 25602(b)* expressly provides that there shall be no civil liability to any person injured as a result of intoxication by the consumer of the beverage. *B. & P.C. 25658* makes it a misdemeanor to furnish liquor to a minor, but contains no express language of civil immunity. (37 C.3d 723, 724.)

(b) Notwithstanding the absence of this language in *B. & P.C. 25658*, general principles of statutory construction call for application of "the sweeping civil immunity" now provided by C.C. 1714 and *B. & P.C. 25602*. (37 C.3d 724.) The single exception is for sale to an *obviously intoxicated minor* provided by *B. & P.C. 25602.1* (*supra*, §1072). "If the Legislature had intended also to exclude sales to sober, underage persons from the reach of the superseding statute, it could have said so directly" by amending *B. & P.C. 25658*. (37 C.3d 725.) The majority opinion in *Burke* "stands alone as contrary authority," and is disapproved. (37 C.3d 728.)

Three justices dissented, concluding that the revival of the rule existing prior to *Vesely v. Sager* (1971) 5 C.3d 153, 95 C.R. 623, 486 P.2d 151, *supra*, §1067, concerning proximate cause was limited to the situations covered by the two specific immunities: the social host and the person who serves common drunkards and obviously intoxicated persons. (37 C.3d 730.)

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ee. Furnishing Liquor to Disabled Person.

6 Witkin Sum. Cal. Law Torts § 1074

[§ 1074] Furnishing Liquor to Disabled Person.

Whether furnishing liquor to a disabled person creates liability is unsettled. In *Cantor v. Anderson* (1981) 126 C.A.3d 124, 178 C.R. 540, the complaint alleged that plaintiff maintained a home for developmentally disabled persons; that E, such a person, was served liquor by defendant neighbors with full knowledge of his disability; that as a result of his consumption of the liquor E became violent, and plaintiff was injured when she attempted to render aid to him. *Held*, liability could be imposed on a properly framed complaint.

(a) Defendants relied on *B. & P.C. 25602(b)* and C.C. 1714(c), precluding liability of a social host furnishing liquor "to any person" (supra, §1070). But the contention that "any person" covers all persons of whatever mental or physical condition is unsound. C.C. 1714(b) states that the legislative intent is to reinstate prior judicial interpretation of "proximate cause" (supra, §1070), and thereby requires that C.C.1714(c) be read with reference to a specific common law rule. (126 C.A.3d 129.) The common law rule followed in *Cole v. Rush* (1955) 45 C.2d 345, 289 P.2d 450, supra, §1066, and similar cases was based on the theory that voluntary consumption of liquor by an ordinary person or a competent person was the proximate cause of the injury. (126 C.A.3d 129, 130.) Thus, the common law rule did not affect liability for furnishing of liquor to a person unable to voluntarily resist its consumption. (126 C.A.3d 130.)

(b) C.C. 1714(a), under accepted principles of statutory interpretation, is limited by the common law theory of causation. "By this theory the proximate cause of injuries to or by an ordinary intoxicated person is his voluntary decision to consume the alcohol. But the theory does not preclude liability rooted in a *concurrent proximate cause* emanating from the exceptional physical or mental condition of the consumer. Thus, where an injury is the joint product of an exceptional mental or physical condition and alcohol, such condition is a 'concurrent proximate cause' of the injury upon which liability may be predicated. ... Moreover, where an injury is the proximate result of concurrent conditions, one of which is statutorily immunized from liability, the one that is not immunized may form the basis of liability." (126 C.A.3d 130.)

(c) C.C. 1714 also makes no distinction between commercial and noncommercial furnishers of alcohol, and thus

was not meant to revive the distinctions that existed prior to *Coulter v. Superior Court* (1978) 21 C.3d 144, 145 C.R. 534, 577 P.2d 669, supra, §1069). Rather, for claims *not* affected by C.C. 1714, "the common law development of negligence principles is left unimpaired." And foreseeability is the key component necessary to establish liability. (126 C.A.3d 131.)

(d) The complaint as it stands is insufficient in failing to allege that the injuries suffered by plaintiff were a foreseeable and concurrent product of E's mental condition. "However, if plaintiff is able to plead and prove that defendants not only knew of [E]'s disability but also knew or should have known the effect that liquor would have on him *by reason of* his disability (i.e., that it would cause him to lose control and become violent), she then has a cause of action not limited by" C.C. 1714. (126 C.A.3d 131.)

(e) "Our decision is a narrow one. We hold, simply, that where a social host knows his guest is one who *because of* some exceptional physical or mental condition should not be served alcoholic beverages and is or should be aware of the risks included in providing such person with alcohol, the host is not protected by" C.C. 1714(b) and (c). (126 C.A.3d 132.) (See *Bass v. Pratt* (1986) 177 C.A.3d 129, 136, 222 C.R. 723 [*Cantor* was distinguished where no sufficient showing of incompetency was made].)

Hepe v. Paknad (1988) 199 C.A.3d 412, 244 C.R. 823, refused to extend *Cantor*, to cases involving service of liquor to known alcoholics. (199 C.A.3d 418, quoting *Strang v. Cabrol* (1984) 37 C.3d 720, 209 C.R. 347, 691 P.2d 1013, supra, §1073.)

Cardinal v. Santee Pita (1991) 234 C.A.3d 1676, 286 C.R. 275, on facts similar to *Cantor* contended that *Cantor* was wrongly decided. (234 C.A.3d 1682.) "Because the mentally infirm, incompetent or retarded range from those whose disability is not immediately evident to those requiring constant care, we leave it to the Legislature, guided by qualified professionals, to determine whether this large and diversified group is to be treated similarly to minors for purposes of" the exclusion under B. & P.C. 25602.1. (234 C.A.3d 1682.)

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ff. Entrusting Vehicle to Intoxicated Driver.

6 *Witkin Sum. Cal. Law Torts* § 1075

[§ 1075] Entrusting Vehicle to Intoxicated Driver.

In *Blake v. Moore* (1984) 162 C.A.3d 700, 208 C.R. 703, plaintiff and defendant, friends who had driven to Bakersfield, decided to go to Las Vegas in defendant's car with plaintiff driving. Each had consumed liquor in Bakersfield and both continued drinking in the vehicle. Plaintiff drove at an excessive speed, lost control of the car, and was injured in a crash. He brought this action on the theory of negligent entrustment (*infra*, §1222), alleging that he was obviously intoxicated at the time that defendant gave him the keys to the car. The trial judge granted summary judgment for defendant. *Held*, reversed.

(a) Although the statute makes consumption rather than furnishing the proximate cause, in this case, more than liquor was supplied. "[T]he immunity for the supplier of alcoholic beverages protects only against the risks directly flowing from the supply of the liquor. It does not provide immunity for the entrustment of the car. Therefore, two concurrent causes were at work when plaintiff lost control of the vehicle." (162 C.A.3d 702.)

(b) Plaintiff, however, will face a practical difficulty if he is unable to excuse his voluntary intoxication. A comparative fault trial should result in a weighing of defendant's fault in entrusting his car to plaintiff with knowledge of the intoxication, and the fault of plaintiff in drinking and then driving. (162 C.A.3d 707.) (See *Knighten v. Sam's Parking Valet* (1988) 206 C.A.3d 69, 75, 253 C.R. 365, *supra*, §1040 [no negligent entrustment when bailee returns car to its owner].)

West's Key Number Digest, Negligence k.351 et seq.

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gg. Failure To Prevent Driving.

6 *Witkin Sum. Cal. Law Torts* § 1076

[§ 1076] Failure To Prevent Driving.

In *De Bolt v. Kragen Auto Supply* (1986) 182 C.A.3d 269, 227 C.R. 258, a wrongful death action, the complaint alleged the following: Defendant conducted a beach party for its employees, and an employee invited C, a minor, to attend; defendant served liquor to C, she became intoxicated and disorderly, and defendant asked her to leave; defendant knew she intended to drive her car, but did not offer any safer alternative (e.g., taxi, or call to police or parents); C drove, and struck a motorcycle from behind, killing the driver and passenger. *Held*, judgment for defendant on demurrer affirmed.

(a) Plaintiffs contended that they had stated a cause of action sounding in general negligence, based not on selling or furnishing liquor but rather on allowing C to drive in a condition that created an unreasonable risk of harm to third persons. (182 C.A.3d 273.) They also contended that defendant was guilty of the affirmative act of forcing C to leave, and that therefore no special relationship was needed for imposition of liability. (182 C.A.3d 274.) But the immunity cannot be avoided by alleging the wrong to be forcing a person to leave or failing to provide safe transportation. Under the statute the *consumption of the beverage* is the proximate cause of the injuries inflicted by an intoxicated person. (182 C.A.3d 274, citing *Strang v. Cabrol* (1984) 37 C.3d 720, 209 C.R. 347, 691 P.2d 1013, *supra*, §1073.) "If we found liability possible here, soon complaints would be easily couched in language apart from furnishing or selling liquor. Plaintiffs would claim liability for *inviting* a person to a party where drinks are served knowing he/she might become intoxicated, failing to keep someone from driving ... , or any number of possibilities." (182 C.A.3d 275.)

(b) No other legal theory supports the complaint. (1) The exception for furnishing liquor to a person unable to resist its consumption in *Cantor v. Anderson* (1981) 126 C.A.3d 124, 178 C.R. 540, *supra*, §1074, is inapplicable, for no such facts are alleged. (182 C.A.3d 275.) (2) The theory of employer's liability for serving alcohol to employees at office parties does not apply because C was only a guest and not defendant's employee. (182 C.A.3d 276.)

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c. Statutory Duty.

6 *Witkin Sum. Cal. Law Torts* § 1077

[§ 1077] Statutory Duty.

An affirmative duty may arise by statute.

(1) *Duty of Driver To Render Aid*. Statutes commonly require the driver of a vehicle involved in an accident to stop and render assistance to an injured person. (See *Veh.C. 20001* et seq.; 80 A.L.R.2d 299 [violation of statute requiring one involved in accident to render aid]; 36 A.L.R.4th 907 [amnesty for hit-and-run driver who files accident report within statutorily specified time]; 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §249 et seq.) Under such a statute, it is immaterial whether the driver is at fault or the injured person is free from contributory negligence; the liability arises not from any act causing the injury, but from an independent duty to render aid to one whose helpless condition is or should be known to the driver. (See *Brooks v. E. J. Willig Truck Trans. Co.* (1953) 40 C.2d 669, 678, 255 P.2d 802; *Summers v. Dominguez* (1938) 29 C.A.2d 308, 312, 84 P.2d 237; *Rest.2d, Torts* §322.)

(2) *Duty To Seek Medical Care for Child*. In *Quigley v. First Church of Christ, Scientist* (1998) 65 C.A.4th 1027, 76 C.R.2d 792, a 12-year-old boy in the custody of plaintiff's ex-husband died of juvenile diabetes after being treated by Christian Science healers (see supra, §1042). In addition to suing the Christian Science church and various healers, plaintiff sued decedent's grandmother who had some custody of decedent on the 3 days before he died and who played some role in selecting the healers. *Held*, summary judgment for defendant affirmed.

(a) Defendant was accused of violating P.C. 273a (child abuse). (See 1 *Cal. Crim. Law* (3d), *Crimes Against the Person*, §188.) Although the statute refers to "anyone," *People v. Heitzman* (1994) 9 C.4th 189, 37 C.R.2d 236, 886 P.2d 1229, 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §170, held that a duty of care can be imposed only on a person with actual custody and control over a dependent or on a person with the legal duty to control the person with custody or control. (65 C.A.4th 1038.)

(b) Here, plaintiff contended that in caring for the decedent during the week of his death and participating in his care on the day of his death defendant shared joint custody of the decedent during the critical hours before he died. However, the evidence showed nothing more than that defendant acted as a baby-sitter, with the consent of the decedent's father, during the week before the death, when it was undisputed that the decedent did not appear to be

seriously ill. Agreeing to look after a child, on and off, for period of a few days, does not transform the caretaker into a de facto parent, with legal rights and responsibilities coequal to the actual parent. (65 C.A.4th 1038.)

(c) In applying the factors set forth in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, infra, §1086, to determine whether defendant, as a baby-sitter, had a duty to seek medical care for a child who did not appear to be seriously ill and whose parent had elected not to do so, it should be remembered that imposing a duty of care on baby-sitters would encourage them to protect themselves from liability whenever the child cared for complained of a minor illness, especially because there are situations, as in the present case, when summoning medical care might save the child's life. Moreover, baby-sitters, as temporary caregivers, generally do not have as much information as the parents about a child's day-to-day needs and are thus handicapped in evaluating the child's health care requirements. And finally, imposing on baby-sitters a duty equal to that of the parents would encourage conflict and would potentially undermine parental authority in opposition to the legislative policy of favoring primacy of parental responsibilities in the health care area. (65 C.A.4th 1040.)

(3) *Duty of Dog Owner To Render Aid for Bite.* California's dog-bite statute imposes liability for damages on the dog's owner to a person bitten by the dog. (C.C. 3342, infra, §§1408, 1409.) After a person has been bitten, the owner has an affirmative duty "to take such reasonable steps as are necessary to remove any danger presented to other persons from bites by the animal." (C.C. 3342.5(a).)

If the dog has bitten a person on at least two separate occasions, or on one occasion if the dog was trained to fight, attack, or kill, and the bite caused substantial physical injury, any person, including the district attorney or city attorney, may bring an action against the owner, to determine whether the conditions (of treatment or confinement) or other circumstances have so changed as to remove the danger. Venue is in the county where a bite occurred. The court, after a hearing, may make an appropriate order "including, but not limited to, the removal of the animal from the area or its destruction if necessary." (C.C. 3342.5(b), (c).)

No action may be brought under the two-bite provision for a bite inflicted on a trespasser, or for a bite by a dog performing military or police work. (C.C. 3342.5(d).)

(4) *Duty of Automobile Dealer To Give Notice of Insurance.* Veh.C. 5604 requires a dealer transferring a motor vehicle to notify the buyer if the required insurance policy does not cover public liability of the operator or owner. In *Dana v. Sutton Motor Sales* (1961) 56 C.2d 284, 14 C.R. 649, 363 P.2d 881, the court held that this statute imposed a duty, for violation of which a tort action could be maintained against the dealer. "[T]he Legislature has, from the experience of the community, formulated a standard of conduct for automobile dealers who procure insurance for their customers, and prohibited conduct by them which is likely to cause harm. Defendants failed to comply with the formulated standard, which was an appropriate measure for their conduct, and in the absence of legal excuses defendants would therefore be guilty of negligence." (56 C.2d 287.)

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d. Contractual Duty.

6 *Witkin Sum. Cal. Law Torts* § 1078

[§ 1078] Contractual Duty.

A duty may arise out of a contract, and negligent performance may be a tort as well as a breach of contract. (See *Eads v. Marks* (1952) 39 C.2d 807, 810, 249 P.2d 257; *North Amer. Chemical Co. v. Superior Court* (1997) 59 C.A.4th 764, 773, 69 C.R.2d 466 [packaging and shipping contract imposed duty of reasonable care, breach of which supported negligence action by shipping party]; *Rest.2d, Torts* §323; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §110 et seq.; 27 *So. Cal. L. Rev.* 216; supra, §2; 3 *Cal. Proc.* (4th), *Actions*, §141 et seq.; on duty of lessor arising from covenant to repair, see 12 *Summary* (10th), *Real Property*, §640.)

The early cases laid great stress on the *privity* requirement, and denied liability for negligence of the promisor where the plaintiff was neither the promisee nor an express third party beneficiary. But the privity doctrine was later subjected to exceptions; e.g., the manufacturer's duty (infra, §1168) and the building contractor's duty (infra, §1160). And a progressive opinion of the California Supreme Court virtually abolishes the limitation and recognizes a broad area of liability to persons intended to be benefited by the performance. (See infra, §1179; and see also *Rest.2d, Torts* §324A; *FNS Mortg. Service Corp. v. Pacific General Group* (1994) 24 C.A.4th 1564, 1575, 1576, 29 C.R.2d 916 [following *Rest.2d, Torts* §324A; nonprofit organization inspecting pipe manufacturers and delisting noncomplying manufacturers had duty to consumers to exercise reasonable care in performing these undertakings].)

West's Key Number Digest, Negligence k.219

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Tort as well as breach of contract: *Cross-Reference:* 3 *Cal. Proc.* (5th), *Actions*, §146 et seq.



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2. Exceptions: Affirmative Duty Without Relationship.

e. Active Force Under Defendant's Control.

6 *Witkin Sum. Cal. Law Torts* § 1079

[§ 1079] Active Force Under Defendant's Control.

The general rule that there is no affirmative duty in the absence of a special relationship (*supra*, §1038 et seq.) does not apply where there is some active force under the defendant's control. The defendant is considered to be directing the force. (See *Rest.2d, Torts* §302; 3 Harper, James & Gray 2d §18.6.) Thus, where a defendant furnishes gas or steam to buildings, and is notified of a leaking pipe and the possible dangers from it, a defendant who fails to make reasonable efforts to shut off the flow is negligent, regardless of the fact that the defective pipes are not owned by the defendant and he or she has no obligation to maintain or repair them. (*Gross v. Wright & Callender Bldg. Co. (1931) 116 C.A. 480, 484, 2 P.2d 857; supra*, §922.)

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See 3 Harper, James & Gray 3d §18.6.



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2. Exceptions: Affirmative Duty Without Relationship.

f. Creation of Peril.

6 Witkin Sum. Cal. Law Torts § 1080

[§ 1080] Creation of Peril.

In *Bastian v. San Luis Obispo* (1988) 199 C.A.3d 520, 245 C.R. 78, a negligence action against a county and its deputy sheriff, plaintiff newspaper photographer alleged that defendant deputy placed an empty vodka bottle alongside the body of a driver who was killed in an automobile accident; that shortly thereafter plaintiff photographed the scene in defendant's presence without receiving a warning that it was contrived; and that the decedent's family, having become suspicious about the conspicuous position of the vodka bottle (which remarkably was still intact after the accident), accused plaintiff and the newspaper of staging the photograph, with the result that plaintiff's relationship with his employer deteriorated to the point of his being fired and suffering injury to his reputation. The trial judge sustained a demurrer to the complaint. *Held*, reversed. "One who creates a foreseeable danger not readily discoverable by the endangered persons has the duty to warn them of the potential peril. ... In this situation, a special relationship is not required to impose the duty." (199 C.A.3d 530.) Hence, because defendant created a peril by placing the vodka bottle alongside the body, he had a duty to warn plaintiff that the accident scene was contrived. And this duty existed irrespective of whether defendant was a law enforcement officer. (199 C.A.3d 529.)

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2. Exceptions: Affirmative Duty Without Relationship.

g. Interference With Attempt To Aid.

6 *Witkin Sum. Cal. Law Torts* § 1081

[§ 1081] Interference With Attempt To Aid.

In *Soldano v. O'Daniels* (1983) 141 C.A.3d 443, 190 C.R. 310, a patron of Happy Jack's Saloon went across the street to the Circle Inn, informed the bartender that a man had been threatened at Happy Jack's, and asked the bartender either to call the police or allow him to make the call. The bartender refused both requests. On the same day, plaintiff's father was shot and killed by V in Happy Jack's saloon, and plaintiff brought this action for wrongful death against defendant owner of the Circle Inn. *Held*, summary judgment for defendant reversed.

(a) There was no special relationship between defendant and the deceased, or between defendant and the patron who wished to summon aid; but the special circumstances of this case call for a reexamination of the common law rule of nonliability for nonfeasance (*supra*, §1038 et seq.). Official organizations have emphasized that citizen assistance is vital to crime control, and statutes such as *Govt.C. 13970* recognize that rescuing a person in danger benefits the entire public. (141 C.A.3d 449, and footnote 7.) The Legislature has in several statutes also recognized the importance of the telephone system in reporting crime and in summoning emergency aid. (141 C.A.3d 450.) These statutes suggest that current societal conditions call for a new approach to legal duty in cases such as this. (141 C.A.3d 450.)

(b) Applying the factors set forth in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086: "(1) The harm to the decedent was abundantly foreseeable; it was imminent. ... The employee was a bartender. As such he knew it is foreseeable that some people who drink alcohol in the milieu of a bar setting are prone to violence. (2) The certainty of decedent's injury is undisputed. (3) There is arguably a close connection between the employee's conduct and the injury: the patron wanted to use the phone to summon the police to intervene. The employee's refusal to allow the use of the phone prevented this anticipated intervention. ... (4) The employee's conduct displayed a disregard for human life that can be characterized as morally wrong: he was callously indifferent to the possibility that [decedent] would die as the result of his refusal to allow a person to use the telephone. Under the circumstances before us the bartender's burden was minimal and exposed him to no risk: all he had to do was allow the use of the telephone. ... (5) Finding a duty in these circumstances would promote a policy of preventing future harm. ... (6) [T]he liability which is sought to be imposed here is that of employee negligence, which is covered by many insurance policies. (7) The extent of the burden on the defendant was minimal." (141 C.A.3d 451.)

(c) *Rest.2d, Torts §427* states that one who knows or has reason to know that a third person is giving or is ready to give aid to another necessary to prevent physical harm to him, and "negligently prevents or disables the third person from giving such aid," is liable for the harm. The facts of this case "come very nearly" within this section (*141 C.A.3d 452*); and, to the extent that this holding expands the section's reach, it represents logical and needed growth of the common law. (*141 C.A.3d 453, 455.*) (See 41 Proof of Facts 2d 305 [tortious refusal to allow use of telephone]; *15 Pacific L. J. 1261, 1273*; *37 A.L.R.4th 1196* [uninvolved person's liability for harm caused by refusal to phone, or to allow others to phone, for help].)

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B. Landowners and Possessors.

1. In General.

a. Nature of Liability.

6 *Witkin Sum. Cal. Law Torts* § 1082

[§ 1082] Nature of Liability.

A landowner or possessor (see *infra*, §§1083, 1084) owes certain affirmative duties of care as to conditions or activities on the land, to persons who come on the land (see *infra*, §1085 et seq.), and sometimes to persons outside the land (see *infra*, §§1088, 1089). (See *Rest.2d, Torts* §328E et seq.; 5 Harper, James & Gray 2d §27.1 et seq.; Dobbs, *The Law of Torts* §231 et seq.; C.E.B., *Tort Guide* 3d, Chap. 10; Cal. Civil Practice, 1 Torts, Premises Liability, Chap. 16; California Premises Liability, §1:1 et seq.; 41 *San Diego L. Rev.* 1211 [proposal of strict enterprise liability for injuries from use of premises]; 62, 62A *Am.Jur.2d* (2005 ed.) *Premises Liability* §1 et seq.; 40 Proof of Facts 3d 111 [negligent operation of gymnasium, health club, or similar facility]; 41 Proof of Facts 3d 109 [governmental liability for failure to maintain trees near public way]; 45 Proof of Facts 3d 115 [liability of ski area operator for skiing accident]; 28 *A.L.R.5th* 603 [liability of excavator on private property for injury to public utility cables]; 44 *A.L.R.5th* 525 [liability of owner or operator of business premises for injuries from electrically operated door]; 49 *A.L.R.5th* 659 [liability of owner of wire, structure, or pole struck by aircraft]; 62 *A.L.R.5th* 475 [landlord's liability for injuries occasioned by swimming pool maintained for tenants]; 64 *A.L.R.5th* 1 [owner's liability for injury or death from residential swimming pool accident].)

The nature of the duty owed must have a relationship to the degree of control conferred by the scope of the ownership interest. Thus, in *Cody F. v. Falletti* (2001) 92 C.A.4th 1232, 1240, 112 C.R.2d 593, vicious dogs escaped and attacked plaintiff on an access road. Defendant easement owner, who possessed a right only to pass over the road, owed no duty to plaintiff. (92 C.A.4th 1240, distinguishing *Davert v. Larson* (1985) 163 C.A.3d 407, 209 C.R. 445, *supra*, §40.)

The liability is to *persons*; there is no duty to keep premises safe for trespassing *animals*. In *Lenk v. Spezia* (1949) 95 C.A.2d 296, 213 P.2d 47, defendant notified plaintiff of his intention to dust a tomato crop with arsenic from an airplane. Plaintiff, who nevertheless allowed his bees to remain at large, was denied recovery for bees poisoned. (95 C.A.2d 303.) (See P.C. 596 [no liability for killing with poisoned bait if signs are posted]; 23 So. Cal. L. Rev. 414; 12 *A.L.R.3d* 1103 [injury to trespassing stock from poisonous substances].)

In some cases, the defect may be so trivial or insignificant that, as a matter of law, the landowner has no duty of

care. This principle, which recognizes that land need not be maintained in an absolutely perfect condition, has been referred to as the "trivial defect defense." (See *Caloroso v. Hathaway* (2004) 122 C.A.4th 922, 928, 19 C.R.3d 254 [crack in landowner's walkway of less than one-half inch elevation was trivial as matter of law].) However, defects that are ordinarily considered to be trivial may become dangerous in view of the surrounding conditions. In those cases, the usual duty of care applies. (See *Johnson v. Palo Alto* (1962) 199 C.A.2d 148, 150, 18 C.R. 484 [shadow cast by overhead trees].)

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SUPPLEMENT: [This section is current through the latest supplement]

See 5 Harper, James & Gray 3d §27.1 et seq.; 39 *McGeorge L. Rev.* 131 [policy oscillation in law of premises liability]. *Trivial defect doctrine:* See *Kasparian v. AvalonBay Communities* (2007) 156 C.A.4th 11, 26, 66 C.R.3d 885 [conflicting evidence whether drain was embedded in walkway of apartment complex in manner required by industry guidelines presented genuine issue of material fact whether drain was "trivial defect" and precluded summary judgment for landlord in premises liability action by tenant who tripped over drain; trivial defect doctrine is not affirmative defense but rather aspect of duty that plaintiff must plead and prove].



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B. Landowners and Possessors.

1. In General.

b. Owner or Possessor.

1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1083

[§ 1083] In General.

(1) *Basic Rule.* The liability is imposed on an owner or possessor. "The important thing in the law of torts is the possession, and not whether it is or is not rightful as between the possessor and some third person. Thus a disseisor is a possessor from the moment that his occupation begins, although as between the disseisor and the true owner he is not legally entitled to possession until his adverse possession has ripened through lapse of ownership." (*Rest.2d*, §328E, Comment a; see 5 Harper, James & Gray 2d §27.2.)

(2) *Owner.* An owner may be an "invitor" though not in actual occupancy. (*Green v. Menveg Properties* (1954) 126 C.A.2d 1, 9, 271 P.2d 544; see *Jackson v. Pacific Gas & Elec. Co.* (2001) 94 C.A.4th 1110, 1115, 114 C.R.2d 831 [express permission to enter property must be given by underlying fee owner; easement owner is incapable of giving this permission].) (On general rule of nonliability of owner of leased land, see *Rest.2d, Torts* §355 et seq.; on exceptions under *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *infra*, §1086, see 12 *Summary* (10th), *Real Property*, §§639, 644); on liability of holder of bare legal title, see *infra*, §1084.)

(3) *Occupier.* An occupier who is not an owner may be liable. (See *Fitch v. LeBeau* (1969) 1 C.A.3d 320, 324, 81 C.R. 722 [defendants living in mobilehome parked in trailer park and used as residence were governed by land occupier principles]; *Rest.2d, Torts* §328E [defining "possessor"]; 44 A.L.R.3d 943 [liability based on tenant's obligations under lease].)

(4) *Trespasser.* A trespasser may be a possessor subject to the rule. In *Yee Chuck v. Board of Trustees of Leland Stanford Junior University* (1960) 179 C.A.2d 405, 3 C.R. 825, defendant trustees of Stanford University leased land to flower growers. Then, without terminating the leases, they engaged defendant independent contractor to make soil tests. The contractor dug a test hole, negligently left it without a railing or warning sign, and plaintiff, an employee of a sublessee, fell into the hole and was injured. *Held*, judgment for plaintiff affirmed. Defendant trustees had no right to be on the land without permission of the lessee; hence, their status was that of trespassers who had taken possession (as distinguished from casual trespassers). And a trespasser who takes possession is, in respect of his or her rights and liabilities as to third persons, an owner. Hence, they were liable to plaintiff invitee. (179 C.A.2d 410.)

(5) *No Liability Without Ownership or Control*. If, however, there is neither ownership nor control of the premises, there can be no liability. (*Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 134, 211 C.R. 356, 695 P.2d 653; *Preston v. Goldman* (1986) 42 C.3d 108, 123, 227 C.R. 817, 720 P.2d 476, *infra*, §1159; *Gray v. America West Airlines* (1989) 209 C.A.3d 76, 84, 256 C.R. 877.)

In *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 C.A.3d 1142, 1146, 214 C.R. 405, defendant leased premises in an industrial park, and decedent attended a business "mixer" there, hosted by defendant lessee and sponsored by defendant Chamber of Commerce. Defendant lessee had parking space for only a few cars, and decedent, like others, used additional space within the park. After leaving the mixer to return to her parked car, decedent was stabbed by an unknown assailant. Plaintiffs' theory was that defendants failed to provide a safe place for invitees to park their cars, and that lack of security and inadequate lighting in the other parking areas contributed to decedent's death. *Held*, summary judgments for defendants affirmed.

(a) There is no authority holding a landowner or possessor liable for injuries to an invitee from criminal activity occurring outside his or her premises. (169 C.A.3d 1146.)

(b) Defendants were under no duty to insure safe ingress and egress to the leased property. "The instant case cannot be distinguished from that of a movie theater showing the latest academy award winning movie, or a department store holding its annual clearance sale, neither of which is able to afford sufficient parking for the number of invitees seeking to enter the premises. We are aware of no obligation upon the movie theater or department store owner to provide additional lighting on the city streets or hire security guards to patrol those streets for the safety of its invitees. Nor can the instant situation be distinguished from that of a homeowner whose business guests must park on city streets because there is not sufficient parking on the premises. It is not legally incumbent upon the homeowner to provide additional lighting or hire security guards to escort his guests to their cars." (169 C.A.3d 1147.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Basic Rule*. See 5 Harper, James & Gray 3d §27.2.



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1. In General.

b. Owner or Possessor.

2. Holder of Bare Legal Title.

6 *Witkin Sum. Cal. Law Torts* § 1084

[§ 1084] Holder of Bare Legal Title.

The liability of an active trustee of an express trust is clear. (See *Johnston v. Long* (1947) 30 C.2d 54, 61, 181 P.2d 645, supra, §31; 21 So. Cal. L. Rev. 199.) But where the trustee merely holds the legal title and has no duties in connection with the land, a difficult problem is presented.

In *Richman v. Green* (1956) 143 C.A.2d 470, 299 P.2d 890, an elevator fell and injured plaintiff. *Held*, F, the beneficial owner, was liable, but G, who took title to the building as an accommodation and became a resulting trustee, was not. (143 C.A.2d 472.)

Richman was distinguished in *Bianchi v. Western Title Ins. & Guaranty Co.* (1970) 14 C.A.3d 235, 96 C.R. 750. A group of 13 owners of shares in a building made an agreement with defendant, under which the latter held title, but was exempted from liability for any act relating to the property. Plaintiff, a maintenance man, was injured as a result of allegedly unsafe condition of the building. He sued defendant and a nonsuit was granted. *Held*, judgment of dismissal reversed. The opinion left open the general question whether the holder of a bare legal title is immune; however, the facts (14 C.A.3d 240) showed a greater involvement by defendant:

- (a) Defendant applied for and obtained a permit in its own name to operate elevators in the building.
- (b) Inspection of the elevators was done by its insurance company, and the engineer's report on the condition of the property was under defendant's name.
- (c) After a prior claim of injury, the insurance company's agent described defendant as the assured in his "notice of loss."
- (d) Defendant and all the beneficial owners were insured under the same policy with the same company, and defendant gave the company control over defense of the litigation.
- (e) If the "syndicate" did not maintain the premises or pay insurance premiums, defendant could require corrective

action or withdraw.

SUPPLEMENT: [This section is current through the latest supplement]



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B. Landowners and Possessors.

1. In General.

c. Duty to Person Coming on Land.

1. Traditional Status Classification.

6 *Witkin Sum. Cal. Law Torts* § 1085

[§ 1085] Traditional Status Classification.

A distinction has traditionally been made as to the duties owed to three classes of persons: trespassers (*infra*, §1094), licensees (*infra*, §1100), and invitees (*infra*, §1113). (See generally *Oettinger v. Stewart* (1944) 24 C.2d 133, 136, 148 P.2d 19; *Rowland v. Christian* (1968) 69 C.2d 108, 113, 70 C.R. 97, 443 P.2d 561, *infra*, §1086; 5 Harper, James & Gray 2d §27.1; *Rest.2d, Torts* §§333 et seq., 340 et seq.; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §68 et seq.; 13 *Cal. L. Rev.* 72; 22 *A.L.R.4th* 294 [modern status of rules conditioning landowner's liability on injured party's status as invitee, licensee, or trespasser].)

Although the great majority of American cases still continue to use the invitee-licensee-trespasser approach, it has been criticized by writers and courts as unsound in theory and undesirable in practice. "Such an approach requires a court to first determine the precise status of the visitor, which is sometimes a most difficult task, and then to determine from the cases whether the owner has violated any duty owed to a member of such a class. Such an approach is unrealistic, arbitrary, and inelastic. The point where the duties toward members of each of the classes begins or ends, or where it should begin or end, or where the duty not to act becomes supplemented by the duty to act, is almost impossible of perception. It is no wonder that exceedingly fine distinctions have been developed so that the law is most confused in this field." (*Fernandez v. Consolidated Fisheries* (1950) 98 C.A.2d 91, 96, 219 P.2d 73; see *Boucher v. American Bridge Co.* (1950) 95 C.A.2d 659, 667, 213 P.2d 537 [comparing California cases and Restatement]; *Carey v. Seeger Elec. Co.* (1964) 225 C.A.2d 410, 420, 37 C.R. 332 [quoting *Fernandez*]; 5 Harper, James & Gray 2d §27.1; for California rule, see *infra*, §1086.)

West's Key Number Digest, Negligence k.1036

SUPPLEMENT: [This section is current through the latest supplement]

Traditional distinction: See 5 Harper, James & Gray 3d §27.1; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §68 et seq.

Criticism: See 5 Harper, James & Gray 3d §27.1.



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1. In General.

c. Duty to Person Coming on Land.

2. Repudiation of Traditional Classification.

6 *Witkin Sum. Cal. Law Torts* § 1086

[§ 1086] Repudiation of Traditional Classification.

In *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, the California Supreme Court repudiated the trespasser-licensee-invitee classification and substituted the basic approach of foreseeability of injury to others. Plaintiff was the social guest of defendant in her apartment. The knob of the cold water faucet on the bathroom basin had been cracked, and, one month before the accident, defendant had asked her lessors to replace it. Plaintiff, using the bathroom, received severe injuries to his hand when the faucet broke. The trial judge gave summary judgment for defendant, following the general rule that a social guest is only a licensee, to whom the possessor owes no duty to warn of a dangerous condition. (See *infra*, §1101.) *Held*, reversed.

(a) *General principle of liability for negligence.* Under C.C. 1714, all persons are required to use ordinary care to prevent injury to others, unless an exception is recognized for reasons of public policy, in accordance with broad criteria newly declared. (69 C.2d 111.) (See *supra*, §833.)

(b) *Traditional licensee rule and exceptions.* The rule that a licensee takes the premises as he or she finds them has lately been subjected to two chief exceptions: (1) Where there is active negligence, and (2) where the known dangerous condition is a trap. (See *infra*, §1101.) Cases on both are indicative of "the subtleties and confusion" resulting from application of the common law principles and from attempted definitions of licensee and invitee. "The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards 'imposing on owners and occupiers a single duty of reasonable care in all the circumstances.' " (69 C.2d 116.)

(c) *Classifications repudiated.* The immunities and the exceptions to the immunities often do not reflect the major facts that should govern liability; some courts have rejected the common law distinctions and have approached the issue on the basis of ordinary principles of negligence; and continued adherence to the classifications can only lead to injustice and further fictions and confusion. "We decline to follow and perpetuate such rigid classifications. The proper test to be applied to the liability of the possessor of land in accordance with *section 1714 of the Civil Code* is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative." (69 C.2d 119.)

(d) *New rule applied.* Because the case was presented on a motion for summary judgment, it was assumed that defendant had knowledge of the dangerous condition, that the defect was not obvious, that plaintiff was about to come in contact with it, and that defendant neither remedied the condition nor warned plaintiff of it. "Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it." (69 C.2d 119.)

(e) *Alternate theories.* The same result could have been reached by applying the active negligence or trap exceptions, or by expanding the concept of invitee to include any person invited. (69 C.2d 120.)

Two justices dissented. (See Dobbs, *The Law of Torts* §237; 58 Cal. L. Rev. 311; 9 Santa Clara Lawyer 179; 22 A.L.R.4th 294 [modern status of rules conditioning landowner's liability on injured party's status as invitee, licensee, or trespasser].)

The approach of *Rowland v. Christian* has been applied in many later cases. The following are illustrative of decisions on liability of landowners and possessors:

(1) *Licensee.* (See *Carlson v. Ross* (1969) 271 C.A.2d 29, 30, 76 C.R. 209, *infra*, §1102; *Fitch v. LeBeau* (1969) 1 C.A.3d 320, 81 C.R. 722, *infra*, §1102.)

(2) *Trespasser on real property.* (See *Beard v. Atchison, Topeka & Santa Fe Ry. Co.* (1970) 4 C.A.3d 129, 84 C.R. 449, *infra*, §1097; *Cappa v. Oscar C. Holmes* (1972) 25 C.A.3d 978, 983, 102 C.R. 207, *infra*, §1096; *Smith v. American Motor Lodge* (1974) 39 C.A.3d 1, 7, 113 C.R. 771, *infra*, §1195; *Lucas v. Pollock* (1992) 7 C.A.4th 668, 675, 8 C.R.2d 918, *infra*, §1096.)

(3) *Trespasser on personal property.* (See *Mark v. Pacific Gas & Elec. Co.* (1972) 7 C.3d 170, 176, 101 C.R. 908, 496 P.2d 1276, *infra*, §1096.)

(4) *Invitee.* (See *Beauchamp v. Los Gatos Golf Course* (1969) 273 C.A.2d 20, 25, 77 C.R. 914, *infra*, §§1118, 1127; *Seaber v. Hotel Del Coronado* (1991) 1 C.A.4th 481, 493, 2 C.R.2d 405, *infra*, §1090; *Hamilton v. Gage Bowl* (1992) 6 C.A.4th 1706, 1713, 8 C.R.2d 819, *infra*, §1090.)

(5) *Liability of landlord.* (See *Brennan v. Cockrell Inv.* (1973) 35 C.A.3d 796, 111 C.R. 122; *Uccello v. Laudenslayer* (1975) 44 C.A.3d 504, 513, 118 C.R. 741; 12 Summary (10th), *Real Property*, §644.)

(6) *Liability of owner for harm caused by natural conditions.* (See *Sprecher v. Adamson Cos.* (1981) 30 C.3d 358, 368, 178 C.R. 783, 636 P.2d 1121, *infra*, §1089; *Scott v. Chevron U.S.A.* (1992) 5 C.A.4th 510, 516, 6 C.R.2d 810, *infra*, §1088.)

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SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

c. Duty to Person Coming on Land.

3. Instructions.

6 *Witkin Sum. Cal. Law Torts* § 1087

[§ 1087] Instructions.

Following the decision in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, the BAJI Committee eliminated its previous instructions defining trespasser, licensee, business visitor, public invitee, and social guest, and substituted one general instruction on "Duty of Owner, Occupant or Lessor of Premises." BAJI No. 8.01 provides as follows:

"The [owner] [occupant] [lessor] of premises is under a duty to exercise ordinary care in the [use] [maintenance] [or] [management] of such premises in order to avoid exposing [persons] [or] [other property] to an unreasonable risk of harm. [Such duty exists whether the risk of harm is caused by the natural condition of such premises or by an artificial condition created on such premises.] [Such duty exists even when the unreasonable risk of harm is caused by the criminal conduct of a third person which, in the exercise of reasonable care, is or should be foreseeable [or where the [owner] [occupant] [lessor] of the premises maintains the property in such a way as to increase the risk of criminal activity].] [Such duty is owed to persons on the premises and to persons off the premises.] A failure to fulfill this duty is negligence."

"[Ordinary care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.]"

"[This duty of care is owed only to such persons as the [owner] [occupant] [lessor], as a reasonably prudent person under the same or similar circumstances should have foreseen would be exposed to such a risk of harm.]"

"[You shall determine whether a person under the same or similar circumstances as the defendant ____ should have foreseen that the plaintiff ____ would be exposed to an unreasonable risk of harm. If you so find, you are instructed that the defendant ____ owed plaintiff ____ such a duty of care and you should determine if the defendant exercised such care, considering all the surrounding circumstances shown by the evidence.]"

Related BAJI instructions include the following:

No. 8.00. Negligence of Owner, Occupant, or Lessor--Essential Elements

No. 8.02. Unreasonable Risk of Harm--Defined

No. 8.03. Unreasonable Risk of Harm Defined--Landlord-Tenant

No. 8.05. Store Owner's Duty of Care

No. 8.23. Duty of Care of Proprietor of Business

No. 16.02. Form of Special Verdict--Owner's, Occupant's or Lessor's, Liability-

The following CACI instructions relate to premises liability:

No. 1000. Essential Factual Elements

No. 1001. Basic Duty of Care

No. 1002. Extent of Control Over Premises Area

No. 1003. Unsafe Concealed Conditions

No. 1004. Obviously Unsafe Conditions

No. 1005. Business Proprietor's Liability for the Negligent/Intentional/Criminal Conduct of Others

No. 1006. Landlord's Duty

No. 1007. Sidewalk Abutting Property

No. 1008. Liability for Adjacent Altered Sidewalk--Essential Factual Elements

No. 1009. Liability to Employees of Independent Contractors for Dangerous Conditions

No. 1010. Recreational Immunity (C.C. 846)

No. 1011. Constructive Notice of Store Owner Regarding Dangerous Conditions

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SUPPLEMENT: [This section is current through the latest supplement]

BAJI, No. 8.01 was revised in 2008 without substantive change. *CACI instructions related to premises liability:* CACI, No. 1009 was repealed in 2007 and replaced by CACI, No. 1009A [Liability to Employees of Independent Contractors for Unsafe Concealed Conditions] and CACI, No. 1009B [Liability to Employees of Independent Contractors for Unsafe Conditions--Retained Control or Defective Equipment]. In 2008, the title of CACI, No. 1003 was changed to "Unsafe Conditions" and the title of CACI, No. 1011 was changed to "Constructive Notice Regarding Dangerous Conditions on Property."



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1. In General.

d. Duty to Person Outside Land.

1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1088

[§ 1088] In General.

(1) *General Rule.* Normally, the duties of landowners and possessors do not extend to persons outside the land, e.g., on adjacent land or on the highway. (*Scott v. Chevron U.S.A. (1992) 5 C.A.4th 510, 516, 6 C.R.2d 810* [landowner who erected fixed object near highway had no duty to motorists injured when their car was hit by drunk driver who had hit guardrail erected near the object]; see *Medina v. Hillshore Partners (1995) 40 C.A.4th 477, 481, 46 C.R.2d 871*, *infra*, §1152, quoting the text; *Rest.2d, Torts* §363 *et seq.*; 25 Proof of Facts 3d 473 [dioxin contamination]; 37 Proof of Facts 3d 439 [injury from environmental condition on neighboring land]; 57 Am.Jur. Trials 395 [toxic tort litigation]; 8 A.L.R.5th 177 [liability for injury or death from collision with guy wire].)

(2) *Exceptions.* There are some exceptions:

(a) *Dangerous Activity.* The owner or possessor is under the usual liability to any persons, including those outside the land, where his or her dangerous activities cause harm. (*Rest.2d, Torts* §371.)

(b) *Artificial Condition or Dangerous Disrepair.* The owner or possessor is liable for creating or maintaining dangerous artificial conditions, or for permitting dangerous disrepair. (See *Gerberich v. Southern Calif. Edison Co. (1935) 5 C.2d 46, 51, 53 P.2d 948* [unmarked and unlighted power pole, located on dirt shoulder of highway]; *Alcaraz v. Vece (1997) 14 C.4th 1149, 1158 60 C.R.2d 448, 929 P.2d 1239*, *infra*, §1092 [landowner exercising control over adjacent city-owned property had duty to protect others from injury from city-owned meter box]; *Coole v. Haskins (1943) 57 C.A.2d 737, 741, 135 P.2d 176* [defendant restaurant keeper negligently allowed garbage to accumulate, attracting rats, which infested living quarters in adjoining premises and bit plaintiff tenants]; *Rest.2d, Torts* §364, 365; 1 U.S.F. L. Rev. 321 [duty to warn aircraft of presence of high structures]; 81 A.L.R.2d 897 [glass falling from window, door, or wall]; 97 A.L.R.2d 1431 [falling objects].)

(c) *Deceptive Strip Adjacent to Public Way.* Liability is incurred where the landowner paves or otherwise improves, maintains, or alters a strip of his or her own land next to the highway or street in such a manner as to deceive persons into thinking the strip is part of the public way. (*Barlow v. Los Angeles County Flood Control Dist. (1950) 96 C.A.2d*

979, 985, 216 P.2d 903; *Rest.2d, Torts* §367, and Special Note; see 19 A.L.R.2d 1053, 1075 [liability for injury on parking or strip between sidewalk and curb].) In *Barlow*, defendant constructed a drainage channel and a pavement similar to the street without a barrier or other protection. On a dark night, decedent walked on the pavement and fell into the channel. *Held*, following the Restatement rule, defendant was liable. (See *Hayashi v. Alameda County Flood Control & Water Conservation Dist.* (1959) 167 C.A.2d 584, 590, 334 P.2d 1048, 12 Summary (10th), *Real Property*, §970 [property damage from negligently maintained levee; following Restatement]; 44 A.L.R.3d 355 [defective condition of private road or driveway].)

(d) *Excavation or Condition Dangerous to Travelers*. A further ground of liability is the maintenance of an excavation or other dangerous artificial condition on the landowner's own land, but so near the highway as to involve an unreasonable risk to travelers who might be forced off the road by other traffic, or skid or slip while walking. (See *Carlton v. Pacific Coast Gasoline Co.* (1952) 110 C.A.2d 177, 184, 242 P.2d 391 [defendant lessee of land plowed it up to within 3 feet of paved area of highway]; *Rest.2d, Torts* §368.)

West's Key Number Digest, Negligence k.1071, 1125, 1150

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

Witkin Summary of California Law XI. NEGLIGENCE: AFFIRMATIVE DUTIES ARISING FROM SPECIAL RELATIONSHIPS

B. Landowners and Possessors.

1. In General.

d. Duty to Person Outside Land.

2. Natural Conditions.

6 *Witkin Sum. Cal. Law Torts* § 1089

[§ 1089] Natural Conditions.

The common law rule of nonliability for harm caused by natural conditions was abrogated in *Sprecher v. Adamson Cos.* (1981) 30 C.3d 358, 178 C.R. 783, 636 P.2d 1121. Defendant owned a 90-acre parcel of land in Malibu, California, which contained a landslide extending beyond its boundaries. The landslide, evident since the early 1900s, exhibited periodic cycles of activity and dormancy. It was a natural condition, not affected by any of defendant's activities on the 90-acre parcel. In 1978, heavy rains triggered a major movement of the slide, causing plaintiff's home to press against the home of his neighbor S. S sued plaintiff to enjoin the encroachment, and plaintiff filed a cross-complaint against defendant for damages to his home, alleging defendant's negligent failure to correct or control the landslide condition. *Held*, summary judgment for defendant reversed.

(a) *Common law rule.* The possessor of land is liable for harm caused by artificial conditions, but the common law gave an absolute immunity for harm caused by conditions considered natural in origin. "[N]o matter how great the harm threatened to his neighbor, or to one passing by, and no matter how small the effort needed to eliminate it, a possessor of land had no duty to remedy conditions that were natural in origin." (30 C.3d 362.)

(b) *Developing case law rejecting distinction.* In recent years, 13 states and the District of Columbia have begun to apply ordinary negligence principles in determining a possessor's liability for harm caused by a natural condition. (30 C.3d 364.) The cases all involved injuries caused by falling trees (30 C.3d 365), but the decisions do not merely create a specific exception to the general rule of nonliability. "Instead, the courts are moving toward jettisoning the common law rule in its entirety and replacing it with a single duty of reasonable care in the maintenance of property." (30 C.3d 365.) And the duty has not been imposed solely on possessors of land in urban and suburban areas; some cases extend it to rural areas. (30 C.3d 365.)

(c) *Modern Restatement Rule.* *Rest.2d, Torts* §840(2), recognizing liability for natural conditions of land, still limits the reach of the duty to persons traveling on the public streets and highways; but the Comment notes that at the time of formulation of the new rule, authority was insufficient to support a position on a duty to adjoining landowners. (30 C.3d 366.)

(d) *Effect of Rowland case.* The broad declaration in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, has resulted in the striking down of common law immunities that could not withstand critical scrutiny. (30 C.3d 363.) The theory that failure to prevent a natural condition from causing harm is mere nonfeasance is no longer tenable. Modern cases recognize that, after *Rowland*, a possessor of land has a duty to act affirmatively for the protection of individuals who come on the land, based on possession and the attendant right to control and manage the premises. (30 C.3d 368, 369, 370.)

(e) *Policy considerations.* Under the old rule, a possessor of land in California would owe a duty of care to protect trespassers, invitees, and licensees, but not neighbors, from harm threatened by a natural condition of the land. "It is difficult to see why this court should support a rule which would allow a trespasser to bring an action in negligence that would be denied a neighbor, where both were standing on either side of the possessor's boundary line and were both struck by a dead limb from his tree." (30 C.3d 370.)

(f) *New rule declared.* The erosion of the doctrinal underpinning of the rule of nonliability is evident from even a cursory review of the case law. Also evident is the lack of congruence between the old common law rule of nonliability and the relevant factors that should determine whether a duty exists. All this leads to but one conclusion: "The distinction between artificial and natural conditions should be rejected." (30 C.3d 371.) (See 30 C.3d 372, footnote 9, disapproving inconsistent language in prior cases, including *Coates v. Chimm* (1958) 51 C.2d 304, 308, 332 P.2d 289; *Potter v. Empress Theatre Co.* (1949) 91 C.A.2d 4, 12, 204 P.2d 120; *Wisher v. Fowler* (1970) 7 C.A.3d 225, 228, 86 C.R. 582; *Moeller v. Fleming* (1982) 136 C.A.3d 241, 245, 186 C.R. 24 [under *Sprecher*, liability could be imposed for allowing roots of tree on property to cause break in adjacent public sidewalk]; *Pultz v. Holgerson* (1986) 184 C.A.3d 1110, 1115, 229 C.R. 531 [following *Moeller*]; 41 Proof of Facts 3d 109 [governmental liability for failure to maintain trees near public way]; 16 *Loyola L.A. L. Rev.* 625 [Nonfeasance Immunity Slides by the California Supreme Court]; 54 A.L.R.2d 1195 [tree or limb overhanging street or highway]; 94 A.L.R.3d 1160 [tree or limb falling onto highway]; 100 A.L.R.3d 510 [tree or stump on land abutting highway]; 54 A.L.R.4th 530 [tree or limb falling onto adjoining property]; 66 A.L.R.4th 885 [vegetation obscuring view at railroad crossing]; 69 A.L.R.4th 1092 [vegetation obscuring view at highway intersection].)

In *Swann v. Olivier* (1994) 22 C.A.4th 1324, 28 C.R.2d 23, *Sprecher* was treated as applying an exception to the general rule precluding one from being held liable, as a landowner, for injuries that occur on property outside his or her ownership, possession, or control, and it was held that this exception did not apply to a person who was invited to a private beach, but who was injured while in public waters. (22 C.A.4th 1329, footnote 8.) Plaintiff was the friend of a guest at a party being given on the private beach by an acquaintance of two members of the association. Plaintiff sued the association for failing to warn him of the hazards in the surf that was slightly beyond the private beach. *Held*, summary judgment for the association affirmed.

(a) A corollary to the general rule is that the landowner has no duty to warn of dangers beyond his or her own property unless the landowner created those dangers. (22 C.A.4th 1329, 1330.) "In the present case ... any thought of 'control' over the area of injury is out of the question." (22 C.A.4th 1333.) Moreover, no recognized exception to the no-duty-to-warn rule applies, because defendant received no commercial benefit from plaintiff's use of the surf area, and it did not impose or create any palpable external effect on the area. (22 C.A.4th 1333.)

(b) In two cases where potential liability for injuries sustained in the surf was recognized--*Buchanan v. Newport Beach* (1975) 50 C.A.3d 221, 123 C.R. 338, and *Gonzales v. San Diego* (1982) 130 C.A.3d 882, 182 C.R. 73, supra, §254--the surf was publicly owned and the defendant was a public entity. Moreover, the holding in *Buchanan* was based on the special statutory obligation imposed on public entities by Govt.C. 835 (see supra, §258). Here, defendant is a private owner not subject to that statute. (22 C.A.4th 1334, 1335.) (See *Princess Hotels Int. v. Superior Court* (1995) 33 C.A.4th 645, 648, 39 C.R.2d 457 [hotel had no duty to warn patrons of tides and other dangers at adjacent beach; following *Swann*].)

Alcaraz v. Vece (1997) 14 C.4th 1149, 1162, 60 C.R.2d 448, 929 P.2d 1239, infra, §1092, disapproved *Swann* and

Princess Hotels Int. to the extent that they held that a landowner may be found liable for an injury on adjacent property only if he or she not only exercised control over that property, but also derived a commercial benefit from the portion of the property that was in a dangerous condition.

West's Key Number Digest, Negligence k.1071, 1125, 1150

SUPPLEMENT: [This section is current through the latest supplement]

See *Garcia v. Paramount Citrus Assn.* (2008) 164 C.A.4th 1448, 1459, 80 C.R.3d 512 [owner of private road did not owe duty of care to place warning sign on road alerting drivers to approaching intersection with public road, even though intersection was obscured by owner's trees from vantage point outside public right-of-way; burden of imposing asserted duty was relatively high, foreseeability of harm to injured party traveling on public road was low, landowner was not "morally blameworthy," and speeding drivers, such as other driver here, might not have time to react to warning].



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B. Landowners and Possessors.

1. In General.

e. Conditions or Activities Outside Land.

1. General Rule of Nonliability.

6 *Witkin Sum. Cal. Law Torts* § 1090

[§ 1090] General Rule of Nonliability.

(1) *In General.* The duty of the landowner or possessor relates to conditions or activities on the land; he or she is ordinarily not liable for harm resulting from conditions or activities outside, on adjoining land or on the highway, street, or sidewalk. (*Corcoran v. San Mateo* (1953) 122 C.A.2d 355, 359, 265 P.2d 102 [adjoining land]; *Seaber v. Hotel Del Coronado* (1991) 1 C.A.4th 481, 491, 2 C.R.2d 405 [fact that crosswalk was installed in front of hotel for benefit of its patrons did not render it liable for injury, where crosswalk was used by general public as well]; *Hamilton v. Gage Bowl* (1992) 6 C.A.4th 1706, 1712, 8 C.R.2d 819 [sign extending slightly over defendant's parking lot, but attached to building on adjacent land; defendant had no control over sign, and hence no duty to check it for safety]; *Swann v. Olivier* (1994) 22 C.A.4th 1324, 1333, 28 C.R.2d 23, supra, §1089 [homeowners association had no duty to warn plaintiff of surf dangers off its private beach]; see California Premises Liability, §1:56 et seq.)

The most common illustration is the unsafe street or sidewalk in front of the premises. In the absence of statute or ordinance, abutting owners are under no obligation to keep it in safe condition for the public. (*Bolles v. Hilton & Paley* (1931) 119 C.A. 126, 127, 6 P.2d 335; *Schaefer v. Lenahan* (1944) 63 C.A.2d 324, 326, 146 P.2d 929; *Winston v. Hansell* (1958) 160 C.A.2d 570, 572, 325 P.2d 569; see *Rest.2d, Torts* §349; 18 *So. Cal. L. Rev.* 77.)

In *Galiano v. Pacific Gas & Elec. Co.* (1937) 20 C.A.2d 534, 67 P.2d 388, defendant maintained a canal over which a highway was later constructed. The state Highway Department made the usual concrete slab and dirt shoulder; but placed no railings or markers indicating the existence of the canal. On a dark night, decedent's car collided with another near this point, and decedent, apparently with the intention of throwing away liquor, walked over to the side of the highway and stepped or fell into the canal. *Held*, defendant was not liable; the highway itself was safe, and only when decedent left the car and went off the highway for personal reasons was there any danger. Assuming, however, that the absence of a barrier or markers was a negligent omission, the liability would rest on the Highway Department, and not on the owner of the canal, for the duty to maintain a highway in condition safe for travel rests upon the public authorities, and not upon the owner of land that it crosses. (20 C.A.2d 539.)

(2) *Statutory Duty.* Sts. & H.C. 5610 et seq. require abutting owners, upon notice by the superintendent of streets, to

repair streets or sidewalks when they are in a dangerous condition, and makes them liable for failure to do so, after notice. But the liability thus created is to pay for the repairs or reimburse the city for doing so, and not to pay damages to an injured individual. (*Schaefer v. Lenahan*, *supra*, 63 C.A.2d 332; *Holdridge v. Drewes* (1968) 257 C.A.2d 626, 629, 65 C.R. 189, citing the text; *Williams v. Foster* (1989) 216 C.A.3d 510, 521, 265 C.R. 15; *Selger v. Steven Bros.* (1990) 222 C.A.3d 1585, 1590, 1591, 272 C.R. 544; *Contreras v. Anderson* (1997) 59 C.A.4th 188, 195, 69 C.R.2d 69 [city ordinance requiring abutting landowners to maintain public sidewalks did not impose legal duty of care toward members of public; following *Schaefer* and *Williams*]; see *Rest.2d, Torts* §288, Comment a; 30 Proof of Facts 2d 643 [sidewalk defects]; 71 A.L.R.2d 793 [pedestrian injured by snow in street]; 82 A.L.R.2d 998 [snow removal statutes]; 88 A.L.R.2d 331 [condition of sidewalk]; 39 A.L.R.3d 579 [condition of adjacent premises]; 58 A.L.R.3d 1085 [liability of abutting owner for injury to municipal employee engaged in constructing or repairing sewers or drains]; BAJI, No. 8.50.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Duty*. See 86 Proof of Facts 3d 327 [liability of abutting owner for sidewalk defects; superseding 30 Proof of Facts 2d 643, text, p. 420].

(3) (New) *No Preemption*. A city ordinance that makes an adjacent landowner liable to third persons who are injured as a result of dangerous conditions on a city-owned sidewalk is not preempted by state law. (*Gonzales v. San Jose* (2004) 125 C.A.4th 1127, 1133, 23 C.R.3d 178.)



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B. Landowners and Possessors.

1. In General.

e. Conditions or Activities Outside Land.

2. Defective Structure.

6 *Witkin Sum. Cal. Law Torts* § 1091

[§ 1091] Defective Structure.

The owner's freedom from liability for conditions on the sidewalk or street (*supra*, §1090) disappears when he or she builds something there, such as a lightwell or a driveway. The owner is then under a duty to keep it in repair. (See *Monsch v. Pellissier* (1922) 187 C. 790, 792, 204 P. 224 [vault under sidewalk with iron grating and glass; hole in glass]; *Granucci v. Claasen* (1928) 204 C. 509, 512, 269 P. 437 [wooden driveway with loose planks]; *Peters v. San Francisco* (1953) 41 C.2d 419, 423, 260 P.2d 55 [slope on sidewalk to reach garage 11 inches below sidewalk level]; *San Francisco v. Ho Sing* (1958) 51 C.2d 127, 129, 330 P.2d 802 [sidewalk skylight with crack 2 inches wide and 18 inches long]; *Rest.2d, Torts* §350; 31 A.L.R.2d 1334 [liability of owner or occupant for condition of covering over opening or vault in sidewalk]; 51 A.L.R.4th 602 [private utility's liability for collision with pole within or beside highway]; cf. *Winston v. Hansell* (1958) 160 C.A.2d 570, 576, 325 P.2d 569 [mere allegation that defendant used sidewalk as driveway was insufficient where there was no structure or alteration]; BAJI, No. 8.50.)

The duty to maintain structures or artificial conditions built outside one's property "runs with the land"; i.e., the landowner is liable even though the condition was created by a predecessor in title or possession. (*Sexton v. Brooks* (1952) 39 C.2d 153, 157, 245 P.2d 496; *Peters v. San Francisco, supra*, 41 C.2d 423.)

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1. In General.

e. Conditions or Activities Outside Land.

3. Hazardous Condition.

6 *Witkin Sum. Cal. Law Torts* § 1092

[§ 1092] Hazardous Condition.

(1) *In General.* An owner who creates a hazardous condition by placing or leaving materials on the land, e.g., escaping oil or scattered debris, is liable. (*Kopfinger v. Grand Cen. Public Market* (1964) 60 C.2d 852, 859, 37 C.R. 65, 389 P.2d 529; see 18 A.L.R.3d 428 [ice formed on sidewalk due to artificial conditions on abutting property]; 5 A.L.R.5th 1 [pollution from underground storage tank]; BAJI, Nos. 8.50.1, 8.51.)

In *Kopfinger*, plaintiff, an elderly woman, slipped and fell on the sidewalk in front of the entrance to defendant's market, which she was about to enter. The cause of the fall was a small piece of meat. The evidence showed that defendant M, operating retail meat stalls, took numerous deliveries of meat by wheeling or dragging it from the trucks. The stalls were regularly swept every 15 or 20 minutes, but sweeping the sidewalk followed no regular pattern. *Held*, reversing judgment of nonsuit, an inference could have been drawn that defendants permitted a dangerous condition to exist for a period of time in excess of that which would constitute due care. The fact that the deliveries were made by independent contractors was immaterial, for the negligence consisted of failure to clean up after the deliveries. (60 C.2d 858.) As to the duty, the court generalized its rule as follows: "When the activities of a business enterprise, conducted for its economic benefit, are such as to create a hazard on the public sidewalk, of which fact the defendants know or have reason to know, and particularly when, as here, the sidewalk is immediately adjacent to the nonenclosed aisles of a large supermarket catering to the passing pedestrian traffic, there exists a duty to protect from injury those so endangered." (60 C.2d 857.)

However, in *Jones v. Deeter* (1984) 152 C.A.3d 798, 199 C.R. 825, the court emphasized that, under the special circumstances involved, defendant was not responsible for the hazard on the adjoining property. Defendant owned property abutting on a sidewalk and parkway. The sidewalk and parkway were both dedicated to the city, and under *Sts. & H.C. 5610*, the owner had a duty to maintain them. Magnolia trees growing in the parkway had roots that pressed up underneath the concrete of the sidewalk, causing a break on which plaintiff tripped and fell. *Held*, summary judgment for defendant affirmed.

(a) The abutting owner is liable to pedestrians for a defect in the sidewalk attributable to his or her own negligence;

e.g., where the abutting owner left dangerous material on the sidewalk or altered it for his or her own benefit. (152 C.A.3d 803, citing *Kopfinger* and *Moeller v. Fleming* (1982) 136 C.A.3d 241, 245, 186 C.R. 24, supra, §1089.)

(b) If the condition is not attributable to the owner, he or she is not liable. Here, the owner merely mowed and watered the parkway; the city habitually maintained the trees and surface, and thereby assumed the duty to keep them in reasonably safe condition. (152 C.A.3d 805.) If the city wished to place that duty on the abutting owner, it could do so under *Sts. & H.C. 5600* et seq.; but, until this is done, "it would be fundamentally unfair to hold an abutting owner liable to pedestrians injured by defects in the sidewalk and parkway, when past practice has given that owner every reason to believe that the City has undertaken the responsibility to repair these defects." (152 C.A.3d 806.)

(2) *Duties of Landowner Exercising Control Over Adjoining Property.* In *Alcaraz v. Vece* (1997) 14 C.4th 1149, 60 C.R.2d 448, 929 P.2d 1239, defendants owned land adjacent to a 10-foot strip of city property. On the portion of this property immediately bordering defendant's land was a water meter box embedded in the lawn with the cover either broken or missing. Plaintiff tripped over this box and sued defendants for the resulting personal injuries. The trial judge sustained defendants' demurrer on the ground that the box and the property on which it was located were not in defendants' control. *Held*, reversed.

(a) The proper test to be applied to the liability of the possessor of land is whether the possessor has managed the land as would a reasonable person in view of the probability of injury to others. This duty of safe management requires persons to maintain land in their possession and control in a reasonably safe condition. The duty exists even where the dangerous condition on the land is caused by an instrumentality that the landowner does not own or control. Thus, in the present case, if the condition of the meter box created a dangerous condition on land that was in defendants' possession or control, defendants owed a duty to take reasonable measures to protect persons on the land from that danger, whether or not defendants owned, or exercised control over, the meter box itself. (14 C.4th 1155.)

(b) *Hamilton v. Gage Bowl* (1992) 6 C.A. 4th 1706, 8 C.R.2d 819, supra, §1090, is distinguishable. The issue there was whether defendants had a duty to *discover* a dangerous condition located on property that they did not own. In the present case, in addition to evidence that defendants controlled the adjacent property, there is some proof that defendants knew that the meter box lacked a cover and was in a dangerous condition. (14 C.4th 1156.)

(c) It is clear that defendants did not own the land on which the meter was located. However, a long line of cases has established that a person who exercises "control" over land has a duty to maintain it in a safe condition. Whether defendants exercised this control is a question of fact. (14 C.4th 1157.) This is so, because evidence was introduced that defendants maintained the two-foot strip on which the meter was located, and that, after plaintiff's accident, they fenced their entire lawn, including the strip. Essentially, they treated the land as if it were an extension of their lawn. This evidence, although not conclusively establishing that defendants controlled the property, was sufficient to raise a triable issue of fact regarding control. (14 C.4th 1161.)

(d) Defendants did not have possession or control of the meter box itself, and therefore lacked the power to repair it. However, because it was located on property that they did control, they had a duty, in view of evidence that they had knowledge that the meter box posed a dangerous condition, to protect others from it. This duty could have been performed by a warning sign or by erecting a fence around the box. They did not have to actually repair it. (14 C.4th 1157.)

(e) A dissenting justice maintains that a landowner may be held liable for an injury on adjacent property only if he or she *both* exercises control over that property *and* derives a commercial benefit from the portion of the property that was in a dangerous condition. This position is without merit. It is true that some decisions have held that "commercial benefit" is a factor in determining whether a landowner has exercised control over certain property, but no decision has held that it is required. (14 C.4th 1162.) (See *Contreras v. Anderson* (1997) 59 C.A.4th 188, 197, 69 C.R.2d 69 ["neighborly maintenance" by sweeping and gardening in adjoining city-owned planting strip was insufficient to support finding of control; distinguishing *Alcaraz*].)

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e. Conditions or Activities Outside Land.

4. City's Liability and Right of Indemnity.

6 *Witkin Sum. Cal. Law Torts* § 1093

[§ 1093] City's Liability and Right of Indemnity.

(1) *City's Concurrent Liability to Injured Person.* The argument has been unsuccessfully made by cities that the primary statutory duty as to conditions on a sidewalk or street is on the landowner (see *supra*, §§1091, 1092), and that the city's liability is derivative only. It is now established that the city's statutory liability to the injured person is that of a concurrent tortfeasor (see *supra*, §49) and can be enforced independently of that of the landowner. (*Peters v. San Francisco* (1953) 41 C.2d 419, 429, 260 P.2d 55.)

(2) *City's Right of Indemnity From Landowner.* Another unsuccessful argument, made by landowners, was that, because the city is a concurrent tortfeasor, if it is compelled to pay a judgment it cannot obtain reimbursement from the landowner because of the rule against contribution between tortfeasors. If contribution (sharing the loss proportionately) were involved, the contribution statute (*supra*, §105) would be a complete answer. But contribution is not involved. As between the city and the landowner, the primary responsibility for the safe condition of a structure created for the landowner's exclusive benefit is on the landowner, and a city that is compelled to pay an injured party is entitled to indemnity, i.e., reimbursement of the entire sum from the landowner. (*San Francisco v. Ho Sing* (1958) 51 C.2d 127, 138, 330 P.2d 802; *Reinach v. San Francisco* (1958) 164 C.A.2d 763, 769, 331 P.2d 1006; see 32 So. Cal. L. Rev. 293; *supra*, §112 et seq.)

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Witkin Summary of California Law XI. NEGLIGENCE: AFFIRMATIVE DUTIES ARISING FROM SPECIAL RELATIONSHIPS

B. Landowners and Possessors.

2. Trespassers.

a. Who Are Trespassers.

6 *Witkin Sum. Cal. Law Torts* § 1094

[§ 1094] Who Are Trespassers.

Although the trespasser classification has lost much of its importance, it still has some significance. (See *infra*, §1096 et seq.)

(1) *Trespasser on Land*. A trespasser comes on the land without privilege or consent. (*Hamakawa v. Crescent Wharf & Warehouse Co.* (1935) 4 C.2d 499, 501, 50 P.2d 803; *Kirkpatrick v. Damianakes* (1936) 15 C.A.2d 446, 449, 59 P.2d 556 [plaintiff who drove her car into private alley by mistake was trespasser]; see *Rest.2d, Torts* §329; 5 Harper, James & Gray 2d §27.3; Dobbs, *The Law of Torts* §232; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §121;.)

Several cases, difficult to distinguish, deal with the situation where the plaintiff is a trespasser but the defendant is not the owner of the land.

In *Leslie v. Monterey* (1934) 139 C.A. 715, 719, 34 P.2d 837, plaintiff was held a trespasser as to a power company while working on a strip of land over which it had placed power lines under a franchise. (See 30 *A.L.R.3d* 777 [trespasser injured on land over which electricity supplier ran wires that caused harm].) And in *Hamakawa*, plaintiff went out on a pier for a social visit. Defendant stevedoring company, though not the owner, had the right of control over the pier, and therefore plaintiff was a trespasser as to it. (See *Palmquist v. Mercer* (1954) 43 C.2d 92, 101, 272 P.2d 26 [oil company, using flood control district property with express permission of district, had no greater duty than landowner towards persons using land by sufferance].)

On the other hand, in *Langazo v. San Joaquin Light & Power Corp.* (1939) 32 C.A.2d 678, 90 P.2d 825, decedent, walking across a field, was killed by contact with an abandoned telephone line, negligently allowed to sag in violation of a Railroad Commission safety order. *Held*, defendant power company was liable. (a) The company merely held an easement on the land, and, though decedent was a trespasser as to the landowner, this defense was unavailable to defendant. (32 C.A.2d 686.) (b) Even if defendant was regarded as the landowner, it might still be liable for breach of a statutory duty to the general public; the Commission's order had the force of law, and plaintiff, though a trespasser, was a member of the class intended to be protected. (32 C.A.2d 690.) (See *Dunn v. Pacific Gas & Elec. Co.* (1954) 43 C.2d 265, 276, 272 P.2d 745 [approving *Langazo*].)

(2) *Trespasser on Personal Property*. Most of the cases deal with trespass on real property, but the same rules apply to trespass on personal property. (See *Mark v. Pacific Gas & Elec. Co.* (1972) 7 C.3d 170, 176, 101 C.R. 908, 496 P.2d 1276, *infra*, §1096; *Albers v. Shell Co. of Calif.* (1930) 104 C.A. 733, 738, 286 P. 752 [plaintiff rode with truck driver in violation of company rules]; *Fernandez v. Consolidated Fisheries* (1950) 98 C.A.2d 91, 97, 219 P.2d 73 [plaintiff climbed on delivery truck]; *Billeter v. Rhodes & Jamieson* (1951) 104 C.A.2d 137, 144, 231 P.2d 93 [invitee, employee of general contractor, exceeding scope of invitation by climbing defendant subcontractor's concrete mixer]; *Herrera v. Southern Pac. Ry Co.* (1961) 188 C.A.2d 441, 447, 10 C.R. 575 [boys hopped on empty freight car in motion]; *Beard v. Atchison, Topeka & Santa Fe Ry. Co.* (1970) 4 C.A.3d 129, 135, 84 C.R. 449, *infra*, §1097; 65 A.L.R.2d 798 [liability of owner or operator of motor vehicle to adult trespasser].)

West's Key Number Digest, Negligence k.1045(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Trespasser on Land*. See 5 Harper, James & Gray 3d §27.3; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §121.



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B. Landowners and Possessors.

2. Trespassers.

b. Former Limited Duties.

6 *Witkin Sum. Cal. Law Torts* § 1095

[§ 1095] Former Limited Duties.

The following summary of the general law preceding *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, and infra, §1102, will be helpful in determining the effect of the decision.

(1) *Unknown Trespasser*. The landowner had merely to refrain from intentional harms or "wilful or wanton injury," and no duty was owed to keep the premises in safe condition or to carry on activities carefully. (*Toomey v. Southern Pac. R. Co.* (1890) 86 C. 374, 379, 24 P. 1074; *Giannini v. Campodonico* (1917) 176 C. 548, 550, 169 P. 80; *Hamakawa v. Crescent Wharf & Warehouse Co.* (1935) 4 C.2d 499, 502, 50 P.2d 803; *Flick v. Ducey & Attwood Rock Co.* (1945) 70 C.A.2d 70, 78, 160 P.2d 569; *Wilson v. Long Beach* (1945) 71 C.A.2d 235, 238, 162 P.2d 658, 163 P.2d 501; *Strother v. Pacific Gas & Elec. Co.* (1949) 94 C.A.2d 525, 529, 211 P.2d 624; *Boucher v. American Bridge Co.* (1950) 95 C.A.2d 659, 667, 213 P.2d 537; *Hume v. Hart* (1952) 109 C.A.2d 614, 615, 241 P.2d 25; see *Rest.2d, Torts* §333; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §206; 47 *Cal. L. Rev.* 427.)

(2) *Known Trespasser*. Where the defendant knew or should have known that a trespasser had come on the land, he or she had the duty to warn of artificial conditions constituting concealed dangers, and to exercise reasonable care in carrying on activities. (*Rest.2d, Torts* §336, 337.) This same result had been reached under the theory that failure to warn of a trap or pitfall, or to conduct activities with due care toward a *known* trespasser, amounted to "wilful or wanton" conduct. (*Rest.2d, Torts* §336, Special Note; see *Blaylock v. Jensen* (1941) 44 C.A.2d 850, 852, 113 P.2d 256; *Fernandez v. Consolidated Fisheries* (1950) 98 C.A.2d 91, 97, 219 P.2d 73; *Fernandez v. American Bridge Co.* (1951) 104 C.A.2d 340, 343, 231 P.2d 548; 70 *A.L.R.3d* 1125 [duty to trespasser in peril through no fault of landowner].)

(3) *Habitual Trespasser at Particular Place*. Although a railroad company owed no duty of care to discover trespassers on its tracks, and was liable only after their presence became known, a special rule had developed to cover the situation where people had habitually and notoriously crossed the tracks, for a long period of time, with the acquiescence of the company. The company was held to a duty of care both to discover and to avoid injury to them. (*Smithwick v. Pacific Elec. Ry. Co.* (1929) 206 C. 291, 303, 274 P. 980; *Staggs v. Atchison, Topeka & Santa Fe Ry. Co.* (1955) 135 C.A.2d 492, 500, 287 P.2d 817.) The Restatement refers to these persons as trespassers who constantly intrude upon a limited area, and specifies the same duties as are owed to known trespassers. (See *Rest.2d, Torts* §§334,

335.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Unknown Trespasser*. See 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §205.



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B. Landowners and Possessors.

2. Trespassers.

c. Current Bases of Liability.

6 *Witkin Sum. Cal. Law Torts* § 1096

[§ 1096] Current Bases of Liability.

(1) *Doctrine of Rowland v. Christian*. *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, involving a licensee, rejected the status classifications that limited the duties that were owed to licensees and trespassers. (See *supra*, §1086.) "The status of a claimant at the time of his injury no longer affects the general duty of a possessor of property to exercise ordinary care with respect to reasonable foreseeable risks of personal injury to persons coming on the property. The possessor's duty of ordinary care extends to invitees and trespassers alike, although the foreseeability of injury, and hence the degree of care required of a possessor, continues to be influenced by the likelihood that persons will be present on the property at a particular time and place, a likelihood normally considerably greater for invitees than for trespassers." (*Beard v. Atchison, Topeka & Santa Fe Ry. Co.* (1970) 4 C.A.3d 129, 136, 84 C.R. 449, *infra*, §1097; see *Mark v. Pacific Gas & Elec. Co.* (1972) 7 C.3d 170, 176, 101 C.R. 908, 496 P.2d 1276 ["The active passive negligence concept ... no longer represents an inflexible limitation upon the imposition of liability to trespassers or licensees"]; *Cappa v. Oscar C. Holmes* (1972) 25 C.A.3d 978, 983, 102 C.R. 207 [trespasser on property under construction; "in the determination whether industrial safety orders apply to persons other than workmen, no distinction may be made between trespassers, licensees, and invitees"].) In other words, under *Rowland*, liability to a trespasser is not precluded, but neither is it automatic. For example, the owner of undeveloped property was held not liable to trespassing migrant workers who, without his knowledge, lived on the property. (*Lucas v. Pollock* (1992) 7 C.A.4th 668, 675, 8 C.R.2d 918; see *Jarvis v. Southern Pac. Trans. Co.* (1983) 142 C.A.3d 246, 253, 191 C.R. 29 [fact of trespass, although not determinative, has some bearing on liability].)

(2) *Trespasser on Personal Property*. The *Rowland* rule applies to persons coming on personal property as well as real property. In *Mark v. Pacific Gas & Elec. Co.*, *supra*, 7 C.3d 177, defendant's bent street lamp cast a bright light into decedent's apartment, making sleep difficult. (See *infra*, §1323.) Decedent climbed on the power pole from his fire escape to unscrew the bulb, and was electrocuted. *Held*, it was error to grant a nonsuit. Under the former law, defendant would not have been liable because it was not actively negligent; the danger was only from a passive condition on its property. (7 C.3d 176.) However, applying the *Rowland* factors, there was evidence "that PG&E knew, or at least should have known, that Calvin or his roommates had been unscrewing the bulb of the lamp post; that the presence of high voltage current constituted a high risk of harm to anyone tampering with the bulb; that reasonable safety

precautions (such as straightening the bent post, locking the canopy in place, or warning of high voltage) could have been taken; and that PG&E's failure to take such precautions rendered the lamp post and bulb unsafe." (7 C.3d 178.) Hence the jury could have concluded that defendant's failure to warn or repair constituted negligence. (On contributory negligence issue, see *infra*, §1323.)

West's Key Number Digest, Negligence k.1045(3), 1045(4)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Trespasser on Railroad Car.

1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1097

[§ 1097] In General.

In *Beard v. Atchison, Topeka & Santa Fe Ry. Co.* (1970) 4 C.A.3d 129, 84 C.R. 449, plaintiff, a 14-year-old boy, came on to defendant's right of way. A slow-moving freight car approached, plaintiff grasped the handle bar of a box car to pull himself aboard, and the sill step gave way. He fell beneath the train, losing both legs. *Held*, under *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086, his status as a trespasser no longer precluded recovery (4 C.A.3d 136); and the older view that this conduct constituted assumption of risk as a matter of law could no longer be followed (4 C.A.3d 139).

The reasoning of this opinion seems in accord with the *Rowland* doctrine, but the holding has been nullified by statute. "No person who is injured while getting on, or attempting to get on, a moving locomotive or railroad car, without authority from the owner or operator of the railroad, or who, having gotten on a locomotive or railroad car while in motion without such authority, is injured while so riding or getting off, shall recover any damages from the owner or operator thereof for such injuries unless proximately caused by an intentional act of such owner or operator with knowledge that serious injury is the probable result of such act, or with a wanton and reckless disregard of the probable result of such act." (C.C. 1714.7.)

The constitutionality of C.C. 1714.7 was upheld in *Durham v. Los Angeles* (1979) 91 C.A.3d 567, 572, 154 C.R. 243, against a number of equal protection challenges. (1) The purpose of the section is reasonable, especially in the light of P.C. 587b, making train jumping a misdemeanor. (2) The concept of statutory exceptions to the general rule of C.C. 1714 has been approved in several cases. (91 C.A.3d 573; see *infra*, §1103.) (See *Wiley v. Southern Pac. Trans. Co.* (1990) 220 C.A.3d 177, 191, 269 C.R. 240 [child climbed onto stationary car and was injured when it began to move; C.C. 1714.7 did not apply].)

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2. Authority Must Be Express.

6 *Witkin Sum. Cal. Law Torts* § 1098

[§ 1098] Authority Must Be Express.

In *Perez v. Southern Pac. Trans. Co.* (1990) 218 C.A.3d 462, 267 C.R. 100, plaintiff, a 13-year-old boy, was injured while attempting to board a moving railroad car owned by defendant. He argued (1) that he had defendant's implied permission to board the train, and (2) that defendant's conduct was committed with wanton and reckless disregard of its probable consequences. *Held*, summary judgment for defendant affirmed.

(a) Plaintiff declared that defendant knew that hundreds of children were jumping on and off of its trains but never told them to stop, thereby leading plaintiff to believe that he had implied permission to engage in this behavior. Plaintiff also argued that C.C. 1714.7 (*supra*, §1097) was intended to revive the "habitual trespasser" theory (company with knowledge of habitual trespassers has duty to protect them), in cases where trespassers habitually jump aboard moving locomotives. However, C.C. 1714.7 expressly states the only circumstances under which a train jumper may recover, i.e., he or she has express authorization to do so, or the railway is guilty of wilful misconduct. "To allow a claimant such as plaintiff the opportunity to show that he was somehow 'impliedly invited' aboard the train by railroad personnel based on nothing more than the railroad's failure to inform a claimant that he is trespassing and likely to be hurt in so doing would be to emasculate the immunity established by the statute." (218 C.A.3d 469.)

(b) Plaintiff's argument that C.C. 1714.7 did not apply because defendant's conduct was reckless was based on evidence that, although defendant knew that its tracks were used by many children as a short cut between a residential area and a park, it neither warned them of the danger nor erected barriers to stop this use. At most, plaintiff raised a triable issue of fact as to defendant's *negligence*, but the language of C.C. 1714.7 has been equated with *wilful misconduct*. (218 C.A.3d 470, citing *Goncalves v. Los Banos Mining Co.* (1962) 58 C.2d 916, 26 C.R. 769, 376 P.2d 833, and *Lostritto v. Southern Pac. Trans. Co.* (1977) 73 C.A.3d 737, 140 C.R. 905, *infra*, §1104.)

(c) "[T]he failure of Southern Pacific to erect barriers to prevent the public from crossing the train tracks was not, as a matter of law, wilful misconduct. While it may be argued that an accident such as plaintiff experienced might be anticipated, it is only where a defendant's conduct amounts to a wanton and reckless disregard, as opposed to a mere failure to perform a duty that a defendant can be held liable for wilful misconduct." (218 C.A.3d 470.)

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6 *Witkin Sum. Cal. Law Torts* § 1099

[§ 1099] Person Committing Serious Felony.

(1) *In General.* C.C. 847, enacted after *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, provides that an owner, including a public entity, is not liable for injury or death occurring on his or her property during or after the commission of specified felonies by the injured or deceased person. (C.C. 847(a); see 17 *Pacific L. J.* 797; C.C. 847(b) [listing felonies, most of which involve force or violence].)

(2) *Conditions.* This limitation on an owner's liability is subject to the following conditions and qualifications:

- (a) It is in addition to any other available defense. (C.C. 847(g).)
- (b) It extends from the moment the felony commences until the felon leaves the property. (C.C. 847(c).)
- (c) It arises only upon the charge and conviction of the felony or a lesser included offense. (C.C. 847(e).)
- (d) The commission of the felony must be a proximate cause of the injury or death. (C.C. 847(d).)
- (e) The owner or his agent remains liable "for willful, wanton, or criminal conduct, or for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. (C.C. 847(f).)

(3) *Trespasser Killed or Injured.* *Calvillo-Silva v. Home Grocery* (1998) 19 C.4th 714, 80 C.R.2d 506, 968 P.2d 65, concerns the effect of C.C. 847 when the owner's actions are *intentionally* injurious. Plaintiff, who was shot by an employee during the robbery of a store, sued the store, its owners, and its employees, seeking compensation for his injuries. Plaintiff had been convicted of attempted grand theft in connection with the robbery, a felony listed in C.C. 847. The trial court entered summary judgment for defendants on the basis that the action was barred by that statute. *Held*, reversed and remanded. Limited liability under C.C. 847 may extend to the intentional use of deadly force, but use of that force must be justifiable.

(a) C.C. 847 limits the liability of the owner of real property for injuries that occur on the property during or after the injured person's commission of any one of 25 enumerated felonies. By its own terms, however, the statute "does not

limit the liability of an owner or an owner's agent which otherwise exists for willful, wanton, or criminal conduct, or for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." (19 C.4th 723.)

(b) The immunity conferred by C.C. 847 is not restricted to conduct relating solely to physical conditions or uses of land. By delineating only *conduct-based* exceptions to its provision limiting liability "for any injury or death that occurs on [the] property," the statute necessarily implies that conduct not falling within those exceptions is immunized when the statutory elements have been shown. This reading is entirely consistent with the statute's underlying purpose to protect landowners and possessors from lawsuits brought by persons injured on the property during the commission of a crime. (19 C.4th 725.)

(c) Thus, when the statutory predicates have been established, an owner is entitled to immunity unless liability otherwise exists for either wilful, wanton, or criminal conduct, or for wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Consistent with established principles of tort law, the statutory reference to wilful or wanton conduct relates to intentional *wrongful* conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results. So construed, the immunity granted extends not only to negligent conduct, but also to intentionally injurious acts that are justifiable under the circumstances and hence not "wrongful." For instance, under C.C. 50, a person is privileged to use any necessary force to protect or defend his or her person or property from wrongful injury. (19 C.4th 727.)

(d) Although defendants' intentional use of deadly force is not actionable if not wrongful, the summary judgment must be reversed, because the record gives rise to conflicting inferences whether defendants' use of force was justified under the circumstances. It could not be said, as a matter of law, that defendants' use of force reasonably appeared necessary to prevent an impending injury. (19 C.4th 735.)

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3. Licensees.

a. Who Are Licensees.

6 Witkin Sum. Cal. Law Torts § 1100

[§ 1100] Who Are Licensees.

Although the licensee classification has lost much of its importance, it still has some significance. (See *infra*, §1103 et seq.)

(1) *In General*. A licensee comes on the land by consent or permission, but usually for purposes of his or her own, having no relation to the business of the owner or occupant. (See *Lindholm v. Northwestern Pac. R. Co.* (1926) 79 C.A. 34, 37, 248 P. 1033; *Aguilar v. Riverdale Cooperative Creamery Assn.* (1930) 104 C.A. 263, 264, 285 P. 889; *Fraters v. Keeling* (1937) 20 C.A.2d 490, 491, 67 P.2d 118; *Boucher v. American Bridge Co.* (1950) 95 C.A.2d 659, 667, 213 P.2d 537; *Allen v. Jim Ruby Const. Co.* (1956) 138 C.A.2d 428, 431, 291 P.2d 991; *Miller v. Desilu Productions* (1962) 204 C.A.2d 160, 163, 22 C.R. 36, quoting the text; *Rest.2d, Torts* §330; 5 Harper, James & Gray 2d §27.8; Dobbs, *The Law of Torts* §233; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §184 et seq.)

In *Fisher v. General Petroleum Corp.* (1954) 123 C.A.2d 770, 776, 267 P.2d 841, defendant landowner granted a right of way to a gas company, and decedent, a bulldozer operator, was killed as a result of a dangerous condition (*infra*, §1101 et seq.). The written instrument referred to "a right of way and easement," but was without consideration, and recited that it was "personal to Grantee and shall not be assigned." *Held*, despite the loose use of the word "easement," this was a mere license or personal privilege, and the duty owed to the gas company and its employees was merely that owed to a licensee. (123 C.A.2d 776.) (See 7 *Stanf. L. Rev.* 130.)

(2) *Social Guest*. Even though "invited," a social guest is not an "invitee" in the legal sense of a business visitor (*infra*, §1113) but is only a licensee. (See *Ashley v. Jones* (1954) 126 C.A.2d 328, 332, 271 P.2d 918; *Saba v. Jacobs* (1955) 130 C.A.2d 717, 718, 279 P.2d 826; *Free v. Furr* (1956) 140 C.A.2d 378, 385, 295 P.2d 134; *Simpson v. Richmond* (1957) 154 C.A.2d 27, 29, 315 P.2d 435; *Nelsen v. Jensen* (1960) 177 C.A.2d 270, 271, 2 C.R. 180; *Bylling v. Edwards* (1961) 193 C.A.2d 736, 739, 14 C.R. 760; *Huselton v. Underhill* (1963) 213 C.A.2d 370, 374, 28 C.R. 822; *Hansen v. Richey* (1965) 237 C.A.2d 475, 478, 46 C.R. 909; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §184, ; 9 *So. Cal. L. Rev.* 182; 20 *A.L.R.2d* 1127 [child social guest]; 25 *A.L.R.2d* 598 [any guest]; 78 *A.L.R.2d* 107 [social guest of employee on employer's business premises]; 38 *A.L.R.4th* 200 [injuries not caused by condition of premises]; 8 *A.L.R.5th* 1 [person attending church]; cf. *Speece v. Browne* (1964) 229 C.A.2d 487, 494, 40 C.R. 384 [social guest who

renders services that are not merely incidental to social purpose of visit is invitee].)

(3) *Firefighter and Police Officer*. A number of jurisdictions, including California, hold that a firefighter, though entering under imperative necessity, and in performance of a public duty, is only a licensee. (See *Wilson v. Union Iron Works Dry Dock Co.* (1914) 167 C. 539, 544, 140 P. 250; 5 Harper, James & Gray 2d §27.14.) The same conclusion has been reached as to police officers. (See 5 Harper, James & Gray 2d §27.14.) But some courts either depart from this classification or enlarge the duty so as to impose liability for negligent activities or dangerous conditions. (See 5 Harper, James & Gray 2d §27.14; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §416 et seq.; 11 *A.L.R.4th* 597 [liability to firefighter coming on premises in discharge of duty]; 30 *A.L.R.4th* 81 [liability to police officer coming on premises in discharge of duty].)

West's Key Number Digest, Negligence k.1040(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 5 Harper, James & Gray 3d §27.8; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §184 et seq.

(2) *Social Guest*. See 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §184.(3) *Firefighter and Police Officer*. See 5 Harper, James & Gray 3d §27.14; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §416 et seq.



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b. Former Limited Duties.

6 Witkin Sum. Cal. Law Torts § 1101

[§ 1101] Former Limited Duties.

(1) *Nonliability for Dangerous Condition.* Under the general law, where no active negligence is involved, the duty owed to a licensee is practically no greater than that owed to a trespasser; i.e., the licensee assumes the risks incident to the condition of the premises, and can recover only for "wilful or wanton injury." This means that the landowner need not inspect the land to discover possible or probable dangers. (See *Means v. Southern Calif. Ry. Co.* (1904) 144 C. 473, 480, 77 P. 1001; *Powers v. Raymond* (1925) 197 C. 126, 131, 239 P. 1069; *Palmquist v. Mercer* (1954) 43 C.2d 92, 101, 272 P.2d 26; *Hall v. Southern Calif. Edison Co.* (1934) 137 C.A. 449, 453, 30 P.2d 1013; *Robbins v. Yellow Cab Co.* (1950) 100 C.A.2d 174, 176, 223 P.2d 80; *Allen v. Jim Ruby Const. Co.* (1956) 138 C.A.2d 428, 432, 291 P.2d 991; *Free v. Furr* (1956) 140 C.A.2d 378, 383, 295 P.2d 134; *Simpson v. Richmond* (1957) 154 C.A.2d 27, 30, 315 P.2d 435; *Nelsen v. Jensen* (1960) 177 C.A.2d 270, 272, 2 C.R. 180; *Bylling v. Edwards* (1961) 193 C.A.2d 736, 742, 14 C.R. 760; *Rest.2d, Torts* §342; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §188.)

(2) *Exception Where Condition Is Known.* *Rest.2d, Torts*, §342 recognizes a limited duty with respect to condition of the premises: The landowner is not bound to inspect and keep them safe but, if he or she knows of a dangerous condition and has reason to believe that the licensee would not discover it, the landowner must either remedy the condition or warn the licensee. Prior to *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, the California cases were in conflict on this point. (See *Newman v. Fox West Coast Theatres* (1948) 86 C.A.2d 428, 432, 194 P.2d 706 [approving Restatement rule]; *Fisher v. General Petroleum Corp.* (1954) 123 C.A.2d 770, 780, 267 P.2d 841 [contra]; *Ward v. Oakley Co.* (1954) 125 C.A.2d 840, 844, 271 P.2d 536 [contra, and distinguishing *Newman*]; *Saba v. Jacobs* (1955) 130 C.A.2d 717, 719, 279 P.2d 826 [dictum to same effect]; *Hansen v. Richey* (1965) 237 C.A.2d 475, 479, 46 C.R. 909 [Restatement rule is not California law]; 22 *So. Cal. L. Rev.* 318; 7 *Stanf. L. Rev.* 130, 132; 2 *U.S.F. L. Rev.* 230.)

(3) *Exception Where Safety Regulation Is Violated.* A landowner may be liable even to a trespasser where he or she has violated a safety regulation prescribed for the benefit of the general public (see supra, §1094.) It necessarily follows that the owner is liable to a licensee under these circumstances. (See *Longway v. McCall* (1960) 181 C.A.2d 723, 734, 5 C.R. 818.)

(4) *Due Care in Activities*. As in the case of trespassers, where the presence of the licensee is or should reasonably be known, there is a duty to carry on activities with reasonable care. Consequently the licensee may recover for "active negligence" or an "overt act of negligence." In *Oettinger v. Stewart* (1944) 24 C.2d 133, 138, 148 P.2d 19 (quoting Prosser), the court said the defendant "must run his train, operate his machinery, or back his truck with due regard for the possibility that the permission given may have been accepted and the guest may be present." (See *Lucas v. Walker* (1913) 22 C.A. 296, 301, 134 P. 374; *Gay v. Cadwallader-Gibson Co.* (1939) 34 C.A.2d 566, 570, 93 P.2d 1051; *Smith v. Western Pac. R. Co.* (1940) 36 C.A.2d 433, 436, 97 P.2d 863; *Dunlavy v. Nead* (1940) 36 C.A.2d 478, 482, 97 P.2d 1003; *Yamauchi v. O'Neill* (1940) 38 C.A.2d 703, 707, 102 P.2d 365; *Tesone v. Reiman* (1953) 117 C.A.2d 211, 214, 255 P.2d 48; *Laidlaw v. Perozzi* (1955) 130 C.A.2d 169, 172, 278 P.2d 523; *Hansen v. Richey*, *supra*, 237 C.A.2d 478, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nonliability for Dangerous Condition*. See 62 Am.Jur.2d (2005 ed.), *Premises Liability* §188.



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6 *Witkin Sum. Cal. Law Torts* § 1102

[§ 1102] Current Bases of Liability.

The general rule of nonliability for the condition of the premises (*supra*, §1101) was abrogated by *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086. (See *Carlson v. Ross* (1969) 271 C.A.2d 29, 30, 76 C.R. 209 [12-year-old social guest injured hand on protruding pipe]; *Fitch v. LeBeau* (1969) 1 C.A.3d 320, 323, 81 C.R. 722 [plaintiff visiting defendants slipped on large tear in carpeting of mobilehome].)

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SUPPLEMENT: [This section is current through the latest supplement]



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d. No Liability to Recreational Licensees.

1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1103

[§ 1103] In General.

(1) *No Duty Where Purpose Is Recreational.* Under C.C. 846, an "owner" (see *infra*, §§1109, 1110) owes no duty to keep his or her premises safe or to warn of hazards as to persons entering with permission for "any recreational purpose." The term includes such activities as "fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleanings, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites." (On activities within definition, see *infra*, §§1105, 1107; on abrogation of requirement that property be suitable for recreational use, see *infra*, §1108.)

Except as provided in C.C. 846, the owner does not extend assurances that the premises are safe for a recreational purpose, constitute the person "the legal status of an invitee or licensee to whom a duty of care is owed," or "assume responsibility for or incur liability for any injury to person or property caused by any act of such person." (C.C. 846.) (See *Charpentier v. Von Geldern* (1987) 191 C.A.3d 101, 107, 111, 236 C.R. 233; *Shipman v. Boething Treeland Farms* (2000) 77 C.A.4th 1424, 1427, 92 C.R.2d 566 [protection afforded to private landowners by C.C. 846 is not limited to dangers presented by premises per se, but extends to dangers presented by drivers of vehicles]; *Jackson v. Pacific Gas & Elec. Co.* (2001) 94 C.A.4th 1110, 1115, 114 C.R.2d 831 [express permission to enter property must be given by underlying fee owner; easement owner is incapable of giving this permission]; 47 A.L.R.4th 262 [effect of statute limiting landowner's liability to recreational user]; on statute's inapplicability to navigable waters, see *Pacific Gas & Elec. Co. v. Superior Court* (1983) 145 C.A.3d 253, 257, 259, 193 C.R. 336, 12 *Summary* (10th), *Real Property*, §919; on constitutionality, see *infra*, §1104.)

(2) *Exceptions: Where Liability Is Imposed.* C.C. 846 recognizes existing liability for (a) wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity (see *infra*, §1111); (b) injury suffered where permission was granted for a consideration (other than that paid to the landowner by the state), or where consideration was received from others for the same purpose; and (c) injury to persons expressly invited rather than merely permitted. (See *Johnson v. Unocal Corp.* (1993) 21 C.A.4th 310, 316, 26 C.R.2d 148 [exception was inapplicable where consideration paid did not apply to landowner, which allowed plaintiff's employer to use land for company picnic on

condition that it sign hold harmless agreement; this did not constitute consideration].)

(3) *Rowland v. Christian Is Not Applicable. In English v. Marin Mun. Water Dist.* (1977) 66 C.A.3d 725, 136 C.R. 224, the court rejected the contention that C.C. 846 was abrogated by *Rowland*.

(a) In adopting the fundamental rule of C.C. 1714, i.e., that all persons are liable for injury caused by lack of care in the management of their property, the *Rowland* court recognized two methods of creating exceptions: legislative enactments and common law rules supported by public policy. However, the court considered only the latter method, and did not address the effect of statutory exceptions, such as C.C. 846. (66 C.A.3d 730.)

(b) The *Rowland* court had no power to invalidate C.C. 846 on the ground that it contravenes public policy. "As a legislative enactment it becomes public policy." (66 C.A.3d 730.) And by enacting amendments to C.C. 846 broadening the scope of its immunities, the Legislature demonstrated a clear intention to create an exception to the rule of C.C. 1714. (66 C.A.3d 731.) (See *Parish v. Lloyd* (1978) 82 C.A.3d 785, 788, 147 C.R. 431; 11 U.C. Davis L. Rev. 367 [agricultural landowners; argument for repeal of C.C. 846 and application of *Rowland*].)

(4) *Recovery of Attorneys' Fees*. In prescribed circumstances, the state Board of Control must allow a claim for reasonable attorneys' fees incurred by an owner of real property who gives permission to the public to enter or use the property under an agreement with a public or nonprofit agency for recreational trail use and is sued by a person who allegedly suffers injury or damage on the property or who seeks to restrict, prevent, or delay public use of the property. The claim for fees must be allowed where (a) the court dismisses the action on a demurrer or motion for summary judgment by the owner or on its own motion for lack of prosecution, (b) the action is dismissed by the plaintiff without payment from the owner, or (c) the owner prevails in the action. (C.C. 846.1(a), (c), (d).)

(5) *No Immunity for Agent of Landowner. Jenson v. Kenneth I. Mullen Consulting Engineers* (1989) 211 C.A.3d 653, 259 C.R. 552, involving injuries to a motorcyclist who crashed into a percolation test hole dug by the landowner's agent, rejected the contention that the agent of a landowner should share in the landowner's immunity under C.C. 846. An agent's liability to a third person does not depend on the agent's relationship with the principal; and the purpose of C.C. 846, i.e., to encourage property owners to allow the general public to use their land for recreational purposes, would not be promoted by extending immunity to a landowner principal's agents. (211 C.A.3d 659.)

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(2) *Exceptions: Where Liability Is Imposed. Consideration:* See *Miller v. Weitzen* (2005) 133 C.A.4th 732, 739, 35 C.R.3d 73 [horse rider's payment to riding club and club's subsequent payment to organization that maintained public riding trail did not trigger "consideration" exception, where trail was open to any member of public without charge of any kind; following *Johnson v. Unocal Corp.* (1993) 21 C.A.4th 310, 26 C.R.2d 148, text, p. 435].

(4) *Recovery of Attorneys' Fees*. C.C. 846.1, as amended in 2006, refers to the California Victim Compensation and Government Claims Board rather than the state Board of Control.



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2. Constitutionality of Statute.

6 *Witkin Sum. Cal. Law Torts* § 1104

[§ 1104] Constitutionality of Statute.

C.C. 846 was challenged in *Lostritto v. Southern Pac. Trans. Co.* (1977) 73 C.A.3d 737, 140 C.R. 905, on grounds of "underinclusion" and "overinclusion." *Held*, neither challenge was good.

(a) *Underinclusion*. The Legislature has enumerated the major activities undertaken by persons entering another's property; the fact that other activities may be thought of does not demonstrate arbitrariness. (73 C.A.3d 748.)

(b) *Overinclusion*. Plaintiff contended that unnecessary exemptions were granted to premises generally unsuited for recreation. But the statute was not designed to exempt only owners of properties ordinarily entered by persons seeking recreation: "It applies to those who without it would fence their lands, to those who, with it, fence them anyway, and to those who do not know of its existence. The Legislature probably decided not only that freedom of recreation should be encouraged, but also that it is unfair to permit claims for negligence in favor of persons who choose to enter the lands of others for the described activities." (73 C.A.3d 749.) (See *Parish v. Lloyd* (1978) 82 C.A.3d 785, 787, 147 C.R. 431 [classifications of C.C. 846 bear rational relationship to legitimate state interest of encouraging landowners to open their property for recreational use].)

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3. Recreational Purpose.

aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1105

[§ 1105] In General.

In *Valladares v. Stone* (1990) 218 C.A.3d 362, 267 C.R. 57, the court, in support of its holding that tree climbing comes within the statute, first made it clear that the list of activities (see *supra*, §1103) is merely illustrative, and that other recreational activities similar to those listed are covered. (218 C.A.3d 369.)

(a) The dictionary defines "recreational purpose" as one intended to refresh the body or mind by diversion, amusement, or play. "Clambering about in trees is such an activity. With fond memories of the tree-scaling days of our youth, we conclude that climbing a tree for play is, as a matter of law, a recreational purpose within the meaning of section 846. Certainly, it is a form of 'nature contacting' contemplated by the statute." (218 C.A.3d 369.)

(b) *Domingue v. Presley of Southern Calif.* (1988) 197 C.A.3d 1060, 1065, 243 C.R. 312, held only that the fact that the plaintiff was riding his bicycle did not automatically make his trip across the defendant's land a recreational use. Here, however, it was undisputed that plaintiff entered defendant's vacant lot for the purpose of climbing and playing in a tree. (218 C.A.3d 369.)

In *Gerkin v. Santa Clara Valley Water Dist.* (1979) 95 C.A.3d 1022, 157 C.R. 612, plaintiff fell from a two-plank bridge while either walking or walking with her bicycle across it. Summary judgment was granted in favor of defendant on the ground that plaintiff's activity was "hiking." *Held*, reversed; the term refers to *recreational hiking* in its commonly understood meaning, i.e., taking a long walk for pleasure or exercise. (95 C.A.3d 1027.) (See *Domingue v. Presley of Southern Calif.*, *supra* [whether bicyclist using defendant's land as shortcut to friend's house was "recreational purpose" was question of fact]; *Gordon v. Havasu Palms* (2001) 93 C.A.4th 244, 256, 112 C.R.2d 816 [eating lunch in restaurant was not recreational purpose]; *Jackson v. Pacific Gas & Elec. Co.* (2001) 94 C.A.4th 1110, 1114, 114 C.R.2d 831 [kite flying, including attempt to retrieve wayward kite, is "recreational activity"].)

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3. Recreational Purpose.

bb. Playing on Machinery.

6 *Witkin Sum. Cal. Law Torts* § 1106

[§ 1106] Playing on Machinery.

In *Ornelas v. Randolph* (1993) 4 C.4th 1095, 17 C.R.2d 594, 847 P.2d 560, defendant R owned a large parcel of property in the city of Delano in Kern County, adjacent to a residential subdivision. One part of defendant's property was used for crops, another contained a small rental house, and a third was an open area used for storage of old farm equipment, machinery, and irrigation pipes.

Plaintiff, 8 years old, lived with his family in the residential subdivision. On the day of the accident, plaintiff and five other children were playing in the storage area. Several of the children were on top of a piece of old machinery when a metal pipe dislodged and fell on plaintiff, causing injuries. Plaintiff was not on the equipment, but was sitting nearby playing with a toy; his mother had cautioned him several times not to play on defendant's property.

Plaintiff, by his guardian ad litem, filed a complaint for personal injury. Defendant moved for summary judgment on the ground of C.C. 846 immunity. The trial judge granted the motion. The Court of Appeal reversed, holding that C.C. 846 was inapplicable because the portion of the land used to store defendant's equipment had no legitimate recreational use. *Held*, judgment of Court of Appeal reversed.

(a) The examples included in C.C. 846 (*supra*, §1103) range from risky activities to more sedentary pursuits amenable to almost anyone, indoors as well as outdoors; and the statute draws no distinction between natural and artificial conditions. (4 C.4th 1101.)

(b) Plaintiff contended that he raised a triable issue whether he entered the property to play on the equipment, or merely accompanied the other children for unspecified reasons. However, in either case his presence was occasioned by the recreational use of the property, and his injury was the product of it. "We discern no meaningful distinction, for purposes of section 846, between the passive spectator and the active participant. Both take advantage of the recreational opportunities offered by the property; neither, therefore, may be heard to complain when injury results." (4 C.4th 1102.)

(c) "Accordingly, because the list of examples provided by the Legislature does not effectively limit the meaning of 'recreational purpose,' we conclude that entering and using defendant's property to play on his farm equipment invokes the immunity provisions of section 846. As noted, a recreational injury may result as readily from playing on a manmade object as on a natural edifice. Therefore, for our purposes here, clambering about on farm equipment is no different in kind from scaling a cliff or climbing a tree." (4 *C.4th* 1101.)

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4. Land Unsited for Recreation.

aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1107

[§ 1107] In General.

In a number of decisions, the applicability of C.C. 846 depended on whether the property was considered suitable for recreation.

In *Paige v. North Oaks Partners* (1982) 134 C.A.3d 860, 184 C.R. 867, plaintiff child was injured while jumping over an open trench in a temporary project near the loading dock of a market in an urban shopping center. *Held*, this was not the type of property to which the statute was intended to apply. (134 C.A.3d 865.)

Potts v. Halstead Financial Corp. (1983) 142 C.A.3d 727, 191 C.R. 160, held that the statute did not apply to a building under construction on beachfront property within a residential area. (142 C.A.3d 730.) The court noted that *Lostritto v. Southern Pac. Trans. Co.* (1977) 73 C.A.3d 737, 140 C.R. 905, *supra*, §1104, had taken a contrary position, holding the statute applicable to property unsited for recreation, but declared that this view was not supported by the statutory language or history, and would lead to results that the Legislature could not have intended. (142 C.A.3d 731.)

Page and *Potts* were distinguished in *Colvin v. Southern Calif. Edison Co.* (1987) 194 C.A.3d 1306, 240 C.R. 142, holding that C.C. 846 rendered defendant electric company immune from liability for injuries sustained by plaintiff when he grabbed a guy wire dangling from one of defendant's poles. "Obviously defendant's physical facilities were not designed or suitable for recreational use. This is not true, however, of the total area defendant had permission to use. That area included space under the suspended transmission and guy wires, and space required to gain access and do required maintenance and repairs. This extended area consisted of natural terrain. It was open to anyone for hiking, cycle riding, exploring, roaming, and (in terms of §846) 'enjoying ... natural ... sites.' Furthermore, such use was reasonably foreseeable. Therefore it did not fall within the exception to section 846 as an area unsuitable for recreation." (194 C.A.3d 1314.)

In *Myers v. Atchison, Topeka & Santa Fe Ry. Co.* (1990) 224 C.A.3d 752, 274 C.R. 122, the statute was applied to deny recovery to plaintiff motorcycle driver injured when the vehicle fell into a ditch created by a culvert. "The aspect

of Santa Fe's right-of-way that purportedly makes it unsuitable for recreational use is the potential for injury or death from being struck by a passing train. Here, as in *Lostritto*, Myers was not injured by a train, but by her use of Santa Fe's property to ride a motorcycle." (224 C.A.3d 760.) (See *Wineinger v. Bear Brand Ranch* (1988) 204 C.A.3d 1003, 1010, 251 C.R. 681 [land withdrawn from recreational use]; on abrogation of suitability requirement, see *infra*, §1108.)

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bb. Suitability Requirement Abrogated.

6 *Witkin Sum. Cal. Law Torts* § 1108

[§ 1108] Suitability Requirement Abrogated.

In *Ornelas v. Randolph* (1993) 4 C.4th 1095, 17 C.R.2d 594, 847 P.2d 560, Plaintiff, 8 years old, and several other children were playing on a part of defendant's property used to store various machinery. The injury occurred when a metal pipe dislodged and struck plaintiff, who was then sitting nearby playing with a toy. Plaintiff attempted to recover, despite the immunity extended to defendant by C.C. 846, by arguing that, under the "suitability" requirement, the land in question was not suitable for recreational use. *Held*, argument rejected; the suitability requirement is not supported by either statutory language or practical considerations, and is thus abrogated.

(a) In a series of decisions, the Courts of Appeal recognized what amounts to a third, nontextual element of immunity: The property must also be "suitable" for a recreational pursuit. (4 C.4th 1103; see *supra*, §1105.) Prior to the present case, all of the decisions have involved construction sites and many have involved minors. (4 C.4th 1104.) Here, the Court of Appeal concluded that defendant withdrew his property from recreational use when he stored his dangerous equipment on it. The instant case is thus the first to extend the suitability rule beyond the construction site context. (4 C.4th 1105.)

(b) The suitability requirement is a purely judicial construct, without any basis of support in the statutory language. The plain language of the statute admits of no exceptions, either for property unsuitable for recreational use or otherwise. (4 C.4th 1105.)

(c) Courts may disregard even plain language that leads to absurd results or contravenes clear evidence of a contrary legislative intent. But the Legislature could reasonably determine that a landowner should not in fairness be held liable for injuries sustained by a trespasser from the recreational use of the owner's property; i.e., the statute may be read to mean precisely what it says. (4 C.4th 1105, citing *Lostritto v. Southern Pac. Trans. Co.* (1977) 73 C.A.3d 737, 140 C.R. 905, *supra*, §1104.)

(d) Practical considerations also support this conclusion. The concept of "suitability" is elusive and unpredictable; it

has engendered disparate application; and it can only thwart the laudable goal of inducing owners to make their properties available for recreation. (4 C.4th 1106.) Moreover, the rule has resulted in the perverse anomaly that landowners who make the most efforts to safeguard their property are the least likely to benefit from the statute. (4 C.4th 1107, discussing *Wineinger v. Bear Brand Ranch* (1988) 204 C.A.3d 1003, 251 C.R. 681.) The dissent's argument that the Legislature, by amending C.C. 846 to include additional activities while failing to reject the suitability exception, impliedly adopted this requirement, does not bear scrutiny. legislative inaction is "a weak reed upon which to lean." (4 C.4th 1107.)

(e) In sum, the suitability requirement is not compelled by law or logic. "On the contrary, assuming, as we must, that the Legislature chose its words carefully, the broad language of the statute suggests that the Legislature consciously eschewed any restrictions on the property subject to the statute in order to provide clear guidance to landowners, to encourage access to recreationists, and to fairly balance the interests of both. One who avails himself of the opportunity to enjoy access to the land of another for one of the recreational activities within the statute may not be heard to complain that the property was inappropriate for the purpose." (4 C.4th 1108.) (See 25 *Pacific L. J.* 1131; 21 *Pepperdine L. Rev.* 1048; 32 *San Diego L. Rev.* 857; for complete statement of facts of *Ornelas*, see *supra*, §1106.)

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6 *Witkin Sum. Cal. Law Torts* § 1109

[§ 1109] Owner of Estate or Interest in Real Property.

The statute protects "an owner of any estate or any other interest in real property, whether possessory or nonpossessory." (C.C. 846.) This broad language immunizes persons holding various interests.

(1) *Owner of Easement.* *Darr v. Lone Star Industries* (1979) 94 C.A.3d 895, 901, 157 C.R. 90, held that the protection given to "an owner of any estate in real property" did not extend to the owner of an easement, which is nonpossessory and cannot be an estate. However, the 1980 Legislature nullified the holding by amending the statute to include nonpossessory interests. (See *Colvin v. Southern Calif. Edison Co.* (1987) 194 C.A.3d 1306, 1312, 240 C.R. 142; 12 *Pacific L. J.* 599.)

(2) *Owner of License.* In *O'Shea v. Claude C. Wood Co.* (1979) 97 C.A.3d 903, 159 C.R. 125, defendant had a license to stockpile earth, and the court held that whether he had a possessory interest and thus was protected by C.C. 846 was a question of fact. (97 C.A.3d 910, 911.) The 1980 amendment, *supra*, makes this question irrelevant, because the holder of a nonpossessory interest is protected. (See *Ornelas v. Randolph* (1993) 4 C.4th 1095, 17 C.R.2d 594, 847 P.2d 560, *supra*, §1106.)

(3) *Owner of Property Subject to Public Easement.* In *Collins v. Tippet* (1984) 156 C.A.3d 1017, 203 C.R. 366, defendant owned a home built on a cliff above a beach. A piece of gunite broke off the cliff and fell on plaintiff, who was sunbathing on the beach. *Held*, defendant was immune. (a) She was the owner of the beach despite the fact that it was subject to a public easement by implied dedication. (b) Plaintiff contended that the immunity existed only as to the condition of the beach to which the public had access, and not to the condition of the cliff which the owner kept closed. This construction of the statute could lead beachfront property owners to close their entire areas; a construction that gives immunity where they permit public use only of the beach area is more likely to achieve the goal of keeping as much private land as possible open for public recreational use. (156 C.A.3d 1020.)

(4) *Owner of Federal Grazing Permit.* The holder of a permit to graze livestock on federal lands in California is an owner of an interest in real property for purposes of immunity under C.C. 846. (*Hubbard v. Brown* (1990) 50 C.3d 189,

197, 266 C.R. 491, 785 P.2d 1183.) (See 18 Pepperdine L. Rev. 826.)

(5) *Distinction: Business Invitee of Landowner.* A business invitee working on the property of a landowner is not immune. "Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property." (*Jenson v. Kenneth I. Mullen Consulting Engineers* (1989) 211 C.A.3d 653, 658, 259 C.R. 552.)

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6. Exception for Public Property.

6 Witkin Sum. Cal. Law Torts § 1110

[§ 1110] Exception for Public Property.

In *English v. Marin Mun. Water Dist.* (1977) 66 C.A.3d 725, 136 C.R. 224, the court assumed without express comment that C.C. 846 applied to defendant district, a public entity. The same assumption was made in *Gerkin v. Santa Clara Valley Water Dist.* (1979) 95 C.A.3d 1022, 157 C.R. 612, and *Blakley v. California* (1980) 108 C.A.3d 971, 975, 167 C.R. 1. In *Moore v. Torrance* (1979) 101 C.A.3d 66, 72, 166 C.R. 192, the court said: "Since *English* was reported, the state Legislature has by amendment broadened section 846 but it did not remove public entities from its protection. The Legislature is presumed to have had knowledge of the existing judicial decision and therefore it is reasonable to expect that it intended public entities to also benefit from the immunity."

However, in *Nelsen v. Gridley* (1980) 113 C.A.3d 87, 169 C.R. 757, the court refused to follow *Moore's* "uncritical reliance" on *English* and rejected the notion that the Legislature could be presumed to be cognizant of "the isolated *English* decision," which did not directly deal with the issue. (113 C.A.3d 96, 97.) *Nelsen* elaborately examines the legislative and judicial history of governmental liability for dangerous condition of property and of the recreational license statute, and concludes that the phrase "owner of any estate in real property" was intended to refer to a private landowner defendant, for the purpose of reducing landowner tendency to remove real property from recreational access. (113 C.A.3d 91.) "It would make little sense to apply the section's broad immunity to all types of public properties. If, for example, the publicly owned property in question were a city park intended solely as a public recreational facility, a statutory grant of immunity on such property would not further encourage recreational usage. Or, as in the case of a public road the very purpose of which is to provide an avenue for public travel, there would be no rational basis for granting immunity based on the injured person's use of the road for a recreational purpose as opposed to some other purpose." (113 C.A.3d 91.)

Nelsen was affirmed by the California Supreme Court in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 C.3d 699, 707, 190 C.R. 494, 600 P.2d 1168, disapproving "the *English-Gerkin-Moore* line of cases."

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7. Liability for Wilful Misconduct.

6 Witkin Sum. Cal. Law Torts § 1111

[§ 1111] Liability for Wilful Misconduct.

In *New v. Consolidated Rock Products Co.* (1985) 171 C.A.3d 681, 217 C.R. 522, defendant had a gravel quarry with a road constantly used by motorcyclists, despite "No Trespassing" signs that warned that the property might be used at any time for excavation. Defendant enlarged an excavation pit by cutting away the end of a two-lane haul road, leaving a 20-foot cliff. There was a dispute about the precautions taken to avoid injuries, but plaintiffs' evidence was that a single earthen barrier only 12 inches high had been constructed to prevent defendant's trucks from going over the cliff, and that cyclists believed that it was a jump. Plaintiffs, two motorcyclists, drove over the cliff and sustained serious injuries. The trial judge instructed the jury on the elements of wilful misconduct, and the verdict was for plaintiffs. *Held*, affirmed.

(a) Under established law, wilful misconduct may consist of conscious disregard of probable results, and may be based on constructive knowledge measured by an objective standard. (17 C.A.3d 688, 689, 690; see *supra*, §870.)

(b) Defendant argued that by using the phrase "willful or malicious" in C.C. 846, the Legislature intended to impose liability only where the defendant acted with a subjectively culpable state of mind. But the cases have applied the standard tort definition. (171 C.A.3d 692, citing *Lostritto v. Southern Pac. Trans. Co.* (1977) 73 C.A.3d 737, 140 C.R. 905, *supra*, §1104.) If the term is to have a more restrictive meaning, the Legislature must express that intent. (171 C.A.3d 692.) (See *Nazar v. Rodeffer* (1986) 184 C.A.3d 546, 552, 229 C.R. 209; *Charpentier v. Von Geldern* (1987) 191 C.A.3d 101, 113, 236 C.R. 233; *Bacon v. Southern Calif. Edison Co.* (1997) 53 C.A.4th 854, 859, 62 C.R.2d 16 [allegation that power company had acted maliciously in failing to guard or warn against dangerous electrical tower was refuted by evidence that it had used barbed wire and warning sign to keep people away; plaintiff's evidence that these measures were in disrepair showed only negligence, not wilful misconduct].)

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e. No Liability to Gleaners of Agricultural Products.

6 Witkin Sum. Cal. Law Torts § 1112

[§ 1112] No Liability to Gleaners of Agricultural Products.

C.C. 846.2 immunizes owners, tenants, and lessees from liability for injury to any person expressly invited onto their property to glean agricultural or farm products for charitable purposes, unless the injury was caused by the gross negligence or wilful and wanton misconduct of the owner, tenant, or lessee. However, if the owner, tenant, or lessee receives consideration for allowing the gleaning, the immunity provided by the statute is not applicable. (See *20 Pacific L. J.* 733.)

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- B. Landowners and Possessors.
 - 4. Invitees or Business Visitors.
 - a. Who Are Invitees.
 - 1. Theory of Mutual Business Interest.
 - aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1113

[§ 1113] In General.

California originally followed the limited test of potential economic benefit, adopted by the first Restatement: An invitee enters at the "express or implied invitation" of the occupant, for a purpose "of common interest or mutual benefit" to the owner or occupant and the invitee, or in connection with the business of the occupant. (See *Oettinger v. Stewart* (1944) 24 C.2d 133, 137, 148 P.2d 19; *Smith v. Kern County Land Co.* (1958) 51 C.2d 205, 208, 331 P.2d 645; *Bush v. Weed Lumber Co.* (1923) 63 C.A. 426, 432, 218 P. 618; *Madigan v. O.A. Hale & Co.* (1928) 90 C.A. 151, 154, 265 P. 574; *Buckingham v. San Joaquin Cotton Oil. Co.* (1932) 128 C.A. 94, 98, 16 P.2d 807.)

The term "invitee" is, however, misleading. A *social guest* may be invited, and will still be only a licensee (supra, §1100). But laborers coming on the property to do work, and customers coming into a shop to look at goods displayed, are invitees if led by the owner's conduct reasonably to believe that they would be willingly received, whether expressly invited or not. (*Rest.2d, Torts* §332; see *infra*, §1117.) The distinguishing characteristic of the invitee is a mutual *business* interest with the occupant, and the more modern term "business visitor" is now commonly used. (See *Hinds v. Wheadon* (1942) 19 C.2d 458, 460, 121 P.2d 724; *Crane v. Smith* (1943) 23 C.2d 288, 297, 144 P.2d 356; *Royal Ins. Co. v. Mazzei* (1942) 50 C.A.2d 549, 552, 123 P.2d 586 ["business invitee"]; *Rest.2d, Torts* §332(3); 5 Harper, James & Gray 2d §27.12; Dobbs, *The Law of Torts* §234; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §90; 6 *Proof of Facts* 527 [invitees].)

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Mutual business interest test: See 5 Harper, James & Gray 3d §27.12; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §90.



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6 *Witkin Sum. Cal. Law Torts* § 1114

[§ 1114] Nonbusiness Activity as Business.

Edwards v. Hollywood Canteen (1946) 27 C.2d 802, 167 P.2d 729, makes it clear that one may be an invitee, even though the activity is a social affair, where the defendant's business consists of the social activity. Defendant Hollywood Canteen was a corporation created chiefly for the purpose of providing recreational facilities for men in the armed services. Plaintiff, a professional dancer who acted gratuitously as a hostess at dances to which servicemen were admitted without charge, was held to be an invitee, for she was clearly conferring a benefit on defendant by aiding in the carrying out of its corporate objectives. (27 C.2d 809.)

The same reasoning was employed in *Fernquist v. San Francisco Presbytery* (1957) 152 C.A.2d 405, 409, 313 P.2d 192, where plaintiff, a member of defendant church, rendered carpentry services in construction of a church dormitory. (See *Cain v. Friend* (1959) 171 C.A.2d 806, 809, 341 P.2d 753 [plaintiff carpenter volunteered to help defendant friend in construction of addition to home]; *Tierstein v. Licht* (1959) 174 C.A.2d 835, 840, 345 P.2d 341 [plaintiff veterinarian, called to treat defendant's horse, and asked to help load another horse on trailer, was invitee as to trailer]; *Speece v. Browne* (1964) 229 C.A.2d 487, 491, 40 C.R. 384 [social guest performing requested beneficial services]; 94 A.L.R.2d 6 [private business with employee].)

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6 *Witkin Sum. Cal. Law Torts* § 1115

[§ 1115] Circumstances and Custom.

The status of a business visitor may arise from such circumstances as the conduct of the possessor, the arrangement of the premises, or local custom. (See *Oettinger v. Stewart* (1944) 24 C.2d 133, 136, 148 P.2d 19; *Rest.2d, Torts* §332.) Ordinarily, a bystander who performs services at the unauthorized request of an employee is not an invitee, even though the employee pays for the services. (*Giannini v. Campodonico* (1917) 176 C. 548, 551, 169 P. 80.) But the authority or consent of the employer need not be express; it may be implied from the nature of the work, or from conduct by the employer or employee. In *Dyer v. McCorkle* (1929) 208 C. 216, 280 P. 965, defendant corporation employed defendant driver to deliver milk, and the driver, without authority, engaged small boys to help him, paying them with milk, candy, and small sums of money. Plaintiff, while so engaged, was injured as a result of lack of ordinary care on the part of the driver. *Held*, the custom of engaging boys in this manner was so notorious that defendant corporation must have known of it, and its consent could be implied. (208 C. 219.)

The same principle of implied invitation was applied where a short line logging or freight railroad, not a common carrier of passengers, customarily permitted employees and others residing in the vicinity to ride the trains for their own convenience. (*Brown v. Feather River Lumber Co.* (1928) 203 C. 493, 496, 265 P. 203; see *Strong v. Chronicle Publishing Co.* (1939) 34 C.A.2d 335, 339, 93 P.2d 649 [newsboy on airport runway to receive delivery of newspapers, by implied invitation arising out of custom of defendant operating airport].)

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2. Theory of Public Invitation.

6 *Witkin Sum. Cal. Law Torts* § 1116

[§ 1116] Theory of Public Invitation.

The theory of the first Restatement, that invitees are "business visitors" (*supra*, §1113) has been usefully applied to store customers, hotel guests, passengers in carriers, deliverymen, repairmen, and others of similar character. (See *infra*, §1117.) Another theory, coexisting though not always articulated, broadens the class to cover "public invitees." As defined in the *Rest.2d, Torts* §332, a public invitee as "a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." And the Comment states: "Where land is held open to the public, it is immaterial that the visitor does not pay for his admission, or that the possessor's purpose in so opening the land is not a business purpose, and the visitor's presence is in no way related to business dealings with the possessor, or to any possibility of benefit or advantage, present or prospective, pecuniary or otherwise, to the possessor." (See 5 Harper, James & Gray 2d §27.12; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §§91, 97; 95 *A.L.R.2d* 992 ["economic benefit" or "public invitation" as test of licensee-invitee status].)

Language in several California cases indicates support for this extension of the class of invitees. (See *O'Keefe v. South End Rowing Club* (1966) 64 *C.2d* 729, 739, 51 *C.R.* 534, 414 *P.2d* 830; *Farrier v. Levin* (1959) 176 *C.A.2d* 791, 803, 1 *C.R.* 742 [plaintiff, at request of friend, accompanied her to defendant's store where friend made purchases]; *Weyburn v. California Kamloops* (1962) 200 *C.A.2d* 239, 242, 19 *C.R.* 357; 55 *Cal. L. Rev.* 366.)

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See 5 Harper, James & Gray 3d §27.12; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §§91, 97.



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3. Illustrations.

6 Witkin Sum. Cal. Law Torts § 1117

[§ 1117] Illustrations.

The circumstances giving rise to the relationship of landowner and invitee are too numerous to classify, but the following cases cover the common situations and some unusual ones:

(1) A *customer* entering a store to buy goods (*Brinkworth v. Sam Seelig Co.* (1921) 51 C.A. 668, 670, 197 P. 427), and the children of a customer, accompanying the customer for reasons of necessity or convenience (*Crane v. Smith* (1943) 23 C.2d 288, 297, 144 P.2d 356). (See 44 A.L.R.2d 1319 [child accompanying business visitor to store as invitee or licensee]; 50 A.L.R.3d 1227 [liability of owner or operator of store for injury to child playing on furniture, fixtures, or displays]; 61 A.L.R.4th 27 [customer's injury from falling of displayed, stored, or piled objects].)

(2) A *customer* coming to a restaurant. (*Chance v. Lawry's* (1962) 58 C.2d 368, 374, 24 C.R. 209, 374 P.2d 185.)

(3) A *salesman* of a wholesaler delivering goods to a retail store. (*Madigan v. O.A. Hale & Co.* (1928) 90 C.A. 151, 154, 265 P. 574.)

(4) A *person rendering a service*. (*Tharp v. San Joaquin Cotton Oil Co.* (1938) 27 C.A.2d 554, 557, 81 P.2d 443 [deliveryman]; *Stockovich v. Acme Spray Painters* (1954) 129 C.A.2d 81, 84, 276 P.2d 1 [bridge inspector]; see 5 Harper, James & Gray 2d §27.14; 62 Am.Jur.2d (2005 ed.), *Premises Liability* §412 et seq.; 28 A.L.R.2d 891 [building inspector]; 28 A.L.R.2d 1344 [meter reader]; 32 A.L.R.2d 9 [deliveryman]; 36 A.L.R.2d 610 [garbageman]; 69 A.L.R.4th 207 [window washer].)

(5) An *employee of an independent contractor* doing work on the owner's premises. (*Hinds v. Wheadon* (1942) 19 C.2d 458, 460, 121 P.2d 724; *Florez v. Groom Dev. Co.* (1959) 53 C.2d 347, 354, 1 C.R. 840, 348 P.2d 200; *Markley v. Beagle* (1967) 66 C.2d 951, 955, 59 C.R. 809, 429 P.2d 129; *Dobbie v. Pacific Gas & Elec. Co.* (1928) 95 C.A. 781, 787, 273 P. 630; *Biondini v. Amship Corp.* (1947) 81 C.A.2d 751, 762, 185 P.2d 94; *Moran v. Zenith Oil Co.* (1949) 92 C.A.2d 236, 241, 206 P.2d 679; *Boucher v. American Bridge Co.* (1950) 95 C.A.2d 659, 669, 213 P.2d 537; *Bickham v. Southern Calif. Edison Co.* (1953) 120 C.A.2d 815, 819, 263 P.2d 32; *Gonzales v. Robert Hiller Const. Co.* (1960) 179

C.A.2d 522, 530, 3 C.R. 832 [employee of subcontractor is invitee as to general contractor]; *Scott v. John E. Branagh & Son* (1965) 234 *C.A.2d 435, 440, 44 C.R. 384* [same]; *Grahn v. Tosco Corp.* (1997) 58 *C.A.4th 1373, 1396, 68 C.R.2d 806* [hirer has duty to maintain premises in reasonably safe condition for independent contractor's employees].)

(6) A *tenant* of a rented home who remains on the premises by permission of house movers during removal. (*Donahoo v. Kress House Moving Corp.* (1944) 25 *C.2d 237, 242, 153 P.2d 349.*) The tenant of an owner of a building is also an invitee as to an independent contractor doing construction or repair work on the premises. (*Hall v. Barber Door Co.* (1933) 218 *C. 412, 419, 23 P.2d 279.*)

(7) An *employee of a tenant* of a building. (*De Graf v. Anglo Calif. Nat. Bank of San Francisco* (1939) 14 *C.2d 87, 93, 92 P.2d 899.*)

(8) A *guest of a tenant* of an office building. (*Blumberg v. M. & T.* (1949) 34 *C.2d 226, 229, 209 P.2d 1*; see 23 *So. Cal. L. Rev. 417.*) One who enters premises to *do business with a tenant* and is injured in an entrance or hallway used in common. (*Brown v. Pepperdine* (1921) 53 *C.A. 334, 336, 200 P. 36.*)

(9) A *prospective tenant or purchaser*. (*Oettinger v. Stewart* (1944) 24 *C.2d 133, 137, 148 P.2d 19*; see 3 *A.L.R.3d 976* [liability to prospective tenant or purchaser for injury resulting from condition of premises].)

(10) A *guest of a hotel or inn*, and the guest's own invited guest. (*Goldstein v. Healy* (1921) 187 *C. 206, 211, 201 P. 462*; see 55 *A.L.R.5th 463* [motel, resort, etc. operating swimming pool].)

(11) A *member of the public in a railway depot* to meet passengers arriving or departing. (*Kircher v. Atchison, Topeka & Santa Fe Ry. Co.* (1948) 32 *C.2d 176, 186, 195 P.2d 427.*)

(12) A *student brought to a factory for instruction*, by arrangement with school authorities, as part of school work, this being one means of advertising the manufactured product. (*McDonald v. Standard Gas Engine Co.* (1935) 8 *C.A.2d 464, 472, 47 P.2d 777.*)

(13) A *member of the family of a country club member*. (See *Lucas v. Hesperia Golf & Country Club* (1967) 255 *C.A.2d 241, 247, 63 C.R. 189.*)

(14) A *passenger at an airport*. (See 14 *A.L.R.5th 662* [air carrier's liability for injury from condition of airport premises].)

(15) *Person invited or permitted to accompany patient in hospital during emergency room treatment*. (See 90 *A.L.R.4th 478.*)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Person rendering service*: See 5 Harper, James & Gray 3d §27.14; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §399 et seq.



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b. Bases of Liability.

6 *Witkin Sum. Cal. Law Torts* § 1118

[§ 1118] Bases of Liability.

(1) *Traditional Approach.* It is usually said that the duties owed to an invitee include the lesser duty owed to a licensee of due care in activities, and in addition, the further obligations to correct or warn against known dangerous conditions (see *infra*, §§1119, 1120) and to make a reasonable inspection to discover defects not known (see *infra*, §1121). (See generally *Rest.2d, Torts* §341; 5 Harper, James & Gray 2d §27.12; Dobbs, *The Law of Torts* §235; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §160 et seq.; 41 *U.C.L.A. L. Rev.* 861 [slip-and-fall cases; arguing for adoption of rebuttable presumption of negligence by store owner and retention of knowledge requirement].)

(2) *Effect of Rowland v. Christian.* Although *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086, greatly enlarged the duties owed to licensees and trespassers, it had less effect on the already broad scope of duties owed to invitees. In *Beauchamp v. Los Gatos Golf Course* (1969) 273 C.A.2d 20, 77 C.R. 914, plaintiff, a golfer and business invitee of defendant golf club, put on her golf shoes in the parking lot, and used a rough-surfaced concrete walk to reach the starting area. There were other means of access, including an oiled rock passageway. A rubber mat had been placed on a portion of the concrete walk, but plaintiff slipped and fell before she reached that point. The evidence established that nearly 4,000 people had traversed the area each month with no record of accidents; that there were no defects in the walk and no foreign matter on it; that the cleats on plaintiff's shoes were half-worn and lacked normal traction; and that plaintiff, an experienced golfer, who had played the course regularly, knew that her footing on concrete would not be as stable as on grass. On the other hand, she was unfamiliar with the walk, and no one had told her that it was slippery. *Held*, judgment of nonsuit reversed.

(a) *Present significance of status classifications.* As the court observed in *Rowland*, status still has some relevancy. "The term 'invitee' has not been abandoned, nor have 'trespasser' and 'licensee.' In the minds of the jury, whether a possessor of the premises has acted as a reasonable man toward a plaintiff, in view of the probability of injury to him, will tend to involve the circumstances under which he came upon defendant's land and the probability of exposure of plaintiff and others of his class to the risk of injury, as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property. In turn, that reinvolves the degree to which those on the property could be expected to be there, and the use they could be expected to make of the premises. In this, there is a wide difference between a trespasser, who actually may be forbidden the use of the property, and an invitee, invited or

urged to be there." (273 C.A.2d 25.)

(b) *Invitee rules still applicable.* "[T]he legal duties declared to exist in favor of the invitee upon the premises have been the highest judicially imposed upon the possessor of land. We do not believe they have been jettisoned by *Rowland v. Christian*, *supra*. Likewise, we do not believe that such established decisional principles have been abandoned and free-wheeling by the triers of fact substituted in their stead. If guidelines are withdrawn from juries relative to the invitor and invitee, proof of fault might tend to consist of the fact of plaintiff's injury and defendant's ability to pay, assumed to exist since a reasonably prudent man would be silly not to have insurance. If withdrawal of such guidelines expanded the discretion of juries on the one hand, it would limit *pro tanto* the power of the court to control abuses on the other, for want of yardsticks applicable to appropriate categories of situations." (273 C.A.2d 26.) (For *Beauchamp* holding on obvious dangers, see *infra*, §1127.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Traditional Approach.* See 5 Harper, James & Gray 3d §27.12; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §160 et seq.



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 - c. Dangerous Physical Condition.
 - 1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1119

[§ 1119] In General.

California cases, both before and after *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, followed the general law, declaring a duty to exercise ordinary care to keep the premises in a reasonably safe condition. (See *Hinds v. Wheadon* (1942) 19 C.2d 458, 460, 121 P.2d 724; *Laird v. T.W. Mather* (1958) 51 C.2d 210, 215, 331 P.2d 617; *Chance v. Lawry's* (1962) 58 C.2d 368, 374, 24 C.R. 209, 374 P.2d 185 [open planter box, without barricade or warning sign, 30 inches wide and 18 inches deep, in narrow foyer leading to defendant's restaurant]; *Markley v. Beagle* (1967) 66 C.2d 951, 955, 59 C.R. 809, 429 P.2d 129 [defective guardrail on stairs leading to roof]; *Bush v. Weed Lumber Co.* (1923) 63 C.A. 426, 432, 218 P. 618; *Bigbee v. Superior Court* (1979) 93 C.A.3d 451, 454, 155 C.R. 545 [improper siting of telephone booth]; *Dobbie v. Pacific Gas & Elec. Co.* (1928) 95 C.A. 781, 788, 273 P. 630; *Williams v. Carl Karcher Enterprises* (1986) 182 C.A.3d 479, 488, 227 C.R. 465 [wet tile floor; trial judge instructed on general duty to use reasonable care, but erred in refusing to give specific instructions of duty to correct or warn]; *Lopez v. Superior Court* (1996) 45 C.A.4th 705, 714, 52 C.R.2d 821 [lessor of produce market; floor littered with grapes]; *Craddock v. Kmart Corp.* (2001) 89 C.A.4th 1300, 1306, 107 C.R.2d 881 [fact that store patrons' attention is often attracted by displays, etc., can be considered in determining whether store used ordinary care]; *Rest.2d, Torts* §343; 5 Harper, James & Gray 2d §27.12; 62A *Am.Jur.2d* (2005 ed.), *Premises Liability* §471 et seq.; cf. *Jones v. Bridges* (1940) 38 C.A.2d 341, 346, 101 P.2d 91 [landowner is not an insurer of safety].)

An enormous accumulation of annotations and practice works on specific applications of this rule is available:

(1) *Slip and fall*. (See 28 Proof of Facts 2d 167 [slip and fall due to foreign substance on floor]; 28 Proof of Facts 2d 253 [slip and fall due to improper cleaning or waxing of floor]; 11 *Am.Jur. Trials* 265 [Stairway Fall Suits]; 79 *Am.Jur. Trials* 285 [Premises Liability--Trip and Fall]; 25 *Santa Clara L. Rev.* 591 [slip-and-fall cases in hotel bathrooms; argument for strict liability]; 65 *A.L.R.2d* 420 [liability of proprietor of store, office, etc., for injury from fall on ramp or inclined floor]; 65 *A.L.R.2d* 443 [same, fall due to improper lighting of steps or stairway]; 65 *A.L.R.2d* 471 [same, fall on step-down or other one-step change in floor level]; 66 *A.L.R.2d* 331 [same, fall down open stairway or into trap door, etc.]; 85 *A.L.R.3d* 1000 [store or business premises slip and fall: notice of transitory interior condition]; 24 *A.L.R.4th* 696 [liability of operator of grocery store to invitee slipping on spilled liquid or semiliquid substance]; 26

A.L.R.4th 481 [liability of operator of store, office, or similar place of business to invitee slipping on spilled liquid or semiliquid substance]; *123 A.L.R.5th 1* [liability of owner of store, office, or similar place of business to invitee falling on tracked-in water or snow].)

(2) *Swimming facilities*. (See *85 A.L.R.3d 750* [hazardous condition in water, injury to or death of diver]; *85 A.L.R.3d 849* [defects of diving board, slide, or other equipment]; *86 A.L.R.3d 388* [condition of deck, bathhouse, or other area in vicinity of water]; *86 A.L.R.3d 1021* [hazardous condition in water, injury to or death of swimmer]; *87 A.L.R.3d 380* [absence of or inadequacy in rescue equipment]; *87 A.L.R.3d 886* [failure to adequately fence facility]; *87 A.L.R.3d 1032* [failure to provide or exercise proper supervision].)

(3) *Particular places*. (See *46 Proof of Facts 3d 161* [liability of owner or operator of self-service gas station for injury or death of business invitee]; *67 A.L.R.2d 965* [liability of private owner or operator of picnic ground]; *69 A.L.R.2d 1067* [liability for injury from slide or chute in amusement place]; *88 A.L.R.2d 1090* [liability of theatre proprietor for defect in lavatory or restroom]; *92 A.L.R.2d 1074* [liability of bowling alley proprietor]; *4 A.L.R.3d 938* [liability of parking facility operator]; *8 A.L.R.3d 6* [liability of garage or gas station operator]; *14 A.L.R.3d 629* [liability of operator of funeral home]; *23 A.L.R.3d 1246* [liability of self-service laundry for defect in premises or appliances]; *36 A.L.R.3d 1341* [liability of physician or dentist; patient injured from defect in office premises]; *45 A.L.R.3d 1428* [liability of operator of drive-in restaurant]; *63 A.L.R.3d 1252* [liability of cemetery to persons going on premises]; *94 A.L.R.3d 876* [liability of owner or operator of boat livery for injury to patron]; *17 A.L.R.4th 1308* [telephone company's liability for condition or location of telephone booth]; *29 A.L.R.4th 304* [employer's liability for injury to baby-sitter in home]; *34 A.L.R.4th 572* [liability of wharf owner for injury from condition of premises]; *38 A.L.R.5th 107* [owner's or operator's liability for injury to skating rink patron]; *60 A.L.R.5th 379* [liability of owner or operator of self-service gas station for injury to patron].)

(4) *Particular conditions*. (See *18 Proof of Facts 2d 611* [extrahazardous nature of railroad crossing--obstruction of view]; *83 A.L.R.2d 743* [injury from overhead door]; *90 A.L.R.2d 329* [business premises, customer striking head or body on overhead beam or projection]; *15 A.L.R.3d 1420* [liability of operator of billiard or pool room]; *21 A.L.R.3d 931* [liability of store owner for failing to provide carry-out service]; *93 A.L.R.3d 132* [revolving door on nonresidential premises]; *94 A.L.R.3d 389* [dangerous or defective doormat on nonresidential premises]; *94 A.L.R.3d 439* [storekeeper: customer injured by shopping car, baby stroller, or similar vehicle controlled by another customer]; *95 A.L.R.3d 15* [ice or snow on nonresidential premises]; *19 A.L.R.4th 1110* [theatre owner's or operator's liability for injury or death resulting from lighting conditions]; *41 A.L.R.4th 176* [liability of owner or proprietor for injury from collision with glass door, panel, or wall]; *55 A.L.R.4th 632* [ski resort's liability for injuries resulting from condition of ski run or slope]; *40 A.L.R.5th 135* [liability for injury from object projecting into store aisle or passageway]; *40 A.L.R.5th 807* [liability of store or shopping center maintaining amusement device]; *42 A.L.R.5th 159* [liability of proprietor of store, office, etc., for injury to one using baby stroller, shopping cart, and the like]; *99 A.L.R.5th 141* [liability of building owner, lessee, or manager for injury or death from use of automatic passenger elevator].)

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SUPPLEMENT: [This section is current through the latest supplement]

See 5 Harper, James & Gray 3d §27.12; *62A Am.Jur.2d* (2005 ed.), *Premises Liability* §471 et seq.

(3) *Particular places*. See *89 Proof of Facts 3d 329* [liability of owner or operator of commercial premises for unsafe condition of parking lot]; *1 A.L.R.6th 297* [liability of owner or proprietor for injury from defective or dangerous shelves, displays, racks, counters, or the like]; *6 A.L.R.6th 1* [liability of owner or operator for injury from nonautomatic swinging door]. (4) *Particular conditions*. See *1 A.L.R.6th 297* [liability of owner or proprietor for injury from defective or dangerous shelves, displays, racks, counters, or the like]; *6 A.L.R.6th 1* [liability of owner or proprietor for injury from nonautomatic swinging door].



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Witkin Summary of California Law XI. NEGLIGENCE: AFFIRMATIVE DUTIES ARISING FROM SPECIAL RELATIONSHIPS

- B. Landowners and Possessors.
 - 4. Invitees or Business Visitors.
 - c. Dangerous Physical Condition.
 - 2. Knowledge of Condition.

6 *Witkin Sum. Cal. Law Torts* § 1120

[§ 1120] Knowledge of Condition.

Liability is particularly appropriate where the landowner has actual knowledge of the danger, e.g., where the landowner has created the condition. (See *Laird v. T.W. Mather* (1958) 51 C.2d 210, 216, 331 P.2d 617 [department store catering to elderly customers, basement stairway with handrail not running full length of stairway]; *Foster v. A.P. Jacobs & Associates* (1948) 85 C.A.2d 746, 750, 193 P.2d 971 [linoleum floor in building vestibule and corridor, waxed unevenly and slippery in places]; *Lopez v. Superior Court* (1996) 45 C.A.4th 705, 716, 52 C.R.2d 821 [grapes littering floor of produce market leased by defendant to another]; *Moore v. Wal-Mart Stores* (2003) 111 C.A.4th 472, 475, 3 C.R.3d 813 [where plaintiff slipped on food dropped by third party on store floor, it was error not to instruct that defendant had to have actual or constructive knowledge of dangerous condition; in California, "mode of operation" does not eliminate store patron's duty of proving actual or constructive knowledge]; 62 *Am.Jur.2d* (2005 ed.), *Premises Liability* §163; BAJI, No. 8.20.)

The knowledge of an employee may be imputed to the landowner, as where the employee, acting within the scope of employment, creates the condition. (*Hatfield v. Levy Bros.* (1941) 18 C.2d 798, 806, 117 P.2d 841; *Lorenz v. Santa Monica City High School Dist.* (1942) 51 C.A.2d 393, 401, 124 P.2d 846; *Gilbert v. Pessin Grocery Co.* (1955) 132 C.A.2d 212, 225, 282 P.2d 148.)

West's Key Number Digest, Negligence k.1037(4), 1087

SUPPLEMENT: [This section is current through the latest supplement]
See 62A *Am.Jur.2d* (2005 ed.), *Premises Liability* §481 et seq.



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- 3. Failure To Inspect: Recovery Allowed.

6 *Witkin Sum. Cal. Law Torts* § 1121

[§ 1121] Failure To Inspect: Recovery Allowed.

The landowner's lack of knowledge of the dangerous condition is not a defense. He or she has an affirmative duty to exercise ordinary care to keep the premises in reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, the landowner would have discovered the dangerous condition, he or she is liable. (See *Mondine v. Sarlin* (1938) 11 C.2d 593, 597, 81 P.2d 903; *Blumberg v. M. & T.* (1949) 34 C.2d 226, 229, 209 P.2d 1; *Swanberg v. O'Mectin* (1984) 157 C.A.3d 325, 330, 203 C.R. 701, citing the text; *Portillo v. Aiassa* (1994) 27 C.A.4th 1128, 1135, 32 C.R.2d 755, 12 Summary (10th), *Real Property*, §647 [commercial landlord had duty to conduct reasonable inspection for presence of dangerous dogs]; *Lopez v. Superior Court* (1996) 45 C.A.4th 705, 716, 52 C.R.2d 821 [produce market lessor had duty of reasonable inspection of floor that became littered with grapes]; *Rest.2d, Torts* §343; 5 Harper, James & Gray 2d §27.12; 44 Proof of Facts 3d 449 [constructive notice to landlord of unsafe condition on premises]; 23 So. Cal. L. Rev. 417.) (On employee duty to inspect workplace, see *Devens v. Goldberg* (1948) 33 C.2d 173, 178, 199 P.2d 943, 3 Summary (10th), *Agency and Employment*, §126.)

Many cases allow the jury to determine whether the condition existed for a long enough period to be discoverable by ordinary care in inspection, and emphasize the fact that the place was one to which a large number of people were invited, and therefore called for more frequent inspection. (See, e.g., *Lehman v. Richfield Oil Corp.* (1953) 121 C.A.2d 261, 264, 263 P.2d 13 [phone booth at gas station; oily spot on step]; *McKenney v. Quality Foods* (1957) 156 C.A.2d 349, 356, 319 P.2d 448 [supermarket; plaintiff slipped on lettuce scraps].)

In *Bridgman v. Safeway Stores* (1960) 53 C.2d 443, 2 C.R. 146, 348 P.2d 696, plaintiff testified that she selected a pumpkin from defendant's self-service market stand, and that negligently placed pumpkins fell and knocked her down. *Held*, judgment for defendant affirmed. If the condition is caused by a customer disarranging merchandise, the store owner is liable only if he or she had actual knowledge, or if the condition lasted long enough that a proper inspection would have revealed it. However, in a self-service store, where customers are allowed to inspect and replace goods, exercise of ordinary care may require greater precautions and more frequent inspections, and the sufficiency of the inspection is a jury question. (53 C.2d 449.)

In *Ortega v. Kmart Corp.* (2001) 26 C.4th 1200, 114 C.R.2d 470, 36 P.3d 11, plaintiff, while shopping in defendant grocery store, slipped on a puddle of milk and suffered substantial knee injuries. He sued for personal injuries and obtained a verdict for \$ 47,000, even though he was unable to present evidence showing how long the milk had been on the floor. *Held*, affirmed.

(a) Under *Girvetz v. Boys' Market* (1949) 91 C.A.2d 827, 206 P.2d 6, *infra*, §1123, a store is not an insurer of the safety of its patrons. However, the owner does owe them the duty to exercise ordinary care in keeping the premises reasonably safe, and the owner can fulfill this duty by making reasonable inspections of areas open to customers. To establish liability, the plaintiff must prove that the owner had actual or constructive knowledge of the alleged defect in sufficient time to have corrected it. The basic question is: "[I]f the plaintiff has no evidence of the source of the dangerous condition or the length of time it existed, may the plaintiff rely *solely* on the owner's failure to inspect the premises within a reasonable period of time in order to establish an inference that the defective condition existed long enough for a reasonable person exercising ordinary care to have discovered it?" (26 C.4th 1203.)

(b) The plaintiff need not show actual knowledge where the evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge. And whether the dangerous condition existed for the requisite amount of time can be established by circumstantial, as well as direct, evidence. Although numerous cases have considered the owner's inspection practice as one of several factors in determining the length of time a condition existed prior to an accident, none has held that this failure *alone* can satisfy the plaintiff's burden to prove constructive knowledge. However, *Sapp v. W.T. Grant Co.* (1959) 172 C.A.2d 89, 341 P.2d 826, and *Bridgman v. Safeway Stores*, *supra*, support this proposition. (26 C.4th 1206.)

(c) A plaintiff may prove that a dangerous condition existed for an unreasonable time with circumstantial evidence. As *Bridgman* observed, "evidence that an inspection has not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it." (26 C.4th 1210.) It is then a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner exercising reasonable care. The burden of proof of this fact remains on the plaintiff. (26 C.4th 1207, 1212.)

(d) Here, defendant's manager testified that the store kept no written inspection records, that all of defendant's employees were trained to look for and clean up spills, and that every 15 to 30 minutes an employee usually walked the aisle where plaintiff slipped, but that the milk could have been on the floor for as long as 2 hours. (26 C.4th 1204.) This evidence was sufficient to justify a reasonable inference that the dangerous condition existed long enough for it to have been discovered by defendant. (26 C.4th 1212.)

(e) Allowing an inference of constructive knowledge from a failure to inspect a reasonable time prior to the accident does not change the rule that if a store owner has taken care in the discharge of its duty, by inspecting its premises in a reasonable manner, then no breach of duty will be found, even if a plaintiff does suffer injury. (26 C.4th 1211.)

SUPPLEMENT: [This section is current through the latest supplement]

See 5 Harper, James & Gray 3d §27.12.



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 - aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1122

[§ 1122] In General.

It has been frequently emphasized that the landowner is not an insurer of the personal safety of the invitee, and that his or her duty is performed by a reasonable inspection. (See *Adams v. Dow Hotel* (1938) 25 C.A.2d 51, 54, 76 P.2d 210; 8 *Hastings L. J.* 335; BAJI, No. 8.20.)

Other cases absolve a defendant who has no actual or constructive knowledge of the condition. In *Crawford v. Pacific States Savings & Loan Co.* (1937) 22 C.A.2d 448, 71 P.2d 333, plaintiff, an invitee in defendant's hotel, fell on a slippery bathroom floor. In the absence of evidence showing knowledge by the defendant of the condition, or its existence for so long a time as to charge defendant with notice, a judgment for plaintiff could not be sustained. (22 C.A.2d 449.)

In *Dingman v. Mattock Co.* (1940) 15 C.2d 622, 104 P.2d 26, plaintiff, an invitee of defendant contractor, was injured when a defective plank on which he was walking broke. *Held*, the dangerous condition was not apparent, there was no evidence that defendant knew of it, and defendant could not be liable without this knowledge. (15 C.2d 626.) (See *Perbost v. San Marino Hall-School for Girls* (1948) 88 C.A.2d 796, 803, 199 P.2d 701; *Girvetz v. Boys' Market* (1949) 91 C.A.2d 827, 829, 206 P.2d 6; *Oldenburg v. Sears Roebuck & Co.* (1957) 152 C.A.2d 733, 742, 314 P.2d 33.)

In *Laico v. Chevron U.S.A.* (2004) 123 C.A.4th 649, 20 C.R.3d 307, plaintiff was an employee of a company that operated facilities on land owned by defendant. When the chemicals that he worked with caused injuries, plaintiff successfully sued defendant owner under a premises liability theory. *Held*, reversed. Absent evidence of a danger present at the site when the company took possession, and absent evidence of the property owner's knowledge of and ability to control hazardous practices by the company's employees, there is no basis for imposing on the owner a duty to avert the harm plaintiff incurred in the course of his employment. *Portillo v. Aiassa* (1994) 27 C.A.4th 1128, 1135, 32 C.R.2d 755, *supra*, §1121, is distinguished. Here there is no evidence defining the relationship between the owner and the occupier, landlord-tenant or otherwise; thus, it is impossible to determine when the owner is entitled to enter the property and inspect the occupier's facilities. (123 C.A.4th 665.)

Some of the foregoing cases seem to place too much emphasis on the knowledge factor and fail to give sufficient consideration to the duty of inspection.

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bb. Where Inspection Would Not Disclose Defect.

6 Witkin Sum. Cal. Law Torts § 1123

[§ 1123] Where Inspection Would Not Disclose Defect.

(1) *Short Duration*. Some cases turn on the circumstance that the dangerous condition was of such *short duration* that the defendant, though reasonably diligent in inspection, could not have discovered it. (See *Owen v. Beauchamp* (1944) 66 C.A.2d 750, 752, 152 P.2d 756.) In *Girvetz v. Boys' Market* (1949) 91 C.A.2d 827, 206 P.2d 6, plaintiff, walking along the aisle of a market, slipped on a banana peel, and a judgment for defendant notwithstanding the verdict was affirmed. The court distinguished *Louie v. Hagstrom's Food Stores* (1947) 81 C.A.2d 601, 606, 184 P.2d 708, on the ground that in that case, there was evidence that the syrup had been on the floor for a substantial period of time, while here, the only evidence bearing on the issue was the testimony of a witness who had observed the banana on the floor "a good minute and a half" before the accident, and this period was too short. (91 C.A.2d 831.) The distinction seems to be a thin one, for the jury's determination of the time the condition existed, from "circumstantial evidence," seems as much (or as little) a matter of guesswork in the one as in the other case.

(2) *Hidden or Trivial Defect*. Recovery is denied where the defect is so hidden or so trivial that a reasonable inspection would not bring it to light. (See *Reinhard v. Lawrence Warehouse Co.* (1940) 41 C.A.2d 741, 747, 107 P.2d 501.) In *Graves v. Roman* (1952) 113 C.A.2d 584, 248 P.2d 508, plaintiff caught her foot on leaving the elevator of defendant's office building. The alleged negligence was in maintaining stripping in front of the elevator, in some places one-eighth inch above the adjacent linoleum. In denying recovery, the court referred to the sidewalk cases involving municipalities (*supra*, §212), and declared that the underlying basis of these cases "is a practical recognition of the impossibility of maintaining heavily traveled surfaces in a perfect condition and that minor defects such as differences in elevation are bound to occur in spite of the exercise of reasonable care by the party having the duty of maintaining the area involved." (113 C.A.2d 586.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Hidden or Trivial Defect*. See *Kasparian v. AvalonBay Communities* (2007) 156 C.A.4th 11, 27, 66 C.R.3d 885

["trivial defect" doctrine permits court to determine triviality as matter of law and allows elimination from court system

of unwarranted litigation that attempts to impose on property owner what amounts to absolute liability for injury to persons who come upon property].



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 - cc. Injury From Insect Bite.

6 Witkin Sum. Cal. Law Torts § 1124

[§ 1124] Injury From Insect Bite.

In *Brunelle v. Signore* (1989) 215 C.A.3d 122, 263 C.R. 415, plaintiff spent a weekend at defendant's vacation home, a structure abutting on a desert. He was bitten by a brown recluse spider, and the venom caused serious injuries. His complaint alleged negligent maintenance of the property and failure to warn of a dangerous condition. *Held*, summary judgment for defendant affirmed.

(a) "Plaintiff has not cited nor has our research revealed any California case that discusses the issue of whether an owner or occupier of a residence, a business or a hotel/motel may be held liable for plaintiff's injury as a result of an insect or spider bite sustained on the premises." (215 C.A.3d 122.) No out-of-state case has been found on liability of an owner or occupier of a private residence, and the very few cases dealing with the owner of a business or hotel are split on the issue. (215 C.A.3d 128.)

(b) "Our consideration of the *Rowland* factors leads us to the conclusion in this case that an owner or occupier of a private residence does not have a duty to protect or prevent bites from harmful insects where: (1) it is not generally known that the specific insect is indigenous to the area; (2) the homeowner has no knowledge that a specific harmful insect is prevalent in the area where his residence is located; (3) the homeowner has on no occasion seen the specific type of harmful insect either outside or inside his home; and (4) neither the homeowner nor the injured guest has seen the specific insect that bit the guest either before or after the bite occurred. To impose a duty under these circumstances, where the owner or occupier of the premises had no reason to anticipate or guard against such an occurrence would be unfair and against public policy. ... Further, the task of defining the duty and the measures required of the owner or occupier of private residences to meet that duty would be difficult in the extreme." (215 C.A.3d 129; on *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, see supra, §1086.)

(c) Plaintiff contended that because defendant had *general knowledge* of the prevalence of other harmful insects around his home, he had a duty to use professionals to clean the house when he was not in residence. "However, that foreseeability which an owner or occupier of a residence shares with the public at large does not, per se, impose a duty

on such owner or occupier to procure professional exterminators and/or cleaning crews to 'de-bug' his residence, inside and out, on a periodic basis." (215 C.A.3d 130.) (See *Butcher v. Gay* (1994) 29 C.A.4th 388, 398, 34 C.R.2d 771 [citing *Brunelle*; homeowner, who had no warning that Lyme disease was danger in his area, was not under duty to protect overnight guest from getting it].)

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- aa. Theory of Contributory Negligence.

6 *Witkin Sum. Cal. Law Torts* § 1125

[§ 1125] Theory of Contributory Negligence.

Where the danger is so obvious that a person could reasonably be expected to see it, the plaintiff's failure to take precautions is regarded by many cases as contributory negligence. (See *Jones v. Bridges* (1940) 38 C.A.2d 341, 346, 101 P.2d 91; *Robinson v. King* (1952) 113 C.A.2d 455, 248 P.2d 477; *Markwell v. Swift & Co.* (1954) 126 C.A.2d 245, 251, 272 P.2d 47; *Scott v. Alpha Beta Co.* (1980) 104 C.A.3d 305, 310, 163 C.R. 544 [plaintiff, with "trick knee" and wearing house slippers, slipped and fell in rainwater that had been tracked onto floor of defendant's store]; 83 A.L.R.5th 589 [comparative negligence, contributory negligence, and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow]; 29 Proof of Facts 2d 657 [proceeding into darkened interior premises]; cf. *Donahoo v. Kress House Moving Corp.* (1944) 25 C.2d 237, 245, 153 P.2d 349 [plaintiff was allowed to recover despite some familiarity with condition].)

The effect of the contributory negligence approach is sometimes to limit the landowner's obvious danger defense. Thus, where the plaintiff is a customer in a store, and the defective condition consists of a slippery or otherwise dangerous floor, he or she may be allowed to recover even though the condition could have been seen on an examination of the floor. The customer may properly give his or her attention to the display of goods and need not watch the floor. (*Wills v. J.J. Newberry Co.* (1941) 43 C.A.2d 595, 603, 111 P.2d 346; see *Thompson v. B.F. Goodrich Co.* (1941) 48 C.A.2d 723, 727, 120 P.2d 693; *Louie v. Hagstrom's Food Stores* (1947) 81 C.A.2d 601, 610, 184 P.2d 708.) In *Sommerfield v. Miratti* (1942) 49 C.A.2d 450, 454, 121 P.2d 746, where plaintiff fell down waxed, slippery steps, it was held that she could recover despite some prior experience with the same steps; she could assume that the slippery condition was not permanent but would be corrected by defendant in the exercise of due care.

In *Florez v. Groom Dev. Co.* (1959) 53 C.2d 347, 1 C.R. 840, 348 P.2d 200, defendant general contractor had an employee who placed a four-foot by six-foot plank across a ditch in loose dirt, inadequate to span it properly. Plaintiff employee of a subcontractor walked on it in the course of his work, it gave way, and he fell into the ditch. *Held*, judgment for damages affirmed. Defendants contended that if the plank was too narrow or too short, these defects were obvious; but the quantum of care required of invitor and invitee are not identical. An invitee may assume that he or she

may use the area to which the invitation extends without danger; the invitee is not required to look for hidden traps. Likewise, a workman may pay attention to his or her work, and is not required to exercise the same quantum of care as other invitees. Moreover, the plank was knowingly set in loose dirt, which was unsafe. If plaintiff was charged with seeing the obvious, he was still not bound to examine either the plank or the bank with care. (53 C.2d 358.)

The existence and extent of a duty is a question of law, while contributory negligence is a question of fact. In *Neel v. Mannings* (1942) 19 C.2d 647, 122 P.2d 576, plaintiff struck her head on a projecting ceiling board, while ascending the steps of a restaurant. The board was in plain sight, and plaintiff was familiar with the stairway, but her attention was distracted by the necessity of avoiding collision with people coming downstairs and she forgot the danger. *Held*, the question of contributory negligence was for the jury and it was error to give judgment for defendant notwithstanding the verdict. (19 C.2d 656.) In *Henderson v. McGill* (1963) 222 C.A.2d 256, 34 C.R. 897, plaintiff, an invitee at defendants' cafe, walked on a paved strip alongside the building, and tripped on a faucet protruding four-five inches above the ground, five-six inches from the building wall. *Held*, judgment for plaintiff affirmed. Even though a condition is physically obvious, liability is not precluded where the circumstances are such that a person would not necessarily observe it, and this is a fact question for the jury. Here, e.g., the jury could find that a distraction was provided by the building window, a water tank in the path, or rain, which might focus the person's attention away from the ground. (222 C.A.2d 262.) (See *Chance v. Lawry's* (1962) 58 C.2d 368, 374, 24 C.R. 209, 374 P.2d 185 [whether plaintiff, under circumstances, should have seen danger, was question of fact decided against defendant by jury]; 65 Harv. L. Rev. 623.)

West's Key Number Digest, Negligence k.1012

SUPPLEMENT: [This section is current through the latest supplement]



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- bb. Theory of No Breach of Duty.

6 Witkin Sum. Cal. Law Torts § 1126

[§ 1126] Theory of No Breach of Duty.

The landowner does not necessarily have to eliminate the defective condition; the landowner may choose to discharge his or her duty by giving adequate *warning* of the danger. However, if the danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty unless harm was foreseeable despite the obvious nature of the danger. Under this analysis, the defendant is not negligent; i.e., he or she has not violated any duty of care. (See *Shanley v. American Olive Co.* (1921) 185 C. 552, 555, 197 P. 793; *Mautino v. Sutter Hosp. Assn.* (1931) 211 C. 556, 561, 296 P. 76; *Pauly v. King* (1955) 44 C.2d 649, 653, 284 P.2d 487 [unsupported flashing obvious to plaintiff, an experienced roofer]; *Ambrose v. Allen* (1931) 113 C.A. 107, 112, 298 P. 169; *Royal Ins. Co. v. Mazzei* (1942) 50 C.A.2d 549, 552, 123 P.2d 586; *Nagle v. Long Beach* (1952) 113 C.A.2d 669, 672, 248 P.2d 799 [uncompleted structure, defective ladder]; *Delk v. Mobilhomes* (1953) 118 C.A.2d 529, 532, 258 P.2d 75 [house to be moved, on jacks, soft wet soil]; *Curland v. Los Angeles County Fair Assn.* (1953) 118 C.A.2d 691, 695, 258 P.2d 1063 [tripped over object in plain sight]; *Mula v. Meyer* (1955) 132 C.A.2d 279, 287, 282 P.2d 107 [uncovered hole in floor of building under construction]; *Obrien v. Fong Wan* (1960) 185 C.A.2d 112, 116, 8 C.R. 124 [fall down stairs of recessed entranceway near window display]; *Miller v. Desilu Productions* (1962) 204 C.A.2d 160, 167, 168, 22 C.R. 36, quoting the text; *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 C.A.3d 650, 661, 136 C.R. 203 [jobsite injury of employee of subcontractor; judgment of nonsuit affirmed]; *Edwards v. California Sports* (1988) 206 C.A.3d 1284, 1288, 254 C.R. 170 [50-inch guard fence along driveway descending to subterranean entrance to sports arena, clearly adequate to prevent person from falling over edge]; *Danieley v. Goldmine Ski Associates* (1990) 218 C.A.3d 111, 124, 266 C.R. 749 [ski resort had no duty to remove tree next to ski run, obvious danger that itself served as warning]; *O'Donoghue v. Bear Mountain Ski Resort* (1994) 30 C.A.4th 188, 192, 35 C.R.2d 467, *infra*, §1339 [ski resort]; *Rest.2d, Torts* §343A; 5 Harper, James & Gray 2d §27.13; 65 Harv. L. Rev. 625; 8 Hastings L. J. 335; 35 A.L.R.3d 230 [rule absolving possessor of land from liability to those coming on land for harm caused by dangerous condition known to injured party].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Christoff v. Union Pac. R. Co.* (2005) 134 C.A.4th 118, 126, 36 C.R.3d 6 [danger of walking on railroad bridge when train was passing was so obvious that railroad had no duty to warn injured pedestrian of danger; pedestrian admitted awareness of general hazard of walking on metal grid approximately four feet wide in proximity to trains that were wider than tracks]; 5 Harper, James & Gray 3d §27.13.



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 - cc. Effect of Rowland Case.

6 *Witkin Sum. Cal. Law Torts* § 1127

[§ 1127] Effect of Rowland Case.

In *Beauchamp v. Los Gatos Golf Course* (1969) 273 C.A.2d 20, 77 C.R. 914, plaintiff, a golfer wearing worn golf shoes, slipped and fell on a concrete walk that she used instead of a safer means of access to the course. (See *supra*, §1118.) Defendant set up the defenses of no duty to warn of an obvious danger and contributory negligence, and the trial judge granted a nonsuit. *Held*, reversed; in view of plaintiff's previous unfamiliarity with the walk, the issues of her appreciation of the risk of using it with her badly worn shoes, or her contributory negligence, were for the jury. (273 C.A.2d 34.) Under *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086, "the obvious nature of the risk, danger, or defect ... can no longer be said *per se* to abridge the invitation given by the possessor of land, or to derogate his or her duty of care, so as to make the possessor's liability solely a matter of law to be determined on a nonsuit. By that decision, this matter of law for the court is transmuted to a question of fact for the jury; namely, whether a possessor of land even in respect to the obvious risk has acted reasonably in respect to the probability of injury to an invitee; and whether or not the invitee used the property reasonably in full knowledge of any obvious risk entering into a subsequent injurious incident." (273 C.A.2d 33.)

In *Osborn v. Mission Ready Mix* (1990) 224 C.A.3d 104, 273 C.R. 457, discussing *Florez v. Groom Dev. Co.* (1959) 53 C.2d 347, 1 C.R. 840, 348 P.2d 200, *supra*, §1125, and *Beauchamp v. Los Gatos Golf Course*, the court said: "The unspoken but operative principle in *Beauchamp*, as well as in *Florez*, is foreseeability: it is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger ... , may lead to the legal conclusion that the defendant 'owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.'" (224 C.A.3d 121.)

In *Krongos v. Pacific Gas & Elec. Co.* (1992) 7 C.A.4th 387, 9 C.R.2d 124, a construction worker was electrocuted when a cable he was holding touched an overhead high-voltage wire that passed over land owned by defendant and

leased to the decedent's employer for use as a "job yard" during a highway construction project. At the time of the accident, the decedent was assisting the operator of a boom truck by attaching the boom cable to bundles of timber. The decedent was killed when the operator was blinded by the sun and swung the boom into the overhead power line. In the ensuing wrongful death action by plaintiff heirs, the trial judge entered summary judgment for defendant. *Held*, reversed; defendant owed a general duty of due care to persons coming on his land to protect them from the hazard presented by the high voltage lines.

(a) The general duty of care established by *Rowland* applies to lessors who are not in possession of the leased premises. (7 C.A.4th 392, citing *Becker v. IRM Corp.* (1985) 38 C.3d 454, 213 C.R. 213, 698 P.2d 116, *infra*, §1507, *Wylie v. Gresch* (1987) 191 C.A.3d 412, 236 C.R. 552, *infra*, §1147, and *Mora v. Baker Commodities* (1989) 210 C.A.3d 771, 258 C.R. 669, 12 Summary (10th), *Real Property*, §653.) Hence, defendant had a duty to exercise due care to protect third persons, such as the decedent, who come onto the leased premises, but this does not answer the specific question whether he had a duty to protect the decedent against the obvious danger of operating a boom truck near high voltage lines. (7 C.A.4th 392.)

(b) Despite the obviousness of the danger, it was reasonably foreseeable by defendant that a person might be electrocuted by the boom's coming into contact with the overhead power lines. "[T]he practical necessity of encountering the danger (i.e., the necessity of using the boom truck to move materials), when weighed against the apparent risk involved (electrocution by contact with electrical wires), is such that under the circumstances, a person might (and in fact did) choose to encounter the danger." (7 C.A.4th 394, citing *Osborn*.) However, although the decedent's injury was "foreseeable" as it pertains to a general duty of care, the fact-finder is still free to find that the injury was not foreseeable in light of this particular defendant's conduct. (7 C.A.4th 394.)

(c) Defendant's general duty to use due care to protect people coming on his land from the obvious hazard of electrocution is supported not only by foreseeability, but also by the sum total of the policy considerations enunciated in *Rowland*: the decedent clearly suffered injury; there is a strong policy of preventing future harm of the kind that happened here; defendant could have easily discharged his burden either by refusing to rent the land for the purpose for which it was used or by specifically prohibiting the use of boom trucks on the premises; and the risk involved is likely to be covered by a standard landlord's liability policy. Whether defendant breached this duty with respect to the decedent is, however, an issue that should be left to the fact finder to decide. (7 C.A.4th 395.) (See *Martinez v. Chippewa Enterprises* (2004) 121 C.A.4th 1179, 1184, 18 C.R.3d 152 [although obviousness of danger may obviate duty to warn, if it is foreseeable that danger may cause injury despite being obvious, e.g., when necessity requires persons to encounter it, there may be duty to remedy danger, and breach of that duty may form basis for liability].)

SUPPLEMENT: [This section is current through the latest supplement]



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 - 4. Invitees or Business Visitors.
 - c. Dangerous Physical Condition.
 - 6. Exceeding Scope of Invitation.

6 Witkin Sum. Cal. Law Torts § 1128

[§ 1128] Exceeding Scope of Invitation.

(1) *Early Rule of Restricted Scope.* It was formerly held that the duty of the owner extended only to that portion of the premises where the invitee would, under the circumstances, be entitled to go; and this depended on various factors, such as the character of the place and the nature of the business to be transacted. An invitee who went to other parts of the premises exceeded the scope of the invitation and became a mere licensee or trespasser, toward whom no duty was owed as to the condition of the premises. In *Powers v. Raymond* (1925) 197 C. 126, 239 P. 1069, plaintiff, an employee of a hotel, desiring to go to the railroad station, chose a dark bypath instead of the well-lighted roadway, and was injured by reason of a defect in the walk. While the invitation to the employee included not only the use of the building but also of a safe means of ingress and egress, this was provided in the roadway, and in the use of the bypath, plaintiff was a mere licensee. (197 C. 131.) (See *Medcraft v. Merchants Exchange* (1931) 211 C. 404, 406, 295 P.2d 822 [plaintiff, in search of washroom, entered darkened room and stepped through door into air shaft]; *Billeter v. Rhodes & Jamieson* (1951) 104 C.A.2d 137, 144, 231 P.2d 93 [plaintiff climbed concrete mixer in improper manner, disregarding safe method]; *Robinson v. King* (1952) 113 C.A.2d 455, 248 P.2d 477 [plumber doing repair work in hotel went to unfamiliar unlighted place and stepped through doorway into flight of stairs]; *Powell v. Jones* (1955) 133 C.A.2d 601, 606, 284 P.2d 856 [baby-sitter left premises for personal reasons and returned by unfamiliar outside stairway]; *Rest.2d, Torts* §332, Comment l; 58 A.L.R.2d 1201, 1204 [duty and liability of innkeeper to visitor or caller of registered guest].)

(2) *Relaxation of Rule.* Later cases rejected the notion that an invitee loses his or her status whenever the invitee goes beyond the place where *actual business* is to be transacted. (See *Rest.2d, Torts* §332, Comment l.) Thus:

(a) The use of washrooms is generally considered within the scope of the invitation unless some notice to the contrary is given. (*Stewart v. Lido Cafe* (1936) 13 C.A.2d 46, 51, 56 P.2d 553; *Sheridan v. Ravn* (1949) 91 C.A.2d 112, 115, 204 P.2d 644 [jury could find implied invitation to use washroom].)

(b) The invitation includes the right to use any means of ingress or egress that reasonably appears to have been provided. (*Johnston v. De La Guerra Properties* (1946) 28 C.2d 394, 399, 170 P.2d 5; see *Tschumy v. Brook's Market* (1943) 60 C.A.2d 158, 165, 140 P.2d 431 [customer of market, on foot, was still invitee when leaving by crossing

market's parking lot]; *DeLay v. Braun* (1944) 63 C.A.2d 8, 10, 146 P.2d 32 [plaintiff, after unsuccessfully ringing defendant's doorbell for business purpose, was still invitee when she walked to rear of house to make further inquiry]; *Keane v. McIndoe* (1949) 93 C.A.2d 82, 84, 207 P.2d 1059 [tenant authorized by landlord to put garbage in can located on landlord's adjacent lot was invitee while on lot disposing of garbage]; *Danisan v. Cardinal Grocery Stores* (1957) 155 C.A.2d 833, 837, 318 P.2d 681 [customer in food market slipped in aisle used for customers of different lessees].)

(c) Other parts of the premises may be considered within the scope of the invitation. (See *Christy v. Ulrich* (1931) 113 C.A. 338, 340, 298 P. 135 [state engineer, inspecting highway bridge under construction, was injured while voluntarily carrying tool to worker]; *Koppelman v. Ambassador Hotel Co. of Los Angeles* (1939) 35 C.A.2d 537, 540, 96 P.2d 196 [defendant company maintained shops and bank on its lower floor; plaintiff, having bank business, was instead attracted by sightseeing crowd, and followed it along corridor where she tripped over timber on floor]; *Miller v. Contra Costa* (1951) 106 C.A.2d 304, 307, 235 P.2d 76 [pilot at airport was invitee not only as to field and runway, but as to shoulder negligently maintained with dirt mound].)

Under the doctrine of *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, (supra, §1086), the test of the scope of the invitation has lost most of its significance.

SUPPLEMENT: [This section is current through the latest supplement]



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 - 1. Nature of Duty.

6 *Witkin Sum. Cal. Law Torts* § 1129

[§ 1129] Nature of Duty.

(1) *Duty To Control Activity*. The landowner's duty is not limited to keeping the physical property in safe condition. The premises alone may involve no dangers, but the condition may be unsafe because of the activity taking place. As pointed out in the *Rest.2d, Torts* §344, the possessor has a duty to take appropriate measures to restrain conduct by third persons of which the possessor should be aware and that the possessor should realize is dangerous. (See *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, *infra*, §1134; *Taylor v. Centennial Bowl* (1966) 65 C.2d 114, 121, 52 C.R. 561, 416 P.2d 793, *infra*, §1137 [duty "to take affirmative action to control the wrongful acts of third persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom"]; *Baley v. J.F. Hink & Son* (1955) 133 C.A.2d 102, 111, 283 P.2d 349 [storekeeper may be liable for permitting dogs in store aisle where they may cause a customer to stumble or trip]; *Winn v. Holmes* (1956) 143 C.A.2d 501, 504, 299 P.2d 994 [complaint alleged that guest in defendant's restaurant was threatened and assaulted by two other guests while defendant was present]; *Thomas v. Bruza* (1957) 151 C.A.2d 150, 154, 311 P.2d 128 [duty of bar operator to protect guests]; *Bartosh v. Banning* (1967) 251 C.A.2d 378, 384, 59 C.R. 382 [bar operator must exercise control over customer when operator has reason to believe from observation or past experience that customer's conduct will be dangerous to another]; *Orser v. George* (1967) 252 C.A.2d 660, 672, 60 C.R. 708 [member of duck club participating in practice shoot, under duty to control shooting by other members]; *Barker v. Wah Low* (1971) 19 C.A.3d 710, 716, 97 C.R. 85 [drive-in restaurant with bumper stops inadequate to stop patron's car, which jumped barrier and killed decedent]; *Musgrove v. Ambrose Properties* (1978) 87 C.A.3d 44, 51, 52, 150 C.R. 722 [plaintiff injured by bicycle ridden by boy on passageway in shopping center; defendant knew that bicycles were ridden on premises and took no precautions to minimize risk of striking pedestrian]; *Cantwell v. Peppermill* (1994) 25 C.A.4th 1797, 1801, 31 C.R.2d 246 [bar and restaurant operator has duty to take reasonable steps to protect guests from aggressive conduct of other persons on premises]; *Hassoon v. Shamieh* (2001) 89 C.A.4th 1191, 1199, 107 C.R.2d 658 [landowner has no legal duty to take measures to prevent violence from occurring outside property, even when foreseeable]; *Sakiyama v. AMF Bowling Centers* (2003) 110 C.A.4th 398, 402, 1 C.R.3d 762 [all night rave parties are not inherently dangerous].)

(2) *Control Over Third Person*. In addition to notice, the landowner must have some control over the conduct of the third person. (See *Nevarez v. Thriftmart* (1970) 7 C.A.3d 799, 804, 87 C.R. 50, supra, §1062.) *Young v. Desert View Management Corp.* (1969) 275 C.A.2d 294, 79 C.R. 848, rejected an unwarranted extension of duty. Plaintiff was a part-time employee in defendant's restaurant, off duty, when a robbery was committed. One waitress said "Help, I have been robbed," and another waitress said "A man ... just robbed Helen. Help. Let's get a license number." Plaintiff went out, saw a man walking, and asked him if he saw the robbers. The man drew a gun and plaintiff fled but was shot in the back. *Held*, defendant was not liable. The theory that plaintiff responded to a request to go into a zone of danger was not supported by this evidence; the only justifiable inference was a reasonable belief by the waitress that a robber was making a getaway, not that he was lurking outside. As to the "social value" of his conduct, the Legislature has covered the field of indemnification of Good Samaritans (see *Govt.C. 13970* et seq.); there is no reason to impose liability on the initial victim. (275 C.A.2d 300.)

(3) *Duration of Activity*. One practical difference between liability for conditions and for activities is that usually the physical condition is continuous and discoverable by inspection, while the dangerous activity may sometimes be temporary. The question then is whether it was so obvious and had continued for such a period as to charge the defendant with notice of it.

In *Edwards v. Hollywood Canteen* (1946) 27 C.2d 802, 167 P.2d 729, plaintiff, a volunteer hostess at a servicemen's dance conducted by defendant corporation, was injured when a Marine with whom she was dancing threw her around in "wild jitterbug antics," disregarding her protest and screams for help. Defendant was held liable on a showing that the objectionable activity continued for 3 or 4 minutes before the accident. (27 C.2d 810; see 6 U.C.L.A. L. Rev. 494.) (Cf. *Hunter v. Mohawk Petroleum Corp.* (1959) 51 C.2d 439, 441, 334 P.2d 193 [customer at self-service gas station negligently repairing his car injured plaintiff, another customer; no notice and no liability]; *Porter v. California Jockey Club* (1955) 134 C.A.2d 158, 160, 285 P.2d 60 [plaintiff at racetrack was struck by running spectator; no notice and no liability].)

(4) *Joint and Several Liability*. Under *Rest.3d, Torts: Apportionment of Liability* §14, a person "who is liable to another based on a failure to protect the other from the specific risk of an intentional tort" is jointly and severally liable for both the person's share of comparative responsibility and the intentional tortfeasor's share. (On Restatement rule of comparative responsibility generally, see *infra*, §§1297, 1328.)

(5) *Commentary*. The following sources may be consulted on the possessor's duty to control the conduct of third persons. (See 3 Harper, James & Gray 2d §18.7; 62, 62A *Am.Jur.2d* (1990 ed.), *Premises Liability* §§40 et seq., 563 et seq.; California Premises Liability, §1:41 et seq.; 7 Proof of Facts 2d 635 [tavern owner's liability for third person's assault]; 42 Proof of Facts 2d 173 [landowner's liability for failing to provide security against criminal attack by third person]; 4 Proof of Facts 3d 497 [bank's liability for criminal attack at ATM or night depository]; 17 California Lawyer 48 (October 1997) [premises liability for criminal acts]; 23 Cal. Western L. Rev. 165; 6 U.C.L.A. L. Rev. 494; 20 A.L.R.2d 8 [patron injured by pushing of other patrons]; 81 A.L.R.2d 1207 [fireworks display]; 86 A.L.R.2d 350 [operation of Ferris wheel, miniature car, etc.]; 87 A.L.R.2d 1179 [operation of horse or dog racetrack]; 10 A.L.R.3d 619 [duty to protect against criminal attack]; 48 A.L.R.3d 1258 [injuries caused by insect or small animal]; 51 A.L.R.3d 711 [bank patron injured during robbery]; 72 A.L.R.3d 1269 [liability of storekeeper for death or injury to customer in course of robbery]; 75 A.L.R.3d 441 [liability of owner or operator of theatre or other amusement to patron assaulted by another patron]; 90 A.L.R.3d 533 [liability of swimming facility operator for injury or death inflicted by third person]; 93 A.L.R.3d 999 [liability of shopping center for criminal assault of third party]; 13 A.L.R.4th 623 [liability for injury or death of participant in automobile or horse race at public track]; 14 A.L.R.4th 950 [liability of storekeeper for injury to customer arising out of pursuit of shoplifter]; 47 A.L.R.4th 404 [injury to martial arts participant]; 43 A.L.R.3d 281 [liability of tavern keeper to patron for third person's assault]; 61 A.L.R.4th 27 [injury to retail store customer from falling of displayed, stored or piled objects]; 67 A.L.R.4th 976 [injury to business patron caused by dog or cat]; 38 A.L.R.5th 107 [owner's or operator's liability for injury to skating rink patron].)

West's Key Number Digest, Negligence k.1019, 1070, 1160

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Duty To Control Activity*. See *Rotolo v. San Jose Sports & Entertainment, LLC* (2007) 151 C.A.4th 307, 326, 59 C.R.3d 770 [special relationship between operators of ice hockey facility and hockey players, as business invitees, did not create duty on operators to undertake affirmative measures to prevent death of player from cardiac arrest by notifying facility's users of existence and location of automatic external defibrillators; facility was not in violation of any statutory duty].(5) *Commentary*. See 3 Harper, James & Gray 3d §18.7; 21 A.L.R.6th 81 [fireworks display; superseding 81 A.L.R.2d 1207, text, p. 466]; 62 Am.Jur.2d (2005 ed.), *Premises Liability* §44 et seq.; 62A Am.Jur.2d (2005 ed.), *Premises Liability* §567 et seq.



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 - aa. In General: Prior Incidents.

6 Witkin Sum. Cal. Law Torts § 1130

[§ 1130] In General: Prior Incidents.

Liability is imposed only where the possessor has reasonable cause to anticipate the misconduct of third persons; when the injury results from a sudden, intentional criminal act, which the possessor has no reasonable opportunity to anticipate or prevent, there is no breach of duty. (See *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, *infra*, §1134; *Jamison v. Mark C. Bloome Co.* (1980) 112 C.A.3d 570, 580, 169 C.R. 399; 7735 *Hollywood Boulevard Venture v. Superior Court* (1981) 116 C.A.3d 901, 905, 172 C.R. 528; *Claxton v. Atlantic Richfield Co.* (2003) 108 C.A.4th 327, 338, 133 C.R.2d 425 reversing nonsuit against gas station customer assaulted for racial reasons, where station's manager had earlier been robbed at knifepoint by same perpetrator, that attack had been reported to defendant, and there had been other robberies and assaults on premises; prior assaults need not have been racially motivated, because they must only be similar, not identical]; *Sakiyama v. AMF Bowling Centers* (2003) 110 C.A.4th 398, 406, 1 C.R.3d 762 [landowner who rented facility for all night rave party did not owe duty of care to person injured hours later at remote location as result of voluntary drug use, even if owner knew or could assume that drugs would be used by some attendees, where owner did nothing to promote drug use and even took steps to prevent it; distinguishing *Weirum v. RKO General* (1975) 15 C.3d 40, 123 C.R. 468, 539 P.2d 36, *supra*, §914]; *Rest.2d, Torts* §314A, Comment e; 23 Cal. Western L. Rev. 165; BAJI, No. 8.21.)

A number of Court of Appeal decisions contained language to the effect that in the absence of prior similar accidents, the landowner was not bound to anticipate the criminal activities of strangers. (See *Rogers v. Jones* (1976) 56 C.A.3d 346, 351, 128 C.R. 404; *Totten v. More Oakland Residential Housing* (1976) 63 C.A.3d 538, 542, 134 C.R. 29, *infra*, §1143; *Jamison v. Mark C. Bloome Co.*, *supra*; *Wingard v. Safeway Stores* (1981) 123 C.A.3d 37, 43, 176 C.R. 320; *Riley v. Marcus* (1981) 125 C.A.3d 103, 109, 177 C.R. 827, *infra*, §1143; *Jubert v. Shalom Realty* (1982) 135 C.A.3d Supp. 1, 6, 185 C.R. 641; *infra*, §1143; *Anaya v. Turk* (1984) 151 C.A.3d 1092, 199 C.R. 187, *infra*, §1144.) This rigid rule was rejected, and these cases were disapproved on that point, in *Isaacs v. Huntington Memorial Hosp.*, *supra*, 38 C.3d 125, 126.) However, the rejection of this rule by *Isaacs* was substantially modified by *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 C.4th 666, 25 C.R.2d 137, 863 P.2d 207, *infra*, §1136, in which the court said: "[T]he

requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." (6 *C.4th* 679.)

SUPPLEMENT: [This section is current through the latest supplement]

See 54 *U.C.L.A. L. Rev.* 971 [basing landlord's duty to protect tenants from third-party criminal acts on implied warranty of habitability].



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 - bb. Assault Involving Firearms.

6 *Witkin Sum. Cal. Law Torts* § 1131

[§ 1131] Assault Involving Firearms.

In *Lopez v. McDonald's Corp.* (1987) 193 C.A.3d 495, 238 C.R. 436, J entered defendant McDonald's restaurant in San Ysidro, armed with several guns, and indiscriminately shot at patrons and employees, killing 21 and wounding 11, until he was killed by a police officer. He did not seek to rob or take hostages; his single apparent purpose was to kill as many people as possible before he himself was killed. Plaintiffs sued for damages for wrongful death and personal injuries, alleging that defendant failed to provide adequate safety devices or security personnel to protect customers from dangerous and known risks. Their pleadings and evidence on defendant's motion for summary judgment showed that the restaurant was in a high-crime area involving robberies, theft, and assaults with deadly weapons; that defendant had rejected a proposed offer of a security firm to provide uniformed security officers at \$ 5.75 per hour; and that a number of other businesses in the area had various kinds of security systems. *Held*, summary judgment for defendant affirmed.

(a) The special relationship between a business establishment and its customers imposes an affirmative duty to take reasonable precautions to protect patrons from reasonably foreseeable criminal conduct of unknown third parties. (193 C.A.3d 504.) "Thus, the primary issue here is not whether a fast-food proprietor has a duty to protect plaintiffs from the potential criminal attacks perpetrated by unknown third parties, but rather to determine whether the boundaries of McDonald's general 'duty' encompasses the burden to protect against once-in-a-lifetime massacres." (193 C.A.3d 504.)

(b) The issue of duty is for the court, to be determined by applying the factors and policy considerations set forth in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086, *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, *infra*, §1134, and other cases. (193 C.A.3d 506, 507, 508, and footnotes 5, 6, and 7.) Applying the foreseeability factor: "[T]he theft-related and property crimes of the type shown by the history of its operations, or the general assaultive-type activity which had occurred in the vicinity bear no relationship to purposeful homicide or assassination. In other words, under all the circumstances presented, the risk of a maniacal, mass murderous assault is not a hazard the likelihood of which makes McDonald's conduct unreasonably dangerous. Rather, the likelihood of this unprecedented murderous assault was so remote and unexpected that, as a

matter of law, the general character of McDonald's nonfeasance did not facilitate its happening." (193 C.A.3d 509.)

(c) Applying other *Rowland* factors: "[A]lthough the policy of preventing future harm is great, the extent of the burden to the defendant and the consequences to the community of imposing a duty to protect against heavily-armed suicidal murderers is onerous. ... Finally, without infringing upon the issue of causation, what protective measures should be pursued to protect against a mass murderous assault truly defy exact delineation, because how can one know what measures will be effective against a degenerate, a psychopath, or a psychotic." (193 C.A.3d 512.) (For the holding on causation, see *infra*, §1214.)

The reasoning and holding of *Lopez* were followed in *Thai v. Stang* (1989) 214 C.A.3d 1264, 263 C.R. 202. Plaintiff was standing outside the entrance of defendant's roller rink when an automobile drove by and its occupants fired shots at the entrance with an automatic rifle. Plaintiff was not the intended victim; the target was his companion, a rival gang leader. Here, as in *Lopez*, there was no evidence that would have reasonably forecast a potentially homicidal act. Plaintiff has not presented any admissible evidence that would have put defendant on notice "that a daytime drive-by shooting of someone on his premises was a real possibility, let alone a likely event." As a matter of law, the drive-by shooting here was an unforeseeable attack by a third party. (214 C.A.3d 1273.)

In *Gray v. Kircher* (1987) 193 C.A.3d 1069, 236 C.R. 891, defendant advertised his hotel as "gay managed," and plaintiff, who was gay, selected it as a permanent residence. He and other residents became concerned with the "anti-gay" attitude of M, a transient, and complained to defendant. Subsequently, plaintiff was involved in a confrontation with M over excessive noise from M's stereo, and M shot plaintiff. *Held*, judgment of nonsuit affirmed. While lack of similar incidents was not automatically fatal to plaintiff's case, the other, undisputed facts supported the judgment.

(a) There was no prior history of violence by M, no evidence that anyone was aware that he possessed a gun, and no evidence that defendant knew or should have known of any risk to other hotel guests occasioned by M's presence; and it was not reasonably foreseeable that a noisy tenant might criminally assault another guest. (193 C.A.3d 1074.)

(b) Plaintiff's suggestion that M might have him expelled or moved to another part of the hotel because of his alleged "anti-gay" philosophy was untenable. This type of discrimination by a provider of public accommodations would be contrary to the Unruh Civil Rights Act (C.C. 51). (193 C.A.3d 1078.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Hawkins v. Wilton* (2006) 144 C.A.4th 936, 944, 51 C.R.3d 1 [in action against owners of apartment complex, filed by tenant who was shot outside complex by security guard employed by owners, trial court erred in granting owners summary judgment; tenant stated prima facie case for liability on various theories, including that of employer liability, and owners did not carry initial burden of negating those theories]; *Barber v. Chang* (2007) 151 C.A.4th 1456, 1467, 60 C.R.3d 760, 12 Summary (10th), *Real Property*, Supp., §646A [plaintiff visitor to apartment complex was shot by tenant; in action for negligence, summary judgment for landlord was improper where there was genuine issue of material fact whether landlord reasonably responded to tenant's threats against plaintiff visitor and others, including whether landlord was required to hire security guards or call police].



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- 2. Foreseeability: Activity of Third Person.
 - cc. Assault Not Involving Firearms.

6 *Witkin Sum. Cal. Law Torts* § 1132

[§ 1132] Assault Not Involving Firearms.

The element of causation was emphasized in *Noble v. Los Angeles Dodgers* (1985) 168 C.A.3d 912, 214 C.R. 395. Plaintiffs, husband and wife, were returning to their car in defendant's parking lot after attending a night baseball game. Plaintiff husband became involved in an altercation with two drunks and was knocked down. The theory of the action was defendant's failure to provide adequate security, and the jury brought in a verdict for plaintiffs despite its special finding that the husband was 55% responsible for his injuries. *Held*, judgment on verdict reversed. Plaintiffs made no showing that there were any reasonable steps that defendant could have taken to prevent the occurrence or that defendant's inaction was the cause of the injury. (168 C.A.3d 915.) Their expert witness offered an opinion on inadequacy of security measures, but defendant's evidence showed that 69 security guards were on duty, one for every 900 customers. (168 C.A.3d 917.) The case "is a classic example of a plaintiff establishing what could be described as abstract negligence, in the context that the Dodgers' security didn't comport with plaintiffs' expert's or the jury's notion of 'adequacy,' but failing to prove any causal connection between that negligence and the injury." (168 C.A.3d 918.)

In *Wiener v. Southcoast Childcare Centers* (2004) 32 C.4th 1138, 12 C.R.3d 615, 88 P.3d 517, defendant day care center was located on property leased from defendant property owner and was so situated that its playground, which was surrounded by a four-foot-high chain link fence, was a few feet from a busy street corner. A *intentionally* drove his vehicle through this fence and onto the playground, killing two children unrelated to each other and injuring several others. A was eventually convicted of first degree murder and sentenced to life without parole. Plaintiffs (the parents of the deceased children) sued defendants for negligence and premises liability, claiming that the *harm* (if not the manner in which it was perpetrated) was foreseeable and that the fence afforded inadequate protection. As evidence of foreseeability, plaintiffs relied on a prior incident in which a momentarily unattended, parked mail truck had crashed through the fence (no one was injured) and on a few minor traffic accidents that had occurred near the fence. Contending that A's murderous rampage was a wholly unforeseeable criminal act that could not give rise to negligence liability, defendants successfully moved for summary judgment, but the Court of Appeal reversed on the ground that an errant motorist crashing through the fence was a foreseeable event that could have been prevented by a stronger fence.

Held, judgment of the Court of Appeal reversed.

(a) *Wingard v. Safeway Stores* (1981) 123 C.A.3d 27, 176 C.R. 320, held that third party criminal acts were not foreseeable in the absence of prior similar incidents, but this "prior similar incidents" rule was apparently modified by *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, *infra*, 1134, which held that foreseeability was to be determined by the "totality of the circumstances." When this latter rule caused confusion, especially in cases involving third party criminal acts, it was further refined in *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 C.4th 666, 25 C.R.2d 137, 863 P.2d 207, *infra*, §1136, by the adoption of the present-day balancing test under which the decision to impose a duty of care to protect against criminal assaults requires balancing the foreseeability of the harm against the burden of the duty to be imposed. Hence, the greater the burden, the higher the degree of foreseeability required. (32 C.4th 1146.)

(b) The Court of Appeal below ignored the balancing test of *Ann M.* and looked instead to whether defendants' playground was generally vulnerable to "errant" traffic. In so doing, the Court of Appeal observed that the threatened harm--being struck by an automobile driven onto the playground--was not dependent on the driver's criminal state of mind. The court relied on *Robison v. Six Flags Theme Parks* (1998) 64 C.A.4th 1294, 75 C.R.2d 838, *infra*, §1134, in which a third party was held liable for injuries that occurred when his car, operated by a developmentally disabled person while it was being pushed, left a parking lot driveway and inadvertently veered into a nearby picnic area. *Robison* was given as an example of the type of harm that should have been guarded against in the present case. (32 C.4th 1148.)

(c) *Robinson* correctly realized that the precise details of how a third party's negligence cause injury are not overly significant, but where the third party acts criminally, the manner in which the injury results is highly relevant. In fact, in noting that *Ann M.* was inapplicable in that case because it was based on a criminal act, *Robison* acknowledged that the California cases analyze third-party criminal acts differently from ordinary negligence, and require courts to apply a *heightened sense of foreseeability* before holding a defendant liable for the criminal acts of third parties. This is because (1) it is difficult if not impossible in today's society to predict where and when a criminal might strike; and (2) if a criminal decides on a particular goal or victim, it is extremely difficult to remove his or her every means for achieving that goal. Hence, under *Ann M.*'s balancing test, defendants owed no duty to plaintiffs. (32 C.4th 1148.) There has been no showing that plaintiffs can prove that A's murderous act was foreseeable. "Without prior similar criminal acts, or even any indication of prior criminal acts or intrusions of any type in the surrounding businesses, defendants here could not have been expected to create a fortress to protect the children, or to take further steps to deter or hinder a vicious murderer, unconcerned about the safety of innocent children, from committing his crime." (32 C.4th 1149.)

(d) "[E]ven if we were to treat this case as one involving ordinary landlord negligence, and looked at the 'kind of harm' the children suffered, rather than the criminal act itself, we would still distinguish the action from *Robison*. ... There, the property's physical layout, traffic pattern, and inviting recreational area, made an injurious automotive intrusion on the proximately located picnic area foreseeable. By contrast, in the present action, the one freak accident involving a runaway mail truck in which no one was injured could have occurred anywhere, at any time. That fact, together with the evidence indicating the physical layout of defendants' fence and the playground had adequately protected the children against all other intrusions, was simply inadequate to make any automobile intrusion through the fence foreseeable." (32 C.4th 1149.)

A concurring opinion, in which one other justice joined, argued that it was only necessary to consider whether the third party's act was foreseeable and that it was unnecessary to focus on whether the third party's action was negligent or intentional.

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 - dd. Spilled Liquid.

6 *Witkin Sum. Cal. Law Torts* § 1133

[§ 1133] Spilled Liquid.

In *Jamison v. Mark C. Bloome Co.* (1980) 112 C.A.3d 570, 580, 169 C.R. 399, defendant's premises were used for servicing automobiles. Unknown persons--probably vandals--opened waste oil drums, and the oil ran onto the sidewalk, where plaintiffs slipped and fell. *Held*, judgment of nonsuit affirmed. "[T]he harm, though foreseeable, was minimally so. There was no relationship between the vandals and either plaintiff or defendant. There was no close connection between the defendant's conduct and the injury suffered; the spillage was entirely the result of the third party's action, there being nothing inherently unstable or vulnerable about the barrels which were not so placed as to advertise their presence. The element of moral blame attached to defendant's conduct is virtually nonexistent. The oil was stored to satisfy conservation and environmental obligations of defendant." (112 C.A.3d 580.)

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- B. Landowners and Possessors.
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 - d. Dangerous Activity on Premises.
- 3. Foreseeability: Absence of Prior Incidents.
 - aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1134

[§ 1134] In General.

In *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, plaintiff doctor, affiliated with defendant private hospital, arrived at the hospital with his wife at 8:30 p.m., and parked his car in the hospital's research parking lot. When leaving at 10 p.m., plaintiff was grabbed by an assailant with a gun, and while turning, was shot and seriously injured. This action was brought against defendant hospital and Exchange, its insurance carrier. The complaint alleged that the hospital failed to provide adequate security measures to protect invitees and licensees against the criminal acts of third persons on its premises, and that Exchange negligently participated in the hospital's decision to disarm its security guards. At the trial, plaintiff produced evidence showing that the hospital was located in a high crime area, that many assaults and threatened assaults had occurred elsewhere on the premises, that security guards were few and unarmed, and that the lighting in the parking lot was inadequate. The trial judge granted Exchange's motion for summary judgment, and at the close of plaintiff's case, granted the hospital's motion for nonsuit, mainly on the ground that plaintiff had failed to prove notice of prior crimes of the same or similar nature in the same or similar portion of defendant's premises. *Held*, summary judgment for Exchange affirmed, and judgment of nonsuit for defendant reversed.

(a) *Foreseeability to establish landowner's liability.*

(1) "The primary question presented by this appeal is whether foreseeability, for the purposes of establishing a landowner's liability for the criminal acts of third persons on the landowner's property, may be established other than by evidence of prior similar incidents on those premises." (38 C.3d 123.)

(2) *Rest.2d, Torts* §344, Comment f, states in part: "If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection." (38 C.3d 124.)

(3) Foreseeability is a flexible concept: the degree necessary to warrant a finding of a duty will vary from case to

case. Thus, where the burden of preventing future harm is great, a high degree of foreseeability may be required; but where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree may be required. (38 C.3d 125, quoting *Gomez v. Ticor* (1983) 145 C.A.3d 622, 193 C.R. 600, supra, §1139.)

(b) *Court of Appeal opinions disapproved.* A line of Court of Appeal cases "has rigidified the foreseeability concept" in these cases by stating the rule that in the absence of prior similar incidents, the landowner is not bound to anticipate the criminal activities of third persons, particularly where the wrongdoer was a stranger to both the landowner and the victim and where the crime came about precipitously. (38 C.3d 125, citing *Rogers v. Jones* (1976) 56 C.A.3d 346, 351, 128 C.R. 404, supra, §1130; *Totten v. More Oakland Residential Housing* (1976) 63 C.A.3d 538, 542, 134 C.R. 29, infra, §1143; *Jamison v. Mark C. Bloome Co.* (1980) 112 C.A.3d 570, 580, 169 C.R. 399, supra, §1133; *Wingard v. Safeway Stores* (1981) 123 C.A.3d 37, 43, 176 C.R. 320, supra, §1132; *Riley v. Marcus* (1981) 125 C.A.3d 103, 109, 177 C.R. 827, infra, §1143; *Jubert v. Shalom Realty* (1982) 135 C.A.3d Supp. 1, 185 C.R. 641, infra, §1143; *Anaya v. Turk* (1984) 151 C.A.3d 1092, 199 C.R. 187, infra, §1144.) "This rule is fatally flawed in numerous aspects":

(1) The rule discourages landowners from taking adequate measures to protect premises that they know are dangerous, thus contravening the policy of preventing future harm; and the first victim always loses. "Surely, a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property." (38 C.3d 126.)

(2) The rule leads to arbitrary results and distinctions: (a) how "similar" must the prior accidents be; (b) how close in time do they have to be; (c) how near in location must they be? (38 C.3d 126.)

(3) "The rule erroneously equates foreseeability of a particular act with previous occurrences of similar acts." This notion has been rejected; i.e., the mere fact that a particular kind of accident has not happened before does not show that it might not reasonably have been anticipated. (38 C.3d 126, quoting *Weirum v. RKO General* (1975) 15 C.3d 40, 123 C.R. 468, 539 P.2d 36, supra, §914.)

(4) Finally, the rule improperly removes too many cases from the jury's consideration. Prior similar incidents are helpful in determining foreseeability, but are not necessary; and a rule that limits evidence of foreseeability to prior similar incidents deprives the jury of its role in determining that question of fact. (38 C.3d 127.)

(c) *Court of Appeal decisions approved.* Several decisions have properly recognized that evidence of prior similar incidents is not essential to a finding of foreseeability. (38 C.3d 127, 128, 129, discussing *Kwaitkowski v. Superior Trading Co.* (1981) 123 C.A.3d 324, 176 C.R. 494, infra, §1142, *Gomez v. Ticor* (1983) 145 C.A.3d 622, 193 C.R. 600, infra, §1139, and *Cohen v. Southland Corp.* (1984) 157 C.A.3d 130, 203 C.R. 572, infra, §1140.) *Gomez* and *Cohen*, after analyzing foreseeability in light of all the circumstances and in terms of the factors set forth in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, point out that prior incidents, whether similar or not, may constitute evidence of foreseeability and that other types of evidence, such as the nature, condition, and location of the defendant's premises, may also establish it. (38 C.3d 129.)

(d) *Evidence in present case required submission to jury.* The hospital was located in a high-crime area; several threatened assaults had occurred in the emergency room area directly across from the research parking lot; there had been thefts in the area; incidents involving harassment were common; emergency room facilities and surrounding areas were dangerous; parking lots create an especial temptation and opportunity for criminal misconduct; the research parking lot was poorly lighted; there was no security there at the time, while another parking lot on the hospital premises had a security guard and a monitoring TV camera. (38 C.3d 130.) The fact that the injury was brought about by the criminal act of a third person is of no consequence. (38 C.3d 131, quoting *Rest.2d, Torts* §449, and citing *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 C.3d 49, 192 C.R. 857, 665 P.2d 947, infra, §1206.)

(e) *Conclusion.* "Foreseeability of harm should ordinarily be determined by a jury. That determination calls for the consideration of what is reasonable in light of all the circumstances. One such circumstance is whether the occurrence

of prior similar incidents placed the defendant on notice that its security measures were not adequate to prevent harm to persons who used the defendant's premises. While prior similar incidents are helpful to determine foreseeability, they are not required to establish it. Other circumstances may also place the landowner on notice of a dangerous condition. A rule which limits proof of foreseeability to evidence of prior similar incidents automatically precludes recovery to first-injured victims. Such a rule is inherently unfair and contrary to public policy." (38 C.3d 135.) (See *Onciano v. Golden Palace Restaurant* (1990) 219 C.A.3d 385, 392, 393, 268 C.R. 96 [following *Isaacs*]; *Robison v. Six Flags Theme Parks* (1998) 64 C.A.4th 1294, 1297, 75 C.R.2d 838 [amusement park was liable when car struck picnickers, where picnic area was island in parking lot without barriers; *some* accident was foreseeable, even though particular way accident occurred, i.e., slow learner, unlicensed driver involved in effort to push-start car, was not foreseeable]; 23 Cal. Western L. Rev. 165, 179.) (On refinements of the foreseeability rule of *Isaacs*, see *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 C.4th 666, 25 C.R.2d 137, 863 P.2d 207, *infra*, §1136.)

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- 3. Foreseeability: Absence of Prior Incidents.
 - bb. Parking Garages.

6 *Witkin Sum. Cal. Law Torts* § 1135

[§ 1135] Parking Garages.

In *Sharon P. v. Arman, Ltd.* (1999) 21 C.4th 1181, 91 C.R.2d 35, 989 P.2d 121, plaintiff paid a monthly fee to park in an assigned space in her office building's underground parking garage. On a Thursday morning at approximately 11 a.m., plaintiff parked in the garage, and was sexually assaulted at gunpoint as she was preparing to leave her car. Plaintiff sued the owner of the building and the parking services provider on the ground that their failure to provide adequate security resulted in the attack. Defendants moved for summary judgment, contending that, because the attack was not reasonably foreseeable, neither defendant owed a duty to plaintiff to make the garage more secure.

The evidence supporting and opposing the motions showed that the garage was about 200 feet by 225 feet; the building manager knew of no incident in which anyone was physically assaulted on the premises or was confronted with a firearm in the garage in the last 10 years; armed robberies had occurred at the bank on the ground floor of the building, but none had involved criminal activity in the garage or personal injury; police records showed that, in the immediately preceding year, a total of 363 crimes, including 2 rapes, occurred in the 50 square blocks surrounding the office building, and that for the first quarter of the year of the assault, 72 crimes, but no rapes, were recorded; several lights in the garage were out; the smell of urine was present; and the garage security camera was not working. The trial judge granted defendants' summary judgment motions, but the Court of Appeal reversed on the ground that a sexual assault was foreseeable despite the absence of prior incidents, because parking garages were, as a matter of law, "inherently dangerous." *Held*, on supreme court review, judgment of trial court affirmed.

(a) *General considerations.* The critical issue in this case is whether a sexual assault in the garage was sufficiently foreseeable to support a requirement that defendants secure the area against that crime. Plaintiff argued that garages, being inherently dangerous, carry with them a higher foreseeability of violent attacks, with a corresponding obligation to provide more than just minimal security measures, and that security guards were thus justified (but not required). Plaintiff further argued that even if security guards were not mandatory, the facts imposed on defendants a minimum duty of protection, i.e., a clean, brightly lit garage with working security cameras and periodic walk-throughs by existing personnel. (21 C.4th 1188.)

(b) *Security guards.*

(1) *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 C.4th 666, 25 C.R.2d 137, 863 P.2d 207, supra, §1136, clarified that a landowner's general duty of maintenance includes the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of these precautions. It is thus necessary to resolve whether the sexual attack on plaintiff was sufficiently foreseeable to require hiring security guards. (21 C.4th 1189.) *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, supra, §1134, held that foreseeability depends on the totality of the circumstances and that prior similar incidents, although helpful, are not necessary to prove foreseeability. In contrast, in concluding that a "high degree of foreseeability" was required in order to require landowners to hire security guards, *Ann M.* noted that this degree of foreseeability could rarely, if ever, be established in the absence of prior similar incidents on the landowner's premises. (21 C.4th 1189.)

(2) The foregoing analysis leads to the conclusion that defendants were not required to provide security guards for the garage. The prior robberies, all of which targeted a bank elsewhere on the premises and which did not involve violent attacks, were not sufficiently similar to the sexual assault inflicted on plaintiff to establish the requisite high degree of foreseeability. Moreover, this degree of foreseeability was not proved by evidence of the crime rate in the surrounding 50-block area, even if considered in combination with the bank robberies and with evidence that persons had slept and urinated in the garage prior to the assault. (21 C.4th 1191.)

(3) Plaintiff relied on a footnote in *Ann M.*, which indicated that parking garages are so inherently dangerous that, even in the absence of prior similar incidents, landowners might be required to provide security guards. However, "[u]pon careful deliberation, we reject" this view. (21 C.4th 1191.) First, there is no evidence or authority indicating that underground structures, regardless of their physical characteristics, are prone to violence. Moreover, several cases indicate that aboveground commercial and residential buildings are just as prone to sex crimes by unknown third parties. Second, while *Gomez v. Ticor* (1983) 145 C.A.3d 622, 193 C.R. 600, supra, §1139, stated that violent crime in parking garages *may* be foreseeable, it did not hold that, as a matter of law, violent assaults in these structures are foreseeable. (21 C.4th 1192.)

(4) Because all businesses attract some crime, they could all be characterized as "inherently dangerous," a description often justified in hindsight by the fact that a crime has occurred on the premises. To hold that parking garages are inherently dangerous as a matter of law would lead to endless litigation over what other businesses could be similarly described. In the present case, adoption of plaintiff's position would mean that defendants would be saddled with the burden of hiring security guards merely because an underground garage was involved, without regard either to the dissimilarity of prior criminal incidents elsewhere on the premises or the garage's 10-year history of crime-free existence. Such a holding would ignore the fact that many businesses are economically viable precisely because they do not require on-site labor. (21 C.4th 1193.)

(c) *Other security measures.*

(1) Plaintiff argued that even if there was not the high degree of foreseeability requiring defendants to hire security guards, the occurrence of violent crime in underground parking garages was sufficiently foreseeable to require defendants to provide less burdensome methods of protection, such as a brightly lit and clean garage, a working security camera, and periodic walk-throughs by existing personnel. Plaintiff's reasoning is flawed, because it is questionable whether plaintiff's proposed measures would have been effective against the type of violent assault that occurred here and whether these measures would have been any less burdensome than hiring security guards. (21 C.4th 1195.)

(2) Some cases have criticized the view that adequate lighting is a simple and well-defined security measure effective in preventing crime. Others have rejected claims of abstract negligence pertaining to the lighting and maintenance of property where no connection to the alleged injuries was shown. (21 C.4th 1196.) *Cohen v. Southland Corp.* (1984) 157 C.A.3d 130, 203 C.R. 572, supra, §1140, and *Gomez*, provide a somewhat broader concept of foreseeability with regard to assaults occurring on properties that have some history of *nonassaultive* crime. These

courts reasoned that it would be foreseeable that a violent crime would occur if a person were present at an otherwise foreseeable offense or if that person interrupted such a crime. Here, however, plaintiff offered no evidence suggesting that her attack had any connection to an otherwise foreseeable crime on the premises (i.e., the bank robberies). Accordingly, the assault on plaintiff falls outside the even broader scope of reasonable foreseeability contemplated in these cases. (21 C.4th 1197.)

(3) The police department records of nearby crimes do not aid plaintiff's case. Although it is possible that violent crime may be foreseeable in the absence of prior similar incidents if violent crimes previously occurred at a substantially similar business in the immediate vicinity, plaintiff provided no evidence regarding the exact location of any of the reported crimes that occurred within the 50-block area and no indication of their proximity to the garage. In fact, plaintiff never even showed that defendants were aware of the police statistics. In short, the evidence of nearby crimes provides no tenable basis for establishing foreseeability. (21 C.4th 1198.)

(d) *Conclusion.* "It is difficult to quarrel with the abstract proposition that the provision of improved lighting and maintenance, operational surveillance cameras and periodic walk-throughs of the tenant garage owned and operated by defendants might have diminished the risk of criminal attacks occurring in the garage. But absent any prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location, we cannot conclude defendants were required to secure the area against such crime." (21 C.4th 1199.) (See *Lopez v. Baca* (2002) 98 C.A.4th 1008, 1016, 120 C.R.2d 281 [nightclub's violation of statute prohibiting payment of commission to persons who solicit patrons to buy drinks did not render club "inherently dangerous" within meaning of *Sharon P.*]; *Alvarez v. Jacmar Pac. Pizza Corp.* (2002) 100 C.A.4th 1190, 1207, 122 C.R.2d 890 [altercation prompted restaurant to call police, thereby fulfilling its only duty under circumstances; restaurant had no reason to foresee that departed group would return with *deadly force* and had no reason to inform police that this group had made *general* threat to return; citing *Ann M.* and *Sharon P.*]; 33 U.S.F. L. Rev. 521 [foreseeability of criminal acts in commercial parking structures].)

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 - cc. Other Structures.

6 *Witkin Sum. Cal. Law Torts* § 1136

[§ 1136] Other Structures.

In *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 C.4th 666, 25 C.R.2d 137, 863 P.2d 207, the issue was "whether the scope of the duty owed by the owner of a shopping center to maintain common areas within its possession and control in a reasonably safe condition includes providing security guards in those areas." *Held*, under the facts of this case, the owner did not owe such a duty.

Defendant Pacific Plaza Shopping Center entered into a commercial lease with Photo Co. for operation of a photo processing service located in a secluded area of the Center. The lease granted the Center the exclusive right to control the common areas, but did not impose an obligation to police either the common areas or those under the exclusive control of the tenants. Plaintiff, an employee of Photo Co., opened the store for business at 8 a.m. on June 17, 1985. A man, armed with a knife, entered the store, raped plaintiff, robbed the store, and fled. Plaintiff sued Pacific Plaza and others, and Pacific Plaza moved for summary judgment. The trial court granted the motion on a finding that Pacific Plaza owed no duty of care to plaintiff. The Court of Appeal affirmed the judgment on the ground that, although a duty was owed to both tenants and their employees, the evidence presented was insufficient to support the conclusion that Pacific Plaza acted unreasonably in failing to provide security patrols. *Held*, affirmed.

(a) This is a proper case to apply the rules specifying the duty of a landowner to its tenants and patrons. Although plaintiff was not Pacific Plaza's tenant, her employer was; and "in the commercial context where the tenant generally is not a natural person and must, therefore, act through its employees, it cannot be seriously asserted that a tort duty that a landlord owes to protect the personal safety of its tenant should not extend to its tenant's employees." (6 C.4th 675.)

(b) Pacific Plaza argued that it owed no duty, because the crime occurred on property not within its possession and control. This argument was rejected in *O'Hara v. Western Seven Trees Corp.* (1977) 75 C.A.3d 798, 142 C.R. 487, *infra*, §1142, and *Frances T. v. Village Green Owners Assn.* (1986) 42 C.3d 490, 229 C.R. 456, 723 P.2d 573, *supra*, §39. *Frances T.* extended the reasoning of *O'Hara* to a residential condominium. The plaintiff, a unit owner, was raped inside the unit and not in a common area; nevertheless, the association was held liable for negligent failure to install

adequate lighting in the common area. (6 C.4th 676.)

(c) Because the existence of a duty is not precluded in this case either by the lack of a direct landlord-tenant relationship or by the lack of control over the premises where the crime occurred, the basic issue is whether Pacific Plaza had reasonable cause to anticipate that criminal conduct such as rape would occur in the shopping center unless it provided security patrols. This issue calls for a reexamination of the case of *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, supra, §1134. (6 C.4th 674.) *Isaacs* is the court's most comprehensive analysis to date of the foreseeability required to establish the existence of a business landowner's duty to take reasonable steps to protect its tenants and patrons from third party crime. The court held that foreseeability could be established despite the absence of prior similar incidents on the premises. (6 C.4th 677.)

(d) Lower court opinions have questioned the wisdom of abandoning the "prior similar incidents" rule. (6 C.4th 677, citing *Nola M. v. University of Southern Calif.* (1993) 16 C.A.4th 421, 20 C.R.2d 97, infra, §1189, and *Onciano v. Golden Palace Restaurant* (1990) 219 C.A.3d 385, 268 C.R. 96, supra, §1134.) "Upon further reflection and in light of the increase in violent crime, refinement of the rule enunciated in *Isaacs* ... is required. We are not reluctant to revisit the rule ... because it was unnecessary for this court to consider the viability of the 'prior similar incidents' rule in order to decide the *Isaacs* case: the record contained evidence of prior, violent, third party attacks on persons on the hospital's premises in close proximity to where the attack at issue in that case occurred." (6 C.4th 678.) Moreover, broad language used in *Isaacs* has tended to confuse duty analysis. The opinion can be read to hold that foreseeability is normally a question of fact for the jury. Any such reading is in error; foreseeability is a question of law for the court. (6 C.4th 678.)

(e) The scope of the duty is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed; and in cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. (6 C.4th 678.) The hiring of security guards will rarely, if ever, be found to be a "minimal burden." The obligation to provide patrols adequate to deter criminal conduct is not well defined, and the social costs of imposing the duty are not insignificant. "For these reasons, we conclude that a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards. We further conclude that the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well-established policy in this state." (6 C.4th 679.)

(f) In the present case, violent criminal assaults were not sufficiently foreseeable to impose that duty. (1) Pacific Plaza did not have notice of prior similar incidents; it had a standard practice to note instances of violent crime, and its records contained no reference to violent criminal acts prior to the rape of plaintiff. (2) Even assuming that it had notice of other incidents, they were not similar to the violent assault suffered by plaintiff. (3) Neither evidence regarding the presence of transients nor evidence of the statistical crime rate of the surrounding area is of a type sufficient to satisfy the burden. (6 C.4th 679.)

One justice dissented, contending that the unanimous opinion in *Isaacs* should have been controlling, and that the majority opinion "in effect resurrects an improper test discarded by this court eight years ago." (6 C.4th 680, 683.) (See *Pamela W. v. Millsom* (1994) 25 C.A.4th 950, 959, 30 C.R.2d 690, supra, §1143 [landlord and condominium association had no duty to protect plaintiff from assault and rape in her home, in absence of similar incidents; following *Ann M.*]; *Arendell v. Auto Parts Club* (1994) 29 C.A.4th 1261, 1264, 35 C.R.2d 83 [no public policy that storeowner provide security guards, even though there had been robberies in store before]; 22 *Pepperdine L. Rev.* 339 [*Ann M.*].)

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- B. Landowners and Possessors.
 - 4. Invitees or Business Visitors.
 - d. Dangerous Activity on Premises.
 - 4. Warning of Danger.

6 *Witkin Sum. Cal. Law Torts* § 1137

[§ 1137] Warning of Danger.

A landowner may discharge his or her duty, without correcting a dangerous condition, by a sufficient warning of it. (See *supra*, §1086.) And there has been some tendency to regard any clear warning as sufficient, without inquiring into its adequacy under the circumstances. But *Rest.2d, Torts* §344(b) sets up a stricter test: The landowner or possessor must exercise reasonable care to "give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it." And Comment d states: "In many cases a warning is sufficient care if the possessor reasonably believes that it will be enough to enable the visitor to avoid the harm, or protect himself against it. There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons, or animals, may conduct themselves in a manner which will endanger the safety of the visitor."

This approach was approved and applied in *Taylor v. Centennial Bowl* (1966) 65 C.2d 114, 52 C.R. 561, 416 P.2d 793. Plaintiff drove to defendant's bowling alley, parked in its lot, and went to the bar. She was accosted by W with an indecent proposal; she rebuffed him and he left. He repeated the proposal 2 hours later and was again rebuffed. B, defendant's bouncer, was within hearing distance at the second episode, and plaintiff reported W's offensive behavior to B. Shortly before closing time, B told plaintiff, "don't go outside because that goofball is out there." Plaintiff replied that she had to go home and go to work, and B saw her to the door of the parking lot with a final admonition, "please be careful." When plaintiff reached her car, W, waiting for her, told her again that he wanted her. She told him to "go to hell," and he attacked her with a knife, inflicting severe and permanent injuries.

Plaintiff sought to prove by police officers that the alley, located in an economically depressed area, was frequently the scene of disturbances resulting in arrests for assaults, mayhem, drunkenness and other serious offenses. Objections were sustained, and a directed verdict was entered for defendant. *Held*, reversed. This evidence was admissible, and plaintiff's showing was sufficient to support a verdict for her. The court approved the Restatement test, with its explanatory comment. (65 C.2d 124.) The warnings were insufficient: (1) They did not inform plaintiff of the specific nature of the danger, known to defendant, of an actual assault. (65 C.2d 123.) (2) Even if they had done so, plaintiff still

had to leave, and heeding the warning would have required her to give up her right to do so. She was entitled to protection without sacrifice of this right, and the protection could easily have been given by B accompanying her to her car. (65 C.2d 124.) (See 55 Cal. L. Rev. 1191.)

In *Martin v. Barclay Distr. Co.* (1970) 13 C.A.3d 828, 91 C.R. 817, plaintiff and her husband came to defendant's restaurant for dinner. While waiting in a narrow, crowded corridor for the hostess, plaintiff was jostled and her finger caught in the door. *Held*, judgment of nonsuit reversed. Whether defendant acted reasonably in permitting patrons to congregate in the small foyer without warning, and the foreseeability of the harm, were fact questions for the jury. (13 C.A.3d 832.)

The warning was held sufficient in *Slater v. Alpha Beta Acme Markets* (1975) 44 C.A.3d 274, 118 C.R. 561. Defendant's store was robbed by an armed robber, defendant notified police, and the police conducted a surveillance of the checkout stands. About 2 months later, the same robber appeared, the police officers drew their weapons, and the robber fired a shot into the ceiling. Plaintiff, a customer, was pushed to the floor by another customer, and suffered injuries. She sued on the theory that defendants failed to warn her of the prior robberies or the surveillance. *Held*, judgment based on a motion for judgment under C.C.P. 631.8 affirmed; the trial judge could reasonably find that defendant adequately discharged its duty to its customers by notifying the police and cooperating in the surveillance. (44 C.A.3d 279.) (See 72 A.L.R.3d 1269 [liability of storekeeper for death or injury to customer in course of robbery].)

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 - 5. Proximate Cause.

6 *Witkin Sum. Cal. Law Torts* § 1138

[§ 1138] Proximate Cause.

A plaintiff injured by criminal conduct on a defendant's premises must show that the defendant's negligence was a *substantial factor* in causing the injury. In *Saelzler v. Advanced Group 400* (2001) 25 C.4th 763, 107 C.R.2d 617, 23 P.2d 1143, plaintiff was assaulted and nearly raped after attempting to make a daytime delivery of a package to a resident of defendants' apartment complex. Prior to the assault, plaintiff had observed two of the attackers loitering outside an open security gate and a third attacker on the premises. Plaintiff presented ample evidence showing the dangerous condition of defendants' property, i.e., during the year before the attack, defendants had received 41 reports of trespass and 45 reports concerning inoperable perimeter fences and gates; sheriff's officers had come to the apartment complex approximately 50 times; and a gang headquartered in one of defendants' buildings was conducting drug transactions and intimidating people on the premises. In addition, plaintiff's expert opined that the attack would not have occurred had defendants provided daytime security and made a greater effort to keep the gates repaired and closed. The trial judge concluded that the evidence established a high foreseeability that violent crime would occur on the premises, thus establishing a duty to provide increased security, but nevertheless granted defendants' motion for summary judgment on the ground that plaintiff had failed to show a reasonably probable causal connection between defendants' breach of duty and plaintiff's injuries. The Court of Appeal reversed. *Held*, judgment of the Court of Appeal reversed.

(a) A party attempting to obtain summary judgment under C.C.P. 437c (see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §178 et seq.) has the initial burden of proving a right to summary judgment, but on a showing that one or more elements of a cause of action cannot be established, the burden then shifts to the opposing party. Hence, defendants were initially required to show that plaintiff had not established, and could not reasonably expect to establish, a *prima facie* case of causation (25 C.4th 767, citing *Scheiding v. Dinwiddie Const. Co.* (1999) 69 C.A.4th 64, 81 C.R.2d 360, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §216.) Plaintiff was then required to establish that defendants' breach of duty was a substantial factor in causing her injuries. (25 C.4th 772.)

(b) *Leslie G. v. Perry & Associates* (1996) 43 C.A.4th 472, 50 C.R.2d 785, *infra*, §1189, holding that expert opinion testimony on the need for increased security was too speculative to furnish a causal link between a landowner's negligence and an assault, observed that the plaintiff could not survive summary judgment merely because of the

possibility that the attacker might have entered through a broken gate. *Nola M. v. University of Southern Calif.* (1993) 16 C.A.4th 421, 20 C.R.2d 97, *infra*, §1189, emphasized that a plaintiff may not establish causation by criticizing, usually by the testimony of security experts, the adequacy of the defendant's security measures. (25 C.4th 774.) "Here, by reason of the prior criminal assaults and incidents on the premises, defendants may have owed a duty to provide a reasonable degree of security to persons entering them. For purposes of discussion, we assume defendants breached that duty by failing (1) to keep all entrance gates locked and functioning, and (2) to provide additional daytime security guards to protect persons such as plaintiff. But the evidence fails to show that either breach contributed to plaintiff's injuries in this case." (25 C.4th 775.)

(c) The purpose of security measures is to keep unauthorized persons out. However, there was no evidence that plaintiff's assailants were of this type. In view of the substantial number of incidents involving defendants' tenants, it is quite likely that the assault was by tenants having authority to enter and remain on defendants' premises. This being so, plaintiff was unable to show, even by her expert testimony, that defendants' failure to provide increased security was a substantial factor, i.e., more probable than not, in causing her injuries. "To characterize a landowner's failure to deter ... violence of a third person as the 'cause' of the victim's injuries is ... to make the landowner the insurer of the absolute safety of everyone who enters the premises." (25 C.4th 777.)

(d) The present case is substantially different from *Rosh v. Cave Imaging Systems* (1994) 26 C.A.4th 1225, 32 C.R.2d 136, *infra*, §1215, in which a security firm with *advance notice* that a particular assailant was on the premises was held liable for taking inadequate security measures. No advance notice was involved here. Furthermore, language in *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, *infra*, §1134, indicating that a finding of foreseeability would establish a close connection between the defendant's negligence and the plaintiff's injuries only meant, in the context of the present case, that there was a *general* foreseeability of criminal activity, not that the particular crime against plaintiff was foreseeable. (25 C.4th 777.)

(e) The Court of Appeal applied a practical approach, under which the complete absence of security measures would necessarily be a contributing cause of most crimes occurring on the property. Despite the fact that there was not a "complete absence" of security measures in the present case, a more fundamental weakness with the Court of Appeal's position is that it would prevent summary judgment on the causation issue in *every* case in which the defendant refused to adopt increased security measures of some kind. Under existing law, the plaintiff must establish some substantial link between omission and injury, and under the Court of Appeal's approach, the omission itself would constitute "the missing link." (25 C.4th 778.)

(f) The Court of Appeal also adopted a novel approach whereby defendants' flagrant failure to provide adequate daytime security justified shifting the burden of proof to defendants to conclusively establish the absence of a causal link between its breach and plaintiff's injury. However, the breach in this case was not "flagrant," because the evidence showed that most crimes occurred in the nighttime and that, even in the daytime, defendants attempted to keep gates repaired. Moreover, no matter how inexcusable a defendant's conduct might appear, it must still be a substantial factor in causing the injury. Otherwise, a defendant might be held liable for conduct that actually caused no harm, contrary to the policy against making the landowner the insurer of the safety of all those who enter the premises. (25 C.4th 779.) Finally, the Court of Appeal's burden-shifting approach is counter to *C.C.P.* 437c. Under the statute, "a moving defendant need not support his motion with affirmative evidence negating an essential element of the responding party's case" but may "point to the absence of evidence to support the plaintiff's case." The burden then shifts to the plaintiff to present evidence showing a triable issue of material fact. (25 C.4th 780, citing *Rutherford v. Owens-Illinois* (1997) 16 C.4th 953, 67 C.R.2d 16, 941 P.2d 1203, *infra*, §1492.)

Three justices dissented. (25 C.4th 781.) (See 40 Cal. Western L. Rev. 79 [Saelzler]; 40 San Diego L. Rev. 971 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Roe v. McDonald's Corp.* (2005) 129 C.A.4th 1107, 1115, 29 C.R.3d 127 [in negligence action against restaurant

after customer was assaulted in restaurant's restroom, declaration of customer's expert that design of premises could have been safer and that this might have prevented assault was insufficient to establish causal link between design and assault; following *Saelzler v. Advanced Group 400* (2001) 25 C.4th 763, 107 C.R.2d 617, 23 P.3d 1143, text, p. 484]; *Rinehart v. Boys & Girls Club of Chula Vista* (2005) 133 C.A.4th 419, 433, 34 C.R.3d 677 [plaintiff was injured by rock thrown onto playground from nearby hill; even assuming that injury was foreseeable and that defendant breached its duty of supervision, in absence of showing that additional supervision would have prevented injury, plaintiff failed to demonstrate that inadequate supervision was "substantial factor" in causing his injuries]; *Ambriz v. Kelegian* (2007) 146 C.A.4th 1519, 1531, 53 C.R.3d 700 [in underlying premises liability action arising from tenant's rape in storage room of apartment complex, evidence of repeated unauthorized entries and police determination that there was no evidence of forced entry raised viable issue whether landlords' failure to secure entry doors was substantial cause of injury; thus, in legal malpractice action, there were issues of fact whether summary judgment against tenant in underlying premises liability action was caused by attorneys' deficient performance].

Summary judgment:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §201 et seq.

Scheiding case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §241. *Correction:* Page 484, line 4 of section, citation for *Saelzler* case should be 23 P.3d 1143.



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 - aa. Parking Garage Owner.

6 *Witkin Sum. Cal. Law Torts* § 1139

[§ 1139] Parking Garage Owner.

In *Gomez v. Tigor* (1983) 145 C.A.3d 622, 193 C.R. 600, decedent, visiting his attorney in defendant's building, left at 8:45 p.m. and entered the building garage where his car was parked. An armed robbery was in progress, and decedent was shot and fatally wounded by one of the robbers. In this action for wrongful death, the trial judge granted summary judgment for defendant, relying on *Totten v. More Oakland Residential Housing* (1976) 63 C.A.3d 538, 134 C.R. 29, *infra*, §1143. *Held*, reversed.

(a) Plaintiffs offered evidence of 16 acts of theft or vandalism in the 3 years prior to the killing, thus establishing foreseeability of such an act. A triable issue of fact was therefore raised whether it was foreseeable that a patron of the garage returning at the time of such an act would be subject to violent attack by the thief or vandal. (145 C.A.3d 628.)

(b) Prior decisions, upholding or denying liability, called for a balancing process (145 C.A.3d 629, 630, 631), and do not justify a fixed rule on whether prior similar events are required (145 C.A.3d 630). Plaintiffs' evidence did not show prior assaults, but did support a minimal duty to provide the "first line of defense" mentioned in *Kwaitkowski v. Superior Trading Co.* (1981) 123 C.A.3d 324, 176 C.R. 494, *infra*, §1142). "[T]he peculiar attraction which a large commercial building's unattended parking structure poses for the criminal may necessitate some minimal human or mechanical means of protecting patrons." (145 C.A.3d 632.)

(c) Plaintiffs offered evidence that the security system monitoring the structure was not functional on the night of the attack. "[H]ad they been operational and effectively deployed, the security measures employed in defendant's building would have exceeded the level of precautions required to fulfill this duty." (145 C.A.3d 633.) (See *Sharon P. v. Arman, Ltd.* (1999) 21 C.4th 1181, 1188, 91 C.R.2d 35, 989 P.2d 121, *supra*, §1135; 9 Proof of Facts 3d 597 [failure to protect parking facility patron from criminal attack]; 46 Am.Jur. Trials 1 [liability of owner or operator of public parking facility]; 33 U.S.F. L. Rev. 521 [foreseeability of criminal acts in commercial parking structures]; 49 A.L.R.4th 1257 [parking facility proprietor's liability for criminal attack on patron].)

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See *Ericson v. Federal Express Corp. (2008) 162 C.A.4th 1291, 1305, 77 C.R.3d 1* [risk of third-party assault in parking lot was not foreseeable, and thus property owner had no duty to undertake even minimally burdensome measures to prevent assault of contractor's employee, despite claim that there was criminal activity in parking lot; two witnesses to trespassing by transients indicated that they were not aggressive, and prior thefts on property did not involve force, weapons, or intimidation].



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 - bb. Store Owner.

6 *Witkin Sum. Cal. Law Torts* § 1140

[§ 1140] Store Owner.

In *Cohen v. Southland Corp.* (1984) 157 C.A.3d 130, 203 C.R. 572, plaintiff drove into the parking lot of a 7-Eleven store in the early morning hours intending to buy a sandwich. A man with a gun approached plaintiff's car and stated that he intended to rob the store, take plaintiff hostage, and use plaintiff's car as the getaway vehicle. The robber then entered the store with plaintiff following, approached defendant W, the store employee, and displayed the gun. Plaintiff seized the robber from behind, but in the ensuing struggle, plaintiff was shot and the robber escaped. Defendant W, observing the struggle, retreated to the back office, barricaded the door, and did not emerge until the police arrived. In this action against the store owner, the franchisee, and the employee, the trial judge granted summary judgment for defendants. *Held*, reversed.

(a) Nearly all courts are agreed that possessors of business premises owe a duty to take affirmative steps to control a third person's foreseeable wrongful conduct. (157 C.A.3d 138, and footnote 1.) Defendants contended that plaintiff's injury was not foreseeable because no prior *injury-producing* armed robbery had occurred at this store in the preceding 6 years. But the foreseeability required is of the general character of the event or harm, not its precise nature or manner of occurrence. (157 C.A.3d 140, citing *Gomez v. Ticor* (1983) 145 C.A.3d 622, 193 C.R. 600, *supra*, §1139.)

(b) Here, there was evidence of past armed robberies of 7-Eleven stores. Moreover, in the very operation of an all-night convenience store, defendants created "an especial temptation and opportunity for criminal misconduct." (157 C.A.3d 141.) Accordingly, foreseeability was a triable issue of fact for the jury. (157 C.A.3d 140, 141.)

(c) The adequacy of measures to take in fulfillment of the duty was also a question of fact for the jury, which could consider evidence that the store was not well lit, the parking lot was dark, and security measures were inadequate. (157 C.A.3d 144.)

Cohen and *Gomez* were distinguished in *Gregorian v. National Convenience Stores* (1985) 174 C.A.3d 944, 220 C.R. 302. Plaintiff, shopping in defendants' market, was attacked and beaten by a marauding youth gang. In upholding

summary judgment for defendants, the court pointed out that there was no evidence of prior similar incidents and that the store was not located in an area of gang activity and criminal assaults. (174 C.A.3d 949, 950.) "While the proprietor of an all-night convenience store may, in this day and age, reasonably anticipate that his place of business will be a target of armed robbers, the same cannot be said for a crime resulting from gang violence. ... Unlike *Cohen*, plaintiff's injuries were the result of an extraordinarily malicious criminal act that, based on defendants' past experience and knowledge, could not have been anticipated." (174 C.A.3d 950.) (See *Jefferson v. Qwik Korner Market* (1994) 28 C.A.4th 990, 995, 996, 34 C.R.2d 171 [convenience store was not liable to customer injured while standing in front of store when car jumped over parking block and curb; there were no prior similar incidents and nothing required customers to remain next to parking area]; *Hassoon v. Shamieh* (2001) 89 C.A.4th 1191, 1194, 107 C.R.2d 658 [in absence of similar incidents, store owed no duty of care to patron who, while in store, was shot by someone outside, even though shooting occurred immediately after employee had given refuge to beating victim and beaters had threatened to return and kill victim]; 31 A.L.R.5th 550 [liability of shopping center owner, operator, or business for patron's injury from criminal attack by third party]; BAJI, Nos. 8.05, 8.24.)

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 - 6. Liability of Owner of Business Premises.
 - cc. No Duty To Comply With Criminal's Demand.

6 Witkin Sum. Cal. Law Torts § 1141

[§ 1141] No Duty To Comply With Criminal's Demand.

In *Kentucky Fried Chicken of Calif. v. Superior Court* (1997) 14 C.4th 814, 59 C.R.2d 756, 927 P.2d 1260, plaintiff, a customer in defendant restaurant, brought an action for negligence based on the conduct of defendant's employee during an armed robbery. Plaintiff was the only customer in the restaurant when she was accosted by R, who put a gun to her back. She surrendered her cash and wallet to R, who then demanded that defendant's employee, C, give him the money from the cash register. When C said she would have to go to the back of the restaurant for a key, R became extremely agitated, shoved his gun harder into plaintiff's back, and told C he would shoot plaintiff if C did not "quit playing games" and open the cash register immediately. Only after plaintiff, who believed that she was going to die because of C's actions, screamed at C, did C open the register and give R the money. The trial judge denied defendant's summary judgment motion. *Held*, mandamus granted.

(a) *Rest.2d, Torts* §§314A, 344 establish the generally accepted test of liability of a business owner for injuries on the business premises caused by third-party criminal conduct. A landowner must act as a reasonable person to avoid harm from intentional attacks by third persons who have entered the land. The landowner is required to take action when he or she has reason to believe, from observation or past experience, that the conduct of a third person will be dangerous to an invitee, but not if there is no reason to anticipate a problem. The standard of a "reasonable prudent person under the circumstances" is the general standard of care, but in particular situations a more specific standard may be established by judicial decision, statute, or ordinance. (14 C.4th 823.)

(b) California has never recognized a duty to surrender property to an armed robber to protect others, and neither the Restatement rules nor the Supreme Court's past decisions, in which general principles of negligence law were applied to determine the duty of a landowner to prevent injury to persons present on the land, create a duty to acquiesce in an unlawful demand for the surrender of property. Further, no other state has held that the law imposes a duty to comply with a robber's demands. While some cases from other states hold that a shopkeeper may actively resist the robbery attempt only if the resistance is reasonable in light of the threat to third persons, none holds that the duty to avoid harm to patrons or others on the premises is breached if the shopkeeper simply refuses to surrender property. (14

C.4th 824.)

(c) C.C. 1714, which states the general rule making every person responsible for negligent conduct, does not impose a duty on a shopkeeper to comply with a robber's demands in order to prevent possible injury to patrons. That statute states a civil law principle that is the foundation of California's negligence law, but it has never been construed as imposing a duty to comply with an unlawful demand that property be surrendered. (*14 C.4th 828.*)

(d) No duty to comply with a robber's unlawful demands should be imposed on a shopkeeper on the theory that compliance may lessen the danger to other persons on the premises. Both Cal. Const., Art. I, §1, and C.C. 50 recognize the right of any person to defend property with reasonable force. Recognizing a duty to comply with an unlawful demand to surrender property would be inconsistent with the public policy reflected in these provisions. Because this case does not involve a situation in which active resistance to a robbery resulted in injury to a third person, it need not be decided if the right to defend property with reasonable force is qualified by the duty to avoid injury to third persons or if a duty exists to avoid physical resistance that might provoke a robber into carrying out a threat to harm third persons. "We hold only that there is no duty to comply with a robber's unlawful demand for the surrender of property. Simple refusal to obey does not breach any duty to third persons present on the premises." (*14 C.4th 829.*)

(e) The public interest would not be served by recognition of a duty to comply with a robber's demands. Persons who commit armed robbery may become aware of and be encouraged by the existence of that duty. Moreover, there is no basis on which to conclude that compliance actually prevents injury to robbery victims. The public as a whole is much better served if would-be robbers are deterred by knowledge that their victims have no legal duty to comply with the robber's demands and are under no duty to surrender their property in order to protect third persons from possible injury. (*14 C.4th 829.*)

Three justices dissented, primarily on the ground that a business proprietor's immunity should not be determined as a matter of law, but should be left to the jury to be decided on a case by case basis. (*14 C.4th 830.*) (See *Vandermost v. Alpha Beta Co.* (1985) 164 C.A.3d 771, 778, 210 C.R. 613 [defendant was not liable; distinguishing *Winn v. Holmes* (1956) 143 C.A.2d 501, 504, 299 P.2d 994, supra, §1129, and *Taylor v. Centennial Bowl* (1966) 65 C.2d 114, 52 C.R. 561, 416 P.2d 793, supra, §1137 on ground that in both cases, potential assailant had focused attention on plaintiff]; 25 Western State L. Rev. 369 [*Kentucky Fried Chicken of Calif.*].)

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 - aa. Liability Upheld.

6 *Witkin Sum. Cal. Law Torts* § 1142

[§ 1142] Liability Upheld.

In *O'Hara v. Western Seven Trees Corp.* (1977) 75 C.A.3d 798, 142 C.R. 487, supra, §817), plaintiff, a tenant in defendant's apartment complex, was raped in her apartment. Her complaint alleged that defendants were aware of previous rapes of tenants, but did not disclose the information and assured her that the premises were safe. *Held*, a cause of action was stated for fraud (see supra, §817) and for negligence. On the negligence issue, the court reasoned as follows:

(a) In recent years, a few courts have departed from the traditional rule that a landlord has no duty to safeguard his or her tenants from criminal acts of others. The landlord is in a position to secure common areas, and has a duty to protect against types of crimes of which he or she has notice and that are likely to recur. (75 C.A.3d 802, 803, citing *Kline v. 1500 Massachusetts Avenue Apartment Corp.* (DC Cir. 1970) 439 F.2d 477.)

(b) *Totten v. More Oakland Residential Housing* (1976) 63 C.A.3d 538, 134 C.R. 29, infra, §1143, involving a sudden unexpected outburst, is distinguishable: Plaintiff here was the victim of the same type of criminal conduct previously inflicted on other tenants by the same assailant, whose appearance was known to defendants; and defendants not only failed to provide adequate security, but failed to warn about the suspected assailant and misrepresented the security measures in force. (75 C.A.3d 803.)

(c) The fact that the assault took place inside plaintiff's apartment instead of in the common areas is not determinative. Failure to take reasonable precautions to safeguard the common areas could have contributed substantially to plaintiff's injuries. (75 C.A.3d 803.)

(d) Liability could be based on the analysis in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, because foreseeability of danger and failure to act by warning or providing adequate security was sufficiently alleged. (75 C.A.3d 804.) Liability is also suggested by *Rest.2d, Torts* §302B: An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the

conduct of a third person (see *infra*, §1215). (75 C.A.3d 804.)

O'Hara was followed in *Kwaitkowski v. Superior Trading Co.* (1981) 123 C.A.3d 324, 176 C.R. 494. Plaintiff tenant was raped, assaulted, and robbed in the lobby of an apartment building. The landlords had notice that the building was in a high crime area, that the lock of the lobby entrance door was defective, and that strangers had easy access to the premises. The landlord contended, however, that despite knowledge of a prior assault and robbery, this was the first rape, and it was not reasonably foreseeable. *Held*, a cause of action was stated; cases from other jurisdictions hold landlords liable even for the first crime of a particular type. (123 C.A.3d 329 et seq.) 7735 *Hollywood Boulevard Venture v. Superior Court* (1981) 116 C.A.3d 901, 172 C.R. 528, is distinguishable. There the landlord had no more knowledge than any local citizen concerning violent crimes in the area. (123 C.A.3d 333.)

Other decisions deal with landlord liability. (See *Reyes v. Kosha* (1998) 65 C.A.4th 451, 457, 76 C.R.2d 457 [lessor who allowed workers to reside in huts on his land, who exercised control over the housing, and who received direct economic benefit from workers had duty to maintain housing in safe condition; any duty imposed by Employee Housing Act was declaratory of existing law, rather than a new duty]; *Vasquez v. Residential Inv.* (2004) 118 C.A.4th 269, 276, 12 C.R.3d 846 [apartment owners could be liable, based on failure to replace windowpane, when resident was killed by former boyfriend who entered through missing pane, where there had been complaints to manager of missing pane, another intruder had attempted to enter victim's apartment, and there had been reports of assaultive crimes in other apartments in building]; 2 Proof of Facts 3d 393 [liability of landlord for injury caused by tenant's dog]; 35 Proof of Facts 3d 439 [landlord's liability for lead-based paint hazard]; 35 Am.Jur. Trials 1 [liability of landlord for criminal attack on tenant]; 7 Cal. Western L. Rev. 197; 23 Cal. Western L. Rev. 115; 5 U.S.F. L. Rev. 378; 87 A.L.R.4th 1004 [liability of landlord for injury caused by tenant's dangerous or vicious animal]; 43 A.L.R.5th 207 [landlord's liability for failure to protect tenant from criminal acts of third persons]; BAJI, No. 8.22; 38 A.L.R.4th 240 [liability to tenant for criminal conduct of employee]; 28 A.L.R.4th 80 [liability of hotel or motel owner to guest for assault by third person].)

West's Key Number Digest, Landlord and Tenant k.164(1); Negligence k.1060

SUPPLEMENT: [This section is current through the latest supplement]

See *Raven H. v. Gamette* (2007) 157 C.A.4th 1017, 1026, 68 C.R.3d 897 [assailant entered ground floor apartment and sexually assaulted tenant; whether assailant entered premises due to absence of security measures for tenant's apartment that had been provided to other tenants and therefore whether that absence was proximate cause of tenant's injuries were issues of material fact precluding summary judgment in tenant's negligence action against landlord]. *Commentary on landlord liability:* See 85 Proof of Facts 3d 1 [liability of landlord for injury caused by tenant's dog; superseding 2 Proof of Facts 3d 393, text, p. 492]; 17 A.L.R.6th 453 [liability of hotel or motel operator for assault on guest by third person; superseding 28 A.L.R.4th 80, text, p. 492].



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- B. Landowners and Possessors.
 - 4. Invitees or Business Visitors.
 - d. Dangerous Activity on Premises.
 - 7. Liability of Landlord.
 - bb. Liability Denied.

6 Witkin Sum. Cal. Law Torts § 1143

[§ 1143] Liability Denied.

(1) *Absence of Prior Similar Acts.* The observation in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, that status may have "some bearing" on the question of liability is illustrated in *Totten v. More Oakland Residential Housing* (1976) 63 C.A.3d 538, 134 C.R. 29. Plaintiff C, a minor, was visiting her boyfriend, a tenant in an apartment house operated by defendant nonprofit corporation for low income people. While she was sitting in the laundry room, a fight erupted between two strangers. One of them fired a pistol and plaintiff was hit by stray bullets. Plaintiff brought this action for damages, and the court described the issue as one of first impression: "whether a landlord may be held liable for injuries caused to a stranger, who happens to be on the premises, by the criminal attack of other strangers." *Held*, judgment for defendant on demurrer affirmed.

(a) The general rule is that in the absence of a special relationship or special circumstances, a private person has no duty to protect another from a criminal attack by a third person. (63 C.A.3d 541, citing the text and *Rest.2d, Torts* §§314, 315.) The two main exceptions in the landowner cases involve injuries to an invitee in a business establishment (see *infra*, §§1139, 1140) and injury to a tenant or his employee (see *supra*, §1142). However, these cases, and *Rest.2d*, §314A, Comment e, recognize that the duty to control wrongful acts of third persons arises only where the landowner has reasonable cause to anticipate both the acts and the probability of injury from them. (63 C.A.3d 542.)

(b) Plaintiff's complaint did not state a cause of action within these exceptions: (1) She was not an invitee, but only a licensee; and (2) she did not allege any knowledge by defendant of specific prior similar incidents that would make him anticipate the wrongful acts. (63 C.A.3d 543.) The general allegation that the commission of violent crimes was foreseeable in the apartment house area was insufficient. (63 C.A.3d 544.)

(c) *Rowland* does not support plaintiff's claim. Applying its guidelines: (1) The injury was inflicted by persons not in any legal relationship to either the victim or the landlord. (2) The harm was not reasonably foreseeable by the defendant. (3) There was no close connection between defendant's conduct and the injury: the incident probably could not have been prevented by employment of a security guard. (4) Defendant was not morally culpable or blameworthy

"for its failure to protect an unidentified group of victims on its premises against the criminal attacks of an equally unidentified or unidentifiable group of criminals." (5) The burden on the defendant and the consequences to the community of imposing liability would be extremely onerous: Defendant, a nonprofit organization, would be unable to absorb the heavy insurance expense, and the increased cost would be passed on to the low income tenants. (63 C.A.3d 545.)

(d) The creation of a new duty in the present situation would also be patently unfair, for both the duty and the means of its discharge defy exact delineation; e.g., to what multifamily houses would it apply; to what kind of offenses; and what protective measures should be employed? "[P]olice protection, which essentially is demanded by appellants here, is and should remain the duty of the government." (63 C.A.3d 546.) (See 12 Proof of Facts 2d 497 [landlord's liability to tenant for allowing dangerous activities by other tenants or by third persons]; 43 A.L.R.5th 207 [landlord's liability for failure to protect tenant from criminal acts of third persons].)

In *Riley v. Marcus* (1981) 125 C.A.3d 103, 177 C.R. 827, plaintiff, a tenant in defendants' apartment building, was raped at 4 a.m. by a burglar who forced his way into her apartment by removing a louver from the window and unlatching the chain lock. She sued on the theory that defendants had negligently failed to maintain the premises in a safe condition, by reason of inadequate locks and outside lighting going off at 1 or 1:30 a.m. *Held*, summary judgment for defendants affirmed.

(a) "[T]here was no history of any rapes or similar acts of violence which had occurred on the premises and which, unless adequate steps were taken, would likely reoccur. Moreover, defendants were not aware of any risks attendant to the premises which they concealed from plaintiff. The manner of the installation of the locks on plaintiff's doors did not constitute a representation that the doors were secure against intruders, or that the premises were safe against such risks." (125 C.A.3d 109.)

(b) Plaintiff argues that despite the absence of any duty, defendants undertook to provide security (by installing locks and outside lighting), and failed to do so adequately, and liability should be imposed on that theory. These items are commonplace and furnished by virtually every landlord to every tenant. "Moreover, a landlord's efforts to make his premises more secure against criminal activity should not be greeted by a pronouncement that if such efforts are later found to be inadequate he will incur a liability which would have been nonexistent had he done nothing. Absent a duty to take reasonable precautions to prevent the reoccurrence of criminal acts which are known to be likely to reoccur, a landlord incurs no liability by attempting, albeit unsuccessfully or inadequately, to make his premises less vulnerable to criminal intrusions." (125 C.A.3d 109.) (See *Jubert v. Shalom Realty* (1982) 135 C.A.3d Supp. 1, 185 C.R. 641 [owner of apartment building was not liable for damage to car parked in building's parking lot, even though he permitted unauthorized persons to loiter nearby and there had been previous vandalism to cars].)

(2) *Effect of Isaacs and Ann M Cases. Totten, Riley, and Jubert, supra*, were disapproved in *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 125, 126, 127, 211 C.R. 356, 695 P.2d 653, *supra*, §1134, to the extent that they suggested that in the absence of prior similar accidents, the landowner was not bound to anticipate the criminal activities of strangers. However, the *Isaacs* rule was refined in *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 C.4th 666, 25 C.R.2d 137, 863 P.2d 207, *supra*, §1136, as follows: (a) foreseeability is a question of law for the court; (b) a high degree of foreseeability is required in order to find that the scope of a landlord's duty includes hiring security guards; and (c) the requisite degree of foreseeability can rarely, if ever, be proven in the absence of prior similar incidents on the premises. In the opinion of the dissenting justice, these refinements had the effect of resurrecting the "prior similar incidents" test that *Isaacs* had rejected. (6 C.4th 680.)

In *Pamela W. v. Millsom* (1994) 25 C.A.4th 950, 30 C.R.2d 690, plaintiff sued her landlords and the condominium association governing her residence, alleging that she would not have been assaulted and raped in her home if defendants had met their duty of protecting her from third-party criminal conduct. *Held*, summary judgment for defendants affirmed. *Held*, affirmed. Plaintiff alleged that a burglary had occurred in another unit of the complex, but even assuming that defendants had notice of this incident, it is not similar to the violent assault plaintiff suffered. (25

C.A.4th 959.) Because the attack on plaintiff appeared to be by someone who was stalking her, it is possible that only armed guards could have forestalled it. "[N]either the landlord nor the four-member condominium association in this case could reasonably be placed under a duty to have provided a level of security likely to have prevented the attack." (25 *C.A.4th* 959.) (See *Sturgeon v. Curnutt* (1994) 29 *C.A.4th* 301, 305, 34 *C.R.2d* 498 [homeowners, who rented property to tenant known to have alcohol troubles and to have firearm, but who had never posed problem before, did not owe duty to protect guest, who was accidentally shot when tenant swung firearm around wildly]; *Pineda v. Ennabe* (1998) 61 *C.A.4th* 1403, 1407, 72 *C.R.2d* 206 [landlord had no duty to assure that tenant's child did not fall out of ordinary second story windows that met all code regulations; child's fall was caused by parents' negligence in placing bed beneath window and in failing to supervise child]; cf. *Leslie G. v. Perry & Associates* (1996) 43 *C.A.4th* 472, 480, 50 *C.R.2d* 785, *infra*, §1189 [no causal connection shown between landlord's negligent failure to repair garage security gate and tenant's rape, even assuming duty owed to tenant].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Effect of Isaacs and Ann M Cases.* See *Castaneda v. Olsher* (2007) 41 *C.4th* 1205, 1219, 63 *C.R.3d* 99, 162 *P.3d* 610, 12 *Summary* (10th), *Real Property*, Supp., §646A [despite previous incidents and allegedly harassing conduct by suspected gang members, mobilehome park owner had no duty to evict suspected gang members prior to shootout between rival gangs at park, in which resident was injured, because prior incidents did not render shootout highly foreseeable].



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 - 8. Liability of Lessee to Guest.

6 *Witkin Sum. Cal. Law Torts* § 1144

[§ 1144] Liability of Lessee to Guest.

In *Anaya v. Turk* (1984) 151 C.A.3d 1092, 199 C.R. 187, plaintiff's complaint alleged that defendants were lessees of an apartment; that he was present at the apartment as a social guest of defendants; that they negligently allowed W, a dangerous ex-criminal, on the premises; and that W shot and severely injured plaintiff. The first cause of action was based on defendants' failure to warn plaintiff of W's known dangerous propensities. The second cause of action contained allegations that defendants were engaged in the sale of narcotics, that W was a customer, and that defendants knew or should have known that such a person was likely to be an addict and to attack, rob, or injure persons at the scene of a drug transaction. Defendants moved for summary judgment, and the trial judge granted the motion. *Held*, reversed.

(a) *First cause of action is not maintainable.* The question on this cause was whether a lessee has a duty to control criminal conduct of third persons or to warn social guests about criminal propensities of other persons on the premises. (151 C.A.3d 1097.) Plaintiff was only a licensee, but under *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086, status is not controlling, and in *Rowland*, a social guest was entitled to recover from a lessee for injuries suffered in using a defective faucet. (151 C.A.3d 1098.) In the present case, plaintiff seeks to establish defendants' duty without evidence of prior specific acts of violence, solely on the fact that defendants knew that W was an ex-convict. This general knowledge cannot be the basis of a finding of foreseeability of harm. "An apartment dweller cannot be held to have a duty to protect friends and acquaintances from the violent criminal conduct of others on the premises unless he has reasonable cause to anticipate such conduct. Mere knowledge that [W] had been in federal prison did not constitute reasonable cause to anticipate his violent conduct." (151 C.A.3d 1101.)

(b) *Second cause of action is maintainable.* Here, as in *Weirum v. RKO General* (1975) 15 C.3d 40, 123 C.R. 468, 539 P.2d 36, *supra*, §914, and *Pamela L. v. Farmer* (1980) 112 C.A.3d 206, 169 C.R. 282, *supra*, §1058, the cause of action is not based on mere nonfeasance (failure to intervene to protect plaintiff), but on acts of defendants that created the risk of harm that resulted in the injury: conducting illicit drug transactions from the apartment. The allegation that defendants were engaged in this dangerous activity was supported by plaintiff's counteraffidavit on the motion for summary judgment, and presented a triable issue. (151 C.A.3d 1101, 1102, 1103.)

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 - 9. Injury to or Loss of Property.

6 *Witkin Sum. Cal. Law Torts* § 1145

[§ 1145] Injury to or Loss of Property.

The landowner's duty extends to the property of an invitee. In *La Malfa v. Piombo Bros.* (1945) 70 C.A.2d 840, 161 P.2d 964, plaintiffs rented their truck to defendants, but plaintiffs' agent, in violation of instructions and therefore in excess of authority, also furnished a driver. The truck was damaged on defendants' premises as a result of negligent conduct of another independent contractor. *Held*, defendants were liable. "The truck ... was on defendants' private roadway at defendants' invitation and on defendants' business. It was there in the control of a driver who was a business invitee of defendants." (70 C.A.2d 846.)

This theory has an important practical effect on the liability of storekeepers for valuables stolen from a customer. "A retailer impliedly invites the public to enter his store and do business, and thereby undertakes to exercise reasonable care for the protection of property which the customer properly brings there and necessarily lays aside while doing business pursuant to the invitation." (*Fuller v. I. Magnin & Co.* (1951) 104 C.A.2d 517, 522, 232 P.2d 36.) In *Fuller*, plaintiff, an old customer of defendant, was wearing a diamond brooch. The saleslady, who knew her and the brooch, mistakenly took plaintiff's dress with the brooch attached from the fitting room to the stockroom, where the brooch was stolen. In upholding judgment for plaintiff, the court distinguished cases where customers voluntarily laid aside purses or other valuables, as follows: (a) A clothing storekeeper must exercise care for the protection of the customer's garments which he or she necessarily removes in trying on new clothes. (b) The clothing storekeeper has a similar duty to protect other articles (money, watch, jewelry, etc.) that the customer must lay aside while being fitted, where notice is brought home to him or her. (c) The storekeeper is particularly liable where, as here, defendant's employee takes the valuables from a place of safety to a place of hazard (affirmative act, i.e., active negligence). (104 C.A.2d 525.)

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- 1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1146

[§ 1146] In General.

An owner may sometimes be held liable for injuries caused to another by his or her negligence even though the injury was inflicted beyond the limits of the defendant's property. (See *62A Am.Jur.2d* (2005 ed.), *Premises Liability*, §688.) *Rest.3d, Torts: Apportionment of Liability* §14, without qualification as to the location of an injury, provides that a person "who is liable to another based on a failure to protect the other from the specific risk of an intentional tort" is jointly and severally liable for both the person's share of comparative responsibility and the intentional tortfeasor's share. (On Restatement rule of comparative responsibility generally, see *infra*, §§1297, 1328.)

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 - 2. Vicious Dog In Neighborhood.

6 *Witkin Sum. Cal. Law Torts* § 1147

[§ 1147] Vicious Dog In Neighborhood.

In *Wylie v. Gresch* (1987) 191 C.A.3d 412, 236 C.R. 552, the court held that "a landlord has no duty to warn a prospective tenant of the presence of a vicious dog in the neighborhood." (191 C.A.3d 414.) The complaint alleged that plaintiffs, Mr. and Mrs. W, leased a residence from defendant G; defendants Mr. and Mrs. B, who lived next door in rented property, owned a pit bull dog that had attempted to attack persons and animals; the dog had previously broken through the fence separating the backyards of the two properties, but defendant G did not warn plaintiffs of the dog's vicious propensities; on a day when plaintiffs' 12-year-old daughter was on their property, the dog broke his leash, defendant Mr. B "invited and permitted" the child to pet the dog, and the dog bit her, inflicting severe injuries. *Held*, no cause of action was stated against defendant G.

(a) *General duty to ensure safety of premises.* Although *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086, and cases following it have greatly expanded the landlord's duty to ensure the safety of the premises (191 C.A.3d 418, 419), "[n]o case that we have found ... imposes a duty on a landlord to protect against dangerous conditions off the premises (that is, in the neighborhood), or against dangerous persons (or animals) over which the landlord has no control, which come onto the property in a location or manner over which the owner has no control." (191 C.A.3d 419.) *Uccello v. Laudenslayer* (1975) 44 C.A.3d 504, 118 C.R. 741, 12 Summary (10th), *Real Property*, §644, is distinguishable. In that case, the vicious dog was kept by a tenant on the leased premises, and the landlord had actual knowledge and the right to control by removing the tenant and retaking possession of the premises. Here, the dog was kept by strangers on premises over which the landlord had no control. (191 C.A.3d 420.)

(b) *No special relationship giving rise to common law duty to warn.* The facts alleged do not indicate that defendant landlord created a dangerous situation or that plaintiffs relied on defendant to warn them of any possible danger. (191 C.A.3d 423.) "[I]t would be unreasonable to extend the resulting duty in the landlord beyond the duty imposed on landlords to disclose defective conditions on their leased premises; and in cases involving that type of defect the rule is that before a duty is found ... [t]he lessor must ... have reason to believe that the lessee will not discover the condition, or that [the lessee] will not realize the risk." (191 C.A.3d 423, quoting *Rest.2d, Torts* §358, Comment b.) That is the situation here. "Landlords in respondent's position could reasonably expect that appellants would discover the presence

of the dog for themselves, and, unfortunately, a vicious dog is a danger one might expect to encounter anywhere in our society." (191 C.A.3d 424.)

(c) *Extension of landlord's duty is undesirable.* It would be unreasonable to extend the duty beyond the basis of the relationship--the property: "Insofar as dangers in the neighborhood are concerned, the tenant's position is no different from that of any member of the general public. Neither the tenant nor members of the public rely on a landlord to warn them of such dangers." (191 C.A.3d 424.) A requirement that landlords warn prospective tenants of dangers in the neighborhood would produce a large volume of warnings that would add little effective protection, and would place the landlord in the position of a purveyor of gossip and groundless warnings. (191 C.A.3d 424.)

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- 3. Failure To Correct or Warn of Flammable Structure.

6 Witkin Sum. Cal. Law Torts § 1148

[§ 1148] Failure To Correct or Warn of Flammable Structure.

In *Lucas v. George T. R. Murai Farms* (1993) 15 C.A.4th 1578, 19 C.R.2d 436, L and R were working as migrant farm labors and residing in an encampment known as the cancha, located on undeveloped land that was adjacent to the ranches owned by defendants M and N. L and R lived in a structure that they had built from materials taken from the trash dump areas on defendants' ranches. The cancha was patrolled by a company (RIPCO) that had contracted with defendants to provide security services to their ranches. In addition, M provided some services and amenities to workers living in the cancha, such as allowing them to use water and toilet facilities on the M ranch and to receive their mail there. One night, the structure built by L and R caught fire, apparently from a candle that R was using to read by. L suffered serious injuries and R was killed. In this action by the L and R heirs based on defendants' alleged duty to make safe the conditions on the cancha property or to warn plaintiffs of the dangerous conditions created by the flammable structures, the trial judge entered summary judgment for defendants. *Held*, affirmed; no such duty existed.

(a) To support their assertion that defendants had sufficient control over the cancha area to impose on them a duty of care, plaintiffs argued that RIPCO was an agent of defendants such that its activities at the cancha, such as banning alcohol and prostitutes, showed control over the entire premises. This position is without merit. Both defendants presented evidence showing that their contracts with RIPCO did not cover off-premises areas. Hence, it does not appear that any actions of defendants were relied on by L and R to create the impression that RIPCO was the defendants' agent for purposes of insuring overall camp safety. (15 C.A.4th 1588.)

(b) Plaintiffs also based their assertion of defendants' control over the adjacent property on the fact that defendants' foremen instructed workers living at the camp to pick up trash, and allegedly permitted scrap materials to be taken from defendants' dumps for use in building living structures. However, the evidence showed that defendants made an effort to stop the workers from taking building materials from the ranch dumps. And although the foremen apparently did not succeed in prohibiting this practice, public policy is against imposing a duty of care in this situation. Foreseeability of the type of harm that occurred is questionable, and the necessary connection between defendants' conduct and the injury is missing. The accident was caused by something over which defendants had no control, i.e., the use of an open-flame candle. (15 C.A.4th 1590.)

(c) L and R were not business patrons, and no third party criminal acts were inflicted upon them. Instead, these workers were faced with an obvious danger, i.e., using fire in the temporary structure, but they chose to confront it anyway. Hence, there is no basis for imposing a duty on defendants to warn of dangers inherent in the use of structures just off their premises, nor any duty to make those structures safe for the inhabitants. (15 C.A.4th 1590.)

(d) By allowing the workers to use water and toilet facilities on the M property and by failing to prevent the use of building materials taken from their property, defendants were somewhat analogous to Good Samaritans. However, these actions are not equivalent to an undertaking to perform the duties allegedly owed to plaintiffs. Whatever aid defendants rendered "did not increase the risk of harm to plaintiffs, nor did plaintiffs rely upon the services provided and thereby suffer further harm. Construction of the shelters and use of them with candles to provide illumination went on independent of any actions by these defendants." (15 C.A.4th 1591.)

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 - 4. Failure To Build Barrier.

6 *Witkin Sum. Cal. Law Torts* § 1149

[§ 1149] Failure To Build Barrier.

In *Barnes v. Black* (1999) 71 C.A.4th 1473, 84 C.R.2d 634, plaintiff and his family lived in defendant's apartment complex. In front of the complex was a private sidewalk, leading to a children's play area. A private driveway extended from the sidewalk down a steep slope to a busy public street. There was no barrier between the sidewalk and the driveway, a dangerous condition causing several residents to complain, unsuccessfully, to defendant's apartment manager. Plaintiff's son was riding a tricycle back and forth on this sidewalk when he apparently lost control, causing his tricycle to veer down the driveway and into the public street, where he was hit and killed by a car. Plaintiff sued defendant on multiple causes of action, and defendant moved for summary adjudication. *Held*, judgment for defendant reversed.

(a) A landowner's duty of care to avoid exposing others to a risk of harm is not limited to injuries that occur on premises owned or controlled by the landowner. Instead, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site, if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off site. The scope of this duty is determined by application of the factors listed in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086. (71 C.A.4th 1477.)

(b) Defendant had the burden to negate a duty of care, and the only evidence introduced for this purpose was that the injury occurred on property that it neither owned nor operated. "This fact is not dispositive under the *Rowland* analysis. [Defendant] does not offer any evidence to show the injury was not foreseeable, the injury was not actually suffered, or the slope of the driveway and configuration of the sidewalk, play area, and driveway were not closely connected to the injury, or to negate any of the other *Rowland* factors." With respect to the claim that there was no close connection between its conduct and the injury in question, defendant introduced no evidence rebutting the inference that the lack of a barrier between the sidewalk and the steep driveway leading to the public street was what created a condition that contributed to the injury. (71 C.A.4th 1479.)

(c) To support its contention that a landowner owes no duty to erect a fence to protect children from off-site dangers, defendant cited *Brooks v. Eugene Burger Management Corp.* (1989) 215 C.A.3d 1611, 1624, 264 C.R. 756,

which held that the manager of an apartment complex had no duty to fence the premises to keep children inside. In *Brooks*, however, which involved a child struck by an automobile after walking into a street in front of an apartment complex, plaintiff did not allege that the configuration of defendant's property ejected or propelled the child into the public street against his will, there was no close connection between defendant's conduct and the child's injuries, and little or no moral blame attached to that conduct. (71 C.A.4th 1479.)

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CHAPTER IX - Torts

Witkin Summary of California Law XI. NEGLIGENCE: AFFIRMATIVE DUTIES ARISING FROM SPECIAL RELATIONSHIPS

- B. Landowners and Possessors.
 - 4. Invitees or Business Visitors.
 - e. Dangerous Activity Off Premises.
- 5. Criminal Acts of Third Parties: Location of Assault.
 - aa. Near School.

6 Witkin Sum. Cal. Law Torts § 1150

[§ 1150] Near School.

In *Donnell v. California Western School of Law* (1988) 200 C.A.3d 715, 246 C.R. 199, plaintiff, a student at defendant law school, left defendant's building after dark and headed towards his car. While walking on a public sidewalk bordering the building, he was attacked by an unknown assailant. Plaintiff alleged that, by failing to provide parking for its students, defendant forced him to walk through a high crime area and, despite knowledge of the danger, provided neither warning nor other protective measures, such as security guards or lights or monitors on the building. *Held*, summary judgment for defendant affirmed.

(a) The special relationship between a school and its minor students (see *Hoyem v. Manhattan Beach City School Dist.* (1978) 22 C.3d 508, 150 C.R. 1, 585 P.2d 851, supra, §327; *Satariano v. Sleight* (1942) 54 C.A.2d 278, 129 P.2d 35, supra, §1001; *Raymond v. Paradise Unified School Dist. of Butte* (1963) 218 C.A.2d 1, 31 C.R. 847, supra, §861; is not applicable here to impose on defendant a duty to insure the safety of its *adult* students once they have left its premises. Because these students are generally considered business invitees, the issue is the extent of defendant's premises liability to plaintiff. (200 C.A.3d 720.)

(b) Premises liability is based on ownership, possession, or control. (200 C.A.3d 725.) Plaintiff argued that defendant's alleged duty to take reasonable steps to protect its invitees from foreseeable criminal assaults on the sidewalks providing immediate access to its building was based on its power to "control" the sidewalk by placing lights or monitors on its own building. However, merely having the power to influence or affect adjoining property does not amount to control under premises liability law. (200 C.A.3d 720.)

(c) Unlike the situations in *Kopfinger v. Grand Cen. Public Market* (1964) 60 C.2d 852, 37 C.R. 65, 389 P.2d 529, supra, §1092, *Johnston v. De La Guerra Properties* (1946) 28 C.2d 394, 170 P.2d 5, supra, §1128, or *Ross v. Kirby* (1967) 251 C.A.2d 267, 59 C.R. 601, there is no evidence that defendant created a dangerous condition on the adjoining property or actually assumed control over it, or that the property was modified or built specifically to benefit defendant's property. (200 C.A.3d 721.) And the "elastic concept of business premises" applied in *Schwartz v. Helms Bakery Ltd.*

(1967) 67 C.2d 232, 60 C.R. 510, 430 P.2d 68, supra, §1062, has never been extended to a business conducted on private property at a *fixed* location. (200 C.A.3d 725, citing *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 C.A.3d 1142, 214 C.R. 405.)

(d) Requiring defendant to use lighting or monitors to influence or affect the condition of the sidewalk would go beyond the limits of any existing case. It would also establish an indefinable duty, because, depending on location, building configuration, and technology, defendant might have the potential to influence or affect adjoining property at various distances from its own property. (200 C.A.3d 725.) On the other hand, the existing standard for premises liability, based on ownership, possession, or control, provides predictability and reasonably clear limits. (200 C.A.3d 726.)

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 - bb. Near Business.

6 *Witkin Sum. Cal. Law Torts* § 1151

[§ 1151] Near Business.

In *Southland Corp. v. Superior Court* (1988) 203 C.A.3d 656, 250 C.R. 57, plaintiff was attacked by three unknown men in a vacant, unpaved parking lot adjacent to defendants' convenience store while returning to his car after making purchases at the store. Defendants, claiming that they had no duty as a matter of law to a customer after he or she left the premises, petitioned for mandamus to compel the trial judge to grant their motion for summary judgment. *Held*, denied; there were triable issues of fact as to defendants' control over the lot and the foreseeability of the assault.

(a) A business proprietor's duty to protect invitees, even from criminal attack, may extend to property that the proprietor neither owns nor possesses, but over which the proprietor exercises actual or apparent control. (203 C.A.3d 664.) Here, there was sufficient evidence to allow a jury to conclude that defendants' control over the adjacent lot was sufficient to permit imposition of a duty to those customers using it. For example, (1) only eight marked parking spaces were provided on the store's premises and these often proved inadequate, (2) customers, including plaintiff, regularly used the adjacent lot to park while shopping at the store, (3) defendants' lease apparently authorized the nonexclusive use of the adjacent lot for customer parking, (4) defendants were aware that their customers regularly used the lot and took no action to limit or discourage this use, (5) a reasonable inference can be drawn that defendants realized a significant commercial benefit from their customers' use of the lot, (6) the store premises and the adjacent lot had become a hangout for local juveniles, among whom fist fights sometimes broke out, and (7) the store employees had, on a number of occasions, taken action, including the request of police assistance, to remove juvenile loiterers from both the store premises and the adjacent lot. (203 C.A.3d 666.)

(b) The fact that no prior criminal attacks had occurred on the store premises did not establish that the attack on plaintiff was unforeseeable as a matter of law. (203 C.A.3d 668.) A triable issue of fact on this issue was raised by the evidence of previous fistfights among juvenile loiterers on defendants' premises and the need to seek police assistance. (203 C.A.3d 669.)

In *Balard v. Bassman Event Sec.* (1989) 210 C.A.3d 243, 258 C.R. 343, plaintiff restaurant customer was assaulted

by some inebriated men who were in a car parked across the street from the restaurant. Defendant, a security contractor hired by the restaurant, failed to warn plaintiff of the danger, although defendant was aware that an incident of harassment involving the same men had occurred approximately 15 minutes earlier. *Held*, judgment on demurrer for defendant affirmed.

(a) A security contractor hired to protect business premises owes no greater duty toward patrons of the business than is owed by the business owner under premises liability law; and such an owner has no duty to protect patrons from criminal activity occurring off his premises. (210 C.A.3d 247.)

(b) Both *Southland Corp. and Marois v. Royal Investigation & Patrol* (1984) 162 C.A.3d 193, 208 C.R. 384, *supra*, §1053, are distinguishable. *Southland* imposed liability for a criminal attack on a patron that occurred on property not owned by the business, but over which it had a leasehold right to use and otherwise exercised control. (210 C.A.3d 248.) *Marois* imposed liability for a criminal attack that occurred on the business premises. And nothing in *Marois* supports plaintiff's contention that there is a special relationship between a business' security guards and its customers that results in a greater liability than that existing between the business itself and its customers. (210 C.A.3d 249.)

(c) Plaintiff's argument that, even if defendant had no duty to intervene, it at least had a duty to warn of a known danger existing off the premises, must be rejected despite its surface appeal. "The problem is that a duty to warn in the context of dangers existing off premises will seldom be as simple as passing along unverified information. Inevitably, we would be imposing not just a duty to warn but a duty to investigate, monitor and evaluate reports of off-premises dangers. Given the potential scope of this duty, we are reluctant to impose it at all." (210 C.A.3d 250.)

SUPPLEMENT: [This section is current through the latest supplement]

Delgado v. Trax Bar & Grill (2005) 36 C.4th 224, 30 C.R.3d 145, 113 P.3d 1159, involved the duty of the proprietor of a bar to intervene in an altercation involving a patron of which the proprietor has actual notice. Plaintiff was assaulted in the parking lot of defendant's bar by other patrons who followed him outside. One of defendant's security guards had anticipated that a confrontation might occur within the bar and asked plaintiff and his wife to leave, but failed to escort them to their car. In plaintiff's premises liability action, the Court of Appeal reversed a jury verdict for plaintiff on the ground that there was no evidence of any prior criminal incident that would have put defendant on notice that such an occurrence might reasonably be anticipated. *Held*, reversed.

(a) *Special relationship doctrine*. As a general matter, there is no duty to act to protect others from the conduct of third parties. As an exception to this general rule, however, a defendant may owe an affirmative duty to protect another from the conduct of third parties if the defendant has a special relationship with the other person. Courts have found special relationships in cases involving proprietors of businesses such as shopping centers, restaurants, and bars and their tenants, patrons, or invitees. Accordingly, *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 C.4th 666, 25 C.R.2d 137, 863 P.2d 207, text, §1136, recognized as "well established" the proposition that a business proprietor has a duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of these precautionary measures. (36 C.4th 235.)

(b) *Duty to provide security guards is limited*. Only in limited circumstances, however, does the scope of a business proprietor's special-relationship duty to patrons or invitees include a duty to provide security guards. (36 C.4th 236.) Under *Ann M. and Sharon P. v. Arman, Ltd.* (1999) 21 C.4th 1181, 91 C.R.2d 35, 989 P.2d 121, text, §1135, it is only when there is "heightened foreseeability" of third-party criminal activity on the premises--shown by prior similar incidents, or other indications of a reasonably foreseeable risk of violent criminal assaults, in that location--that the proprietor's special-relationship duty includes an obligation to provide guards to protect patrons. To hold otherwise would be to impose an unfair burden on business proprietors and, in effect, force them to become insurers of public safety. (36 C.4th 237.)

(c) *Other special-relationship duties may apply*. A business proprietor that has no duty under *Ann M. and Sharon P.* to hire security guards or to undertake other burdensome preventative measures still owes a duty of due care to patrons

and invitees by virtue of the special relationship, and there are other circumstances that may give rise to liability based on that relationship. For example, restaurant or bar proprietors have a duty to warn patrons of known dangers and, in circumstances in which a warning alone is insufficient, a duty to take other reasonable and appropriate measures to protect patrons and invitees from imminent or ongoing criminal conduct. These measures may include telephoning the police or 911 for assistance, or providing an escort to the parking lot by existing security personnel. (36 C.4th 240.)

(d) *Showing of heightened foreseeability is not always required.* Relying on *Hassoon v. Shamieh* (2001) 89 C.A.4th 1191, 107 C.R.2d 658, defendant asserted that a showing of heightened foreseeability, generally including proof of prior similar incidents, is *always* required when a plaintiff seeks to impose on a proprietor special-relationship liability related to the criminal conduct of a third party. (36 C.4th 242.) This position is inconsistent with *Ann M.* and its progeny, all of which, when articulating and applying the heightened foreseeability doctrine, expressly reaffirm the sliding-scale balancing formula articulated prior to and in *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, text, §1134. These decisions recognize that, as a general matter, imposition of a high burden requires heightened foreseeability, but that a minimal burden may be imposed on a showing of a lesser degree of foreseeability. Thus, to the extent *Hassoon* "suggests that a showing of heightened foreseeability is required in all premises liability cases--regardless of the extent of the burden sought to be imposed upon the defendant--that aspect of *Hassoon* is disapproved." (36 C.4th 244.)

(e) *Analysis of present case.* Here, defendant owed a duty to plaintiff under the special relationship doctrine. (36 C.4th 244.)

(1) To the extent plaintiff's claim rests on a duty to provide guards to protect patrons from assaults, plaintiff must demonstrate heightened foreseeability. Heightened foreseeability is satisfied by a showing of prior similar criminal incidents or other indications of a reasonably foreseeable risk of a violent criminal assault in that location. It does not require a showing of prior *nearly identical* criminal incidents, as suggested by the Court of Appeal. Nevertheless, although the record refers to a few prior altercations between patrons, plaintiff produced insufficient evidence of either prior similar incidents or other indications of a reasonably foreseeable risk of a violent criminal assault that would have imposed on defendant an obligation to provide security guards. (36 C.4th 244.)

(2) However, the absence of heightened foreseeability in this case merely signifies that defendant owed no special-relationship duty to provide guards or undertake other burdensome preventative measures to protect plaintiff; it does not signify that defendant owed no *other* special-relationship duty to plaintiff, such as a duty to respond to unfolding events by undertaking reasonable, relatively simple, and minimally burdensome measures. Indeed, the record clearly establishes the existence of a duty here. Under the circumstances, it was foreseeable that an assault would occur absent separation of plaintiff and his subsequent attackers. Accordingly, defendant had a special-relationship duty to respond by taking minimally burdensome steps to address the imminent danger. These measures may have included, for example, the guard's attempt to dissuade the subsequent attackers from following plaintiff from the bar, or the guard's confirmation that defendant's outside guard was at his post in the parking lot, available to help maintain the desired separation. (36 C.4th 245.)

(f) *Proprietor, by employment of security guards, does not assume duty to protect.* Review was granted in this case largely in light of conflict between the Court of Appeal opinion in this case and the earlier Court of Appeal opinion in *Mata v. Mata* (2003) 105 C.A.4th 1121, 130 C.R.2d 141. In *Mata*, the appellate court, reversing an order granting summary judgment to the defendant, held that when a proprietor voluntarily employs a guard on its premises, the proprietor has assumed a "duty to protect" its patrons from criminal assault "and therefore the issue of foreseeability becomes irrelevant." (36 C.4th 234.) Like the Court of Appeal, this court finds the analysis in *Mata* to be overbroad and misleading. First, the scope of any duty assumed depends on the nature of the undertaking. Merely because a business chooses to have a security program does not signify that the proprietor has assumed a duty to protect invitees from third-party violence. For example, a store that hires a security officer to guard its interior cash office does not assume a duty to protect a customer who is injured in the store's exterior parking lot by the criminal act of a third party. Second, a defendant's undertaking will support finding a duty to another only if (1) the defendant's action increases the risk of

harm to another or (2) the other person reasonably relies on the undertaking to his or her detriment. Finally, foreseeability remains a highly relevant factor--even in cases in which a legal duty is found (and regardless of the doctrine under which it is found). For example, even when a proprietor voluntarily employs guards and owes a duty to patrons, foreseeability remains relevant to the factfinder's determination of breach and causation. (36 C.4th 248.)

(g) *Conclusion.* The Court of Appeal erred in reversing the trial court's judgment for plaintiff on the ground that defendant owed no duty. A business proprietor with "actual notice of an impending assault" has a special-relationship duty that includes "an obligation to take reasonable, relatively simple, and minimally burdensome steps to attempt to avert that danger." (36 C.4th 250.) Whether there was sufficient evidence to support the jury's determinations of breach of duty and causation are matters to be addressed by the Court of Appeal on remand. (36 C.4th 250.)

Two justices dissented on the ground that the attack at issue here was not foreseeable. (36 C.4th 250.)

See 36 Southwestern U. L. Rev. 59 [*Delgado*].

Morris v. De La Torre (2005) 36 C.4th 260, 30 C.R.3d 173, 113 P.3d 1182, involved a restaurant proprietor's duty to summon aid for an invitee who was attacked outside the restaurant. Plaintiff customer was injured by third-party criminals in the parking lot of defendant's all-night restaurant while defendant's employees watched from inside, failing to phone 911 or otherwise summon aid. In the course of the attack, one of the criminals entered the restaurant to take a knife, which he then used to stab plaintiff. The Court of Appeal reversed the trial court's grant of summary judgment for defendant. *Held*, affirmed; after applying the principles enunciated in *Delgado*, the court made the following points unique to this case:

(a) *Foreseeability analysis.* Foreseeability analysis in a case like this--involving a proprietor's duty to *respond* reasonably to criminal conduct that is imminent or ongoing in his or her presence--contrasts fundamentally with the type of foreseeability at issue in cases such as *Ann M. v. Pacific Shopping Plaza*, which involve a proprietor's duty to take *preventative measures* to guard against possible *future* criminal conduct. Defendant's employees could readily foresee the immediate danger posed to plaintiff. The question in the present case is thus whether those employees (as agents of defendant) owed any duty to plaintiff to take reasonable action for his protection at some point during the ongoing criminal conduct. The answer depends on whether there was a special relationship between defendant and plaintiff. (36 C.4th 271.)

(b) *Special relationship existed between defendant and plaintiff.* Defendant contended that no special relationship existed between himself and plaintiff because plaintiff, who merely accompanied friends to the restaurant and did not plan to eat, was not a customer at the time of the attack. However, a special relationship exists not only between a business proprietor and patrons or customers, but also between the proprietor and invitees. Also, courts long have recognized that a person may be an invitee even if he or she is not a paying customer at the time of injury. Potential customers on the premises of a business open to provide services are easily invitees by any definition. Moreover, when consistent with the purpose for which the invitation is implicitly or explicitly issued, those who accompany an invitee are themselves invitees. Accordingly, plaintiff was an invitee for purposes of the special relationship doctrine. (36 C.4th 271.)

(c) *Special relationship status is not precluded by occurrence of assault outside defendant's physical structure.* The conclusion that plaintiff was an invitee for purposes of the special relationship doctrine is not altered by the circumstance that the attack occurred outside the restaurant. It is well established that a proprietor's special-relationship duty to customers and invitees extends beyond the structure of a premises to areas within the proprietor's control. A finding of sufficient control in this case can be based on a number of factors: (1) apparently customers and invitees regularly used the parking lot when patronizing defendant's restaurant; (2) defendant was aware of this use, and posted in its windows advertising that could be read from the parking lot; (3) the area of the parking lot where the attack occurred was directly in front of the restaurant's windows; (4) defendant's lease authorized the nonexclusive use of the parking lot for customers' and invitees' cars; and (5) a reasonable inference can be drawn that defendant realized a

significant commercial benefit from his customers' use of the parking lot. (36 C.4th 274.)

(d) *Duty to summon assistance.* Because defendant stood in a special relationship with plaintiff, defendant owed an obligation to respond to ongoing criminal conduct by undertaking such "appropriate action as is reasonable under the circumstances" to protect plaintiff and other patrons and invitees. (36 C.4th 274, citing *Kentucky Fried Chicken of Calif. v. Superior Court* (1997) 14 C.4th 814, 823, 59 C.R.2d 756, 927 P.2d 1260, text, §1141.) Plaintiff argued that measures reasonable under the circumstances included calling 911 to summon assistance. (36 C.4th 274.) Neither a business proprietor nor his or her employees have an absolute obligation to call 911 in the face of ongoing criminal conduct: in some situations, doing so actually might increase the danger to customers or invitees or might unreasonably place proprietors or their employees in danger. Nevertheless, on the disputed facts presented here, the record does not establish, as a matter of law, that defendant's employees had no obligation to call 911 or undertake other similar measures to summon aid. (36 C.4th 275.) Calling 911 is a well-recognized and generally minimally burdensome method of seeking assistance. Although there may be situations in which the appropriate and reasonable response does not include making such a call, as a general matter a proprietor's special-relationship duty to patrons and invitees includes an obligation to do so. (36 C.4th 277.)

(e) *Conclusion.* The judgment of the Court of Appeal reversing summary judgment for defendant is accordingly affirmed. However, the conclusion that defendant owed plaintiff a legal duty of care, of course, will not prevent defendant from presenting evidence at trial and arguing to the jury that his employees did not in fact breach any duty owed because they acted reasonably in light of their fear that placing a 911 call would endanger their own safety. Furthermore, even if the jury finds a breach of duty, it also would be required to consider whether the breach was a proximate cause of plaintiff's injuries, that is, whether the failure of defendant's employees to act caused plaintiff to incur greater injury than he would have suffered had defendant's employees taken appropriate action. (36 C.4th 278.)



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 - cc. Near Apartment.

6 Witkin Sum. Cal. Law Torts § 1152

[§ 1152] Near Apartment.

Medina v. Hillshore Partners (1995) 40 C.A.4th 477, 46 C.R.2d 871, was a wrongful death action brought against the owner of an apartment complex by the mother of a young man who was killed by a gang near the complex. Plaintiff's son was killed off the premises, in the public street, by a member of the gang who was not a tenant. The trial court sustained defendant's demurrer without leave to amend. *Held*, affirmed.

(a) In California, a landowner owes a duty to exercise ordinary care in the use and management of his or her land. Normally, the duty does not extend to persons outside the land, e.g., on adjacent land or on the highway. Lacking a special relationship, the landowner has no duty to protect members of the public against criminal activities occurring on a public sidewalk or street. (40 C.A.4th 481, citing C.C. 1714(a), *supra*, §833; *Rowland v. Christian* (1968) 69 C.2d 108, 119, 70 C.R. 97, 443 P.2d 561, *supra*, §1086; and the text.)

(b) Defendant owed no duty to protect members of the public from gang members who congregated around the property and assaulted individuals on adjacent public streets. The rule governing *Martinez v. Pacific Bell* (1990) 225 C.A.3d 1557, 275 C.R. 878, *infra*, §1153, applies here: A property owner is not liable for criminal acts of third parties committed on the premises of another. Premises liability is based on the concept that possession includes the attendant right to manage and control; no facts were alleged to show that the decedent entered the apartment complex or was assaulted on property controlled by defendant. (40 C.A.4th 483.) Although the congregation of gangs poses a foreseeable risk of harm to the public, the foreseeability of the criminal assault does not compel the ruling that landowners owe a duty to protect the public from gang-related crimes or assume a special relationship with members of the public who use adjacent streets and sidewalks. (40 C.A.4th 486.)

(c) Although P.C. 186.20 et seq. (13 Summary (10th), *Equity*, §150), which provide that a building used for criminal gang activities constitutes an actionable nuisance, these statutes are not intended to expand a landowner's vicarious liability for personal injuries occurring off the premises. A plaintiff may not invoke the statutes and sue for wrongful death damages based on the theory that he or she is abating a private nuisance. The essence of a private

nuisance is an interference with the use and enjoyment of land; without it, the fact of personal injury, or of interference with some purely personal right, is not enough for such a nuisance. (40 C.A.4th 484.)

In *Rosenbaum v. Security Pac. Corp.* (1996) 43 C.A.4th 1084, 50 C.R.2d 917, the plaintiff's theory of liability was deemed "even more attenuated than the one rejected in *Medina*." (43 C.A.4th 1093.) Plaintiff, who was attacked as she parked her car across the street from her apartment, contended that defendant apartment owner breached its duty of care by failing to adequately light its premises, thereby causing plaintiff to decide not to use her assigned garage out of fear for her safety and to park on the street instead. The trial court entered judgment notwithstanding the verdict for defendant. *Held*, affirmed.

(a) A landlord has a duty to take reasonable steps to secure common areas of the premises against foreseeable criminal acts of third parties. Further, the location of the crime does not necessarily determine the landowner's liability for injuries resulting from criminal acts. (43 C.A.4th 1090.) However, there is liability for injuries occurring off the property only if the harm was foreseeable *and* (1) the owner controlled the site of the injury, (2) the owner affirmatively created a dangerous condition on the site, or (3) there was a functional connection between the owner's conduct and the injury suffered. The duty of a landlord to protect the tenant from criminal activity is not a general one, but arises only where the landlord's negligence facilitates the criminal act. The landlord is not the insurer of the tenant's safety. In other words, a duty is imposed on the landlord where there is a "close, or functional, connection" between the landlord's conduct and the harm suffered. (43 C.A.4th 1091.)

(b) The duty to secure the common areas with adequate lighting, locks, and other appropriate security measures is imposed to protect tenants against the risk of unauthorized entry into the apartment building. Because only the landlord is in the position to secure common areas, he or she has a duty to protect against types of crimes of which the landlord has notice and that are likely to recur if the common areas are not secure. Patently, however, muggings on public streets are not the foreseeable result of the landlord's negligence in maintaining adequate lighting in the apartment building's common areas. (43 C.A.4th 1094.) To adopt plaintiff's theory of liability would impose an unfair burden on landlords and, in effect, force them to become insurers of their tenants' safety, contrary to the well-established policy of this state. (43 C.A.4th 1095.)

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 - dd. Near Public Telephone.

6 Witkin Sum. Cal. Law Torts § 1153

[§ 1153] Near Public Telephone.

In *Martinez v. Pacific Bell* (1990) 225 C.A.3d 1557, 275 C.R. 878, plaintiff, operator of a parking lot, worked on the premises in an attendant's booth. Defendant placed a public telephone on a public sidewalk about 20 feet from the booth. Plaintiff's complaint alleged the following: The telephone attracted large numbers of youths who harassed parking lot customers; on two prior occasions, after being assaulted, he requested defendant to remove the booth, but his request was ignored; on a later occasion he was robbed and shot by persons attracted to the telephone. He sought to impose liability on theories of premises liability and nuisance. *Held*, judgment for defendant on demurrer affirmed.

(a) *No legal duty.*

(1) Premises liability is imposed for tortious conduct on the premises where the defendant owns or controls the premises. No liability can be imposed on a defendant who does not have this control and who could not exclude third parties intent on committing crime. (225 C.A.3d 1561, citing *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, *supra*, §1134, *Owens v. Kings Supermarket* (1988) 198 C.A.3d 379, 243 C.R. 627, and *Balard v. Bassman Event Sec.* (1989) 210 C.A.3d 243, 258 C.R. 343, *supra*, §1151.)

(2) Plaintiff relied in part on the theory of the street vendor case, *Nevarez v. Thriftmart* (1970) 7 C.A.3d 799, 87 C.R. 50, *supra*, §1062, in which child patrons were allowed to recover from vendors for injuries received when they ran into public streets to the trucks selling sweets. But the analogy fails: (a) Plaintiff was not induced by defendant's solicitations to patronize defendant's telephones; he remained on his own premises; (b) in the street vendor case, the vendor was doing business from a mobile vehicle, and could have parked his truck in a safe place. (225 C.A.3d 1562.)

(3) Defendant owner of a pay telephone had no legal right to prevent members of the public from approaching the booth used by plaintiff in his parking lot. And to impose tort liability on solvent owners of property for criminal acts committed by third parties on another's property is wholly inconsistent with the principles underlying premises liability; while the tortious conduct of third persons might have been foreseeable, the defendant's lack of control made it

impossible to institute preventive measures. (225 C.A.3d 1563, 1564.)

(b) *Alleged nuisance is not a proximate cause.*

(1) Plaintiff advanced the theory that there was a question of fact whether the pay telephone, which allegedly became a place of resort for criminals, constituted a nuisance. But whether it was or not, the alleged nuisance was not the legal cause of the robbery; the independent intervening intentional act was the cause. (225 C.A.3d 1564, 1565.) Whether the theory of liability is negligence or nuisance, it extends only to injury legally caused by the defendant's conduct. (225 C.A.3d 1565.)

(2) No policy reason exists for the extension of liability for a nuisance that does not proximately cause the injury. Criminals may come to a specific area for a variety of reasons; and, under modern conditions, members of the public move freely about, subject to maintenance of public order and prevention of crime by law enforcement officials. "[A]n owner of publicly used personal property, having no law enforcement power toward or control over persons using that property, incurs no civil liability to persons injured by the commission of an intervening criminal act such users commit in the neighborhood of that property." (225 C.A.3d 1569.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Landowners and Possessors.

5. Trespassing Children.

a. Former Doctrine of Attractive Nuisance.

1. Rule and Classification.

6 Witkin Sum. Cal. Law Torts § 1154

[§ 1154] Rule and Classification.

In this and the next two sections, the law established prior to *Rowland v. Christian* (1968) 69 C.2d 108, 119, 70 C.R. 97, 443 P.2d 561, supra, §1086, will be briefly summarized.

(1) *Exception to Trespasser Rule.* The "attractive nuisance doctrine" grew up as an exception to the general rule that the landowner owes no affirmative duty of care to trespassers. The conventional doctrine has been stated as follows: "One who places an attractive but dangerous contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent such injury to them, and this because he is charged with knowledge of the fact that children are likely to be attracted thereto and are usually unable to foresee, comprehend, and avoid the dangers into which he thus knowingly allures them." (*Cahill v. Stone (E.B. & A.L.) & Co.* (1908) 153 C. 571, 574, 96 P. 84; see *Marino v. Valenti* (1953) 118 C.A.2d 830, 843, 259 P.2d 84; *Copfer v. Golden* (1955) 135 C.A.2d 623, 627, 288 P.2d 90; 5 Harper, James & Gray 2d §27.5; 62 Am.Jur.2d (2005 ed.), *Premises Liability* §271 et seq.; 80 Am.Jur. Trials 535 [attractive nuisance litigation]; 41 Cal. L. Rev. 138; 46 Cal. L. Rev. 610; 47 Cal. L. Rev. 428; 48 Cal. L. Rev. 348; 3 *Hastings L. J.* 38; 10 So. Cal. L. Rev. 214; 14 So. Cal. L. Rev. 86; 24 So. Cal. L. Rev. 504; 16 A.L.R.3d 25 [age and mentality as affecting attractive nuisance doctrine]; 19 A.L.R.3d 184 [private owner's liability to trespassing children for injury sustained in engaging in sliding sports on landowner's property].)

(2) *Theory of Balancing Conveniences.* The doctrine involves a "balancing of the opposing conveniences." The duty is "to use ordinary prudence and foresight to prevent an injury to children which might be expected where it can be guarded against without placing an undue burden upon the owner of the land and his right to make a beneficial use of it." (*Melendez v. Los Angeles* (1937) 8 C.2d 741, 745, 68 P.2d 971; see *Hernandez v. Santiago Orange Growers' Assn.* (1930) 110 C.A. 229, 235, 293 P. 875; *Rest.2d, Torts* §339, Comment n; 39 A.L.R.2d 1452 [duty to erect fence or other device]; 26 Cal. L. Rev. 149; 46 Cal. L. Rev. 615; 47 Cal. L. Rev. 463; 1 So. Cal. L. Rev. 534.)

(3) *Artificial Contrivance or Structure.* The theory developed that the attraction must be an artificial contrivance or structure of some sort, such as a machine or vehicle, and not a natural condition such as a body of water. (See *Puchta v.*

Rothman (1950) 99 C.A.2d 285, 287, 221 P.2d 744; 46 Cal. L. Rev. 613.) Under the Restatement rule, the attraction must be an artificial condition, but it need not be a contrivance. (*Rest.2d, Torts* §339; see *infra*, §1155.)

(4) *Classification.* The conventional approach to child trespasser problems has been to classify the instrumentality or structure either as an attractive nuisance or not. In California, this approach has been applied in numerous cases, and a variety of machines, appliances, and contrivances has been held to be an attractive nuisance. (See *Clark v. Pacific Gas & Elec. Co.* (1931) 118 C.A. 344, 5 P.2d 58 [power poles containing spikes close to the ground, which could be climbed by children]; *Marino v. Valenti, supra*, 118 C.A.2d 842 [uninhabited and dilapidated shack, with broken board offering easy entrance, near place where school bus discharged children]; *Lambert v. Western Pac. R. Co.* (1933) 135 C.A. 81, 26 P.2d 824 [dynamite caps left abandoned in accessible place where children play]; *Walker v. Fresno Distr. Co.* (1965) 233 C.A.2d 840, 44 C.R. 68 [large 400-pound gate in chain-link fence, moving on wheels on track]; 41 Cal. L. Rev. 138; 46 Cal. L. Rev. 610; 3 A.L.R.2d 758 [attractive nuisance doctrine as applied to vehicles or their contents]; 23 A.L.R.2d 1157 [oil and gas tanks, pipes, and pipelines as attractive nuisance]; 62 A.L.R.2d 898 [machines other than vehicles as attractive nuisance]; 86 A.L.R.2d 709 [liability for injury or death of child in refrigerator]; 64 A.L.R.3d 1069 [animals as attractive nuisance].)

West's Key Number Digest, Negligence k.1172 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Exception to Trespasser Rule.* See 5 Harper, James & Gray 3d §27.5; 62 Am.Jur.2d (2005 ed.), *Premises Liability* §271 et seq.



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2. Extension of Liability Under Restatement.

6 *Witkin Sum. Cal. Law Torts* § 1155

[§ 1155] Extension of Liability Under Restatement.

The general policy, which imposes a special duty toward foreseeable child trespassers, is almost universally accepted. But the rigid formula approach, which sought to list various kinds of instrumentalities or structures as attractive nuisances and to exclude liability where the object did not come within the classification, was criticized. (See *Knight v. Kaiser Co.* (1957) 48 C.2d 778, 781, 312 P.2d 1089 [where facts are undisputed, classification is question of law; strong argument against categorization in dissenting opinion]; 46 Cal. L. Rev. 614, 618.) Rest. 2d, Torts §339 takes a different and broader view: The landowner is liable for harm to young trespassing children caused by an artificial condition if "(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared to the risk to young children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children."

The later California cases rejected the categorization approach and embraced the Restatement version of the doctrine. (See *Reynolds v. Willson* (1958) 51 C.2d 94, 99, 103, 331 P.2d 48; *Garcia v. Soogian* (1959) 52 C.2d 107, 110, 338 P.2d 433; *King v. Lennen* (1959) 53 C.2d 340, 343, 1 C.R. 665, 348 P.2d 98; *Copfer v. Golden* (1955) 135 C.A.2d 623, 628, 288 P.2d 90; *Edler v. Sepulveda Park Apartments* (1956) 141 C.A.2d 675, 679, 297 P.2d 508; *Woods v. San Francisco* (1957) 148 C.A.2d 958, 964, 307 P.2d 698; *Herrera v. Southern Pac. Ry. Co.* (1961) 188 C.A.2d 441, 447, 10 C.R. 575; *Crain v. Sestak* (1968) 262 C.A.2d 478, 482, 68 C.R. 849; 46 Cal. L. Rev. 610; 47 Cal. L. Rev. 435.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Application in Particular Situations.

6 Witkin Sum. Cal. Law Torts § 1156

[§ 1156] Application in Particular Situations.

(1) *Concealed Traps and Artificial Ponds.* Natural bodies of water were excluded from the operation of the attractive nuisance doctrine because they are not artificial conditions, and artificially created bodies of water, such as reservoirs, irrigation ditches, or pools created by clogged sewers or storm drains were formerly excluded because they were considered common and familiar dangers. However, under a theory designed to escape some of the consequences of the rigid formula without wholly dispensing with it, recovery was allowed where either a natural or artificial body of water contained an additional artificial contrivance constituting a concealed danger or trap. (See *Sanchez v. East Contra Costa Irr. Co.* (1928) 205 C. 515, 517, 271 P. 1060; *Reynolds v. Willson* (1958) 51 C.2d 94, 99, 103, 331 P.2d 48; *Schaffer v. Claremont Country Club* (1959) 168 C.A.2d 351, 355, 336 P.2d 254; 46 Cal. L. Rev. 618; 8 *Hastings L. J.* 305, 306; 9 *Stanf. L. Rev.* 204; 6 *U.C.L.A. L. Rev.* 487.)

(2) *Building and Building Materials.* Earlier California cases placed a building under construction, and machinery or other materials in it, outside the attractive nuisance classification. (See *Camp v. Peel* (1939) 33 C.A.2d 612, 614, 92 P.2d 428; *Puchta v. Rothman* (1950) 99 C.A.2d 285, 289, 221 P.2d 744 [second floor overlaid with tar paper concealing hole for ventilator and skylight; completed stairway giving access to floor].) The explanation given in *Puchta* is that "a building under construction, being immobile for one thing, is readily distinguishable from an attractive, moving vehicle or piece of machinery," and that to require a barricade of sufficient size and strength to keep out children would be too great a burden on the property owner. (99 C.A.2d 289.) In *Woods v. San Francisco* (1957) 148 C.A.2d 958, 964, 307 P.2d 698, the court rejected the supposedly inflexible rule of *Puchta*, and held that liability may be imposed if the four conditions of the Restatement rule are met. (See *Crain v. Sestak* (1968) 262 C.A.2d 478, 485, 68 C.R. 849; 44 *A.L.R.2d* 1253 [building under construction]; 64 *A.L.R.2d* 972 [building being demolished].)

(3) *Common and Familiar Dangers.* It was long thought that the contrivance or condition must be of such a nature that children are not likely to realize the risk involved in coming near it or meddling with it. Hence, whatever the court considered to be common and familiar dangers were not classified as attractive nuisances and were excluded from the operation of the rule. (See *Melendez v. Los Angeles* (1937) 8 C.2d 741, 68 P.2d 971; *Hernandez v. Santiago Orange Growers' Assn.* (1930) 110 C.A. 229, 233, 293 P. 875; 46 Cal. L. Rev. 615; C.E.B., 1 Construction Contracts and

Disputes 3d, §6.17.)

The principal application of this exclusionary rule was to ponds, reservoirs, swimming pools, and other natural or artificially created bodies of water. (See *Peters v. Bowman* (1896) 115 C. 345, 47 P. 113; *Melendez v. Los Angeles*, *supra*; *Demmer v. Eureka* (1947) 78 C.A.2d 708, 710, 178 P.2d 472; *Betts v. San Francisco* (1952) 108 C.A.2d 701, 702, 239 P.2d 456; *Ward v. Oakley Co.* (1954) 125 C.A.2d 840, 845, 271 P.2d 536; *Lake v. Ferrer* (1956) 139 C.A.2d 114, 293 P.2d 104; *Van Winkle v. King* (1957) 149 C.A.2d 500, 506, 308 P.2d 512; 26 Cal. L. Rev. 159; 46 Cal. L. Rev. 616; 8 *Hastings L. J.* 300; 9 *Stanf. L. Rev.* 204.)

Similarly, the doctrine was held inapplicable in other situation. (See *Loftus v. Dehail* (1901) 133 C. 214, 217, 65 P. 379 [open cellar or excavation]; *Allred v. Pioneer Truck Co.* (1918) 179 C. 315, 176 P. 455 [vehicles in common use]; *Doyle v. Pacific Elec. Ry. Co.* (1936) 6 C.2d 550, 59 P.2d 93 [ladder]; *Solomon v. Red River Lumber Co.* (1922) 56 C.A. 742, 746, 206 P. 498 [playground swing intended for children]; *Giddings v. Superior Oil Co.* (1951) 106 C.A.2d 607, 611, 235 P.2d 843 [oil well pump]; *Lopez v. Capitol Co.* (1956) 141 C.A.2d 60, 66, 296 P.2d 63 [scaffolding on public sidewalk].)

In *Garcia v. Soogian* (1959) 52 C.2d 107, 110, 338 P.2d 433, the common and familiar danger rule, applied objectively as a matter of law to any child without inquiry as to the capacity and understanding of the child, was expressly repudiated. "The circumstance that a condition giving rise to injury is common in character does not necessarily exclude liability. ... What is important is not whether conditions are common in character but whether their dangers are fully understood by children." (52 C.2d 111.) (See 48 Cal. L. Rev. 348; 13 *Hastings L. J.* 38; 33 *So. Cal. L. Rev.* 349.)

Nevertheless, the common and familiar danger concept remained implicit in some of the decisions applying the conditions of the Restatement rule. (See *Davis v. Goodrich* (1959) 171 C.A.2d 92, 98, 340 P.2d 48 [abandoned roller coaster having no moving parts]; *Hickey v. Nulty* (1960) 182 C.A.2d 237, 241, 5 C.R. 914 [hay mowing machine]; *Kemline v. Simonds* (1964) 231 C.A.2d 165, 168, 41 C.R. 653 [sliding glass panel door fronting on patio, new swimming pool].) (See 55 Cal. L. Rev. 366, 1187.)

West's Key Number Digest, Negligence k.1175

SUPPLEMENT: [This section is current through the latest supplement]
(3) *Common and Familiar Dangers*.

See C.E.B., 2 Construction Contracts, Defects, and Litigation, §10.18 (replacing C.E.B., Construction Contracts and Disputes 3d).



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6 *Witkin Sum. Cal. Law Torts* § 1157

[§ 1157] New Foreseeable Risk Approach.

With the abandonment of status classifications and the substitution of the foreseeable risk approach in *Rowland v. Christian* (1968) 69 C.2d 108, 119, 70 C.R. 97, 443 P.2d 561, supra, §1086, there is little reason to consider liability to a child on the basis of the attractive nuisance exceptions to the trespasser rule (supra, §1154 et seq.).

In *Beard v. Atchison, Topeka & Santa Fe Ry. Co.* (1970) 4 C.A.3d 129, 135, 84 C.R. 449, although its precise holding was later nullified by statute (see supra, §1097), the court took a strong position to this effect: "Under *Rowland v. Christian*, the liability of a possessor of property to trespassing children is no longer limited by the conditions set out in *Restatement Second Torts*, §339 ... , or by the terms of other special doctrines and theories created as exceptions to a general rule barring trespassers from recovery for negligence, but is governed by *Civil Code*, section 1714, which imposes general liability on every person for injuries occasioned to others by want of ordinary care in the management of his property. ... [T]he extent of a possessor's duty is controlled by the foreseeability of the risk and not by the status of the person injured."

"Since a person's status as a trespasser is now largely immaterial and no longer determines that he assumed the risk of personal injuries caused by a possessor's negligence, it follows that the various exceptions to the former rule prohibiting trespassers from recovery for negligence no longer serve their intended purpose. ... Under the attractive nuisance exception a trespassing child had the burden of proving his lack of appreciation of the risk involved in coming on the property ... and also the burden of proving the feasibility to the possessor of eliminating the dangerous condition. ... [P]roof of trespass no longer creates a presumption that the trespasser took the property as he found it, and a trespassing adult need not rebut the presumption that he assumed the risk of the possessor's negligence in going upon the property. A fortiori, a trespassing child is entitled to the benefit of the same rule. Hence the defense of assumption of risk must be established by defendant in some manner other than mere proof that plaintiff was a trespasser."

In *Smith v. Americania Motor Lodge* (1974) 39 C.A.3d 1, 7, 113 C.R. 771, the court, citing *Beard*, declared that *Rowland* "in effect, abolishes the attractive nuisance doctrine in California." (See also 88 A.L.R.3d 1197 [note on *Smith* case; liability of swimming facility operator for injury to or death of trespassing child].)

West's Key Number Digest, Negligence k.1015, 1065, 1175

SUPPLEMENT: [This section is current through the latest supplement]



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C. Real Property: Vendor, Lessor, and Contractor.

1. Vendor and Lessor.

a. General Rule of Nonliability.

6 Witkin Sum. Cal. Law Torts § 1158

[§ 1158] General Rule of Nonliability.

After transfer to the purchaser, the vendor of real property is ordinarily not liable for injuries resulting from defects in the premises. The reason is that the vendor no longer has control of the property, and therefore has neither the right nor the duty to enter to inspect or repair or take any other precautions to protect persons coming on the property. The liability of a landowner or possessor thus shifts to the purchaser. (See *Preston v. Goldman* (1986) 42 C.3d 108, 115, 227 C.R. 817, 720 P.2d 476, *infra*, §1159; *Stone v. Heyman Bros.* (1932) 124 C.A. 46, 48, 12 P.2d 126; *Copfer v. Golden* (1955) 135 C.A.2d 623, 630, 288 P.2d 90; *Lorenzen-Hughes v. MacElhenny, Levy & Co.* (1994) 24 C.A.4th 1684, 1687, 30 C.R.2d 210 [under general rule of nonliability for prior owners or possessors, previous tenant was not liable to present tenant when cabinet, installed by defendant, fell on plaintiff; installation of cabinet did not turn defendant into contractor so as to make rule inapplicable]; *Lewis v. Chevron USA* (2004) 119 C.A.4th 690, 693, 14 C.R.3d 636 [rule of nonliability applies even if prior owner negligently created condition]; *Rest.2d, Torts* §351 et seq.; 5 Harper, James & Gray 2d §27.18; 34 Proof of Facts 3d 465 [contractual allocations of environmental risk]; 57 Am.Jur. Trials 395 [toxic tort litigation]; 59 Am.Jur. Trials 231 [contractual indemnifications and releases from environmental liability]; 25 A.L.R.3d 383 [liability of vendor of new dwelling for loss, injury, or damage occasioned by defective condition]; 48 A.L.R.3d 1027, 1035 [liability of vendor or grantor for personal injury to purchaser or third person due to premises' defective condition].)

The Restatement recognizes two bases of liability:

(1) Where the vendor fails to disclose concealed dangerous conditions known to the vendor and that the purchaser is not likely to discover. (*Rest.2d, Torts* §353.) (On disclosure requirement, see 12 *Summary* (10th), *Real Property*, §471 et seq.)

(2) Where the vendor created, or negligently permitted to remain, a structure or other artificial condition involving an unreasonable risk of harm to persons outside the land. In this situation, liability continues until the purchaser has discovered or has had a reasonable opportunity to discover the condition. (*Rest.2d, Torts* §373.)

The same general rule of nonliability applies to lessors of real property, but the exceptions to the rule are more

numerous and important. (See *Rest.2d, Torts* §355 et seq.; 12 *Summary* (10th), *Real Property*, §638 et seq.); BAJI, No. 8.20.1.)

West's Key Number Digest, Negligence k.1262, 1263; Products Liability k.23.1

SUPPLEMENT: [This section is current through the latest supplement]

See 5 Harper, James & Gray 3d §27.18.



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1. Vendor and Lessor.

b. Former Owner's Liability for Improvement.

6 *Witkin Sum. Cal. Law Torts* § 1159

[§ 1159] Former Owner's Liability for Improvement.

In *Preston v. Goldman* (1986) 42 C.3d 108, 227 C.R. 817, 720 P.2d 476, defendant K, in 1972, built a small pond with a 12-inch wall in the backyard of their residence. In 1973, they sold the property to G, and in November, 1974, G entered into a lease-option-to-buy agreement with the Rs. The Rs improved the pond with a new brick facing and coping; in the process, they emptied the pond and were aware of its depth and configurations. In May, 1976, plaintiff child, 22 months old, was visiting the Rs with his parents. He was left alone for a short time and was found immersed in the pond. He suffered brain damage and quadriplegia.

Plaintiff's complaint, filed in April, 1978, named G and the Rs as defendants, and in September, 1980, it was amended to add the Ks. At trial, the jury verdicts were in favor of all defendants. On plaintiff's appeal, the Court of Appeal held that the Ks were not insulated from liability by their sale of the property, and the Supreme Court granted review solely to consider this issue: "Should former owners, allegedly negligent in constructing an improvement on their property, be subject to liability for injuries sustained on that property long after they have relinquished all ownership and control?" *Held*, they should not, except under special circumstances.

(a) The general rule of nonliability is stated in *Copfer v. Golden* (1955) 135 C.A.2d 623, 288 P.2d 90, and in *Rest.2d, Torts* §352 (supra, §1158). The trial judge thought *Copfer* was not controlling because plaintiff alleged that defendant K had been actively negligent in their design and construction of the pond. The judge therefore instructed the jury on the theory of liability based on affirmative conduct. But *Copfer* cannot be distinguished on this ground; its language indicates that the active or passive role of the former owner is irrelevant, because, having parted with possession, the former owner can do nothing about the alleged dangerous condition. (42 C.3d 114.)

(b) "The development of the law of predecessor landowners' liability has been, in fact, somewhat murky." (42 C.3d 114.) Three separate approaches have arisen:

(1) The doctrine of caveat emptor is generally followed; i.e., termination of liability occurs on transfer of control except under specified circumstances. (42 C.3d 115, citing *Rest.2d, Torts* §§352, 353.) The reason, as pointed out in Comment a to *Rest.2d, Torts* §352, is that the purchaser is expected to make his or her own inspection of the premises,

and the vendor is not responsible for their defective condition at the time of transfer. (42 C.3d 115.)

(2) Both the Restatement and Prosser recognize the two exceptions to the general rule: (a) The vendor is under a duty to disclose any hidden defects that he or she may anticipate that the purchaser will not discover; and (b) the vendor may be liable where the land, when transferred, is in such condition that it involves an unreasonable risk of harm to those outside the premises. (42 C.3d 115; see supra, §1158.)

(3) A third view is that the vendor should be liable, notwithstanding transfer of title, if he or she negligently created a dangerous condition. (42 C.3d 115.)

(c) As to private property, most jurisdictions follow the common law rule of caveat emptor. (42 C.3d 116.) Plaintiff's theory of liability, which was based not on the Ks' status as landowners but rather as the creators of a negligent condition, does not withstand analysis; except as to professional developer/owners, the principles of negligence applied to manufacturers of chattels have usually not been extended to negligent conditions on land. (42 C.3d 117.)

(d) *Sprecher v. Adamson Cos.* (1981) 30 C3d 358, 178 C.R. 783, 636 P.2d 1121, supra, §1089, extending liability of landowners to cover natural conditions on land, emphasized the possession of the premises and the attendant right to control and manage them. (42 C.3d 118.) "Thus, generally, we have continued to treat ownership and control as a fundamental requirement for ascribing liability." (42 C.3d 119.) This theory is also reflected in the usually applicable insurance coverage: The Ks' renters' insurance on their new residence would not cover liability arising from and connected with other premises. (42 C.3d 120, 121.) And the same implication is found in the statute of limitations on actions for liability based on patent and latent defects (C.C.P. 337.1, 337.15; see 3 Cal. Proc. (4th), Actions, §§557, 558.) The defect here was patent, and the provision on patent defects demonstrates, by its shorter limitations period as well as by its exemptions for professionals engaged in home improvements, that the Legislature intended to limit liability for those who did not have the continuing opportunity to discover and correct these defects. (42 C.3d 125.)

(e) "After consideration of the relevant variables reviewed above, we have concluded that we should not depart from the existing rules restricting liability of predecessor landowners. Our recent emphasis on the importance of possession and control as a basis for liability comports with our conclusions, as does our analysis of the factors enunciated in" *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086. (42 C.3d 125.) (See 17 Southwestern U. L. Rev. 23.)

SUPPLEMENT: [This section is current through the latest supplement]
Statute of limitations:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §606 et seq.



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C. Real Property: Vendor, Lessor, and Contractor.

2. Contractor.

a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1160

[§ 1160] In General.

(1) *Former Rule of Nonliability.* Some courts have been reluctant to apply the rule of *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382, 111 N.E. 1050, *infra*, §1168, to a general contractor who constructs a building, after the owner has taken possession. (See 70 A.L.R.5th 261 [exceptions to traditional "completed and accepted" rule, protecting contractor from liability for injury to third person after completion and acceptance of work].) Among the reasons advanced for distinguishing between the liability of a manufacturer of a chattel and the building contractor are:

(a) The manufacturer produces standardized goods over which he or she has complete control, while the building contractor constructs individual units and often in conformity with another's plans.

(b) The owner, assuming a landowner's duty, usually inspects the building, and this inspection makes it reasonable to terminate the contractor's liability on acceptance.

(c) Liability imposed for defects in real property would cover a much longer period than that for defects in personal property, which are likely to cause the harm in a relatively short time. (See 62 *Harv. L. Rev.* 145 [discussing and criticizing the distinction].)

(2) *Modern Theory of Liability.* *Rest.2d, Torts* §385 repudiates this approach and makes the contractor liable for the negligent creation of a dangerous condition of the structure in the same manner as the manufacturer of a chattel. (See C.E.B., 1 Construction Contracts and Disputes 3d, §6.1 et seq.; 51 Am.Jur. Trials 493 [plumbing contractor's negligence]; 62 *Harv. L. Rev.* 145; 30 *McGeorge L. Rev.* 299 [negligence liability for construction defects]; 58 A.L.R.2d 865 [negligence of contractor as ground of liability for injury or damage to third person occurring after completion and acceptance of the work]; 61 A.L.R.3d 792 [liability of builder or subcontractor for insufficiency of building resulting from latent defect in materials]; 73 A.L.R.3d 1213 [duty of contractor to warn owner of defects in subsurface conditions].)

This view has been adopted in California, although it is expressed in terms of an "exception" to the "general rule" of nonliability of an independent contractor after the work is accepted. In *Johnston v. Long* (1943) 56 C.A.2d 834, 837,

133 P.2d 409, where the injury was caused by an unsafe overhead door at a delivery entrance, the court said that "the contractor is liable if the work done and turned over by him is so negligently defective as to be imminently dangerous to third persons, provided the contractor knows, or should know, of the dangerous situation created by him, and the owner does not know ... and would not discover it by reasonable inspection." (See *Stuart v. Crestview Mut. Water Co.* (1973) 34 C.A.3d 802, 809, 110 C.R. 543; *Kent v. Bartlett* (1975) 49 C.A.3d 724, 730, 122 C.R. 615 [negligent survey by surveyor employed by plaintiffs' predecessor in title]; 28 Cal. L. Rev. 782, 785; *infra*, §1161; on right of homeowner to bring action against contractor or others for construction defects, see *infra*, §1162 et seq.)

The result is different when the owner has knowledge of the defect. In *Sanchez v. Swinerton & Walberg Co.* (1996) 47 C.A.4th 1461, 1466, 55 C.R.2d 415, plaintiff slipped and fell and sued the general contractor of the building. The building had been completed by defendant and accepted by the owner, and the cause of the accident, pooled water on the floor, was observed by the owner's agents on several occasions before the accident. *Held*, summary judgment for defendant affirmed. The *latency* of the defect is essential to a contractor's negligent-construction liability after the owner has accepted the structure. (47 C.A.4th 1470.) It was undisputed that the owner's agents observed the dangerous condition and appreciated the risk it entailed. Even if the defect initially could have been considered latent, once it was discovered, it became patent. That the owner failed to take precautions until after plaintiff was injured did not change the nature of the defect. (47 C.A.4th 1471.)

Liability is, of course, dependent on proof of original negligence in construction or knowledge of a dangerous condition; the contractor has no more duty than a vendor to maintain the property in a safe condition after acceptance by the owner. (See *Hogan v. Miller* (1957) 153 C.A.2d 107, 111, 314 P.2d 230.)

Nor is the contractor responsible for the negligence of another who is not in a relationship (such as agent or subcontractor; *infra*, §1236 et seq.) giving rise to liability. Thus, in *Hamilton v. Harkins* (1956) 146 C.A.2d 566, 304 P.2d 82, a city engineer's office negligently prepared defective sewer plans, defendant general contractors were successful bidders and installed the sewers accordingly, and plaintiffs suffered damage to their property from a landslide. *Held*, defendants were not liable; i.e., the contractor is not liable despite the inherently dangerous plan where he or she does not know of or is not chargeable with knowledge of the defect. (146 C.A.2d 574.) (See *De Lima v. Magnesite Waterproofing & Refinishing* (1987) 191 C.A.3d 776, 781, 236 C.R. 519, quoting the text [contractor who installed outside stairs was not liable for second contractor's negligence in resealing them 1 year later without adding sand to the sealer to prevent slipperiness].)

West's Key Number Digest, Negligence k.205(7); Products Liability k.23.1

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Modern Theory of Liability*. See *Stonegate Homeowners Assn. v. Staben* (2006) 144 C.A.4th 740, 750, 50 C.R.3d 709 [in action by homeowners association against subcontractor for defective work on retaining walls, trial court erred in precluding association from presenting expert testimony to establish that subcontractor, in performing waterproofing and drainage work, met standard of care expected within industry]; *Jones v. P.S. Dev. Co.* (2008) 166 C.A.4th 707, 82 C.R.3d 882 [contractors' work in installing mounting bolts securing explosive detection system machine was completed and accepted by Transportation Security Administration (TSA) within meaning of "completed and accepted" doctrine, shielding contractors from liability in negligence action by TSA employee who tripped over mounting bolts, in absence of evidence that contractors performed work on, or retained control of, machine after bolts had been installed; TSA employees were aware of hazard].

See C.E.B., 2 Construction Contracts, Defects, and Litigation, §10.1 et seq. (replacing C.E.B., Construction Contracts and Disputes 3d).



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CHAPTER IX - Torts

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C. Real Property: Vendor, Lessor, and Contractor.

2. Contractor.

b. Illustrations.

6 *Witkin Sum. Cal. Law Torts* § 1161

[§ 1161] Illustrations.

In *Hale v. Depaoli* (1948) 33 C.2d 228, 201 P.2d 1. Defendant and F, his partner, built a house in 1925 and sold it. Defendant reacquired it in 1937 and leased it to plaintiff's mother. Plaintiff was injured when a back porch railing collapsed, 18 years after the building was constructed. *Held*, a nonsuit was improperly granted. (a) Testimony of a witness that the railing had been improperly nailed was sufficient to warrant an inference by the jury that sound building practice had not been followed; and the liability of a building contractor, like that of a manufacturer of a chattel, is not limited to things "imminently" dangerous, but extends to situations where a thing is "reasonably certain to place life and limb in peril when negligently made." (33 C.2d 231.) (b) Defendant was liable if he knew or should have known of the dangerous condition, and the knowledge of the carpenters was imputed to him and his partner. (33 C.2d 231.) (c) Whether the railing failed because of the original defect, or through the wearing effect of the elements during the intervening period, was a question of fact for the jury. (33 C.2d 232.) (See *Freeman v. Mazzera* (1957) 150 C.A.2d 61, 63, 309 P.2d 510 [citing *Hale*; defective iron latticework on stairway landing; accident 3 years after construction]; 22 So. Cal. L. Rev. 505; on issue of imputed notice, see 3 *Summary* (10th), *Agency and Employment*, §152.)

In *Chance v. Lawry's* (1962) 58 C.2d 368, 24 C.R. 209, 374 P.2d 185, the court applied this theory to a new situation. Plaintiff came into defendant L's restaurant with others for dinner, and while allowing persons to pass in the crowded narrow foyer, fell into a recessed planter box under construction by defendant S, a general contractor. *Held*, judgment for damages against both defendants affirmed.

(a) Defendant contractor knew that the restaurant was open for business during the remodeling, and that the foyer was the only means of ingress and egress for patrons; hence, plaintiff was a person to whom a duty was owed. (58 C.2d 379.) The jury could well have decided that a reasonable contractor in his position would have put a board over the planter box or installed a barricade or warning sign before he left the job. (58 C.2d 379.)

(b) "The imposition of a legal duty by precisely defining the status of the injured person vis-a-vis the tortfeasor is hard enough and often arbitrary where the defendant is an owner or occupier of real property. ... But where the defendant is not an owner or occupier the application of these legal distinctions becomes impossible in fact and is without reason. ... Justice will not be served by trying to fit each case involving an independent contractor into a

Procrustean bed bounded by the concepts of 'invitee' at the head and 'licensee' at the foot." (58 C.2d 376.) In brief, the contractor has a general duty to use reasonable care to prevent injury "to persons whom he may reasonably expect to be affected by his work." (58 C.2d 378.)

In *Stewart v. Cox* (1961) 55 C.2d 857, 13 C.R. 521, 362 P.2d 345, general contractor W agreed to construct a swimming pool, and subcontractor C did the concrete work by the gunite process. C's work was negligent, the pool cracked, and escaping water undermined the house of plaintiff owner. Held, C, though not in privity with plaintiff owner, was nevertheless liable to him. The old privity requirement was abandoned in *Dow v. Holly Mfg. Co.* (1958) 49 C.2d 720, 724, 321 P.2d 736, and by the test of *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *infra*, §1179, and the liability of a contractor or subcontractor must be determined by the *Biakanja* test. "Here it was obvious that the pool for which [C] provided the gunite work was intended for the plaintiffs and that property damage to them--and possibly to some of their neighbors--was foreseeable in the event the work was so negligently done as to permit water to escape. It is clear that the transaction between [W and C] was intended to specially affect plaintiffs." (55 C.2d 863.) (On finding of proximate cause, see *infra*, §1211; and see *Sabella v. Wisler* (1963) 59 C.2d 21, 28, 27 C.R. 689, 377 P.2d 889 [following *Stewart*; contractor was liable to owner for damage to home, which subsided because of negligent compacting of earth]; 4 Santa Clara Lawyer 141 [*Sabella*].)

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D. Construction Defects.

1. In General.

6 Witkin Sum. Cal. Law Torts § 1162

[§ 1162] In General.

In *Aas v. Superior Court* (2000) 24 C.4th 627, 101 C.R.2d 718, 12 P.3d 1125, defendants developed and built a condominium project and a subdivision of tract homes. Plaintiff homeowners in both subsequently discovered a variety of construction defects and brought suit for negligence and strict liability, seeking damages for the cost of repair and for diminution in the value of their residences. The trial judge granted defendants' *in limine* motions to exclude any evidence of defects that had not caused property damage. Plaintiffs' petition for mandamus challenging these rulings was denied in the Court of Appeal. *Held*, affirmed. Homeowners may not recover in negligence for prospective property damage from construction defects.

(a) *Tort remedies are limited by economic loss rule.* The question whether homeowners may recover damages in negligence for construction defects that have not caused property damage is not simple, because it arises from the nebulous and troublesome margin between tort and contract law. Generally, tort law provides a remedy for construction defects that cause property damage or personal injury. Focusing on the conduct of persons involved in construction, courts in this state have found such a remedy in the law of negligence. Viewing the home as a product, courts have also found a tort remedy in strict products liability. For defective products and negligent services that have caused neither property damage nor personal injury, however, tort remedies have been uncertain. Any construction defect can diminish the value of a house. But the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence or strict liability. In actions for negligence or strict liability, a manufacturer's liability is limited to damages for physical injuries. Under *Seely v. White Motor Co.* (1965) 63 C.2d 9, 18, 45 C.R. 17, 403 P.2d 145, *infra*, §1514, no recovery is allowed for economic loss alone. This general principle, the so-called economic loss rule, is the primary obstacle to plaintiffs' claim. (24 C.4th 635.)

(b) *Rule applies to strict liability claims for construction defects.* Plaintiffs asserted strict liability claims at trial but now concede that that cause of action is unavailable here. California courts have applied strict liability to mass-produced homes, reasoning that there is no meaningful distinction between the mass production and sale of homes and the mass production and sale of other products, and that the overriding policy considerations are the same. However, a remedy in strict liability is denied for defects that have not caused property damage or personal injury. This was the holding in *Seely*. While a consumer should not be charged at the will of the manufacturer with bearing the risk

of physical injury when the consumer buys a product on the market, the consumer can be fairly charged with the risk that the product will not match his or her economic expectations unless the manufacturer agrees that it will. (24 C.4th 640.)

(c) *No action for negligent interference with prospective economic advantage.* Seely added a dictum that the economic loss rule also applies in negligence cases, and the rule has since been routinely applied in negligence as well as strict liability cases to distinguish recoverable damages for physical injury from unrecoverable damages representing the benefit of a contractual bargain. Plaintiffs urge that an action nevertheless lies for negligent interference with prospective economic advantage, as described in *J'Aire Corp. v. Gregory* (1979) 24 C.3d 799, 804, 157 C.R. 407, 598 P.2d 60, supra, §751. According to plaintiffs, when the parties occupy the "special relationship" defined in *J'Aire*, there is both a duty to avoid negligently injuring a person's economic interests and a right to recover for that injury, even though unaccompanied by damage to person or property. On analysis, however, such a cause of action does not arise here. (24 C.4th 643.)

(d) *Balancing of Biakanja/J'Aire factors indicates that no duty arises.*

(1) *J'Aire* relied on this court's earlier decision in *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, infra, §1179, which held that a defendant's negligent performance of a contractual obligation resulting in damage to the property or economic interests of a person not in privity can support recovery if the defendant was under a duty to protect those interests. The *Biakanja* court articulated a case-by-case test for identifying a duty involving the balancing of six factors. These include (a) the extent to which the transaction was intended to affect the plaintiff, (b) the foreseeability of harm to the plaintiff, (c) the degree of certainty that the plaintiff suffered injury, (d) the closeness of the connection between the defendant's conduct and the injury suffered, (e) the moral blame attached to the defendant's conduct, and (f) the policy of preventing future harm. *J'Aire*, a negligence action by the tenant of a building used as a restaurant against a contractor hired by the building's owner for business income lost when the contractor failed to complete the project with due diligence, applied the *Biakanja* factors to find a "special relationship" that permitted recovery of economic damages under the facts of that case. (24 C.4th 643.)

(2) To apply the multifactored *Biakanja* balancing test followed in *J'Aire* tends to involve a court in making fairly subjective judgments. In this case, however, a relatively objective obstacle to plaintiffs' claim appears in the third factor, which looks to the degree of certainty that the plaintiff suffered injury. This would obviously not include construction defects that have not ripened into property damage, or at least into involuntary out-of-pocket losses. Plaintiffs argue that the cost of repairs is an accepted measure of damage for construction defects and that plaintiffs could make the cost of repairs certain by voluntarily repairing defects and obtaining a receipt for money spent. This confuses the *measurement* of alleged damages with the ability of particular facts to support a tort action. (24 C.4th 644.)

(3) The other factors similarly provide no adequate justification. The sixth factor, the policy of preventing future harm, is probably plaintiffs' strongest argument. In some sense, that policy might be served by a rule of tort liability making builders, in effect, the insurers of building code compliance, even as to defects that have not caused property damage or personal injury. Moreover, as plaintiffs argue, to require builders to pay to correct defects as soon as they are detected rather than after property damage or personal injury has occurred might be less expensive. On the other hand, this rule would likely increase the cost of housing by an unforeseeable amount as builders raised prices to cover the increased risk of liability. The rule should also be unnecessary to the extent buyers timely enforce their contract, warranty, and inspection rights, and to the extent building authorities vigorously enforce the applicable codes for new construction. (24 C.4th 644.)

(e) *Liability should be imposed, if at all, by Legislature.* The many considerations of social policy that this case implicates emphasize that certain choices are better left to the Legislature. Home buyers in California already enjoy protection under contract and warranty law for enforcement of builders' and sellers' obligations; under the law of negligence and strict liability for acts and omissions that cause property damage or personal injury; under the law of fraud for misrepresentations about the property's condition; and an exceptionally long 10-year statute of limitations for

latent construction defects (C.C. 337.15). While the Legislature may add whatever additional protections it deems appropriate, the facts of this case do not present a sufficiently compelling reason to preempt the legislative process with a judicially created rule of tort liability. (24 C.4th 650.)

Two justices dissented, arguing that homeowners should be provided a cause of action to remedy serious defects caused by negligent construction that pose a significant risk of damage to persons or property. (24 C.4th 653.) (See *Keru Inv. v. Cube Co.* (1998) 63 C.A.4th 1412, 1418, 74 C.R.2d 744 [contractor who did seismic retrofitting was not liable to subsequent purchaser; contractor was not developer who knew that buildings would be resold, and it had not retrofitted building in expectation that it would be transferred to third party]; *Siegel v. Anderson Homes* (2004) 118 C.A.4th 994, 1000, 13 C.R.3d 462 [absent proof that original owners of homes suffered economic injuries from construction defects, they had no action against builder that precluded subsequent owners from maintaining action]; 93 Am.Jur. Trials 405 [condominium construction litigation]; 30 *Pepperdine L. Rev.* 529 [toxic mold litigation].)

Construction defect legislation in response to *Aas* and other construction defects cases was adopted in 2002. (See C.C. 895 et seq.; infra, §1163 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Construction Defects.

2. Scope of Legislation.

6 Witkin Sum. Cal. Law Torts § 1163

[§ 1163] Scope of Legislation.

C.C. 895 et seq., governing recovery for construction defects, apply to new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2003. (C.C. 938.) The statutes are limited to original construction intended to be sold as an individual dwelling unit, and do not apply to condominium conversions. (C.C. 896.)

A "homeowner" or "claimant," within the scope of C.C. 895 et seq., is an individual owner of a single-family home, an individual unit owner of an attached dwelling, and, in the case of common interest developments, an association as defined in C.C. 1351(a) (see 12 *Summary* (10th), *Real Property*, §97). (C.C. 895(f).) A "builder" is generally defined as a builder, developer, general contractor, contractor, or original seller of a new residential unit who, at the time of sale, was also in the business of selling residential units to the public for the property subject to the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property subject to the homeowner's claim. Excepted is any entity or individual whose involvement with the residential unit is limited to his or her capacity as a general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder; these nonaffiliated general contractors and nonaffiliated contractors are treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals. (C.C. 911.)

No other cause of action for a claim covered by C.C. 895 et seq. or for damages recoverable under C.C. 895 et seq. is allowed. On the other hand, the statutes are expressly made inapplicable to "any action by a claimant to enforce a contract or express contractual provision, and to any action for fraud, personal injury, or violation of a statute." (C.C. 943(a).) Providers of independent quality reviews are immune from liability for construction defects in prescribed circumstances. (See C.C. 43.99, *supra*, §160.)

The provisions, standards, rights, and obligations set forth in C.C. 895 et seq. are binding on all original purchasers and their successors in interest. (C.C. 945.)

SUPPLEMENT: [This section is current through the latest supplement]
See 28 Thomas Jefferson L. Rev. 277 [critique of California's construction defect law].



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D. Construction Defects.

3. Actionable Defects.

6 Witkin Sum. Cal. Law Torts § 1164

[§ 1164] Actionable Defects.

(1) *Liability Based on Violation of Statutory Standards.* In an action to recover damages arising out of, or related to deficiencies in, residential construction, and the design, specifications, surveying, planning, supervision, testing, or observation of that construction, builders, general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals are liable for violations of specified standards. Similarly, the claimant's claims or causes of action are limited to these violations. (C.C. 896; on liability of general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals generally, see C.C. 936, *infra*, §1167.) The standards, which set forth in detail what is expected of the finished components, relate to the following:

- (a) Water issues. (C.C. 896(a).)
- (b) Structural issues. (C.C. 896(b).)
- (c) Soil issues. (C.C. 896(c).)
- (d) Fire protection issues. (C.C. 896(d).)
- (e) Plumbing and sewer issues. (C.C. 896(e).)
- (f) Electrical system issues. (C.C. 896(f).)
- (g) Issues regarding other areas of construction. (C.C. 896(g).)

These standards are intended to address every function or component of a structure. To the extent that a function or component of a structure is not so addressed, it is actionable if it causes damage. (C.C. 897.)

(2) *No Requirement of Resulting Personal Injury or Property Damage.* There is no requirement of resulting personal injury or property damage, as set forth in *Aas v. Superior Court* (2000) 24 C.4th 627, 101 C.R.2d 718, 12 P.3d 1125, *supra*, §1162. (Stats. 2002, Chap. 722 §1.)

(3) *Enhanced Protection Agreements.* A builder may offer greater protection in its express contract with the homeowner than that set forth in the statutory standards; this is termed an "enhanced protection agreement." On the other hand, the builder is prohibited from limiting the application of the statutory standards or lowering their protection through the express contract. (C.C. 901, 902.) The homeowner's acceptance of an enhanced protection agreement must be in writing no later than the close of escrow. (C.C. 903.) If a builder has elected to use an enhanced protection agreement, and a homeowner alleges that the particular provision of the agreement is not greater than or equal to the statutory standards, the homeowner may enforce the application of the relevant standard. The homeowner must give the builder written notice of intent to do so at the time of filing the homeowner's notice of claim. (C.C. 904; see C.C. 905 [prescribing procedure].)

(4) *Warranty of Fit and Finish.* A builder is required to provide a home buyer with a minimum 1-year express written limited warranty covering the "fit and finish" of cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim. If the builder fails to provide the warranty, there is deemed to be a warranty for these items for a period of 1 year. The warranty does not apply to damage caused by defects in other components governed by C.C. 895 et seq. (C.C. 900.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Construction Defects.

4. Right To Repair and Other Prelitigation Requirements.

6 Witkin Sum. Cal. Law Torts § 1165

[§ 1165] Right To Repair and Other Prelitigation Requirements.

(1) *In General.* Prescribed prelitigation procedures must be followed before an action for violation of the statutory standards may be filed. These requirements include permitting the builder to repair the defect in lieu of litigation. (See C.C. 910 et seq.) A builder must "record on title" a notice of these prelitigation requirements, and a notice that they impact the legal rights of the homeowner. This information must also be included with the original sales documentation and must be initialed and acknowledged by the purchaser and the builder's sales representative. (C.C. 912(f).) (See *44 Santa Clara L. Rev. 1249* [prelitigation requirements in construction defect actions].)

If a claim combines causes of action or damages not covered by C.C. 895 et seq., such as for personal injuries, fraud, or other statutory remedies, or involving a class, the claimed unmet standards must nevertheless be administered according to the prelitigation requirements, although evidence of the property in its unrepaired condition may be introduced to support the elements of the other causes of action. (C.C. 931.)

(2) *Alternative Procedures.* These statutory procedures are nonadversarial. At the time the sales agreement is executed, the builder must notify the homeowner whether the builder intends to engage in these procedures or attempt to enforce alternative nonadversarial contractual provisions. If the builder elects to use alternative nonadversarial contractual provisions in lieu of these procedures, the election is binding, regardless of whether the builder's alternative nonadversarial contractual provisions are successful. (C.C. 914 [referring to alternative dispute resolution methods, contractual arbitration, judicial reference, and similar procedures].)

(3) *Notice of Violation.* The claimant must initially serve notice of the violation on the builder. The notice has the same force and effect as a notice of commencement of a legal proceeding. (C.C. 910.) The builder must acknowledge receipt of the notice within 14 days after receipt. (C.C. 913.)

(4) *Production of Documents.* Within 30 days of a written request by the homeowner, the builder must supply prescribed documents, including copies of relevant plans, specifications, reports, engineering calculations, and preventative maintenance recommendations that pertain to the residence and of the builder's limited contractual warranties in effect at the time of the original sale of the residence. (C.C. 912.)

(5) *Inspection or Testing.* If the builder elects to inspect and test concerning the violation, the builder must complete the initial inspection and testing within 14 days after acknowledgment of receipt of the notice of the claim, at a mutually convenient date and time. If the builder deems a second inspection or testing reasonably necessary, and specifies the reasons in writing within 3 days following the initial inspection, the builder may conduct a second inspection or testing; the second inspection or testing must be completed within 40 days of the initial one. (C.C. 916.)

(6) *Offer To Repair.* Within 30 days of the initial or, if requested, second inspection or testing, the builder may offer in writing to repair the violation. The offer to repair must also compensate the homeowner for all recoverable damages. The offer must be accompanied by a detailed statement identifying the particular violation that is being repaired, explaining the nature, scope, and location of the repair, and setting a reasonable completion date. The offer must also include the names and other specified information relating to the contractors whom the builder intends to have perform the repair. (C.C. 917.)

On receipt of the offer to repair, the homeowner has 30 days to authorize the builder to proceed with the repair or, alternatively, request a choice of alternative contractors to perform the repair. Within 35 days after the request for alternative contractors, the builder must present the homeowner with a choice of contractors. Within 20 days after that presentation, the homeowner must authorize the builder or one of the alternative contractors to perform the repair. (C.C. 918.) The offer to repair may be accompanied by an offer to mediate the dispute if the homeowner so chooses. (C.C. 919.) Repairs must be conducted in a prescribed manner. (See C.C. 921 et seq.)

The builder is prohibited from obtaining a release or waiver in exchange for the mandated repair work. (C.C. 926.)

(7) *Cash Offer in Lieu of Offer To Repair.* The builder has the option of making only a cash offer and no repair. In this situation, the homeowner is free to accept the offer, or may reject the offer and file an action. (C.C. 929.)

(8) *Mediation.* If the builder has invoked the prelitigation procedure and completed a repair, the homeowner must request mediation in writing prior to filing an action, unless there has been previous mediation between the parties. The mediation is limited to 4 hours, except as otherwise mutually agreed, before a nonaffiliated mediator selected and paid for by the builder. At the homeowner's sole option, the homeowner may agree to split the cost of the mediator and if he or she does so, the mediator is selected jointly. (C.C. 928.)

SUPPLEMENT: [This section is current through the latest supplement]

(8) *Mediation.* See 100 Am.Jur. Trials 45 [alternative dispute resolution in resolving construction disputes].



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5. Action and Relief.

6 Witkin Sum. Cal. Law Torts § 1166

[§ 1166] Action and Relief.

(1) *When Action May Be Commenced.* If the builder fails to make an offer to repair, properly complete a repair, or otherwise strictly comply with the prelitigation requirements within the times specified (see *supra*, §1165), the claimant is released from the prelitigation requirements and may proceed with filing an action. (C.C. 920, 925.)

No action may be brought under C.C. 895 et seq. more than 10 years "after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion." However, this limitation "may not be asserted by way of defense by a person in actual possession or control, as owner, tenant or otherwise, of the improvement, at the time a deficiency in the improvement constitutes the proximate cause for which it is proposed to make a claim or bring an action." (C.C. 941.)

(2) *Showing Required.* To make a claim for violation of the statutory standards, a homeowner need only demonstrate, in accordance with the applicable burden of proof, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in C.C. 945.5. No further showing of causation or damages is required to meet the burden of proof, provided that the violation arises out of, pertains to, or is related to, the original construction. (C.C. 942.)

(3) *Damages Recoverable.* If a claim for damages is made under C.C. 895 et seq., the homeowner is only entitled to recovery for the following (C.C. 944):

- (a) The reasonable value of repairing violations of the standards.
- (b) The reasonable cost of repairing damages caused by the repair efforts.
- (c) The reasonable cost of repairing and rectifying damages resulting from the failure of the home to meet the standards.
- (d) The reasonable cost of removing and replacing improper repair by the builder.
- (e) Reasonable relocation and storage expenses.

(f) Lost business income if the home was used as a principal place of a business licensed to be operated from the home.

(g) Reasonable investigative costs for each established violation.

(h) All other costs or fees recoverable by contract or statute.

Damages awarded for these items in other causes of action, i.e., for breach of contract, personal injury, fraud, or violation of statute, must be reduced by the amounts recovered for them pursuant to C.C. 895 et seq. (C.C. 943(a).)

As to claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in current value of the home caused by the nonconformity, whichever is less, subject to the personal use exception as developed under common law. (C.C. 943(b).)

(4) *Affirmative Defenses*. Under the principles of comparative fault pertaining to affirmative defenses, a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional may be excused, in whole or in part, from any obligation, damage, loss, or liability if able to demonstrate any of the following affirmative defenses:

(a) To the extent the obligation, damage, loss, or liability is caused by an unforeseen act of nature that caused the structure not to meet the standard. An "unforeseen act of nature" means a weather condition, earthquake, or manmade event such as war, terrorism, or vandalism, in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of original construction. (C.C. 945.5(a).)

(b) To the extent the obligation, damage, loss, or liability is caused by a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this title. This includes the failure to give timely notice to the builder after discovery of a violation, but does not include damages due to the untimely or inadequate response of a builder to the homeowner's claim. (C.C. 945.5(b).)

(c) To the extent the obligation, damage, loss, or liability is caused by the homeowner or his or her agent, employee, subcontractor, independent contractor, or consultant by virtue of their failure to follow the builder's or manufacturer's recommendations, or commonly accepted homeowner maintenance obligations. In order to rely on this defense as it relates to a builder's recommended maintenance schedule, the builder must show that the homeowner had written notice of these schedules and recommendations and that the recommendations and schedules were reasonable at the time they were issued. (C.C. 945.5(c).)

(d) To the extent the obligation, damage, loss, or liability is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose. (C.C. 945.5(d).)

(e) To the extent that the time period for filing actions bars the claimed violation. (C.C. 945.5(e).)

(f) As to a particular violation for which the builder has obtained a valid release. (C.C. 945.5(f).)

(g) To the extent that the builder's repair was successful in correcting the particular violation of the applicable standard. (C.C. 945.5(g).)

As to causes of action to which C.C. 895 et seq. do not apply, all applicable affirmative defenses are preserved. (C.C. 945.5(h).)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

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D. Construction Defects.

6. Liability of Contractors, Suppliers, Product Manufacturers, and Design Professionals.

6 Witkin Sum. Cal. Law Torts § 1167

[§ 1167] Liability of Contractors, Suppliers, Product Manufacturers, and Design Professionals.

(1) *In General.* Apart from the provisions relating to prelitigation requirements (see C.C. 910 et seq., supra, §1165), C.C. 895 et seq. apply to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals to the extent that those persons caused, in whole or in part, a violation of a particular standard as the result of a negligent act or omission or a breach of contract. (C.C. 936.)

In addition to the affirmative defenses set forth in C.C. 945.5 (supra, §1166), a general contractor, subcontractor, material supplier, design professional, individual product manufacturer, or other entity may also offer common law and contractual defenses as applicable to a claimed violation of a standard. (C.C. 936.)

All actions by a claimant or builder to enforce an express contract against a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional are preserved. Nothing in C.C. 895 et seq. modifies the law pertaining to joint and several liability for general contractors, subcontractors, material suppliers, individual product manufacturer, and design professionals that contribute to any specific violation. (C.C. 936.)

(2) *Strict Liability Cases.* C.C. 936 does not apply to a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional to which strict liability would apply. (C.C. 936; on strict liability respecting home construction, see *infra*, §1501 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 110 Am.Jur. Trials 309 [roofer's negligence].



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E. Manufacturers and Other Suppliers of Goods.

1. In General.

a. Privity Requirement Repudiated

6 *Witkin Sum. Cal. Law Torts* § 1168

[§ 1168] Privity Requirement Repudiated

The strict "privity doctrine" was established in the early case of *Winterbottom v. Wright* (1842) 152 Eng. Rep. R. 402: A repairer, seller, or manufacturer of defective goods was liable for injuries sustained by persons using them only on contract principles, and the liability did not extend beyond the immediate buyer--the person with whom direct dealings were had. Hence, while the buyer might sue the seller or repairer on warranty, he or she could not hold the manufacturer liable, there being no "privity of contract" between them.

In *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382, 111 N.E. 1050, *infra*, §1175, the doctrine was repudiated, and the duty of a manufacturer to exercise due care was extended to anyone to whom a risk of harm could be foreseen. (See exhaustive review of American decisions in 74 A.L.R.2d 1111 [privity of contract as essential]; and see *Reynolds v. Natural Gas Equipment, Industrial Indem. Co., Intervener* (1960) 184 C.A.2d 724, 736, 7 C.R. 879; 3, 5 Harper, James & Gray 2d §18.5, 28.1; 63 Am.Jur.2d (1997 ed.), *Products Liability* §286 et seq.; 22 Cal. L. Rev. 359; 69 Harv. L. Rev. 863; 2 So. Cal. L. Rev. 92; 8 So. Cal. L. Rev. 315; 8 Stanf. L. Rev. 725; BAJI, No. 9.19 et seq.) (For comparison of theories of recovery on negligence and implied warranty, see *Tremeroli v. Austin Trailer Equipment Co.* (1951) 102 C.A.2d 464, 478, 227 P.2d 923; 33 Cal. L. Rev. 637; 43 Cal. L. Rev. 614, 809; for doctrine of strict liability, see *infra*, §1428 et seq.)

A number of annotations deal with particular goods. (See 41 A.L.R.2d 329, 386 [liability for injury by X-ray]; 72 A.L.R.2d 865 [gas-burning appliance]; 78 A.L.R.2d 460 [automobile, other vehicle, aircraft, boat, or their parts, supplies, or equipment]; 78 A.L.R.2d 594 [industrial or farm machinery, tools, and equipment]; 78 A.L.R.2d 696 [paint, cement, lumber, building supplies and tools, etc.]; 79 A.L.R.2d 401 [medical and health equipment]; 80 A.L.R.2d 598 [household and domestic appliances]; 80 A.L.R.2d 681 [tobacco products]; 80 A.L.R.2d 702 [clothing, shoes, combs, etc.]; 84 A.L.R.3d 877 [door glass]; 95 A.L.R.3d 390 [toys and games]; 2 A.L.R.4th 462 [fertilizers, insecticides, pesticides, fungicides, weed killers, and the like]; 29 A.L.R.4th 1045 [animal feed or medicines]; 36 A.L.R.4th 419 [explosion or breakage of beverage bottle]; 76 A.L.R.4th 117 [bicycles and accessories], 76 A.L.R.4th 145 [exercise and related equipment], 76 A.L.R.4th 171 [trampolines and similar devices]; 76 A.L.R.4th 201 [skiing equipment]; 76 A.L.R.4th 256 [exercise and related equipment]; 77 A.L.R.4th 1121 [general recreational equipment]; 77 A.L.R.4th 1152 [mechanical amusement rides and devices].)

West's Key Number Digest, Products Liability k.1, 20; Torts k.14.1

SUPPLEMENT: [This section is current through the latest supplement]
See 3, 5 Harper, James & Gray 3d §§18.5, 28.1.



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E. Manufacturers and Other Suppliers of Goods.

1. In General.

b. Restatement and California Law.

6 *Witkin Sum. Cal. Law Torts* § 1169

[§ 1169] Restatement and California Law.

(1) *Duties of Suppliers.* The Restatement recognizes a general liability on the part of anyone supplying chattels, whether as seller, lessor, bailor, repairer, donor, or lender, in three situations: (a) Where the chattel is known or should be known to be dangerous for the intended use. (*Rest.2d, Torts* §388.) (b) Where it is known or should be known to be incapable of safe use, or unlikely to be used safely. (*Rest.2d, Torts* §389.) (c) Where it is for the use of a person known to be incompetent by reason of youth, inexperience, or otherwise. (*Rest.2d, Torts* §390.) The liability is not only to those to whom the chattel is supplied (i.e., buyer, hirer, donee, etc.), but also to others whom the supplier should expect to use it with consent of the original party.

In the first Restatement, the liability was further extended to persons whom the supplier should have expected to be "in the vicinity" of the chattel's probable use. This qualification was changed in the Second Restatement to protect those persons whom the supplier should have expected "to be endangered" by the probable use. (*Rest.2d, Torts* §388.) These same rules apply to manufactures. (See *supra*, §442 et seq.)

(2) *Person Selling Product as Own.* If a dealer obtains a product from a manufacturer, and substitutes his or her label for that of the manufacturer (or otherwise represents that it is the dealer's own product), he or she induces others to rely on his or her care and skill rather than that of the true manufacturer. A number of courts, and *Rest.2d, Torts* §400, hold that under these circumstances, the dealer is subject to the same liability as though he or she were the manufacturer. (See 5 Harper, James & Gray 2d §28.28.)

(3) *California Law.* The doctrine of *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382, 111 N.E. 1050, *infra*, §1175, as elaborated in the Restatement, is widely followed today, and the California cases frequently cite the Restatement sections as authoritative. (See generally *Dahms v. General Elevator Co.* (1932) 214 C. 733, 738, 7 P.2d 1013 [repairer]; *Kalash v. Los Angeles Ladder Co.* (1934) 1 C.2d 229, 231, 34 P.2d 481 [manufacturer]; *Rae v. California Equipment Co.* (1939) 12 C.2d 563, 569, 86 P.2d 352 [lessor]; *McNeal v. Greenberg* (1953) 40 C.2d 740, 742, 255 P.2d 810 [lessor of tractor with defective brakes]; *Owen v. Rheem Mfg. Co.* (1947) 83 C.A.2d 42, 47, 187 P.2d 785 [shipper is supplier, though goods are consigned to federal government]; *Martin v. Food Machinery Corp.* (1950) 100 C.A.2d 244, 250, 223 P.2d 293 [defendant, constructing building, left defective scaffold for use by subcontractor];

Jaehne v. Pacific Tel. & Tel. Co. (1951) 105 C.A.2d 683, 688, 234 P.2d 165 [telephone company installed hotel switchboard with defective cord]; *Monroe v. East Bay Rental Service* (1952) 111 C.A.2d 574, 578, 245 P.2d 9; *Jones v. Johnston Testers* (1955) 132 C.A.2d 162, 165, 281 P.2d 602 [lessor of oil well testing equipment]; *Reynolds v. Natural Gas Equipment, Industrial Indem. Co., Intervener* (1960) 184 C.A.2d 724, 736, 7 C.R. 879; *Varas v. Barco Mfg. Co.* (1962) 205 C.A.2d 246, 258, 22 C.R. 737, citing the text; 57 A.L.R.4th 1186 [liability of commercial renter of personal property for customer's personal injuries]; 59 A.L.R.4th 1142 [franchisor's liability for injury caused by franchisee premises or equipment].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Person Selling Product as Own*. See 5 Harper, James & Gray 3d §28.28.



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E. Manufacturers and Other Suppliers of Goods.

1. In General.

c. Injury to Property.

6 *Witkin Sum. Cal. Law Torts* § 1170

[§ 1170] Injury to Property.

"Will an action lie against the manufacturer of an article that, if negligently made, is likely to produce injury to person or property, for damages resulting from an accident caused by the negligence, where the damages are confined to destruction or harm to the article itself?" (*Fentress v. Van Etta Motors* (1958) 157 C.A.2d Supp. 863, 864, 323 P.2d 227.) The usual answer to this question had been *no*; i.e., the doctrine of *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382, 111 N.E. 1050, *infra*, §1175, was generally confined to personal injuries, and recovery in tort was denied where there was only physical damage to the article itself or economic loss suffered through its use. (See 8 *Stanf. L. Rev.* 725.)

Fentress gave an affirmative answer. Plaintiff alleged that his Mercury automobile was wrecked as a result of defective brakes and wheel bearings. He sued defendant seller on warranty and defendant manufacturer in tort. *Held*, a cause of action was stated against the manufacturer. The court, influenced partly by *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *infra*, §1179, disapproved its own contrary decision in *Judson-Pac. Murphy v. Thew Shovel Co.* (1954) 127 C.A.2d Supp. 828, 275 P.2d 841, and accepted the theory of a New York case.

(a) "[I]t would be illogical to hold that a person driving a car with negligently fabricated brakes could recover from the manufacturer if he suffered personal injury, but if he had jumped from the vehicle and escaped personal injury, and the automobile was destroyed, he could not recover for the damage to the car." (157 C.A.2d Supp. 865.) "If his property happens to be the article negligently made, he is entitled to damages no less than is a total stranger to the property. In fact, his purchase, though not directly from the manufacturer, may have promoted the latter's business, and his position should not be inferior to that of others. Nothing is added to the required quantum of care, because the manufacturer must observe that duty in order to avoid responding to strangers, in any event, where the articles are of the nature described above. The amount of care itself required is not enlarged, but the owner of the article is regarded as not being excluded from the protection afforded to the entire public." (157 C.A.2d Supp. 867.)

(b) The rule does not make a manufacturer a virtual warrantor to ultimate users. (1) Negligence must be proved. (2) The article must be one that if negligently made is likely to produce harm (thus excluding articles that could become harmful only under remote possibilities or bizarre circumstances). (3) An accident must have resulted, i.e., a casualty

involving some violence or collision with external objects, and not mere deterioration or ruin caused by an internal defect. (157 C.A.2d Supp. 868.) (See *Pedroli v. Russell* (1958) 157 C.A.2d 281, 283, 320 P.2d 873 [dictum that *MacPherson* doctrine applies where only foreseeable risk is of danger to tangible property]; *Rest.2d, Torts* §395, Comment n; 5 Harper, James & Gray 2d §28.9; 29 So. Cal. L. Rev. 246; 2 U.C.L.A. L. Rev. 293; on strict liability, see *infra*, §1428 et seq.)

West's Key Number Digest, Products Liability k.17.1

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §28.9.



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E. Manufacturers and Other Suppliers of Goods.

2. Knowledge of Danger and Duty To Warn.

a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1171

[§ 1171] In General.

Where the article is or should be known to be dangerous for the intended use, either inherently or because of defects, there is a duty to warn, i.e., to disclose the danger. (*Rest.2d, Torts* §§388, 394, 399, 400; see 5 Harper, James & Gray 2d §28.7; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §§324 et seq.; 6 *Proof of Facts.2d* 175 [manufacturer's duty to warn ultimate user directly of product-connected danger]; 47 *Proof of Facts 2d* 227 [failure to warn consumer of allergenic nature of product].)

This rule applies not only to inherently dangerous things such as poisons or explosives mislabeled so as not to show their nature, but also to a nondangerous article that, by reason of a defect, is unsafe. (*Lewis v. Terry* (1896) 111 C. 39, 44, 43 P. 398 [folding bed]; *Martin v. Food Machinery Corp.* (1950) 100 C.A.2d 244, 250, 223 P.2d 293 [defective scaffold]; *Monroe v. East Bay Rental Service* (1952) 111 C.A.2d 574, 576, 245 P.2d 9 [small gasoline-driven plow ("Roto-Tiller") rented to plaintiff without instruction or warning of danger of getting out of control]; *Ghera v. Ford Motor Co.* (1966) 246 C.A.2d 639, 650, 55 C.R. 94; *DeLeon v. Commercial Mfg. & Supply Co.* (1983) 148 C.A.3d 336, 343, 195 C.R. 867, *infra*, §1454, citing the text; see 11 *A.L.R.2d* 1028 [explosives or other dangerous articles]; 76 *A.L.R.2d* 9 [manufacturer's or seller's duty to warn]; BAJI, No. 9.20; *supra*, §1169.)

In *Reynolds v. Natural Gas Equipment, Industrial Indem. Co.* (1960) 184 C.A.2d 724, 737, 7 C.R. 879, defendant A Co. manufactured a gas burner used to dry sand and gravel for black-top road paving mix, and defendant N Co. installed it in the place of business of plaintiff's employer. There was evidence that if operated with an air passage closed, it could explode, and that neither defendant had warned of this danger. *Held*, both were under a duty to warn and their failure constituted negligence. (184 C.A.2d 737.)

There is, however, no duty to warn of dangers normally involved in the use of a common article. (See *Morris v. Toy Box* (1962) 204 C.A.2d 468, 473, 22 C.R. 572 [bow and arrow sold to mother for 10-year-old son]; *Bojorquez v. House of Toys* (1976) 62 C.A.3d 930, 933, 133 C.R. 483 [slingshot sold to 10-year-old boy; to hold seller negligent in selling this toy to class for which it was intended would amount to judicial ban of sales].)

In *Holmes v. J.C. Penney Co.* (1982) 133 C.A.3d 216, 220, 183 C.R. 777, defendant retailer sold CO2 cartridges to

defendant minor. The minor used them to power a pellet gun, shot at birds, and a stray pellet struck plaintiff. *Held*, no cause of action was stated. (a) These cartridges are sold for a variety of uses (in toys, air brushes, seltzer bottles, etc.), and while the Legislature has evidenced an intention to control the sale of pellet guns to minors, it has not evidenced an intention to control the sale of devices that power those guns. (133 C.A.3d 219.) (b) The cartridges do not by their appearance suggest the use to which they were put, and pose an even lesser potentiality for harm than toy slingshots. (133 C.A.3d 220.)

West's Key Number Digest, Products Liability k.9, 14

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §28.7.



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2. Knowledge of Danger and Duty To Warn.

b. Dangerous Chemicals.

6 *Witkin Sum. Cal. Law Torts* § 1172

[§ 1172] Dangerous Chemicals.

In *Tingey v. E.F. Houghton & Co.* (1947) 30 C.2d 97, 179 P.2d 807, defendant manufacturer supplied to a tool company two chemical salts in separate drums, for heat-treating tool steel. While the salts were being used, an explosion occurred, causing death and injury to employees of the tool company. Liability of the manufacturer was upheld on two theories: (a) Evidence of discoloration of one of the salts, and testimony showing that the contents of the drum were untouched until used, justified the inference of contamination by improper preparation, and of defendant's negligence in failing to discover the condition. (30 C.2d 101.) (See *infra*, §1175.) (b) Evidence that the two salts were explosive when mixed justified an inference that the products were properly manufactured and then were mixed by the tool company's employees, but the manufacturer was nevertheless liable for negligent failure, by appropriate label or otherwise, to warn of the dangers of such a mixture. (30 C.2d 102.)

In *Gall v. Union Ice Co.* (1951) 108 C.A.2d 303, 239 P.2d 48, defendant S Co. produced sulphuric acid in drums and sold it to a retailer who sold it to U Co. The latter left it in the sun, where the gas eventually burst two drums and killed an invitee. On conflicting evidence, the jury found that there were no labels on the drums warning against heat and the need to vent regularly to expel gas. *Held*, defendant was liable for wrongful death. (108 C.A.2d 310.)

In *Larramendy v. Myres* (1954) 126 C.A.2d 636, 272 P.2d 824, a mail-order smoke-making device (igniting powder with an electric wire) was ordered for a dancing exhibition, and it caused an explosion and fire. *Held*, defendant was liable for negligent failure to warn of the danger from fire; the directions warned only to hold the device away from the user's face so that the puff would not strike him. (126 C.A.2d 641.)

In *Crane v. Sears, Roebuck & Co.* (1963) 218 C.A.2d 855, 32 C.R. 754, plaintiff, desiring to paint the interior of premises, bought a liquid surface preparer manufactured by defendant Universal according to a formula furnished by defendant Sears, with a label provided by defendant Sears. The label warned that the material was flammable and that its fumes were poisonous, but did not mention its combustibility (highly volatile and low flash point). While being used, it exploded, burning plaintiff severely. *Held*, judgment for damages affirmed. Sufficiency of the warning was a question of fact, and Universal was not exempt merely because it carried out the express directions of Sears; it had an independent duty to determine that adequate warning was given. (218 C.A.2d 859.) (See 28 Am.Jur. Trials 427

[household caustics injuries]; 79 *A.L.R.2d* 482 [soaps, detergents, cleansers, polishes, etc.]; 12 *A.L.R.4th* 462 [fertilizers, insecticides, pesticides, fungicides, weed killers, and the like]; 29 *A.L.R.4th* 1045 [animal feed or medicines]; 69 *A.L.R.5th* 137 [paints, stains, and similar products].)

West's Key Number Digest, Products Liability k.6, 43

SUPPLEMENT: [This section is current through the latest supplement]



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E. Manufacturers and Other Suppliers of Goods.

2. Knowledge of Danger and Duty To Warn.

c. State of Emergency.

6 *Witkin Sum. Cal. Law Torts* § 1173

[§ 1173] State of Emergency.

In *Macias v. California* (1995) 10 C.4th 844, 42 C.R.2d 592, 897 P.2d 530, plaintiffs, a minor and his parents, brought suit against the manufacturers and distributors of malathion, which was used by the state to eradicate an infestation of the Mediterranean fruit fly (medfly) as part of a state of emergency declared under the Emergencies Services Act (*Govt.C. 8550 et seq.*). Plaintiff son was injured when he was sprayed with malathion. His injury was untreated until it was too late, and eventually resulted in legal blindness. Insecticides such as malathion are regulated by the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C., §136 et seq.). Because EPA-approved labeling did not include use of the insecticide against the medfly, the state obtained "a special local needs registration" that permitted it to undertake an "off label" use of malathion, on the condition that it inform the public of the "precautions listed on the product label." The EPA-approved labeling warned the public, if exposed, to flush with water and to see a doctor as soon as possible. However, the state instead proceeded pursuant to provisions of the Food and Agricultural Code enacted for this purpose. The public information protocol that was developed and disseminated, in addition to giving relevant information (when, where, and what was going to be sprayed), included the statement that malathion posed no health hazard. Plaintiffs argued that, if properly warned, their son would not have gone outside or, if exposed, would have washed with water and seen a doctor in time to prevent the legal blindness, instead of waiting until it was too late. Plaintiffs contended that defendants knew of the state's inadequate warning, and yet did nothing, allowing the state to not only fail to inform the public, but mislead the public into thinking that malathion was safe. *Held*, judgment for defendants affirmed.

(a) The basic issue here is whether it was reasonable for defendants to rely on the state to give the proper medfly warning, or whether they should have intervened in the state's prosecution of this crisis by providing a more effective warning. The state was aware of the EPA-approved labels, because it had applied for "off label" use of malathion, a condition of which was that it inform the public of "the precautions listed on the product label." In addition, the state's decision to produce the allegedly inadequate warning was made unilaterally under the statutory authority provided by the *Emergency Services Act*. (10 C.4th 853.)

(b) In a state of emergency, the state may exercise its sovereignty to the fullest extent possible. The Emergency Services Act grants to the Governor broad powers to deal swiftly and effectively with an emergency, including the

power to suspend regulations, commandeer persons and property, make expenditures, and coordinate the efforts of all agencies. (10 C.4th 855.)

(c) "To hold in these circumstances that a private citizen or corporation was compelled, at the risk of potentially substantial civil damages, to interfere with the state's comprehensive efforts to respond to the medfly emergency would be truly extraordinary. Plaintiffs ask this court, in effect, to recognize a private tort duty to judge independently the adequacy of the state's emergency warning protocol and, if found wanting, to undertake a separate public information campaign in direct conflict with that promulgated by the state. Alternatively, they would have us impose on defendants a duty to demand that the state modify its public notices to include the EPA-approved warnings and, should the state fail to comply, a further duty to halt future shipments of the pesticide." (10 C.4th 857.)

(d) "We have recognized that certain areas of law are peculiarly appropriate to legislative judgment, and have deferred in such cases to the policies implicit in statutes and administrative regulations in determining a tort duty of care. ... This is plainly such a case. Defining the locus of power and responsibility during 'conditions of disaster or ... extreme peril to life, property, and the resources of the state' is a task for which the Legislature is peculiarly well suited, and the state is the natural and logical repository of this power and responsibility. In the Emergency Services Act and related provisions of the Food and Agricultural Code, the Legislature has provided a clear framework of authority, so that, as we observed in a somewhat analogous situation, 'affected persons and entities, in both the private and public spheres, know exactly what is expected of them.' " (10 C.4th 858, quoting *Ramirez v. Plough* (1993) 6 C.4th 539, 25 C.R.2d 97, 863 P.2d 167, *infra*, §1472.)

(e) It is not suggested that the state may withhold critical information during an agricultural emergency. On the contrary, the Food and Agricultural Code clearly requires full disclosure. But it is the *state's* responsibility to design and implement an informational protocol, and that responsibility, as a practical or prudential matter, cannot be *divided* during an emergency. When deciding whether to expand a tort duty of care, courts must consider the potential social and economic consequences. The court has in the past considered the impact that expanded liability would have on activities that are important to society. A centralized and well-coordinated governmental response to a public emergency is essential to the security and welfare of the citizens of California. The imposition of a private tort duty to warn or otherwise intervene in these circumstances could severely compromise the state's efforts, and thereby place in jeopardy the lives, property, and resources of these citizens. (10 C.4th 859, citing *Moore v. Regents of Univ. of Calif.* (1990) 51 C.3d 120, 271 C.R. 146, 793 P.2d 479, *supra*, §460, *Huggins v. Longs Drug Stores Calif.* (1993) 6 C.4th 124, 24 C.R.2d 587, 862 P.2d 148, *supra*, §1030, and *Potter v. Firestone Tire & Rubber Co.* (1993) 6 C.4th 965, 25 C.R.2d 550, 863 P.2d 795, *infra*, §1670.) One justice dissented. (See 23 *Pepperdine L. Rev.* 1444 [Macias]; 31 *U.S.F. L. Rev.* 85 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

See 2 *A.L.R. Fed* 2d 265 [Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C., §136 et seq.) as preempting state common law and statutory claims concerning herbicides].



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E. Manufacturers and Other Suppliers of Goods.

2. Knowledge of Danger and Duty To Warn.

d. Dangerous Design.

6 *Witkin Sum. Cal. Law Torts* § 1174

[§ 1174] Dangerous Design.

A product may be dangerous because of a defective design, and the manufacturer's negligence may be the failure to adopt a safe design or to give warning of a particular danger. (See *Pike v. Frank G. Hough Co.* (1970) 2 C.3d 465, 471, 85 C.R. 629, 467 P.2d 229, *infra*, §1449; *Rest.2d, Torts* §398; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §62 et seq.; 59 *Cal. L. Rev.* 285; 5 *Golden Gate L. Rev.* 161 [second collision design defects]; 80 *Harv. L. Rev.* 688 [case holding that manufacturer is not liable for failure to design "crashworthy automobile"]; 96 *A.L.R.3d* 22 [product design liability].)

Most of the cases are now decided on the theory of strict products liability (see *infra*, §§1449, 1450), but the alternative negligence theory is frequently urged, and is a necessary basis for recovery if the elements of strict liability are not shown. Thus, in *Putensen v. Clay Adams* (1970) 12 C.A.3d 1062, 1076, 91 C.R. 319, plaintiff entered a hospital for a heart catheterization. The doctor used a length of plastic tubing from a roll manufactured by defendant C. The tubing kinked after insertion and had to be removed by surgery. The action was brought against the doctor, hospital, and manufacturer, and plaintiff appealed from a judgment on nonsuit in favor of the manufacturer and judgment on verdicts in favor of the doctor and hospital. *Held*, nonsuit judgment reversed.

(a) There was no basis for strict liability, for the element of reaching the consumer without a substantial change in condition was not established. (12 C.A.3d 1072; *infra*, §1530.)

(b) The following evidence would, however, support a verdict for negligence, either as to design or for the failure to give warning of a dangerous condition: (1) The tubing kinked easily when heated or soaked, and once kinked, did not recover. (2) Defendant C knew that the tubing was being used in heart catheterization; the jury could infer that it was aware of methods used in adapting it for this use and did not take the necessary precautions. (3) Defendant C conducted no tests of the tubing; the jury could have found that reasonable inspection would have disclosed the propensity to kink. (12 C.A.3d 1078.)

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E. Manufacturers and Other Suppliers of Goods.

2. Knowledge of Danger and Duty To Warn.

e. (New) Sophisticated User Defense.

6 *Witkin Sum. Cal. Law Torts* § 1174A

[§ 1174A] (New) Sophisticated User Defense.

In *Johnson v. American Standard* (2008) 43 C.4th 56, 74 C.R.3d 108, 179 P.3d 905, plaintiff, a trained and certified heating, ventilation, and air conditioning (HVAC) technician, brought a products liability action against defendant, an air conditioning equipment manufacturer, for negligence and strict liability. Plaintiff alleged that his work on equipment manufactured by defendant involved a refrigerant, R-22, that, when exposed to the heat generated by welding, decomposed into phosgene gas, causing him to develop pulmonary fibrosis. Plaintiff's theory was that defendant, knowing that servicing its equipment would create a known harmful gas, failed to provide plaintiff with an adequate warning. Defendant successfully moved for summary judgment, claiming that it had no duty to warn about the risks of R-22 exposure because it could assume that the group of trained professionals to which plaintiff belonged was aware of those risks. The Court of Appeal affirmed, holding that the sophisticated user defense, which had been adopted by the federal courts, applied in California and that plaintiff was a sophisticated user. *Held*, affirmed.

(a) *Nature and development of sophisticated user defense.*

(1) Generally speaking, manufacturers have a duty to warn consumers about the hazards inherent in their products. (43 C.4th 64, citing *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 C.3d 987, 281 C.R.2d 528, 810 P.2d 549, text, §1477.) However, where a sophisticated user is involved, the sophisticated user defense exempts manufacturers from their typical obligation to provide product users with warnings about potential hazards and acts as an affirmative defense that negates the manufacturer's duty to warn. The rationale supporting the defense is that the failure to provide warnings about risks already known to a sophisticated user usually is not a proximate cause of harm resulting from those risks, because the user's knowledge of the dangers is equivalent to prior notice. (43 C.4th 64.)

(2) *Rest. 2d, Torts* §388, provides that a supplier of goods is liable for physical harm that the goods cause if (a) the supplier knows or should know that the items are likely to be dangerous, (b) it fails to reasonably warn of the danger, and (c) it "has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition." Courts have interpreted the quoted language to mean that, if the manufacturer reasonably believes that the user knows or should know about a product's risk, the manufacturer need not warn that user of that risk. Federal decisions that have adopted the sophisticated user defense have cited *Rest. 2d, Torts* §388, as a basis for doing so. While California has not

expressly adopted the sophisticated user defense, it adopted *Rest. 2d, Torts* §388, in *Stevens v. Parke, Davis & Co.* (1973) 9 C.3d 51, 107 C.R. 45, 507 P.2d 653, text, §1177. (43 C.4th 66.)

(3) *Bojorquez v. House of Toys* (1976) 62 C.A.3d 930, 133 C.R. 483, recognizes the obvious danger rule, which provides that there is no need to warn of known risks under either a negligence or strict liability theory. The sophisticated user defense is a natural outgrowth of the obvious danger rule, because the sophisticated user defense recognizes that, for those who know or should know about a product's potential dangers, i.e., sophisticated users, the dangers are obvious. "Just as a manufacturer need not warn ordinary consumers about generally known dangers, a manufacturer need not warn members of a trade or profession ... about dangers generally known to that trade or profession." (43 C.4th 67.)

(4) In *Fierro v. International Harvester Co.* (1982) 127 C.A.3d 862, 179 C.R. 923, the court, in dictum, addressed the sophisticated user defense in the strict liability context. The Court of Appeal, after affirming the trial court's judgment on the ground that the plaintiff had not properly raised at trial the issue of failure to warn, impliedly adopted the sophisticated user defense in rationalizing its affirmance of that judgment. Numerous federal courts have taken notice of *Fierro* and have predicted that the sophisticated user defense would eventually be adopted in *California*. (43 C.4th 69, disapproving the reasoning in *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of America* (1990) 221 C.A.3d 1601, 271 C.R. 596, 13 Summary (10th), *Equity*, §155, to the extent that it might lead to the conclusion that the sophisticated user defense should not be adopted.)

(b) *Public policy*. Requiring manufacturers to warn their users in all instances would place an onerous burden on them and would invite mass consumer disregard and ultimate contempt for the warning process. The sophisticated user defense fits into this understanding of the role of warnings. It helps ensure that warnings will be heeded. In addition, although manufacturers are responsible for products that contain dangers of which the public is unaware, they are not insurers, even under strict liability, for the mistakes or carelessness of consumers who should know of the dangers involved. "Accordingly, we adopt the defense in *California*." (43 C.4th 70.)

(c) *Operation of sophisticated user defense in California.*

(1) A manufacturer is not liable to a sophisticated user of its product for failure to warn of a danger if the sophisticated user knew or should have known of the danger. "[I]ndividuals who represent that they are trained or are members of a sophisticated group of users are saying to the world that they possess the level of knowledge and skill associated with that class," and, if they do not actually possess that knowledge and skill, that fact should not give rise to liability on the part of the manufacturer. "Under the 'should have known' standard there will be some users who are actually unaware of the dangers. However, the same could be said of the currently accepted obvious danger rule," where the courts employ an objective test and do not inquire into the user's subjective knowledge. Thus, under the sophisticated user defense, even if a user is truly unaware of a product's hazards, that fact is irrelevant if the danger is objectively obvious. (43 C.4th 71.)

(2) Noting that some federal decisions recognize the sophisticated user defense in negligence actions but reject it in strict products liability actions, plaintiff contended that the "should have known" requirement of the sophisticated user defense conflicts with principles of strict liability and that the defense should thus be limited to cases where the plaintiff has actual knowledge. This contention is without merit. In the context of the sophisticated user defense, because intended users are deemed to know of the risks, manufacturers have no obligation to warn. The focus of the defense, therefore, is whether the danger in question is so generally known within the trade or profession that a manufacturer should not have been expected to provide a warning specific to the group to which plaintiff belonged. Consequently, there is no reason why the sophisticated user defense should not be as available against strict liability causes of action as it is for negligence causes of action. In both instances, the sophisticated user's knowledge eliminates the manufacturer's need for a warning. "In addition, even if the 'should have known' standard is considered more closely aligned with a negligence concept, we have repeatedly held that strict liability products liability law in *California* may incorporate negligence concepts without undermining the principles fundamental to a strict liability claim." The sophisticated user

defense is thus applicable to both negligence and strict liability causes of action. (43 C.4th 71, 73.)

(3) The sophisticated user's knowledge of the risk is measured from the time of the plaintiff's injury, rather than from the date the product was manufactured. The timeline focuses on the general population of sophisticated users, rather than on the plaintiff's actual knowledge, and conforms to the defense's purpose to eliminate any duty to warn when the expected user population is generally aware of the risk at issue. (43 C.4th 73.)

(d) *Plaintiff is sophisticated user.* Plaintiff completed a year-long course on HVAC systems at a technical institute. He received additional training and certifications, including an Environmental Protection Agency universal certification allowing those certified to work on and purchase refrigerants for large commercial air conditioning systems. The dangers and risks associated with R-22, including decomposition and the release of toxic gases when in contact with heat, were noted on the Material Safety Data Sheet for R-22, which was given to plaintiff every time he purchased that refrigerant. In addition, defendant's expert testified that, throughout his 28 years as an HVAC technician, it was widely known among HVAC technicians that R-22, when heated, could decompose into toxic byproducts, including phosgene. From this evidence, it is clear that plaintiff knew or should have known of the dangers of R-22 heat exposure and that he was thus a sophisticated user. Plaintiff's claims that he had read the data sheets for R-22 but did not understand that he should avoid heating R-22 and that he had never heard of phosgene gas were irrelevant under the circumstances. (43 C.4th 74.) (See BAJI, No. 9.06 [Sophisticated User Defense]; BAJI, No. 9.07 [Obvious Danger Defense]; CACI, No. 1244 [Affirmative Defense--Sophisticated User].)

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E. Manufacturers and Other Suppliers of Goods.

3. Duty To Inspect.

6 *Witkin Sum. Cal. Law Torts* § 1175

[§ 1175] Duty To Inspect.

(1) *In General.* Where the article is dangerous if not carefully made, liability is imposed for negligence in manufacturing or assembling. This was the holding of the leading case of *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382, 111 N.E. 1050. Defendant manufactured and assembled automobiles, using wheels furnished by another company; plaintiff bought a car from a retail dealer; injuries were sustained by reason of a defective wheel; and inspection by defendant would have revealed the defect. *Held*, defendant was liable.

A number of California cases are in accord. (See *Dahms v. General Elevator Co.* (1932) 214 C. 733, 738, 7 P.2d 1013 [repairer]; *Nebelung v. Norman* (1939) 14 C.2d 647, 654, 96 P.2d 327 [manufacturer; retreaded auto tire with "mold-pinch"]; *McNeal v. Greenberg* (1953) 40 C.2d 740, 742, 255 P.2d 810 [lessor of tractor with defective brakes]; *Jaehne v. Pacific Tel. & Tel. Co.* (1951) 105 C.A.2d 683, 688, 234 P.2d 165 [supplier of hotel switchboard with defective cord]; *Phillips v. Ogle Aluminum Furniture* (1951) 106 C.A.2d 650, 655, 235 P.2d 857 [seller of aluminum tubular kitchen chair]; see *Rest.2d, Torts* §395; 5 Harper, James & Gray 2d §28.11; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §305 et seq.; 9 *A.L.R.2d* 1337, 1350 [manufacturer of automobile]; 3 *A.L.R.3d* 1016 [manufacturer's responsibility for defective component supplied by another and incorporated in product]; 6 *A.L.R.3d* 91 [manufacturer's duty to test or inspect]; *BAJI*, No. 9.24.)

In *Post v. Alameda Amusement Co.* (1953) 117 C.A.2d 588, 256 P.2d 580, the court made clear the difference between the duty owed by the manufacturer and that owed by a retailer or other immediate supplier. Defendant Heater Company manufactured portable electric heaters that defendant Theatre Company used in its drive-in theatres, advertising this fact. Plaintiff was shocked and burned by a heater with a defective switch. *Held*, although the manufacturer was clearly liable, the Theatre Company (also a supplier) was not; the defective condition of the switch could not be discovered except by opening the heater, and only the manufacturer had the special tools necessary to do this. (117 C.A.2d 592.)

In *Saporito v. Purex Corp.* (1953) 40 C.2d 608, 255 P.2d 7, a bottle of bleaching solution exploded when plaintiff tried to open it. Judgment for plaintiff was affirmed on evidence that the container was a weak glass bottle only visually inspected and not tested for strength or defects; and there was no sufficient testing of the venting device necessary for gas accumulation. "A serious risk of harm to consumers is created when a product which might explode is offered to the

public as a safe household commodity. Defendant was under a duty to employ techniques and practices in the preparation and bottling which were reasonably designed to prevent dangerously defective bottles of the solution from reaching the market." (40 C.2d 611.) (On application of doctrine of res ipsa loquitur to bursting bottles, see 1 Cal. Evidence (4th), Burden of Proof and Presumptions, §135.)

(2) *What Constitutes Reasonable Care.* The difficult problem presented by the cases is whether the affirmative duty of care has been fulfilled, which usually resolves itself into the question whether there was a sufficient *inspection* for the purpose of discovering defects. Where the device or other product is capable of doing great harm, e.g., explosives, electrical equipment for high voltage current, and internal combustion engines, reasonable care requires extra precautions. But where the product is not of a dangerous type, a lesser amount of care is deemed sufficient; i.e., the kind of inspection required varies with the nature of the thing to be inspected. (See *Kalash v. Los Angeles Ladder Co.* (1934) 1 C.2d 229, 233, 34 P.2d 481; *Edison v. Lewis Mfg. Co.* (1959) 168 C.A.2d 429, 442, 336 P.2d 286; *Rest.2d, Torts* §395; Comment e; cf. *Sheward v. Virtue* (1942) 20 C.2d 410, 413, 126 P.2d 345 [collapse of beauty parlor chair leg; custom of other manufacturers to make no special examination for fractures in castings was not a defense].)

In *O'Rourke v. Day & Night Water Heater Co.* (1939) 31 C.A.2d 364, 88 P.2d 191, defendant manufacturer sold a water heater with a defective "safety pilot," the latter having been furnished in quantity lots and in sealed units by another company that had regularly inspected and tested them. *Held*, it was sufficient for defendant to make an external inspection of the safety pilot and to test its operation; it was not necessary to take it apart and test each part. (31 C.A.2d 370.)

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(1) *In General.* See 5 Harper, James & Gray 3d §28.11.



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E. Manufacturers and Other Suppliers of Goods.

4. Food and Beverages.

6 *Witkin Sum. Cal. Law Torts* § 1176

[§ 1176] Food and Beverages.

The manufacturer or other supplier of food or beverages for human consumption is subject to the same tort liability. (See *Escola v. Coca Cola Bottling Co. of Fresno* (1944) 24 C.2d 453, 459, 150 P.2d 436; *Medeiros v. Coca-Cola Bottling Co. of Turlock* (1943) 57 C.A.2d 707, 714, 135 P.2d 676 [cleaning brush in bottle]; *Moss v. Coca-Cola Bottling Co.* (1951) 103 C.A.2d 380, 383, 229 P.2d 802 [mouse in bottle]; *Rest.3d, Torts: Products Liability* §7 [liability of commercial seller or distributor for harm caused by defective food products]; 30 Proof of Facts 2d 1 [foreign substance in food or beverage]; 47 Proof of Facts 3d 47 [liability for food poisoning]; cf. *Lamb v. Hill* (1952) 112 C.A.2d 41, 42, 245 P.2d 316 [chicken pie served in restaurant with fragment of bone; restaurant keeper was not negligent]; *Ford v. Miller Meat Co.* (1994) 28 C.A.4th 1196, 1202, 33 C.R.2d 899 [supermarket not liable for injury caused by bone fragment in ground meat]; on action based on breach of warranty, see 4 *Summary* (10th), *Sales*, §102 et seq.)

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E. Manufacturers and Other Suppliers of Goods. 5. Drugs and Cosmetics.

6 *Witkin Sum. Cal. Law Torts* § 1177

[§ 1177] Drugs and Cosmetics.

The rule on medicine, drugs, soap, and cosmetics is the same as that on food and beverages (*supra*, §1176). (See *Rest.3d, Torts: Products Liability* §7 [liability of commercial seller or distributor for harm caused by defective prescription drugs and medical devices]; 49 Proof of Facts 2d 543 [tetracycline as cause of tooth damage]; 7 Proof of Facts 3d 1 [injuries from drugs]; 56 *Cal. L. Rev.* 149 [drugs]; 23 *Hastings L. J.* 1526 [birth control pills]; 71 *So. Cal. L. Rev.* 1387 [preemptive effect of FDA labeling rules for over-the-counter drugs]; 51 *Stanf. L. Rev.* 1343 [learned intermediary doctrine and patient package inserts]; 79 *A.L.R.2d* 301 [drug or medicine]; 79 *A.L.R.2d* 431 [cosmetics, soaps]; 79 *A.L.R.2d* 482 [detergents, cleansers, etc.]; 94 *A.L.R.3d* 748 [failure to warn of danger in use of vaccine or prescription drug]; 94 *A.L.R.3d* 1080 [promotional efforts directed toward prescribing physician]; 13 *A.L.R.4th* 52 [punitive damages in products liability case]; 57 *A.L.R.5th* 1 [learned intermediary doctrine that prescription drug manufacturer or supplier has no duty to warn consumer of drug's dangerous propensities where adequate warning is provided to prescribing physician].)

In *Love v. Wolf* (1964) 226 *C.A.2d* 378, 395, 38 *C.R.* 183, plaintiff patient sued defendant doctor and defendant manufacturer for damages for illness (aplastic anemia) resulting from the use of the drug chloromycetin. There was no showing of negligence in manufacture; the theory of the action was failure to warn of potential dangers in the use of the drug. The manufacturer had a strong defense: This was a prescription-dispensed drug, and adequate warnings had been given to doctors, on labels and packages, in advertising and in letters. This would ordinarily have discharged its duty; or, in terms of causation, the doctor's misuse of the drug in the face of the warnings would have been a superseding cause. (226 *C.A.2d* 395.) Nevertheless, the following evidence was held sufficient to establish the manufacturer's liability: Despite the warnings, it vigorously pushed sales through "detail men" who minimized the dangers and urged a wider use than experts thought safe; thus, it "watered down its regulations-required warnings." (226 *C.A.2d* 402.) "[I]f the overpromotion can reasonably be said to have induced the doctor to disregard the warnings previously given, the warning given is thereby withdrawn or cancelled and if, furthermore, the jury could have found that the doctor here actually prescribed the drug to cure an infection for which the company's advertising or its detail men had actually recommended its use, then the pharmaceutical company's negligence remains as an inducing cause coinciding with the negligence of the doctor to produce the result." (226 *C.A.2d* 400.) (See *Stevens v. Parke, Davis & Co.* (1973) 9 *C.3d* 51, 65, 107 *C.R.* 45, 507 *P.2d* 653 [death from use of chloromycetin; following *Love* and affirming judgment for plaintiff].)

The plaintiff made a much stronger case in *Toole v. Richardson-Merrell* (1967) 251 C.A.2d 689, 702, 60 C.R. 398. Defendant marketed Mer/29 for treatment of arteriosclerosis. The drug had serious toxic effects, particularly in causing cataracts of the eye. Laboratory testing by defendant disclosed bad effects on animals, and doctors using the drug in the short period it was on the market began to report dangers. Nevertheless, defendant engaged in the greatest promotional effort ever made by it, falsified records, made misrepresentations in advertising, and withheld information from the FDA. Plaintiff, who took the drug as prescribed by his physician, developed cataracts and a serious emotional condition from fear of other effects. He sued on theories of negligence and breach of express and implied warranties. The jury returned a general verdict for \$ 175,000 and \$ 500,000 punitive damages. Remission of \$ 250,000 of punitive damages was accepted, and judgment for plaintiff was affirmed. (See 13 A.L.R.4th 52 [punitive damages in products liability case].)

The duty to warn is discharged by warning of hazards to *doctors* who may in the exercise of their medical judgments decide to use the drug. This is explained in *Fogo v. Cutter Laboratories* (1977) 68 C.A.3d 744, 137 C.R. 417, quoting from a law review article: "(1) The doctor is intended to be an intervening party in the full sense of the word. Medical ethics as well as medical practice dictate independent judgment, unaffected by the manufacturer's control, on the part of the doctor. (2) Were the patient to be given the complete and highly technical information on the adverse possibility associated with the use of the drug, he would have no way to evaluate it, and in his limited understanding he might actually object to the use of the drug, thereby jeopardizing his life. (3) It would be virtually impossible for a manufacturer to comply with the duty of direct warning, as there is no sure way to reach the patient." (68 CA.3d 754.)

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E. Manufacturers and Other Suppliers of Goods.

6. Secondhand Equipment.

6 *Witkin Sum. Cal. Law Torts* § 1178

[§ 1178] Secondhand Equipment.

The seller of defective secondhand equipment does not have quite the same liability to the immediate buyer on warranties as does the seller of new equipment. (See 4 *Summary* (10th), *Sales*, §73.) But the seller's tort liability to the buyer and others under the doctrine of *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382, 111 N.E. 1050, *supra*, §1168, is much the same as that of the seller or supplier of new equipment.

In *Benton v. Sloss* (1952) 38 C.2d 399, 240 P.2d 575, J, a 19-year-old minor without a driver's license, bought a used car from defendant dealer. J's father refused to sign the contract (so defendant remained the owner). J took the minor plaintiffs for a ride, and in a reckless race with another driver, the defective brakes failed and plaintiffs were injured in a collision with a telephone pole. *Held*, judgment against defendant dealer affirmed.

(a) His duty "extended not only to the prospective buyer, but to third persons who could reasonably be expected to be in the vicinity of the probable use of the automobile." The injury to J's guests was therefore within the limits of the risk created by defendant's negligence. (38 C.2d 406.) Although a used car dealer need not disassemble the car and examine the parts, the dealer must make a reasonable inspection for defects that would make the car a menace on the highways; in particular, this duty is breached where the dealer fails (as here) to inspect the brakes, and a reasonable inspection would have disclosed the defects. (38 C.2d 404.)

(b) Defendant challenged the result as anomalous in that if he had driven the car as owner, the former guest law (*infra*, §1280) would have protected him from liability for this ordinary negligence. However, his liability was not based on responsibility for the driver's conduct, but on his liability to anyone injured because of his failure to maintain the machine in proper mechanical condition. (38 C.2d 403.) (See 31 Proof of Facts 2d 639 [dealer's liability for defective used car]; 2 U.C.L.A. L. Rev. 290; cf. *Eason v. Kelly Pipe Co.* (1936) 16 C.A.2d 88, 93, 60 P.2d 488 [defendant supplier of defective pipe was not liable because supplier was not informed of intended use for installation of light pole].)

The same theory of liability applies to the lessor or bailor of defective secondhand equipment: He or she must from time to time make such inspections as a reasonably careful person would make, for the lessee or bailee of a chattel intended for immediate use cannot be expected to make more than a cursory inspection. (See *McNeal v. Greenberg* (1953) 40 C.2d 740, 742, 255 P.2d 810 [tractor (skip loader) with defective brakes]; *Jones v. Johnston Testers* (1955)

132 C.A.2d 162, 165, 281 P.2d 602 [testing equipment for oil well]; Rest.2d, §408; 5 *Summary* (10th), *Torts*, §457.)

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F. Negligent Performance of Ordinary Contract.

1. Recovery Allowed.

6 *Witkin Sum. Cal. Law Torts* § 1179

[§ 1179] Recovery Allowed.

California formerly followed the traditional view that no tort cause of action arises from negligent breach of a contractual duty in the absence of privity of contract between the plaintiff and defendant. (See *Buckley v. Gray* (1895) 110 C. 339, 342, 42 P. 900; *Bilich v. Barnett* (1951) 103 C.A.2d Supp. 921, 924, 229 P.2d 492; *Mickel v. Murphy* (1957) 147 C.A.2d 718, 721, 305 P.2d 993; 8 *Stanf. L. Rev.* 725.)

In *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, the Supreme Court took a revolutionary step forward, overruling *Buckley* and *Mickel*. Defendant notary public had prepared the will of plaintiff's brother, leaving the entire estate to plaintiff. By reason of defendant's negligence, the will was improperly attested, and plaintiff received by intestate succession only one-eighth of the estate. *Held*, defendant was liable for the difference between the amount plaintiff would have received and the amount distributed.

(a) There is little question as to the breach of duty--the negligent act; defendant was not qualified to draw a will and was illegally practicing law. This conduct "should be discouraged and not protected by immunity from civil liability, as would be the case if plaintiff, the only person who suffered a loss, were denied a right of action." (49 C.2d 651.)

(b) The difficulty is in recognizing a duty to *plaintiff*. The modern development of tort liability for negligent performance of a contract by manufacturers and suppliers, to a person not in privity, for injury to person or tangible property (see *supra*, §1168 et seq.), also justified repudiation of the privity doctrine as to intangible interests. (49 C.2d 650.)

(c) There is not unlimited liability in favor of any person who might have been benefited by a contract negligently performed. Here, benefit to the plaintiff was the "end and aim" of the transaction, and the particular loss was clearly foreseeable; but this will not always be true. "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (49 C.2d 650.)

Many later cases apply the rule and test. (See *J'Aire Corp. v. Gregory* (1979) 24 C.3d 799, 804, 157 C.R. 407, 598 P.2d 60, supra, §751; *Adams v. Southern Pac. Trans. Co.* (1975) 50 C.A.3d 37, 123 C.R. 216, supra, §751; *Huber, Hunt & Nichols v. Moore* (1977) 67 C.A.3d 278, 301, 136 C.R. 603; *Jackson v. Aetna Life & Cas. Co.* (1979) 93 C.A.3d 838, 841, 846, 155 C.R. 905; *Ales-Peratis Foods Int. v. American Can Co.* (1985) 164 C.A.3d 277, 285, 209 C.R. 917, supra, §752; *North Amer. Chemical Co. v. Superior Court* (1997) 59 C.A.4th 764, 783, 69 C.R.2d 466; *The Ratcliff Architects v. Vanir Const. Management* (2001) 88 C.A.4th 595, 604, 106 C.R.2d 1; *Ochs v. PacifiCare of Calif.* (2004) 115 C.A.4th 782, 788, 9 C.R.3d 734 [when health care provider delegated its payment responsibilities to contracting medical provider that became insolvent, it could be liable for emergency services if it acted negligently in delegating those responsibilities]; C.E.B., 2 Business Litigation, §11.99 et seq.; 46 Cal. L. Rev. 851; 72 Harv. L. Rev. 380; 9 Hastings L. J. 330; 33 San Diego L. Rev. 137; 5 U.C.L.A. L. Rev. 681.)

The *Biakanja* rule and test are equally applicable to an action by the intended beneficiary of a will against an attorney draftsman. (*Lucas v. Hamm* (1961) 56 C.2d 583, 588, 15 C.R. 821, 364 P.2d 685, 1 Cal. Proc. (4th), Attorneys, §322; 75 Harv. L. Rev. 62; 5 Stanf. L. Rev. 580; 65 A.L.R.2d 1363 [liability of one drawing an invalid will].)

Biakanja and *Lucas* upheld recovery either in contract (on third-party beneficiary principles, 1 Summary (10th), Contracts, §688) or in tort. In *Heyer v. Flaig* (1969) 70 C.2d 223, 74 C.R. 225, 449 P.2d 161, the court declared that the contract theory "is conceptually superfluous," for the beneficiary's right arises from a breach of duty growing out of the relationship. The attorney "realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries." (70 C.2d 228.) And the beneficiary's interests are actually greater. Failure of the testamentary scheme deprives him or her of a bequest, while the estate is injured only to the extent of fees paid. "We impose this duty because of the relationship between the attorney and the intended beneficiary; public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable." (70 C.2d 229.)

The *Biakanja* criteria were applied to impose liability on a lender for defective homes built by the borrower. (See *Connor v. Great Western Savings & Loan Assn.* (1968) 69 C.2d 850, 865, 73 C.R. 369, 447 P.2d 609, infra, §1279.) But the decision was later nullified by statute. (See infra, §1279.)

West's Key Number Digest, Negligence k.219; Products Liability k.23.1

SUPPLEMENT: [This section is current through the latest supplement]

Cases applying *Biakanja* and allowing recovery: See *Century Surety Co. v. Crosby Ins.* (2004) 124 C.A.4th 116, 127, 21 C.R.3d 115 [insurer's cross-complaint against broker for negligently completing insurance application]. *Lucas* case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §297.



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CHAPTER IX - Torts

Witkin Summary of California Law XI. NEGLIGENCE: AFFIRMATIVE DUTIES ARISING FROM SPECIAL RELATIONSHIPS

F. Negligent Performance of Ordinary Contract.

2. Recovery Denied.

6 *Witkin Sum. Cal. Law Torts* § 1180

[§ 1180] Recovery Denied.

In *Gill v. Mission Savings & Loan Assn.* (1965) 236 C.A.2d 753, 46 C.R. 456, plaintiffs alleged that the owners of land obtained a \$ 20,000 construction loan from defendant, secured by a first deed of trust; the owners also borrowed money from plaintiffs, secured by subordinated (second) deeds of trust; the owners agreed that the money lent by defendant would be used solely for construction; defendant, with knowledge of this agreement, so negligently supervised disbursement of the money that construction was not completed, the property was not sold, plaintiffs' notes became delinquent, and they were forced to make certain expenditures. *Held*, no cause of action was stated. Defendant did not participate in the transaction between plaintiffs and the owners, and did not undertake to manage distribution of the loan funds. Moreover, plaintiffs could have protected themselves by making this restriction on use of the money a part of their subordination agreement. (236 C.A.2d 757.) (See *Norton v. Hines* (1975) 49 C.A.3d 917, 921, 123 C.R. 237, *supra*, §510; *Fox & Carskadon Financial Corp. v. San Francisco Fed. Savings & Loan Assn.* (1975) 52 C.A.3d 484, 489, 125 C.R. 549 [*Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *supra*, §1179, factors applied and found inapplicable].)

In *Goodman v. Kennedy* (1976) 18 C.3d 335, 134 C.R. 375, 556 P.2d 737, plaintiffs sued defendant attorney for fraud. The complaint alleged that defendant negligently advised his clients, corporate officers, that certain corporate shares could be issued to them as stock dividends and sold to others without SEC registration; that plaintiffs were prospective buyers, and defendant failed to disclose to plaintiffs' attorney material facts affecting the transaction; that plaintiffs bought the shares, the SEC suspended their exemption, and the stock became valueless. *Held*, judgment for defendant on demurrer affirmed. Defendant could not be held liable to plaintiffs for negligent advice to his own clients unless he owed a duty to plaintiffs. The attorney's liability to his client's intended beneficiary (see, *supra*, §1179) is distinguishable; plaintiffs were not intended beneficiaries of defendant's clients, but bargained with them at arm's length. And to make an attorney liable for negligent confidential advice not only to the client but to the other parties to the transaction "would inject undesirable self-protective reservations into the attorney's counseling role," thereby preventing the attorney from devoting his or her entire energies to the client's interests. (18 C.3d 344.) Two justices dissented. (18 C.3d 354.) (See *Parnell v. Smart* (1977) 66 C.A.3d 833, 838, 136 C.R. 246 [following reasoning in *Goodman* and holding that attorney for adverse party (defendant) owes no duty to plaintiff].)

In *Weaver v. Superior Court* (1979) 95 C.A.3d 166, 156 C.R. 745, the adverse party was held entitled to sue the attorney for *malicious prosecution* (see *supra*, §510), but the court, following *Norton*, *Goodman*, and cases from other

jurisdictions, rejected the theory that the attorney could be sued for *negligence* in investigation of the facts before filing a complaint. (95 C.A.3d 179 et seq.) "[I]f an attorney owes no duty of care to foreseeable third parties with whom his client might deal in a non-litigated, arm's length transaction, by no logical stretch of the imagination could such a duty arise in favor of adverse third parties in litigation." (95 C.A.3d 182.) "[E]xcept in those isolated instances where the basic intent and purpose of the attorney's service is to create rights for specific third parties as in a will or trust, or to induce specific action on the part of third parties, ... his liability should be limited strictly to his client." (95 C.A.3d 182, footnote 4.)

There are numerous other cases applying the *Biakanja* criteria, but denying recovery for negligent performance of a contract. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 C.4th 26, 58, 77 C.R.2d 709, 960 P.2d 513 [title insurer's refusal to issue insurance to prospective purchasers of tax-defaulted properties did not state cause of action in prospective sellers of property acquired at tax sale]; *Ott v. Alfa-Laval Agri* (1995) 31 C.A.4th 1439, 1446, 37 C.R.2d 790; *Diediker v. Peelle Financial Corp.* (1997) 60 C.A.4th 288, 296, 70 C.R.2d 442 [trustee under deed of trust owed no duty to future purchasers and their title insurers to locate IRS liens of record and give notice to IRS before conducting foreclosure sale]; *Adelman v. Associated Int. Ins. Co.* (2001) 90 C.A.4th 352, 359, 108 C.R.2d 788 [homeowners association insurer, which allegedly failed to timely perform its indemnity obligations, was not liable to condominium unit owners for forcing them to delay repairing their own units]; *Desert Healthcare Dist. v. PacifiCare FHP* (2001) 94 C.A.4th 781, 791, 114 C.R.2d 623 [hospital provided services to health care plan's subscribers through intermediary that went bankrupt and could not make payments to hospital; under *Biakanja*, health care plan, in its contract with intermediary, had no duty to ensure intermediary's financial stability].)

SUPPLEMENT: [This section is current through the latest supplement]

Cases applying Biakanja but denying recovery: See *Weseloh Family Ltd. Partnership v. K.L. Wessel Const. Co.* (2004) 125 C.A.4th 152, 164, 22 C.R.3d 660 [engineers who designed retaining walls under contract with subcontractor owed no duty of care to property owners or general contractor, in absence of contractual privity, so as to establish liability for failure of walls]; *Richard B. LeVine v. Higashi* (2005) 131 C.A.4th 566, 580, 32 C.R.3d 244 [accountant entered into contract with partnership to calculate profits of each partner in manner instructed by partnership; where instructions differed from those set forth in written partnership agreement, with result that plaintiff's allocation was lessened, contract was not made for plaintiff's benefit]; *Heritage Oaks Partners v. First Amer. Title Ins. Co.* (2007) 155 C.A.4th 339, 344, 66 C.R.3d 510 [trustee under deed of trust was not liable to subsequent purchaser for conducting earlier foreclosure sale that was set aside because trustee was not trustee of record; citing *Diediker v. Peelle-Financial Corp.* (1997) 60 C.A.4th 288, 70 C.R.2d 442, text, p. 548].



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CHAPTER IX - Torts

Witkin Summary of California Law
XII. NEGLIGENCE: PROXIMATE OR LEGAL CAUSE

A. In General.

1. Nature of Doctrine.

a. Development.

6 *Witkin Sum. Cal. Law Torts* § 1181

[§ 1181] Development.

The breach of duty--the negligent act or omission--must be the "proximate cause" (termed "legal cause" in the Torts Restatement) of the plaintiff's injury. (See *Rest.2d, Torts* §430; *infra*, §1182.)

The following are illustrations of early attempts by California courts to lay down rules of proximate cause: "Consequences which follow from the original wrong in unbroken sequence, without an intervening sufficient independent cause, are natural and proximate, and for these the original wrongdoer is responsible." (*Merrill v. Los Angeles Gas & Elec. Co.* (1910) 158 C. 499, 503, 111 P. 534.) "A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not) would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind." (*Williams v. San Francisco Northwestern Ry. Co.* (1907) 6 C.A. 715, 724, 93 P. 122.) "The primary cause may be the proximate cause ... though it may operate through successive instruments. ... The question always is: Was there an unbroken connection between the wrongful act and injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" (*Catlin v. Union Oil Co. of Calif.* (1916) 31 C.A. 597, 606, 161 P. 29.) (See *Hale v. Pacific Tel. & Tel. Co.* (1919) 42 C.A. 55, 58, 183 P. 280; *Newman v. Steuernagel* (1933) 132 C.A. 417, 420, 22 P.2d 780; *Inai v. Ede* (1941) 42 C.A.2d 521, 109 P.2d 400; *Weck v. Los Angeles County Flood Control Dist.* (1947) 80 C.A.2d 182, 189, 181 P.2d 935; *Werkman v. Howard Zink Corp.* (1950) 97 C.A.2d 418, 424, 218 P.2d 43; *Kettman v. Levine* (1953) 115 C.A.2d 844, 847, 253 P.2d 102; *Maupin v. Widling* (1987) 192 C.A.3d 568, 573, 237 C.R. 521 [modern terminology].)

Despite the foregoing generalizations, proximate cause remains an elusive concept, and both its rules and their application were the subject of continual debate by courts and writers. (For general discussions, see 4 Harper, James & Gray 2d §20.4; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §409 et seq.; 15 *Cal. L. Rev.* 1; 20 *Cal. L. Rev.* 229, 396; 38 *Cal. L. Rev.* 369; 52 *Cal. L. Rev.* 459, 764 [analytical study]; 75 *Harv. L. Rev.* 1691; 14 *So. Cal. L. Rev.* 1, 115, 416; 15 *So. Cal. L. Rev.* 187, 304, 427; 16 *So. Cal. L. Rev.* 1, 61, 275; 31 *So. Cal. L. Rev.* 99; 50 *U.C.L.A. L. Rev.* 293.)

However, the Torts Restatement analysis and progressive approach (see *infra*, §§1182, 1183) has had a strong liberalizing influence on the California law. (See, e.g., *Mosley v. Arden Farms Co.* (1945) 26 C.2d 213, 218, 157 P.2d

372, *infra*, §1207; *Richardson v. Ham* (1955) 44 C.2d 772, 776, 285 P.2d 269, *supra*, §842.)

SUPPLEMENT: [This section is current through the latest supplement]

Elusive concept: See 4 Harper, James & Gray 3d §20.4.



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A. In General.

1. Nature of Doctrine.

b. Restatement 2d.

6 *Witkin Sum. Cal. Law Torts* § 1182

[§ 1182] Restatement 2d.

Chapter 16 of Rest.2d, Torts, entitled "The Causal Relation Necessary to Responsibility for Negligence," is divided into two topics: Topic 1 deals with causal relation necessary to the *existence* of liability, and Topic 2 deals with causal relation affecting the *extent* of liability (see *infra*, §§1553, 1554).

"Legal cause" is defined in *Rest.2d, Torts* §431: "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."

Comment a explains: "The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred."

Comment b adds: "In many cases the question before the court is whether the actor's negligence was in fact the cause of the other's harm--that is, whether it had any effect in producing it--or whether it was the result of some other cause, the testimony making it clear that it must be one or the other, and that the harm is not due to the combined effects of both. In such a case, the question, whether the defendant's negligence has a substantial as distinguished from a merely negligible effect in bringing about the plaintiff's harm, does not arise if the testimony clearly proves that the harm is from a cause other than the actor's negligence. Indeed, the testimony often makes it clear that, if the defendant's conduct had any effect, the effect was substantial. It is only where the evidence permits a reasonable finding that the defendant's conduct had some effect that the question whether the effect was substantial rather than negligible becomes important." (See *Wilson v. Blue Cross of Southern Calif.* (1990) 222 C.A.3d 660, 673, 271 C.R. 876 [*Rest.2d, Torts* §431 "correctly states California law as to the issue of causation in tort cases"].)

The considerations important in determining whether negligent conduct is a substantial factor are set forth in *Rest.2d, Torts* §433: "(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by

other forces for which the actor is not responsible; (c) lapse of time."

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A. In General.

1. Nature of Doctrine.

c. Restatement 3d.

6 *Witkin Sum. Cal. Law Torts* § 1183

[§ 1183] Restatement 3d.

Rest.3d, Torts: Apportionment of Liability §26 addresses the apportionment of liability when damages can be divided by causation.

When damages for an injury can be divided by causation, the fact-finder "first divides them into their indivisible component parts and separately apportions liability for each indivisible component part" under the general Restatement rules for apportioning liability. (*Rest.3d, Torts: Apportionment of Liability* §26(a); on Restatement rules for apportioning liability generally, see *supra*, §§51, 75, 104, 113,), and *infra*, §§1297, 1328, 1341, 1332.) In other words, a two-step apportionment is undertaken. "[D]ivisible damages are first divided by causation into indivisible parts, and then each indivisible part is apportioned by responsibility." (*Rest.3d, Torts: Apportionment of Liability* §26, Comment a.)

Damages can be divided by causation when the evidence provides a reasonable basis for the fact-finder to determine both (a) that any legally culpable conduct of a party or other relevant person to whom the fact-finder assigns a percentage of responsibility was a legal cause of less than the entire damages for which the plaintiff seeks recovery, and (b) the amount of damages separately caused by that conduct. Otherwise, the damages are indivisible, and liability respecting the entire injury is apportioned under the general Restatement rules for apportioning liability. (*Rest.3d, Torts: Apportionment of Liability* §26(b).)

The burden of proving the divisibility of the damages and the magnitude of the divisible parts rests on the party who seeks division. (*Rest.3d, Torts: Apportionment of Liability* §26, Comment h.)

Should the court determine that the two-step process of apportionment is administratively unsuitable because the case is too complex for a jury to find the requisite facts, it may decide to use a one-step process in which the fact-finder determines the total recoverable damages and then assigns percentages of responsibility to each person who caused some of the damages. When assigning percentages of responsibility, the fact-finder takes into account both evidence relevant to comparative responsibility and evidence relevant to causation. However, the two-step process "is preferable." (*Rest.3d, Torts: Apportionment of Liability* §26, Comment j.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

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A. In General.
2. Question of Fact or Law.

6 Witkin Sum. Cal. Law Torts § 1184

[§ 1184] Question of Fact or Law.

Proximate cause, like negligence (supra, §866) is generally held to be a question of fact for the jury. (*Fennessey v. Pacific Gas & Elec. Co.* (1942) 20 C.2d 141, 144, 124 P.2d 51; *Hoyem v. Manhattan Beach City School Dist.* (1978) 22 C.3d 508, 520, 150 C.R. 1, 585 P.2d 851, supra, §327, citing the text; *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 C.3d 49, 56, 192 C.R. 857, 665 P.2d 947, infra, §1206; *Stockwell v. Board of Trustees of Leland Stanford Junior University* (1944) 64 C.A.2d 197, 204, 148 P.2d 405; *Jackson v. Utica Light & Power Co.* (1944) 64 C.A.2d 885, 894, 149 P.2d 748; *Been v. The Lummus Co.* (1946) 76 C.A.2d 288, 292, 173 P.2d 34; *Jones v. South San Francisco* (1950) 96 C.A.2d 427, 435, 216 P.2d 25; *Hill v. Matthews Paint Co.* (1957) 149 C.A.2d 714, 723, 308 P.2d 865; *Parker v. San Francisco* (1958) 158 C.A.2d 597, 608, 323 P.2d 108; *Fowler v. Callis* (1958) 159 C.A.2d 746, 749, 324 P.2d 728; *Sanders v. Atchison, Topeka & Santa Fe Ry. Co.* (1977) 65 C.A.3d 630, 649, 135 C.R. 555, citing the text; *Bigbee v. Superior Court* (1979) 93 C.A.3d 451, 456, 155 C.R. 545; see *Rest.2d, Torts* §434; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §446 et seq.)

In a medical malpractice case, the evidence must be sufficient to allow the jury to infer that, in the absence of the defendant's negligence, there was a *reasonable medical probability* that the plaintiff would have obtained a better result. (*Morgenroth v. Pacific Med. Center* (1976) 54 C.A.3d 521, 533, 126 C.R. 681; see *Burford v. Baker* (1942) 53 C.A.2d 301, 306, 127 P.2d 941; *Cullum v. Seifer* (1969) 1 C.A.3d 20, 26, 81 C.R. 381; *Keen v. Prinsinzano* (1972) 23 C.A.3d 275, 281, 100 C.R. 82; 54 *A.L.R.4th* 10 [medical malpractice: "loss of chance" causality].)

Occasionally, however, on undisputed facts, the question is regarded as one of law. (See *Stasulat v. Pacific Gas & Elec. Co.* (1937) 8 C.2d 631, 668, 67 P.2d 678; *Warner v. Santa Catalina Island Co.* (1955) 44 C.2d 310, 319, 282 P.2d 12; *Burdette v. Rollefson Const. Co.* (1959) 52 C.2d 720, 726, 344 P.2d 307; *Traylen v. Citrarro* (1931) 112 C.A. 172, 175, 297 P. 649; *Gallichotte v. California Mut. Bldg. & Loan Assn.* (1935) 4 C.A.2d 503, 509, 41 P.2d 349; *Rosa v. Pacific Gas & Elec. Co.* (1955) 133 C.A.2d 672, 674, 284 P.2d 844; *Arthur v. Santa Monica Dairy Co.* (1960) 183 C.A.2d 483, 490, 6 C.R. 808; *Sanders v. Atchison, Topeka & Santa Fe Ry. Co.* (1977) 65 C.A.3d 630, 649, 135 C.R. 555, citing the text; *Hooks v. Southern Calif. Permanente Med. Group* (1980) 107 C.A.3d 435, 447, 165 C.R. 741; *Constance B. v. California* (1986) 178 C.A.3d 200, 207, 223 C.R. 645; *Capolungo v. Bondi* (1986) 179 C.A.3d 346, 354, 224 C.R. 326; *Rest.2d, Torts* §434; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §428; 38 *Cal. L. Rev.* 419.)

West's Key Number Digest, Negligence k.713, 714

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.

3. Cause in Fact and Proximate Cause.

a. Cause in Fact.

6 *Witkin Sum. Cal. Law Torts* § 1185

[§ 1185] Cause in Fact.

The first element of legal cause is *cause in fact*: i.e., it is necessary to show that the defendant's negligence contributed in some way to the plaintiff's injury, so that "but for" the defendant's negligence the injury would not have been sustained. If the accident would have happened anyway, whether the defendant was negligent or not, then his or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause. The "but for" rule has traditionally been applied to determine cause in fact. (See *Lammers v. Pacific Elec. Ry. Co.* (1921) 186 C. 379, 384, 199 P. 523; *Stasulat v. Pacific Gas & Elec. Co.* (1937) 8 C.2d 631, 637, 67 P.2d 678; *Akins v. Sonoma* (1967) 67 C.2d 185, 199, 60 C.R. 499, 430 P.2d 57, citing the text; *Johnson v. Union Furniture Co.* (1939) 31 C.A.2d 234, 237, 87 P.2d 917; *Valdez v. J.D. Diffenbaugh Co.* (1975) 51 C.A.3d 494, 508, 509, 124 C.R. 467, citing the text; *Sagadin v. Ripper* (1985) 175 C.A.3d 1141, 1160, 221 C.R. 675, citing the text; *Maupin v. Widling* (1987) 192 C.A.3d 568, 574, 237 C.R. 521; *Gordon v. Havasu Palms* (2001) 93 C.A.4th 244, 251, 112 C.R.2d 816; 4 Harper, James & Gray 2d §20.2; Dobbs, *The Law of Torts* §168 et seq.; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §446 et seq.; 15 *Cal. L. Rev.* 1, 3; 20 *Cal. L. Rev.* 396; 38 *Cal. L. Rev.* 375; 61 *So. Cal. L. Rev.* 2075; 9 *Stanf. L. Rev.* 60.)

The Restatement formula uses the term *substantial factor* "to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause." (*Rest.2d, Torts* §431, Comment a; see supra, §1182.) And "the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent." (See *Mitchell v. Gonzales* (1991) 54 C.3d 1041, 1 C.R.2d 913, 819 P.2d 872, infra, §1187; *Greathouse v. Amcord* (1995) 35 C.A.4th 831, 837, 41 C.R.2d 561; *Rest.2d, Torts* §432(1); 57A *Am.Jur.2d* (2004 ed.), *Negligence* §458 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Dixon v. Livermore* (2005) 127 C.A.4th 32, 42, 25 C.R.3d 50 [no evidence that air show operator's negligence caused helicopter crash, where issue of negligent entrustment to inexperienced pilot had been decided in operator's favor]; *Jonkey v. Carignan Const. Co.* (2006) 139 C.A.4th 20, 24, 42 C.R.3d 399 [there was no substantial evidence that contractor's negligence in disassembling scaffold caused injury by falling plank, where workers had been disassembling scaffold for some time before injury, it was obvious to anyone who looked that scaffold was being disassembled, disassembly was being accomplished by method common in industry, and workers yelled warnings to owner, who was

focused on cell phone conversation]; *Mills v. U.S. Bank* (2008) 166 C.A.4th 871, 899, 83 C.R.3d 146 [bank's negligence in accepting for deposit checks, written by investors, without endorsement by payee entity was not substantial factor in causing investment loss; harm would have occurred even if bank had not been negligent in accepting checks without endorsement, because principals would have supplied endorsement if bank had refused to deposit checks]; 4 Harper, James & Gray 3d §20.2.



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CHAPTER IX - Torts

Witkin Summary of California Law
XII. NEGLIGENCE: PROXIMATE OR LEGAL CAUSE

A. In General.

3. Cause in Fact and Proximate Cause.

b. Proximate Cause.

6 *Witkin Sum. Cal. Law Torts* § 1186

[§ 1186] Proximate Cause.

The doctrine of proximate cause limits liability; i.e., in certain situations where the defendant's conduct is an actual cause of the harm, the defendant will nevertheless be absolved because of the manner in which the injury occurred. Thus, where there is an independent intervening act that is not reasonably foreseeable, the defendant's conduct is not deemed the "legal" or proximate cause. Rules of legal cause, therefore, operate to relieve the defendant whose conduct is a cause in fact of the injury, where it would be considered unjust to hold him or her legally responsible. (See *Mitchell v. Gonzales* (1991) 54 C.3d 1041, 1 C.R.2d 913, 819 P.2d 872, *infra*, §1187; *PPG Industries v. Transamerica Ins. Co.* (1999) 20 C.4th 310, 315, 84 C.R.2d 455, 975 P.2d 652, 2 *Summary* (10th), *Insurance*, §113 [insurer's unreasonable failure to settle third-party lawsuit may be cause in fact, but cannot be proximate cause, of award of punitive damages against insured; imposition of liability is based not only on simple causality but on considerations of policy against morally culpable wrongdoer shifting responsibility for these damages]; *Ingham v. Luxor Cab Co.* (2001) 93 C.A.4th 1045, 1054, 113 C.R.2d 587 [whether telling diabetic passenger who had difficulty walking to exit cab two blocks from her destination was proximate cause of injury she sustained while walking up steep incline was question of fact]; *Rest.2d, Torts* §440 et seq.; *Dobbs, The Law of Torts* §180 et seq.; 15 *Cal. L. Rev.* 1, 2; 20 *Cal. L. Rev.* 229; 38 *Cal. L. Rev.* 391; 2 *So. Cal. L. Rev.* 209; 9 *Stanf. L. Rev.* 97; 100 *A.L.R.2d* 942 [foreseeability as element]; 2 *A.L.R.3d* 290, 360, 384, 401, 434, 446, 464, 487 [sufficiency of proof that injury resulted from accident rather than from preexisting condition].)

West's Key Number Digest, Negligence k.371 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.

3. Cause in Fact and Proximate Cause.

c. Instructions.

6 *Witkin Sum. Cal. Law Torts* § 1187

[§ 1187] Instructions.

In *Mitchell v. Gonzales* (1991) 54 C.3d 1041, 1 C.R.2d 913, 819 P.2d 872, the court disapproved the traditional "proximate cause" or "but for" instruction (former BAJI, No. 3.75) and approved the "substantial factor" instruction (BAJI, No. 3.76) for negligence cases. The opinion begins with an important observation: "We emphasize that despite the use of the terms proximate cause and legal cause, BAJI, Nos. 3.75 and 3.76 are instructions on *cause in fact*. Issues that are properly referred to as questions of proximate or legal cause are contained in other instructions." (54 C.3d 1044, footnote 2.)

Plaintiffs were parents of 12-year-old D, who went to a picnic at a lake with his friend L, 14 years old. Although L knew that D could not swim, L, Y, and D rented a paddleboard and went out into the deep water of the lake, where they engaged in horseplay. L rocked the paddleboard, it tipped over, and D fell off and was drowned. In this wrongful death action against L and his parents, the complaint alleged negligence, and defendants asserted comparative negligence.

Plaintiffs requested an instruction under BAJI, No. 3.76; the trial judge denied the request and instructed under BAJI, No. 3.75. The jury, by special verdict, concluded that defendants were negligent but that the negligence was not a cause of the death. (Hence, no verdict was reached on comparative negligence.) The judge then denied plaintiffs' motions for new trial or judgment notwithstanding the verdict. On plaintiffs' appeal, the Court of Appeal reversed, holding that BAJI, No. 3.75 is potentially misleading, and that the trial court committed prejudicial error in refusing to give BAJI, No. 3.76. *Held*, Court of Appeal decision affirmed.

(a) Both BAJI, Nos. 3.75 and 3.76 relate to "actual cause" or "cause in fact." They are alternative instructions that should not jointly be given in a single lawsuit. (54 C.3d 1049, citing *Maupin v. Widling* (1987) 192 C.A.3d 568, 237 C.R. 521.) "It has generally been recognized that the 'but for' test contained in BAJI, No. 3.75 should not be used when two 'causes' concur to bring about an event and either one of them operating alone could have been sufficient to cause the result. ... In those few situations, where there are concurrent [independent] causes, our law provides one cannot escape responsibility for his negligence on the ground that identical harm would have occurred without it. The proper rule for such situations is that the defendant's conduct is a cause of the event because it is a material element and a substantial factor in bringing it about." (54 C.3d 1049.) In such a situation BAJI, No. 3.76 should be given. (54 C.3d 1049.)

(b) BAJI, No. 3.75 should not be given in any negligence action.

(1) Criticism of the term "proximate cause" by courts and commentators has been continuous. As Prosser and Keeton observed: "The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins. The word means nothing more than near or immediate; and when it was first taken up by the courts it had connotations of proximity in time and space which have long since disappeared. It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness." (54 C.3d 1050.) In *Fraijo v. Hartland Hosp.* (1979) 99 C.A.3d 331, 347, 160 C.R. 246, the court said: "We agree that BAJI, No. 3.75--the proximate cause instruction--is far from constituting a model of clarity in informing a jury as to what is meant by proximate causation." (54 C.3d 1051.)

(2) "We believe the foregoing authorities properly criticize BAJI, No. 3.75 for being conceptually and grammatically deficient. The deficiencies may mislead jurors, causing them, if they can glean the instruction's meaning despite the grammatical flaws, to focus improperly on the cause that is spatially or temporally closest to the harm." (54 C.3d 1052.)

(c) BAJI, No. 3.76 is the proper instruction and should be given.

(1) This instruction states the "substantial factor" test developed by *Rest.2d, Torts* §431. Prosser and Keeton observed that it is "sufficiently intelligible to any layman to furnish an adequate guide to the jury, and it is neither possible nor desirable to reduce it to lower terms." (54 C.3d 1052.) Moreover, it subsumes the "but for" test. "If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries." (54 C.3d 1052, quoting *Doupnik v. General Motors Corp.* (1990) 225 C.A.3d 849, 275 C.R. 715, *infra*, §1527)

(2) The substantial factor instruction also aids in the disposition of two other troublesome types of situations: "One is where a similar, but not identical result would have followed without the defendant's act; the other where one defendant has made a clearly proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire. But in the great majority of cases, it produces the same legal conclusion as the but-for test. Except in the classes of cases indicated, no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it; nor will cases very often arise where it would not be such a factor when it was so indispensable a cause that without it the result would not have followed." (54 C.3d 1053, quoting Prosser & Keeton.)

(3) BAJI, No. 3.76 has been criticized for use of the confusing term "legal cause," and a "Psycholinguistic Study" has recommended substitution of the simple term "cause." (54 C.3d 1053.) Moreover, many critics have pointed out ambiguities in the term "substantial," and have criticized its use in cases where a defendant's conduct is clearly a "but for" cause, but defense counsel argues that the conduct made an insubstantial contribution to the outcome. "Such a use of the 'substantial factor' test undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby. We are confident, however, that proper argument by counsel and instruction by the court will prevent any confusion from occurring." (54 C.3d 1053.)

(d) Giving a BAJI, No. 3.75 instruction and refusing to give a BAJI, No. 3.76 instruction constituted reversible error. "It seems that the jury did follow BAJI No. 3.75 but was misled by the instruction's flaws. Having found the defendants negligent, it is illogical and inconsistent on this record to conclude that they were not a cause in fact of [D]'s death. Accordingly, we conclude it is reasonably probable that the jury was confused by BAJI No. 3.75 and overemphasized the 'but for' nature of the instruction, improperly focusing on the factor operative at the closest temporal proximity to the time of death, [D]'s inability to swim." (54 C.3d 1055.)

One justice dissented, criticizing the majority for invalidating an instruction used for 50 years and embodying well-established law, and for delegating responsibility for defining proximate cause to the BAJI Committee instead of

providing guidance to the *Committee*. (54 C.3d 1056.) (See *Sandoval v. Bank of America* (2002) 94 C.A.4th 1378, 1386, 115 C.R.2d 128 [instruction and answer to jury question stating that proper question was whether absence of defendant's negligence "would" have prevented injury was prejudicial error; jury need only determine that it was more probable than not that injury would not have occurred in absence of that negligence]; *Viner v. Sweet* (2003) 30 C.4th 1232, 135 C.R.2d 629, 70 P.3d 1046, 1 Cal. Proc. (4th), *Attorneys*, Supp., §334 [in malpractice action against corporate lawyer who had negotiated plaintiffs' sale of company and employment termination agreement, plaintiffs were required to prove that more favorable result would have been obtained "but for" alleged negligence; *Mitchell* did not repudiate "but for" test].)

BAJI, No. 3.75 has been revoked. BAJI, No. 3.76 was given a new title, "Cause--Substantial Factor Test," and redrafted to read as follows: "The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm." This instruction was substantially repeated in the 9th edition, published in 2002: "The law defines cause in its own particular way. A cause of [injury] [damage] [loss] [or] [harm] is something that is a substantial factor in bringing about an [injury] [damage] [loss] [or] [harm]."

CACI, Nos. 430 and 431 read as follows:

"A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." (CACI, No. 430.)

"A person's negligence may combine with another factor to cause harm. If you find that [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm, then [name of defendant] is responsible for the harm. [Name of defendant] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [name of plaintiff]'s harm." (CACI, No. 431.)

West's Key Number Digest, Negligence k.1741

SUPPLEMENT: [This section is current through the latest supplement]

See *Mayes v. Bryan* (2006) 139 C.A.4th 1075, 1095, 44 C.R.3d 14 [in medical malpractice action, trial court did not err in refusing to instruct on "but for" causation as to doctor's negligence, because jury was instructed on "substantial factor" test, and "but for" test was subsumed under "substantial factor" test]. *Viner case*:

Cross-Reference: 1 Cal. Proc. (5th), *Attorneys*, §311. CACI, No. 430, as revised in 2007, states after the matter quoted in the text: "[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]".



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CHAPTER IX - Torts

Witkin Summary of California Law XII. NEGLIGENCE: PROXIMATE OR LEGAL CAUSE

A. In General.

3. Cause in Fact and Proximate Cause.

d. Illustrations.

1. Negligence of Medical Personnel or Facility.

6 *Witkin Sum. Cal. Law Torts* § 1188

[§ 1188] Negligence of Medical Personnel or Facility.

In *Osborn v. Irwin Memorial Blood Bank* (1992) 5 C.A.4th 234, 7 C.R.2d 101, plaintiffs, who had read about AIDS and whose son Michael was about to undergo heart surgery, found 7 family members and 35 friends who were willing to donate blood to defendant blood bank to be used during the operation. However, plaintiffs were incorrectly informed by defendant that it did not allow directed donations, and Michael contracted AIDS from the 12 units of blood that were used. Plaintiffs sued defendant on several causes of action, including negligent misrepresentation. Defendant offered to prove that, because of Michael's rare blood type, none of his family could have donated blood for him, and that the 35 friends could have provided only a small fraction of the rare blood he needed. However, the trial judge excluded evidence of Michael's blood type. *Held*, judgment for plaintiffs reversed; the excluded evidence was relevant on the issue of cause in fact.

(a) *Defendant was not entitled to judgment.* Defendant argued that plaintiffs could not establish a prima facie case that denial of directed donations was the cause in fact of Michael's contracting AIDS, because there is no scientific evidence that blood from family and friends is any safer than blood from routine (homologous) donations by the general public. This argument is without merit, even conceding the lack of scientific proof of the relative safety of directed donations. There is a clear chain of cause and effect: Michael received blood from defendant's donor pool because of its misrepresentation about its policy on directed donations, and he contracted AIDS because defendant's blood was contaminated. If the chance of contracting AIDS from any 12 units of blood is less than 50%, as was evidently conceded by defendant, then it is more probable than not that Michael would not have contracted AIDS had he been allowed to use directed donations. Plaintiffs need show no more than this to establish cause in fact. (5 C.A.4th 253.)

(b) *Defendant was entitled to new trial.* Negligent conduct is not a substantial factor in causing harm to another if the harm would have occurred even had there been no negligence. (5 C.A.4th 254, quoting *Rest.2d, Torts* §432.) Here, had the evidence concerning Michael's rare blood type been admitted, it might have caused the jury to conclude that the misrepresentation precluding directed donations did not affect the outcome of his case, because directed donations for him would not have been feasible and most of the blood used in the operation would, in any event, have come from homologous donations. Hence, the exclusion of blood type evidence was erroneous (5 C.A.4th 254) and, given the close nature of the case, the error was prejudicial (5 C.A.4th 256). Whether the blood type evidence, once admitted, will

justify nonsuit will be for the trial judge to determine after all the evidence is in. (5 C.A.4th 257.)

In *Bromme v. Pavitt* (1992) 5 C.A.4th 1487, 7 C.R.2d 608, plaintiff brought an action for the wrongful death of his wife, who had died of colon cancer in 1984 allegedly due to defendant doctor's negligent delay in making the diagnosis. Defendant first saw decedent in June 1980, when she was complaining of abdominal pain, but he did not diagnose its cause, allegedly because he failed to conduct the proper tests. As a result, the cancer was not discovered until September 1981. There was expert testimony that before June 1981, it was medically probable that the cancer, if detected, could have been treated successfully, but that thereafter successful treatment became medically improbable, i.e., less than 50%. At the close of plaintiff's case, the trial judge granted a partial nonsuit precluding the jury from considering any alleged negligent acts by defendant after June 1981. Thereafter, the jury returned a verdict for defendant on the allegations of negligence through June 1981. On appeal, plaintiff claimed that the partial nonsuit was error because California recognizes a cause of action for wrongful death even where the decedent had less than 50% chance for survival. *Held*, judgment affirmed.

(a) Under C.C.P. 377 (infra, §1381) plaintiff was required to prove that defendant's negligence caused the death, i.e., that it was a substantial factor in bringing it about. To accomplish this, plaintiff had to establish a reasonable medical probability that the negligence was sufficient of itself to bring about the death. (5 C.A.4th 1498.)

(b) The trial court correctly concluded that plaintiff did not meet this burden of proof with respect to any negligence after June 1981. The expert witnesses agreed that decedent's chance of surviving the colon cancer was less than 50% after June 1981. Even with proper medical intervention, it was more likely than not she would die from the cancer. Because proper care after June 1981 would not have averted decedent's death, the absence of that care was not of itself sufficient to bring about her death. Consequently, defendant's alleged negligence after June 1981 was not a substantial factor (cause in fact) of decedent's death. (5 C.A.4th 1499.)

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2. Negligence Resulting in Violent Act.

6 *Witkin Sum. Cal. Law Torts* § 1189

[§ 1189] Negligence Resulting in Violent Act.

In *Nola M. v. University of Southern Calif.* (1993) 16 C.A.4th 421, 20 C.R.2d 97, plaintiff was raped on the campus of defendant University of Southern California. The attack occurred after dark while plaintiff was walking on a sidewalk in front of the human resources center and was grabbed from behind by an unknown assailant and dragged to some bushes in front of the center. Plaintiff's expert described the inadequacy of defendant's security measures, and the ways in which they could have been improved, but could not say that 2 or 10 or 20 more guards or other security measures would have prevented plaintiff's injuries. *Held*, judgment for plaintiff reversed; even assuming that defendant breached its duty to protect plaintiff from foreseeable criminal assault, there was no proof of any causal connection between defendant's negligence and plaintiff's injury.

(a) "We think it comes down to this: When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person. ... But where, as here, we are presented with an open area which could be fully protected, if at all, only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented." (16 C.A.4th 436, citing *Noble v. Los Angeles Dodgers* (1985) 168 C.A.3d 912, 214 C.R. 395, *supra*, §1132.)

(b) "Otherwise, where do we draw the line? How many guards are enough? Ten? Twenty? Two hundred? How much light is sufficient? Are Klieg lights necessary? Are plants of any kind permissible or is USC to chop down every tree and pull out each bush? Does it matter if the campus looks like a prison? Should everyone entering the campus be searched for weapons? Does every shop, every store, every manufacturing plant, have to be patrolled by private guards hired by the owner? Does a landowner have to effectively close his property and prevent its use altogether? ... To characterize a landowner's failure to deter the wanton, mindless acts of violence of a third person as the 'cause' of the victim's injuries is (on these facts) to make the landowner the insurer of the absolute safety of everyone who enters the premises." (16 C.A.4th 437.)

(c) Police protection is, and should remain, a governmental and not a private obligation. Making landowners insurers of absolute safety would force businesses in high crime areas to either close or charge such high prices that the

poor would be unable to meet their basic needs. (16 C.A.4th 438.) It would also create a form of victim compensation that has not been legislatively sanctioned. (16 C.A.4th 438.)

The element of causation imposes rational limits on the liability that otherwise attaches under the judiciary's expansive view of duty. "If the theoretical underpinnings of the duty cases are correct, there must be a legally sound approach to the causation issue and that is what we have attempted to articulate in this case. If there is a flaw in our analysis, we suggest it may be time for the Supreme Court to reexamine the concept of duty ... in the context of a society which appears unable to effectively stem the tide of violent crime. But unless we as judges limit the duty we created, it appears inevitable that the Legislature will do it for us." (16 C.A.4th 438.)

In *Leslie G. v. Perry & Associates* (1996) 43 C.A.4th 472, 50 C.R.2d 785, plaintiff tenant, who was raped in the garage of defendant landlords' apartment building, sued on the ground that they had negligently failed to repair a broken security gate. Deposition testimony by plaintiff's security expert and by investigating police officers, offered when defendant moved for summary judgment, indicated that the deponents did not in fact know how the rapist entered or left the garage, although the expert offered his opinion that the rapist was attracted to the garage because of the broken gate. *Held*, summary judgment for defendants affirmed; there was insufficient evidence of causation.

(a) The causation element of negligence is satisfied when the plaintiff establishes that the defendant's breach of duty (negligent act or omission) was a substantial factor in bringing about the plaintiff's harm, and that there is no rule of law relieving the defendant of liability. (43 C.A.4th 481, citing *Mitchell v. Gonzales* (1991) 54 C.3d 1041, 1052, 1 C.R.2d 913, 819 P.2d 872, *supra*, §1187, and *Nola M.*) In the context of a case involving a duty to secure areas against foreseeable criminal acts of third parties, the causation analysis is unaffected by the fact that an assailant's conduct is criminal and not merely negligent. The assailant's attack is not a superseding cause and does not, in itself, relieve the defendant of liability. The question is therefore whether there is evidence supporting plaintiff's claim that defendants' negligence was the legal cause of her injuries. (43 C.A.4th 481.)

(b) It is clear from the evidence presented that causation was not--and could not be--established. (43 C.A.4th 482.) Plaintiff did not raise a triable issue of material fact about whether, but for defendants' negligence, the rape would not have occurred. There was no direct evidence that the rapist entered or departed through the broken gate (or even that the broken gate was the only way he could have entered or departed). The opinion testimony of plaintiff's expert did not constitute substantial evidence of causation. (43 C.A.4th 483.)

(c) A landlord is not the insurer of the absolute safety of everyone who enters the premises against the ravages of today's violent society. (43 C.A.4th 489.) If as a matter of public policy the Legislature concludes that it is proper to impose this obligation, then it is the legislative branch of government that must make that decision and adopt a rule of strict liability. Until that time, "this case and others like it expose a victim's damage suit against her landlord for what it is--an artificial scheme designed not to fairly assess culpability but to reach into the deepest pocket." (43 C.A.4th 490.)

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3. Negligent Hiring of Tortfeasor.

6 *Witkin Sum. Cal. Law Torts* § 1190

[§ 1190] Negligent Hiring of Tortfeasor.

In *Evan F. v. Hughson United Methodist Church* (1992) 8 C.A.4th 828, 10 C.R.2d 748, plaintiffs sued the Hughson Methodist Church and the Annual Conference of the church of which Hughson was a member, for sexual molestation by a pastor. The trial court granted summary judgment for defendants, and the Court of Appeal reversed the judgment in part. The opinion deals with the issues raised by the motions for summary judgment and the responses to it.

The Conference learned that M had sexually molested adolescent males in 1971, and in 1972 the Conference advised M that, if he would "step down" from the ministry, no formal charges would be made and he would retain his ordination. M agreed, and he worked for some years as a counselor at a secular high school. In 1977, he requested an appointment as the youth director of Hughson Church. D, district superintendent of the Conference, supported his appointment, despite information that M had been fired from his counselor position because of sexual molestation charges. Neither the Conference nor D informed Hughson Church or the pastor-parish relations Conference Committee of these matters, although when M sought and obtained reappointment to the active ministry in 1982, the Committee was aware that M had been charged with inappropriate sexual behavior. In 1985, M sexually molested plaintiff E, 13 years old. Two weeks later E sexually molested his younger sister, plaintiff EY, 6 years old. Based on his molestations of E, M was convicted of committing lewd acts with a child.

In 1990, E, EY, and their parents sued the Conference, Hughson Church, M, and D. "The cornerstone of the suit--at least as it pertains to Conference and Hughson Church--is a cause of action for the negligent hiring of M. There was also a cause of action for negligent misrepresentation of M's pedophile history. Negligence and negligent infliction of emotional distress were also alleged; these claims arose out of the molestations themselves and the defendants' counseling of and ministry to all plaintiffs." (8 C.A.4th 833.) The trial court ruled that the parents' causes of action were time-barred; that EY could not recover from Conference, D, or M; and that Hughson Church was entitled to summary judgment against all plaintiffs because it had no knowledge of M's sexual history. *Held*, summary judgment regarding EY affirmed, but summary judgment on E's negligent hiring cause reversed.

(a) *Proximate cause: policy considerations.*

(1) EY's action invokes policy concerns regarding the limits of liability, and the trial court appropriately analyzed this action in the context of the policy considerations component of proximate cause. (8 C.A.4th 834, citing *Maupin v. Widling* (1987) 192 C.A.3d 568, 237 C.R. 521, Prosser & Keeton, and the text.) Causation in fact is not involved here. The Conference's hiring of M as the pastor at Hughson Church can be deemed a substantial factor and thus a cause in fact of EY's injury. (8 C.A.4th 835, citing *Mitchell v. Gonzales* (1991) 54 C.3d 1041, 1 C.R.2d 913, 819 P.2d 872, supra, §1187.)

(2) "As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. ... This limitation is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains. Often to greater extent, however, the legal limitation on the scope of liability is associated with policy--with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient." (8 C.A.4th 835, quoting Prosser and Keeton.)

(b) *Policy considerations preclude EY's negligent hiring action against Conference.*

(1) An employer may be liable to a third person for negligently hiring an incompetent or unfit employee. California follows the rule of Rest.2d, Agency §213, explained in Comment d: "The principal may be negligent because he has reason to know that the servant or other agent, *because of his qualities, is likely to harm others* in view of the work ... entrusted to him. ... An agent, although otherwise competent, may be incompetent *because of his reckless or vicious disposition*, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, *he is subject to liability for harm caused by the vicious propensity*." (8 C.A.4th 836.) A related rule is stated in Rest.2d, Torts §449 (infra, §1215): "[I]n a large number of situations the very reason why the defendant's conduct is negligent is that it creates the risk of the particular intervening criminal act." (8 C.A.4th 836, quoting the text.)

(2) "[EY] wants to sue Conference for negligently hiring [M] because the victim of [M]'s molestation, [E], in turn molested her. But [EY]'s position is a step removed from the negligently hired employee and a step removed from that employee's conduct. ... [T]he theory of negligent hiring here encompasses the *particular risk of molestation by an employee* with a history of this specific conduct. It does not encompass acts done by nonemployees, such as [E], or consequences involving less particular, even speculative, hazards." (8 C.A.4th 837.) To conclude otherwise would impose liability on "the person who hired the person who molested the person who molested the person in [EY]'s position." This "convoluted syntax" graphically illustrates the problem of imposing liability for negligent hiring in light of plaintiffs' theory of "molestation perpetuation." (8 C.A.4th 837.)

(3) "Aside from the question of *how* the molestation victim might 'act out,' there is the question of *when* the victim might act, if at all. How long is the span of liability? Since we are dealing with *child* molestation, conceivably the child could wait for many years until the age of majority to sue." (8 C.A.4th 837.)

(4) "Finally, it must be realized that [EY]'s action for negligent hiring against Conference is based on two intervening criminal acts of molestation. In the past, courts were reluctant to impose civil liability when a single criminal act had intervened." (8 C.A.4th 838, citing the text, §§1214, 1215.) "This reluctance has given way in more recent times, particularly in the negligent hiring-criminal act arena where it is necessarily incompatible. ... But where two or more criminal acts have intervened, this reluctance may still be justified." (8 C.A.4th 838.)

(c) *EY cannot maintain related causes of action.* EY's cause of action for emotional distress is asserted as an element of damages arising out of the negligent hiring of M; and the fall of her negligent hiring action spells the fall of her emotional distress claim. (8 C.A.4th 838.) The policy concerns and doctrinal limitations which defeat her cause of action against Conference apply with equal force to her identical actions against *Hughson Church*. (8 C.A.4th 841.)

(d) *E can maintain action against Hughson Church.*

(1) The trial court granted summary judgment because the church had no actual knowledge of M's history. (8 C.A.4th 842.) However, under the rule and Comment in the Agency Restatement discussed above, "an employer can be held liable for negligent hiring if he knows the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring him." (8 C.A.4th 843.)

(2) "The summary judgment evidence viewed most liberally to [E] shows the following: Hughson Church hired [M] for the youth director position it created in 1977. This hiring took place without an investigation, but was based on the knowledge that [M] was a Methodist minister working as a counselor at a secular high school and on the fact that several parishioners in the church knew and recommended [M]. When the pastor position at Hughson Church became available in 1982, [M] approached the relevant committee at the church. ... [M] informed the Committee that he was no longer employed as a school counselor, that he was available to return to full-time ministry as the church's pastor and that he would enjoy the Committee's support in obtaining the position. Pursuant to the pastor appointment procedure, Committee informs the Conference of the vacancy, consults with the Conference regarding the appointment and then approves or disapproves the Conference's selection. Committee agreed to support [M]--with [E]'s father as the sole dissenter--if he was reinstated, permitted to return to full-time ministry." (8 C.A.4th 843.)

(3) Although the Church had no actual knowledge of M's past, "the evidence recounted above presents triable issues of material fact regarding whether the Church had reason to believe M was unfit or whether the Church failed to use reasonable care in investigating M." (8 C.A.4th 843.) (See *Roman Catholic Bishop of San Diego v. Superior Court* (1996) 42 C.A.4th 1556, 50 C.R.2d 399 [charge of negligent hiring of parish priest who sexually abused 15-year-old girl; distinguishing *Evan F.*]; *Doe v. Capital Cities* (1996) 50 C.A.4th 1038, 58 C.R.2d 122 [complaint for negligent hiring and supervision failed where, although it alleged that employer knew that its casting director purchased drugs and used his position to gain sexual favors, no facts were alleged showing that it was employer's negligent hiring and supervision that resulted in director's sexual assault of plaintiff]; *Federico v. Superior Court* (1997) 59 C.A.4th 1207, 1213, 69 C.R.2d 370 [employer must be chargeable with facts that would warn reasonable person that employee presents undue risk of harm to third persons in light of particular work to be performed; defendant hairstyling college was not negligent in hiring employee, who had been convicted of sexually molesting juveniles, to supervise training of adults]; *Mendoza v. Los Angeles* (1998) 66 C.A.4th 1333, 1342, 78 C.R.2d 525 [no "but for" (cause in fact) connection between city's negligent hiring of police officer and permitting him to carry concealed weapon while off duty and officer's act of killing his fiancée with his own weapon during domestic argument]; 101 A.L.R.5th 1 [liability of church or religious organization for negligent hiring, retention, or supervision of clergy member based on sexual misconduct].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Delfino v. Agilent Technologies* (2006) 145 C.A.4th 790, 815, 52 C.R.3d 376 [employer whose employee transmitted Internet threats using employer's computer system was not liable, under negligent supervision theory, to threat recipients; employer owed recipients no duty in absence of business relationship or close connection with recipients' injuries, and, even assuming existence of duty, employer did not breach any duty to recipients, as it was unaware of employee's conduct]; *Deutsch v. Masonic Homes of Calif.* (2008) 164 C.A.4th 748, 783, 80 C.R.3d 368 [tort of negligent hiring or supervision allows for liability of principal for acts of agent where principal is either negligent or reckless in hiring or supervising agent; trial court correctly refused to give instruction that principal was required to have actual knowledge or specific warning that agent had engaged in unlawful sexual conduct, and properly ruled that standard to be used was actual or constructive knowledge].



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CHAPTER IX - Torts

Witkin Summary of California Law
XII. NEGLIGENCE: PROXIMATE OR LEGAL CAUSE

A. In General.

3. Cause in Fact and Proximate Cause.

d. Illustrations.

4. Other Acts of Negligence.

6 *Witkin Sum. Cal. Law Torts* § 1191

[§ 1191] Other Acts of Negligence.

In *Arthur v. Santa Monica Dairy Co.* (1960) 183 C.A.2d 483, 490, 6 C.R. 808, H, a boy driving a car, was looking on the floor for a burning cigarette for some 10 seconds. He ran into defendant's illegally double-parked milk truck, in plain sight. Although H was barred by contributory negligence, plaintiff, his guest, was not, and seemingly had a right to recover; but the court held that defendant's negligence was neither the actual nor the proximate cause of the accident.

(a) *Not a cause in fact.* This accident would have happened even if the truck had been going slowly, had legally stopped for a traffic signal or other reason, or if the thing H ran into had been any other obstruction in the street. "[T]he driver simply was not looking and thus would have struck anything in front of him." (183 C.A.2d 488, citing the text.)

(b) *Not a proximate cause.* The independent intervening act of H, in taking his eyes from the road, was not reasonably likely to happen and was not foreseeable within the test of proximate cause. "[I]t would hardly be expected that the driver of the milk truck should or would have been expected to reasonably anticipate that any driver would run head-on into his truck parked ahead of him which was in plain sight and had been stopped for some time." (183 C.A.2d 490.) (See 13 *Hastings L. J.* 160 [criticism of decision].)

In *Williams v. Wraxall* (1995) 33 C.A.4th 120, 39 C.R.2d 658, plaintiff was convicted of murder and related offenses, partly on the basis of the testimony by a forensic serologist presented by the prosecution. In this action, plaintiff sued a private forensic serologist hired by plaintiff's brother, who was charged with the same crimes. Plaintiff claimed that defendant serologist's failure or refusal to testify on his behalf was a cause of his conviction. Essentially, the prosecution serologist placed plaintiff in the class of persons who might have contributed the samples, while the testimony of defendant serologist was unable to include or exclude him from the secretor class. *Held*, judgment for plaintiff reversed.

(a) Under the substantial factor test, plaintiff must prove that defendant serologist's negligence was a substantial factor in causing the harm. His failure or refusal to testify need not have been the sole cause of the harm, but plaintiff must show that there was a probability that, but for the negligence, plaintiff would have obtained a more favorable result, i.e., he would have been acquitted. Plaintiff cannot recover damages based on a mere possibility that the

negligence of the defendant caused the harm. (33 C.A.4th 132.) Here, there was no credible evidence that defendant's test results would have resulted in a judgment of acquittal in plaintiff's first murder trial. Defendant's test results, although inconsistent with those of the prosecution's expert, are not particularly exculpatory in nature. Plaintiff's guilt was established by the testimony of many witnesses and that the testimony of the prosecution's serologist was mere corroborating evidence that was rebutted by another witness. (33 C.A.4th 133.)

(b) Plaintiff argued that causation was established under the "lost chance" theory developed in medical malpractice cases, where the defendant's malpractice deprived the plaintiff of a statistically measurable chance of survival. The "lost chance" theory essentially reduces a plaintiff's burden of proof from a probability to a possibility that medical malpractice resulted in the loss of a chance to live. This theory has been rejected in California on legal and policy grounds. (33 C.A.4th 135, citing *Simmons v. West Covina Med. Clinic* (1989) 212 C.A.3d 696, 260 C.R. 772, supra, §978.) Even where recognized, the theory has been limited to medical malpractice cases. (33 C.A.4th 135, citing *Bromme v. Pavitt* (1992) 5 C.A.4th 1487, 1506, 7 C.R.2d 608, supra, §1188.)

(c) Finally, plaintiff argued that the burden should be shifted to defendants. It is true that in negligence and products liability cases, the burden of proof is sometimes shifted to the defendant. This is especially true where the defendant is obviously guilty, but where his or her negligence has made it impossible for the plaintiff to prove that defendant is guilty. In products liability cases, no definitive or general rule exists that delineates the circumstances under which the defendant in such a case must bear the burden of proof. Here, while the serologist's test results were not presented, the evidence was not lost and was available to both parties to prove causation. Further, plaintiff failed to establish a substantial probability of causation, which is a condition precedent to shifting the burden of proof. Under these conditions, there is no policy reason to shift the burden of proof to defendants. (33 C.A.4th 136.) (See *Nelson v. Los Angeles* (2003) 113 C.A.4th 783, 790, 6 C.R.3d 650 [expert's opined that police hog-tying procedure was substantial factor in causing arrestee's death, and fact that he rejected defendant's claims of causation did not render his opinion unreasonable].)

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B. Direct Causation.

1. Liability for Unforeseeable Consequences.

6 Witkin Sum. Cal. Law Torts § 1192

[§ 1192] Liability for Unforeseeable Consequences.

In cases of direct causation (without an intervening force), the traditional view is that foreseeability is immaterial. The defendant is liable for all consequences that follow in unbroken sequence from his or her negligent act, regardless of whether the defendant could have anticipated them. This has been termed the "direct consequence rule" or "natural and proximate consequence rule," and is illustrated by the famous case of *In re Polemis* (1921) 3 K.B. 560. Defendants' employees negligently dropped a plank into the hold of a ship, and it struck metal, causing a spark to explode gasoline vapor in the hold, destroying the ship. Defendants were held liable. (See Dobbs, *The Law of Torts* §187 et seq.; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §494 et seq.; 15 *Cal. L. Rev.* 1, 8; 20 *Cal. L. Rev.* 473; 38 *Cal. L. Rev.* 391, 399.)

Rest.2d, Torts §435 offers the following rationalization:

(1) If the actor's conduct is a substantial factor in bringing about the harm, he or she is liable despite unforeseeability of the extent of the harm or the manner in which it occurred.

(2) However, the conduct may be held not a legal cause "where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."

West's Key Number Digest, Negligence k.371, 385, 387

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B. Direct Causation.
2. Concurring Causes.

6 Witkin Sum. Cal. Law Torts § 1193

[§ 1193] Concurring Causes.

The defendant's negligent act need not be the *sole cause* of the injury; it is enough that it be *a cause*. When the separate and distinct negligent acts of two persons are in substantially simultaneous operation, and contribute to cause the injury, "each is and both are the proximate cause," and the plaintiff may recover in full from either of the parties, or both. (See *Canvin v. General Brewing Corp.* (1937) 20 C.A.2d 49, 53, 66 P.2d 691; *Modica v. Crist* (1954) 129 C.A.2d 144, 147, 276 P.2d 614; *Eramdjian v. Interstate Bakery Corp.* (1957) 153 C.A.2d 590, 607, 315 P.2d 19; *Hughey v. Candoli* (1958) 159 C.A.2d 231, 240, 323 P.2d 779; *Thomsen v. Rexall Drug & Chemical Co.* (1965) 235 C.A.2d 775, 783, 45 C.R. 642; *Hart v. Browne* (1980) 103 C.A.3d 947, 959, 163 C.R. 356; *John B. Gunn Law Corp. v. Maynard* (1987) 189 C.A.3d 1565, 1571, 235 C.R. 180; *Espinosa v. Little Co. of Mary Hosp.* (1995) 31 C.A.4th 1304, 1314, 37 C.R.2d 541; *Logacz v. Limansky* (1999) 71 C.A.4th 1149, 1155, 84 C.R.2d 257; *Rest.2d, Torts* §§432(2), 439; 4 Harper, James & Gray 2d §20.2, 20.3; 57A Am.Jur.2d (2004 ed.), *Negligence* §514 et seq.; 19 Cal. L. Rev. 630; 20 Cal. L. Rev. 396, 402; 13 A.L.R.3d 431 [liability of participant in unauthorized highway race, where injury to plaintiff directly caused by another racer]; BAJI, No. 3.77; CACI, No. 431.)

A familiar example is the collision of two vehicles, driven by two negligent drivers, resulting in injury to the plaintiff, who is either a pedestrian, a passenger in one of the cars, or a driver or passenger in another vehicle. (See *Blackwell v. American Film Co.* (1920) 48 C.A. 681, 684, 192 P. 189; *Springer v. Pacific Fruit Exchange* (1928) 92 C.A. 732, 737, 268 P. 951; *Fishman v. Silva* (1931) 116 C.A. 1, 7, 2 P.2d 473; *Herron v. Smith Bros.* (1931) 116 C.A. 518, 521, 2 P.2d 1012; *Cummings v. Kendall* (1940) 41 C.A.2d 549, 558, 107 P.2d 282; *Hardison v. Bushnell* (1993) 18 C.A.4th 22, 28, 22 C.R.2d 106; cf. *Petersen v. Lewis* (1935) 2 C.2d 569, 572, 42 P.2d 311 [principle probably should have been applied].)

West's Key Number Digest, Negligence k.421

SUPPLEMENT: [This section is current through the latest supplement]

See *Third Eye Blind v. Near North Entertainment Ins. Services, LLC* (2005) 127 C.A.4th 1311, 1318, 26 C.R.3d 452, citing the text [resolution of coverage issue in favor of insureds did not negate their negligence claims against business manager and insurance broker for failing to advise them about policy exemptions and to obtain additional coverage; whether manager and broker failed to give competent advice on insurance matters was independent question not dependent on whether insurer was justified in denying coverage]; 4 Harper, James & Gray 3d §20.3.



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B. Direct Causation.
3. Concurrent Negligence but Single Unidentified Cause.

6 Witkin Sum. Cal. Law Torts § 1194

[§ 1194] Concurrent Negligence but Single Unidentified Cause.

A significant doctrine, phrased in terms of burden of proof but having a clear substantive effect, was announced in *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1. Plaintiff and defendants T and S were hunting quail. With knowledge of plaintiff's location and with an unobstructed view, defendants both fired their shotguns in plaintiff's direction. The major injury for which damages were sought was caused by a pellet entering plaintiff's eye, which could have come only from one of the guns, and the lower court could not determine which defendant had fired it. *Held*, judgment against both defendants was proper. (a) Both defendants were negligent toward plaintiff. (b) Although only one defendant's act was the proximate cause of the major injury, defendants were in a better position than plaintiff to offer evidence on the issue of causation, and fairness required that the burden of proof be shifted to them. "They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless." (33 C.2d 86.)

The court was greatly influenced by the similar result reached in *Ybarra v. Spangard* (1944) 25 C.2d 486, 154 P.2d 687, under the *res ipsa loquitur* doctrine, but two distinctions might be noted: (a) In *Ybarra*, involving injury to an unconscious patient during an operation, the issue was whether one or more defendants were negligent; in the instant case, negligence was established, and the issue was causation. (2) In *Ybarra*, the defendants might well have been able to offer evidence to escape liability; in the instant case it was actually impossible to identify the gun that caused the injury, so that, in practical effect, the shifting of the burden of proof necessarily resulted in joint liability.

Discussion of the reasoning and effect of *Summers* has been extensive. (See *Haft v. Lone Palm Hotel* (1970) 3 C.3d 756, 773, 91 C.R. 745, 478 P.2d 465, *infra*, §1195; *Dumin v. Owens-Corning Fiberglas Corp.* (1994) 28 C.A.4th 650, 657, 33 C.R.2d 702, *infra*, §1498; *Lineaweaver v. Plant Insulation Co.* (1995) 31 C.A.4th 1409, 1417, 37 C.R.2d 902; *Setliff v. E.I. Du Pont de Nemours & Co.* (1995) 32 C.A.4th 1525, 1534, 38 C.R.2d 763; *Kennedy v. Baxter Healthcare Corp.* (1996) 43 C.A.4th 799, 812, 50 C.R.2d 736; *Edwards v. A.L. Lease & Co.* (1996) 46 C.A.4th 1029, 1035, 54 C.R.2d 259, *infra*, §1498; *Rest.2d, Torts* §433B(3) and Comment f; 4 Harper, James & Gray 2d §20.2; 38 Cal. L. Rev. 389; 23 So. Cal. L. Rev. 412; 9 Stanf. L. Rev. 82; 63 A.L.R.5th 195 ["concert of activity," "alternative liability," "enterprise liability," or similar theory as basis for imposing liability on one or more manufacturers of defective uniform product, in absence of identification of manufacturer of precise unit or batch causing injury]; and see BAJI, No. 3.80 [when precise cause cannot be identified]; CACI, No. 434 [alternative causation].)

In *Vahey v. Sacia* (1981) 126 C.A.3d 171, 178 C.R. 559, A's car stopped on a highway and was hit by B's car; C ran into B; plaintiff's car, driven by her husband, hit C's car; defendant's car then hit plaintiff's car. Other evidence could have supported the conclusion that plaintiff's husband stopped and then defendant ran into him and pushed him into C. Plaintiff suffered injury either in the collision with C or the collision with defendant, but there was evidence that she would not have been injured if she had been wearing a seat belt. The negligence of A, B and/or C as a contributing cause of plaintiff's injury was clear, and plaintiff requested BAJI, No. 3.80 on the *Summers* doctrine of shifting the burden of proof on causation. The trial judge refused to so instruct. *Held*, reversed.

Defendant's arguments against application of the *Summers* doctrine here are unconvincing. Thus, the fact that plaintiff settled with all parties except defendant is immaterial; *Summers* applies to multiple *tortfeasors*, not multiple *defendants*. And the introduction of comparative negligence did not obviate the reason for the *Summers* rule. (126 C.A.3d 171.) (See Use Note to BAJI, No. 3.80 [revised to provide that, depending on facts, instruction *may or may not* be appropriate in multiparty traffic accident cases].)

West's Key Number Digest, Negligence k.422

SUPPLEMENT: [This section is current through the latest supplement]

See 4 Harper, James & Gray 3d §20.2; 59 *Stanf. L. Rev.* 1065 [scope of *res ipsa loquitur* doctrine].



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B. Direct Causation.
4. Unknown Cause.

6 Witkin Sum. Cal. Law Torts § 1195

[§ 1195] Unknown Cause.

An extraordinary substantive advance, again expressed in procedural terms (see *supra*, §1194), was made in *Haft v. Lone Palm Hotel* (1970) 3 C.3d 756, 91 C.R. 745, 478 P.2d 465. Defendants operated a large motel with a swimming pool violating safety regulations (no lifeguard or notice thereof or warning of depth). Plaintiffs were a mother and daughter. The father and 5-year-old son, both of whom were unable to swim, went into the pool on rubber rafts. They were later discovered drowned in the deep end. There was no direct evidence of the circumstances, and the jury verdict was for defendants. *Held*, judgment reversed. The evidence of negligence was overwhelming, but causation presented a more difficult problem.

(a) Defendant's basic contention was that its statutory duty would be satisfied by either a lifeguard or a warning; and that, because decedents were the only people in the pool at the time, the absence of a lifeguard was as obvious as if there had been a notice; hence, the failure to post a notice of an obvious fact (no lifeguard) could not be the proximate cause of their death. This reasoning would, however, subvert the major purpose of the statute. Accordingly it was held that plaintiffs sustained their initial burden by showing violation of the statute, and that the burden then shifted to defendants to show that their violation was not a proximate cause. (3 C.3d 768, 769.)

(b) The remaining question was how to determine the issue of causation in the absence of any direct evidence as to the precise manner in which the drownings occurred. (1) The negligent failure to provide a lifeguard "not only stripped decedents of a significant degree of protection to which they were entitled, but also deprived the present plaintiffs of a means of definitively establishing the facts leading to the drownings." (3 C.3d 771.) (2) The situation is similar to that in *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1, *supra*, §1194, and *Ybarra v. Spangard* (1944) 25 C.2d 486, 154 P.2d 687: "Because no persons witnessed the drownings (in part a result of the very negligence at issue) and because neither of the victims survived, plaintiffs can no more adduce definitive evidence of causation than the injured hunter in *Summers* or the unconscious patient in *Ybarra*." (3 C.3d 773.) In some respects the case is stronger than *Summers*. There, uncertainty of proof was not a foreseeable consequence; here, the lack of evidence on causation is a direct and foreseeable result of defendants' negligence. (3 C.3d 773.)

(c) Thus, to prevent nullification of the statutory protection, the burden of proof must shift to the defendant whose negligent act made evidence of causation unavailable: "Since the pool-owner violates the statute, since he creates the dangerous condition and exercises control over it, since the death occurs upon his premises, he cannot take refuge in the

position that the burden of proof rests with the probable victim of his statutory violation." (3 C.3d 776.)

(d) This holding is consistent with "the emerging tort policy of assigning liability to a party who is in the best position to distribute losses over a group which should reasonably bear them." (3 C.3d 775, footnote 20.) (See 23 *Hastings L. J.* 650.)

Haft v. Lone Palm Hotel was distinguished in *Smith v. American Motor Lodge* (1974) 39 C.A.3d 1, 113 C.R. 771. Plaintiff's two children, ages 10 and 11, were drowned in defendant's pool. In the wrongful death action, plaintiffs offered evidence that the safety rope and buoys required by a state safety regulation to mark the break from shallow to deep water were not in place, and that the children drowned where the line should have been situated. On the basis of this evidence, they asked for an instruction on shifting the burden of proving proximate cause, which was refused. *Held*, judgment on a verdict for defendant affirmed. (a) *Haft* involved decedents who were not contributorily negligent; here, the children, who could read, and knew they could not swim, entered a pool with a posted notice warning of the absence of a lifeguard and stating that children should be accompanied by an adult. (b) The lack of evidence of causation in *Haft* was due to the defendant's negligent failure to provide a lifeguard; the absence of a safety rope did not make it more difficult for plaintiffs to prove their case. (39 C.A.3d 1.)

Haft was also distinguished in *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 C.A.3d 396, 209 C.R. 456, where the evidence of an instrumentality that caused the injury was lacking. Plaintiff, alleging that her cancer of the cervix was caused by ingesting defendant's contraceptive drug, was nonsuited on the ground that the experts testified that the causal connection was less than a 50-50 possibility. (163 C.A.3d 404, 405.)

The *Haft* approach was employed in *Harris v. Irish Truck Lines* (1974) 11 C.3d 373, 113 C.R. 489, 521 P.2d 481. Plaintiff was injured in an automobile collision when the brakes on defendant's truck failed. The judge instructed the jury on the presumption of negligence from violation of *Veh.C.* 26453 (brakes maintained in good working order), gave former BAJI, No. 3.45, and also instructed that, in rebutting the presumption, defendant must show "the cause of the failure." *Held*, the instruction was proper, and judgment for plaintiff affirmed; evidence is often unavailable, for the defendant will repair the brakes before any claim is made by the plaintiff. "When a defendant seeks to excuse his failure to control his car on the ground of brake failure, he concedes the statutory violation and assumes the burden of rebutting the presumption of negligence. When examination of the vehicle subsequent to the accident fails to reveal a defect which caused the alleged brake failure, the plaintiff should not be penalized; absence of evidence of a defect renders the entire claim of brake failure highly suspect and indicates that the defendant's failure to control his vehicle was most likely due to inattentiveness or other lack of care. On the other hand, when evidence of the causative defect is available, such evidence will often by itself vitiate any claim by the defendant of compliance with the nondelegable duty to carefully maintain brakes; a defendant who is in a better position to discover and preserve such evidence should not be permitted to profit from the plaintiff's inability to produce it." (11 C.3d 379.)

In *Fagerquist v. Western Sun Aviation* (1987) 191 C.A.3d 709, 236 C.R. 633, the judge instructed the jury that defendant airline had the burden of establishing that its failure to comply with Federal Aviation Administration (FAA) regulations was not the proximate cause of a plane crash that killed plaintiff's father. In holding that this instruction was improper, the court distinguished *Haft* on two grounds: *First*, the evidence, i.e., a defective cylinder, was not destroyed in the crash so as to prevent accident reconstruction, analysis, and scientific examination. *Second*, the FAA violations, i.e., noncompliance with inspection and maintenance procedures, did not directly go to plaintiff's inability to establish causation; compliance with the regulations would not have eased plaintiff's burden of proving that defendant's negligent inspection and maintenance proximately caused the accident. (191 C.A.3d 726.)

Other decisions are illustrative. (See *Thomas v. Lusk* (1994) 27 C.A.4th 1709, 1719, 34 C.R.2d 265 [malpractice action against attorney who, in products liability action, had failed to obtain defective hammer that caused injury to plaintiff; plaintiff failed to establish substantial probability of causation so as to shift burden of proof; distinguishing *Haft*]; *Ochoa v. Pacific Gas & Elec. Co.* (1998) 61 C.A.4th 1480, 1485, 72 C.R.2d 232 [plaintiff's expert's "feeling" that leak of some unspecified gas probably aggravated plaintiff's respiratory problems (because there was no other possible

cause) was insufficient to rebut two defense experts who stated that, assuming methane gas leak in plaintiff's home, this exposure could not have caused her symptoms]; *Galanek v. Wismar* (1999) 68 C.A.4th 1417, 1424, 81 C.R.2d 236 [in attorney malpractice action based on spoliation of evidence, burden of proving causation shifted to defendants, because requiring plaintiff to establish causation would have allowed defendants to take advantage of lack of proof resulting from attorney's own negligence; following *Haft*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Padilla v. Rodas* (2008) 160 C.A.4th 742, 752, 73 C.R.3d 114, Supp., supra, §1058 [unlocked gate to swimming pool in which child drowned was not proximate cause of death, where child could have gained access to pool through two other entrances].



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C. Normal Intervening Forces.

6 Witkin Sum. Cal. Law Torts § 1196

[§ 1196] Normal Intervening Forces.

Where the defendant's negligent conduct is the stimulus for some other act or force that then causes the harm, there is no break in the chain of causation. The intervening force that is the normal reaction to the defendant's negligent conduct is characterized by *Rest.2d, Torts* §443 as a "normal intervening force," and it is not a superseding cause. (See *Werkman v. Howard Zink Corp.* (1950) 97 C.A.2d 418, 425, 218 P.2d 43; *Brewer v. Teano* (1995) 40 C.A.4th 1024, 1037, 47 C.R.2d 348, *infra*, §1218) [prosecution of plaintiff for leaving scene of accident was not normal intervening force].)

A frequent example is found in the acts of persons frightened by the defendant's negligence. In *Champagne v. A. Hamburger & Sons* (1915) 169 C. 683, 147 P. 954, defendant's crowded elevator fell as a result of negligent maintenance; plaintiff was thrown to the floor; the other passengers, panic-stricken, rushed out, trampling upon her and causing injuries. *Held*, the intervening act was the natural and probable result of the original negligence, and defendant was liable. (169 C. 689.) (See *Rest.2d, Torts* §444; 4 Harper, James & Gray 2d §20.5; 57A Am.Jur.2d (2004 ed.), *Negligence* §§644, 645.)

In *Titlow v. Florence Trading Co.* (1917) 35 C.A. 457, 170 P. 172, defendant negligently delivered gasoline (instead of kerosene) that plaintiff's wife placed in a kerosene lamp. Noticing the peculiar flame, she rushed out to call a neighbor, instead of attempting to get rid of the lamp. *Held*, defendant was liable for damages from the resulting explosion. (35 C.A. 459.)

The same principle is involved where the defendant's negligence puts someone's property or person in danger, and that person or a third person makes reasonable attempts at protection. In *Haverstick v. Southern Pac. Co.* (1934) 1 C.A.2d 605, 37 P.2d 146, a grass fire started through the negligence of the employees of defendant railroad, and plaintiff, without negligence, was injured while attempting to save his property. *Held*, his act was not a superseding cause, and he could recover not only for damage to his property, but also for his personal injuries. (1 C.A.2d 611.) (See *Rest.2d, Torts* §445; 42 A.L.R.2d 494 [liability of one negligently causing fire for injuries sustained in fighting the fire or attempting to save life or property].) (On the rescue rule, see *infra*, §1306.)

West's Key Number Digest, Negligence k.431

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §20.5.



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Witkin Summary of California Law XII. NEGLIGENCE: PROXIMATE OR LEGAL CAUSE

D. Independent Intervening Act.

1. Test of Foreseeability.

a. In General.

6 Witkin Sum. Cal. Law Torts § 1197

[§ 1197] In General.

Where, subsequent to the defendant's negligent act, an independent intervening force actively operates to produce the injury, the chain of causation may be broken. It is usually said that if the risk of injury might have been reasonably foreseen, the defendant is liable, but that if the independent intervening act is highly unusual or extraordinary, not reasonably likely to happen and hence not foreseeable, it is a *superseding cause*, and the defendant is not liable. (See generally *Merrill v. Los Angeles Gas & Elec. Co.* (1910) 158 C. 499, 504, 111 P. 534; *Stasulat v. Pacific Gas & Elec. Co.* (1937) 8 C.2d 631, 637, 67 P.2d 678; *Mosley v. Arden Farms Co.* (1945) 26 C.2d 213, 218, 157 P.2d 372; *McEvoy v. American Pool Corp.* (1948) 32 C.2d 295, 299, 195 P.2d 783; *Gonzalez v. Derrington* (1961) 56 C.2d 130, 133, 14 C.R. 1, 363 P.2d 1, *infra*, §1214; *Akins v. Sonoma* (1967) 67 C.2d 185, 199, 60 C.R. 499, 430 P.2d 57, citing the text; *Hale v. Pacific Tel. & Tel. Co.* (1919) 42 C.A. 55, 58, 183 P. 280; *Sweatman v. Los Angeles Gas & Elec. Corp.* (1929) 101 C.A. 318, 326, 281 P. 677; *Newman v. Steuernagel* (1933) 132 C.A. 417, 420, 22 P.2d 780; *McMillan v. Thompson* (1934) 140 C.A. 437, 439, 35 P.2d 419; *Burke v. W.R. Chamberlin & Co.* (1942) 51 C.A.2d 419, 423, 125 P.2d 120; *Jackson v. Utica Light & Power Co.* (1944) 64 C.A.2d 885, 891, 149 P.2d 748; *Werkman v. Howard Zink Corp.* (1950) 97 C.A.2d 418, 424, 218 P.2d 43; *DeMirjian v. Ideal Heating Corp.* (1954) 129 C.A.2d 758, 772, 278 P.2d 114; *Ferroggiaro v. Bowline* (1957) 153 C.A.2d 759, 763, 315 P.2d 446; *Bilyeu v. Standard Freight Lines* (1960) 182 C.A.2d 536, 542, 6 C.R. 65, *Yecny v. Eclipse Fuel Engineering Co.* (1962) 210 C.A.2d 192, 198, 26 C.R. 402; *Custodio v. Bauer* (1967) 251 C.A.2d 303, 316, 59 C.R. 463, citing the text; *Schrimsher v. Bryson* (1976) 58 C.A.3d 660, 664, 130 C.R. 125, *infra*, §1205, quoting the text; *Sanders v. Atchison, Topeka & Santa Fe Ry. Co.* (1977) 65 C.A.3d 630, 650, 135 C.R. 555, citing the text; *Pappert v. San Diego Gas & Elec. Co.* (1982) 137 C.A.3d 205, 210, 186 C.R. 847, *infra*, §1198; *United Pac. Ins. Co. v. Southern Calif. Edison Co.* (1985) 163 C.A.3d 700, 710, 209 C.R. 819; *Brewer v. Teano* (1996) 40 C.A.4th 1024, 1032, 47 C.R.2d 348, *infra*, §1218, quoting the text; *Martinez v. Vintage Petroleum* (1998) 68 C.A.4th 695, 700, 80 C.R.2d 449; *Park v. Burlington Northern Santa Fe Ry. Co.* (2003) 108 C.A.4th 595, 611, 133 C.R.2d 757, *infra*, §1252; *Vasquez v. Residential Inv.* (2004) 118 C.A.4th 269, 285, 12 C.R.3d 846; *Rest.2d, Torts* §§441, 442; 4 Harper, James & Gray 2d §20.5; Dobbs, *The Law of Torts* §190 et seq.; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §555 et seq.; 15 *Cal. L. Rev.* 1, 10; 20 *Cal. L. Rev.* 496, 507; 38 *Cal. L. Rev.* 398; BAJI, No. 3.79.)

In *Premo v. Grigg* (1965) 237 C.A.2d 192, 46 C.R. 683, the court quoted Prosser: "The virtually unanimous agreement that the liability must be limited to cover only those intervening causes which lie within the scope of

foreseeable risk, or have at least some reasonable connection with it, is based upon a recognition of the fact that the independent causes which may intervene to change the situation created by the defendant are infinite, and that as a practical matter responsibility simply cannot be carried to such lengths." (237 C.A.2d 197.)

In this wrongful death action, plaintiff was a part-time dishwasher and janitor in defendants' restaurant. While he and his wife were cleaning at night, they allowed their 4-year-old daughter to roam about. She received fatal burns from a bucket of extremely hot water drawn by plaintiff for his mop. Plaintiff's theory, that defendants were liable for permitting the hot water system to supply waters at excessive temperatures, was rejected. Applying the general criteria of *Rest.2d, Torts §442*, the harm brought about by the intervening force (plaintiff filling the bucket) was different in kind and extraordinary. (237 C.A.2d 198.)

West's Key Number Digest, Negligence k.387, 431-

SUPPLEMENT: [This section is current through the latest supplement]

See 4 Harper, James & Gray 3d §20.5. *Correction:* Page 575, line 15, year of *Brewer v. Teano* should be 1995.



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D. Independent Intervening Act.

1. Test of Foreseeability.

b. Precise Act or Harm Need Not Be Foreseen.

6 Witkin Sum. Cal. Law Torts § 1198

[§ 1198] Precise Act or Harm Need Not Be Foreseen.

The foreseeability required is of the *risk of harm*, not of the particular intervening act. In other words, the defendant may be liable if his or her conduct was "a substantial factor" in bringing about the harm, though the defendant neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred. (See *Fein v. Permanente Med. Group* (1985) 38 C.3d 137, 152, 211 C.R. 368, 695 P.2d 665, citing the text; *Monterrosa v. Grace Line* (1949) 90 C.A.2d 826, 832, 204 P.2d 377; *Osborn v. Whittier* (1951) 103 C.A.2d 609, 616, 230 P.2d 132; *Ferroggiaro v. Bowline* (1957) 153 C.A.2d 759, 763, 315 P.2d 446; *Bigbee v. Superior Court* (1979) 93 C.A.3d 451, 455, 155 C.R. 545; *Jackson v. Ryder Truck Rental* (1993) 16 C.A.4th 1830, 1848, 20 C.R.2d 913; *Rest.2d, Torts* §435; 4 Harper, James & Gray 2d §20.5; 13 *Hastings L. J.* 160.)

This rule was applied in *Gibson v. Garcia* (1950) 96 C.A.2d 681, 216 P.2d 119, where defendant street railway maintained defective wooden poles at curbs, and defendant G, negligently striking the pole, caused it to fall on plaintiff. "Respondent [railway] appears to contend that it is absolved from liability since it was not foreseeable that a motorist would negligently collide with its pole with such force as to cause it to fall upon plaintiff. However, in order to prevent an intervening act from being a superseding cause which will relieve the defendant of responsibility for his negligence, the law does not inevitably require that the precise act be foreseeable. Numerous cases have declared that if the defendant's conduct exposes persons in the class to which plaintiff belongs to a foreseeable risk of injury, and his act or omission contributes substantially to injury of that nature actually occurring, he may be held liable notwithstanding the fact that an unforeseeable independent intervening act is a concurring cause." (96 C.A.2d 684.)

In *Pappert v. San Diego Gas & Elec. Co.* (1982) 137 C.A.3d 205, 186 C.R. 847, the top of a tall tree in decedent's yard was dangerously close to defendant's uninsulated power line. Decedent decided to trim it himself and was electrocuted. In this wrongful death action the jury, instructed on foreseeability of intervening acts, but not on foreseeability of the harm, returned a special verdict finding defendant negligent but also determining that its negligence was not a legal cause of the death. *Held*, reversed for error in instructions. "If properly instructed, the jurors could only have concluded, even though they found SDG&E could not have reasonably foreseen the specific nature of decedent's negligent conduct, its original negligence in installing an uninsulated, high-voltage wire, or in failing to trim the tree away from the wire, exposed persons within decedent's class to a foreseeable risk of electrocution." (137 C.A.3d 211.) Here, the injury sustained was precisely the result to be expected when a person trimming a tree on his residential

property is exposed to the high-voltage charge from a power line passing through its foliage. Thus, decedent was within the class of persons exposed to danger, and there was no factual issue of superseding cause. (*137 C.A.3d 211.*)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §20.5.



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2. Natural Forces and Animals.

6 *Witkin Sum. Cal. Law Torts* § 1199

[§ 1199] Natural Forces and Animals.

An "act of God," i.e., an extraordinary natural force, that brings about harm different from that threatened by the defendant's negligence is a superseding cause; but if it merely increases or accelerates the results of the defendant's negligence, it is not. (See *Rest.2d, Torts* §§450, 451; 4 Harper, James & Gray 2d §20.5; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §666 et seq.; 6 Proof of Facts 3d 319 [Act of God]; 38 *Cal. L. Rev.* 406; 46 *A.L.R.4th* 1170 [liability for injury or damage from lightning].)

Thus, if a person starts a fire on his or her land, and it is communicated to other property by a sudden and unexpected rising of the wind after the fire was started, this may be a superseding cause. (*McVay v. Central Calif. Inv. Co.* (1907) 6 C.A. 184, 188, 91 P. 745.) But where a power company maintained its wires close to a tree, without protection, a sudden wind that blew branches against the wire, causing it to sag, was held not to be a superseding cause; the power company was liable for the death of a pedestrian coming in contact with the charged wire. (*Rocca v. Tuolumne County Elec. Power & Light Co.* (1926) 76 C.A. 569, 583, 245 P. 468.) And where a rubbish dump fire was maintained during high winds, its spread to distant property was foreseeable. (*Osborn v. Whittier* (1951) 103 C.A.2d 609, 616, 230 P.2d 132.) (See 24 *A.L.R.2d* 241, 271 [liability for spread of fire purposely and lawfully kindled]; 17 *A.L.R.5th* 547 [liability of property owner for spread of accidental fire].)

In cases involving alleged "unprecedented" rainstorms, it has generally been held that occasional heavy rainfall is a hazard that may reasonably be anticipated, and is not an act of God. (See *Southern Pac. Co. v. Los Angeles* (1936) 5 C.2d 545, 549, 55 P.2d 847; *Jefferis v. Monterey Park* (1936) 14 C.A.2d 113, 117, 57 P.2d 1374 [where one obstructs a natural watercourse, he or she may be liable for flooding though an extraordinary storm is a concurring cause]; *Conlin v. Coyne* (1937) 19 C.A.2d 78, 87, 64 P.2d 1123; *Diamond Springs Lime Co. v. American River Constructors* (1971) 16 C.A.3d 581, 598, 94 C.R. 200.)

In *Royal Indem. Co. v. Midland Counties Public Service Corp.* (1919) 42 C.A. 628, 183 P. 960, defendant negligently allowed a guy wire supporting a pole carrying power lines to become unfastened and uninsulated. A horse became entangled in the guy wire, broke it, and live wires came in contact with it, killing the horse and injuring the rider. Held, the accident should reasonably have been anticipated. (42 C.A. 634.) (See *Williams v. San Francisco Northwestern Ry. Co.* (1907) 6 C.A. 715, 719, 93 P. 122.)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §20.3.



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3. Irresponsible or Innocent Act of Third Person.

6 Witkin Sum. Cal. Law Torts § 1200

[§ 1200] Irresponsible or Innocent Act of Third Person.

A legally irresponsible act will usually not be a superseding cause. Thus, the impulsive acts of a child are frequently held not to break the chain. (*Cahill v. E.B. & A.L. Stone Co.* (1914) 167 C. 126, 137, 138 P. 712; *Katz v. Helbing* (1932) 215 C. 449, 452, 10 P.2d 1001; *McKay v. Hedger* (1934) 139 C.A. 266, 273, 34 P.2d 221; see 57A Am.Jur.2d (2004 ed.), *Negligence* §608 et seq.; on act of responsible child, see *infra*, §1217.)

West's Key Number Digest, Negligence k.408

SUPPLEMENT: [This section is current through the latest supplement]



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4. Negligent Act or Omission of Third Person.
a. Object Left in Path of Vehicle.

6 Witkin Sum. Cal. Law Torts § 1201

[§ 1201] Object Left in Path of Vehicle.

In this group of cases, the defendant negligently leaves some object or obstruction in a street, highway, or other place where vehicles are driven, and later a negligent driver runs into the object. Most of the cases uphold recovery.

In *Lacy v. Pacific Gas & Elec. Co.* (1934) 220 C. 97, 29 P.2d 781, defendant negligently left an electric light pole in a roadway. A third person, whose car plaintiff was attempting to enter, negligently tried to start the vehicle, hurling the pole in the air so that it struck and injured plaintiff, who had been thrown onto the ground. *Held*, defendant was liable; the dangerous condition created by its negligence continued until it concurred with the other negligent act to cause the injury. (220 C. 98.)

In *Burke v. W.R. Chamberlin & Co.* (1942) 51 C.A.2d 419, 125 P.2d 120, stevedores negligently left blocks of wood in the path of a lumber carrier, which ran into them, catapulting one into space, and striking plaintiff. *Held*, this possibility should have been foreseen. (51 C.A.2d 423.)

In *Carroll v. Central Counties Gas Co.* (1925) 74 C.A. 303, 240 P. 53, defendant negligently maintained a gas pipe line without adequate support. An automobile, negligently driven, struck and broke the pipe, and escaping gas ignited and burned plaintiff, a passenger in the automobile. *Held*, defendant was liable. (74 C.A. 308.) (See *Sawyer v. Hooper* (1926) 79 C.A. 395, 402, 249 P. 530.)

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4. Negligent Act or Omission of Third Person.
b. Obstruction Diverting Pedestrian From Safe Place.

6 Witkin Sum. Cal. Law Torts § 1202

[§ 1202] Obstruction Diverting Pedestrian From Safe Place.

In this group of cases, the defendant negligently obstructs a sidewalk, safety zone, or other safe place, forcing the injured party to detour and come into the street or highway, exposed to traffic and to the risk of being struck by negligently driven vehicles. One view, stressing the distinction between an active cause and a passive "condition," is that the defendant is not liable for his creation of the condition because the intervening active force is a superseding cause. In *Klarquist v. Chamberlain & Proctor* (1932) 124 C.A. 398, 12 P.2d 664, defendant contractor, constructing a building, obstructed the sidewalk. Decedent, a pedestrian, was compelled to walk into the street, where he was killed by a collision between a negligently driven automobile and a parked car. *Held*, the contractor was not liable; the obstruction was merely an actual cause (under the "but for" rule) but not the proximate cause. (124 C.A. 401.) (See dictum in *Sweet v. Los Angeles Ry. Co.* (1947) 79 C.A.2d 195, 201, 179 P.2d 824, *infra*, §1205.)

This so-called distinction is, however, generally rejected. And later opinions either attempt to distinguish the *Klarquist* case on a reinterpretation of its facts (see *Lacy v. Pacific Gas & Elec. Co.* (1934) 220 C. 97, 103, 29 P.2d 781; *Inai v. Ede* (1943) 59 C.A.2d 549, 553, 139 P.2d 76, *infra*, §1203, or repudiate its holding. Thus, in *Jones v. South San Francisco* (1950) 96 C.A.2d 427, 216 P.2d 25, the court said: "If the case stands for the broad proposition that one who negligently blocks a sidewalk, as a matter of law, is not liable to one who is injured by the negligence of a third person while walking about the obstruction, the case is wrong and should be disapproved." (96 C.A.2d 438.)

The correct view is that the defendant who creates the condition should foresee the danger of the subsequent negligent act. Thus, in *Hansen v. Market Street Ry. Co.* (1923) 64 C.A. 426, 221 P. 955, a water company negligently left a large dirt pile on a street close to the car tracks, without lights. Plaintiff, a pedestrian, was forced to skirt the obstruction, and was struck by a negligently operated streetcar which gave no warning signal. *Held*, the water company was liable. (64 C.A. 430.)

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4. Negligent Act or Omission of Third Person.
c. Illegal Parking.

6 *Witkin Sum. Cal. Law Torts* § 1203

[§ 1203] Illegal Parking.

(1) *Superseding Cause*. In *Newman v. Steuernagel* (1933) 132 C.A. 417, 22 P.2d 780, defendant double-parked his car, a wrongful act, leaving his guest in it; another driver wanted to get out, and the guest started the car negligently and struck plaintiff. *Held*, defendant was not liable. If the car had been badly parked under such circumstances that it moved of itself, the proximate cause would clearly have been the original parking; but here there was an independent act of the guest in moving the machine, which was not reasonably to be anticipated. (132 C.A. 423.) (See *McMillan v. Thompson* (1934) 140 C.A. 437, 441, 35 P.2d 419; *Arthur v. Santa Monica Dairy Co.* (1960) 183 C.A.2d 483, 487, 6 C.R. 808, *supra*, §1191; 13 *Hastings L. J.* 160 [criticism].)

(2) *Foreseeable Intervening Act*. A jury's determination of the issue resulted in a somewhat doubtful conclusion in *Fennessey v. Pacific Gas & Elec. Co.* (1942) 20 C.2d 141, 124 P.2d 51. Defendant F, an employee of defendant company, parked a truck between the curb and safety zone, and defendant M turned his jitney bus to avoid the truck and drove along the car tracks, striking plaintiff in a pedestrian zone. Defendant company contended that the jitney bus driver had time to turn back into the proper lane after passing the truck, and that his subsequent careless driving was a superseding cause. *Held*, the question was for the jury and a verdict for plaintiff was upheld. (20 C.2d 144.)

Recovery was properly upheld in *Inai v. Ede* (1941) 42 C.A.2d 521, 109 P.2d 400, *Inai v. Ede* (1943) 59 C.A.2d 549, 139 P.2d 76. Defendant T unlawfully parked his car, obstructing the traveled portion of a narrow highway, and plaintiff, in walking around it, was struck by defendant E's car after it had collided with the parked car. *Held*, it might be found that the negligent parking proximately contributed to plaintiff's injuries, and defendant T was liable. (42 C.A.2d 523.) (See *Sipperly v. San Diego Yellow Cabs* (1949) 89 C.A.2d 645, 652, 201 P.2d 543 [taxi driver who parked on wrong side of street at too great distance from curb should have anticipated that another driver might run into his cab].)

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D. Independent Intervening Act.

4. Negligent Act or Omission of Third Person.

d. Accident Leaving Plaintiff Helpless.

6 *Witkin Sum. Cal. Law Torts* § 1204

[§ 1204] Accident Leaving Plaintiff Helpless.

A situation frequently arises in which a negligent driver, by a collision or by running down the victim, leaves the victim helpless in the highway, and a second driver negligently runs down or otherwise becomes the immediate cause of the victim's injury or death. In *Christensen v. Los Angeles Electrical Supply Co. (1931)* 112 C.A. 629, 297 P. 614, the decedent was struck by defendant's negligently driven truck, and, before the driver could reach him to pick him up, another car ran over him. *Held*, the second "independent" act was "disconnected in time and nature," and no recovery could be had without showing which one of the automobiles actually caused the death. (112 C.A. 632.)

This reasoning is plainly unsound, because it ignores the question of foreseeability of the "independent," "disconnected" act. The correct rule is applied in *Hill v. Peres (1934)* 136 C.A. 132, 28 P.2d 946, where a first collision due to defendant's negligence threw decedent into the highway, and 15 minutes later another negligently driven car crashed into defendant's car and swung it against the decedent, causing her death. *Held*, the intervening act was foreseeable, and defendant was liable. (136 C.A.138, following *Sawdey v. Producers' Milk Co. (1930)* 107 C.A. 467, 479, 290 P. 684, on substantially similar facts, and distinguishing *Christensen* on point immaterial to proximate cause issue.) (See *Summers v. Tice (1948)* 33 C.2d 80, 87, 199 P.2d 1, *supra*, §1194, disapproving *Christensen*.)

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4. Negligent Act or Omission of Third Person.
e. Intervening Negligent Driver.
1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1205

[§ 1205] In General.

The illustrations of foreseeable negligent automobile drivers in the preceding sections do not, of course, exhaust the possible situations, and the same principle is involved in other cases. In *Ferroggiaro v. Bowline* (1957) 153 C.A.2d 759, 315 P.2d 446, plaintiff alleged that defendant T negligently struck and rendered a highway intersection traffic signal inoperative, and that thereafter, plaintiff was injured by a collision between the car in which he was a passenger and another car, both negligently driving at the intersection. *Held*, a cause of action was stated against defendant T; it could reasonably have been anticipated that cars might collide at the intersection with nonfunctioning traffic signals. (153 C.A.2d 763.) (See *Benton v. Sloss* (1952) 38 C.2d 399, 405, 240 P.2d 575, *supra*, §1178 [negligent sale of defective secondhand car, foreseeable negligent operation]; *George A. Hormel & Co. v. Maez* (1979) 92 C.A.3d 963, 970, 155 C.R. 337 [following *Ferroggiaro*].)

A contrary result, which seems erroneous, was reached in *Sweet v. Los Angeles Ry. Co.* (1947) 79 C.A.2d 195, 179 P.2d 824. Plaintiff, a passenger in defendant's bus, had no seat, and was injured when the bus stopped suddenly to avoid striking an automobile driver who was negligently making a U-turn without signaling. Judgment for defendant was upheld. Although the opinion first takes the position that the bus driver was not negligent, the court then goes on to hold that if negligence were assumed (from overcrowding of the bus), defendant would nevertheless not be liable, because the intervening negligence of the other driver could not reasonably have been anticipated, and it was the sole proximate cause. (79 C.A.2d 200.)

Parker v. San Francisco (1958) 158 C.A.2d 597, 323 P.2d 108, presents essentially the same issue as *Sweet* and reaches the correct conclusion. Defendant's bus driver, finding the parking zone partly obstructed, parked 10 1/2 feet from the curb, in violation of a regulatory ordinance. Plaintiff, alighting, was struck by a negligently driven car. *Held*, defendant was liable. (158 C.A.2d 604.) (See *Schwartz v. Helms Bakery Ltd.* (1967) 67 C.2d 232, 240, 244, 60 C.R. 510, 430 P.2d 68, *supra*, §1062.)

In *Schrimsher v. Bryson* (1976) 58 C.A.3d 660, 130 C.R. 125, defendant, an intoxicated driver involved in a collision, was arrested by plaintiff highway patrolman. Plaintiff, while on the shoulder of the freeway engaged in his investigation of the accident, was injured when S, another drunken driver, struck defendant's car and knocked it into

plaintiff. *Held*, defendant was not liable. It was foreseeable that a traffic officer would be on the scene to investigate the first collision, but the intervening negligent and criminal act of S and its effect could not reasonably have been anticipated, and S's act was therefore a superseding cause. (58 C.A.3d 665.) (See *Whitton v. California* (1979) 98 C.A.3d 235, 159 C.R. 405 [following *Schrimsher*]; 17 A.L.R.4th 897 [note on *Whitton*]; cf. *Jackson v. Ryder Truck Rental* (1993) 16 C.A.4th 1830, 1849, 20 C.R.2d 913 [it was reasonably foreseeable that driver who left negligently maintained truck would be hit by negligently operated vehicle; distinguishing *Schrimsher* and *Whitton*].)

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e. Intervening Negligent Driver.

2. Realizable Likelihood of Act.

6 *Witkin Sum. Cal. Law Torts* § 1206

[§ 1206] Realizable Likelihood of Act.

In *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 C.3d 49, 192 C.R. 857, 665 P.2d 947, plaintiff was standing in a public telephone booth in the parking lot of a liquor store. An intoxicated driver lost control of her car, veered off the street into the parking lot, and crashed into the booth. The complaint alleged that plaintiff, seeing the approaching car, attempted to flee, but the booth was defectively designed or manufactured or was negligently installed or maintained, and the door stuck, trapping him inside. A settlement was reached with the driver and those who furnished liquor to her, and this action was brought against several companies allegedly responsible for the design, location, installation, and maintenance of the booth. The trial judge granted summary judgment for defendants on the ground that the intoxicated driver's negligence was a superseding cause. *Held*, reversed; there was a triable issue of fact.

(a) *Foreseeability as question of fact.* The issue, whether the risk that a car might crash into the phone booth and injure plaintiff, was reasonably foreseeable. Under *Weirum v. RKO General* (1975) 15 C.3d 40, 123 C.R. 468, 539 P.2d 36, *supra*, §914, foreseeability is ordinarily a question of fact and the question is whether there is room for a reasonable difference of opinion on foreseeability of this risk. (34 C.3d 56, 57.)

(b) *Test of foreseeability.* "[F]oreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct." (34 C.3d 57, quoting Harper & James.) "One may be held accountable for creating even 'the risk of a slight possibility of injury if a reasonably prudent [person] would not do so' "; and what is required to be foreseeable is the general character of the event or harm, not its precise nature or manner of occurrence. (34 C.3d 57, 58.)

(c) *Test applied here.* Defendants placed a telephone booth, which was difficult to exit, in a parking lot 15 feet from the side of a major thoroughfare and near a driveway; there was evidence that a booth at this same location had previously been struck; in view of the expected swift traffic late at night, and the tendency of speeding and/or intoxicated drivers to lose control of their cars and crash into poles, buildings, or other objects along the road, the very accident could reasonably have been foreseen. (34 C.3d 58.)

(d) *No superseding cause.* *Rest.2d, Torts §449* (infra, §1215), and *Weirum* make it clear that the negligent or reckless acts of the intoxicated driver do not preclude liability: the risk that a car might hit the booth could be found to constitute one of the hazards to which plaintiff was exposed. (34 C.3d 58, 59.)

One justice, concurring on the theory of liability for a sticky door, disagreed on the other issue, citing *Richards v. Stanley* (1954) 43 C.2d 60, 63, 271 P.2d 23, supra, §840, for the point that foreseeability may sometimes be a question of law where the defendant's responsibility for the activities of third persons is involved. (34 C.3d 60, 61.) (See 17 A.L.R.4th 1308 [telephone company's liability for condition or location of booth].)

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6 *Witkin Sum. Cal. Law Torts* § 1207

[§ 1207] Unknown Intervening Act.

In *Schwartz v. California Gas & Elec. Corp.* (1912) 163 C. 398, 125 P. 1044, defendant's employee negligently dropped an insulator on plaintiff's land. Plaintiff's horse stepped on it and was injured; but the evidence showed that the injury occurred at an entirely different place from that where it was dropped, raising the inference that someone had picked it up and left it in the other place. The court held that if this were true, defendant would not be liable. (163 C. 402.)

Schwartz was overruled in *Mosley v. Arden Farms Co.* (1945) 26 C.2d 213, 157 P.2d 372. Defendant negligently left a pile of crates on a public parkway. Two of them were displaced in some undetermined manner, and obstructed the sidewalk, hidden by weeds. Plaintiff's weed-mowing tractor struck them, causing his injuries. *Held*, defendant should have foreseen the possibility of crates falling off, being moved by children, or being pushed aside by pedestrians. (26 C.2d 216.) (See *Devens v. Goldberg* (1948) 33 C.2d 173, 181, 199 P.2d 943; 38 Cal. L. Rev. 411.)

The court in *Mosley* relied in part on *Rest.2d, Torts* §449 (see *infra*, §1215). The same Restatement rule was stressed in *Reid & Sibell v. Gilmore & Edwards Co.* (1955) 134 C.A.2d 60, 285 P.2d 364. Defendant, occupier of the basement and first floor of a building, negligently stored a large quantity of flammable paint thinner on its premises, which were separated from plaintiff's second floor area by oil-soaked wooden floors. *Held*, defendant was liable for the spread of a fire of *unknown origin* that destroyed plaintiff's goods. (134 C.A.2d 65.)

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1. Intervening Party's Knowledge.

6 Witkin Sum. Cal. Law Torts § 1208

[§ 1208] Intervening Party's Knowledge.

The liability of the manufacturer or seller (*supra*, §1168) may be greatly restricted where an intervening party, e.g., a retailer or middleman, knows of the defect and nevertheless sells or supplies the goods to the ultimate user. The sale or supplying with this knowledge is an independent negligent act that may be regarded as unforeseeable and a superseding cause. In *Stultz v. Benson Lumber Co.* (1936) 6 C.2d 688, 59 P.2d 100, plaintiff, a painter, was injured when the main plank of his scaffolding collapsed. He sued, alleging that defendant lumber company knowingly furnished defective wood to his employer with knowledge of its intended use, and that defendant employer also knew that it was unsafe. There was obviously no cause of action against the employer, the remedy under the Workers' Compensation Act being exclusive. *Held*, the lumber company's demurrer should be sustained; the intervening negligence of the employer in using the defective plank with knowledge of its danger was a superseding cause. (6 C.2d 692.) (See *Waterman v. Liederman* (1936) 16 C.A.2d 483, 487, 60 P.2d 881; 25 Cal. L. Rev. 247; 38 Cal. L. Rev. 409.)

The same conclusion has been reached where the ultimate purchaser or user has knowledge of the defect; whether the defense is considered from the point of view of duty of the manufacturer to warn of concealed danger, or of proximate cause or contributory negligence, makes no difference in the result. (See *Gutelius v. General Elec. Co.* (1940) 37 C.A.2d 455, 458, 99 P.2d 682 [plaintiff knew her washing machine had defective stop lever, but used it and was injured when her hair caught and lever stuck]; *Youtz v. Thompson Tire Co.* (1941) 46 C.A.2d 672, 676, 116 P.2d 636.)

The early leading case of *Merrill v. Los Angeles Gas & Elec. Co.* (1910) 158 C. 499, 111 P. 534, took a different view. Defendant gas company was negligent in discovering and repairing a broken gas pipe, and gas escaped into a restaurant. The restaurant keeper kept his stove lighted, though told to extinguish all lights. The resulting explosion injured plaintiff, a customer. *Held*, defendant company was liable. Its negligence continued up to the time of the injury, and the independent wrongful act, in order to supersede the original primary cause, "must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission." (158 C. 504.) (See 5 Cal. L. Rev. 178; 25 Cal. L. Rev. 247; for rule that strict liability of manufacturer cannot be excused by reason of negligent act or omission of retail dealer, see *infra*, §1480.)

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2. Intervening Party's Failure To Inspect.

6 *Witkin Sum. Cal. Law Torts* § 1209

[§ 1209] Intervening Party's Failure To Inspect.

If the retailer or other intervening party had no knowledge of the defect, but could have discovered it by the exercise of reasonable care in inspection or testing, his or her failure to inspect is a negligent omission, and there is some earlier authority holding that this breaks the chain of causation. (See *Catlin v. Union Oil Co. of Calif.* (1916) 31 C.A. 597, 604, 161 P. 29 [defendant manufacturer negligently furnished gasoline instead of kerosene to grocer; grocer's negligent act in selling it without proper tests broke chain]; *Solomon v. Red River Lumber Co.* (1922) 56 C.A. 742, 754, 206 P. 948 [disapproved in principle by *Mosley v. Arden Farms Co.* (1945) 26 C.2d 213, 220, 157 P.2d 372, supra, §1207].)

This view is repudiated in *Rest.2d, Torts* §§393, 396 and by later California cases treating the question as one of fact. In *Northwestern Nat. Ins. Co. of Milwaukee v. Rogers Pattern & Aluminum Foundry* (1946) 73 C.A.2d 442, 166 P.2d 401, defendant manufacturer regularly sent aluminum alloy castings to N Co. to be heat treated. On this occasion, a shipment was described in the purchase order as the usual aluminum alloy, but a few castings were of magnesium and, when the treatment (immersion in a chemical solution) was given, an explosion resulted. *Held*, defendant was liable despite the fact that N Co.'s manager noticed the slight difference in color and weight of the odd castings but nevertheless proceeded in the usual manner in reliance on the description. (73 C.A.2d 444.) (See *Warner v. Santa Catalina Island Co.* (1955) 44 C.2d 310, 319, 282 P.2d 12 [negligent manufacturer of bullets, intervening negligence of operator of shooting gallery]; *Gall v. Union Ice Co.* (1951) 108 C.A.2d 303, 313, 239 P.2d 48 [following *Northwestern* and distinguishing *Catlin*].)

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6 *Witkin Sum. Cal. Law Torts* § 1210

[§ 1210] Intervening Negligent Act of Stranger.

In *Poore v. Edgar Bros. Co.* (1939) 33 C.A.2d 6, 90 P.2d 808, the driver bought a secondhand 1936 Ford from defendant, and plaintiff, while a passenger in the car, was cut by broken glass when the car collided with another vehicle. Plaintiff's theory was that shatter-proof glass was standard advertised equipment of 1936 Ford cars and would have prevented the injuries, and that defendant was negligent in knowingly replacing it with inferior glass. *Held*, assuming that this was true, the negligence could not be the proximate cause of plaintiff's injuries, because the accident in such a case would always be immediately and directly caused by an outside source with which the defendant had no connection. (33 C.A.2d 9.) The decision seems clearly wrong, because it assumes that an intervening act must necessarily be a superseding cause, whereas the act here was foreseeable, i.e., the very purpose of the safety glass was to avoid injury from a foreseeable intervening "blow from an outside source." (See *Rest.2d, Torts* §449; *Mosley v. Arden Farms Co.* (1945) 26 C.2d 213, 219, 157 P.2d 372, *supra*, §1207; *infra*, §1215; 38 Cal. L. Rev. 411.)

The correct view is declared in *McEvoy v. American Pool Corp.* (1948) 32 C.2d 295, 195 P.2d 783. Defendant negligently supplied dangerous chemicals for transportation by its service employee. Plaintiff, a guest in the employee's car, was burned by the chemicals following a collision with a hit and run driver. The court, following *Rest.*, *Torts* §449 and *Mosley*, held that the intervening act of the stranger was foreseeable, "in view of the frequency of automobile accidents." (32 C.2d 298.) (See *Reid & Sibell v. Gilmore & Edwards Co.* (1955) 134 C.A.2d 60, 65, 285 P.2d 364, *supra*, §1207 [following principle declared in *McEvoy*].)

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h. Subcontractor's Negligence and Contractor's Intervening Negligence.

6 *Witkin Sum. Cal. Law Torts* § 1211

[§ 1211] Subcontractor's Negligence and Contractor's Intervening Negligence.

In *Stewart v. Cox* (1961) 55 C.2d 857, 13 C.R. 521, 362 P.2d 345, supra, §1161, subcontractor C, engaged by general contractor W, negligently performed concrete work on plaintiff's swimming pool, which cracked, leaked, and allowed water to escape, resulting in damage to plaintiff's home. C contended that his negligence was not the proximate cause because W had knowledge of the cracking and leaking for 2 months before informing C; that W undertook to repair the pool himself and prevent the damage and did so negligently. Thus, the contention was that intervening negligent acts and omissions were superseding causes. *Held*, C's negligent act was a proximate cause.

(a) Under *Rest.2d, Torts* §447, an intervening negligent act does not supersede "if a reasonable man knowing the situation existing when the act of the third person is done would not regard it as highly extraordinary that the third person so acted or the act is a normal response to a situation created by the defendant's conduct and the manner in which the intervening act is done is not extraordinarily negligent." (55 C.2d 864.)

(b) Under *Rest.2d, Torts* §452, "[t]he fact that a third person does not perform his duty to protect the plaintiff from harm, either because he makes no effort or through his negligence does not succeed, is not a superseding cause." (55 C.2d 864.)

(c) *Stultz v. Benson Lumber Co.* (1936) 6 C.2d 688, 59 P.2d 100, supra, §1208, is distinguishable on the ground that an intervening act done with full awareness of the danger may be considered "highly extraordinary." (55 C.2d 865.) (See *Sabella v. Wisler* (1963) 59 C.2d 21, 28, 27 C.R. 689, 377 P.2d 889; 4 Santa Clara Lawyer 141.)

Rest.2d, Torts §447 uses the phrase "normal consequence of" instead of "normal response to." *Rest.2d, Torts* §452(2) states that the original actor is relieved from liability where "because of lapse of time or otherwise," the duty and responsibility for the situation has been shifted to a third person.

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i. Intervening Negligence of Hospital Staff.

6 *Witkin Sum. Cal. Law Torts* § 1212

[§ 1212] Intervening Negligence of Hospital Staff.

In *Fish v. Los Angeles Dodgers Baseball Club* (1976) 56 C.A.3d 620, 128 C.R. 807, plaintiffs' 14-year-old son, watching a major league baseball game, was struck by a foul ball and rendered unconscious for about one minute. He received emergency first aid by one of the defendants, Dr. J, who operated the baseball club's medical facility, and was later sent to a hospital where he died 4 days later from an intracerebral hemorrhage. In this wrongful death action by his parents against the baseball club and Dr. J, a nonsuit disposed of the cause of action against the club, and the case proceeded on the issue of alleged malpractice of Dr. J. Plaintiffs' experts testified on direct examination that Dr. J was negligent in failing to properly diagnose the patient's condition and to send him to a hospital immediately after the injury; but under cross-examination they testified that there was still time to save him by emergency surgery at the time he was admitted to the hospital and that surgery was not performed. Defendants' counsel therefore argued that the intervening negligent hospital omission was a superseding cause, and the trial judge refused to instruct that it was not a defense. The jury verdict was for defendants. *Held*, reversed; refusal of the requested instruction was prejudicial error.

(a) BAJI, No. 3.79 on intervening cause refers to *Rest.2d, Torts* §452, and calls for a distinction between intervening conduct that is the immediate cause of the injury and conduct that merely constitutes the failure to prevent harm. The failure of a third person to act to prevent harm to the plaintiff threatened by the defendant's negligent conduct is not a superseding cause. "If the third person is under a duty to the other to take such action, his failure to do so will subject him to liability for his own negligence, which is concurrent with that of the actor, for the resulting harm which he has failed to prevent; but his failure to perform his duty does not relieve the original actor of liability for the results of his own negligence." (56 C.A.3d 636, quoting *Rest.2d, Torts* §452, Comment b.)

(b) The Restatement section was approved in *Stewart v. Cox* (1961) 55 C.2d 857, 13 C.R. 521, 362 P.2d 345, *supra*, §1211. The section was thereafter amended to add the following: "Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause." The Comments and illustrations indicate that this exception applies only in exceptional situations recognized by authorities in some jurisdictions; and the examples are not comparable to the situation in the instant case. (56 C.A.3d 638.) Moreover, *Stewart* applied only the original version of the Restatement section, and no subsequent decision of the court has approved the exception. (56 C.A.3d 639.)

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j. Intervening Negligence of Attorney.

6 *Witkin Sum. Cal. Law Torts* § 1213

[§ 1213] Intervening Negligence of Attorney.

Rest.2d, Torts §952, discussed in *Fish v. Los Angeles Dodgers Baseball Club* (1976) 56 C.A.3d 620, 128 C.R. 807, supra, §1212, was applied to attorneys' malpractice in *Cline v. Watkins* (1977) 66 C.A.3d 174, 135 C.R. 838. Plaintiff wife engaged attorney W to file a complaint for divorce, and he did so, listing specific items of community property and adding a catch-all allegation covering unknown property. After the husband had answered and cross-complained, plaintiff substituted attorney S, who filed an answer to the cross-complaint. Although the husband's declaration mentioned his receipt of monthly payments of Air Force retirement pay, attorney S did not claim a community property interest in it, and plaintiff received her decree of divorce without reference to the pension. Plaintiff brought the present action against both attorneys, alleging that they so negligently represented her as to cause her to lose this community interest. Attorney W demurred, and the trial court, taking judicial notice of the file, sustained his demurrer and dismissed the action against him. The court's theory was that W had been relieved as attorney before the pretrial and trial proceedings, and therefore his alleged negligence could not have been a proximate cause of the injury to plaintiff. *Held*, reversed; the issue of proximate cause was one of fact for the trier of fact.

(a) The alleged failure of W to assert his client's community property interest in the federal pension could support a factual inference of negligence, under *Smith v. Lewis* (1975) 13 C.3d 349, 118 C.R. 621, 530 P.2d 589, 1 Cal. Proc. (4th), *Attorneys*, §344. The alleged failure of S to do so was likewise negligence. (66 C.A.3d 178.) "We disagree with the dissent's conclusion that as a matter of law the standard of reasonable care does not require an attorney to conduct at least a cursory investigation of the facts bearing on his client's claim to relief in the early stages of litigation. Here nothing more than a careful client interview would have disclosed the pension. In our view, the question must be treated as one of fact and not law. Otherwise, it is unduly influenced by the personal view of the practice of law held by an individual judge." (66 C.A.3d 178.)

(b) The intervening act of S would be a superseding cause, relieving W of liability, only if it was highly unusual or extraordinary and hence not reasonably foreseeable. (66 C.A.3d 178, citing the text.) And reasonable foreseeability was a question of fact that could not be determined on demurrer. (66 C.A.3d 178.)

(c) Under *Rest.2d, Torts* §452 (1), approved in *Fish*, the failure of S to prevent the harm flowing from W's negligence was not a superseding cause unless, as stated in subdivision (2), unusual circumstances shifted the duty to S

to prevent the harm. This raises an issue of public policy not previously considered in California: "Is the substitution of another lawyer for one whose prior representation of the client in the matter has been negligent such an exceptional circumstance that all duty and responsibility for the prevention of harm normally flowing from the negligence passes to substituted counsel?" (66 C.A.3d 179.)

(d) The answer is not. "Except for a still developing certification of a few specialties, the bar supplies no means of assessing the qualifications of its members. A member of the public seeking the services of a lawyer thus has no real means of determining his capability. Nor has a member of the public engaging the services of a lawyer any real means of gauging the quality of service performed. Where a lawyer originally retained is relieved and another substituted, the client is likely to have some general dissatisfaction with the quality of service of the original lawyer but is unlikely to be aware of any specific reason for the dissatisfaction although a legitimate reason exists. The same lack of means to assess lawyer quality which results in the retention of a negligent lawyer in the first instance may well result in his being replaced by another negligent lawyer when the client acquires the vague uneasiness that the first is not doing what he should." (66 C.A.3d 180.)

(e) Just as a negligent physician is not relieved of the consequences of his lack of care when a subsequent physician could have avoided the injury, a negligent lawyer is not so relieved when replaced by another. "True enough, the new lawyer assumes full responsibility for the matter and has exclusive control over it; but so also does the new physician assume full responsibility and have full control." (66 C.A.3d 181.)

The dissenting justice took the position that an attorney representing the plaintiff in a contested divorce action does not have the duty of determining what is community property at the outset of the litigation, and that W followed the accepted practice in making his general catch-all allegation on unknown property (66 C.A.3d 187, 189); that the attorney-client relationship and legal services are so distinct that the physician-patient analogy is inappropriate and unwise (66 C.A.3d 187, 188); and that the majority opinion tells the members of the family law bar that they must be "swamis with soothsaying capability as to the competency of subsequent counsel without a say in the selection of subsequent legal representation." (66 C.A.3d 190.)

SUPPLEMENT: [This section is current through the latest supplement]
Smith case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §328.



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a. Unforeseeable Act.

6 *Witkin Sum. Cal. Law Torts* § 1214

[§ 1214] Unforeseeable Act.

Some cases take the view that an intervening criminal act or intentional tort is less foreseeable than an intervening negligent act, and ordinarily is to be regarded as a superseding cause. (See *Angelis v. Foster* (1938) 24 C.A.2d 541, 543, 75 P.2d 650 [negligent failure to provide safe transportation for school child; intervening act of intoxicated automobile driver, who continued course after seeing plaintiff, was superseding cause]; *Blunk v. Atchison, Topeka & Santa Fe Ry. Co.* (1950) 97 C.A.2d 229, 232, 217 P.2d 494, [negligent littering of employees' change room; deliberate placing of brake shoe and tube in dangerous position was superseding cause].)

In *Gonzalez v. Derrington* (1961) 56 C.2d 130, 14 C.R. 1, 363 P.2d 1, the court employed proximate cause analysis rather than duty analysis (supra, §837). Two men, B and C, bought gasoline in an open five-gallon can from a service station of defendant Union Oil Co. The station was owned and operated by defendant D, and the gasoline was given to them by defendant L, an employee. B and C threw the gasoline into a bar and set fire to it, causing injuries and deaths, for which these actions were filed. *Held*, judgment for defendants notwithstanding the verdicts for plaintiffs, affirmed. (a) Negligence was established by proof of violation of the Los Angeles Municipal Code, which prohibited sale of gasoline from public gas stations except into gas tanks or all-metal covered containers of not over two gallons' capacity. (b) But this was not the proximate cause of the injuries; the intentional misconduct of B and C was an independent intervening cause, neither foreseeable nor one of the dangers the ordinance was designed to protect against. "There is nothing about purchasing gasoline in an open 5-gallon can that makes it more likely that it will be used intentionally to injure others than that purchased in a closed 2-gallon can." (56 C.2d 133.) (See *Ewart v. Southern Calif. Gas Co.* (1965) 237 C.A.2d 163, 46 C.R. 631, *infra*, §1216.)

In *Lopez v. McDonald's Corp.* (1987) 193 C.A.3d 495, 238 C.R. 436, *supra*, §1131, where a gunman entered defendant's restaurant and killed a number of people, the court held that, assuming the existence of a duty to provide a security guard, in the light of the record, the failure to do so could not be considered a substantial factor in causing the harm: "[I]t paints a portrait of a demented, mentally unbalanced man, bent on murder and self-destruction, who viewed the nearby McDonald's restaurant with his binoculars from his apartment, kissed his wife goodbye and stated he was going 'hunting for humans'. Huberty set out to kill the most people possible and went to the restaurant, unconcerned with detection, dressed in camouflage fatigue pants and heavily armed. Upon entry into the restaurant, he immediately began firing his weapons indiscriminately at everything and everyone in sight, reloading his weapons periodically and

walking up and down the aisles slaughtering those he found still alive. His only apparent motive was killing." (193 C.A.3d 516.)

West's Key Number Digest, Negligence k.408, 431

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See *Flores v. AutoZone West* (2008) 161 C.A.4th 373, 385, 74 C.R.3d 178 [customer assaulted by employee could not recover from employer on grounds that employer negligently failed to train employee and to ensure that he had read and understood employee handbook; there was no reasonable basis to conclude that employee's act of criminally assaulting customer was result of employer's failure to make clear that such conduct would not be considered acceptable employee act].



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b. Likelihood of Act.

6 *Witkin Sum. Cal. Law Torts* § 1215

[§ 1215] Likelihood of Act.

The view set forth in the preceding section--that an intervening criminal act is by its very nature a superseding cause--is rejected by many courts and writers as an illogical and undesirable formula. They point out that in a large number of situations the very reason why the defendant's conduct is negligent is that it creates the risk of the particular intervening criminal act, and that it is absurd to invoke the very fact that establishes negligence to absolve the negligent person from liability.

Rest.2d, Torts §449 sets forth the modern rule as follows: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." And Comment b states: "The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability, cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger. To deny recovery because the other's exposure to the very risk, from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity." (See 4 Harper, James & Gray 2d §20.5; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §540 et seq.; 38 *Cal. L. Rev.* 403; 9 *A.L.R. 3d* 1172 [tort liability of insurer insuring life policy to beneficiary without insurable interest, where beneficiary kills or injures insured].)

Most California cases have fully accepted this theory. (See *Lillie v. Thompson* (1947) 332 U.S. 459, 68 S.Ct. 140, 92 L.Ed. 73 [railroad telegrapher was negligently placed in isolated building at night; railroad was liable for assault by stranger]; *Terrell v. Key System* (1945) 69 C.A.2d 682, 688, 159 P.2d 704 [employees of railway company permitted passengers to engage in boisterous conduct; liable for assault on passenger]; *Campodonico v. State Auto Parks* (1970) 10 C.A.3d 803, 808, 89 C.R. 270 [women criminally assaulted in defendant's automobile parking lot; action on theory of negligent maintenance without proper protection]; *Kane v. Hartford Acc. & Indem. Co.* (1979) 98 C.A.3d 350, 360, 159 C.R. 446; *Koepke v. Loo* (1993) 18 C.A.4th 1444, 1449, 23 C.R.2d 34, supra, §1041 [defendant failed to warn plaintiff that person who had previously assaulted her with a gun had regained possession of gun; subsequent assault was not superseding cause]; *Rosh v. Cave Imaging Systems* (1994) 26 C.A.4th 1225, 1235, 32 C.R.2d 136, supra, §55 [security company's repeated failure to remove terminated employee from premises was substantial cause of employee's subsequent assault on manager who had fired him]; *Lombardo v. Huysentruyt* (2001) 91 C.A.4th 656, 666, 110 C.R.2d

691, 1 Cal Proc. (4th), Attorneys, Supp., §334 [attorney representing conservatee drafted trust amendment that was rejected by probate court because it had not been approved as apparently required by that court's order; probate court's ruling did not supersede attorney's prior negligence, because, whether ruling was correct or incorrect, it was foreseeable given ambiguous wording of court's order]; 53 Proof of Facts 3d 373 [employer liability for employee injury from third-person attack]; supra, §1206; cf. *Leslie G. v. Perry & Associates* (1996) 43 C.A.4th 472, 481, 50 C.R.2d 785, supra, §1189 [criminal act was not superseding cause, but plaintiff failed to show causation].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Roe v. McDonald's Corp.* (2005) 129 C.A.4th 1107, 1115, 29 C.R.3d 127 [security services company had no duty to take special action to protect restaurant customer who was sexually assaulted in restroom, based on her statements to security guard that assailant had made sexually suggestive facial expressions, where guard never saw him, and he had committed no crimes, made no threats, and had apparently departed; distinguishing *Rosh v. Cave Imaging Systems* (1994) 26 C.A.4th 1225, 32 C.R.2d 136, text, p. 592]; 4 Harper, James & Gray 3d §20.5. *Lombardo case*:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §311.



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5. Intentional Act of Third Person.
c. Act Not Highly Extraordinary.

6 *Witkin Sum. Cal. Law Torts* § 1216

[§ 1216] Act Not Highly Extraordinary.

In nearly all of the California opinions dealing with intervening negligent acts, the test of superseding cause has been foreseeability. (See *supra*, §1201 et seq.) This test is set forth in *Rest.2d, Torts* §447(a). But §447(b) states a distinct additional test: Whether "a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted."

Comment b explains: "The actor at the time of his negligence may have no reason to realize that a third person might act in the particular negligent manner in which the particular third person acts, because his mind is not centered upon the sequence of events which may result from his act and therefore he has no reason to realize that it will create the situation which the third person's intervening act makes harmful. However, when the situation is known to exist, the likelihood that some negligent act may make it dangerous may be easily realizable or even obvious." (See 4 Harper, James & Gray 2d §20.5.)

In *Ewart v. Southern Calif. Gas Co.* (1965) 237 C.A.2d 163, 46 C.R. 631, the court, emphasizing the distinction between the two tests and the importance of the second one, reversed a judgment for defendants for error in instructing solely on the first.

(a) Decedent was employed by M, constructing a 30-inch water pipeline underground, with covering earth tamped, and asphalt paving. Covered manholes left at intervals were not airtight. The line crossed utility lines of defendant Gas Co., which maintained a regular inspection service to protect its property and the public. Defendant E, subcontractor to compact the covering earth, damaged a gas connection that leaked 800,000 cubic feet of gas before the leak was discovered. The evidence supported an inference that the gas--odorless methane--filtered through the earth into the manhole and pipe. While the pipe was being cleaned, an explosion occurred, and decedent was killed inside the pipe by carbon monoxide poisoning, a product of the explosion. (237 C.A.2d 166.)

(b) From these facts, defendant E could have been found negligent in damaging the gas pipe while compacting; and defendant Gas Co. could have been found negligent in that, while it promptly notified M of the leak, it gave no information as to the quantity of gas that escaped, made no attempt to determine where the gas had gone, and made no tests of the nearly completed water pipe. But M, decedent's employer (hence not liable in tort), was an intervening actor

guilty of almost unbelievable negligence, including violation of industrial safety orders: permitting men to smoke inside the pipe after knowledge of the leak, making no tests for gas, having no safety regulations or safety instructions, and failing to provide blowers to ventilate the pipe. (237 C.A.2d 167.)

(c) "The jury may have felt that it was not foreseeable as a probability that [M] would be as callously indifferent to the safety of its employees in the pipe as the evidence justified it in finding. On the other hand if the jury had been permitted to apply both applicable tests of the Restatement ... a different result might well have been reached." (237 C.A.2d 172.)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §20.5.



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5. Intentional Act of Third Person.
d. Act of Responsible Child.

6 *Witkin Sum. Cal. Law Torts* § 1217

[§ 1217] Act of Responsible Child.

(1) *Unforeseeable Act*. The irresponsible act of a child will not break the chain. (See *supra*, §1200.) But where the child is old enough to be deemed responsible, the earlier cases tended to apply the formula (*supra*, §1214) that an intentionally wrongful act is normally unforeseeable and a superseding cause. In *Hale v. Pacific Tel. & Tel. Co.* (1919) 42 C.A. 55, 183 P. 280, defendant stored dynamite caps in a tin box on a shelf in an open porch. An 8-year-old boy entered, pried open the box, took a number of caps, and gave some to plaintiff, a 7-year-old boy, who was injured while playing with them. *Held*, assuming that defendant was negligent in leaving the caps thus exposed, the proximate cause of the injury was the theft knowingly committed by the other boy, who testified that he knew his act was wrongful. (42 C.A. 59.) (See *Frace v. Long Beach City High School Dist.* (1943) 58 C.A.2d 566, 572, 137 P.2d 60 [intervening theft by high school boy]; 57A Am.Jur.2d (2004 ed.), *Negligence* §608 et seq.)

(2) *Foreseeable Act*. The later cases tend to escape from the formula by finding foreseeability in the particular situation.

In *Katz v. Helbing* (1928) 205 C. 629, 271 P. 1062, the complaint alleged that defendant contractors left mortar in a box on a sidewalk, to which small boys had access, and that plaintiff was struck by a handful of mortar thrown by a child. The court held that a cause of action was stated. (205 C. 635.) At the trial, a stronger case was presented, the evidence showing that defendants had notice of the fact that the children were playing with the lime. (*Katz v. Helbing* (1932) 215 C. 449, 452, 10 P.2d 1001.)

In *Stockwell v. Board of Trustees of Leland Stanford Junior University* (1944) 64 C.A.2d 197, 148 P.2d 405, plaintiff, on a university campus, was injured by BB shot fired by an unidentified boy. Defendants, university authorities, had knowledge of children hunting there, although the land was a game refuge. *Held*, the jury could consider whether defendants were negligent in failing to police the area adequately, and whether the intervening act was foreseeable. (64 C.A.2d 200.)

In *Salas v. Whittington* (1946) 77 C.A.2d 90, 174 P.2d 886, defendant manufacturer, with knowledge of danger to children from explosive materials, left his fence unlocked. Children found a can of shellac and alcohol, took it to plaintiff's adjoining yard, and ignited it, causing injuries to plaintiff, an 8-year-old boy. *Held*, the intervening act of the

child who carried the can away did not break the chain of causation. (77 C.A.2d 95.) (See *Marino v. Valenti* (1953) 118 C.A.2d 830, 845, 259 P.2d 84 [comparing *Hale* and *Katz*]; 57A Am.Jur.2d (2004 ed.), Negligence §§610, 611.)

SUPPLEMENT: [This section is current through the latest supplement]



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- 5. Intentional Act of Third Person.
- e. Arrest and Prosecution by Authorities.

6 *Witkin Sum. Cal. Law Torts* § 1218

[§ 1218] Arrest and Prosecution by Authorities.

In *Brewer v. Teano* (1996) 40 C.A.4th 1024, 47 C.R.2d 348, plaintiff filed a complaint against an estate alleging that the decedent negligently and recklessly drove his car so that it repeatedly collided with plaintiff's car, and sought compensation not only for damage to plaintiff's car and for physical injury and emotional distress, but also for expenses stemming from his ensuing arrest and prosecution for leaving the scene (as a result of his fear of the decedent). The trial court sustained defendant's general demurrer without leave to amend, and dismissed the action. *Held*, reversed and remanded. The complaint was "a sufficient conventional pleading for physical and emotional injury." (40 C.A.4th 1029.) On the other hand, plaintiff failed to state a cause of action based on his *prosecution*, which operated as a superseding cause. Further, the complaint did not state facts sufficient to justify a conclusion that the *arrest* was a superseding cause as a matter of law.

(a) *Liability for damages from prosecution.* It cannot be said that the intervening force consisting of the prosecution of formal criminal charges against plaintiff was "foreseeable" from the decedent's conduct, however characterized. The harm from that proceeding was different in kind from that which could be expected to result from the kind of conduct alleged. It was an extraordinary, rather than a normal, result of the decedent's act. The decisions of prosecutors to file a complaint against plaintiff, and of the magistrate or grand jury to hold him to answer felony charges, operated independently from anything that the decedent did; they could not be described as a normal result of his negligent driving. Whether the decedent's conduct was negligent or deliberate, it would be an unwarranted extension of liability to hold the estate liable for these remote official acts of independent public officers. Thus, as a matter of law, the plaintiff is not entitled to recover for the damages he suffered as a result of the filing of the criminal charges and the subsequent proceedings in the criminal case. (40 C.A.4th 1037.)

(b) *Liability for damages from arrest.* On plaintiff's claim for damages for his arrest, the principal issue, as before, is superseding cause. Depending on the circumstances, an arrest by police may or may not be a superseding cause, cutting off liability for what has gone before. (40 C.A.4th 1037, citing *Pool v. Oakland* (1986) 42 C.3d 1051, 1064, 232 C.R. 528, 728 P.2d 1163, *supra*, §1033.) But unlike the issue of superseding cause as it relates to the criminal prosecution, where enough may be gleaned to decide the legal issues, "the complaint is too sparse to justify a conclusion that the arrest was superseding as a matter of law." Resolution of the causation issue will have to await development of the facts. (40 C.A.4th 1037.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 595, first line of section, year of *Brewer v. Teano* should be 1995.



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D. Independent Intervening Act.
6. Suicide.

6 Witkin Sum. Cal. Law Torts § 1219

[§ 1219] Suicide.

In *Tate v. Canonica* (1960) 180 C.A.2d 898, 5 C.R. 28, supra, §461, an action for wrongful death from acts causing emotional distress leading to suicide, the second count of the complaint was based on negligence, and raised a question of first impression in California: whether suicide is a superseding cause. Earlier cases held that it is, but the modern view of the Restatement and text writers was adopted: When the insanity prevents the decedent from realizing the nature of his or her act or controlling his or her conduct, it is no more a superseding cause than unconsciousness or delirium brought about by an injury.

"[W]here the negligent wrong only causes a mental condition in which the injured person is able to realize the nature of the act of suicide and has the power to control it if he so desires, the act then becomes an independent intervening force and the wrongdoer cannot be held liable for the death. On the other hand, if the negligent wrong causes mental illness which results in an uncontrollable impulse to commit suicide, then the wrongdoer may be held liable for the death. Some cases speak of 'insanity,' and of 'delirium or frenzy,' and take the view that if the defendant knew what he was doing, the suicide is an independent intervening cause. We think, in the light of modern knowledge as to mental illness, that this view is too narrow. It should not make any difference that the defendant 'knew what he was doing.' If defendant is to avoid liability, the decedent's act must be voluntary, not in that sense but in the sense that he could, in spite of his mental illness, have decided against suicide and refrained from killing himself." (180 C.A.2d 915.)

The court suggested, but did not decide, that even if the suicide were voluntary and hence an independent intervening act, the defendant could be liable if, under the particular circumstances, it was a reasonably foreseeable result of defendant's wrongdoing. (180 C.A.2d 918.) (See *Lucas v. Long Beach* (1976) 60 C.A.3d 341, 349, 351, 131 C.R. 470 [distinguishing *Tate*; suicide of 17-year-old boy in juvenile detention cell under influence of drugs an unforeseeable act and was superseding cause]; *Grant v. F.P. Lathrop Const. Co.* (1978) 81 C.A.3d 790, 795, 146 C.R. 45 [instructions on suicide and causation]; 4 Harper, James & Gray 2d §20.5; 77 A.L.R.3d 311 [physical injuries as result of which injured party attempts or commits suicide].)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §20.5.



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A. Circumstances Justifying Vicarious Liability.

6 Witkin Sum. Cal. Law Torts § 1220

[§ 1220] Circumstances Justifying Vicarious Liability.

(1) *General Rule.* Tort liability of a person for the acts of others does not exist unless there is some relationship or other circumstance justifying the imposition of this liability. (See *Matthias v. United Pac. Ins. Co.* (1968) 260 C.A.2d 752, 755, 67 C.R. 511, supra, §865, citing the text; *Rubio v. Swiridoff* (1985) 165 C.A.3d 400, 404, 211 C.R. 338, citing the text; *Thomas v. Intermedics Orthopedics* (1996) 47 C.A.4th 957, 962, 55 C.R.2d 197, supra, §976 [discussing "captain of the ship" negligence doctrine of surgeon's liability for not assisting persons]; *Rest.2d, Torts* §315; 5 Harper, James & Gray 2d §26.1 et seq.; 57B Am.Jur.2d, *Negligence* (2004 ed.), §1096 et seq.; Cal. Civil Practice, 1 Torts, Liability for Acts of Others, Chap. 3.)

(2) *Vicarious Liability Present.* In the following situations, vicarious liability is generally recognized by common law or statute:

(a) *Special Relationship Between Defendant and Wrongdoer.* Where a special relationship exists between the defendant and the wrongdoer, such as agency or employment (see 3 *Summary* (10th), *Agency and Employment*, §163 et seq.), joint enterprise (see infra, §1235), and in some situations, employer and independent contractor (see infra, §1236 et seq.). (See also *Rest.2d, Torts* §319 [duty of those in charge of person having dangerous propensities]; 42 *A.L.R.4th* 586 [liability of physician to third person for prescribing drug to known drug addict]; 43 *A.L.R.4th* 153 [liability of physician to third person for failure to disclose driving-related impediment]; 25 *A.L.R.5th* 1 [liability of adult assailant's family for physical assault on third party].)

(b) *Special Relationship Between Defendant and Plaintiff.* Where a special relationship exists between the defendant and the plaintiff, so that the defendant owes an affirmative duty of care toward the plaintiff; e.g., landowner and person coming on the land. (See *Rest.2d, Torts* §344; supra, §1129).

(c) *Statutory Liability.* Where a statute imposes this liability; e.g., the limited liability of a parent for torts of a child (see infra, §1229 et seq.), or an owner for negligence of one driving a car with permission (see infra, §1260 et seq.), and of an insurance company for negligence of an insured driver (see 2 *Summary* (10th), *Insurance*, §§309, 310).

(d) *Dangerous Instrumentality.* Where the defendant entrusts a dangerous instrumentality to an improper person. (See infra, §§1221, 1222.)

(3) *No Vicarious Liability.* In the following situations, vicarious liability is not generally recognized:

(a) *Family Relationship.* Family relationships normally do not give rise to vicarious liability. Thus, a parent is not, as such, liable for the torts of his or her child except by statute in special situations and to a limited extent (see *infra*, §1227 et seq.). And one spouse is not liable for the torts of another. (*Family C. 1000.*) (On liability of community property, see 11 *Summary* (10th), *Community Property*, §175 et seq.)

In *Wise v. Superior Court* (1990) 222 C.A.3d 1008, 272 C.R. 222, defendant's husband mounted a sniper attack from the roof of his home, and injured a number of passing motorists, including plaintiffs, before taking his own life. Plaintiffs sued defendant widow, alleging that decedent husband was "a human time bomb" with a long history of erratic and violent behavior and an arsenal of weapons; and that defendant was negligent in permitting decedent to occupy the house without doing anything to protect or warn others in the zone of danger. *Held*, no cause of action was stated.

(a) No special relationship was shown, for decedent's behavior was beyond the control of anyone, and the type of attack was not foreseeable. (222 C.A.3d 1008.)

(b) *Pamela L. v. Farmer* (1980) 112 C.A.3d 206, 169 C.R. 282, *supra*, §1058, is distinguishable. In that case defendant wife, who allegedly knew of her husband's history of child molestation, invited minor girls to use the swimming pool in their home while she was at work. (222 C.A.3d 1014.)

(b) *Landlord-tenant Relationship.* The landlord and tenant relationship also falls outside the vicarious liability rules; a landlord is not liable for the negligence of a tenant. (*Mundt v. Nowlin* (1941) 44 C.A.2d 414, 415, 112 P.2d 782; 30 *Stanf. L. Rev.* 725 [argument that landlord has duty of care in selection of tenant, hence should be liable for foreseeable injuries inflicted by a foreseeably dangerous tenant].)

West's Key Number Digest, Negligence k.483

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* See 5 Harper, James & Gray 3d §26.1 et seq.



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B. Entrustment of Dangerous Instrumentality.
1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1221

[§ 1221] In General.

Even where no duty arises by reason of a relationship (see *supra*, §1220), it has been recognized that entrusting an instrumentality to an improper or incompetent person, under circumstances that indicate a likelihood of misuse, may be grounds for liability. (See *Rest.2d, Torts* §§308, 390; 5 Harper, James & Gray 2d §26.10; Dobbs, *The Law of Torts* §330.) The principal example is entrustment of a motor vehicle to an incompetent, reckless, or intoxicated driver. (See *infra*, §1222.)

In *Jacoves v. United Merchandising Corp.* (1992) 9 C.A.4th 88, 11 C.R.2d 468, plaintiffs brought a wrongful death action against defendant sporting goods store (Big 5) for negligently selling a firearm to their son Jonathan. The complaint alleged that Jonathan first attempted to buy a handgun, but did not do so when he learned that there was a statutory waiting period. Later, Jonathan returned and was sold a rifle and ammunition (for which there was no waiting period) and instructed on its use, even though he appeared youthful, confused, distraught, and trembling. On the same day, he used the rifle to commit suicide. *Held*, the allegations failed to state a cause of action for negligent entrustment.

"In order to impose a duty on Big 5 to refuse to sell the rifle and ammunition to Jonathan, the complaint must allege that Big 5 knew, or had reason to know, that Jonathan was reasonably likely to use the rifle to harm himself. The complaint does not allege that Big 5 knew Jonathan intended to commit suicide with the rifle. Nor are facts alleged which can reasonably be said to have given Big 5 reason to know that Jonathan intended to commit suicide. The facts, if proved, establish only that Jonathan, a young adult, wanted to purchase a firearm without waiting two weeks for its delivery and was confused, distraught and trembling. A salesclerk in a sporting goods store cannot reasonably be expected to have concluded, from these observations alone, that Jonathan intended to commit suicide. Jonathan's alleged demeanor was not on such a scale so as to manifest to the ordinary observer that Jonathan was mentally impaired, incompetent or irresponsible with regard to the handling of firearms. In the circumstances alleged in this case, there was, as a matter of law, no reason for Big 5 to anticipate a violent act on the part of Jonathan." (9 C.A.4th 118.) (See *Todd v. Dow* (1993) 19 C.A.4th 253, 260, 261, 23 C.R.2d 490 [action against parents whose adult son took his rifle from parents' house and accidentally shot plaintiff; causal connection between bailment of rifle and harm suffered was too tenuous to state claim for negligent entrustment]; 37 Proof of Facts 3d 1 [negligent entrustment of firearm]; 39 A.L.R.4th 517 [liability for providing firearm or ammunition to adult who shoots another]; on permitting child access to firearm, see *infra*, §§1233, 1234.)

West's Key Number Digest, Negligence k.351 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §26.10.



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2. Incompetent, Reckless, or Intoxicated Driver.
a. In General.

6 Witkin Sum. Cal. Law Torts § 1222

[§ 1222] In General.

Liability of a defendant who permits an incompetent, reckless, or intoxicated person to drive his or her motor vehicle has long been recognized. (See *Rocca v. Steinmetz* (1923) 61 C.A. 102, 109, 214 P. 257; *Kanananako v. Badalamente* (1931) 119 C.A. 231, 233, 6 P.2d 338; *Knight v. Gosselin* (1932) 124 C.A. 290, 293, 12 P.2d 454; *McCalla v. Grosse* (1941) 42 C.A.2d 546, 550, 109 P.2d 358; *Jones v. Ayers* (1963) 212 C.A.2d 646, 652, 28 C.R. 223 [entrustment to 15-year-old boy with only instruction permit]; *Reclusado v. Mangum* (1964) 228 C.A.2d 8, 10, 39 C.R. 157 [same]; *Hartford Acc. & Indem. Co. v. Abdullah* (1979) 94 C.A.3d 81, 91, 156 C.R. 254, citing the text [entrustment by used car dealer]; *Allen v. Toledo* (1980) 109 C.A.3d 415, 420, 167 C.R. 270, citing the text; *Dodge Center v. Superior Court* (1988) 199 C.A.3d 332, 338, 244 C.R. 789, citing the text; *White v. Inbound Aviation* (1999) 69 C.A.4th 910, 920, 82 C.R.2d 71 [evidence supported finding that FAA-licensed pilot who had not received high-altitude training was "incompetent"]; 7A Am.Jur.2d (1997 ed.), *Automobile and Highway Traffic* §790 et seq.; 14 *Hastings L. J.* 436; 41 *So. Cal. L. Rev.* 440; 17 *Stanf. L. Rev.* 539; 30 *A.L.R.4th* 838 [negligent entrustment of vehicle--where owner admits liability on another theory]; 91 *A.L.R.5th* 1 [liability for entrusting automobile to one who is known to be intoxicated or known to be excessive user of intoxicants]; BAJI, No. 13.80; CACI, No. 724.)

In *Caccamo v. Swanston* (1949) 94 C.A.2d 957, 212 P.2d 246, a husband and wife were business partners and registered coowners of an automobile. The wife left the car while her husband was in the driver's seat and the engine was running, with knowledge of his intoxication. Held, she was liable for injuries suffered by plaintiffs in the ensuing accident that killed the husband, and the statutory limitations on amount recoverable (*infra*, §1261) were inapplicable. (94 C.A.2d 967.)

The fact that the driver was unlicensed makes a *prima facie* case of negligence in entrusting the car. (*Owens v. Carmichael's U-Drive Autos* (1931) 116 C.A. 348, 352, 2 P.2d 580; see *Shifflette v. Walkup Drayage & Warehouse Co.* (1946) 74 C.A.2d 903, 907, 169 P.2d 996 [citing *Veh.C.* 14606, prohibiting owner of vehicle from authorizing unlicensed person to drive]; *Nault v. Smith* (1961) 194 C.A.2d 257, 267, 14 C.R. 889; 55 *A.L.R.4th* 1100 [negligent entrustment of vehicle to unlicensed driver].) But a driver is not incompetent merely because he or she does not have liability insurance. (*Skerlec v. Wells Fargo Bank* (1971) 18 C.A.3d 1003, 1008, 96 C.R. 434.)

In *Grafton v. Mollica* (1965) 231 C.A.2d 860, 42 C.R. 306, defendant brought his car to a service station for

lubrication, and asked plaintiff, the attendant, to check the automatic transmission fluid. This necessitated starting of the engine, and defendant did so, leaving his 21/2-year-old son on the front seat. Plaintiff got in front of the car and lifted the hood, whereupon it gave a lurch forward and crushed him against a wall. The trial judge directed a verdict for defendant on the theory that defendant owed no duty to control the acts of a third person. *Held*, reversed: "We consider that leaving an active 21/2-year-old boy alone in the front seat of an automobile with the engine running, is at least comparable to placing a loaded firearm in his hands." (231 C.A.2d 863.)

In *Mettelka v. Superior Court* (1985) 173 C.A.3d 1245, 1249, 219 C.R. 697, the car was coowned by the father and the incompetent driver. *Held*, a cause of action could be stated for negligent entrustment by the father. (173 C.A.3d 1249.)

The theory of these cases has so far been applied only to the supplier of the car; an automobile financing agency cannot be held liable. (*Drake v. Morris Plan Co.* (1975) 53 C.A.3d 208, 215, 125 C.R. 667; *Altman v. Morris Plan Co.* (1976) 58 C.A.3d 951, 959, 130 C.R. 397.)

SUPPLEMENT: [This section is current through the latest supplement]
See 8 *Am.Jur.2d* (2007 ed.), *Automobiles and Highway Traffic* §610 et seq.



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b. No Duty To Inquire into Competency.

6 *Witkin Sum. Cal. Law Torts* § 1223

[§ 1223] No Duty To Inquire into Competency.

In *Osborn v. Hertz Corp.* (1988) 205 C.A.3d 703, 252 C.R. 613, E, while sober, and holding a valid driver's license, rented a car from defendant Hertz. Later, while drunk, he drove the car into a tree, injuring plaintiff, his passenger. Plaintiff sued defendant on the theory of negligent entrustment, contending that defendant should have inquired into E's competency, and that the inquiry would have disclosed two convictions for drunken driving (the most recent, 7 years before the accident). *Held*, summary judgment for defendant affirmed.

(a) Liability of negligent entrustment of a car to an incompetent driver is well established, and a rental agency by statute is prohibited from renting to an unlicensed driver. (205 C.A.3d 709, citing *Veh.C. 14608*.) However, because E had a valid license and was sober when he rented the car, no basis existed for liability under these rules. (205 C.A.3d 710.)

(b) No authority supports plaintiff's contention that defendant should have questioned E on his prior record of drunk driving. (205 C.A.3d 710.) And if the question had been asked and answered, there is no authority for a rule that would make it practically impossible for a person previously convicted of drunk driving to rent a car. (205 C.A.3d 711.)

(c) Plaintiff's final theory was that a rental agency is under a duty to screen out potential drunk drivers by asking questions and warning the driver of the dangers of driving while drunk. (205 C.A.3d 713.) But defendant acted reasonably in relying on E's license as a screening device. (205 C.A.3d 714.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Seller of Vehicle Is Not Liable.

6 *Witkin Sum. Cal. Law Torts* § 1224

[§ 1224] Seller of Vehicle Is Not Liable.

In *Dodge Center v. Superior Court* (1988) 199 C.A.3d 332, 244 C.R. 789, an adult with an expired driver's license and a driving record with several Vehicle Code violations bought a car from Dodge. He told Dodge employees that he had a license, and no employee was aware of the truth. While driving the car he collided with a motorcycle. Plaintiffs, the motorcycle riders, sustained injuries, and brought this suit against Dodge. *Held*, mandamus issued directing the trial court to grant Dodge's motion for summary judgment.

(a) Both the common law cause of action for negligent entrustment, and the statutory action under *Veh.C. 14606*, require a showing of knowledge of the incapacitating condition. (199 C.A.3d 338, citing *Johnson v. Casetta* (1961) 197 C.A.2d 272, 17 C.R. 81.) And *Veh.C. 14606* "refers only to the act of allowing another to drive a vehicle owned by the entrustor or under his control; it does not refer to a sales transaction in which ownership and control pass from the seller to the purchaser." (199 C.A.3d 339.)

(b) "Although it has been suggested that the sale of an automobile to an unlicensed and inexperienced person with actual or presumptive knowledge that the incompetent is going to drive it may form a basis for imposing tort liability for negligent entrustment under some circumstances ... , no California decision actually appears to have based such liability upon the automobile transaction. ... The California decisions involve loans or permissive use transactions where the entrustor retains an ownership interest in the vehicle." (199 C.A.3d 339.)

(c) In the absence of statute, to impose on the seller a duty of inquiry as to the buyer's driver's license status would violate the general principle that "it may be presumed that every person will obey the law. ... It follows that a retail seller of motor vehicles may normally assume that a purchaser is either legally entitled to drive the vehicle, or, if not himself qualified, will arrange for a legally qualified driver's services." (199 C.A.3d 342; on duty to inquire into competency, see *supra*, §1223.) (See *Johnson v. Casetta* (1961) 197 C.A.2d 272, 276, 17 C.R. 81 [used car dealer's sale of automobile to unlicensed person with virtually no driving experience].)

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d. Gift of Vehicle.

6 Witkin Sum. Cal. Law Torts § 1225

[§ 1225] Gift of Vehicle.

In *Talbott v. Csakany* (1988) 199 C.A.3d 700, 245 C.R. 136, decedent's estate alleged that defendant C gave an automobile to their daughter and her husband as a wedding present, with knowledge that the husband was a habitual drunken driver; and that the husband, driving while intoxicated, killed decedent. *Held*, judgment on demurrer for defendants affirmed, although the opinion recognizes that under some circumstances a cause of action based on such a gift could be stated.

(a) A person who *lends* a car to another who is known to the lender as an incompetent driver may be liable for negligent entrustment. (199 C.A.3d 703; see *supra*, §1222.)

(b) The question of liability of a person who gives a car has been the subject of conflicting decisions in other jurisdictions. A Tennessee case and other cases take the position that in the absence of a relationship constituting legal control, liability should be imposed only if the receiving party is intoxicated or otherwise incapacitated at the time of delivery of possession and control. Moreover, causation is too tenuous and remote, because there are many probable intervening events and conditions between the gift of the car and the negligent operation. Legal scholars have criticized the reasoning of these cases, and a Maryland case rejects their holdings. (199 C.A.3d 704.)

(c) In California, the issue should be approached on a consideration of the factors set forth in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §833). And the tort of *negligent entrustment* of an instrumentality to an incompetent person under circumstances indicating a likelihood of misuse is committed even if the instrumentality is transferred. (199 C.A.3d 706, citing the text.) Hence, "even when there is no evidence of control, since the foreseeability of injury from a known habitual drunk driver is strong and the policy of preventing drunk driving is compelling, it is appropriate to allow liability where the facts show sufficient causation." (199 C.A.3d 706.)

(d) In the Maryland case where a father purchased the car as a gift to his son, sufficient causation was in evidence that the donee's income was minimal and that he obtained money from his father several times a week; this permitted a reasonable conclusion that he would not have had a car if his father had not bought it for him. (199 C.A.3d 706.) Here, however, "the pleaded facts do not support an inference that the act of giving the car was peculiarly the means which afforded the adult, licensed, albeit habitually drunk, driver the means to injure the plaintiff." (199 C.A.3d 707.) (See 22

A.L.R.4th 738 [liability of donor of motor vehicle for injuries from owner's operation].)

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B. Entrustment of Dangerous Instrumentality.
3. Respondeat Superior Liability Distinguished.

6 Witkin Sum. Cal. Law Torts § 1226

[§ 1226] Respondeat Superior Liability Distinguished.

An employer cannot be held vicariously liable for the negligence of an employee if the employee is exonerated. (See 3 *Summary* (10th), *Agency and Employment*, §167.) But an employer may be directly liable for his or her own tort of negligent entrustment of a dangerous instrumentality to an incompetent employee.

In *Syah v. Johnson* (1966) 247 C.A.2d 534, 55 C.R. 741, defendant partners, operating an automobile sales agency, employed defendant H as a pickup and delivery man. H suffered a dizzy spell and ran an automobile over a curb; he also had a collision with a car door. The service manager arranged for a doctor's appointment. H gave the doctor a disarming medical history; the doctor made a cursory examination and told him to come back if he had any further dizziness. H reported the examination to the service manager and nothing further was done. Then, while driving a customer's car, H had an epileptic seizure, blacked out, ran through a stop signal at high speed and struck another car, killing decedent. *Held*, judgment on verdicts against defendant partners and in favor of defendant H affirmed. The duty of a retail automobile sales firm, not to entrust the car to an incompetent driver, was not satisfied by merely arranging a doctor's appointment. (247 C.A.2d 545.)

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(New) *Where respondeat superior liability is admitted:* "[N]egligent entrustment evidence of the employee's prior accidents may not be presented against the employer when the employer has admitted to vicarious liability for the employee's conduct." (*Jeld-Wen v. Superior Court* (2005) 131 C.A.4th 853, 864, 32 C.R.3d 351 [disagreeing with statement in *Syah v. Johnson* (1966) 247 C.A.2d 534, 55 C.R. 741, text, p. 604, that rule is merely dictum].)



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1. General Rule of Nonliability.

6 *Witkin Sum. Cal. Law Torts* § 1227

[§ 1227] General Rule of Nonliability.

In the absence of statute, a parent is not liable for the torts of his or her minor child. (See generally *Hagerty v. Powers* (1885) 66 C. 368, 369, 5 P. 622; *Hudson v. Von Hamm* (1927) 85 C.A. 323, 326, 259 P. 374; 2 Harper, James & Gray 2d §8.13; 54 A.L.R.3d 974 [legal responsibility of parent for intentional act of child]; 70 A.L.R.3d 611 [legal responsibility of parent for injury caused by child riding bicycle].)

Apart from situations in which the child is an agent or employee of the parent (see 3 *Summary* (10th), *Agency and Employment*, §163 et seq.), there are four principal exceptions:

- (1) Where the parent has knowledge of the child's prior misconduct (infra, §1228).
- (2) Where the parent has signed the child's driver's license or the child drives the parents' car with permission (infra, §§1256, 1257, 1260).
- (3) Where the child is guilty of wilful misconduct (infra, §1229 et seq.).
- (4) Where the child is given ready access to a firearm (infra, §§1233, 1234).

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SUPPLEMENT: [This section is current through the latest supplement]
See 2 Harper, James & Gray 3d §8.13.



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a. Knowledge of Past Misconduct.

6 *Witkin Sum. Cal. Law Torts* § 1228

[§ 1228] Knowledge of Past Misconduct.

The parent is liable for the child's tort if, knowing or having reason to know (e.g., from past misconduct of the child) that it is necessary to control the child, the parent fails to exercise reasonable care to do so. This rule is set forth in the *Rest.2d, Torts* §316, and is explained in *Singer v. Marx* (1956) 144 C.A.2d 637, 644, 301 P.2d 440, *supra*, §25), quoting Prosser: "[T]he parent has a special power of control over the conduct of the child, which he is under a duty to exercise reasonably for the protection of others. He may thus be liable for a failure to take the gun away from the child when he finds him with it, or to make reasonable efforts to restrain and correct him when he manifests a tendency to beat other children with a stick, or to shoot at horses in the street. Probably, however, the effect of the decided cases is that there is no liability upon the parent unless he has had an opportunity to correct a specific propensity on the part of the child, and that it is too much to hold the parent responsible for general incorrigibility and a bad disposition. He may, however, be under a duty to warn others who may suffer from such characteristics." (See 2 Harper, James & Gray 2d §8.13; 6 *Hastings L. J.* 102; 54 A.L.R.3d 974 [liability of parent for injury or damage inflicted by minor]; BAJI, No. 13.75; CACI, No. 410; 5 *Cal. Proc.* (4th), *Pleading*, §878; cf. *Martin v. Barrett* (1953) 120 C.A.2d 625, 628, 261 P.2d 551 [rule recognized but complaint held insufficient for lack of allegations of habitual misconduct and knowledge of it]; *Reida v. Lund* (1971) 18 C.A.3d 698, 702, 96 C.R. 102, *infra*, §1233 [evidence was insufficient to show negligent control, but liability was possible for permitting access to firearm]; *Robertson v. Wentz* (1986) 187 C.A.3d 1281, 232 C.R. 634, *infra*, §1230 [mother, lacking physical custody and control at critical time, was not liable; mere legal custody is insufficient].)

In *Ellis v. D'Angelo* (1953) 116 C.A.2d 310, 253 P.2d 675, *supra*, §25, the complaint of plaintiff, a baby-sitter injured by a young child, was upheld where she alleged that the child had habitually attacked people with violence, and that defendant parents negligently failed to warn her of these traits. (116 C.A.2d 317.) And in *Singer*, (a) the evidence showed continual rock throwing by a child and complaints by neighbors to the *mother*, justifying the inference that she had notice of his dangerous proclivities and did not administer effective discipline; but (b) there was no evidence of personal knowledge on the part of the *father*, and a nonsuit as to him was affirmed. (144 C.A.2d 646.)

The rule is not restricted to the parent-child relationship; others with custody and control of the child may be liable. In *Poncher v. Brackett* (1966) 246 C.A.2d 769, 55 C.R. 59, citing the text, plaintiff alleged that defendants, grandparents of a minor boy, had custody and control over him; that, knowing he was emotionally disturbed and potentially

dangerous, they permitted him to move freely about, giving no warnings of his dangerous propensities and taking no precautions to protect the public; and that the boy assaulted plaintiff. *Held*, judgment for defendants on demurrer reversed; a cause of action was stated. This liability is not based on general incorrigibility but on specific manifested dangerous tendencies. (246 C.A.2d 771.) And ability to control the child, not the relationship, is the crucial factor. (246 C.A.2d 772.) (See *Costello v. Hart* (1972) 23 C.A.3d 898, 900, 100 C.R. 554 [grandmother with custody of 4-year-old boy].)

West's Key Number Digest, Parent and Child k.13(1)

SUPPLEMENT: [This section is current through the latest supplement]
See 2 Harper, James & Gray 3d §8.13.

Liability of parent:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §924.



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b. Statutory Liability for Wilful Misconduct.

1. Nature and Scope of Statute.

6 *Witkin Sum. Cal. Law Torts* § 1229

[§ 1229] Nature and Scope of Statute.

(1) *In General.* "Any act of willful misconduct of a minor that results in injury or death to another person or in any injury to the property of another must be imputed to the parent or guardian having custody and control of the minor for all purposes of civil damages, and the parent or guardian having custody and control are jointly and severally liable with the minor for any damages resulting from the willful misconduct." (C.C. 1714.1(a).) (See 43 *Cal. L. Rev.* 877; 20 *Cal. Western L. Rev.* 187 [proposed Model Parental Liability Act]; 7 *Hastings L. J.* 98 [insurer's liability for damage caused by wilful misconduct of insured's child, as affected by C.C. 1714.1]; 6 *Pacific L. J.* 422; 11 *Pacific L. J.* 655; 37 *Santa Clara L. Rev.* 621 [use of parental liability laws to control juvenile delinquency]; 8 *A.L.R.3d* 612 [validity and construction of statutes making parents liable for torts committed by their minor children].)

The liability imposed under the statute is the one authorized at the time the act of wilful misconduct was committed. (C.C. 1714.1(d).) It "is in addition to any liability now imposed by law." (C.C. 1714.1(a).)

(2) *Amount.* The joint and several liability of the parent or guardian may not exceed \$ 25,000 for each tort of the minor, and in the case of injury to a person, imputed liability is further limited to medical, dental, and hospital expenses not to exceed \$ 25,000. (C.C. 1714.1(a).)

C.C. 1714.1 also establishes liability for wilful misconduct resulting in the defacement of property with paint or a similar substance. The same maximum (\$ 25,000) is specified, but the liability also includes court costs and attorneys' fees. (C.C. 1714.1(b).) (On parents' joint and several liability for expense of correcting minor's graffiti, see *Govt.C.* 38772, 13 *Summary* (10th), *Equity*, §154.)

The \$ 25,000 amount is adjusted in odd numbered years by the Judicial Council to reflect increases in the California Consumer Price Index. On or before January 1 of each odd-numbered year after 1997, the Judicial Council must compute and publish the adjusted amounts. (See C.C. 1714.1(c); C.R.C., Appendix, Division VII.)

(3) *Insurer's Liability.* Nothing in the statute has the effect of imposing liability on an insurer for a loss caused by an insured's wilful act for purposes of *Ins.C.* 533 (see 2 *Summary* (10th), *Insurance*, §100 et seq.). Moreover, an insurer

is not liable for the conduct imputed to a parent or guardian by C.C. 1714.1 for any amount in excess of \$ 10,000. (C.C. 1714.1(e).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Amount.* As amended in 2007, C.C. 1714.1(c) requires the Judicial Council to compute and publish the adjusted amounts on or before July 1 of each odd numbered year. As of the 2009 adjustment, the amount is \$ 37,100.

In 2006, C.R.C., Appendix VII was redesignated C.R.C., Appendix B.



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2. Illustrations.

6 *Witkin Sum. Cal. Law Torts* § 1230

[§ 1230] Illustrations.

In *Robertson v. Wentz* (1986) 187 C.A.3d 1281, 232 C.R. 634. Roy, a minor, was the son of divorced parents, Mr. and Mrs. W. In January, 1982, 5 days before he became 18, he robbed a store and, in the process, shot and killed Mrs. R. Plaintiff Mr. R brought this action for wrongful death against Mrs. W, based on common law negligence in controlling and supervising Roy (see supra, §1229), and on C.C. 1714.1 (see supra, §1229) and C.C. 1714.3 (liability of parent for minor's discharge of firearm, see infra, §1234). The divorce decree of 1978 had awarded defendant Mrs. W sole legal custody of Roy, with child support, and Roy lived with her until 1979 when he moved in with his father and later with his employer. He returned briefly to his mother's home in 1981, and in 1982, recommenced living with his father. Roy had been introduced to firearms in his youth, and his mother knew that he possessed guns, but she had no knowledge of their misuse. Roy also was a user of liquor and narcotics, but neither his mother nor his father took any action other than counseling and imposing rules on his behavior. Defendant, who had remarried, testified that she and her ex-husband had agreed that Roy was to stay with his father, for guidance and counseling, and that she had no plans for Roy to move back to her home. *Held*, summary judgment for defendant reversed.

(a) As C.C. 1714.1 read prior to its 1983 amendment, an act of wilful misconduct resulting in injury or death to person or injury to property "shall be imputed to the parent or guardian having custody or control of the minor." (187 C.A.3d 1291.) Defendant had *legal custody* pursuant to court order, but the record clearly shows that she did not have *physical custody* at the time of the act of wilful misconduct. (187 C.A.3d 1292.)

(b) The obvious purpose of the law was to provide a remedy (with statutory limits on damages) to innocent third parties injured by a minor where no practical remedy was available under the common law. In view of this purpose, "requiring actual *physical* custody of the child by the parent would not in our view adequately further the objective of the statute." (187 C.A.3d 1293.) And by use of the disjunctive phrase "custody *or* control," the Legislature must have intended that either would be sufficient for application of the statutory liability. Hence, the showing of mere legal custody by the divorce decree was a proper basis for a cause of action under C.C. 1714.1(a), and it was error to grant summary judgment as to that cause of action. (187 C.A.3d 1293, 1294, 1295.)

(c) The 1983 amendment, not applicable to this case, substituted "custody *and* control" for the former disjunctive

phrase. "We are concerned here with only the former, more capacious statutory language, however. As it currently stands, the only apparent distinction between section 1714.1, subdivision (a) and common law negligence liability, is that the former does not require a showing that the parent had knowledge of the child's dangerous tendencies." (187 C.A.3d 1294, footnote 5.)

Cynthia M. v. Rodney E. (1991) 228 C.A.3d 1040, 279 C.R. 94, raised the issue whether the parents of R, a minor who impregnated C, his 16-year-old girlfriend, were liable for damages resulting from uncovered hospitalization bills incurred after the birth of the child. *Held*, R's parents were not liable; consensual sexual intercourse between minors is not "wilful misconduct" within the meaning of C.C. 1714.1.

(a) Although R committed the crime of unlawful sexual intercourse (P.C. 261.5), it is too simplistic to say that his actions constituted "wilful misconduct." The damages sought here resulted from C's becoming pregnant as a result of having intercourse with R, not from the intercourse itself. And the pregnancy could as easily be attributed to negligence, i.e., the failure to practice birth control, as it could be to R's wilful misconduct. (228 C.A.3d 1045.)

(b) While the criminal law does not recognize consent by a minor as a defense, the civil law is replete with examples of situations in which a child over 14 is deemed to have the capacity to consent to various kinds of bodily invasions. Hence, in determining civil liability under C.C. 1714.1, the consent of a person under 18 is a permissible consideration. (228 C.A.3d 1045.)

(c) As a parental responsibility statute in derogation of the common law, C.C. 1714.1 should be strictly construed. (228 C.A.3d 1046.) Given the important distinction between a party who was injured through no fault of his or her own and one who willingly participated in the offense about which a complaint was made, it is unlikely that the Legislature intended C.C. 1714.1 to encompass torts in which the injured party was a willing participant in the wilful misconduct. (228 C.A.3d 1047, citing *Robertson*.)

In *Curry v. Superior Court* (1993) 20 C.A.4th 180, 24 C.R.2d 495, a high school student who had been molested by a minor brought an action against the school district and its employees for failure to control the minor. Defendants cross-complained against the minor's parents for indemnity under C.C. 1714.1. The trial judge overruled the parents' demurrer. *Held*, affirmed. The modern trend favors the equitable sharing of losses among tortfeasors, and even if the statute "was designed to afford relief to injured third parties by imposing liability on a presumably financially responsible parent, we can see no reason why that liability should not run in favor of a concurrently liable tortfeasor." If plaintiff had joined the parents as defendants, their liability would be obvious, and the fact that she did not should not insulate them from a duty to contribute. (20 C.A.4th 189.)

In *Thrifty-Tel v. Bezenek* (1996) 46 C.A.4th 1559, 54 C.R.2d 468, *supra*, §720, plaintiff, a telephone long-distance carrier, sued defendants, the parents of teenage boys who, along with some friends, used the family computer to crack plaintiff's system and make long-distance phone calls without paying. *Held*, judgment for plaintiff affirmed as to liability. C.C. 1714.1 is applicable here. Although the sons' friends participated in the hacking, they acted in concert with the sons, and whatever losses plaintiff incurred arose from use of the defendants' family computer. One of the sons knowingly permitted the friends to use the computer for the improper purpose and knew that this was wrong. Thus, the trial court correctly determined his conduct to be intentional and wilful. It is of no consequence that plaintiff did not plead a conspiracy between the sons and their friends or seek to amend the complaint after trial to conform to proof. A variance between pleading and proof is material only if it actually misleads the adverse party to his or her prejudice in maintaining the defense on the merits. That did not occur here. Defendants knew that plaintiff sued them based on their sons' conduct. (46 C.A.4th 1571.) (See *Jamshid-Negad v. Kessler* (1993) 15 C.A.4th 1704, 1709, 19 C.R.2d 621, 2 Cal. Proc. (4th), *Jurisdiction*, §149 [out-of-state parents' act of sending their son to college in California gave California personal jurisdiction over them in action under C.C. 1714.1].)

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SUPPLEMENT: [This section is current through the latest supplement]
Jamshid-Negad case:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §155.



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3. Injury to School Students, Personnel, or Property.

6 *Witkin Sum. Cal. Law Torts* § 1231

[§ 1231] Injury to School Students, Personnel, or Property.

(1) *Liability of Parent or Guardian.* Notwithstanding C.C. 1714.1 (supra, §1229), *Educ.C. 48904* makes the parent or guardian of any minor liable for damages caused by (a) the minor's wilful misconduct resulting in injury or death to a student, employee, or volunteer for a school district or private school, or (b) his or her wilful cutting, defacement, or other injury to real or personal school property, or personal property of a school employee. (*Educ.C. 48904(a)*.) The liability is limited to \$ 10,000, but the parent or guardian is also liable for any reward, not exceeding \$ 10,000, paid by the district pursuant to *Govt.C. 53069.5*. (*Educ.C. 48904(a)*.)

The parent or guardian of a minor is liable to a school district or private school for all property belonging to the district or school loaned to the minor and not returned on demand of an employee of the district or school authorized to make the demand. (*Educ.C. 48904(a)*.)

(2) *Withholding Grades, Diplomas, and Transcripts.* *Educ.C. 48904* authorizes withholding grades, diplomas, and transcripts until damages are paid or a voluntary work program has been completed. (*Educ.C. 48904(b)*.)

(3) *Request for Legal Action.* An employee of a school district whose personal property is injured or damaged by the wilful misconduct of a student who attends school in the district may request the district to pursue legal action against the student who caused the injury or damage, or the student's parent or guardian pursuant to *Educ.C. 48904*. (*Educ.C. 48905*.) The statute is applicable "when the employee or the employee's property is (1) located on property owned by the district, (2) being transported to or from an activity sponsored by the district or a school within the district, (3) present at an activity sponsored by such a district or school, or (4) otherwise injured or damaged in retaliation for acts lawfully undertaken by the employee in execution of the employee's duties." (*Educ.C. 48905*.) (See 6 *Pacific L. J.* 422; 11 *Pacific L. J.* 655.)

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4. Theft From Merchant or Library.

6 *Witkin Sum. Cal. Law Torts* § 1232

[§ 1232] Theft From Merchant or Library.

If an unemancipated minor's wilful misconduct would constitute petty theft involving merchandise taken from a merchant's premises or a book or other library materials taken from a library, an injured merchant or library may bring a civil action against the parent or legal guardian having control and custody of the minor. "For the purposes of those actions the misconduct of the unemancipated minor shall be imputed to the parent or legal guardian having control and custody of the minor." (P.C. 490.5(b); see 8 *Pacific L. J.* 276.)

The parent or legal guardian is *jointly and severally* liable with the minor to a merchant or library for damages of \$ 50 to \$ 500, plus costs. In addition to these damages, the parent or legal guardian is jointly and severally liable to the merchant for the retail value of the merchandise if it is not recovered in a merchantable condition, or to the library for the fair market value of its book or other library materials. The recovery is in addition to, and is not limited by, any other provision of law limiting the liability of a parent or legal guardian for the tortious conduct of a minor. (P.C. 490.5(b).)

An action to recover damages under P.C. 490.5 may be brought in small claims court if the total damages do not exceed the court's jurisdictional limit, or in any other appropriate court. However, total damages, including the value of the merchandise or book or other library materials, may not exceed \$ 500 for each action brought under the statute. (P.C. 490.5(b).)

The provisions of P.C. 490.5(b) are in addition to other civil remedies and do not preclude the merchants or other persons from electing to pursue other civil remedies, except that the provisions of C.C. 1714.1 (*supra*, §1229) do not apply. (P.C. 490.5(b).)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Torts of Child.

2. Exceptions.

c. Permitting Access to Firearm.

1. Common Law.

6 *Witkin Sum. Cal. Law Torts* § 1233

[§ 1233] Common Law.

The older California cases, applying the general rule of nonliability of a parent for the child's tort (*supra*, §1227 denied recovery even where the parent permitted the child to have access to a firearm and the child shot the victim. (See *Figone v. Guisti* (1919) 43 C.A. 606, 611, 185 P. 694; *Martin v. Barrett* (1953) 120 C.A.2d 625, 627, 261 P.2d 551; 43 Cal. L. Rev. 874; 6 *Hastings L. J.* 102; 68 A.L.R.2d 782 [permitting child to have gun or leaving gun in accessible place].) The majority rule is contra; allowing access to firearms or other deadly instrumentalities is regarded as actionable negligence. (See 2 Harper, James & Gray 2d §8.13; 57A *Am.Jur.2d* (2004 ed.), *Negligence* §314; 37 *Proof of Facts* 3d 1 [negligent sale, entrustment, or storage of firearm]; 68 A.L.R.2d 782 [firearms]; 75 A.L.R.3d 825 [liability of defendant who has made gun available with which minor or other incompetent has shot and injured or killed himself or herself]; 4 A.L.R.4th 331 [liability of one who sells gun to child for injury to third party].)

In *Reida v. Lund* (1971) 18 C.A.3d 698, 96 C.R. 102, M, a 16-year-old boy, took his father's automobile and converted Mauser rifle without permission, stationed himself on a hill, and killed three persons and wounded others. When police approached, he killed himself. Actions for wrongful death and personal injuries were brought against M's estate and his parents. Summary judgment was granted for defendants. *Held*, reversed. Although the rifle and ammunition were kept in a locked cabinet, defendant parents admitted that the location of the key was known to the boy. And the modern trend, as indicated by the out-of-state cases and the 1970 California statute (*infra*, §1234), justified imposition of liability. Defendant father's declaration raises a triable question of fact whether his act in leaving a lethal weapon in a place accessible to his children amounted to a proper exercise of due care or whether it amounted to negligent safeguard of a deadly weapon." (18 C.A.3d 707.) (See *Todd v. Dow* (1993) 19 C.A.4th 253, 259, 23 C.R.2d 490 [summary judgment for parents whose 27-year-old son took his gun from parents' house and accidentally shot plaintiff; parent-child relationship did not create duty of care absent parents' ability to control son, who had threatened no one, exhibited no violent conduct, and intended no harm].)

West's Key Number Digest, Parent and Child k.13(1)

SUPPLEMENT: [This section is current through the latest supplement]
See 2 Harper, James & Gray 3d §8.13.



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2. California Statute.

6 Witkin Sum. Cal. Law Torts § 1234

[§ 1234] California Statute.

"Civil liability for any injury to the person or property of another proximately caused by the discharge of a firearm by a minor under the age of 18 years shall be imputed to a parent or guardian having custody and control of the minor for all purposes of civil damages, and such parent or guardian shall be jointly and severally liable with such minor for any damages resulting from such act, if such parent or guardian either permitted the minor to have the firearm or left the firearm in a place accessible to the minor." (C.C. 1714.3.)

No person, or group of persons collectively, may incur liability under this section in any amount exceeding \$ 30,000 for injury to or death of one person as a result of any one occurrence or, subject to the limit as to one person, exceeding \$ 60,000 for injury to or death of all persons as a result of any one occurrence. (C.C. 1714.3.)

The liability, like that for wilful misconduct (*supra*, §1229), is in addition to any liability otherwise imposed by law. (C.C. 1714.3.) (See 37 Proof of Facts 3d 1 [negligent sale, entrustment, or storage of firearm].)

Liability under C.C. 1714.1 (*supra*, §1229) is for the child's tort (wilful misconduct); liability under C.C. 1714.3 is for the act of "discharge of a firearm," which may be intentional, negligent, or accidental and nontortious. Thus, the literal terms of the section would appear to establish strict liability without any wrongful act by the child. However, in a case not within the statute (e.g., minor over 18), or where damages in excess of the statutory limit are sought, an action may still be brought for the child's tortious firing under the nonstatutory liability for negligent safeguard of a deadly weapon. (See *Reida v. Lund* (1971) 18 C.A.3d 698, 705, 96 C.R 102, *supra*, §1233; 2 *Pacific L. J.* 465.)

Because the liability is for permitting the use of a firearm or leaving it in a place accessible to the minor, it could not be imposed on a parent with whom the minor did not reside. (See *Robertson v. Wentz* (1986) 187 C.A.3d 1281, 1295, 232 C.R. 634.)

West's Key Number Digest, Parent and Child k.13(1)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Members of Joint Enterprise.

6 Witkin Sum. Cal. Law Torts § 1235

[§ 1235] Members of Joint Enterprise.

The mere fact that two or more persons have certain interests in common, as where they drive together in an automobile for pleasure, is an insufficient ground upon which to impute liability to one for the negligence of another. The necessary elements of a joint enterprise that will justify the imputation of liability are (1) a *community of interest* in the object of the undertaking, and (2) an equal right to *control*, i.e., to direct and govern the conduct of each other with respect to the undertaking. (See *Leming v. Oilfields Trucking Co.* (1955) 44 C.2d 343, 350, 282 P.2d 23; *Holtz v. United Plumbing & Heating Co.* (1957) 49 C.2d 501, 506, 319 P.2d 617; *Ramirez v. Long Beach Unified School Dist.* (2002) 105 C.A.4th 182, 193, 129 C.R.2d 128 [school district that recommended nonaffiliated camp was not liable, on joint enterprise theory, for death of student attending camp; school district had no right to control camp or its counselors]; 5 Harper, James & Gray 2d §26.13; 46 Am.Jur.2d (1994 ed.), *Joint Ventures* §42; 6 Proof of Facts 583 [joint ventures]; 3 A.L.R.5th 1 [modern status of rule imputing motor vehicle driver's negligence to passenger on joint venture theory]; BAJI, Nos. 13.35, 13.40, 13.41; CACI, Nos. 3711, 3712.)

As the court said in *Roberts v. Craig* (1954) 124 C.A.2d 202, 208, 268 P.2d 500: "The negligence of one person is not imputed to another nonparticipant except in the clearest of cases and where the interests of justice demand it. The fundamental rule is that one person, himself free from fault, shall not be required to bear the consequences of the actions of another. Vicarious liability is the exception. It is only where a person actually acts through another to accomplish his own ends that the law will or should impose such vicarious liability. Right of control over the other person is a test of the required relationship, but it is not itself the justification for imposing liability. Aside from such legal relationships as master and servant, principal and agent, etc., before the courts will find that the parties were joint adventurers there must be a clear evidence of a community of interest in a common undertaking in which each participant has or exercises the right of equal or joint control and direction." The relationship giving rise to liability under this theory is variously called "joint enterprise," "joint venture," or "joint adventure." But a helpful practice is to use the term "joint enterprise" for noncommercial undertakings, and "joint venture" for the mutual business association closely resembling a partnership.

Even a pleasure trip may meet the tests. In *Shook v. Beals* (1950) 96 C.A.2d 963, 217 P.2d 56, plaintiff leased an airplane to B and four others for a fishing trip. The plane was damaged by the negligence of B, the pilot. Held, all five were liable. (a) A community of interest was shown by the common purpose and sharing of expenses. (b) The necessary control was shown by the joint hiring; i.e., where the parties themselves, or through their authorized agent, jointly own or hire an automobile or airplane, this, as a matter of law, gives each the right of control. "Each, legally, had the right of control over the plane and the driver, if he were their agent in operating the plane for them. It was not necessary to

establish the fact that some one or all of the defendants, excluding [B], personally knew how to pilot the plane themselves." (96 C.A.2d 970.) (Cf. *DeSuza v. Andersack* (1976) 63 C.A.3d 694, 701, 133 C.R. 920 [parties on trip for pleasure and independent errands; no joint enterprise found].)

Most of the joint enterprise or joint venture tort cases deal with the imputation of contributory negligence as a limitation on recovery, which is governed by the same principle. (See *infra*, §1325.) There are, however, a few decisions upholding liability. (See *Shook, Leming and Holtz*; *Buck v. Standard Oil Co. of Calif.* (1958) 157 C.A.2d 230, 239, 321 P.2d 67.)

West's Key Number Digest, Joint Adventures k.7

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §26.13; 46 *Am.Jur.2d* (2006 ed.), *Joint Ventures* §35.



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Witkin Summary of California Law XIII. NEGLIGENCE: LIABILITY FOR NEGLIGENCE OF OTHERS E. Employers of Independent Contractors. 1. In General.

6 Witkin Sum. Cal. Law Torts § 1236

[§ 1236] In General.

(1) *General Rule of Nonliability.* Many cases state the general rule as one of nonliability; i.e., an employer is ordinarily not liable for the negligence or other tort of an independent contractor or of the contractor's employees. (See *Green v. Soule* (1904) 145 C. 96, 99, 78 P. 337; *Schmidlin v. Alta Planing Mill Co.* (1915) 170 C. 589, 591, 150 P. 983; *McDonald v. Shell Oil Co.* (1955) 44 C.2d 785, 790, 285 P.2d 902; *Williams v. Fairhaven Cemetery Assn.* (1959) 52 C.2d 135, 139, 338 P.2d 392; *Slyter v. Clinton Const. Co. of Calif.* (1930) 107 C.A. 348, 353, 290 P. 643; *Gaskill v. Calaveras Cement Co.* (1951) 102 C.A.2d 120, 123, 226 P.2d 633; *Hard v. Hollywood Turf Club* (1952) 112 C.A.2d 263, 266, 246 P.2d 716; *Gonzales v. Robert Hiller Const. Co.* (1960) 179 C.A.2d 522, 527, 3 C.R. 832; *Hickey v. Nulty* (1960) 182 C.A.2d 237, 245, 5 C.R. 914; *Safeway Stores v. Massachusetts Bonding & Ins. Co.* (1962) 202 C.A.2d 99, 110, 20 C.R. 820; *West v. Guy F. Atkinson Const. Co.* (1967) 251 C.A.2d 296, 299, 59 C.R. 286; *Rest.2d, Torts* §409; 5 Harper, James & Gray 2d §26.11; 41 Am.Jur.2d (1995 ed.), *Independent Contractors* §29; C.E.B., 1 Construction Contracts and Disputes 3d, §§6.3, 6.13; 29 Am.Jur. Trials 267 [negligent hiring and retention of employee]; 13 *Hastings L. J.* 147; 15 *Hastings L. J.* 604; on the distinction between agent or employee and independent contractor, see 3 *Summary* (10th), *Agency and Employment*, §21 et seq.)

(2) *Modern Exceptions.* The rule is, however, subject to exceptions of such wide scope that they leave only a small area in which the so-called general rule operates. (See *Kinney v. CSB Const.* (2001) 87 C.A.4th 28, 32, 103 C.R.2d 594 [general rule of nonliability is primarily important as preamble to catalog of exceptions]; *Rest.2d, Torts* §410 et seq.; 32 *Cal. L. Rev.* 196; 44 *Cal. L. Rev.* 762; 9 *Stanf. L. Rev.* 690; *infra*, §1237 et seq.) Accordingly, it seems proper to say that nonliability is now the exception; i.e., the so-called general rule is followed only where no good reason is found for departing from it. And considerations of policy frequently call for departure: "Some of the principal ones are that the enterprise, notwithstanding the employment of the independent contractor, remains the employer's because he is the party primarily to be benefited by it, that he selects the contractor, is free to insist upon one who is financially responsible, and to demand indemnity from him, that the insurance necessary to distribute the risk is properly a cost of the employer's business, and that the performance of the duty of care is of great importance to the public." (*Van Arsdale v. Hollinger* (1968) 68 C.2d 245, 253, 66 C.R. 20, 437 P.2d 508, *infra*, §1243; see *Walker v. Capistrano Saddle Club* (1970) 12 C.A.3d 894, 898, 90 C.R. 912; *Fonseca v. Orange* (1972) 28 C.A. 3d 361, 365, 104 C.R. 566, citing the text; *LaCount v. Hensel Phelps Const. Co.* (1978) 79 C.A.3d 754, 762, 145 C.R. 244; *Henderson Bros. Stores v. Smiley* (1981) 120 C.A.3d 903, 910, 174 C.R. 875, quoting the text; *Caudel v. East Bay Mun. Util. Dist.* (1985) 165 C.A.3d 1, 5,

211 C.R. 222, citing the text; *Rest.2d, Torts* §409, Comment b; 5 Harper, James & Gray 2d §26.11; 41 *Am.Jur.2d* (1995 ed.), *Independent Contractors* §30 et seq., 45 et seq.; C.E.B., 1 Construction Contracts and Disputes 3d, §6.1 et seq.; on liability of public entity, see *supra*, §244.)

(3) *Former Statutory Duty of Employer.* *Lab.C.* 6400 and 6401 require an "employer" to provide a reasonably safe and healthful place of employment, and to furnish safety devices and safeguards and use reasonably adequate methods to insure safety, etc. Safety orders and regulations may be issued to make these duties specific. (*Lab.C.* 6308; see 3 *Summary* (10th), *Agency and Employment*, §363 et seq.) The term "employer" as defined in *Lab.C.* 6304 formerly extended beyond the strict employer-employee relationship to impose liability on the owner or general contractor who controlled the premises or instrumentality causing an injury and exercised general supervision over the job. (See *Souza v. Pratico* (1966) 245 C.A.2d 651, 657, 54 C.R. 159; *Merzerkor v. Texaco* (1968) 266 C.A.2d 76, 89, 72 C.R. 1; *Morehouse v. Taubman Co.* (1970) 5 C.A.3d 548, 558, 85 C.R. 308; *Widman v. Rossmoor Sanitation* (1971) 19 C.A.3d 734, 743, 97 C.R. 52, citing the text; 13 U.C.L.A. L. Rev. 117; cf. *Stanford v. Ontario* (1972) 6 C.3d 870, 878, 882, 101 C.R. 97, 495 P.2d 425 [statute was not applicable where owner or general contractor had no supervisory power over operative details]; *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 C.A.3d 650, 663, 136 C.R. 203 [evidence insufficient to establish requisite control].) (On concurrent negligence of employer-subcontractor, see *Short v. State Comp. Ins. Fund* (1975) 52 C.A.3d 104, 109, 125 C.R. 15 [negligence barred credit for subsequent compensation under *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, 2 *Summary* (10th), *Workers' Compensation*, §92].)

In 1971, *Lab.C.* 6304 was amended to delete the language referring to persons in control and to restore, by cross-reference to *Lab.C.* 3300, the ordinary definition of employer. (See *Smith v. ACandS* (1994) 31 C.A.4th 77, 89, 37 C.R.2d 457 [even under former law, premises owner was not employer subject to safety orders, where independent contractors, instead of premises owner, were responsible for asbestosis contamination].)

Rest.2d, Torts §414 states a rule similar to the former provision of *Lab.C.* 6304: The employer of an independent contractor who retains control of any part of the work may be liable for failure to exercise that control with reasonable care. (See *Hooker v. Department of Trans.* (2002) 27 C.4th 198, 206, 115 C.R.2d 853, 38 P.3d 1081, *infra*, §1241 [independent contractor's employee may sue hirer of contractor for tort of negligent exercise of retained control set forth in *Rest.2d, Torts* §414, if contractor affirmatively contributes to employee's injuries; disapproving *Grahn v. Tosco Corp.* (1997) 58 C.A.4th 1373, 1393, 68 C.R.2d 806]; *McKown v. Wal-Mart Stores* (2002) 27 C.4th 219, 225, 115 C.R.2d 868, 38 P.3d 1094, *infra*, §1241 [same]; *Holman v. California* (1975) 53 C.A.3d 317, 327, 124 C.R. 773, citing the text [question of fact whether defendant state, through its chief engineer, had right to order independent contractor to remove unsafe equipment from job, and had actual knowledge of dangerous condition of the equipment].)

West's Key Number Digest, Master and Servant k.300, 315

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule of Nonliability.* See 5 Harper, James & Gray 3d §26.11; C.E.B., 2 Construction Contracts, Defects, and Litigation, §§10.4, 10.14 (replacing C.E.B., Construction Contracts and Disputes 3d).

(2) *Modern Exceptions.* See 5 Harper, James & Gray 3d §26.11.



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 - a. Employment of Incompetent Contractor.

6 Witkin Sum. Cal. Law Torts § 1237

[§ 1237] Employment of Incompetent Contractor.

An employer who negligently fails to employ a competent and careful contractor may be liable to *third persons* for injuries due to the contractor's lack of skill or failure to exercise due care. (See *Risley v. Lenwell* (1954) 129 C.A.2d 608, 622, 277 P.2d 897; *Holman v. California* (1975) 53 C.A.3d 317, 336, 124 C.R. 773, citing the text; *Golden v. Conway* (1976) 55 C.A.3d 948, 957, 128 C.R. 69 [landlord had defective heater installed by marginal operator in order to cut costs]; *Rest.2d, Torts §411*; 5 Harper, James & Gray 2d §26.11; 41 *Am.Jur.2d* (1995 ed.), *Independent Contractors* §37 et seq.; 13 *Hastings L. J.* 154; 78 *A.L.R.3d* 910 [when is employer chargeable with negligence in hiring contractor].) An injured employee of a contractor is not a third person for purposes of this rule. (*Camargo v. Tjaarda Dairy* (2001) 25 C.4th 1235, 1241, 108 C.R.2d 617, 25 P.3d 1096, *infra*, §1240.)

No duty is recognized to see that the contractor is financially responsible, e.g., that he or she carries workers' compensation insurance. (*Coleman v. Silverberg Plumbing Co.* (1968) 263 C.A.2d 74, 81, 69 C.R. 158; see *Rest.2d, Torts §411*, Comment g.)

West's Key Number Digest, Master and Servant k.315

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §26.11.



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b. Defective Plans.

6 *Witkin Sum. Cal. Law Torts* § 1238

[§ 1238] Defective Plans.

Where the plans and directions are proper, and the duty to make the premises safe is performed, the owner will not be liable for "collateral negligence" of an independent contractor, i.e., negligence in some detail of the work. (See *Williams v. Fresno Canal & Irr. Co.* (1892) 96 C. 14, 15, 30 P. 961; *Rest.2d, Torts* §426; 5 Harper, James & Gray 2d §26.11; *supra*, §1236.)

If, however, plans and specifications for building construction are defectively prepared, so that carrying them out necessarily results in a trespass on adjoining land, or the removal of lateral support, the employer will be liable. (*Williams v. Fresno Canal & Irr. Co.*, *supra*; *Kaufman v. Tomich* (1929) 208 C. 19, 25, 280 P. 130; *Hedstrom v. Union Trust Co.* (1908) 7 C.A. 278, 285, 94 P. 386; *Gardner v. Stonestown Corp.* (1956) 145 C.A.2d 405, 413, 302 P.2d 674; *Rest.2d, Torts* §427B; 41 *Am.Jur.2d* (1995 ed.), *Independent Contractors* §§50, 51.)

West's Key Number Digest, Master and Servant k.320

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §26.11.



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c. Failure To Supervise Concessionaire.

6 *Witkin Sum. Cal. Law Torts* § 1239

[§ 1239] Failure To Supervise Concessionaire.

A landowner or possessor, such as an amusement company, is liable to invited members of the public for negligently allowing an independent contractor or concessionaire to maintain or operate a concession in a manner that is unsafe. The negligence of the owner may consist of the failure to exercise reasonable care in the supervision of the appliances or the methods of operating the concession. (*Johnstone v. Panama Pac. Int. Exposition Co.* (1921) 187 C. 323, 329, 202 P. 34; *McCordic v. Crawford* (1943) 23 C.2d 1, 6, 142 P.2d 7; *Harvey v. Machtig* (1925) 73 C.A. 667, 675, 239 P. 78; *Basye v. Craft's Golden State Shows* (1941) 43 C.A.2d 782, 789, 111 P.2d 746; see *Rest.2d, Torts* §415.)

West's Key Number Digest, Master and Servant k.318(2)

SUPPLEMENT: [This section is current through the latest supplement]



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d. No Liability to Independent Contractor's Employee for Negligent Hiring.

6 Witkin Sum. Cal. Law Torts § 1240

[§ 1240] No Liability to Independent Contractor's Employee for Negligent Hiring.

In *Camargo v. Tjaarda Dairy* (2001) 25 C.4th 1235, 108 C.R.2d 617, 25 P.3d 1096, defendant hirer, a dairy, contracted with an independent contractor to scrape manure out of its corrals and to haul it away. Decedent, an employee of the contractor, was killed when the tractor that he was driving rolled over. Decedent's wife and children sued defendant for wrongful death on the theory, among others, that defendant was negligent in hiring the contractor (because defendant failed to determine whether decedent was qualified to operate the tractor safely). *Held*, defendant's motion for summary judgment was properly granted. The rationale of *Privette v. Superior Court* (1993) 5 C.4th 689, 21 C.R.2d 72, 854 P.2d 721, *infra*, §1245, and *Toland v. Sunland Housing Group* (1998) 18 C.4th 253, 74 C.R.2d 878, 955 P.2d 504, *infra*, §1246, which barred actions by employees of an independent contractor under the *peculiar risk* doctrine, likewise applies to bar actions by an independent contractor's employees for *negligent hiring* of the contractor. (25 C.4th 1238.)

(a) *Privette exception to peculiar risk doctrine*. Under the doctrine of peculiar risk, a person who hires an independent contractor to do inherently dangerous work can be held liable for tort damages when the contractor causes injury to others by negligently performing the work. In *Privette*, the court refused to extend the peculiar risk doctrine to the hired contractor's employees. The rationale for this exception is that the hirer should not have to pay for injuries to the contractor's employees that are caused by the contractor's negligent performance, because the workers' compensation system already covers those injuries. The rule of workers' compensation exclusivity, which shields an independent contractor who pays workers' compensation insurance premiums from further liability to its employees for on-the-job injuries, should equally protect a property owner who, in hiring the contractor, is indirectly paying for the cost of coverage, which has been calculated into the contract price. Also, to allow an independent contractor's employees to additionally seek tort damages under the doctrine of peculiar risk from the person who hired the contractor would give those employees an unwarranted windfall denied to other workers. (25 C.4th 1238.)

(b) *Toland case: application of Privette rationale to either "direct" or "vicarious" peculiar risk liability*. The doctrine of peculiar risk is described in *Rest.2d, Torts* §§413, 416. Under *Rest.2d, Torts* §413, a person who hires an independent contractor to do inherently dangerous work, but who fails to provide in the contract or in some other manner that special precautions be taken to avert the peculiar risks of that work, can be liable if the contractor's negligent performance of the work causes injury to others. Because §413 rests the liability of the hiring person on that

person's omission to provide for special precautions in the contract or in some other manner, it is sometimes described as a rule of "direct liability." Under *Rest.2d, Torts §416*, even if the hiring person has provided for special precautions, the hiring person can nevertheless be liable if the contractor fails to exercise reasonable care to take those precautions and the contractor's performance of the work causes injury to others. Because the hiring person's liability under §416 flows from the independent contractor's negligent failure to take special precautions in performing the inherently dangerous work, the hiring person's liability is often referred to as "vicarious liability." *Toland* rejected the argument that *Privette* bars recovery only for vicarious liability under §416. Peculiar risk is not a traditional theory of direct liability for the risks created by one's own conduct: Liability under both sections is in essence "vicarious" or "derivative" in the sense that it derives from the act or omission of the hired contractor, who has caused the injury by failing to use reasonable care in performing the work. *Toland* held that *Privette* bars employees of a hired contractor who are injured by the contractor's negligence from seeking recovery against the hiring person, *irrespective* of whether recovery is sought under the theory of peculiar risk set forth in §416 or §413. (25 C.4th 1240.)

(c) *Negligent hiring liability.* Under *Rest.2d, Torts §411*, an employer is liable for physical harm to *third persons* caused by failure to exercise reasonable care to employ a competent and careful contractor "to do work which will involve a risk of physical harm unless it is skillfully and carefully done," or "to perform any duty which the employer owes to third persons." (25 C.4th 1241.)

(d) *Application of Privette/Toland rationale to negligent hiring.* For the reasons expressed in *Privette* and *Toland*, an employee of an independent contractor should not be considered a "third person" for purposes of *Rest.2d, Torts §411* and should be barred from seeking recovery from the hirer for negligent hiring. Admittedly, the hirer under §411 is, in a sense, being taxed with the hirer's own negligence under a theory of direct liability. However, the same can be said with regard to an action under the peculiar risk theory in §413. More importantly, under both §411 and §413, the liability of the hirer is essentially vicarious in that it derives from the contractor's act or omission. Therefore, in a negligent hiring case under the theory set forth in §411, just as in peculiar risk cases under the theories set forth in §413 and §416, it would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage. (25 C.4th 1241.) (On application of *Privette/Toland/Camargo* policy considerations to actions by independent contractor's employees for hirer's negligent exercise of retained control, see *infra*, §1241; on liability for employment of incompetent contractor generally, see *supra*, §1237.) (See *Lopez v. C.G.M. Dev. (2002) 101 C.A.4th 430, 437, 124 C.R.2d 227* [peculiar risk doctrine does not permit employee of independent contractor to sue landowner, even if contractor has no workers' compensation, because doctrine is based on equity and public policy, neither of which is served by penalizing property owner for contractor's wrongdoing; moreover, mere retention of ability to control safety conditions does not make landowner liable to employee, where evidence shows that landowner did not actually supervise work]; *Park v. Burlington Northern Santa Fe Ry. Co. (2003) 108 C.A.4th 595, 606, 133 C.R.2d 757, infra*, §1252.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Bell v. Greg Agee Const. (2004) 125 C.A.4th 453, 459, 23 C.R.3d 33* [injured construction employee working for subcontractor could not sue general contractor under peculiar risk doctrine, even though subcontractor lacked workers' compensation coverage; following *Lopez v. C.G.M. Dev. (2002) 101 C.A.4th 430, 124 C.R.2d 227*, text, p. 621].



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CHAPTER IX - Torts

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XIII. NEGLIGENCE: LIABILITY FOR NEGLIGENCE OF OTHERS

E. Employers of Independent Contractors.

2. Where Employer Is at Fault.

e. Limited Liability to Independent Contractor's Employee for Negligent Exercise of Retained Control.

6 Witkin Sum. Cal. Law Torts § 1241

[§ 1241] Limited Liability to Independent Contractor's Employee for Negligent Exercise of Retained Control.

In *Hooker v. Department of Trans.* (2002) 27 C.4th 198, 115 C.R.2d 853, 38 P.3d 1081, defendant hired a general contractor to work on a highway project. As a result of defendant's failure to block off traffic around the construction site, cranes working on the site frequently had to retract their outriggers to permit traffic to pass. Plaintiff's husband, a crane operator, was killed when he attempted to swing the crane boom while the outriggers were retracted and the crane fell over. Plaintiff sued for wrongful death, alleging defendant's negligent exercise of retained control. *Held*, summary judgment for defendant affirmed. The hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at the work site. However, the hirer is liable to an employee of the contractor insofar as the hirer's exercise of retained control *affirmatively contributed* to the employee's injuries. Here, plaintiff failed to raise triable issues of material fact whether defendant actually exercised retained control so as to affirmatively contribute to the death of plaintiff's husband.

(a) *Denial of hirer's liability under doctrines of peculiar risk and negligent hiring.* In a series of cases, the court has considered whether an employee of an independent contractor may sue the hirer of the contractor under tort theories covered in chapter 15 of the Restatement Second of Torts. *Privette v. Superior Court* (1993) 5 C.4th 689, 21 C.R.2d 72, 854 P.2d 721, *infra*, §1245, and *Toland v. Sunland Housing Group* (1998) 18 C.4th 253, 74 C.R.2d 878, 955 P.2d 504, *infra*, §1246, held that an employee of a contractor may not sue the hirer of the contractor under either of the alternative versions of the *peculiar risk* doctrine set forth in *Rest.2d, Torts* §§413 and 416. *Camargo v. Tjaarda Dairy* (2001) 25 C.4th 1235, 108 C.R.2d 617, 25 P.3d 1096, *supra*, §1240, held that an employee of a contractor may not sue the hirer of the contractor under the negligent hiring theory set forth in *Rest.2d, Torts* §411. In each of these situations, it was deemed unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the employee's on-the-job injuries, is limited to providing workers' compensation coverage. Permitting the employee to also collect tort damages from the hirer would give the employee an unwarranted windfall. (27 C.4th 203.)

(b) *Same rationale applies to doctrine of negligent exercise of retained control where hirer fails to intervene.* The question presented in this case is whether an employee of a contractor may sue the hirer of the contractor for the tort of *negligent exercise of retained control* set forth in *Rest.2d, Torts* §414 (see *supra*, §1236). Under *Rest.2d, Torts* §414, one who entrusts work to an independent contractor but retains control over any part of the work is liable for physical

harm to others for whose safety the employer owes a duty to exercise reasonable care, where the harm is caused by the hirer's failure to exercise that control with reasonable care. The rationale applied in *Privette*, *Toland*, and *Camargo* applies insofar as *Rest.2d, Torts §414* might permit the imposition of liability on a hirer for mere failure to intervene in a contractor's working methods or procedures, without evidence that the hirer affirmatively contributed to the employment of those methods or procedures. Similarly, because the liability of the contractor, the person primarily responsible for the employee's on-the-job injuries, is limited to providing workers' compensation coverage, it would be unfair to impose tort liability on the hirer of the contractor merely because the hirer retained the ability to exercise control over safety at the work site. (27 C.4th 206.)

(c) *Test of liability is whether hirer affirmatively contributes to injuries.* The imposition of tort liability on a hirer for negligent exercise of retained control must, in fairness, depend on whether the hirer exercised the control that was retained in a manner that affirmatively contributed to the injury of the contractor's employee. If an employee of an independent contractor can show that the hirer of the contractor affirmatively contributed to the employee's injuries, permitting the employee to sue the hirer for negligent exercise of retained control cannot be said to give the employee an unwarranted windfall. The tort liability of the hirer is warranted by the hirer's own affirmative conduct. The rule of workers' compensation exclusivity does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury, and when affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee, the employee should not be precluded from suing the hirer. The hirer's liability where it affirmatively contributes to the injury is direct, rather than vicarious or derivative as in *Privette*, *Toland*, and *Camargo*. (27 C.4th 211.)

(d) *Summary judgment was proper here.* Here, while plaintiff raised triable issues of material fact whether defendant retained control over safety conditions at the work site, plaintiff failed to raise triable issues of material fact whether defendant actually exercised the retained control so as to affirmatively contribute to the death of plaintiff's husband. There was no evidence that defendant's exercise of retained control affirmatively contributed to the dangerous practice by the crane operator that led to his death. There was, at most, evidence that defendant's safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it. (27 C.4th 215.)

One justice dissented. (27 C.4th 215.)

The *Hooker* "affirmative contribution" test was applied in *McKown v. Wal-Mart Stores* (2002) 27 C.4th 219, 115 C.R.2d 868, 38 P.3d 1094. Defendant hired an independent contractor, plaintiff's employer, to install sound systems in its stores. Defendant requested that the contractor use defendant's forklifts whenever possible in performing the work, but the request was understood not to be a directive. The forklift furnished was defective, and plaintiff was injured. The jury found that defendant was negligent in providing unsafe equipment, and judgment was entered on the verdict. *Held*, affirmed. A hirer is liable to an employee of an independent contractor insofar as unsafe equipment provided by the hirer affirmatively contributes to the employee's injury. Under *Hooker*, the defendant is liable.

(a) The reasons supporting the rule of liability of a hirer that affirmatively contributes to a contractor's employee's injuries apply to the facts here. Where a hiring party contributes to the injury by supplying defective equipment, it is the hiring party's *own* negligence that renders it liable, not that of the contractor. Defendant's contribution to the injury was active, rather than passive; its contention that it should not be held liable for providing the unsafe equipment because it merely requested, and did not insist, that the contractor use its forklift must be rejected. (27 C.4th 225.)

(b) The contractor had several contracts with defendant for the installation of sound systems in its stores, and defendant, the world's largest retailer, was a customer the contractor did not want to displease. Defendant presumably believed that the forklift it provided was safe, and plaintiff may well have believed that refusal to use it would have generated ill will. The extra expense of renting a forklift would have been chargeable to defendant. Moreover, renting a forklift would have entailed delaying the installation project. (27 C.4th 225.) (See *Ray v. Silverado Constructors* (2002) 98 C.A.4th 1120, 1131, 120 C.R.2d 251 [employer retained control over particular facet of safety operations, i.e., traffic control, and independent contractor was prohibited from undertaking certain safety measures without employer's

approval]; *Sheeler v. Greystone Homes* (2003) 113 C.A.4th 908, 920, 6 C.R.3d 683 [no recovery under theory of retained control where there was no evidence that hirer exercised its retained control over construction site by scheduling cleanups *solely* to ensure safety; sweeps of site were mainly to facilitate painting, not for safety]; BAJI, No. 8.30; CACI, No. 1009; on liability generally for negligent exercise of retained control, see *supra*, §1236.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Biles v. Exxon Mobil Corp.* (2004) 124 C.A.4th 1315, 1329, 22 C.R.3d 282 [in asbestos-related action against oil company by insulator for subcontractor, whether company's employees affirmatively contributed to injuries was factual question where there was testimony that company's employees blew asbestos dust towards subcontractor's employees during work on oil refinery construction project]; *Browne v. Turner Const. Co.* (2005) 127 C.A.4th 1334, 1345, 26 C.R.3d 433 [genuine issue of material fact existed about whether removal of safety lines and scissors lift by general contractor on construction site affirmatively contributed to injury of subcontractor's employee who fell off ladder while working on sprinkler system in area where safety equipment was previously located]; *Tilley v. CZ Master Assn.* (2005) 131 C.A.4th 464, 482, 32 C.R.3d 151 [under affirmative contribution test of *Hooker v. Department of Trans.* (2002) 27 C.4th 198, 115 C.R.2d 853, 38 P.3d 1081, text, p. 621, homeowner association's failure to exercise presumed power to control youth parties held on premises could not be basis of liability for injuries sustained by employee of association's independent contractor when he was assaulted while policing youth party on association's premises]; *Millard v. Biosources* (2007) 156 C.A.4th 1338, 1348, 68 C.R.3d 177 [subcontractor's employee failed to establish that general contractor affirmatively contributed to his injuries; general contractor did not control means and methods of employee's work, and no personnel of general contractor were at work site at time employee fell from attic when lights suddenly went off]; *McCarty v. Department of Trans.* (2008) 164 C.A.4th 955, 984, 79 C.R.3d 777 [standard premises liability instruction on retained control doctrine, which permitted jury to hold defendant liable for injuries that independent contractor's employee suffered while removing utility pole as part of highway construction project as long as defendant "contributed" to injuries, improperly permitted jury to find liability without specifically concluding that defendant was negligent or failed to exercise reasonable care]; *Madden v. Summit View* (2008) 165 C.A.4th 1267, 1278, 81 C.R.3d 601 [Lab.C. 6304.5, providing that California Occupational Safety and Health provisions are "applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety," does not abrogate doctrine that hirer of contractor is liable to contractor's employee only insofar as hirer's exercise of retained control affirmatively contributes to employee's injuries, and does not expand general contractor's duty of care to injured employee of subcontractor]; *Padilla v. Pomona College* (2008) 166 C.A.4th 661, 671, 82 C.R.3d 869 [any control that owner and general contractor retained over pressurized polyvinyl chloride pipe that broke and released water, injuring subcontractor's employee, did not affirmatively contribute to employee's injuries, even though only owner and contractor had ability to turn off water once accident occurred; owner and contractor delegated safety measures to subcontractor, and subcontractor made no request to turn off water].

In 2007, CACI, No. 1009 [Liability to Employees of Independent Contractors for Dangerous Conditions] was repealed and CACI, No. 1009A [Liability to Employees of Independent Contractors for Unsafe Concealed Conditions] and CACI, No. 1009B [Liability to Employees of Independent Contractors for Unsafe Conditions--Retained Control or Defective Equipment] were adopted.

(*New*) *Breach of regulatory duty:* In *Barclay v. Jesse M. Lange Distributor* (2005) 129 C.A.4th 281, 28 C.R.3d 242, plaintiff, an employee of an independent contractor, was cleaning a fuel tank on property owned by defendant, a "bulk plant" facility where fuel was stored for later distribution. When the tank exploded, plaintiff sustained serious injuries. The Fire Code, a part of the California Code of Regulations, required that fire extinguishers of a specified rating be located within 75 feet of those portions of a bulk plant facility where fires were likely to occur, and plaintiff claimed that the breach of this duty affirmatively contributed to his injuries. The trial judge entered summary judgment for defendant on the ground that plaintiff had failed to present evidence showing that defendant had retained control over safety conditions and exercised that control so as to affirmatively contribute to plaintiff's injuries, which would have brought the case within the exception to the doctrine of *Privette v. Superior Court* (1993) 5 C.4th 689, 21 C.R.2d 72, 854 P.2d 721, text, §1245, stated in *Hooker*. *Held*, reversed.

(a) Defendant's summary judgment motion was based on the doctrine of *Privette*, which held that a nonnegligent property owner is not liable for injuries to an employee of an independent contractor doing work on the owner's premises. The flaw in defendant's motion is in assuming that *Privette* and its progeny resolved all potential theories of liability, precluding liability unless the owner actually retained control of the project. However, none of the cases relied on by defendant addressed the theory of liability asserted by plaintiff in this case, i.e., breach of regulatory duties (*Rest.2d, Torts, §424*). Instead, those cases addressed other theories of liability, e.g., peculiar risk (*Rest.2d, Torts §§413, 416*), negligent hiring (*Rest.2d, Torts §411*), and retained control (*Rest.2d, Torts §414*). *Park v. Burlington Northern Santa Fe Ry. Co. (2003) 108 C.A.4th 595, 133 C.R.2d 757*, text, §1252, has addressed this theory, and it held that an owner may be liable if its breach of regulatory duties affirmatively contributed to injury of a contractor's employee. (*129 C.A.4th 290*.)

(b) *Hooker* concluded that the hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retains control over safety conditions at a worksite, but that a hirer becomes liable if his or her exercise of retained control affirmatively contributes to the employee's injuries. Imposing liability when the hirer's conduct has affirmatively contributed to the injuries is consistent with *Privette* and its progeny, because the hirer's liability is not vicarious or derivative in the sense that it derives from the act or omission of the independent contractor. However, the affirmative contribution need not always be in the form of actively directing a contractor or a contractor's employee. There are times when a hirer will be liable for its omissions, as where the hirer's failure to undertake a particular safety measure, as promised, leads to an employee's injury. Here, plaintiff is arguing that defendant's omission contributed to the hazard, not that it directly caused the explosion. (*129 C.A.4th 293*.)

(c) *Rest.2d, Torts §424* states that where specific precautions are required by statute or regulation for the safety of "others," the party upon whom the duty is imposed is subject to liability to the others for whose protection the duty is imposed. The *Park* decision implicitly indicates that employees of contractors may be "others" for purposes of *Rest.2d, Torts §424*, subject to the limitation that the hirer's conduct must have affirmatively contributed to the employee's injuries. (*129 C.A.4th 295*.)

(d) Plaintiff introduced the following evidence: (1) expert testimony that a bulk plant facility was required by the Fire Code and by custom to have suitable fire extinguishers within 75 feet of tanks; (2) a witness' testimony that he saw no fire extinguisher "in the area" and had to run approximately 50 yards before finding one; and (3) a doctor's testimony that had the flames on plaintiff's clothing been extinguished more rapidly, his injuries would not have been as severe. This evidence raised triable issues of material fact about whether defendant breached a regulatory duty to provide fire extinguishers, and whether the breach affirmatively contributed to plaintiff's injuries. (*129 C.A.4th 298*.) (See *Evard v. Southern Calif. Edison (2007) 153 C.A.4th 137, 147, 62 C.R.3d 479* [triable issue of fact whether failure of billboard owners to comply with nondelegable billboard safety regulation to assure that safety belt or harness was secured affirmatively contributed to injury to employee of independent contractor who fell from billboard; citing *Barclay*].)



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3. Inherently Dangerous Work.
a. Theory of Liability: Peculiar Risk Doctrine.
1. Restatement 2d.

6 Witkin Sum. Cal. Law Torts § 1242

[§ 1242] Restatement 2d.

Several sections of the Restatement deal with the liability of the employer where there is a risk of harm inherent in the work itself. (See *Rest.2d, Torts* §§413, 416, 427, 427A; *Van Arsdale v. Hollinger* (1968) 68 C.2d 245, 253, 66 C.R. 20, 437 P.2d 508; *Griesel v. Dart Industries* (1979) 23 C.3d 578, 585, 153 C.R. 213, 591 P.2d 503, *infra*, §1243; *Toland v. Sunland Housing Group* (1998) 18 C.4th 253, 267, 74 C.R.2d 878, 955 P.2d 504, *infra*, §1246 [theories of liability in *Rest.2d, Torts* §§413 and 416 overlap]; *Jimenez v. Pacific Western Const. Co.* (1986) 185 C.A.3d 102, 109, 229 C.R. 575; 5 Harper, James & Gray 2d §26.11; 41 *Am.Jur.2d* (1995 ed.), *Independent Contractors* §57, 60 et seq.; 34 *A.L.R.4th* 914 [liability of employer of independent contractor for injuries sustained by employees of contractor while engaged in inherently dangerous work]; BAJI, Nos. 13.21, 13.21.4, 16.04; CACI, Nos. 3708, VF-407.)

Rest.2d, Torts §413, applicable where the employer *makes no provision* in the contract or otherwise for taking of required precautions by the contractor, states that "[o]ne who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a *peculiar unreasonable risk* of physical harm to others unless special precautions are taken," is liable for harm caused by the absence of these precautions.

Comment b explains that the section is not concerned with routine precautions that any careful contractor could reasonably be expected to take against ordinary dangers that may arise in the course of the work; it is concerned with "special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done." And "peculiar" does not mean that the risk must be abnormal to the type of work done, or that it must be an abnormally great risk: "It has reference only to a special, recognizable danger arising out of the work itself."

Rest.2d, Torts §416 imposes liability where needed precautions are not taken even though the employer *does make provision* for them in the contract or otherwise. (See *Van Arsdale v. Hollinger* (1968) 68 C.2d 245, 253, 66 C.R. 20, 437 P.2d 508; *Camargo v. Tjaarda Dairy* (2001) 25 C.4th 1235, 108 C.R.2d 617, 25 P.3d 1096, *supra*, §1240.) In such a case, the employer is still liable, but the contractor is under a duty to indemnify the employer for any liability that the contractor's negligence may bring upon him or her. (*Rest.2d, Torts* §416, Comment c.)

Rest.2d, Torts §427 is to some extent a duplication of §416, applicable where the work involves "a special danger ...

inherent in or normal to the work." Comment a to §416 explains: "The rules stated in the two Sections have been applied more or less interchangeably in the same types of cases, and frequently have been stated in the same opinion as the same rule, or as different phases of the same rule. The rule stated in this Section is more commonly stated and applied where the employer should anticipate the need for some specific precaution, such as a railing around an excavation in the sidewalk. The rule stated in §427 is more commonly applied where the danger involved in the work calls for a number of precautions, or involves a number of possible hazards, as in the case of blasting, or painting carried on upon a scaffold above the highway."

Rest.2d, Torts §427A deals with liability where the work involves "an abnormally dangerous activity." The employer "cannot be permitted to escape the responsibility for the abnormal danger created by the activity which he has set in motion, and so cannot delegate the responsibility for harm resulting to others to the contractor." (Comment b.) (On nondelegable duty, see *infra*, §1247 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §26.11.



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2. California Cases.

6 Witkin Sum. Cal. Law Torts § 1243

[§ 1243] California Cases.

The California cases follow the two main Restatement sections, although it is not always clear whether the basis of the holding is *Rest.2d, Torts* §§413 or 416. (See *Woolen v. Aerojet General Corp.* (1962) 57 C.2d 407, 411, 20 C.R. 12, 369 P.2d 708 [§413]; *Ferrel v. Safway Steel Scaffolds* (1962) 57 C.2d 651, 655, 21 C.R. 575, 371 P.2d 311 [§413]; *Van Arsdale v. Hollinger* (1968) 68 C.2d 245, 254, 66 C.R. 20, 437 P.2d 508 [§416]; *Aceves v. Regal Pale Brewing Co.* (1979) 24 C.3d 502, 508, 510, 156 C.R. 41, 595 P.2d 619; *Privette v. Superior Court* (1993) 5 C.4th 689, 693, 21 C.R.2d 72, 854 P.2d 721, *infra*, §1245; *Toland v. Sunland Housing Group* (1998) 18 C.4th 253, 267, 74 C.R.2d 878, 955 P.2d 504, *infra*, §1246; *Morehouse v. Taubman Co.* (1970) 5 C.A.3d 548, 556, 85 C.R. 308, [§416]; *Walker v. Capistrano Saddle Club* (1970) 12 C.A.3d 894, 900, 90 C.R. 912 [§413]; *Leno v. Y.M.C.A.* (1971) 17 C.A.3d 651, 659, 95 C.R. 96; *Widman v. Rossmoor Sanitation* (1971) 19 C.A.3d 734, 747, 97 C.R. 52 [§416]; *Stilson v. Moulton-Niguel Water Dist.* (1971) 21 C.A.3d 928, 938, 98 C.R. 914 [evidence supported directed verdict against employer under either section]; *Fonseca v. Orange* (1972) 28 C.A.3d 361, 365, 104 C.R. 566 [§416]; *Addison v. Susanville Lumber* (1975) 47 C.A.3d 394, 399, 401, 120 C.R. 737 [conditions of §416 were not met]; *Anderson v. Chancellor Western Oil Dev. Corp.* (1975) 53 C.A.3d 235, 243, 125 C.R. 640 [analysis of theory and policy of §416, and affirmance of judgment for defendant]; *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 C.A.3d 650, 658, 136 C.R. 203 [same; judgment of nonsuit affirmed]; *LaCount v. Hensel Phelps Const. Co.* (1978) 79 C.A.3d 754, 763, 145 C.R. 244; [demolition of wall; laborers working in proximity of bulldozer with no warning device]; *Stark v. Weeks Real Estate* (1979) 94 C.A.3d 965, 968, 156 C.R. 701; *Mackey v. Campbell Const. Co.* (1980) 101 C.A.3d 774, 784, 162 C.R. 64; *Castro v. California* (1981) 114 C.A.3d 503, 510, 511, 170 C.R. 734; *Henderson Bros. Stores v. Smiley* (1981) 120 C.A.3d 903, 910, 917, 174 C.R. 875, citing the text [elaborate review of case law and Restatement sections; roofing contractor using tar kettle without proper precautions to prevent fire]; *Salinero v. Pon* (1981) 124 C.A.3d 120, 135, 177 C.R. 204, *infra*, §1244; *White v. Uniroyal* (1984) 155 C.A.3d 1, 22, 202 C.R. 141; *Caudel v. East Bay Mun. Util. Dist.* (1985) 165 C.A.3d 1, 6, 211 C.R. 222, *infra*, §1244; 1 C.E.B., *Construction Contracts and Disputes* 3d, §6.15; 7 *Proof of Facts* 3d 477 [peculiar risk doctrine]; 19 *Loyola L.A. L. Rev.* 1495 [peculiar risk doctrine and construction workers]; 20 *Pacific L. J.* 197 [Clarifying the Peculiar Risk Doctrine: The Rule Stated]; 13 *U.C.L.A. L. Rev.* 114 [liability for inherently dangerous activities].) (On longshoreman's action against shipowner, see *Johnson v. Canadian Transport. Co.* (1976) 54 C.A.3d 827, 838, 127 C.R. 72, 2 *Summary* (10th), *Worker's Compensation*, §140 [admiralty law subjects vessel owner to common law liability as

defined by *Rest.2d, Torts* §§413, 416]; cf. *Kelleher v. Empresa Hondurena de Vapores, S.A.* (1976) 57 C.A.3d 52, 61, 129 C.R. 32, 2 Summary (10th), *Worker's Compensation*, §140 [*Rest.2d, Torts* §§413, 416 have only limited application in longshoreman's action; criticizing *Johnson's* analysis].)

In *Griesel v. Dart Industries* (1979) 23 C.3d 578, 153 C.R. 213, 591 P.2d 503, the court observed that "peculiar" does not mean "abnormal;" it is sufficient that the risk is peculiar to the work to be done, and is likely to arise in the course of the ordinary and usual method of doing the work or the particular method that the employer knows that the contractor will adopt. (23 C.3d 586.) Hence, where plaintiff was injured when a trench in which he was working caved in, it was error for the trial judge to instruct the jury that "[t]renching is an ordinary and customary danger of construction work, and trenching in and of itself is not a 'peculiar risk'." The key issue in the case was whether defendant should have recognized a likelihood that someone might enter the trench before the piping and concrete work was to be done. "The question was not therefore whether the trenching work involved a peculiar risk in the abstract but whether it involved a peculiar risk at the time that plaintiff was injured." (23 C.3d 587.)

It is not necessary that the owner know of the contractor's failure to take precautions. The duty is imposed to make the most responsible party (for whose benefit the work is done) charged with protection of those likely to be injured. A requirement that the employer know that the independent contractor is not taking the requisite precautions would contravene this rationale. (*McDonald v. Oakland* (1965) 233 C.A.2d 672, 676, 43 C.R. 799.) (On abrogation of peculiar risk doctrine as to employees of independent contractor, see *infra*, §1245.)

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SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., 2 Construction Contracts, Defects, and Litigation, §10.16 (replacing C.E.B., Construction Contracts and Disputes 3d).



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b. Distinction: Collateral Negligence.

6 *Witkin Sum. Cal. Law Torts* § 1244

[§ 1244] Distinction: Collateral Negligence.

Rest.2d, Torts §416 does not apply, and the employer is not vicariously liable, where the injury is caused by a risk apart from the work itself, such as a defect in the equipment furnished by the contractor or the negligence of another employee. (See *Holman v. California* (1975) 53 C.A.3d 317, 330, 124 C.R. 773 [defective equipment].)

In *Smith v. Lucky Stores* (1976) 61 C.A.3d 826, 132 C.R. 628, defendant hired a contractor to remove the letters of a large and heavy sign from its store. The contractor's employees lowered them to the sidewalk with a crane, and an employee then leaned one of the letters against the truck, releasing his hold. While plaintiff was walking in front of the store a gust of wind blew the sign against her, causing injuries. *Held*, defendant was not liable. Once the letter reached the pavement, defendant's responsibility for negligence of the contractor's employee ceased; i.e., the employee's conduct was "collateral" negligence because it did not involve the risk that made the work dangerous. (61 C.A.3d 829, 830.)

In *Stark v. Weeks Real Estate* (1979) 94 C.A.3d 965, 156 C.R. 701, the court observed that it had found no case in which the doctrine had been applied to the negligent use of hand tools by the independent contractor or its employees. "If this type of risk were held to be a special or peculiar risk within the meaning of the doctrine, then one would be hard put to imagine any type of negligence of the contractor or his employees for which the owner could not be held liable." (94 C.A.3d 972.) (See *Hughes v. Atlantic Pac. Const. Co.* (1987) 194 C.A.3d 987, 1000, 240 C.R. 200 [following *Stark*].)

Salinero v. Pon (1981) 124 C.A.3d 120, 177 C.R. 204, explains this concept of "collateral" or "casual" negligence in a case involving a window washer, working from suspended equipment, who fell after a fellow-employee mistakenly removed weighted sand bags: Peculiar risks are encountered by window washers not adequately protected by safety devices or attaching mechanisms; but dangers resulting from negligence of a fellow worker in removing the means of attachment cannot be reasonably foreseen by the landowner and are "collateral to the risks that normally arise out of that activity." (124 C.A.3d 137.)

In *Johnson v. Tosco Corp.* (1991) 1 C.A.4th 123, 1 C.R.2d 747, plaintiff, an employee of an independent contractor hired to insulate defendant oil refinery's steam line, was injured when he fell from a partially assembled single-stage scaffold erected by another independent contractor. At the time of the accident, plaintiff was standing on an inverted

bucket placed on top of the first section of the scaffold, which was about six feet above the ground, and was reaching for a barely accessible pipe fitting. *Held*, defendant was not liable under the peculiar risk doctrine. Plaintiff's injury resulted from the combination of a defective piece of equipment, which was commonly used in the construction industry and did not pose a high risk of harm, and plaintiff's negligent use of the equipment. "Both of these elements of negligence lay outside the peculiar risk doctrine." (1 C.A.4th 134.)

In *Jordy v. Humboldt* (1992) 11 C.A.4th 735, 14 C.R.2d 553, plaintiff, a juvenile who had been placed in a foster home by defendant county, was injured while driving an all-terrain vehicle with the permission of his foster parent. Testifying that he was returning to his parents' home when the accident occurred, plaintiff argued that the risk that he would attempt to flee from the foster home was a foreseeable danger inherent in the placement of a ward with foster families against which defendant should have taken special precautions. *Held*, the peculiar risk doctrine was not applicable in this situation. Even assuming that there was a risk that plaintiff would flee, it was not a risk of physical harm to plaintiff or anyone else. And for the peculiar risk doctrine to apply there must be some evidence linking the risk, i.e., here, the risk of flight, with some special harm against which the employer should guard. (11 C.A.4th 747.)

The distinction between "collateral" negligence and negligence that will render the employer liable is "a shadowy one at best," and is a question of fact. (*Caudel v. East Bay Mun. Util. Dist.* (1985) 165 C.A.3d 1, 8, 9, 211 C.R. 222 [reversing summary judgment for defendant].) Moreover, the distinction is often unnecessary under the current law providing that the peculiar risk doctrine does not apply to employees of independent contractors. (See *infra*, §§1245, 1246.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

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XIII. NEGLIGENCE: LIABILITY FOR NEGLIGENCE OF OTHERS
E. Employers of Independent Contractors.
3. Inherently Dangerous Work.
c. Distinction: Claim by Employee of Independent Contractor.
1. Peculiar Risk Doctrine Is Not Applicable.

6 *Witkin Sum. Cal. Law Torts* § 1245

[§ 1245] Peculiar Risk Doctrine Is Not Applicable.

In *Privette v. Superior Court* (1993) 5 C.4th 689, 21 C.R.2d 72, 854 P.2d 721, P, the owner of a duplex, hired K Roofing to install a new tar and gravel roof. K's foreman directed employee C to carry buckets of hot tar up a ladder to the roof, and, while performing this task, C fell off the ladder and was burned by hot tar. C sought workers' compensation benefits for his injuries, and also sued P under the peculiar risk doctrine. The trial court denied P's motion for summary judgment, and the Court of Appeal denied P's petition for mandamus. *Held*, mandamus granted; the peculiar risk doctrine, imposing liability on the person who hires an independent contractor for the negligent performance of the contractor (supra, §§1242, 1243), does not apply in favor of the contractor's employee.

(a) *Injuries to third parties.*

(1) The courts adopted the peculiar risk exception to the general rulemaking an employer nonliable for the negligence of a general contractor to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work would not have to depend on the contractor's solvency in order to receive compensation for the injuries. The risk of loss was more fairly allocated to the person for whose benefit the job was undertaken, and spreading the risk of loss to this person would promote workplace safety. (5 C.4th 694.)

(2) A person held liable under the peculiar risk doctrine is entitled to equitable indemnity from the independent contractor at fault. Thus, though the doctrine is sometimes described as a "nondelegable duty" rule, it is in effect a form of vicarious liability. (5 C.4th 695, and footnote 2.)

(3) The term "peculiar risk" means neither a risk that is abnormal to the type of work done, nor a risk that is abnormally great; it simply means "a special recognizable danger arising out of the work itself." (5 C.4th 695, quoting *Rest.2d, Torts* §413, Comment b.) For that reason, the term "special risk" is probably more accurate. (5 C.4th 695, citing *Aceves v. Regal Pale Brewing Co.* (1979) 24 C.3d 502, 156 C.R. 41, 595 P.2d 619.)

(b) *Injuries to contractor's employees, and exclusive remedy provision of Workers' Compensation Act.*

(1) A minority of American jurisdictions expanded the peculiar risk doctrine to allow recovery by the contractor's employees, and California approved this expansion of liability in *Woolen v. Aerojet General Corp.* (1962) 57 C.2d 407, 20 C.R. 12, 369 P.2d 708, and several later decisions, including *Ferrel v. Safway Steel Scaffolds* (1962) 57 C.2d 651, 21 C.R. 575, 371 P.2d 311, *Van Arsdale v. Hollinger* (1968) 68 C.2d 245, 66 C.R. 20, 437 P.2d 508, *Griesel v. Dart Industries* (1979) 23 C.3d 578, 153 C.R. 213, 591 P.2d 503, and *Aceves*. (5 C.4th 696.) But *Woolen* and its progeny require reexamination in light of the availability and exclusivity of remedies under the *Workers' Compensation Act*. (5 C.4th 696.)

(2) The Act's exclusivity provision gives efficacy to the theoretical "compensation bargain" between employer and employee; and it applies to work-related injuries regardless of fault, including the employer's failure to provide a safe workplace. (5 C.4th 697.) It does not, however, preclude the employee from suing anyone else whose conduct was a proximate cause of the injury (5 C.4th 697), or apply in favor of employers who fail to obtain workers' compensation insurance (5 C.4th 698).

(3) Expansion of the peculiar risk doctrine to allow recovery against the person who hired the contractor for injuries to the contractor's employee "produces the anomalous result that a nonnegligent person's liability for the injury is greater than that of the person whose negligence actually caused the injury." (5 C.4th 698.) And most courts that have considered the issue have refused to allow such an employee to recover tort damages from the hiring party. These courts have concluded that the property owner should not have to pay for injuries caused by the contractor's negligent performance of the work when workers' compensation statutes already cover those injuries. (5 C.4th 698, 699.)

(4) Courts and commentators have also expressed concern that the minority rule gives the employees an unwarranted windfall. To permit recovery gives them something that is denied to other workers, i.e., the right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment. This in effect would exempt a single class of employees from the statutory limits of workers' compensation, and would penalize those individuals who hire experts to perform dangerous work rather than assigning this activity to their own inexperienced employees. (5 C.4th 700.)

(5) When a property owner is held liable under the peculiar risk doctrine for injuries to an innocent bystander or an owner of neighboring land, the owner may obtain equitable indemnity from the independent contractor responsible for the injuries. However, when the person injured is an employee of the independent contractor, the Welfare and Institutions Code shields the negligent contractor from an action seeking equitable indemnity. Thus, in this situation, a significant policy justification for imposing peculiar risk liability on a nonnegligent party, i.e. the ability of that party to be made whole by the party responsible for the injury, is missing. (5 C.4th 701.)

(c) *Repudiation of Woolen holding*. Considered in light of the various goals that the workers' compensation statutes seek to achieve, the conclusion in *Woolen* that peculiar risk liability should extend to the employee of the independent contractor, "does not withstand scrutiny." (5 C.4th 701.) And, "to the extent that they hold to the contrary," *Woolen* and its progeny are overruled. (5 C.4th 702, footnote 4.) (See 21 *Pepperdine L. Rev.* 648 [*Privette*].)

A number of decisions follow the *Privette* rule. (See *Whitford v. Swinerton & Walberg Co.* (1995) 34 C.A.4th 1054, 1058, 40 C.R.2d 688 [*Privette* did not require reversal, where liability was based on contractor's negligence, instead of on imputable negligence of subcontractor under peculiar risk doctrine, and judgment for noneconomic damages had already been reduced to reflect contractor's percentage of fault]; *Lopez v. University Partners* (1997) 54 C.A.4th 1117, 1122, 63 C.R.2d 359 [rule that peculiar risk doctrine does not apply to employee of independent contractors applies whether person hiring independent contractor is owner or lessee]; *Redfeather v. Chevron USA* (1997) 57 C.A.4th 702, 707, 67 C.R.2d 159 [under *Privette*, owner is not liable for injuries suffered by independent contractor's employees, even if express contract provision requires contractor to indemnify owner against all liability for injury to contractor's employees]; *Park v. Burlington Northern Santa Fe Ry. Co.* (2003) 108 C.A.4th 595, 600, 133 C.R.2d 757, *infra*, §1252; *Sheeler v. Greystone Homes* (2003) 113 C.A.4th 908, 918, 6 C.R.3d 683 [even if tile worker's injuries were not result of employer's negligence, tile worker could not claim liability, under peculiar risk theory, against hirer who subcontracted

tile work to employer].)

Owens v. Giannetta-Heinrich Const. Co. (1994) 23 C.A.4th 1662, 29 C.R.2d 11, finding no compelling reason to depart from the usual rule of retroactive application of tort decisions, held that *Privette* is retroactive. (23 C.A.4th 1669.) (See *Redfeather v. Chevron USA*, *supra*, 57 C.A.4th 707 [citing *Owens*, and holding *Privette* to be retroactive].)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *No liability of hirer's agent:* In *Ruiz v. Herman Weissker* (2005) 130 C.A.4th 52, 29 C.R.3d 641, a gas and electric company hired defendant agent to be "responsible for reviewing plans to ensure proper planning and feasibility and for monitoring the construction work for safety and contract compliance." (130 C.A.4th 56.) The company then chose an independent contractor to replace insulators on two of its transmission lines, and the contract between the hirer and the contractor specified that the latter was to be responsible for both the work methodology and the safety of its employees. Because the equipment to be used was not high enough to reach all of the insulators, the contractor planned to use a ladder, and defendant agent approved of this technique. When the uppermost insulators had been replaced, one of the contractor's employees was electrocuted as he was preparing to descend. Plaintiff's estate then sued defendant. *Held*, summary judgment for defendant affirmed.

(a) The peculiar risk doctrine (text, §1242 et seq.) is based in part on ensuring that the party who ultimately benefited from the independent contractor's work (the hirer) will bear responsibility for an injury to a contractor's employee. Defendant did not benefit from the contractor's work. Moreover, the negligent contractor's liability is limited by workers' compensation. It would thus be unfair to impose greater vicarious liability on defendant than the law would impose on the contractor for its direct liability. This principle, enunciated in *Privette v. Superior Court* (1993) 5 C.4th 689, 21 C.R.2d 72, 854 P.2d 721, text, p. 629, is the same whether the suit is against the hirer or its agent. (130 C.A.4th 59.)

(b) Under *Hooker v. Department of Trans.* (2002) 27 C.4th 198, 115 C.R.2d 853, 38 P.3d 1081, text, §1241, a hirer has a nondelegable duty (see text, §1247 et seq.) to maintain its premises in a reasonably safe condition for the employees of its independent contractors. However, under *Park v. Burlington Northern Santa Fe Ry. Co.* (2003) 108 C.A.4th 595, 133 C.R.2d 757, text, §1252, a hirer's liability for breach of this duty is subject to the limitations announced in *Privette* and its progeny. Even assuming that the hirer is liable under the nondelegable duty doctrine, there is no authority establishing that the hirer's attempt to delegate such a duty to an agent creates liability on the part of the agent. (130 C.A.4th 62.)

(c) Under *Hooker*, *supra*, the hirer of an independent contractor remains liable to an employee of the contractor who is injured during the course of the work, where the hirer retains control over the details of the work, and its conduct affirmatively contributes to the employee's injuries. For example, if the hirer's negligent breach of a promise to undertake a particular safety measure results in injury to a contractor's employee, the hirer is liable. However, a hirer's mere failure to correct an unsafe practice of which it was aware and that it had the authority to correct does not affirmatively contribute to the employee's injury, and thus will not support a claim against the hirer. Here, because there was no evidence that defendant agent asserted authority over the contractor's employees or instructed them about what safety procedures to use, the evidence did not show that defendant contributed to the employee's death by some negligent act or omission that was independent of the contractor's negligence. Rather, it was defendant's failure to exercise control, rather than a negligent exercise of control, that is at the heart of plaintiff's case. In other words, although defendant was authorized to stop the work if the contractor failed to comply with its contractual obligations, its failure to use that authority is not sufficient to establish liability. (130 C.A.4th 65, distinguishing *Ray v. Silverado Constructors* (2002) 98 C.A.4th 1120, 120 C.R.2d 251, text, §1241.)

(New) *Hirer's liability to independent contractor of independent contractor:* The *Privette* doctrine applies, and for the same reasons, whether the injured party is an employee of the independent contractor or whether he or she is an independent contractor of the contractor. (*Michael v. Denbeste Trans.* (2006) 137 C.A.4th 1082, 1093, 40 C.R.3d 777.)

(New) Exception: Landowner's liability to employee of independent contractor for injury caused by hazardous condition on premises: The hirer as the landowner may be liable to an independent contractor's employee, even if it does not retain control over the work, if "(1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Kinsman v. Unocal Corp.* (2005) 37 C.4th 659, 36 C.R.3d 495, 123 P.3d 931 [verdict holding landowner liable to independent contractor's employee who contracted cancer from exposure to asbestos was reversed because instruction failed to make clear that hazard had to be known or knowable to contractor; exhaustive analysis of case law]; see *Padilla v. Pomona College* (2008) 166 C.A.4th 661, 676, 82 C.R.3d 869 [under *Kinsman*, owner and general contractor were not liable, on basis of failure to disclose hazardous condition, for subcontractor's employee's injury from pressurized water after employee accidentally broke polyvinyl chloride pipe; pressurization in pipe was fully disclosed to subcontractor, who then failed to take necessary precautions to protect pipe from harm]).



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2. Direct and Vicarious Liability.

6 *Witkin Sum. Cal. Law Torts* § 1246

[§ 1246] Direct and Vicarious Liability.

In *Toland v. Sunland Housing Group* (1998) 18 C.4th 253, 74 C.R.2d 878, 955 P.2d 504, plaintiff worker was injured at a housing development under construction when a wall fell on him. Plaintiff not only sought recovery from his employer, the framing subcontractor, under the Workers' Compensation Act, but also sued defendant, the project's owner and general contractor, alleging that raising the wall created a peculiar risk of injury for which defendant should have required the subcontractor to take special precautions. Defendant moved for summary judgment in the trial court, asserting that plaintiff's action was barred under *Privette v. Superior Court* (1993) 5 C.4th 689, 21 C.R.2d 72, 854 P.2d 721, supra, §1245. In opposing the motion, plaintiff argued that *Privette* had eliminated peculiar risk liability for employees of independent contractors only in actions based on *Rest.2d, Torts* §416 (supra, §1242; hiring person is liable for contractor's negligence in spite of providing that the contractor take special precautions), but that *Privette* had no effect on an action brought under *Rest.2d, Torts* §413 (supra, §1242; hiring person who fails to provide for special precautions is liable for contractor's negligence). *Held*, summary judgment for defendant affirmed; *all* suits by an independent contractor's employee against the hiring party under the peculiar risk doctrine are barred.

(a) *Restatement provisions relating to peculiar risk doctrine.* The doctrine of peculiar risk, as relevant here, is described in two sections of the Restatement. Under *Rest.2d, Torts* §413, a person who hires an independent contractor to do inherently dangerous work, but who fails to provide in the contract or in some other manner that special precautions be taken to avert the peculiar risks of that work, may be liable if the contractor's negligent performance of the work causes injury to others. Because this section rests the liability of the hiring person on his or her omission to provide for special precautions in the contract or in some other manner, it is sometimes described as a rule of "direct liability." Under *Rest.2d, Torts* §416, even if the hiring person has provided for special precautions "in the contract or otherwise," the hiring person may nevertheless be liable if the contractor fails "to exercise reasonable care to take such precautions" and the contractor's performance of the work causes injury to others. Because the hiring person's liability under this section flows from the independent contractor's negligent failure to take special precautions in performing the inherently dangerous work, as required by "the contract or otherwise," the hiring person's liability is often referred to as "vicarious liability." (18 C.4th 259.)

(b) *Privette case and its progeny.* In *Privette*, this court unanimously held that, under the peculiar risk doctrine, the

hiring person's liability does not extend to the hired contractor's employees. *Privette* pointed out that the policy reasons supporting imposition of peculiar risk liability on the hiring person for injuries to neighboring property owners or innocent bystanders are absent when the person injured by the independent contractor's negligence is an employee of the contractor. The neighboring landowner or innocent bystander may have no other source of compensation for injuries resulting from the contractor's negligence. In contrast, an employee of the negligent contractor can recover under the workers' compensation system regardless of the solvency of the contractor. *Privette* noted that another policy justification for imposing peculiar risk liability on the hiring person--namely the hiring person's right to equitable indemnity from the independent contractor--is also absent; the exclusivity provisions of the workers' compensation scheme shield the negligent contractor from that action. (18 C.4th 260.) However, there has been some disagreement in the trial courts and the Courts of Appeal whether *Privette* bars recovery only in actions brought under *Rest.2d, Torts* §416, or also those described in *Rest.2d, Torts* §413. (18 C.4th 262.)

(c) *No action lies by independent contractor's employee under peculiar risk doctrine.* Contrary to plaintiff's assertion, *Privette* bars a hired contractor's employees who are injured by the contractor's negligence from seeking recovery against the hiring person, irrespective of whether recovery is sought under the theory of peculiar risk set forth in *Rest.2d, Torts* §416 or 413. The reasoning in *Privette* applies in either circumstance. Labeling *Rest.2d, Torts* §413 as "direct liability" and *Rest.2d, Torts* §416 as "vicarious liability" is misleading. While the hiring person's liability is cast in both sections in the form of the hiring person's breach of a duty to see that special precautions are taken to prevent injuries to others and is, to that degree, "direct," liability under both is in essence "vicarious" or "derivative" in the sense that it derives from the hired contractor's failure to use reasonable care in performing the work. In fact, the two theories of liability overlap, and most courts have refused to distinguish cases brought under the two sections. (18 C.4th 267.) Ultimately, however, the conclusion that employees of independent contractors cannot recover under either section is premised on policy: In either situation, it would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage. This view is shared by an overwhelming majority of courts that have considered the issue. (18 C.4th 269.) (See 27 Western State L. Rev. 425 [Toland].)

Later decisions are in accord. (See *Camargo v. Tjaarda Dairy* (2001) 25 C.4th 1235, 1238, 108 C.R.2d 617, 25 P.3d 1096, supra, §1240.) [*Privette/Toland* rationale, barring actions by employees of independent contractor against contractor's hirer under *peculiar risk* doctrine, likewise applies to bar actions by independent contractor's employees for *negligent hiring* of contractor]; *Hooker v. Department of Trans.* (2002) 27 C.4th 198, 206, 115 C.R.2d 853, 38 P.3d 1081, supra, §1241 [*Privette/Toland* rationale applies to bar actions by independent contractor's employees for hirer's *negligent exercise of retained control* where hirer fails to intervene but not where hirer affirmatively contributes to injuries]; *McKown v. Wal-Mart Stores* (2002) 27 C.4th 219, 225, 115 C.R.2d 868, 38 P.3d 1094, supra, §1241 [same]; *Smith v. ACandS* (1994) 31 C.A.4th 77, 94, 37 C.R.2d 457 [*Privette* holds that negligence is not imputed to premises owner for negligence of any independent contractor that injures any employee]; *Zamudio v. San Francisco* (1999) 70 C.A.4th 445, 450, 82 C.R.2d 664 [under vicarious liability theory, subcontractor's injured employee, who had received workers' compensation, could not shift liability from his immune employer to owner of project and construction manager; no evidence that project owner and manager were directly liable for plaintiff's injury].)

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E. Employers of Independent Contractors.

4. Nondelegable Duty.

a. Theory of Liability.

6 Witkin Sum. Cal. Law Torts § 1247

[§ 1247] Theory of Liability.

Where the employer is under a duty to do certain work carefully, or maintain property in safe condition, he or she cannot escape responsibility by delegating the work to an independent contractor. (See *Clark v. Dziabas* (1968) 69 C.2d 449, 451, 71 C.R. 901, 445 P.2d 517, *infra*, §1251; *Delgado v. W.C. Garcia & Associates* (1963) 212 C.A.2d 5, 8, 27 C.R. 613; *Ramsey v. Marutamaya Ogatsu Fireworks Co.* (1977) 72 C.A.3d 516, 525, 140 C.R. 247; *LaCount v. Hensel Phelps Const. Co.* (1978) 79 C.A.3d 754, 772, 145 C.R. 244; *Bonner v. Work. Comp. App. Bd.* (1990) 225 C.A.3d 1023, 1035, 275 C.R. 337, 2 Summary (10th), *Workers' Compensation*, §93 [in view of employer's statutory duty to maintain safe workplace (*Lab.C. 6400*), it could not delegate to building manager task of removing spilled liquid]; *Barry v. Raskov* (1991) 232 C.A.3d 447, 455, 283 C.R. 463 [mortgage loan broker's fiduciary duty to provide home loan investors with full disclosure of material facts cannot be delegated to independent appraiser]; *Lopez v. University Partners* (1997) 54 C.A.4th 1117, 1126, 63 C.R.2d 359 [neither owner nor lessee had contractually agreed to comply with safety standards]; *Rest.2d, Torts* §424; 5 Harper, James & Gray 2d §26.11; 41 *Am.Jur.2d* (1995 ed.), *Independent Contractors* §48; 44 *Cal. L. Rev.* 768; 13 *Hastings L. J.* 149; 9 *Stanf. L. Rev.* 690; 33 *A.L.R.2d* 7, 89 [death from excavation and refill work]; 96 *A.L.R.3d* 1213 [storekeeper's liability for independent contractor's negligence in performing alterations or repair work]; *BAJI*, No. 13.22; *infra*, §1248 et seq.; cf. *Felmler v. Falcon Cable TV* (1995) 36 C.A.4th 1032, 1036, 43 C.R.2d 158 [cable owner did not have nondelegable duty to cable repairman, who was injured fixing cable television line while working for independent contractor].)

"Unlike strict liability, a nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor. To the extent that recognition of nondelegable duties tends to insure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity, it ameliorates the need for strict liability to secure compensation." (*Maloney v. Rath* (1968) 69 C.2d 442, 446, 71 C.R. 897, 445 P.2d 513, *infra*, §1251.)

The nondelegable duty rule is a form of vicarious liability, because it is not based on the personal liability of a landowner who hires an independent contractor. Thus, the nondelegable duty rule is incompatible with the limitations on a hirer's liability to an employee of an independent contractor established by *Privette v. Superior Court* (1993) 5

C.4th 689, 21 C.R.2d 72, 854 P.2d 721, supra, §1245). An employee of an independent contractor cannot recover against the hirer under a nondelegable duty theory unless the hirer has control of the dangerous condition and affirmatively contributes to the employee's injury. (*Sheeler v. Greystone Homes (2003) 113 C.A.4th 908, 921, 6 C.R.3d 683.*)

A county has no nondelegable duty to prevent *ordinary negligence* by foster parents. The juvenile court law is designed to prevent only *intentional abuse and systematic neglect*. (*Jordy v. Humboldt (1992) 11 C.A.4th 735, 743, 14 C.R.2d 553.*)

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See *Castro v. Budget Rent-A-Car System (2007) 154 C.A.4th 1162, 1177, 65 C.R.3d 430* [rent-a-car company that leased vehicle to shipper had no duty under nondelegable duty doctrine to assume financial responsibility for shipper's negligence; distinguishing *Serna v. Pettey Leach Trucking (2003) 110 C.A.4th 1475, 2 C.R.3d 835, text, §1253*, on ground that *Serna* involved carrier subject to federal law]; CACI, No. 1009C [liability to employees of independent contractors for unsafe conditions--nondelegable duty]; 5 Harper, James & Gray 3d §26.11.



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E. Employers of Independent Contractors.

4. Nondelegable Duty.

b. Work Under Public License.

6 *Witkin Sum. Cal. Law Torts* § 1248

[§ 1248] Work Under Public License.

(1) *In General.* Where the employer has a license to excavate for sewers, water pipes, etc., or to grade or pave streets, and by the terms of a municipal ordinance is required to exercise certain precautions and to avoid dangerous conditions, the employer is liable for injuries due to any failure in these respects by an independent contractor engaged by the employer to do the work. (*Colgrove v. Smith* (1894) 102 C. 220, 223, 36 P. 411; *Luce v. Holloway* (1909) 156 C. 162, 165, 103 P. 886; *Robbins v. Hercules Gasoline Co.* (1926) 80 C.A. 271, 273, 251 P. 697; *Sawaya v. De Cou* (1943) 60 C.A.2d 146, 149, 140 P.2d 98 [same rule where owner failed to obtain permit]; see *Rest.2d, Torts* §417; 44 *Cal. L. Rev.* 769; 9 *So. Cal. L. Rev.* 47.)

(2) *Effect of "Reasonableness" of Delegation Where Delegatee Violates Statutory or Regulatory Requirement.* In *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 C.4th 284, 294, 65 C.R.2d 872, 940 P.2d 323, the Supreme Court discussed the general rule of nondelegable duties of public licensees, though in the context of liability for civil penalties rather than tort liability. *Health & Saf.C. 1424* provides that a long-term health care licensee may be assessed civil monetary penalties for violations of state and federal statutes and regulations, but requires the citation to be dismissed if the licensee proves that, despite a violation, it "did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation." Here, plaintiff, an association representing long-term health care facility licensees, sought a declaratory judgment that this defense was intended to relieve licensees of vicarious liability for their employees who acted unreasonably. The trial court granted summary judgment for plaintiff and the Court of Appeal affirmed. *Held*, reversed.

(a) Under the common law, duties of public licensees are nondelegable. The essential justification for this rule is one of ensuring accountability of licensees to safeguard the public welfare. The principle that a licensee will be held liable for the acts of its agents is one that has been applied whether the agent is an independent contractor or an employee. (16 C.4th 296.) Thus, the duties of licensees under *Health & Saf.C. 1424* cannot be delegated to their employees, unless the statutory "reasonable licensee defense" is applicable. (16 C.4th 297.)

(b) This statutory defense is modeled after *Ev.C. 669* (supra, §§873, 874, 890). That provision allows a presumption of negligence per se arising from a violation of law to be rebutted by a showing of reasonableness. It is reasonable to presume that the Legislature in enacting the reasonable licensee defense was aware of judicial interpretations of the

Evidence Code provision on which it was patterned and intended that the defense be given a comparable construction. (16 C.4th 297.) Cases construing *Ev.C.* 669 have held that the statute does not negate or repeal the common law principles either of nondelegable duty or of respondeat superior liability. (16 C.4th 298, citing *Maloney v. Rath* (1968) 69 C.2d 442, 444, 71 C.R. 897, 445 P.2d 513, *infra*, §1251, on nondelegable duty, and respondeat superior, see *Grant v. Petronella* (1975) 50 C.A.3d 281, 288, 123 C.R. 399.)

(c) Pursuant to this judicial construction of *Ev.C.* 669, and following the presumption against implied repeal of the common law, plaintiff similarly should not be excused from liability here. These statutory defenses in the Evidence Code and Health and Safety Code do not apply when the independent contractor or employee to whom the licensee's duty is delegated acts unreasonably. The defenses are not intended to preclude vicarious liability of the licensee, but rather strict liability. A licensee is not permitted to defend by showing that the licensee reasonably delegated its duties, but rather by showing that the licensee and its agents acted reasonably under the circumstances, despite the statutory or regulatory violation. (16 C.4th 299.)

(3) *Distinction: Mortuary May Delegate Duty to Crematorium.* In *Hansell v. Santos Robinson Mortuary* (1998) 64 C.A.4th 608, 75 C.R.2d 361, plaintiffs, family members of decedents whose bodies were improperly cremated by a crematorium, sued defendant mortuaries that had contracted with the crematorium for its cremation services. The trial court entered judgment for defendants, finding that they had no duty to control the improper cremation practices of the crematorium. *Held*, affirmed. As licensed funeral directors, defendants were authorized to direct and supervise the burial or disposal of human remains. However, defendants did not have a license to perform cremation, which is a separately licensed activity in which nonlicensed persons, such as funeral directors, have no say. Thus, there is no merit to plaintiffs' contention that by virtue of their license as funeral directors, defendants had a duty to supervise the cremations to ensure that they were properly carried out. The power to control the conduct of crematories rests with the licensing authority, not with the referring mortuaries. (64 C.A.4th 612.)

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c. Creation of Nuisance.

6 *Witkin Sum. Cal. Law Torts* § 1249

[§ 1249] Creation of Nuisance.

Where the owner of property having a permit to construct a building employs a contractor, and the contractor creates a nuisance on the premises, as by smoke or uncovered piles of materials, the owner, as well as the contractor, is liable. (*Snow v. Marian Realty Co.* (1931) 212 C. 622, 624, 299 P. 720; see *Spence v. Schultz* (1894) 103 C. 208, 212, 37 P. 220.)

This rule was applied where the contractor left a spike projecting from planks on a sidewalk (*Wile v. Los Angeles Ice & Cold Storage Co.* (1905) 2 C.A. 190, 192, 83 P. 271), and where uncrated metal roof capping was delivered and left on the sidewalk with the knowledge of the owner (*Wise v. Maxwell Hardware Co.* (1928) 94 C.A. 765, 768, 271 P. 918). (See 44 Cal. L. Rev. 768.)

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6 *Witkin Sum. Cal. Law Torts* § 1250

[§ 1250] Performance of Owner's or Possessor's Duty.

A lessor who has undertaken the duty to make repairs is liable where his or her contractor negligently fails to make the premises safe. (See *Rest.2d, Torts* §§419, 420.) And the same is true where the contractor is negligent in inspection or maintenance of parts of the building retained by the lessor for the use of all the tenants. (*Brown v. George Pepperdine Foundation* (1943) 23 C.2d 256, 259, 143 P.2d 929 [elevators]; see *Bowater v. Tasse* (1947) 81 C.A.2d 651, 654, 184 P.2d 931; 32 Cal. L. Rev. 196; 44 Cal. L. Rev. 772; 19 So. Cal. L. Rev. 141.)

Similarly, any other possessor who has a duty to repair or to place a building in reasonably safe condition cannot avoid liability by delegating the work to an independent contractor. (See *Rest.2d, Torts* §422.) This rule is limited to buildings, structures, or things affixed to them. In *Knell v. Morris* (1952) 39 C.2d 450, 247 P.2d 352, a borderline case, M, a plumbing contractor, was called to repair a leaking water heater in a building. *Held*, it could reasonably be inferred that the heater was attached to the building by gas and water pipes, and hence, that the owner was charged with the nondelegable duty. (39 C.2d 456.)

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e. Automobile Driver's Duty.

6 *Witkin Sum. Cal. Law Torts* § 1251

[§ 1251] Automobile Driver's Duty.

A startling innovation, almost approaching strict liability, was launched in *Maloney v. Rath* (1968) 69 C.2d 442, 71 C.R. 897, 445 P.2d 513, with only one justice dissenting. Plaintiff stopped his car at a traffic signal. Defendant, coming from behind, stepped on the brake pedal, the brakes failed, and a collision occurred. Defendant had engaged a service station operator 3 months previously to overhaul the brakes, and 2 weeks previously to inspect and repair the car. At the time of repair, the defect--a hole in the hydraulic hose caused by rubbing against the right front wheel--could have been detected by a qualified person inspecting the brakes. But defendant neither knew nor had reason to know of the defect. *Held*, judgment for defendant reversed.

(a) There was no liability under the negligence per se doctrine, for defendant rebutted the presumption of negligence by evidence that she had the car inspected and that the defect was not apparent to anyone but a mechanic. (69 C.2d 444; see *supra*, §890.)

(b) Despite growing dissatisfaction with the law of negligence in cases of this sort, judicially imposed strict liability would result in chaos; only the Legislature can safely do this by a comprehensive compensation plan. (69 C.2d 445.)

(c) Liability should, however, be imposed under the nondelegable duty doctrine. An improperly maintained motor vehicle threatens a grave risk; responsibility properly rests on the person who owns and operates the vehicle, for the owner is the party primarily benefited, the owner selects the contractor (and can choose one financially responsible, and may demand indemnity); the cost of the owner's liability insurance distributes the risk; and the discharge of his or her duty is of the utmost importance to the public. (69 C.2d 448.) (See 58 Cal. L. Rev. 328; 5 Cal. Western L. Rev. 201; 6 San Diego L. Rev. 330.)

The *Maloney* rule was applied in *Clark v. Dziabas* (1968) 69 C.2d 449, 71 C.R. 901, 445 P.2d 517, with emphasis on the possible defense against the new liability. The record did not show that defendant's independent contractor was negligent. The court held that the defendant should have the opportunity to prove, if he or she can, that the defective condition existed before he or she bought the used car, and that it would not have been discoverable by reasonable inspection thereafter; i.e., that neither the defendant nor the independent contractor was negligent, and therefore that the defendant's nondelegable duty to exercise reasonable care to maintain brakes was not violated. (69 C.2d 451.)

In *Dutcher v. Weber* (1969) 275 C.A.2d 961, 80 C.R. 378, defendant's brakes failed and his car collided with plaintiff's car. There was no evidence on the actual cause of the failure. *Held*, judgment on jury verdict for defendant reversed. Defendant produced evidence that the car had been serviced and the brake system checked; hence, he overcame the presumption of negligence per se. (275 C.A.2d 964; see *supra*, §890.) However, under the *Maloney* rule, a defendant must also show that the failure was not owing to the negligence of an independent contractor. There was no evidence on that point, because there was no evidence on the cause of the brake failure. (275 C.A.2d 964.) (See *Harris v. Irish Truck Lines* (1974) 11 C.3d 373, 377, 113 C.R. 489, 521 P.2d 481 [following *Maloney* and *Clark*]; *Kaley v. Catalina Yachts* (1986) 187 C.A.3d 1187, 1201, 232 C.R. 384 [same]; *Park v. Burlington Northern Santa Fe Ry. Co.* (2003) 108 C.A.4th 595, 608, 133 C.R.2d 757, *infra*, §1252.)

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f. Hazardous Waste Disposal.

6 Witkin Sum. Cal. Law Torts § 1252

[§ 1252] Hazardous Waste Disposal.

In *Park v. Burlington Northern Santa Fe Ry. Co.* (2003) 108 C.A.4th 595, 133 C.R.2d 757, plaintiff was an employee of defendant hazardous waste disposal company (the independent contractor), which was retained by defendant railway company (the hirer) to remove hazardous materials, including used batteries, from specified locations. A few days before plaintiff's accident, another employee of defendant independent contractor went to a yard of the hirer, collected batteries packed in plastic totes, and repacked them in 55-gallon drums before transporting them. He and his crew did not remove the leads from the batteries, as is usually done. Then, as an agent of the hirer, the other employee signed a manifest certifying that everything had been done for proper packing and shipping. A few days later, plaintiff was injured when a drum that he was moving exploded, and he recovered damages from both defendants totaling \$ 1.75 million. However, because plaintiff's employer's liability was limited to workers' compensation benefits, the entire burden of the judgment fell on defendant railway company. *Held*, reversed; defendant railroad company was not liable for plaintiff's injuries.

(a) *Nondelegable duty theory.*

(1) Under *Privette v. Superior Court* (1993) 5 C.4th 689, 21 C.R.2d 72, 854 P.2d 721, *supra*, §1245, and *Toland v. Sunland Housing Group* (1998) 18 C.4th 253, 74 C.R.2d 878, 955 P.2d 504, *supra*, §1246, plaintiff, as an employee who had received workers' compensation benefits, could not recover from the hirer on the peculiar risk theory. Because the nonapplicability of the peculiar risk theory removed the possibility of the hirer's being vicariously liable, any liability of that party necessarily had to be based on the existence of a duty to plaintiff. (108 C.A.4th 605.)

(2) State and federal statutes and regulations impose nondelegable duties on the generator of hazardous waste to see that the waste is properly disposed of. The hirer was, therefore, under a nondelegable duty to see that its used storage batteries were properly disposed of, and it could not avoid that duty by hiring an independent contractor to do the disposal work. However, the fact that the duty was nondelegable does not necessarily mean that the hirer was liable to plaintiff for injuries caused by the independent contractor's negligence. (108 C.A.4th 609.)

(3) The current test for determining liability in this situation was stated in *Hooker v. Department of Trans.* (2002) 27 C.4th 198, 115 C.R.2d 853, 38 P.3d 1081, *supra*, §1241, retained control over safety conditions at the worksite does

not support liability unless the plaintiff proves that the exercise of the retained control *affirmatively contributed* to the employee's injuries. Although the duties imposed on the generator of hazardous waste by statute and regulation are nondelegable duties, which survive *Privette*, the generator is not liable to the employee of a subcontractor who is employed to dispose of the hazardous waste unless it is shown that the generator's conduct affirmatively contributed to the employee's injuries. (108 C.A.4th 610.)

(4) Here, the hirer packed the used batteries in totes, not sealed drums, and there was no evidence that the hirer's packaging was inadequate. Although the leads remained on the batteries in many cases, there was no danger of explosion, because the plastic totes used by the hirer were open at the top and thus provided for ample ventilation for the hydrogen released by the batteries. In fact, the accident would not have occurred had the independent contractor not repackaged the batteries in sealed drums. Thus, this repackaging, without removing the leads, must be viewed as a legally superseding cause. (108 C.A.4th 611.)

(b) *Agency theory.*

(1) Plaintiff argued that the hirer's conduct affirmatively contributed to his injuries because the actions of the other employee, as an authorized agent of the hirer, were attributable to the hirer. Although the jury found that plaintiff's employer was the hirer's agent for signing the manifest and its independent contractor for packing the batteries, and although it was the packing of the drums that led to plaintiff's injuries, plaintiff nevertheless contended that the hirer was directly liable for the torts of its agent because it authorized and ratified them. This contention must be rejected. Even assuming that the duties of the independent contractor to collect and pack the batteries for shipment can be divided so that the independent contractor was an agent for purposes of signing the manifests and an independent contractor for purposes of packing the batteries for shipment, plaintiff's injuries were obviously caused by the negligent packing of the drums, not by the certification that they had been properly packed. *Hooker's* retention of control theory applies if plaintiff can show that the hirer's exercise of retained control affirmatively contributed to his injuries. No affirmative contribution is shown by the fact that the hirer authorized signing hazardous waste manifests on its behalf, even though this was done negligently. The same reasoning would apply even if the independent contractor was considered to be the hirer's agent in both respects. (108 C.A.4th 612.)

(2) The issue then is whether the hirer's retained control over signing the hazardous waste manifest was exercised in a manner that contributed to plaintiff's injuries. Plaintiff argued that it was and pointed to the hirer's failure to investigate a prior accident involving still another of the independent contractor's employees. However, this argument neglected the jury finding that, although the hirer was negligent in failing to investigate the prior accident, this negligence was not a cause of that employee's injuries. Because substantial evidence supported this conclusion, it cannot be said that the hirer's failure to investigate the prior accident contributed to plaintiff's injuries. Nor can it be said that the hirer was liable because it knew of the unsafe packing methods used by the independent contractor and that, by the receipt of the signed manifests, it was certifying batteries for transport that were not safely packaged for this purpose. Again, this argument fails because plaintiff did not show that the hirer affirmatively exercised its retained control. (108 C.A.4th 613.)

(3) In summary, the hirer hired a licensed hazardous waste disposal company to properly dispose of its hazardous waste. Although the hirer remained ultimately responsible for the disposal, the overwhelming evidence of the independent contractor's negligence cannot lead to hirer's liability for the entire verdict without a showing that hirer did something to affirmatively contribute to plaintiff's injuries. The Supreme Court's decisions in *Privette*, *Toland*, and *Hooker* require a finding that the hirer is not liable for the injuries to plaintiff, the employee of the independent contractor. (108 C.A.4th 614.)

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5. Public Franchise to Employer.

6 Witkin Sum. Cal. Law Torts § 1253

[§ 1253] Public Franchise to Employer.

If a carrier or other public service corporation operates under a public franchise, it is liable for the negligence of an independent contractor engaged to act. (See *Taylor v. Oakland Scavenger Co.* (1941) 17 C.2d 594, 604, 110 P.2d 1044 [franchise to furnish garbage removal service]; *Gamboa v. Conti Trucking* (1993) 19 C.A.4th 663, 665, 668, 23 C.R.2d 564; *Serna v. Pettey Leach Trucking* (2003) 110 C.A.4th 1475, 1479, 2 C.R.3d 835 [under nondelegable duty theory, interstate carrier operating under public franchise was liable for negligence of trucking company that it used as independent contractor; fact that company's cargo, poultry, was exempt from regulation had no bearing on carrier's liability]; *Rest.2d*, Torts §428; 41 Am.Jur.2d (1995 ed.), *Independent Contractors* §49; 34 A.L.R.2d 1121 [liability of lessor motor carrier for lessee's torts or nonperformance of franchise duties].)

In *Eli v. Murphy* (1952) 39 C.2d 598, 248 P.2d 756, CMT, licensed by the Public Utilities Commission as a highway common carrier, contracted with M to transport goods. *Held*, CMT was liable for M's negligence. The highway common carrier is engaged in a business attended with considerable risks, and legislative safety regulations and financial responsibility to the public would be impaired if the franchised carrier could conduct its business through another over whom it had no control. "Accordingly, both to protect the public from financially irresponsible contractors, and to strengthen safety regulations, it is necessary to treat the carrier's duties as nondelegable." (39 C.2d 600.) (See *Lehman v. Robertson Truck-A-Way* (1953) 122 C.A.2d 82, 84, 264 P.2d 653 [same rule applied where defendant, licensed by ICC, engaged independent contractors to carry some freight]; *Klein v. Leatherman* (1969) 270 C.A.2d 792, 796, 76 C.R. 190 [common and contract carrier was liable for negligence of subhauler operating with revoked permit and cancelled insurance]; cf. *Hill Brothers Chemical Co. v. Superior Court* (2004) 123 C.A.4th 1001, 1010, 20 C.R.3d 530 [public policy does not support extension of nondelegable duty rule to private carriers, i.e., those who use highways only to transport own products incidental to their business, as opposed to for hire carriers, who use public highways as business; distinguishing *Eli*].)

The principle was somewhat extended in *Snyder v. Southern Calif. Edison Co.* (1955) 44 C.2d 793, 285 P.2d 912. Defendant, a public utility distributing electricity, engaged W, an independent contractor, to construct lines. W negligently installed a power pole in violation of a Commission Safety Order. *Held*, defendant was liable, despite the contention that the installation of poles is merely incidental to the main business authorized by its franchise. The construction and maintenance of its lines is a necessary part of the utility's business. "Whether we speak of the existence of a nondelegable duty as arising from defendant's franchise to do business or a special duty imposed by statute or rule

or as a common law principle is not important. ... If a common law principle is involved, defendant, as the possessor of land, is answerable for the negligent failure of ... the independent contractor to put or maintain structures, the poles, in reasonably safe condition." (44 C.2d 802.)

If, however, the employer is not a common carrier operating under a certificate of public convenience and necessity and subject to the Commission's safety regulations, but is a mere contract carrier who engages another contract carrier to carry goods, the special exception does not apply and the case falls within the general rule of nonliability for negligence of an independent contractor. (*Gaskill v. Calaveras Cement Co.* (1951) 102 C.A.2d 120, 125, 226 P.2d 633; cf. *Gilbert v. Rogers* (1953) 117 C.A.2d 712, 714, 256 P.2d 574 [same rule applied to radial highway common carrier and licensed highway contract carrier, both standing on equal footing and no nondelegable duty involved]; see 44 Cal. L. Rev. 770.)

Obviously, the exception applies only where the work is carried on under a public franchise, not merely because the general contractor contracted with the state or other public entity to perform work. (*West v. Guy F. Atkinson Const. Co.* (1967) 251 C.A.2d 296, 301, 59 C.R. 286.)

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6. General Contractor's Liability for Subcontractor's Negligence.

6 Witkin Sum. Cal. Law Torts § 1254

[§ 1254] General Contractor's Liability for Subcontractor's Negligence.

In *Dow v. Holly Mfg. Co.* (1958) 49 C.2d 720, 321 P.2d 736, defendant B, a general contractor, prepared plans and built a home, and defendant D, his plumbing subcontractor, installed gas heaters. The owner sold the home to another, and it was finally acquired by plaintiffs. They brought this action for wrongful death of the father and two children of the family, caused by asphyxiation from a defective heater. *Held*, B was liable.

(a) A general contractor is liable for his or her own negligence under the modern rule dispensing with privity and applying the manufacturer's liability theory to building constructors (supra, §1160). A landowner or possessor is liable for harm caused by a dangerous condition on his or her property, despite the fact that the landowner or possessor employs an *independent contractor* to do the work. (See supra, §1247.) The same rule applies here; i.e., a general contractor, who has control over and is primarily responsible for the construction, should inspect installations, and is liable for the harm despite the fact that a subcontractor (independent contractor) did the particular work. (49 C.2d 725.) (See 32 So. Cal. L. Rev. 203.)

(b) The supplier of chattels who furnishes a product made by another, and is thereby deemed to have vouched for them as his or her own, and to assume the same liability as the manufacturer (see supra, §1169) is analogous. The contractor produces a completed house, including gas heaters, that appear as the contractor's. "Surely there is no valid distinction between a general contractor constructing a building and using subcontractors to install equipment therein, and the manufacturer of an automobile buying parts not fabricated by it to install in the car, and selling the assembled car." (49 C.2d 727.) (See 32 So. Cal. L. Rev. 205 [criticism].)

A general contractor is liable to an invitee where the contractor has knowledge that the work is being done in a dangerous manner. (*Gardner v. Stonestown Corp.* (1956) 145 C.A.2d 405, 412, 302 P.2d 674; see *La Malfa v. Piombo Bros.* (1945) 70 C.A.2d 840, 848, 161 P.2d 964 [defendants, engaged in constructing airport, negligently allowed independent truck drivers to operate in unsafe manner on defendants' private road, injuring plaintiffs' truck]; *Rest.2d, Torts* §414, Comment b; cf. *Ambriz v. Petrolane, Ltd.* (1957) 49 C.2d 470, 481, 319 P.2d 1 [gas company cannot insulate itself from liability for inherently dangerous activity by having independent contractor deliver gas]; and see generally 62 A.L.R.2d 1052 [independent contractor's or subcontractor's liability for injury or death of third person occurring during excavation work not in street or highway].)

The general contractor may also be liable to the negligent subcontractor's employee. In *Kuntz v. Del E. Webb Const. Co.* (1961) 57 C.2d 100, 18 C.R. 527, 368 P.2d 127, defendant W, a general contractor, employed M, a subcontractor, to install steel decking. Plaintiff, a worker employed by another subcontractor, was injured in a fall from a defective installation. The evidence showed that W exercised no control over M's work of installation, but that, by reason of a notice by a state safety engineer, W had knowledge of the dangerous condition. *Held*, W had a duty toward plaintiff, an invitee, to keep the premises safe or warn of the dangers. "[W]here a general contractor knows from matters coming to his attention that work done by a subcontractor has created a type of dangerous condition which may reasonably be expected to recur unless precautions are taken and that employees of other subcontractors may be exposed to the danger without being aware of its existence, he has a duty to exercise reasonable care to protect those employees and may be held liable if his failure to do so is a proximate cause of injury to them." (57 C.2d 105.) (See *Jean v. Collins Const. Co.* (1963) 215 C.A.2d 410, 415, 30 C.R. 149 [general contractor was liable where he left steel rods protruding vertically from foundation, creating dangerous condition for subcontractor's men working on structure above]; 15 *Hastings L. J.* 610; 13 *U.C.L.A. L. Rev.* 120.)

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7. Hospital's Liability for Doctor's Negligence.

6 Witkin Sum. Cal. Law Torts § 1255

[§ 1255] Hospital's Liability for Doctor's Negligence.

"The pivotal question presented by this appeal is whether a hospital is liable to a patient under the doctrine of corporate negligence for negligent conduct of independent physicians and surgeons who, as members of the hospital staff, avail themselves of the hospital facilities, but who are neither employees nor agents of the hospital." (*Elam v. College Park Hosp.* (1982) 132 C.A.3d 332, 335, 183 C.R. 156.) S, a licensed podiatrist, had been granted podiatric surgery privileges by defendant Hospital, but he was an independent contractor operating his own office and paid directly by the patient. The Hospital's patient care evaluation committee reviewed his medical charts along with those of other doctors, and never reported any reason to consider him unqualified to practice podiatric surgery. However, the Hospital had notice of a malpractice suit against S more than 4 months before plaintiff's surgery. Plaintiff alleged that S performed negligent surgery, and that defendant Hospital breached its duty of insuring the competency of its staff physicians. *Held*, summary judgment for defendant Hospital reversed.

(a) California decisions have established hospital liability for a doctor's malpractice when the doctor is actually employed by or is ostensibly an agent of the hospital. (132 C.A.3d 337; see 3 *Summary* (10th), *Agency and Employment*, §39.) But whether a hospital is liable in the absence of the employment relationship, under the doctrine of "corporate negligence," is a question of first impression in *California*. (132 C.A.3d 337, 338; see footnote 5, defining term to describe hospital liability based not on vicarious liability but on violation of corporate duty owed directly to patient.)

(b) Defendant Hospital argues that it does not owe its patients a legal duty to exercise reasonable care in selecting, reviewing, and evaluating the competency of the doctors whom it permits to treat patients within its facilities; hence, even if its acts were a proximate cause of plaintiff's injuries, it cannot be held liable for negligence. Thus, as a basis for holding that the doctrine of corporate hospital liability should be applied, a legal duty of care must be found. (132 C.A.3d 338.) This raises a question of law for the court. (132 C.A.3d 339.)

(c) There is a legal duty. The fundamental policy is embodied in C.C. 1714, and *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086, lists the major factors to be considered. (132 C.A.3d 339, 340.) The case law has recognized a hospital's duty to use reasonable care to protect patients from harm, including the discovery and treatment of their medical conditions; its business is caring for ill persons, and it is under a duty to observe and know their conditions. (132 C.A.3d 340, citing *Rice v. California Lutheran Hosp.* (1945) 27 C.2d 296, 163 P.2d 860, *supra*, §988.) This duty of due care encompasses the duty to insure the competence of its medical staff through careful

selection and review. (132 C.A.3d 341.) The statutory authority recognizing hospital accountability for the quality of medical care and the competence of medical staff furnishes additional support for this conclusion. (132 C.A.3d 341 et seq., listing a number of statutes and administrative regulations.)

(d) The conclusion is also consonant with the public's perception of the modern hospital as "a multifaceted, health-care facility responsible for the quality of medical care and treatment rendered." The patient receives care from a number of individuals of varying capacities, and relies on a highly integrated system of activities; consequently, the concept that a hospital does not undertake to treat patients or act through its doctors and nurses, but only procures them to act on their own responsibility, no longer reflects the fact. (132 C.A.3d 344.) Further, the hospital is in the best position to evaluate the competence of physicians allowed to practice in its premises, for it is the only institutional vehicle available to coordinate the delivery of health care to large numbers of people. (132 C.A.3d 345.)

(e) "In summary, we hold a hospital is accountable for negligently screening the competency of its medical staff to insure the adequacy of medical care rendered to patients at its facility. ... [T]he articulated public policy considerations support the imposition of this general duty and outweigh the potential effect of corporate hospital liability upon the structure of medical malpractice insurance in California. Moreover, imposing hospital-corporate liability does not interfere with the Legislature's comprehensive efforts to ameliorate the integrity and quality of the health care system ... , but rather supplements the efforts by encouraging hospitals to actively oversee the competence of their medical staff and the quality of the medical treatment rendered on their premises, while providing victims with an additional avenue for relief. Simply stated, the Legislature has not attempted to immunize the hospital from liability arising from its negligence. Instead, the underlying statutory intent of the cited legislative campaign is the protection and furtherance of the health care interest of the patient." (132 C.A.3d 346.)

This innovative decision has given rise to much comment, and its evidentiary problems have been considered in later cases. (See 6 Proof of Facts 2d 647 [hospital's failure to supervise private physician using hospital]; 9 Cal. Western L. Rev. 429; 22 Cal. Western L. Rev. 317; 8 *Pacific L. J.* 141; 14 *Pacific L. J.* 803; 17 *San Diego L. Rev.* 383; 21 *San Diego L. Rev.* 431; 24 *Santa Clara L. Rev.* 661; 61 *So. Cal. L. Rev.* 183; 98 *A.L.R.5th* 533 [negligent credentialing of physician]; BAJI, No 6.20; CACI, Nos. 514, 516.)

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6 Witkin Sum. Cal. Law Torts § 1256

[§ 1256] Signer of Driver's License.

(1) *License of Minor.* Persons under 18 years of age are minors for the purposes of civil liability of the signer of a driver's license. (*Veh.C. 17700*; for similar general law, see *Family C. 6500, 1 Summary* (10th), *Contracts*, §26.) A minor's application for a driver's license cannot be granted unless it is signed and verified (a) by the parents, if both are living and have custody, or (b) by the living parent with custody, or (c) if neither parent is living or has custody, by the guardian, or if none, by a person having custody. (*Veh.C. 17701*.)

If the minor is a dependent or ward, the application may be signed by a grandparent, sibling over 18, aunt, uncle, or foster parent with whom the minor resides. If the dependent or ward files proof of financial responsibility, the application may be signed and verified by the probation officer or child protective services worker, but the officer or worker must first notify the foster parents or other responsible party of his or her intent to sign and verify the application. (*Veh.C. 17701*.) If a minor under the age of 18 years is *married*, the application may be signed and verified by the adult spouse of the minor or by the parents of either spouse; in lieu of the signature, the minor may file proof of financial responsibility, as defined in *Veh.C. 16430* et seq. (*Veh.C. 17702*.)

The persons required to sign may consent to an application signed by the minor's employer; the employer then becomes liable and the consenting parents, etc., are not. (*Veh.C. 17706*.)

(2) *Liability of Signer.* The signer of the application is liable for the minor driver's automobile tort. (*Veh.C. 17707*; for similar statutes, see *45 A.L.R.4th 87*.) (See *BAJI*, No. 13.67; *CACI*, No. 723; for driving with permission law, see *Veh.C. 17150*, *infra*, §1260.)

No liability may be imposed under *Veh.C. 17707* on the state or county, or on a probation officer or child protective services worker acting as an officer of the court, for damages caused solely by the minor's negligence or wilful misconduct, where the minor's application was signed by the officer or worker while the minor was a dependent or ward of the court. (*Veh.C. 17707*.)

The signer is also not liable where the minor is acting as another's agent or employee. (*Veh.C. 17710*.)

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- b. Minor Driving With Permission.

6 *Witkin Sum. Cal. Law Torts* § 1257

[§ 1257] Minor Driving With Permission.

Originally, a parent who knowingly permitted a child to drive without a license escaped liability. (See *Perry v. Simeone* (1925) 197 C. 132, 136, 239 P. 1056; 17 Cal. L. Rev. 305.) Now, if a minor, whether *licensed or not*, drives a motor vehicle upon a highway with the express or implied permission of his or her parents, guardian, or custodian, any civil liability of the minor is imposed on the persons granting the permission. (*Veh.C. 17708*; see *Hughes v. Wardwell* (1953) 117 C.A.2d 406, 409, 255 P.2d 881; BAJI, No. 13.66; CACI, No. 722.)

No liability may be imposed under *Veh.C. 17708* on the state or county, or on a probation officer or child protective services worker acting as an officer of the court, for damages caused solely by the minor's negligence or wilful misconduct, where the minor's application was signed by the officer or worker while the minor was a dependent or ward of the court. (*Veh.C. 17707*.) (On driving with permission generally, see *infra*, §1260 et seq.)

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6 *Witkin Sum. Cal. Law Torts* § 1258

[§ 1258] Nature and Scope of Liability.

The following conditions of liability under *Veh.C. 17707* and *17708* (supra, §§1256, 1257) should be noted:

(1) *Maximum Liability*. In the absence of *agency*, i.e., unless the minor acts as the agent of the parent, guardian, or employer, the liability of the signer is limited to \$ 15,000 for injury or death of one person, \$ 30,000 for more than one, and \$ 5,000 for property damage. (*Veh.C. 17709*.) A judgment in excess of the statutory maximum is not void, but it may be reduced on appeal. (*Rogers v. Foppiano* (1937) 23 C.A.2d 87, 93, 72 P.2d 239.)

The liability does not extend to punitive damages imposed on the minor. (*Veh.C. 17709(b)*.) And there is no cumulative liability where two statutes apply. (*Veh.C. 17714*, infra, §1261.)

Veh.C. 17709 is a limitation only on the liability based on signing the minor's application for a license (*Veh.C. 17707*) and the liability of a parent or guardian permitting the minor to drive (*Veh.C. 17708*). It is not a limitation on the liability of a licensed driver for negligent supervision of a driver with a learner's permit (*Veh.C. 12509*). (*Kostecky v. Henry* (1980) 113 C.A.3d 362, 369, 370, 170 C.R. 197.)

(2) *Statute of Limitations*. The liability is similar to that of a bondsman, and the statute of limitations is the same as that governing the right of action for the injury, i.e., 1 year. (*McFarland v. Cordiero* (1929) 99 C.A. 352, 355, 278 P. 889; *Franceschi v. Scott* (1935) 7 C.A.2d 494, 46 P.2d 764; see 3 *Cal. Proc.* (4th), *Actions*, §520.)

(3) *Act of Another Driver*. The signer is liable only where the applicant is the driver of the car; a parent will not be held liable when the child permits a friend to drive and the latter's negligence is the cause of the injury. (*Lundquist v. Lundstrom* (1928) 94 C.A. 109, 112, 270 P. 696; 17 *Cal. L. Rev.* 305; for different rule under driving with permission law, see infra, §1272.)

(4) *Contribution*. There is no liability for contribution. In *Southern Pac. Trans. Co. v. Dolan* (1972) 27 C.A.3d 534, 104 C.R. 131, a person injured in a collision with a railroad handcar and an automobile was given judgment against the railroad company and the minor driver of the automobile. The railroad company paid more than half and became entitled to contribution from the minor. The minor was unable to pay, and the company then sought to enforce the

judgment for contribution against the minor's parents, on a showing that he had driven the car with their permission. *Held*, not entitled. Although the broad language of *Veh.C. 17708* is not free from ambiguity, the purpose of the statutes imposing vicarious liability on owners and signers of license applications is to protect innocent third persons from careless use of automobiles; there was no legislative intent to permit a tortfeasor to obtain contribution from the owner or signer whose liability is only for another's tort. (27 C.A.3d 540.) (See *Dow v. Britt* (1974) 37 C.A.3d 868, 871, 112 C.R. 710 [partial satisfaction of judgment against son, by son's insurance carrier, in amount that equaled statutory liability of defendant parents, released parents from their statutory liability].)

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Franceschi case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §561.



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d. Termination of Liability.

6 *Witkin Sum. Cal. Law Torts* § 1259

[§ 1259] Termination of Liability.

Liability of the parent, guardian, or custodian (see *supra*, §1256 et seq.) may terminate in a number of ways:

- (1) By cancellation of the license, on receipt by the Department of Motor Vehicles of satisfactory evidence of the death of the signer. (*Veh.C. 17712(a).*)
- (2) By cancellation of the license, on the request of the signer. (*Veh.C. 17711, 17712(b).*)
- (3) By cancellation of the license, on receipt by the department of satisfactory evidence of a change in custody and request of the person or persons to whom custody has been transferred. (*Veh.C. 17712(c).*)
- (4) By cancellation of the license, on receipt by the department of satisfactory evidence that a minor has left the employ of an employer who signed the license. (*Veh.C. 17712(d).*)
- (5) By revocation of the license as a penalty under *Veh.C. 13101*. If the department revokes, the privilege of driving is terminated, and application by the parent under *Veh.C. 17711* would be superfluous and is not required. (*Hamilton v. Dick (1967) 254 C.A.2d 123, 125, 61 C.R. 894.*)
- (6) By the minor giving proof of the ability to respond in damages, e.g., by insurance policy or bond. This may be accomplished by an application with the consent of the persons required to sign, or, if the minor is emancipated other than by marriage, by an application of the minor alone. (*Veh.C. 17705.*)

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1. Statutory Development.

6 *Witkin Sum. Cal. Law Torts* § 1260

[§ 1260] Statutory Development.

(1) *Law Prior to 1967*. It was formerly the rule in California that the owner of a car who allowed another to drive it was not liable for the driver's torts, even though the driver was a member of his or her family. The "family purpose doctrine" was not followed, and liability arose only from agency or joint enterprise. (See *Spence v. Fisher* (1920) 184 C. 209, 214, 193 P. 255; 9 *Cal. L. Rev.* 250; 8 *A.L.R.3d* 1191 [family purpose doctrine in other jurisdictions].)

A 1929 statute provided that the owner of a motor vehicle should be responsible for injuries or death resulting from the negligence of "any person using or operating the same with the permission, express or implied, of such owner." (See generally *Sparks v. Berntsen* (1942) 19 C.2d 308, 310, 121 P.2d 497 [what constitutes proper verdict against owner and driver]; *Ridley v. Young* (1944) 64 C.A.2d 503, 510, 149 P.2d 76 [minor owner liable, despite statutory prohibition against delegation of power; liability not based on agency]; 18 *So. Cal. L. Rev.* 75; 31 *Cal. L. Rev.* 572; 16 *So. Cal. L. Rev.* 242; 7 *Stanf. L. Rev.* 517; 6 *U.C.L.A. L. Rev.* 174.)

(2) *Amendments in 1967*. The 1967 Legislature dropped the theory of imputed negligence and enlarged the scope of liability. *Veh.C. 17150* now states that the owner "is liable and responsible" for death or injury to person or property resulting from "a negligent or wrongful act or omission" by the driver with permission. (See *Veh.C. 17707*, *supra*, §1256 [similar rule on liability of parent, etc., signing minor's driving license]; *Veh.C. 17154*, *infra*, §1269 [same, executor or bailee]; *Veh.C. 17159*, *infra*, §1269 [same, executor or administrator].) (For statute imposing liability on motor vehicle lessor for damage caused by operation of rented vehicle, see 41 *A.L.R.4th* 933; for instructions, see BAJI, No. 13.50 et seq.; CACI, No. 720 et seq.)

(3) *Constitutionality and Construction*. The statute is constitutional. (See *Milgate v. Wraith* (1942) 19 C.2d 297, 303, 121 P.2d 10; *Sutton v. Tanger* (1931) 115 C.A. 267, 269, 1 P.2d 521; *O'Neill v. Williams* (1932) 127 C.A. 385, 387, 15 P.2d 879.) It has been said that because it creates a new statutory liability, the statute must be strictly construed (*Weber v. Pinyan* (1937) 9 C.2d 226, 229, 70 P.2d 183), but this theory is questionable in view of C.C. 4 (general preference for liberal construction). (See *Baugh v. Rogers* (1944) 24 C.2d 200, 209, 148 P.2d 633; *Bayless v. Mull* (1942) 50 C.A.2d 66, 69, 122 P.2d 608.)

(4) *Independent Liability*. Liability of the owner is not dependent on a judgment against the operator. (See *Holland v. Kodimer* (1938) 11 C.2d 40, 42, 77 P.2d 843; *Baugh, supra*, 24 C.2d 209.) In *Van Meter v. Reed* (1962) 207 C.A.2d 866, 869, 24 C.R. 688, plaintiff, employee of an automobile agency, was struck by a car driven by defendant fellow employee with the permission of defendant owner. *Held*, a cause of action was stated against defendant owner even though the workers' compensation law precluded any judgment against the fellow employee. (207 C.A.2d 869.) (See *Galvis v. Petito* (1993) 13 C.A.4th 551, 559, 560, 16 C.R.2d 560 [holding that *Baugh* was not affected by amendment to *Veh.C. 17150* deleting imputation language or by amendments to *Lab.C. 3601* and *3864* abrogating owner's right to indemnity against operator who is coemployee of injured party].)

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2. Limited Liability.

6 *Witkin Sum. Cal. Law Torts* § 1261

[§ 1261] Limited Liability.

(1) *Statutory Limits*. The limits are \$ 15,000 for injury or death of one person, \$ 30,000 for more than one, and \$ 5,000 for property damage. (*Veh.C. 17151(a)*.) (See *Veh.C. 17155* [settlement limits total is \$ 30,000]; *Young v. Berry Equipment Rentals* (1976) 55 C.A.3d 35, 42, 127 C.R. 200, 2 Summary (10th), *Workers' Compensation*, §92 [effect of rule of *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, 2 Summary (10th), *Workers' Compensation*, §92]; *Galvis v. Petito* (1993) 13 C.A.4th 551, 564, 16 C.R.2d 560 [rejecting argument that, under Proposition 51 (supra, §52 et seq.), owner is liable only for injured party's economic damages]; *Fremont Comp. Ins. Co. v. Hartnett* (1993) 19 C.A.4th 669, 675, 676, 23 C.R.2d 567 [plaintiff was struck by automobile with defective brakes being pushed by owner's children; owner's liability was not limited by statute, as she was herself negligent in failing to maintain brakes].)

The owner is not liable for punitive damages imposed on the driver. (*Veh.C. 17151(b)*.)

(2) *No Cumulative Liability*. Where the defendant is liable under two statutes, e.g., where a parent has signed his or her child's license application, and also permits the child to drive the parent's car, the parent is subject to liability under both statutes, but the liability is not cumulative, and the statutory maximum amounts are specified in *Veh.C. 17709* (see supra, §1258). (*Veh.C. 17714* [codifying rule of *Rogers v. Foppiano* (1937) 23 C.A.2d 87, 93, 72 P.2d 239].)

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3. Vehicle and Operation.

6 *Witkin Sum. Cal. Law Torts* § 1262

[§ 1262] Vehicle and Operation.

(1) *Motor Vehicle*. Most "self-propelled" vehicles come within the statute. (See *Veh.C. 415* [excluding certain self-propelled machines used by the disabled].) Hence, liability could be imposed for the operation of a bulldozer, irrespective of the facts that it was used on private property and exceeded the weight and other limits for lawful movement on the highway. (*Lambert v. Southern Counties Gas Co. of Calif. (1959) 52 C.2d 347, 351, 340 P.2d 608.*) And for purposes of *Veh.C. 3000* et seq. (regulation of new vehicle sale, manufacture, and distribution), "motor vehicle" includes a recreational vehicle as defined in *Health & Saf.C. 18010(a)*, but does not include a truck camper. (*Veh.C. 415(c).*)

(2) *Place Where Driving Occurs*. *Webster v. Zevin (1947) 77 C.A.2d 855, 176 P.2d 960*, made clear that the liability of an owner is not limited to cases of driving on a public highway. Defendant lent the car to the driver, who parked it on a slope, in the lot of a nightclub; he alighted, and the car immediately rolled down the slope, killing decedent. *Held*, defendant was liable for the negligent operation of the car by the driver on private property, because former *Veh.C. 402* (now *Veh.C. 17150*) indicated no legislative intent to confine liability to accidents occurring on public highways. (*77 C.A.2d 856.*) (See *18 A.L.R.3d 814* [what constitutes "using"]; *103 A.L.R.5th 339* [what constitutes "operation" or "negligence in operation"].)

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4. Effect of Settlement.

6 Witkin Sum. Cal. Law Torts § 1263

[§ 1263] Effect of Settlement.

(1) *Settlement With Owner.* A plaintiff does not, by settlement with the owner, discharge the liability of the driver unless the settlement and release is in full satisfaction of the claim. Under *C.C.P.* 877 (supra, §§71, 72) a partial satisfaction received from one joint tortfeasor discharges the other only to the extent of the payment made. (*Kemp v. Barnett* (1976) 62 C.A.3d 245, 249, 250, 132 C.R. 823.)

(2) *Settlement in Full Satisfaction.* In *Burton v. Gardner Motors* (1981) 117 C.A.3d 426, 172 C.R. 647, plaintiff was injured in a collision with a car lent by defendant owner G to C. C's offer to compromise for \$ 6,500 was accepted by plaintiff, judgment was entered in that amount, and the judgment was satisfied. *Held*, summary judgment for defendant G affirmed. Under the statute, G and C were considered joint tortfeasors, and a full satisfaction against one discharged the liability of the other. (117 C.A.3d 431, citing the text.) *Kemp v. Barnett*, supra, is distinguishable. Because the driver's liability is unlimited, the driver is discharged only to the extent of the payment made by the owner with limited liability. The *Kemp* rule does not apply where the payment is made by the driver and the owner's liability is fixed by the amount of the driver's liability and the statutory maximum. (117 C.A.3d 432.) Where both the permittee (C) and the owner (G) are before the court, the permittee by settling violates the statutory policy favoring a joint judgment against all defendants; and allowing the plaintiff to pursue the claim against the owner after settling with the permittee would impair the owner's right to subrogation against the permittee. (117 C.A.3d 433.) (See *Lindgren v. Baker Engineering Corp.* (1988) 197 C.A.3d 1351, 1354, 243 C.R. 476 [settlement with driver for \$ 25,000 discharged owner's statutory liability of \$ 15,000, despite reservation of right to proceed against owner's assets].)

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5. Effect of Unsatisfied Judgment.

6 *Witkin Sum. Cal. Law Torts* § 1264

[§ 1264] Effect of Unsatisfied Judgment.

Walker v. Belvedere (1993) 16 C.A.4th 1663, 20 C.R.2d 773, presents the issue whether an unsatisfied judgment against the operator, exceeding the owner's statutory \$ 15,000 liability, precludes a judgment against the owner.

Plaintiff Walker was injured when her vehicle was struck by one owned by defendants B and A. At the time of the collision, A was the driver and B was a passenger. W brought two causes of action, negligent operation of the vehicle and negligent entrustment by B. Because A's negligence was admitted, the jury was asked to decide only the negligent entrustment cause of action. It found for B, and the trial judge entered judgment against A's estate for \$ 335,000 (A died prior to commencement of the action). Two weeks later, W asked the trial judge to set aside the judgment and enter a new judgment that included recovery against B under *Veh.C. 17150* and *17151*. The trial judge declined to do so. *Held*, this was error; obtaining a judgment against a negligent permissive driver does not, by itself, extinguish the Vehicle Code statutory liability of the vehicle's owner.

"Here, it is uncontested that the judgment had not yet been satisfied to any extent when Walker asked the trial court for entry of a judgment against Belvedere based on statutory liability. In spite of the existence of an insurance policy, there was no settlement with its implied promise of forthcoming payment. The mere existence of a judgment does not meet the legislative purpose of protecting the injured party first and the owner second. Accordingly, the jury's verdict and consequent judgment did not extinguish Belvedere's liability prior to satisfaction of the judgment to the extent of Belvedere's statutory liability. Walker had proven what she needed in order to secure a Vehicle Code statutory judgment against Belvedere." (16 C.A.4th 1669, citing *Heves v. Kershaw* (1961) 198 C.A.2d 340, 17 C.R. 837, *infra*, §1270, *Burton v. Gardner Motors* (1981) 117 C.A.3d 426, 172 C.R. 647, *supra*, §1263, and *Lindgren v. Baker Engineering Corp.* (1988) 197 C.A.3d 1351, 243 C.R. 476, *supra*, §1263.)

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1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1265

[§ 1265] In General.

(1) *Registered and Actual Owners*. Ordinarily, "owner" means the registered owner. Indeed, a registered owner may be liable even though he or she procures the registration wrongfully and is a converter as to the true owner. (*Irvine v. Wilson* (1955) 137 C.A.2d Supp. 843, 848, 289 P.2d 895.) (See 74 A.L.R.3d 739 [who is "owner" within statute].) However, where defendant owner permitted an incompetent person to drive and for the purpose of avoiding liability had the car registered in the driver's name, defendant was held liable on proof of actual ownership. (*McCalla v. Grosse* (1941) 42 C.A.2d 546, 549, 109 P.2d 358; see 29 Cal. L. Rev. 777.)

(2) *Seller as Owner*. A seller under a conditional sale, prior to repossession, and a chattel mortgagee out of possession are not deemed to be owners for purposes of liability; but the "purchaser under a security agreement" is an owner. (*Veh.C.* 17156; see *Veh.C.* 460 [definition of "owner"].) Whether repossession has occurred is a question of fact. (*Campbell v. Security Pac. Nat. Bank* (1976) 62 C.A.3d 379, 385, 133 C.R. 77.)

A problem arises, however, both in ordinary sales and conditional sales, where the transfer does not comply with the formalities required by *Veh.C.* 5600, 5601. This failure may render the transfer ineffective, and thus defeat the passage of title (see 4 *Summary* (10th), *Sales*, §237), with the result that the seller remains the owner for purposes of liability. (See *Dorsey v. Barba* (1952) 38 C.2d 350, 353, 240 P.2d 604; *Stoddart v. Peirce* (1959) 53 C.2d 105, 112, 346 P.2d 744; *Bunch v. Kin* (1934) 2 C.A.2d 81, 86, 37 P.2d 744; *Schmidt v. C.I.T. Corp.* (1936) 14 C.A.2d 92, 94, 57 P.2d 1016; *Guillot v. Hagman* (1939) 30 C.A.2d 582, 586, 86 P.2d 865 [accident occurred day after sale, notice of transfer was not received by Department of Motor Vehicles until 13 days after sale]; *Helmuth v. Frame* (1941) 46 C.A.2d 372, 376, 115 P.2d 846; *Gutknecht v. Johnson* (1944) 62 C.A.2d 315, 319, 144 P.2d 854; *Traders & General Ins. Co. v. Pacific Employers Ins. Co.* (1955) 130 C.A.2d 158, 162, 278 P.2d 493; *Harbor Ins. Co. v. Paulson* (1955) 135 C.A.2d 22, 27, 286 P.2d 870; 28 Cal. L. Rev. 70; 39 Cal. L. Rev. 398; 17 So. Cal. L. Rev. 414.)

In *Springmeyer v. Ford Motor Co.* (1998) 60 C.A.4th 1541, 71 C.R.2d 190, a mechanic whose arm was severed by a fan blade that broke loose from a truck engine sued the truck's former owner for negligent failure to have the fan replaced in response to a recall notice. The defense was based on evidence that defendant had sold the truck before the recall notice went out. The trial judge excluded this evidence, based on defendant's failure to comply with the vehicle

transfer requirements of *Veh.C. 5600*. *Held*, this was error. Defendant's failure to comply with *Veh.C. 5600* was irrelevant. The issue was simply whether the defective vehicle had been "effectively transferred" at the time that the recall notice went out, not whether defendant had complied with the owner liability law incident to the sale. (*60 C.A.4th 1568*.)

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2. Notification to Department.

6 *Witkin Sum. Cal. Law Torts* § 1266

[§ 1266] Notification to Department.

For protection, a seller who has made a bona fide sale or transfer of a vehicle and has delivered possession of the vehicle to the purchaser must fulfill either of the following requirements:

(1) Properly endorse and deliver the certificate of ownership. (*Veh.C. 5602(a).*)

(2) Deliver or mail to the Department (a) the notice provided in Veh.C.4456(b), 5900, or 5901 or (b) the appropriate documents and fees for registration of the vehicle to the new owner pursuant to the sale or transfer. (*Veh.C. 5602(b).*) A "bona fide sale or transfer" includes a gift. (See *Brown v. Fix* (1978) 86 C.A.3d 809, 813, 150 C.R. 431.)

Originally, the notice was required "immediately," and a dealer who failed to give such notice was held liable where the accident occurred on the night of the sale. (See *Weinberg v. Whitebone* (1948) 87 C.A.2d 319, 325, 196 P.2d 963; *Rosenthal v. Harris Motor Co.* (1953) 118 C.A.2d 403, 405, 257 P.2d 1034; 39 Cal. L. Rev. 400.) The time for notification has been extended numerous times and is presently 5 calendar days for ordinary owners (*Veh.C. 5900(a)*) and 5 calendar days not counting the day of sale for dealers and lessor-retailers (*Veh.C. 5901(a)*).

Failure to give timely notification does not necessarily result in liability; it is sufficient if the notice reaches the Department prior to the accident. (*Stoddart v. Peirce* (1959) 53 C.2d 105, 121, 346 P.2d 744; *Borjesson v. Simpson* (1960) 177 C.A.2d 365, 371, 2 C.R. 366; *Richie v. Tate Motors* (1971) 22 C.A.3d 238, 242, 99 C.R. 223.)

Compliance with the notification requirements is an affirmative defense, and the burden of proof is on the defendant. (*Enis v. Specialty Auto Sales* (1978) 83 C.A.3d 928, 936, 939, 148 C.R. 255.)

The first requirement, i.e., *endorsement and delivery* of the certificate of ownership to the buyer means that delivery alone is not enough. (*Larson v. Barnett* (1950) 101 C.A.2d 282, 285, 225 P.2d 297).

Informal steps, such as the buyer giving the seller a power of attorney to execute necessary documents, will not constitute compliance with the statute. (*Weinberg v. Whitebone, supra*, 87 C.A.2d 326.) And delivery of an undated certificate is not a sufficient compliance with Veh.C. 5753, and therefore does not give immunity under Veh.C. 5602. (

Laureano v. Christensen (1971) 18 C.A.3d 515, 521, 95 C.R. 872; *Nuss v. Pacht* (1971) 22 C.A.2d 553, 557, 99 C.R. 460.)

Strict compliance with the requirement of delivery is required; an attempted delivery by mail to the buyer's last known address is not sufficient. (*Brennan v. Gordon Ball* (1985) 163 C.A.3d 832, 837, 838, 839, 210 C.R. 32.)

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3. Minor Who Disaffirms.

6 *Witkin Sum. Cal. Law Torts* § 1267

[§ 1267] Minor Who Disaffirms.

In *Scollan v. Government Employees Ins. Co.* (1963) 222 C.A.2d 181, 35 C.R. 40, defendant F sold a car to three minors under 15, and all formalities of transfer were complied with. Then one of the minors had an accident, following which they all disaffirmed the contract. (See 1 *Summary* (10th), *Contracts*, §31.) The trial judge, applying the fiction of relation back of rescission, decided that disaffirmance left title in F from the beginning, so that as a matter of law he was an owner who permitted the minor to drive within *Veh.C. 17150. Held*, reversed. The statutory purpose was to impose liability on one who gave over control to another. Here, the sale was in *fact* executed, title passed to the buyers, and defendant F, the seller, had no right of control and could give none. "We think it was not the intent of the Legislature to place this liability upon one who had no voice in that selection. ... The fiction of relation, while proper enough within its sphere, cannot be used to make that happen which did not happen, to raise permission where none was given, and within the statutory frame of reference could not have been given." (222 C.A.2d 185.)

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4. Community and Joint Ownership.

6 *Witkin Sum. Cal. Law Torts* § 1268

[§ 1268] Community and Joint Ownership.

Under prior law, the husband, with certain exceptions, had the right to manage and control community property. The attempt to apply *Veh.C. 17150* (see supra, §1260) to family cars gave rise to a number of problems. (See *Wilcox v. Berry* (1948) 32 C.2d 189, 195 P.2d 414 [registration in both names, and husband drove with wife's permission; wife liable]; *Dorsey v. Barba* (1952) 38 C.2d 350, 353, 240 P.2d 604 [registration in wife's name, and husband drove with wife's consent; wife liable]; *Shepardson v. McLellan* (1963) 59 C.2d 83, 87, 27 C.R. 884, 378 P.2d 108 [registration in husband's name; wife not liable]; *Cooke v. Tsipouroglou* (1963) 59 C.2d 660, 622, 31 C.R. 60, 381 P.2d 940 [registration in both names; as cotenant to whom husband's negligence was imputed, plaintiff wife could not recover]; *Cox v. Kaufman* (1946) 77 C.A.2d 449, 451, 175 P.2d 260 [registration in husband's name; wife not liable]; *Logan v. Serpa* (1949) 91 C.A.2d 818, 822, 206 P.2d 70 [registration in husband's name, and he died; widow liable].)

Under current law, the husband and wife have equal right to manage and control the property. (See 11 *Summary* (10th), *Community Property*, §132.)

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6 *Witkin Sum. Cal. Law Torts* § 1269

[§ 1269] Liability of Bailee or Personal Representative.

(1) *Bailee*. Originally, the statute did not apply to a bailee. (See *Overgard v. Beaverson* (1948) 89 C.A.2d 449, 201 P.2d 67; *Jacobs v. Bozzani Motors, Ltd.* (1952) 109 C.A.2d 681, 689, 241 P.2d 642.) *Veh.C. 17154* now provides that "[e]very bailee of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission" in its operation by a driver with permission of the bailee. (See *Veh.C. 17157* [where motor vehicle is "gratuitously loaned" to school district, bailee is deemed owner notwithstanding terms of any contract, "until the bailor retakes possession"].)

(2) *Executor or Administrator*. Originally, the statute did not apply to a personal representative during administration of the estate of the deceased owner. (See *Fountain v. Bank of America* (1952) 109 C.A.2d 90, 95, 240 P.2d 414.) *Veh.C. 17159* now provides that "a personal representative of a decedent who has control or possession of a motor vehicle subject to administration for the purpose of administration" is "liable and responsible for the death or injury to person or property resulting from a negligent or wrongful act or omission" in its operation by the driver with permission of the representative.

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d. Liability of Operator.

6 *Witkin Sum. Cal. Law Torts* § 1270

[§ 1270] Liability of Operator.

The negligent operator is, of course, subject to unlimited liability for his or her own tort. Under the statute, the operator must be made a party defendant when possible; recourse must first be had against the operator, and the owner who pays is subrogated to the injured party's rights against the operator. (*Veh.C. 17152 et seq.*; see *Brown v. Regan* (1938) 10 C.2d 519, 523, 75 P.2d 1063 [verdict against owner alone is erroneous]; *Aynes v. Winans* (1948) 33 C.2d 206, 208, 200 P.2d 533; *Cook v. Superior Court* (1936) 12 C.A.2d 608, 610, 55 P.2d 1227 [execution cannot be levied on owner's property until means of satisfaction against operator are exhausted]; *Enterprise Rent-A-Car Co. v. Workmen's Auto Ins. Co.* (1997) 58 C.A.4th 1543, 1549, 68 C.R.2d 725 [liability of permissive driver is primary and that of owner is secondary]; *Mercury Cas. Co. v. Hertz Corp.* (1997) 59 C.A.4th 414, 418, 69 C.R.2d 9 [same].)

There are some practical qualifications of this rule. In *Holland v. Kodimer* (1938) 11 C.2d 40, 77 P.2d 843, after judgment against both the owner and operator, the operator disaffirmed on grounds of minority. *Held*, the owner remained liable, though his right of recourse was waived by failure to request appointment of a guardian ad litem. (11 C.2d 43.)

In *Castro v. Giacomazzi Bros.* (1949) 92 C.A.2d 39, 206 P.2d 688, a judgment against the owner was affirmed notwithstanding failure to join the operator. He was not an indispensable party in the jurisdictional sense; hence, the defendant's failure to raise the point at the trial was a waiver of the objection. (92 C.A.2d 44.)

In *Baugh v. Rogers* (1944) 24 C.2d 200, 213, 148 P.2d 633, the owner was held liable, despite the fact that the driver was the employer of plaintiff, and therefore immune from liability except for compensation under the Workers' Compensation Act.

In *Heves v. Kershaw* (1961) 198 C.A.2d 340, 17 C.R. 837, plaintiff, injured in an automobile accident, recovered judgment against B, the operator, H, the parent signer of his license, and K, the owner of the automobile. The judgment was for \$ 19,000, and by stipulation it was limited to \$ 5,000 against H and K, respectively, and \$ 9,000 additionally against B. Partial satisfaction by payment of \$ 10,000 (not made by K) was acknowledged. K then contended that his \$ 5,000 liability was fully satisfied. *Held*, this was correct. The legislative intent was to satisfy the joint liability of the owner and operator before satisfying the primary separate liability of the operator; and, as between the operator and the

owner, the owner's liability is secondary. Hence, the proper procedure should be (a) first satisfy the joint and several liability of the operator and parent signer and the joint and several liability of the operator and owner; (b) then satisfy the separate liability of the operator. (198 C.A.2d 346.)

If the operator negligently injures the owner who permitted operator to drive the car, the owner may recover damages from the operator. (*Mason v. Russell* (1958) 158 C.A.2d 391, 393, 322 P.2d 486; see 6 U.C.L.A. L. Rev. 174.)

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e. Permission.

1. Express and Implied Permission.

6 *Witkin Sum. Cal. Law Torts* § 1271

[§ 1271] Express and Implied Permission.

The burden is on the plaintiff to prove that the owner gave permission to the operator to drive. (*Bradford v. Sargent* (1933) 135 C.A. 324, 330, 27 P.2d 93 [permission expressly refused]; *Helmuth v. Frame* (1941) 46 C.A.2d 381, 383, 115 P.2d 852; *Mucci v. Winter* (1951) 103 C.A.2d 627, 630, 230 P.2d 22 [negligent failure of owner to recover car key was not equivalent of permission]; *Irvine v. Wilson* (1955) 137 C.A.2d Supp. 843, 848, 289 P.2d 895.)

The permission need not be express; it may be implied from the circumstances. (*Burgess v. Cahill* (1945) 26 C.2d 320, 324, 158 P.2d 393 [knowledge of intended use is not essential to inference of implied permission]; *Scheff v. Roberts* (1950) 35 C.2d 10, 15, 215 P.2d 925; *Burford v. Huesby* (1939) 35 C.A.2d 643, 647, 96 P.2d 380 [practice of owner to lend car to intimate friends]; *Hanna v. O'Conner* (1951) 106 C.A.2d 760, 766, 236 P.2d 181.)

Permission may be restricted (*infra*, §1272) or unlimited. Thus, where an automobile salesman drove his employer's car with the employer's permission, without restrictions on either place or time of use, the employer was liable even though at the time of the accident the employee was acting outside the scope of his employment and on business of his own. (*Bayless v. Mull* (1942) 50 C.A.2d 66, 72, 122 P.2d 608; see *Burgess v. Cahill*, *supra* [defendant company allowed employee to use truck for personal purposes without objection]; 16 *So. Cal. L. Rev.* 242; 7 *Stanf. L. Rev.* 522.)

In *Elkinton v. California State Auto. Assn., Interstate Ins. Bureau* (1959) 173 C.A.2d 338, 343 P.2d 396, plaintiff recovered judgment for personal injuries sustained in an accident with the negligent driver. The driver was the 15-year-old daughter of the insured mother and unlicensed. In this action on the insurance policy, the issue was sufficiency of proof of driving with the mother's permission, the sole witness on this being the mother. *Held*, judgment against insurer affirmed.

(a) "Where the issue of implied permissive use is involved, the general relationship existing between the owner and the operator is of paramount importance. Where, for example, the parties are related by blood ... , or marriage ... , or where the relationship between the owner and the operator is that of principal and agent ... , weaker direct evidence will support a finding of such use than where the parties are only acquaintances ... , or strangers. ... Of the above cases only those falling within the last group (mere acquaintances and strangers) hold that the evidence of permissive use was

insufficient as a matter of law." (173 C.A.2d 344.)

(b) The showing held sufficient here was: (1) the keys were accessible to the daughter; (2) the mother had shown the daughter how to start a car, and had never told her she could not drive that car; (3) the mother knew that her daughter was driving other cars; (4) the mother had expressed a desire that her daughter learn to drive and get a driver's license in a few months; (5) the keys had been moved (allowing inference that the mother had learned that her daughter was driving the car). (173 C.A.2d 345.)

In *Peterson v. Grieger* (1961) 57 C.2d 43, 17 C.R. 828, 367 P.2d 420, defendant owner left his car with C at the entrance to C's main parking lot, which was full. L, a 17-year-old boy, occasionally visited teenage employees of C, and, though unlicensed, was allowed by C to park cars. On this occasion C authorized L to take defendant's car to an overflow lot, and L struck plaintiff. *Held*, the evidence was sufficient to support a finding of implied permission. The jury could infer that the permission extended to parking in another connected place pursuant to a routine procedure used on busy nights. (57 C.2d 52.) Defendant's entrustment of the car to C gave C the same authority to select an operator as defendant had in the first instance. (57 C.2d 54.) (See 36 So. Cal. L. Rev. 396.)

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Unlimited permission: See *Taylor v. Roseville Toyota* (2006) 138 C.A.4th 994, 1004, 42 C.R.3d 68 [evidence supported finding that auto dealer gave permission to employee to use its vehicle, where employee testified that key shack attendant told him that "it was okay" to use vehicle for personal errand during lunch break if he brought it back, and where, although evidence of attendant's actual authority to give permission was lacking, there was evidence of his ostensible authority to give permission].



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e. Permission.

2. Restricted Permission.

6 *Witkin Sum. Cal. Law Torts* § 1272

[§ 1272] Restricted Permission.

(1) *Major Deviation*. Permission may be granted for a limited time or restricted use, and in that case the owner is not liable if the accident occurs during a substantial violation of the restrictions. Thus, in *Henrietta v. Evans* (1938) 10 C.2d 526, 75 P.2d 1051, defendant dealer let defendant buyer take possession of a used car before the transfer papers were executed, but gave him permission solely to drive into the dealer's shop the next day to sign them. The buyer drove past the shop towards another destination, where the accident happened. *Held*, the dealer was not liable. The court thought the rule was analogous to that of *deviation* in employer-employee cases (see 3 *Summary* (10th), *Agency and Employment*, §§179, 180), and held that substantial violation of provisions as to time, place, or purpose of use will absolve the owner from liability. (10 C.2d 528.) (See *Engstrom v. Auburn Auto Sales Corp.* (1938) 11 C.2d 64, 72, 77 P.2d 1059; *Barcus v. Campbell* (1949) 90 C.A.2d 768, 772, 204 P.2d 65 [burden on plaintiff]; *Rose v. Porter* (1950) 101 C.A.2d 333, 337, 225 P.2d 245; BAJI, No. 13.53; CACI, No. 721.)

(2) *Unsubstantial Violation*. In *Henrietta v. Evans*, *supra*, the court observed that unsubstantial violation do not absolve the owner. "[I]f the owner permitted the use of the car for a particular purpose or in a certain locality, though he gave specific instructions as to the manner of operation, the speed and care in driving, etc., it would not be reasonable to hold that the use was without permission if any of these detailed instructions were violated, for in such case the liability of the owner could in almost every case be defeated by some showing of violation of authority." (10 C.2d 529.)

(3) *Restriction Against Lending to Another*. In *Souza v. Corti* (1943) 22 C.2d 454, 139 P.2d 645, defendant habitually allowed his son to drive, and on the night of the accident again gave permission, but added: "Don't lend the car to anyone else." In arranging for a group of persons to reach a dance hall, the son allowed defendant C to drive the father's car, while the son rode in another. Plaintiff received injuries from C's negligence. *Held*, the father was liable, because the person with permission (the son) was using the car for his purposes, though a third person was operating it; and, in view of the permission given for general use, the "secret restriction" was ineffective. The case thus apparently distinguishes between valid restriction on purpose or time of use, and restriction of use to a single person. (22 C.2d 460.) (See *Herbert v. Cassinelli* (1946) 73 C.A.2d 277, 281, 166 P.2d 377 [following *Souza*]; 31 Cal. L. Rev. 572; 17 So. Cal. L. Rev. 326; 7 Stanf. L. Rev. 523.)

To be contrasted is *Norris v. Pacific Indem. Co.* (1952) 39 C.2d 420, 247 P.2d 1. P, the owner, gave his son G permission, expressly prohibiting lending. G nevertheless lent it to I, a minor, who negligently injured others. In this action for declaratory relief, I's father (who was liable on his son's driver's license) sought a determination that defendant, P's insurer, was liable under the omnibus clause of its policy. *Held*, the insurer was not liable; the clause did not cover a use that the owner had expressly forbidden. (39 C.2d 424.) The theory of the opinion appears to be that liability of the owner under *Veh.C. 17150* and the *Souza* case is not conclusive on the issue of insurance coverage, which extends only to cases of driving with actual permission. (See *Marquez v. Enterprise Rent-A-Car* (1997) 53 C.A.4th 319, 322, 61 C.R.2d 557 [car rental company whose renter allowed another person to drive was not responsible for accident by that person, where renter initialed box in rental contract indicating that he did not want permission for others to drive car].)

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G. Statutory Liability for Operation of Vessel.

6 Witkin Sum. Cal. Law Torts § 1273

[§ 1273] Statutory Liability for Operation of Vessel.

Harb. & Nav.C. 661 establishes a driving with permission law applicable to undocumented vessels (see *Harb. & Nav.C. 651(y)* ["undocumented vessel" is one lacking valid marine document issued by U.S. Coast Guard]; *71 A.L.R.3d 1018* [liability of owner of power boat].)

(1) Every owner of an undocumented vessel "is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such vessel, in the business of the owner or otherwise, by any person using and operating the same with the permission, express or implied, of the owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damage." (*Harb. & Nav.C. 661(a)*.) Knowledge and consent of the owner are presumed when the operator is an immediate member of the owner's family. (*Harb. & Nav.C. 661(a)*.) The statute does not "relieve any person from any liability which he would otherwise have," and does not "authorize or permit any recovery in excess of injury or damage actually incurred." (*Harb. & Nav.C. 661(a)*.)

(2) The limits of liability for imputed negligence are \$ 10,000 for injury or death of one person, \$ 20,000 for more than one, and \$ 10,000 for property damage, unless the owner's liability arises through the relationship of principal and agent or master and servant. (*Harb. & Nav.C. 661(b)*.)

(3) Where two or more persons are injured or killed in one accident, the owner may settle and pay any bona fide claims, whether reduced to judgment or not; and the payments will diminish to that extent the owner's total liability. Payments aggregating \$ 20,000 "extinguish all liability of the owner for death or personal injury arising out of the accident which exists by reason of imputed negligence." (*Harb. & Nav.C. 661(f)*.)

(4) Where the operator may be reached by personal service within the state, he or she must be made a party defendant; and on recovery of judgment, recourse must first be had against the operator's property. (*Harb. & Nav.C. 661(c)*.) The owner is subrogated to the rights of the injured party, and may recover from the operator the total amount of any judgment and costs recovered against the owner. (*Harb. & Nav.C. 661(d)*.) If the bailee of the owner permits another to operate the vessel, both the bailee and the operator are operators. (*Harb. & Nav.C. 661(e)*.)

(5) If a vessel is sold under a conditional sale contract, the seller or the seller's assignee is not an owner for purposes of imputed negligence; the buyer or the buyer's assignee is the owner until the seller or his assignee retakes possession of the vessel. Similarly, a chattel mortgagee out of possession is not an owner for purposes of imputed

negligence. (*Harb. & Nav.C. 661(g).*)

(6) No action based on imputed negligence abates by reason of the death of an injured person or of a person liable or responsible under the statute. In an action for physical injury by the executor, administrator, or personal representative of a deceased person, the damages recoverable are the same as those recoverable under *C.C.P. 377.20, 377.22, 377.30, 377.34, 377.40, and 377.42.* (*Harb. & Nav.C. 661(h);* see *supra*, §23.)

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1. Owner's Liability.
a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1274

[§ 1274] In General.

(1) *Injury or Death to Passengers.* *Pub.Util.C. 21404* applies the driving with permission law to the owner of an aircraft. "Liability of the owner or pilot of an aircraft carrying passengers for injury or death to the passengers is determined by the rules of law applicable to torts on the land or waters of this state, arising out of similar relationships. Every owner of an aircraft is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the aircraft, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."

(2) *Limited Liability.* The liability of an owner, the bailee of an owner, or the personal representative of a decedent, imposed by *Pub.Util.C. 21404* and not arising through the relationship of principal and agent or master and servant, is limited to \$ 15,000 for injury or death of one person, \$ 30,000 for more than one, and \$ 5,000 for property damage. (*Pub.Util.C. 21404.1(a).*) (See *White v. Inbound Aviation* (1999) 69 *C.A.4th* 910, 930, 82 *C.R.2d* 71 [where jury's verdict established that aircraft owner's negligence was attributable solely to his vicarious liability for pilot's negligence, owner was entitled to limitation of his liability to \$ 15,000 amount authorized by *Pub.Util.C. 21404* and *21404.1*].)

An owner, the bailee of an owner, or the personal representative of a decedent is not liable, for purposes of imputed negligence, for punitive damages; but damages may be imposed for his or her own wrongful conduct. (*Pub.Util.C. 21404.1(b).*)

West's Key Number Digest, Aviation k.153

SUPPLEMENT: [This section is current through the latest supplement]



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XIII. NEGLIGENCE: LIABILITY FOR NEGLIGENCE OF OTHERS
H. Statutory Liability for Operation of Aircraft.
1. Owner's Liability.
b. Who Is Owner of Aircraft.

6 *Witkin Sum. Cal. Law Torts* § 1275

[§ 1275] Who Is Owner of Aircraft.

Pub.Util.C. 21404 (supra, §1274) states that liability of the "owner" is determined by "the rules of law applicable to torts on the land or waters of this state, arising out of similar relationships." And *Pub.Util.C. 24237* defines "owner" as (1) a person who holds legal title, (2) a lessee, or (3) a conditional buyer, trustee under a trust receipt, mortgagor, or other person holding an aircraft subject to a security interest.

In *Cummins v. Sky Cruisers* (1976) 59 C.A.3d 983, 130 C.R. 897, defendant Sky Cruisers, before the accident, sold the plane to R in a sale and lease back plan. R thereby became the legal owner under a document that was never recorded, and Sky Cruisers remained the registered owner on the records of the Federal Aviation Administration. *Held*, Sky Cruisers was not liable.

(a) California statutes on motor vehicles and watercraft establish a system under which ownership liability is tied directly to the ownership registration procedures. (*Veh.C. 5602, 9905*; see 4 *Summary* (10th), *Sales*, §§235 et seq., 262.) There is no similar statute on aircraft ownership liability. (59 C.A.3d 986.)

(b) The federal statutory registration system preempts the area of required registration. Its purpose, however, was to facilitate leasing or financing and to give notice of security interests; it does not create tort liability. (59 C.A.3d 987.) And it differs from California's automobile and watercraft registration systems. There is no certificate of ownership issued to registered owners, and the burden is on the buyer of an aircraft (not on the seller) to record or register the transfer. (59 C.A.3d 987.)

(c) Liability is therefore determined by our common law governing ownership of personal property; and plaintiff's cause of action was against the actual owner, R, and not the registered owner, *Sky Cruisers*. (59 C.A.3d 988.)

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H. Statutory Liability for Operation of Aircraft.
2. Uniform Aircraft Financial Responsibility Act.
a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1276

[§ 1276] In General.

The Uniform Aircraft Financial Responsibility Act (12 U.L.A. (Master Ed.), p. 21) was adopted in California in 1968 with variations, omissions, and additions. (See *Pub.Util.C. 24230 et seq.*) The Act establishes "minimum standards for aircraft financial responsibility." (*Pub.Util.C. 24410.*) "Minimum liability coverage is required for third party, nonpassenger claimants injured or killed as a result of the accident. ... The legislation is designed to provide coverage protection to *ground* victims otherwise unable to foresee or guard against risk of loss or injury due to small aircraft in flight." (*Franks v. Amelia Reid Aviation* (1985) 163 C.A.3d 1207, 1209, 210 C.R. 127.) In addition, a party in any action or proceeding may employ "other processes provided by law." (*Pub.Util.C. 24245.*)

The Act does not apply to the following:

(1) Aircraft owned and operated by or leased to and subject to the sole control of the United States, a state, or a foreign country. (*Pub.Util.C. 24243(a), (b), (c).*)

(2) Commercial air operators. (*Pub.Util.C. 24243(d).*)

(3) Aircraft operated by operators subject to specified provisions of the Food and Agriculture Code. (*Pub.Util.C. 24243(e).*)

(4) Any person who maintains in effect an insurance policy meeting the requirements of *Pub.Util.C. 24350* (*infra*, §1277) and who has filed with the Department of Aeronautics a certificate of insurance issued by the insurance company that issued the policy. (*Pub.Util.C. 24243(f)*; see *Franks v. Amelia Reid Aviation, supra*, 163 C.A.3d 1210 [owner's compliance with *Pub.Util.C. 24243(f)* removed any duty to fulfill notice requirements of *Pub.Util.C. 24362, infra*, §1277]; "neither that section nor any other substantive provision of the Act could serve as a statutory basis for civil liability".)

Because operators of aircraft are licensed by the federal Government, the Act does not contain the sanction of license suspension. It does, however, impose criminal penalties on those who fail to comply with its provisions. (See *Pub.Util.C. 24400 et seq.*)

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The Uniform Aircraft Financial Responsibility Act has been withdrawn as obsolete (see 12 U.L.A. (Master Ed.), p. 3). The California statutes remain in effect.



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2. Uniform Aircraft Financial Responsibility Act.
b. Security Following Accident.

6 *Witkin Sum. Cal. Law Torts* § 1277

[§ 1277] Security Following Accident.

(1) *Accident Report*. The operator of an aircraft involved in an accident in this state, resulting in bodily injury or death, or damage of more than \$ 400 to another's property, must report the accident to the Department of Aeronautics not later than 15 days after the occurrence. If the operator is physically incapacitated, the owner must make the report within 15 days after learning of the accident. (*Pub.Util.C. 24300.*)

(2) *Security*. Not later than 30 days after receipt of the report, the department determines the amount of security required (not to exceed \$ 50,000 for injury or death of one person, \$ 100,000 for more than one, and \$ 50,000 for property damage). (*Pub.Util.C. 24325, 24350.*) The owner or operator must deposit the required security not later than 30 days after entry of the order. (*Pub.Util.C. 24326.*) A pilot or operator of a rental aircraft must be notified in writing of the existence or nonexistence of liability coverage. (*Pub.Util.C. 24362.*)

(3) *Exceptions to Security Requirements*. The security requirements do not apply:

(a) "To the operator of an aircraft involved in an accident in which no injury was caused to the person of anyone other than the operator or guests, and no damage in excess of four hundred dollars (\$ 400) was caused to property not owned, rented, occupied or used by such operator, nor in his care, custody or control, nor carried in or on the aircraft." (*Pub.Util.C. 24327(a).*)

(b) "To the operator or owner of an aircraft if at the time of the accident the aircraft was stationary, without passengers thereon or boarding the aircraft or alighting therefrom and the aircraft was parked in an area legally used for aircraft parking with no engine running nor in the process of being started." (*Pub.Util.C. 24327(b).*)

(c) "To the owner of an aircraft if at the time of the accident the aircraft was being operated, or was parked, without his permission, express or implied." (*Pub.Util.C. 24327(c).*)

(d) "To the owner or operator if there is in effect at the time of the accident a liability insurance policy or bond covering the aircraft or accident." (*Pub.Util.C. 24327(d), (e), (f).*)

(e) "To any person qualified as a self-insurer under Section 24353, or to any person operating an aircraft for the

self-insurer for whose acts the self-insurer is legally responsible." (*Pub.Util.C. 24327(g).*)

(f) "After there is filed with the department satisfactory evidence that the person otherwise required to deposit security has (1) been released from liability, or (2) been adjudicated not to be liable by judgment, or (3) executed a written agreement with all claimants providing for payment of an agreed amount with respect to all claims for injuries or damages resulting from the accident." (*Pub.Util.C. 24327(h).*)

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2. Uniform Aircraft Financial Responsibility Act.
c. Insurance Coverage.

6 Witkin Sum. Cal. Law Torts § 1278

[§ 1278] Insurance Coverage.

(1) *Policy Exclusions.* The Act does not have the mandatory requirement of insurance coverage for operation with permission that the Insurance Code imposes for automobiles under the doctrine of *Wildman v. Government Employees Ins. Co.* (1957) 48 C.2d 31, 307 P.2d 359, 2 Summary (10th), Insurance, §170. Hence, a policy excluding coverage where the aircraft is operated by an unqualified pilot is valid. (*National Ins. Underwriters v. Carter* (1976) 17 C.3d 380, 387, 131 C.R. 42, 551 P.2d 362; see 4 Pepperdine L. Rev. 447; 86 A.L.R.3d 118 [coverage and exclusion].)

The policy or bond need not cover the following:

(a) Liability for bodily injury to or death of an employee of the owner or operator, while the employee is engaged in the duties of his or her employment. (*Pub.Util.C. 24351(a).*)

(b) An obligation for which the owner or operator, or the insurer, may be held liable under any workers' compensation law. (*Pub.Util.C. 24351(b).*)

(c) "A guest, or any other person, riding in or upon any aircraft without giving compensation." (*Pub.Util.C. 24351(c).*)

(d) Liability for bodily injury or death of an occupant riding in an aircraft for purposes of skydiving or sport parachuting when that occupant's injury or death is solely related to hazardous risks associated with skydiving or sport parachuting. However, a notice must be provided in at least 14-point type to any person engaging in skydiving or sport parachuting who is not covered under a liability insurance policy in connection with these activities, disclosing the fact of noncoverage. (*Pub.Util.C. 24351(d).*)

(2) *No Duty To Investigate Insured's Qualification as Pilot.* In *Fireman's Fund Ins. Co. v. Superior Court* (1977) 75 C.A.3d 627, 142 C.R. 249, defendant insurers issued an aircraft liability policy to H, installment buyer of a plane. The policy excluded coverage of pilots without a license, and H had only a student pilot's certificate. Plaintiffs were injured in an accident while H was piloting the plane. They sued the insurers, contending that, under *Barrera v. State Farm Mut. Auto Ins. Co.* (1969) 71 C.2d 659, 79 C.R. 106, 456 P.2d 674, 2 Summary (10th), Insurance, §311, the insurers had

a duty to investigate the competence of the pilot, and that breach of this duty was a proximate cause of the injury to plaintiffs, because if the insurers had discovered that H was not insurable, they would not have issued the policy and the seller of the plane would have repossessed it. *Held*, no cause of action was stated. After an extensive discussion of *Barrera*, *National Ins. Underwriters*, and other cases, the court pointed out that liability insurance may be issued to any vehicle or aircraft owner who may or may not be qualified as a driver or pilot and may not even have the intention of operating the vehicle or plane himself or herself. (75 C.A.3d 637.) As observed in *National Ins. Underwriters*, the statutory public policy that compelled the result in *Barrera* does not apply to aircraft insurers. (75 C.A.3d 637.) (See *American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 C.A.3d 1271, 1277, 1279, 241 C.R. 466 [following *Fireman's Fund*].)

(3) *Cancellation*. There is no coverage where the policy has been cancelled for nonpayment of premiums prior to the accident. *Pub.Util.C. 24361*, requiring 30 days' notice to the Department of Transportation before cancellation, applies only to policies that have been proffered to the department after the accident as proof of financial responsibility. (*Escobedo v. Estate of Snider* (1997) 14 C.4th 1214, 1219, 60 C.R.2d 722, 930 P.2d 979.)

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I. Distinction: Financing Agency Is Not Liable.

6 Witkin Sum. Cal. Law Torts § 1279

[§ 1279] Distinction: Financing Agency Is Not Liable.

(1) *Connor Case*. In *Connor v. Great Western Savings & Loan Assn.* (1968) 69 C.2d 850, 73 C.R. 369, 447 P.2d 609, the Supreme Court, in a 4-3 decision, announced an extraordinary doctrine of vicarious liability: A builder's financing agency was held liable to home buyers for the builder's negligence. The actual holding was immediately repudiated by the Legislature (*infra*, this section); but the reasoning of the majority and minority opinions has implications apart from the particular situation, and is also a necessary basis for an understanding of the effect of the statute.

G and B, without substantial capital and inexperienced in tract housing construction, organized Conejo, to buy land in Ventura County and build a large number of homes. Great Western was the financing agency. The financing arrangement ("land warehousing") involved purchase of the land by Great Western, and holding it until the developers could show prospective sales. Conejo built and sold a number of homes. They were constructed without proper care as to foundations, and 2 years later rainstorms caused serious damage. Plaintiff homeowners sued Conejo and Great Western. Holders of notes and second deeds of trust cross-complained, alleging that their security had been impaired, and seeking liens on any recovery. The trial judge granted a nonsuit in favor of Great Western. *Held*, reversed.

(a) *No joint venture liability*. The first theory of plaintiffs was that Great Western was in a joint venture with Conejo and liable for Conejo's negligence. But the writings and the testimony showed express disclaimer of this relationship, and the evidence did not establish an inference of it. It showed that the parties combined property and skill and shared control, but there was no community or joint interest in the undertaking. Great Western participated as buyer and seller of the land and lender of the funds, Conejo as builder and seller of the homes; neither shared in profits or losses of the other, and neither had any interest in the payments received by the other. (69 C.2d 863.)

(b) *New liability as active participant in enterprise*. Great Western, assisting in development of the project, "became much more than a lender content to lend money at interest on the security of real property. It became an active participant in a home construction enterprise." It had extensive control, and received not merely interest on loans but substantial fees for making them, plus a 20% capital gain for "warehousing" the land. (1) Because the value of the security depended on construction of sound homes, it owed a duty of care to its shareholders to exercise its powers of control to prevent construction of defective homes, and breached that duty. (2) It also owed a duty to home buyers, which was similarly breached. (69 C.2d 865.)

(c) *Biakanja factors*. Each of the criteria of *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, *supra*, §1179, was

met here: (1) Great Western's transactions were intended to affect the plaintiffs significantly." The success of its transactions with Conejo depended on the ability of the parties to induce plaintiffs to buy homes and finance with it. (69 C.2d 866.) (2) "Great Western could reasonably have foreseen the risk of harm to plaintiffs." It knew or should have known of G's and B's lack of experience, and of Conejo's dangerously thin capitalization. (69 C.2d 866.) (3) "It is certain that plaintiffs suffered injury." (69 C.2d 866.) (4) "The injury suffered by plaintiffs was closely connected with Great Western's conduct." It controlled the course of the development, and by reasonable care would have discovered that the "prepackaged plans" bought by Conejo required correction. (69 C.2d 867.) (5) "Substantial moral blame attaches to Great Western's conduct." (69 C.2d 867.) It violated the obligation owed to its own shareholders and to the buyers, in failing to exercise reasonable care to avoid major structural defects in the homes; it knew that the usual buyer is ill-equipped to discern defects, and that a home is not only a major investment but the buyer's only shelter. (69 C.2d 867.) (6) "The admonitory policy of the law of torts calls for the imposition of liability. ... Rules that tend to discourage misconduct are particularly appropriate when applied to an established industry." (69 C.2d 867.)

(d) *Answers to objections:*

(1) That imposition of this duty will increase housing costs, drive marginal builders out of business, and decrease the total housing at a time of great need. Answer: This is conjectural, and there is no social utility in fostering construction of seriously defective homes. Imposing a duty at the point of effective financial control of tract building will insure responsible building practices. (69 C.2d 867.)

(2) That the Legislature should resolve the policy question after marshaling relevant economic and social data. Answer: There is no assurance that the Legislature will; and, in the absence of actual or prospective legislative action, the court is free to resolve the issue before it, "and indeed must resolve it in terms of common law." (69 C.2d 868.)

(3) That lending institutions have relied on the rule of nonliability, hence the new rule should operate prospectively. Answer: This limitation might be justified where earlier decisions are overruled, or where the general consensus is opposed to extension of liability. But, since *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382, 111 N.E. 1050, supra, §1175, there has been a steady expansion of liability for failure to exercise reasonable care to protect others from reasonably foreseeable risks; by the time of *Sabella v. Wisler* (1963) 59 C.2d 21, 27 C.R. 689, 377 P.2d 889, supra, §1211, this liability had been imposed on a builder. Those in the business of financing tract builders could therefore have foreseen this liability, and they have always been under such a duty to their own shareholders. (69 C.2d 868.)

(4) That the negligent acts of Conejo and the county building inspectors were superseding causes. Answer: Under *Rest.2d, Torts §449* (supra, §§1206,1215), the risk of Conejo's negligence was the primary hazard that gave rise to Great Western's duty, and the negligence of building inspectors in conducting their inspection could not diminish the negligence of the lender. (69 C.2d 869.)

(e) *Distinction: No liability to mortgagees.* Great Western owed no independent duty of care to cross-complainants--investors in or pledgees of notes secured by second deeds of trust. (1) The foreseeability of harm was substantially less; they lent only 43% of the face value of notes, hence, they had a margin of safety. (2) Great Western's negligence was not so closely connected with their injury, which would occur only if plaintiffs defaulted on notes and the homes were insufficient security. (3) Substantially less moral blame attaches to Great Western's conduct toward them. They were also investors in a business enterprise, and dealt with Conejo as creditors, not as buyers of homes; as substantial creditors of Conejo, they were voluntary coparticipants with Great Western and Conejo in the enterprise; and, unlike plaintiffs, they were in a position to protect themselves by investigation. (69 C.2d 870.)

The main dissenting opinion was extremely critical: "This result is (a) unsupported by statute or precedent; (b) inconsistent with accepted principles of tort law; (c) likely to be productive of untoward social consequences." (69 C.2d 872.) (See 58 Cal. L. Rev. 119, 6 San Diego L. Rev. 320; 42 So. Cal. L. Rev. 353; 16; 4 U.S.F. L. Rev. 188; 20 A.L.R.3d 499 [financing agency's liability to purchaser of new home for consequences of construction defects].)

(2) *Legislative Abrogation of Connor Rule.* The 1969 Legislature enacted C.C. 3434: "A lender who makes a loan of money, the proceeds of which are used or may be used by the borrower to finance the design, manufacture, construction, repair, modification or improvement of real or personal property for sale or lease to others, shall not be held liable to third persons for any loss or damage occasioned by any defect in the real or personal property so designed, manufactured, constructed, repaired, modified or improved or for any loss or damage resulting from the failure of the borrower to use due care in the design, manufacture, construction, repair, modification or improvement of such real or personal property, unless such loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money or unless the lender has been a party to misrepresentations with respect to such real or personal property." (See *Fox & Carskadon Financial Corp. v. San Francisco Fed. Savings & Loan Assn.* (1975) 52 C.A.3d 484, 488, 125 C.R. 549.)

(3) *Automobile Financing Agency.* In *Drake v. Morris Plan Co.* (1975) 53 C.A.3d 208, 125 C.R. 667, plaintiff sued for wrongful death, alleging that defendant financed the sale of an automobile from a dealer to S; that S was unlicensed and an incompetent driver with a long record of driving offenses; that these facts were known or should have been known by defendant; and that S drove negligently and killed decedent. Plaintiff's theory was that the rule of entrustment of a car to an incompetent driver (see *supra*, §1222) could be applied to a financing agency that knowingly made it possible for the incompetent driver to obtain the car. Held, no cause of action was stated. Under the *Biakanja* tests and the reasoning of *Connor* the allegations showed only the acts of a conventional money lender. Defendant's "participation in the sale of the vehicle was so minimal and restricted that the transaction did not create a legal duty on the part of the lender to protect plaintiffs from damages caused by [S's] illegal use of his automobile." (53 C.A.3d 213.) (See *Skerlec v. Wells Fargo Bank* (1971) 18 C.A.3d 1003, 96 C.R. 434; *Altman v. Morris Plan Co.* (1976) 58 C.A.3d 951, 960, 130 C.R. 397.)

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XIV. NEGLIGENCE: DEFENSES
A. Available Defenses.

6 Witkin Sum. Cal. Law Torts § 1280

[§ 1280] Available Defenses.

(1) *Plaintiff's Negligence*. Contributory negligence (see *infra*, §1295 et seq.) of the plaintiff was formerly a complete bar to recovery; now, under the doctrine of comparative negligence adopted in *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, *infra*, §1329, the plaintiff's negligence diminishes his or her recovery in proportion to the amount of fault attributable to the plaintiff. (See *infra*, §§1295, 1329.)

(2) *Assumption of Risk*. After *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *infra*, §1339, *primary assumption of risk* remains as an independent defense that completely bars recovery; *secondary assumption of risk* is merged into the comparative negligence system and reduces recovery. In determining the type of assumption of risk that is involved, the presence or absence of duty is the determining factor. (See *infra*, §1283.)

(3) *Failure To Mitigate Damages*. Failure to take steps to minimize the harmful effects of the defendant's completed wrongful act can be shown for the purpose of reducing the amount of recoverable damages. (See *infra*, §1624 et seq.)

(4) *Intentional Wrong*. *American Employer's Ins. Co. v. Smith* (1980) 105 C.A.3d 94, 163 C.R. 649, presented the unique situation of a defendant sued for negligence asserting his intentional wrong as a defense. Defendant set fire to business properties and pleaded guilty to arson. Plaintiff insurers paid the owners for the fire damage, and brought suit against defendant for negligence. Defendant's parents had a homeowner's policy with United States Fidelity, which covered defendant and obligated the insurer to pay the insureds all sums they had to pay others by reason of liability imposed upon them. United States Fidelity refused to indemnify or defend because defendant's acts were intentional. In plaintiffs' negligence action, the trial judge granted a nonsuit on the ground that proof of an intentional tort (arson) could not support a verdict on a negligence cause of action. *Held*, reversed.

(a) If plaintiffs had recovered on a cause of action for the actual tort--an intentional act or wilful misconduct--indemnification of defendant's insurer would have been precluded. To protect its right to indemnity it alleged a wrongful act of a lesser degree or kind. (105 C.A.3d 98, 101.)

(b) Defendant's position has some technical support in the language of *Donnelly v. Southern Pac. Co.* (1941) 18 C.2d 863, 118 P.2d 465, distinguishing negligence from wilful misconduct. But in *Donnelly*, the court was asked to determine whether evidence that would support a finding of negligence would also support a finding of wilful

misconduct; here the reverse of this question is presented, i.e., whether evidence that would support a finding of wilful misconduct or intentional wrongdoing could also support a finding of negligence. (105 C.A.3d 99.) "This question is answered when the court determines whether the conduct shown by the evidence passes the minimum threshold necessary to impose liability." (105 C.A.3d 100.)

(c) The insurance issue is not before the court; and whether plaintiffs may satisfy a judgment through defendant's insurance is irrelevant on the issue of whether they may obtain a judgment against defendant. (105 C.A.3d 101, 102.) The only question arising on the motion for nonsuit was whether the evidence as a matter of law supported a cause of action for negligence, and it was error to grant the nonsuit because "[a] showing of willfulness does not as a matter of law negate negligence." (105 C.A.3d 102.)

(5) *Federal Preemption*. In some actions, the defendant may raise the defense of federal preemption. (See *Evraets v. Intermedics Intraocular* (1994) 29 C.A.4th 779, 787, 34 C.R.2d 852, *infra*, §1540 [negligence claim against manufacturer and distributor of allegedly defective intraocular lens was preempted by federal Food, Drug and Cosmetic Act regulations].)

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SUPPLEMENT: [This section is current through the latest supplement]

(6) *(New) Statute of Limitations*. CACI, No. 454 [Affirmative Defense--Statute of Limitations], adopted in 2007, states the common law rule that a negligence action accrues on the date of injury. CACI, No. 455 [Statute of Limitations--Delayed Discovery], adopted in 2007, states the "delayed-discovery" or "discovery" rule that the accrual date of the cause of action is delayed until the plaintiff is aware of the injury and its negligent cause.



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XIV. NEGLIGENCE: DEFENSES

B. Assumption of Risk.

1. In General.

a. Definition.

6 Witkin Sum. Cal. Law Torts § 1281

[§ 1281] Definition.

Assumption of risk is the voluntary and knowing exposure of oneself to obvious dangers incident to certain activities. Strictly speaking, the defense of assumption of risk is distinct from that of contributory negligence (see *infra*, §1295 et seq.), and is more like the defense of consent to an act (see *supra*, §126). (On type of assumption of risk that is merely a variant of contributory negligence, see *infra*, §1336 et seq.) The theory is that the defendant's conduct involves certain dangers or risks, which the plaintiff voluntarily accepts. (See *Morton v. California Sports Car Club* (1958) 163 C.A.2d 685, 688, 329 P.2d 967; *Rest.2d, Torts*, §496A; 4 Harper, James & Gray 2d §21.3; Dobbs, *The Law of Torts* §211 et seq.; 57B *Am.Jur.2d* (2004 ed.), *Negligence* §759 et seq.; 23 *California Lawyer* 40 (June 2003) [modern doctrine of assumption of risk]; 24 *Cal. L. Rev.* 429; 65 *Harv. L. Rev.* 624; 10 *So. Cal. L. Rev.* 67; 50 *U.C.L.A. L. Rev.* 481 [Reflections on Assumption of Risk].)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §21.3.



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B. Assumption of Risk.

1. In General.

b. Relation Contributory Negligence.

6 *Witkin Sum. Cal. Law Torts* § 1282

[§ 1282] Relation Contributory Negligence.

The distinction between assumption of risk and contributory negligence, as well as the significance to the former of the element of knowledge, was emphasized in *Prescott v. Ralphs Grocery Co.* (1954) 42 C.2d 158, 161, 265 P.2d 904: "Contributory negligence arises from a lack of due care. The defense of assumption of risk on the other hand, will negative liability regardless of the fact that plaintiff may have acted with due care. It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. ... Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk, but where it merely appears that he should or could have discovered the danger by the exercise of ordinary care, the defense is contributory negligence and not assumption of risk." (See *Hayes v. Richfield Oil Corp.* (1952) 38 C.2d 375, 385, 240 P.2d 580; *Inouye v. Pacific Gas & Elec. Co.* (1959) 53 C.2d 361, 367, 1 C.R. 848, 348 P.2d 208 [instruction on assumption of risk was properly refused where only contributory negligence was pleaded and mentioned in pretrial order]; *Ziesemer v. McCarty* (1945) 71 C.A.2d 378, 381, 162 P.2d 857; *Hedding v. Pearson* (1946) 76 C.A.2d 481, 484, 173 P.2d 382; *Lilienthal v. Hastings Clothing Co.* (1955) 131 C.A.2d 343, 344, 280 P.2d 824; *Ward v. Knapp* (1955) 134 C.A.2d 538, 540, 286 P.2d 370; *Kingery v. Southern Calif. Edison* (1961) 190 C.A.2d 625, 635, 12 C.R. 173; *Rostant v. Borden* (1961) 192 C.A.2d 594, 598, 13 C.R. 553; *Chase v. Shasta Lake Union School Dist.* (1968) 259 C.A.2d 612, 615, 66 C.R. 517, *infra*, §1288; 57B *Am.Jur.2d* (2004 ed.), *Negligence* §769 et seq.; 2 *Proof of Facts* 177 [assumption of risk]; 82 *A.L.R.2d* 1218 [distinction between assumption of risk and contributory negligence].)

In language that foreshadows *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *infra*, §1339, the distinguishing factors were succinctly stated in *Fonseca v. Orange* (1972) 28 C.A.3d 361, 368, 104 C.R. 566, *infra*, §1291, as follows: "Assumption of risk involves the negation of defendant's duty; contributory negligence is a defense to a breach of such duty; assumption of risk may involve perfectly reasonable conduct on plaintiff's part, contributory negligence never does; assumption of risk typically embraces the voluntary or deliberate incurring of known peril; contributory negligence frequently involves the inadvertent failure to notice danger."

Rest.2d, Torts §496A, Comment d gives a more complete analysis: "A subjective standard is applied to assumption of risk, in determining whether the plaintiff knows, understands, and appreciates the risk. (See §496D.) An objective standard is applied to contributory negligence, and the plaintiff is required to have the knowledge, understanding, and

judgment of the standard reasonable man. (See §464, 289 and 290.) Assumption of risk operates as a defense against liability not only for negligent conduct, but also for reckless conduct, and conduct for which the defendant is subject to strict liability. Contributory negligence, on the other hand, is not a defense where the defendant's conduct is reckless. (See §488 and 503.) It is a defense to strict liability only when it amounts to voluntarily encountering a known unreasonable risk, or in other words, to assumption of risk. (See §515 and 524.) It is also possible that where the plaintiff is injured by the concurring negligence of two persons, he may be barred from recovery against one by his contributory negligence, and against the other by his assumption of risk."

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B. Assumption of Risk.

1. In General.

c. Relation to Comparative Negligence.

6 *Witkin Sum. Cal. Law Torts* § 1283

[§ 1283] Relation to Comparative Negligence.

Assumption of risk may be express, i.e., contractual (see *infra*, §1292 et seq.), or it may be implied, as where the plaintiff's conduct demonstrates that he or she was aware of a risk and voluntarily confronted it (see *infra*, §1284 et seq.). In turn, implied assumption of risk, before *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *infra*, §1339, was often classified as either "reasonable" or "unreasonable" depending on the nature of the plaintiff's conduct in encountering the risk. (See *infra*, §§1337, 1338; on effect of defendant's negligence on assumption of risk doctrine, see *infra*, §1284.) After the adoption of comparative negligence (see *infra*, §1327 et seq.), express assumption of risk remains an independent defense and a complete bar to the plaintiff's recovery. (*Segoviano v. Housing Authority* (1983) 143 C.A.3d 162, 169, 191 C.R. 578; on contributory negligence, see *infra*, §1295 et seq.; on comparative negligence, see *infra*, §1327 et seq.)

Unlike the Third Restatement (see *infra*, §1341), California has only partially abolished implied assumption of risk as a separate defense, depending initially on whether it was classified as reasonable or unreasonable. Thus, the leading case of *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 824, 829, 119 C.R., 858, 532 P.2d 1226, *infra*, §§1329, 1336, held that the form of assumption of risk that is but a variant of contributory negligence, i.e., unreasonable implied assumption of risk, was merged into the comparative negligence doctrine and abolished as a separate defense. Subsequent decisions disagreed as to *Li*'s effect upon reasonable implied assumption of risk (see *infra*, §1338). The matter was resolved in *Knight v. Jewett*, *supra*, but the analysis was not based on the reasonableness of the plaintiff's conduct, but on whether the defendant either owed plaintiff no duty of care or breached an existing duty, i.e., whether the assumption of risk was primary or secondary, respectively. Thus, where the defendant owes no duty to protect the plaintiff from the particular risk involved and the plaintiff assumes that risk, whether reasonably or unreasonably, primary assumption of risk remains as an independent defense and, as before, completely bars recovery. However, where a duty of care is owed and the plaintiff, again whether acting reasonably or unreasonably, assumes the risk resulting from a breach of the duty, the case is one of secondary assumption of risk and recovery is reduced, i.e., the defense is merged into the comparative negligence system.

At times, the reasoning in the older cases that follow is at odds with the foregoing analysis. However, the cases contain many assumption of risk principles that continue to be valid and describe situations that, even in the post-*Knight* world, either bar the plaintiff from all recovery or at least result in reduced recovery under the comparative negligence

doctrine. (See *infra*, §1284 et seq.)

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B. Assumption of Risk.

2. Implied.

a. In General.

1. Risk of Defendant's Negligence.

6 Witkin Sum. Cal. Law Torts § 1284

[§ 1284] Risk of Defendant's Negligence.

(1) *In General*. The contention that the plaintiff does not assume the risk of dangers resulting from a defendant's negligence was rejected in *Prescott v. Ralphs Grocery Co.* (1954) 42 C.2d 158, 162, 265 P.2d 904, supra, §1282: "[T]he elements of the defense ... are a person's knowledge and appreciation of the danger involved and his voluntary acceptance of the risk. It follows that a person, if he is fully informed, may assume a risk even though the dangerous condition is caused by the negligence of others. ... Indeed, the cases in which this defense is applied usually involve dangerous conditions created by the negligence of another."

(2) *Exceptions*. The plaintiff does not, however, assume a risk by surrendering his or her better judgment on assurance by the defendant that the activity will be safe. (*Woodall v. Wayne Steffner Productions* (1962) 201 C.A.2d 800, 819, 20 C.R. 572 [assurance that driver of stunt car furnished by defendant would be expert; actually he was inexperienced].) And the defendant's violation of safety regulations will make the doctrine inapplicable. (See *infra*, §1291.)

Another obvious exception applies where the plaintiff is under a duty to act and cannot avoid the risk. (See *Bilyeu v. Standard Freight Lines* (1960) 182 C.A.2d 536, 544, 6 C.R. 65, supra, §868 [highway patrolman acted under legal and moral duty to clear highway by pushing heavy steel rolls off of it].)

Curran v. Green Hills Country Club (1972) 24 C.A.3d 501, 505, 101 C.R. 158, *infra*, §1289, suggests another exception. Plaintiff was the owner of a home adjacent to a golf course. Defendant club promised to build an adequate protective fence but failed to do so. Plaintiff was struck by a misdirected shot. Although the decision rested on the ground of no knowledge of the specific danger (see *infra*, §1289), the court added this observation: "[T]he doctrine of assumption of risk should not be applied with liberality, if it be applicable at all, where the injury takes place on plaintiff's own property, which in itself is safe and which is rendered dangerous only by invasion of missiles from adjacent land. Otherwise, the owner of the neighboring property could force the homeowner to remain out of his yard and his swimming pool during hours when it was possible that golfers might hit their shots on his property. To a limited extent he would be a prisoner within his home. ... Moreover, if this were the law, there would be no particular reason for the defendant to remedy the situation, unless it were moved by humanitarian reasons."

The Second Restatement recognized implied assumption of risk as an independent defense (see *supra*, §1280), but the Third Restatement abolished this rule (see *infra*, §1293).

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B. Assumption of Risk.

2. Implied.

a. In General.

2. Plaintiff's Knowledge of Danger.

6 Witkin Sum. Cal. Law Torts § 1285

[§ 1285] Plaintiff's Knowledge of Danger.

(1) *Actual Knowledge*. The distinction between assumption of risk and contributory negligence is not merely a matter of correct use of descriptive terminology. The former standard instruction that one assumes a risk "when he knows, or in the exercise of ordinary care would know, that a danger exists" is erroneous. It may be contributory negligence to fail to discover the danger, but there is no assumption of risk without *actual* knowledge arrived at, e.g., through experience, observation, or warning. (See *Hayes v. Richfield Oil Corp.* (1952) 38 C.2d 375, 384, 240 P.2d 580; *Prescott v. Ralphs Grocery Co.* (1954) 42 C.2d 158, 161, 265 P.2d 904, supra, §1282; *Shahinian v. McCormick* (1963) 59 C.2d 554, 567, 30 C.R. 521, 381 P.2d 377; *Vierra v. Fifth Avenue Rental Service* (1963) 60 C.2d 266, 271, 32 C.R. 193, 383 P.2d 777; *Plotts v. Albert* (1953) 120 C.A.2d 105, 106, 260 P.2d 621; *Gold v. Hliviak* (1955) 131 C.A.2d 39, 41, 280 P.2d 71; *Sloboden v. Time Oil Co.* (1955) 131 C.A.2d 557, 562, 281 P.2d 85; *Guerrero v. Westgate Lumber Co.* (1958) 164 C.A.2d 612, 617, 331 P.2d 107; *Perry v. First Corp.* (1959) 167 C.A.2d 359, 366, 334 P.2d 299; *Mullen v. Bruce* (1959) 168 C.A.2d 494, 498, 335 P.2d 945; *Hidden v. Malinoff* (1959) 174 C.A.2d 845, 851, 345 P.2d 499; *Hook v. Point Montara Fire Protection Dist.* (1963) 213 C.A.2d 96, 100, 28 C.R. 560; *Rodriguez v. Lompoc Truck Co.* (1964) 227 C.A.2d 769, 777, 39 C.R. 117; *Goodwin v. Bryant* (1964) 227 C.A.2d 785, 791, 39 C.R. 132; *Cooper v. Lunsford* (1965) 234 C.A.2d 554, 559, 44 C.R. 530; *Gilbert v. Los Angeles* (1967) 249 C.A.2d 1006, 1010, 58 C.R. 56; *Chase v. Shasta Lake Union School Dist.* (1968) 259 C.A.2d 612, 615, 66 C.R. 517, infra, §1288; *Keeton v. Henning* (1969) 1 C.A.3d 50, 56, 81 C.R. 424; *Allabach v. Santa Clara County Fair Assn.* (1996) 46 C.A.4th 1007, 1012, 54 C.R.2d 330, citing the text; 57B Am.Jur.2d (2004 ed.), *Negligence* §775 et seq.)

As in other situations, however, direct evidence of knowledge is not essential. The circumstances, including the conduct of the parties, may support a jury inference of knowledge. (See *Gallegos v. Nash, San Francisco* (1955) 137 C.A.2d 14, 19, 289 P.2d 835 [plaintiff automobile owner took car with knowledge that his brakes caused skidding]; *Morton v. California Sports Car Club* (1958) 163 C.A.2d 685, 688, 329 P.2d 967, infra, §1286.)

(2) *Knowledge of Particular Danger*. The doctrine requires knowledge of the particular risk and appreciation of its magnitude. (See *Vierra v. Fifth Avenue Rental Service* (1963) 60 C.2d 266, 270, 32 C.R. 193, 383 P.2d 777; *Curran v. Green Hills Country Club* (1972) 24 C.A.3d 501, 504, 101 C.R. 158; *Carr v. Pacific Tel. Co.* (1972) 26 C.A.3d 537, 542, 103 C.R. 120, infra, §1289.)

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b. Illustrations of Risk Assumed.

1. Spectator at Athletic Contest.

6 *Witkin Sum. Cal. Law Torts* § 1286

[§ 1286] Spectator at Athletic Contest.

The most common example of assumed risk is that of a spectator at a baseball or hockey game or other contest involving dangers. (See *Quinn v. Recreation Park Assn.* (1935) 3 C.2d 725, 729, 46 P.2d 144 [unscreened seat in grandstand of baseball park]; *Brown v. San Francisco Ball Club* (1950) 99 C.A.2d 484, 487, 222 P.2d 19 [same]; 24 Cal. L. Rev. 429; 2 Lincoln L. Rev. 75; 10 So. Cal. L. Rev. 67; 2 U.S.F. L. Rev. 114; 89 A.L.R.2d 1163 [basketball game]; 8 A.L.R.3d 1427 [trampoline]; 14 A.L.R.2d 993 [wrestling or boxing match]; 14 A.L.R.3d 1018 [hockey game]; 91 A.L.R.3d 24 [spectator at baseball game hit by ball or injured as a result of other hazards of game]; cf. *Mann v. Nutrilite* (1955) 136 C.A.2d 729, 732, 289 P.2d 282 [same rule applied to plaintiff chaperone at girls' softball game]; 10 A.L.R.3d 446 [injury to referee or umpire].)

In *Morton v. California Sports Car Club* (1958) 163 C.A.2d 685, 329 P.2d 967, plaintiff, a member of a sports car racing club, witnessed a race at a turn in the track protected only by a 4-foot picket fence. *Held*, he assumed the risk of injury from a car that went into a spin. "He ignored this hazard in his desire to observe the races from the best (rather than safest) location." (163 C.A.2d 688.)

The authority of *Quinn* was questioned in *Rudnick v. Golden West Broadcasters* (1984) 156 C.A.3d 793, 202 C.R. 900, a decision with separate views expressed by three justices. Plaintiff, seated in an unscreened section of Anaheim Stadium near first base at an Angels game, was struck by a foul ball. The trial court granted summary judgment on the *Quinn* rule: Spectators who choose to sit in unscreened seats assume the risk of being struck by batted balls, and management has no duty to protect them "so long as a sufficient number of screened seats are provided for those who might request them." (156 C.A.3d 796.) *Held*, reversed.

(a) *Reversal for insufficient showing to support summary judgment.* The main opinion written by one of the justices assumes that *Quinn* is still good law, but finds the declaration of defendant's stadium manager insufficient to support the judgment: (1) It states that 2,300 screened seats are provided without mentioning what is a matter of common knowledge: that the Angels regularly draw crowds 10 to 20 times that size. (2) It does not correlate the number of screened seats with the number of requests reasonably to be expected, and does not say that any screened seats are truly available to fans who are not longtime season ticket holders. (156 C.A.3d 796.) The second justice concurred in this part

of the opinion, and the third concurred only in the result.

(b) *Effect of Quinn as authority.* The main opinion discusses the effect of *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 824, 829, 119 C.R. 858, 532 P.2d 1226, *infra*, §1329, on the *Quinn* rule, quoting at some length from a number of commentators, and concluding: "Despite the enormous changes in California tort law over the last 50 years, there is no reason to doubt the continuing vitality of the duty analysis of the *Quinn* line of cases. A baseball club complying with *Quinn*'s screening standard has fulfilled its limited duty to spectators as a matter of law and is entitled to summary judgment. Whether baseball fans are viewed as participants in the game itself ... or merely passive spectators, one thing is certain: the chance to apprehend a misdirected baseball is as much a part of the game as the seventh inning stretch or peanuts and Cracker Jacks. Reasonable screening is defined in the expectations of the fans and the traditions of the national pastime itself. The law of torts imposes no higher standard." (156 C.A.3d 802.) Application of the *Quinn* theory gives the defendant two choices: (1) provide adequate unreserved screened seats; or (2) get insurance for the statistically predictable numbers who will suffer injury. (156 C.A.3d 802, footnote 5.)

Another justice, in a separate opinion, asserted that the *Quinn* theory has been abrogated by *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086, and *Li v. Yellow Cab Co.* (156 C.A.3d 803.) (See 19 *Loyola L.A. L. Rev.* 589.)

In *Neinstein v. Los Angeles Dodgers* (1986) 185 C.A.3d 176, 229 C.R. 612, the court reviewed the *Quinn* and *Rudnick* opinions, and observed that other jurisdictions that adopted the comparative fault system have continued to follow the *Quinn* rationale. Here: "[P]laintiff *impliedly consented* to take her own chances that she would not be injured. She voluntarily elected to sit in a seat which was clearly unprotected by any form of screening. Rather than request a seat in a section where injury was unlikely to occur, plaintiff chose to accept a *highly sought after seat*, close to the sphere of action, where the likelihood of foul balls entering the stands remained a possibility. She was sufficiently warned of the risk by common knowledge of the nature of the sport and by the warning provided on the back of her ticket. The Dodgers were under no duty to do anything further to protect her from that hazard." (185 C.A.3d 184.)

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b. Illustrations of Risk Assumed.

2. Dangerous Activity or Appliance.

6 *Witkin Sum. Cal. Law Torts* § 1287

[§ 1287] Dangerous Activity or Appliance.

A person who uses a slide, swing, or other apparatus in an amusement park or gymnasium obviously assumes the normal risks arising from doing so. (See *Chardon v. Alameda Park Co.* (1934) 1 C.A.2d 18, 21, 36 P.2d 136, *infra*, §1290.)

The same is true of a participant in an athletic contest or exhibition. (See *Hoyt v. Rosenberg* (1947) 80 C.A.2d 500, 503, 182 P.2d 234 [children playing "kick the can," a type of hide and seek; the can, kicked by defendant, struck plaintiff]; *Knowles v. Roberts-At-The-Beach Co.* (1953) 115 C.A.2d 196, 200, 251 P.2d 389 [plaintiff restaurant patron with knowledge of danger voluntarily participated in hobby horse race on dance floor]; *Strand v. Conner* (1962) 207 C.A.2d 473, 475, 24 C.R. 584 [risks assumed by golfer on green]; *Tavernier v. Maes* (1966) 242 C.A.2d 532, 553, 51 C.R. 575 [family softball game, injury to plaintiff when defendant slid into base; whether risk was assumed was jury question, and judgment for defendant was affirmed]; 82 A.L.R.2d 1183 [golf driving range]; 67 A.L.R.3d 451 [participant in theatrical performance or spectacle]; 67 A.L.R.3d 1218 [nonparticipant in water skiing]; 53 A.L.R.4th 282 [participant or employee struck by golf ball]; 52 A.L.R.4th 1253 [tennis player]; 55 A.L.R.5th 529 [participant in team athletic competition]; 55 A.L.R.4th 664 [baseball player].) (For discussion of primary versus secondary assumption of risk during sports or recreation, see *infra*, §1343 et seq.)

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c. When Risk Is Not Assumed.

1. No Actual Knowledge of Danger.

6 *Witkin Sum. Cal. Law Torts* § 1288

[§ 1288] No Actual Knowledge of Danger.

It is usually a jury question whether the plaintiff had the requisite actual knowledge of the particular danger (*supra*, §1285).

In *Thurman v. Ice Palace* (1939) 36 C.A.2d 364, 97 P.2d 999, plaintiff, voluntarily selecting an unscreened seat at her first hockey game, was struck by a flying puck. *Held*, the game was relatively new, the dangers to spectators were not generally known, and it could not be said as a matter of law that she assumed the risk. (36 C.A.2d 366.) (See *Shurman v. Fresno Ice Rink* (1949) 91 C.A.2d 469, 473, 205 P.2d 77 [following *Thurman*]; *Hidden v. Malinoff* (1959) 174 C.A.2d 845, 851, 345 P.2d 499; *Hook v. Point Montara Fire Protection Dist.* (1963) 213 C.A.2d 96, 106, 28 C.R. 560; *Goade v. Benevolent & Protective Order of Elks, Pomona, Calif., Lodge No. 789* (1963) 213 C.A.2d 189, 193, 28 C.R. 669 [spectator at sports car race, unfamiliar with sport, was struck by car that went out of control and through fence into spectator area]; *Keeton v. Henning* (1969) 1 C.A.3d 50, 56, 81 C.R. 424; *Timmons v. Assembly of God Church* (1974) 40 C.A.3d 31, 41, 115 C.R. 917 [fact that volunteer wirecutter admitted that he forgot to secure roll he was cutting established constructive, but not actual, knowledge of danger of recoil]; 13 *So. Cal. L. Rev.* 373.)

In *Chase v. Shasta Lake Union School Dist.* (1968) 259 C.A.2d 612, 66 C.R. 517, plaintiff was a member of an adult evening softball league that used a diamond of defendant district. Playing in left field for the first time, and pursuing a fly ball, he ran into an unfenced concrete incinerator with a protruding base. The trial judge found no contributory negligence but did find that he had assumed the risk. Because plaintiff's injuries produced retrograde amnesia, he had no memory of the accident, and the element of knowledge of the danger had to be inferred. *Held*, judgment for defendants reversed. The dual findings were that plaintiff was aware of the danger or should have been aware of it. These were contradictory, and only the first supported the defense, for assumption of risk requires actual knowledge. (259 C.A.2d 615.)

In *Sperling v. Hatch* (1970) 10 C.A.3d 54, 88 C.R. 704, plaintiffs, husband and wife, purchased a used car from defendant dealer. The car had brake trouble (grabbing at high speed), but defendant assured plaintiff wife that it was imaginary. While the wife was driving at over 45 miles per hour, she applied the brakes, they grabbed, and the car went out of control, injuring both plaintiffs. *Held*:

(a) Plaintiff husband was properly nonsuited. His testimony revealed experience with automobile brakes, knowledge that these were defective, and appreciation of the particular risk; nevertheless, he willingly rode with his wife at the high speed. (10 C.A.3d 62.)

(b) Plaintiff wife was improperly nonsuited. There was no unequivocal evidence of her appreciation of the risk, and defendant's assurance that the brake problem was imaginary made the issue one of fact for the jury. (10 C.A.3d 62.)

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2. Implied.

c. When Risk Is Not Assumed.

2. No Knowledge of Particular Danger.

6 *Witkin Sum. Cal. Law Torts* § 1289

[§ 1289] No Knowledge of Particular Danger.

The rule that mere general knowledge of a danger is not enough to bring the assumption of risk doctrine into operation (see *supra*, §1285) was applied in *Curran v. Green Hills Country Club* (1972) 24 C.A.3d 501, 101 C.R. 158. Plaintiff purchased a home immediately adjacent to the golf course of defendant country club, of which he was a member. At the time of purchase, he knew that golf balls frequently went over the property line and that the 6-foot high grape stake fence was inadequate protection, but members of defendant's board assured him that a proper fence would be erected. This was not done, and plaintiff normally avoided use of his yard and swimming pool until 6 or 7 o'clock at night. On Saturdays, golfers usually finished by 4 p.m., and on one Saturday plaintiff, in his pool at about 5 p.m., followed his customary practice of looking for approaching players, but saw none. He was nevertheless struck by a ball, and brought this action for personal injuries. The trial judge gave an instruction on assumption of risk, and the jury verdict was for defendant. *Held*, judgment reversed. The court expressed doubt whether the doctrine of assumption of risk could be applied at all to a person using his own property (see *supra*, §1284), but rested its decision mainly on the point that plaintiff, though aware of the danger of a misdirected golf shot, was not shown to be aware of golfers in the vicinity of his house at the time of the accident. (24 C.A.3d 504.)

The same emphasis on knowledge of the specific danger appears in *Carr v. Pacific Tel. Co.* (1972) 26 C.A.3d 537, 103 C.R. 120. A large backyard tree was uprooted in a windstorm and fell on a garage and house, and also on defendant's telephone lines. The homeowners employed T Tree Service to remove the tree, and also notified defendant of the fact that it was on its lines. Defendant secured the lines by tying ropes around the lines and two trees, thereby creating considerable tension. Decedent, an experienced tree trimmer employed by T, declined assistance and commenced to cut the trunk into removable lengths. After some cuts from the top, the remainder--an 8-to-10-foot trunk--was flung into the air by the cables and landed on decedent, causing injuries and resulting death. *Held*, it was error to instruct on assumption of risk. Decedent was presumably aware of the danger that the lines burdened with the weight of the tree could snap; but there was no evidence of knowledge of the danger that, by reason of the peculiar method of securing them, the trunk of the tree would be propelled into the air. (26 C.A.3d 543.) (See *Celli v. Sports Car Club of America* (1972) 29 C.A.3d 511, 522, 105 C.R. 904 [car race spectator injured in pit area bordering straightway had no actual knowledge that vehicle would go out of control at that location].)

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3. Unusually Dangerous Condition or Activity.

6 *Witkin Sum. Cal. Law Torts* § 1290

[§ 1290] Unusually Dangerous Condition or Activity.

Although the user of an amusement device assumes the normal risks, if the contrivance is negligently constructed or maintained in an unsafe condition, the defendant may be liable. (*Chardon v. Alameda Park Co. (1934) 1 C.A.2d 18, 21, 36 P.2d 136*; cf. *Ratcliff v. San Diego Baseball Club of Pac. Coast League (1938) 27 C.A.2d 733, 736, 81 P.2d 625* [plaintiff at ball game, walking along a passageway, was struck by a flying bat; defendant was liable for failure to screen that portion of passageway]; see *24 Cal. L. Rev. 433*.)

The same is true where negligent maintenance or supervision permits unusually dangerous activity to continue. In *Edwards v. Hollywood Canteen (1946) 27 C.2d 802, 167 P.2d 729*, supra, §1129, plaintiff, a volunteer hostess at a servicemen's dance, was injured when a Marine with whom she was dancing spun her around despite her protests and attempts to escape. *Held*, she did not assume the risks of his reckless conduct. (*27 C.2d 811*.) (See *Hairston v. Studio Amusements (1948) 86 C.A.2d 735, 739, 195 P.2d 498* [plaintiff fell while skating at defendant's roller skating rink, lay for several minutes without attention by guards, and was struck by a reckless patron skating backwards].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

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XIV. NEGLIGENCE: DEFENSES

B. Assumption of Risk.

2. Implied.

c. When Risk Is Not Assumed.

4. Violation of Safety Regulations.

6 *Witkin Sum. Cal. Law Torts* § 1291

[§ 1291] Violation of Safety Regulations.

The defense of contributory negligence applies even though the defendant has violated a statute (see *infra*, §1301), and the defense of assumption of risk applies where the defendant is guilty of ordinary negligence (*supra*, §1284). But a distinction was made in *Finnegan v. Royal Realty Co.* (1950) 35 C.2d 409, 431, 218 P.2d 17: "Where an ordinance is a police regulation, made for the protection of human life, ... the doctrine of assumption of the risk does not apply. Public policy forbids that the duty which the defendant owes to the plaintiffs should be waived by plaintiffs' mere passive quiescence, even though with knowledge of the infraction of the ordinance. ... Since the fundamental purpose of such statutes would be defeated if the plaintiff were permitted to assume the risk, it is generally held that he cannot do so, either expressly or by implication. The workman has no alternative but the loss of his livelihood, it is his 'poverty and not his will' which consents, and economically he is no more free to leave his employment than a soldier or a sailor." (See *Shahinian v. McCormick* (1963) 59 C.2d 554, 565, 30 C.R. 521, 381 P.2d 377; *Maia v. Security Lumber & Concrete Co.* (1958) 160 C.A.2d 16, 20, 324 P.2d 657; *Guerrero v. Westgate Lumber Co.* (1958) 164 C.A.2d 612, 618, 331 P.2d 107; *Longway v. McCall* (1960) 181 C.A.2d 723, 732, 5 C.R. 818, 12 Summary (10th), *Real Property*, §650; 57B Am.Jur.2d (2004 ed.), *Negligence* §786.)

Fonseca v. Orange (1972) 28 C.A.3d 361, 104 C.R. 566, is a particularly instructive illustration of this distinction. Defendant county engaged L Co. to erect a bridge. L Co. employed plaintiff as a cement finisher. In violation of industrial safety orders, L Co. failed to install scaffolding and railings around the perimeter of the bridge. Plaintiff slipped on wet cement and fell from the bridge, sustaining injuries. L Co.'s insurer paid workers' compensation, and plaintiff sued defendant county. The jury, in response to special interrogatories, found that the violation of the safety orders was the proximate cause of plaintiff's injuries. However, the trial judge instructed on contributory negligence, and the verdict was for defendant. *Held*, reversed.

(a) Plaintiff's conduct was clearly an assumption of the risk. He was an experienced worker, familiar with safety orders; when he arrived on the job, he told the county engineer that scaffolding and railings should be installed; nevertheless, he proceeded to work, with actual knowledge of the specific danger and its magnitude. (28 C.A.3d 369.) However, this defense, though established by the facts, was unavailable as a matter of law under the rule set forth above. (28 C.A.3d 368.)

(b) Contributory negligence could be a defense under the law, but was not established by the evidence. Conduct that is *reasonable* may constitute an assumption of risk but not contributory negligence; for the latter to be found, the conduct must be *unreasonable*, i.e., negligent. (28 C.A.3d 369.) And here, plaintiff was not guilty of any negligence in performing his duties as a cement finisher; he merely continued to work despite the known danger. "Consequently, we hold that it is not unreasonable and not contributory negligence for a worker to continue work despite his employer's preexisting violation of safety orders, whether or not the worker recognizes and appreciates the hazard. By our holding we do not eliminate contributory negligence as a defense in actions arising from a violation of safety orders. We merely limit its scope in deference to the enlightened policy factors underlying safety orders." (28 C.A.3d 370.)

West's Key Number Digest, Negligence k.554(3)

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B. Assumption of Risk.

3. Express.

a. In General.

6 Witkin Sum. Cal. Law Torts § 1292

[§ 1292] In General.

By contract, a person may expressly agree to assume the risk of another person's negligence, and the agreement is valid unless it contravenes public policy. (*Coates v. Newhall Land & Farming* (1987) 191 C.A.3d 1, 8, 236 C.R. 181; see *Saenz v. Whitewater Voyages* (1990) 226 C.A.3d 758, 765, 276 C.R. 672; *Buchan v. United States Cycling Federation* (1991) 227 C.A.3d 134, 147, 277 C.R. 887; *Westlye v. Look Sports* (1993) 17 C.A.4th 1715, 1729, 22 C.R.2d 781 [rejecting contention that express contractual assumption of risk applied to all potential defendants, instead of being limited to parties]; *Paralift v. Superior Court* (1993) 23 C.A.4th 748, 757, 29 C.R.2d 177 [skydiving company's release, signed by decedent skydiver 3 years before fatal jump, which occurred in different location than where activities covered by release originally began, constituted complete defense]; *Allabach v. Santa Clara County Fair Assn.* (1996) 46 C.A.4th 1007, 1013, 54 C.R.2d 330, citing the text [release enforced against plaintiff injured by defective barrier while observing automobile race]; *Leon v. Family Fitness Center (#107)* (1998) 61 C.A.4th 1227, 1231, 71 C.R.2d 923 [health club's release stating that patron assumed all risks connected with participation in sport or exercise did not apply to injury plaintiff suffered when bench collapsed beneath him while he was using sauna]; *Benedek v. PLC Santa Monica* (2002) 104 C.A.4th 1351, 1358, 129 C.R.2d 197 [fitness center release was broad enough to cover nonsports-related injuries (moving TV set)]; *Moser v. Ratino* (2003) 105 C.A.4th 1211, 1217, 130 C.R.2d 198 [release given to "event holders, sponsors and organizers" applied only to those parties, and not to coparticipants in bicycle race, even though release acknowledged risks involved]; *Sweat v. Big Time Auto Racing* (2004) 117 C.A.4th 1301, 1304, 12 C.R.3d 678 [express release did not relieve racetrack from liability, because negligence involved (collapse of grandstand) was not reasonably related to purpose of release (requiring patron to assume risk of injury resulting from being near dangerous activity); distinguishing *Benedek*]; 33 Proof of Facts 3d 421 [avoiding effect of recreational activity liability release]; 24 Cal. Western L. Rev. 127 [Playing with Liability: The Risk Release in High Risk Sports]; BAJI, No. 4.30; CACI, No. 451; 1 Summary (10th), Contracts, §671 et seq.)

In *Sanchez v. Bally's Total Fitness Corp.* (1998) 68 C.A.4th 62, 79 C.R.2d 902, a fitness center was given a release "for any claims for injuries or damages" arising out of use of the fitness center. Held, the release rendered the center immune to a negligence claim for injuries during a slide aerobics class. Use of the term "negligence" is not required to validate an otherwise unambiguous exculpatory clause, especially where the remainder of the clause indicates that negligent conduct is the main activity covered by the release. (68 C.A.4th 65.)

Coates v. Newhall Land & Farming, supra, explained the difference between an *advance waiver of liability*, and an *express assumption of risk*. By an advance waiver, a potential plaintiff promises not to exercise the right to sue for harm caused in the future by the wrongful behavior of a potential defendant, eliminating a remedy for wrongdoing. By express assumption of risk, the potential plaintiff agrees not to expect the potential defendant to act carefully, thus eliminating the potential defendant's duty of care, and acknowledging the possibility of negligent wrongdoing. "Both agreements permit behavior that normally would be actionable as tortious, although an express assumption of risk goes further, more clearly authorizing this behavior." (191 C.A.3d 7.)

In *National & Int. Brotherhood of Street Racers v. Superior Court* (1989) 215 C.A.3d 934, 264 C.R. 44, the court deplored the frequent technical challenges of releases in cases arising from hazardous recreational pursuits (here race car driving): "Drafters of releases always face the problem of steering between the Scylla of simplicity and the Charybdis of completeness. Apparently no release is immune from attack. If short and to the point, a release will be challenged as failing to mention the particular risk which caused a plaintiff's injury ... or as insufficiently comprehensive. ... It will be attacked as totally ineffective if a key word is placed in the caption for emphasis but not repeated in the text ... , or if, despite unambiguous language, the word 'negligence' is not used. ... If the drafter avoids these shortcomings by adding details and illustrations, the plaintiff invokes the doctrine *expressio unius exclusion alterius est* and characterizes the causative hazard as one not found among those listed in the release, but if the list ends with an inclusive term--"and all other risks not specifically enumerated"--it will be argued, under the principle *ejusdem generis*, that the risk encountered is nonetheless not assumed, because its nature is different from those listed. If the drafter strives to be comprehensive, the release is attacked as unduly lengthy ... , but if he fits it onto a single page, the type size will be criticized as inadequate. ... If the significance of the release is emphasized by its repetition in two documents, any variation in wording fuels a challenge." (215 C.A.3d 937.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Zipusch v. LA Workout* (2007) 155 C.A.4th 1281, 1287, 66 C.R.3d 704 [assumption of risk clause whereby health club member agreed to exculpate club from injuries to member caused by others and indemnify club for injuries to others caused by member did not explicitly exculpate club from its own negligence so as to bar member's negligence action against club for injuries she sustained on treadmill; distinguishing *Benedek v. PLC Santa Monica, LLC* (2002) 104 C.A.4th 1351, 129 C.R.2d 197, text, p. 686, on ground that it involved "all" injuries sustained on premises]; *Cohen v. Five Brooks Stable* (2008) 159 C.A.4th 1476, 1485, 72 C.R.3d 471 [release was ambiguous in enumerating only inherent risks of horseback riding and stating that it also applied to "other unknown or unanticipated risks" "not specifically identified," and thus, under rule resolving ambiguity against stable as drafter of release, release did not exculpate stable from its own negligence or that of its employee in causing horses to gallop without warning].



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XIV. NEGLIGENCE: DEFENSES

B. Assumption of Risk.

3. Express.

b. Restatement 3d.

6 *Witkin Sum. Cal. Law Torts* § 1293

[§ 1293] Restatement 3d.

Rest.3d, Torts: Apportionment of Liability reaffirms contractual assumption of risk. A contract between the plaintiff and another person specifically absolving the person of liability for future harm bars recovery from that person for the harm. (*Rest.3d, Torts: Apportionment of Liability* §2.) This rule "is drawn from and replaces" *Rest.2d, Torts* §496B. (*Rest.3d, Torts: Apportionment of Liability* §2, Comment a.) The rule extends to claims based on a defendant's intentional or reckless conduct. (*Rest.3d, Torts: Apportionment of Liability* §2, Comments f and g.) In contrast, *Rest.3d, Torts: Apportionment of Liability* §2 abrogates sections in the Second Restatement, including *Rest.2d, Torts* §496E, that recognized *implied* assumption of risk as an independent defense. (See *Rest.3d, Torts: Apportionment of Liability* §2, Comment i; *supra*, §1283.)

A contractual limitation on liability may arise by written agreement, express oral agreement, or conduct that creates an implied-in-fact contract. Whether there is such an agreement is determined by the applicable rules of contract law. The agreement may be general, relieving the other party of all obligation to protect the plaintiff, or it may be limited to specific conduct and risks, and it may absolve liability entirely or may limit liability to a specific amount. (*Rest.3d, Torts: Apportionment of Liability* §2, Comment c.) However, particular contractual limitations on liability may be unenforceable under substantive rules (*Rest.3d, Torts: Apportionment of Liability* §2, Comment h) or as a matter of public policy (*Rest.3d, Torts: Apportionment of Liability* §2, Comment e).

Unlike a plaintiff's negligence (*infra*, §1327 et seq.), a valid contractual limitation on liability does not provide an occasion for the factfinder to assign a percentage of responsibility to any party or other person. (*Rest.3d, Torts: Apportionment of Liability* §2.) A valid contractual limitation on liability, within its terms, creates an absolute bar to a plaintiff's recovery from the other party to the contract. (*Rest.3d, Torts: Apportionment of Liability* §2, Comment b.)

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B. Assumption of Risk.

3. Express.

c. Release in Wrongful Death Action.

6 *Witkin Sum. Cal. Law Torts* § 1294

[§ 1294] Release in Wrongful Death Action.

In *Madison v. Superior Court* (1988) 203 C.A.3d 589, 250 C.R. 299, plaintiffs' son was drowned while participating in a Y.M.C.A. scuba diving training course. In this wrongful death action, defendant Y.M.C.A. relied on a detailed release of all liability for personal injury or wrongful death (203 C.A.3d 594, 603). *Held*, assuming that the death was due to negligence, the agreement was a bar to plaintiffs' claim.

(a) *Release does not bar wrongful death action.* The right to sue for wrongful death belongs to the heirs, and the decedent had no power to waive that cause of action. (203 C.A.3d 596, citing *Scroggs v. Coast Community College Dist.* (1987) 193 C.A.3d 1399, 239 C.R. 916.)

(b) *Plaintiffs are subject to defenses.* The plaintiff in a wrongful death action is subject to any defenses that could have been asserted against the decedent, including an agreement by the decedent to waive the defendant's negligence and assume all risks. "In other words, a distinction must be made between the legal *ineffectiveness* of a decedent's pre-injury release of his heir's subsequent wrongful death action and the legal *effectiveness* of an express release of negligence by a decedent which provides a defendant with 'a complete defense.' " (203 C.A.3d 597.)

(c) *Release as assumption of risk.* Although the words "assumption of risk" were not used, it was expressly stated that decedent intended to exempt defendants from any liability for their negligence; and by this language decedent "expressly manifested his intent to relieve the defendants of any duty to him and to assume the entire risk of any injury." (203 C.A.3d 597, relying on *Coates v. Newhall Land & Farming* (1987) 191 C.A.3d 1, 236 C.R. 181, *supra*, §1292.)

(d) *Validity.* The release agreement was valid; it did not involve the public interest, and the language was clear and explicit. (203 C.A.3d 598, 599, citing *Kurashige v. Indian Dunes* (1988) 200 C.A.3d 606, 246 C.R. 310, 1 *Summary* (10th), *Contracts*, §333.)

In *Coates, supra*, the court made the following observation: "Behavior which is authorized is not wrongful and, logically, cannot be the basis of a wrongful death action." Assumption of risk means that the plaintiff has given express consent to relieve the defendant of an obligation of conduct toward him or her; the defendant is relieved of legal duty to the plaintiff and cannot be charged with negligence. (191 C.A.3d 9.)

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XIV. NEGLIGENCE: DEFENSES

C. Contributory Negligence.

1. In General.

a. Contributory Negligence and Comparative Negligence.

6 *Witkin Sum. Cal. Law Torts* § 1295

[§ 1295] Contributory Negligence and Comparative Negligence.

(1) *Common Law Doctrine of Contributory Negligence.* The traditional and widely followed doctrine makes contributory negligence a complete defense if it is causally connected with the injury, even though the defendant's negligence is greater or more serious than that of the plaintiff, and even though it can be characterized as "gross" or "wanton." (See *Tucker v. United R. of San Francisco* (1916) 171 C. 702, 704, 154 P. 835; *Bickford v. Pacific Elec. Ry. Co.* (1932) 120 C.A. 542, 550, 8 P.2d 186; 4 Harper, James & Gray 2d §22.1 et seq.; Dobbs, *The Law of Torts* §§199, 200; 57B *Am.Jur.2d* (2004 ed.), *Negligence* §796 et seq.)

(2) *Criticisms of Doctrine and Attempts To Limit Its Application.* Condemnation of the strict contributory negligence doctrine was vigorous (see *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 810, 119 C.R. 858, 532 P.2d 1226, *infra*, §1329; *infra*, §1327), and various exceptions and distinctions have been judicially developed, including the following:

(a) The doctrine of last clear chance. (See *Brandelius v. San Francisco* (1957) 47 C.2d 729, 743, 306 P.2d 432; 4 Harper, James & Gray 2d §22.13; 57B *Am.Jur.2d* (2004 ed.), *Negligence* §889 et seq.)

(b) Inapplicability of the defense where the defendant's conduct was wilful, wanton, or reckless. (See 4 Harper, James & Gray 2d §22.6; 57B *Am.Jur.2d* (2004 ed.), *Negligence* §841 et seq.)

(3) *Adoption of Comparative Negligence Doctrine.* In *Li v. Yellow Cab Co.*, *supra*, the traditional "all or nothing" defense of contributory negligence was abolished, and the "pure form" of comparative negligence was adopted in its place. (See *infra*, §1329.) (On effect of new doctrine, and continued vitality of standards and rules developed in contributory negligence cases, see *infra*, §1327; see also 4 Harper, James & Gray 2d §22.14; 57B *Am.Jur.2d* (2004 ed.), *Negligence* §954 et seq.)

West's Key Number Digest, *Negligence* k.545 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Common Law Doctrine of Contributory Negligence.* See 4 Harper, James & Gray 3d §22.1 et seq. (2) *Criticisms of*

Doctrine and Attempts To Limit Its Application.

- (a) *Last clear chance doctrine*: See 4 Harper, James & Gray 3d §22.12 et seq.
- (b) *Wilful, wanton, or reckless conduct*: See 4 Harper, James & Gray 3d §22.6.
- (3) *Adoption of Comparative Negligence Doctrine*. See 4 Harper, James & Gray 3d §22.15.



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XIV. NEGLIGENCE: DEFENSES

C. Contributory Negligence.

1. In General.

b. Pleading and Proof.

6 Witkin Sum. Cal. Law Torts § 1296

[§ 1296] Pleading and Proof.

(1) *Pleading*. Contributory negligence must be pleaded as an affirmative defense unless it appears on the face of the complaint or from the evidence in the plaintiff's case. (See 5 Cal. Proc. (4th), *Pleading*, §1029.) But the pleading is not an admission of negligence by the defendant. (See *Hoffman v. Southern Pac. Co.* (1927) 84 C.A. 337, 346, 258 P. 397; *Brooks v. Monterey* (1930) 106 C.A. 649, 653, 290 P. 540; 21 Cal. L. Rev. 367.) In other words, the defendant may deny his or her own negligence, and also raise the defense of plaintiff's contributory negligence, and both issues must go to the jury. Hence, it is improper to charge a jury that "contributory negligence *admits* actionable negligence on the part of the defendant." (*Sheets v. Southern Pac. Co.* (1931) 212 C. 509, 514, 299 P. 71; *Harveld v. Milani* (1934) 1 C.A.2d 157, 160, 36 P.2d 393; *Soares v. Barson* (1936) 12 C.A.2d 582, 584, 55 P.2d 1283; see 21 Cal. L. Rev. 367.)

(2) *Proof*. The burden of proving contributory negligence is on the defendant. (*Rush v. Lagomarsino* (1925) 196 C. 308, 314, 237 P. 1066; *Anthony v. Hobbie* (1945) 25 C.2d 814, 818, 155 P.2d 826; *Gyerman v. United States Lines Co.* (1972) 7 C.3d 488, 503, 102 C.R. 795, 498 P.2d 1043, *infra*, §1299; *Ross v. San Francisco Unified School Dist.* (1953) 120 C.A.2d 185, 190, 260 P.2d 663.) A defendant who has met this burden has no further burden to produce particular evidence about the precise percentage of responsibility the factfinder should assign to the plaintiff. (*Rest.3d, Torts: Apportionment of Liability* §4, Comment a.)

In proving the plaintiff's negligence, the defendant may use any of the methods available to a plaintiff in proving a defendant's negligence. (*Rest.3d, Torts: Apportionment of Liability* §4.)

West's Key Number Digest, Negligence k.1527(2), 1531, 1541, 1571, 1602, 1642, 1683

SUPPLEMENT: [This section is current through the latest supplement]
Contributory negligence must be pleaded:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1103.



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C. Contributory Negligence.

1. In General.

c. Standard of Due Care.

1. In General.

6 Witkin Sum. Cal. Law Torts § 1297

[§ 1297] In General.

(1) *Negligence and Contributory Negligence.* Under *Rest.3d, Torts: Apportionment of Liability* §3, "plaintiff's negligence is defined by the applicable standard for a defendant's negligence." Thus, the standard of negligence employed to evaluate a plaintiff's conduct is the same as that employed to evaluate a defendant's conduct. (*Rest.3d, Torts: Apportionment of Liability* §3, Comment a; on evidence of custom, see *Gyerman v. United States Lines Co.* (1972) 7 C.3d 488, 502, 102 C.R. 795, 498 P.2d 1043, *infra*, §1299; on whether "accident proneness" of plaintiff ought to be taken into account, see 63 *Harv. L. Rev.* 769, 782, 786, 794.)

"Special ameliorative doctrines," set forth in the Second Restatement in defining a plaintiff's negligence, are abolished. (*Rest.3d, Torts: Apportionment of Liability* §3.) Included are the doctrines of last clear chance, mitigation of damages, and avoidable consequences. (See *Rest.3d, Torts: Apportionment of Liability* §3, Comment b and §7, Comment o.) These doctrines, which are "designed to avoid the harsh effects of contributory negligence as an absolute bar" to recovery, are deemed no longer appropriate because, under comparative responsibility, a plaintiff's negligence only reduces the amount of recovery. (*Rest.3d, Torts: Apportionment of Liability* §3, Comment a.) Thus, the standard of care set forth in *Rest.3d, Torts: Apportionment of Liability* §3 applies to all types of plaintiff's conduct, "regardless of the relative timing of the defendant's conduct, the plaintiff's conduct, and the accident." (*Rest.3d, Torts: Apportionment of Liability* §3, Comment b.)

(2) *Imminent Peril.* The imminent peril doctrine, which recognizes a lesser quantum of care as reasonable in an emergency (see *supra*, §900), may be of help to the plaintiff. Thus, in *Miller v. Contra Costa* (1951) 106 C.A.2d 304, 235 P.2d 76, an airplane while landing was hit by a gust of wind and went into a ground loop. The pilot chose the alternative of gunning the motor to see if he could become airborne again. *Held*, although this was more difficult than to "ride out" the ground loop, the trier of fact could find it reasonable under the circumstances. (106 C.A.2d 309.) (See 47 A.L.R.2d 6, 11 [negligence of motorist colliding with vehicle approaching in wrong lane]; 47 A.L.R.2d 119 [negligence of motorist avoiding collision with vehicle approaching in wrong lane]; 52 A.L.R.2d 1433, 1436 [contributory negligence of one jumping from moving vehicle].)

(3) *Dangerous Situation.* Although a person dealing with dangerous things such as explosives or highly flammable

materials is required to exercise extreme care (see *supra*, §918 et seq.), a worker whose employment compels him or her to work in a dangerous situation may be limited in the amount of caution that the worker can take for his or her own safety. In this situation a lesser amount of caution will meet the requirement of ordinary care under the circumstances. (See *McDonald v. Oakland* (1967) 255 C.A.2d 816, 827, 63 C.R. 593; BAJI, No. 3.40; CACI, No. 415.)

West's Key Number Digest, Negligence k.503

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C. Contributory Negligence.

1. In General.

c. Standard of Due Care.

2. Children and Disabled Persons.

6 *Witkin Sum. Cal. Law Torts* § 1298

[§ 1298] Children and Disabled Persons.

Under *Rest.3d, Torts: Apportionment of Liability*, §3, a plaintiff's negligence is defined by referring to the standard for evaluating a defendant's negligence. (See *supra*, §1297.) Thus, whether a plaintiff's age or physical or mental ability is taken into account is determined by the same rules that determine whether a defendant's age or physical or mental ability is considered. *Rest.2d, Torts* §464 is abrogated. (*Rest.3d, Torts: Apportionment of Liability* §3, Comment a.) (On age, see *supra*, §998 et seq.; on physical or mental ability, see *supra*, §1003.) (On child's contributory negligence (predating the adoption of *Rest. 3d, Torts: Apportionment of Liability*), see *Haft v. Lone Palm Hotel* (1970) 3 C.3d 756, 777, 91 C.R. 745, 478 P.2d 465, *supra*, §1195; *Beard v. Atchison, Topeka & Santa Fe Ry. Co.* (1970) 4 C.A.3d 129, 141, 84 C.R. 449, *supra*, §1097; *Pittman v. Pedro Petroleum Corp.* (1974) 42 C.A.3d 859, 864, 117 C.R. 220; 57B Am.Jur.2d (2004 ed.), *Negligence* §865 et seq.; 12 Proof of Facts 3d 105 [child pedestrian's contributory negligence]; 32 A.L.R.4th 56 [contributory negligence of children]; BAJI, No 3.60 et seq.)

West's Key Number Digest, Negligence k.535(4) et seq.

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C. Contributory Negligence.

1. In General.

d. Causal Connection With Injury.

6 *Witkin Sum. Cal. Law Torts* § 1299

[§ 1299] Causal Connection With Injury.

The negligence of the plaintiff must be a proximate cause of the injury, and the usual rules of causation apply. (*Rush v. Lagomarsino* (1925) 196 C. 308, 314, 237 P. 1066; *Gaster v. Hinkley* (1927) 85 C.A. 55, 61, 258 P. 988; *Hartford v. Pacific Motor Trucking Co.* (1936) 16 C.A.2d 378, 380, 60 P.2d 476; *Clark v. California* (1950) 99 C.A.2d 616, 623, 222 P.2d 300; *Asplund v. Driskell* (1964) 225 C.A.2d 705, 716, 37 C.R. 652 ["[n]egligence unrelated to the cause or causes of the accident is not a bar"]; *Beard v. Atchison, Topeka & Santa Fe Ry. Co.* (1970) 4 C.A.3d 129, 140, 84 C.R. 449; *Helsley v. Kern* (1974) 42 C.A.3d 97, 105, 116 C.R. 518; see 57B *Am.Jur.2d* (2004 ed.), *Negligence* §881 et seq.; 38 *Cal. L. Rev.* 416; *BAJI*, No. 3.50; *CACI*, No. 405.)

In *Signorelli v. Potter* (1954) 43 C.2d 541, 275 P.2d 449, plaintiffs negligently maintained a 50-gallon butane gas storage tank close to their house wall and hot water heater. Defendant supplier's serviceman, filling it, negligently kept pumping it on a windy day despite a gas odor indicating a hose leak. A fire (probably from the heater pilot light) suddenly started and destroyed the house. *Held*, judgment for plaintiffs affirmed. Applying the Restatement "substantial factor" test, if the fire would have occurred even though the tank had been safely located 10 feet from the house (industrial safety order), its improper location was not a contributing cause. And here, the trial court could conclude that a large amount of the volatile escaping gas could have been blown 10 feet or more to the pilot light. (43 C.2d 546.)

In *Gyerman v. United States Lines Co.* (1972) 7 C.3d 488, 102 C.R. 795, 498 P.2d 1043, plaintiff longshoreman was working in a warehouse adjacent to a dock. His job was to take 100-pound burlap sacks of fishmeal stacked on wooden pallets, and break down the stacks with a forklift so they could be easily loaded by truckers. On the day of his injury stacks were improperly delivered, with too many sacks to a pallet and not "bulkheaded" (tied in by proper packing). He allegedly complained to the chief marine clerk, received the advice to do his best, and proceeded with his work until a load fell, causing his injuries. The trial judge found defendant negligent and plaintiff contributorily negligent, and gave judgment for defendant. *Held*, reversed, for retrial of the issue of contributory negligence.

(a) The evidence supported the trial judge's finding that plaintiff, faced with a safety hazard, had a right to stop work, complain to his union steward, and set arbitration process in motion; that instead he merely complained to the clerk, and therefore failed to use ordinary care for his own protection. (7 C.3d 502.)

(b) However, there was no evidence in the record to support the conclusion that if plaintiff had reported the dangerous condition to his employer's supervisor the stacks would have been made safer. In view of the complete lack of evidence on this critical issue, defendant did not meet its burden of proof. (7 C.3d 505.)

A plaintiff's negligence does not affect his or her recovery unless it was a legal cause of plaintiff's injury. (*Rest.3d, Torts: Apportionment of Liability* §7, Comment f.) Except where negligence of another is imputed to the plaintiff (see *infra*, §1324 et seq.), the defendant has the burden to prove that negligence of the plaintiff was such a cause. (*Rest.3d, Torts: Apportionment of Liability* §4; on general rules of causation, see *supra*, §1181 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]



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XIV. NEGLIGENCE: DEFENSES

C. Contributory Negligence.

1. In General.

e. Question of Law or Fact.

6 *Witkin Sum. Cal. Law Torts* § 1300

[§ 1300] Question of Law or Fact.

Like negligence (*supra*, §§860, 866), contributory negligence is ordinarily a question for the jury, and becomes a question of law only when the court determines that but one inference can reasonably be drawn from the evidence. (See *Zibbell v. Southern Pac. Co.* (1911) 160 C. 237, 241, 116 P. 513; *Flores v. Fitzgerald* (1928) 204 C. 374, 376, 268 P. 369; *Kirk v. Los Angeles Ry. Corp.* (1945) 26 C.2d 833, 838, 161 P.2d 673; *Pewitt v. Riley* (1945) 27 C.2d 310, 316, 163 P.2d 873; *M & M Livestock Transport Co. v. California Auto Transport Co.* (1955) 43 C.2d 847, 851, 279 P.2d 13; *Phillips v. G.L. Truman Excavation Co.* (1961) 55 C.2d 801, 806, 13 C.R. 401, 362 P.2d 33; *Mark v. Pacific Gas & Elec. Co.* (1972) 7 C.3d 170, 180, 101 C.R. 908, 496 P.2d 1276, *infra*, §1323; *Gyerman v. United States Lines Co.* (1972) 7 C.3d 488, 500, 102 C.R. 795, 498 P.2d 1043, *supra*, §1299; *Ross v. Pacific Elec. Ry. Co.* (1919) 39 C.A. 658, 660, 179 P. 538; *White v. Davis* (1930) 103 C.A. 531, 542, 284 P. 1086; *Griffith v. Steimle* (1945) 72 C.A.2d 320, 323, 164 P.2d 564; *Kerr v. Bullock's* (1946) 75 C.A.2d 277, 279, 170 P.2d 966; *Freeman v. Nickerson* (1946) 77 C.A.2d 40, 49, 174 P.2d 688; *Hinchman, Rolph & Landis v. Golding* (1948) 85 C.A.2d 146, 150, 192 P.2d 489; *Cendali v. Barber* (1948) 89 C.A.2d Supp. 929, 932, 201 P.2d 88; *Dennis v. Gonzales* (1949) 91 C.A.2d 203, 207, 205 P.2d 55; *Ribble v. Cook* (1952) 111 C.A.2d 903, 907, 245 P.2d 593; *Ross v. San Francisco Unified School Dist.* (1953) 120 C.A.2d 185, 260 P.2d 663; *Laymon v. Simpson* (1964) 225 C.A.2d 50, 52, 36 C.R. 859; *Crooks v. Pirrone* (1964) 228 C.A.2d 549, 554, 39 C.R. 622, quoting the text; 57B *Am.Jur.2d* (2004 ed.), *Negligence* §942 et seq.; 11 *Hastings L. J.* 353; on contributory negligence per se, see *infra*, §1315 et seq.)

In *Gibson v. Southern Pac. Co.* (1955) 137 C.A.2d 337, 290 P.2d 347, plaintiff, standing on an asphalt pathway by defendant's train (pathway treated here as a platform), was struck by an engine having an overhang extending 1 foot, 21/2 inches over the platform. *Held*, affirming a judgment notwithstanding the verdict, plaintiff's conduct was contributory negligence as a matter of law. "Of course, the platform constituted an invitation from defendant for people to use it, just as any railroad platform does, but it is an invitation to use it with ordinary care. It is a matter of common knowledge that it is dangerous to stand close to a fast moving train, both because of overhang and suction. To hold that it is a question of fact whether a person is using ordinary care in walking in any portion of the danger zone which everyone knows exists, without making any effort to determine whether he is without the overhang and suction area, means that the liability of a railroad to a person on its platforms or pathways is absolute." (137 C.A.2d 353.) (See 6 *Hastings L. J.* 396.)

Under Rest.3d, Torts: Apportionment of Liability, the respective functions of the judge and jury "are the same with respect to a determination of a plaintiff's negligence as with respect to a defendant's negligence." Questions of negligence and legal cause are questions for the jury, "unless the judge determines that the jury can reasonably come to only one conclusion and a judgment as a matter of law is warranted." The appropriate percentage of responsibility to be assigned to each party is a question for the factfinder, "unless the judge determines that no reasonable jury could assign a given magnitude of responsibility to a particular party." (*Rest.3d, Torts: Apportionment of Liability* §4, Comment c.)

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1. In General.

f. Action Based on Negligence Per Se.

6 *Witkin Sum. Cal. Law Torts* § 1301

[§ 1301] Action Based on Negligence Per Se.

The defendant may set up the defense of contributory negligence even when the defendant's negligence consists of the violation of a statute, ordinance, or administrative regulation (*supra*, §871 et seq.). (See *Mula v. Meyer* (1955) 132 C.A.2d 279, 284, 282 P.2d 107 [the argument that, "because respondent was guilty of negligence *per se*, the defense of contributory negligence has been eliminated, simply confuses negligence as a matter of law with the doctrine of absolute liability"]; *Fonseca v. Orange* (1972) 28 C.A.3d 361, 367, 104 C.R. 566; *Smith v. Americana Motor Lodge* (1974) 39 C.A.3d 1, 9, 113 C.R. 771; 57B Am.Jur.2d (2004 ed.), *Negligence* §843 et seq.; 10 A.L.R.2d 853 [contributory negligence as defense to cause of action based on violation of statute].)

In *Travelers Indem. Co. v. Titus* (1968) 265 C.A.2d 515, 71 C.R. 490, tenants, in violation of a statute, burned debris in an improperly located and maintained incinerator, and the house was destroyed. Plaintiff insurer paid the landlord, then sued the tenants for negligence. *Held*, the landlord was negligent in furnishing the improper incinerator, and his contributory negligence, though passive, barred recovery by his subrogee--the insurer. (265 C.A.2d 519.)

An exception is generally recognized, however, for certain acts designed to protect persons unable to protect themselves, where the effect of the statute is to place the entire responsibility on the defendant. (See *Rest.2d, Torts* §483 and Comment c; Appendix, Reporter's Notes to §483, listing, among others, child labor acts, acts for protection of workers, acts regulating sale of dangerous articles to minors; see 57B Am.Jur.2d (2004 ed.), *Negligence* §947 et seq.)

Rest.3d, Torts: Apportionment of Liability applies the comparative responsibility doctrine "even though a party's conduct violated a statute, ordinance, or administrative regulation, unless the purpose of the statute, ordinance, or administrative regulation is to place the entire responsibility for such harm on the party." (*Rest.3d, Torts: Apportionment of Liability* §7, Comment d.)

West's Key Number Digest, Negligence k.222, 525

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C. Contributory Negligence.

1. In General.

g. When Doctrine Is Not Applicable.

1. Intentional Tort and Wilful Misconduct.

6 *Witkin Sum. Cal. Law Torts* § 1302

[§ 1302] Intentional Tort and Wilful Misconduct.

(1) *Intentional Tort*. It is generally held that contributory negligence is not a defense to an action based on an intentional tort, such as fraud (*supra*, §813) or battery (*Bartosh v. Banning* (1967) 251 C.A.2d 378, 385, 59 C.R. 382).

The Third Restatement, after noting that some courts have held that a plaintiff's negligence may serve as a comparative defense to an intentional tort, but that most have not, has taken no position on that issue. (*Rest.3d, Torts: Apportionment of Liability* §1, Comment c.)

(2) *Wilful Misconduct*. Where the defendant's act goes beyond "gross negligence" and reaches "reckless disregard for the plaintiff's safety," i.e., wilful misconduct, the plaintiff is not barred by mere negligence, but only by equally serious fault, such as knowing and reckless exposure to the danger. (See 4 Harper, James & Gray 2d §22.6; BAJI, No. 3.52.)

In *Goldman v. House* (1949) 93 C.A.2d 572, 209 P.2d 639, defendant landlord, seeking to evict plaintiffs, two elderly tenants, turned off the electricity in their flat. As a result, plaintiff wife fell down a stairway. Rejecting defendant's argument that plaintiff wife was negligent in failing to use a candle for illumination, the court said that contributory negligence need not be considered "since the present action is based on wilful misconduct." (93 C.A.2d 575.)

In *Lovett v. Hitchcock* (1961) 192 C.A.2d 806, 14 C.R. 117, there was evidence that plaintiff minor was standing on a country road with his back to the roadway when defendant driver ran him down. The jury was instructed that if defendant was guilty of wilful or wanton misconduct, contributory negligence could not be a defense. The court, following the Restatement, approved the rule and its application to the facts: "Here there is testimony from which the jury could find that defendant saw plaintiff 196 feet away in the paved portion of the roadway, and neither slowed nor sounded his horn. There is also the testimony that defendants' car swerved toward plaintiff immediately before the impact. Thus the evidence could support a jury finding that defendant was guilty of wilful or wanton misconduct." (192 C.A.2d 811.) The opinion, however, contains two cautions:

(a) There is no wilful misconduct unless the defendant knows or should know of the danger, and he or she must have actual knowledge of the circumstances (which may be shown by circumstantial as well as direct evidence). "Wilful or wanton misconduct cannot be found by charging a driver with knowledge which he did not have, but which would have been known to the man of ordinary prudence, and predicating upon that assumed knowledge a disregard which would have been reckless in the mind of a man of ordinary prudence." (192 C.A.2d 812.)

(b) Cases warranting the instruction on wilful misconduct seldom arise, and it should rarely be given. Moreover, "so far as its effect is concerned, the rule concerning such misconduct in almost every case overlaps the doctrine of last clear chance." (192 C.A.2d 813; on the abolition of last clear chance, see *supra*, §1329.) (See *Mahoney v. Corralejo* (1974) 36 C.A.3d 966, 974, 112 C.R. 61 [pleaded factors found inadequate to show wanton and reckless disregard of consequences; hence, complaint alleged only negligence, and judge's refusal to instruct on wilful misconduct was proper]; *Morgan v. Southern Pac. Trans. Co.* (1974) 37 C.A.3d 1006, 1015, 112 C.R. 695, citing the text [evidence was sufficient to show wilful misconduct].)

In *Levizon v. Harrison* (1961) 198 C.A.2d 274, 18 C.R. 284, decedent went to defendant's auto wrecking lot to purchase a part. Defendant had none in stock but told him he could have one off a used car. Defendant's helper H was out, plaintiff said he was in a hurry, so defendant showed him the car and gave him a wrench and bumper jack. Decedent raised the car, crawled under, and was killed when the car fell. There was evidence that blocks and a hydraulic jack were available and not furnished and that H observed decedent under the "teetering" car in a perilous position and merely said to decedent, "I wouldn't crawl under a car like that." (198 C.A.2d 279.) *Held*, it was error to grant a nonsuit. Plaintiff's contributory negligence in creating the dangerous condition was not a defense if defendant was guilty of wilful or reckless misconduct; and the evidence was sufficient for the jury to find that H, defendant's agent, with knowledge of the danger of the unbalanced car, consciously failed to act by departing from the scene after his brief remark. (198 C.A.2d 281, 282.) (See *Williams v. Carr* (1968) 68 C.2d 579, 583, 68 C.R. 305, 440 P.2d 505; *Pelletti v. Membrilla* (1965) 234 C.A.2d 606, 609, 44 C.R. 588.)

In *Palazzi v. Air Cargo Terminals* (1966) 244 C.A.2d 190, 52 C.R. 817, defendant C backed his truck into a loading dock, using side mirrors. Plaintiff, waiting there for merchandise, was struck. Upholding a judgment for defendant, the court used language indicating the type of conduct that might have been a sufficient showing of defendant's wilful misconduct: "It is not suggested or inferred that he failed to look behind at all or that he backed up suddenly or with excessive speed. It is not suggested either that customers of the store usually stood below the dock in the area where plaintiff was standing to await delivery of merchandise or that, if such was the practice, that defendant Canales knew or should have known of it." (244 C.A.2d 196.)

The Third Restatement is *contra*: The comparative negligence doctrine applies "even though the conduct of a defendant was reckless." (*Rest.3d, Torts: Apportionment of Liability* §7, Comment b.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Wilful Misconduct*. See 4 Harper, James & Gray 3d §22.6.



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C. Contributory Negligence.

1. In General.

g. When Doctrine Is Not Applicable.

2. Injury to Property.

6 Witkin Sum. Cal. Law Torts § 1303

[§ 1303] Injury to Property.

(1) *In General.* The doctrine of contributory negligence apparently has no place in actions for damages for injuries to property. In *Kleinclaus v. Marin Realty Co.* (1949) 94 C.A.2d 733, 211 P.2d 582, defendant, dredging a canal, pumped water onto property adjoining plaintiff's airfield. The water seeped into plaintiff's land, where it drained into a ditch, but the ditch was clogged and the accumulated water flooded the land. Negligence of defendant (in continuing to pump with knowledge of the flooding) was clear, but defendant contended that plaintiff's failure to clean out the ditch was contributory negligence. *Held*, the defense was unsound. (a) A person may use his or her own property for any lawful purpose, and cannot be required to curtail or change his or her method of use by reason of the wrongful acts of others; "it is not contributory negligence to neglect to take precautions to avoid future injury which can only occur as the result of another's negligence." (94 C.A.2d 738.) (b) The failure to clear the ditch was, however, relevant to the issue of minimizing damages, on which the lower court failed to find. The evidence showed that, some time after the flooding, plaintiff did clear the obstruction; the court should consider whether the delay was excusable, and, if so, the reasonable cost of the work should be recoverable as part of plaintiff's damages. (94 C.A.2d 739.)

Kleinclaus was followed in *Atlas Assur. Co. v. California* (1951) 102 C.A.2d 789, 229 P.2d 13. In the negligent operation of a railway, a freight car was thrown down an embankment. It fell against a power pole, broke it, and caused a short circuit, fire, and damage to the generating station. In this action by the power company's insurer, defendant sought to show the inadequacy of the substation equipment to handle a short circuit of this magnitude. *Held*, objections were properly sustained and judgment for plaintiff was affirmed; the doctrine of contributory negligence was out of place. Quoting from a United States Supreme Court decision the court said: "That one's uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly. It upsets the presumptions of law and takes from him the assumption and the freedom which comes from the assumption, that the other will obey the law, not violate it. It casts upon him the duty of not only using his own property so as not to injure another, but so to use his own property that it may not be injured by the wrongs of another." (102 C.A.2d 795.)

Kleinclaus emphasized the owner's right to make a lawful use of his or her own property without anticipating an invasion by others. It was distinguished on that ground in *Humboldt v. Shelly* (1963) 220 C.A.2d 194, 33 C.R. 758. Decedent negligently drove his truck over plaintiff county's bridge and demolished it. Plaintiff sued decedent's

administrator, who set up the defense of failure to maintain the bridge in a safe condition. *Held*, judgment for defendant affirmed; the county was bound to anticipate use of the bridge, and under simple concepts of fairness and justice the doctrine of contributory negligence should apply. (220 C.A.2d 203.)

(2) *Comparative Negligence*. In *Tint v. Sanborn* (1989) 211 C.A.3d 1225, 259 C.R. 902, the court held that comparative negligence may be asserted as a defense in an action for damages to real property resulting from the negligent maintenance of a nuisance. (211 C.A.3d 1233, 1234.) *Kleinclaus* and *Atlas Assur. Co.* were explained as decided on the alternative ground that the actions of the plaintiffs did not specifically involve nuisance claims arising from negligent conduct. (211 C.A.3d 1231, 1232.) (For a full discussion of *Tint*, see 13 *Summary* (10th), *Equity*, §168.)

West's Key Number Digest, Negligence k.502(1)

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2. Illustrations of Contributory Negligence.

a. Voluntary Exposure to Danger.

1. Rule and Illustrations.

6 *Witkin Sum. Cal. Law Torts* § 1304

[§ 1304] Rule and Illustrations.

(1) *In General.* It is contributory negligence for the plaintiff to voluntarily expose himself or herself to the danger that may arise from the defendant's negligence. (See *57B Am.Jur.2d* (2004 ed.), *Negligence* §§808, 812 et seq.; *33 A.L.R.4th* 790 [failure to reveal medical history to physician].) If the voluntary exposure is unreasonable, it is sometimes confusingly called "assumption of risk." (See *infra*, §§1336, 1337.)

The following situations are illustrative of contributory negligence:

(a) Riding with a driver known to be, or who should be known to be, intoxicated. (See *Jones v. Pacific Gas & Elec. Co.* (1930) 104 C.A. 47, 57, 285 P. 709; *Whitsett v. Morton* (1934) 138 C.A. 628, 630, 33 P.2d 54; *Knickrihm v. Hazel* (1935) 3 C.A.2d 721, 728, 40 P.2d 305; *Smith v. Maloney* (1938) 26 C.A.2d 97, 100, 78 P.2d 1034; *15 A.L.R.2d* 1165 [guest's knowledge that driver has been drinking as precluding recovery, under guest statute or equivalent common law rule].)

(b) Walking in darkened premises. (See *Globe Indem. Co. v. Hook* (1920) 46 C.A. 700, 703, 189 P. 797 [entering unlighted building at night to use open freight elevator, and failing to ascertain whether it was at the floor before stepping in]; *22 A.L.R.3d* 286 [proceeding in dark as contributory negligence]; *22 A.L.R.3d* 599 [outside path or walkway]; *23 A.L.R.3d* 365 [outside steps or stairs]; *23 A.L.R.3d* 441 [across exterior premises]; *24 A.L.R. 3d* 388 [along inside hall or passageway]; *25 A.L.R.3d* 446 [on inside steps]; *28 A.L.R.3d* 605 [interior].)

(c) Standing on a railroad platform in such close proximity to the train as to be within the line of its ordinary overhang. (*McKeown v. Northwestern Pac. R. Co.* (1937) 20 C.A.2d 324, 326, 66 P.2d 1250; *Gibson v. Southern Pac. Co.* (1955) 137 C.A.2d 337, 347, 290 P.2d 347.)

(d) Walking into a known open space between two platforms, misjudging the distance. (*Fletter v. San Francisco* (1952) 110 C.A.2d 820, 824, 244 P.2d 59.)

(e) Installing a boiler with only fire brick (a conductor of heat) separating it from a wood floor that caught fire. (

Pedroli v. Russell (1958) 157 C.A.2d 281, 285, 320 P.2d 873.)

(f) Assisting the owner of a stalled automobile to move it from a parking lot onto the highway, where a truck hit it. (*Vasquez v. Alameda* (1958) 49 C.2d 674, 676, 321 P.2d 1.) (See 3 A.L.R.3d 780 [liability of owner or operator of stalled or ditched car to person assisting in extricating or starting it]; 27 A.L.R.3d 144 [person engaged about stalled or disabled vehicle on highway].)

(g) Grasping a cable in contact with a live power wire, after being warned not to touch it. (*Bartuluci v. San Joaquin Light & Power Corp.* (1937) 21 C.A.2d 376, 385, 69 P.2d 440.)

(h) Going onto a public dump to salvage scrap, and suffering injury from a cave-in. (*Anderson v. Western Pac. R. Co.* (1936) 17 C.A.2d 244, 248, 61 P.2d 1209.)

(2) *Seat Belts*. A lively debate has centered around the question whether the failure of an automobile driver or passenger to use a seat belt constitutes contributory negligence. (See *Von Beltz v. Stuntman* (1989) 207 C.A.3d 1467, 1481, 1482, 255 C.R. 755, *infra*, §1338; 4 Cal. Western L. Rev. 199; 102 Harv. L. Rev. 925; 18 Hastings L. J. 613; 10 Santa Clara Lawyer 370; 38 So. Cal. L. Rev. 733; 52 So. Cal. L. Rev. 91 [Mandatory Seat Belt Use Legislation]; 1 U.S.F. L. Rev. 277; 92 A.L.R.3d 9 [failure to use seat belt as contributory negligence]; 85 A.L.R.4th 365 [motorcyclist's failure to wear helmet or other protective equipment]; 62 A.L.R.5th 537 [nonuse of seat belt as failure to mitigate damages].)

In *Truman v. Vargas* (1969) 275 C.A.2d 976, 80 C.R. 373, the court held that it was a question of fact for the jury, to be resolved from a consideration of all the circumstances and expert testimony about the efficacy of seat belts. (275 C.A.2d 982.) Under *Truman*, the burden is on the defendant to prove that, under the circumstances, the plaintiff should have used a seat belt, and what the consequences to him or her would have been had seat belts been used. In *Franklin v. Gibson* (1982) 138 C.A.3d 340, 188 C.R. 23, the court reaffirmed the *Truman* rule despite its rejection by a majority of American jurisdictions, but stressed the necessity of expert testimony on the consequences issue. (138 C.A.3d 344.) (See *Lara v. Nevitt* (2004) 123 C.A.4th 454, 458, 19 C.R.3d 865 [jury reasonably concluded that passenger in sleeper berth of truck was negligent for failing to wear seat belt, notwithstanding testimony that truckers did not usually wear restraints in sleeper berth and that there was no law requiring restraints; expert testimony, although unnecessary under circumstances, was helpful in proving that absence of restraints increased injury].)

The *Truman-Franklin* position was codified in the mandatory seat belt law (*Veh.C.* 27315, *supra*, §908): Violation does not constitute "negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation." (*Veh.C.* 27315(i); on failure to maintain seat belts in police cars as not constituting negligence per se for comparative fault purposes, see *Veh.C.* 27315.3, *supra*, §908.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 2 A.L.R.6th 429 [admissibility and use of evidence of nonuse of bicycle helmet].



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2. Illustrations of Contributory Negligence.

a. Voluntary Exposure to Danger.

2. Distinctions.

6 *Witkin Sum. Cal. Law Torts* § 1305

[§ 1305] Distinctions.

(1) *Different Risk*. One who assumes the risk of certain obvious dangers does not assume the risk of all dangers. (See *Perry v. First Corp.* (1959) 167 C.A.2d 359, 334 P.2d 299.) In *Gornstein v. Priver* (1923) 64 C.A. 249, 256, 221 P. 396, defendant contracted to carry a number of persons to a picnic in motor trucks. Plaintiff and other passengers sat on the floor of one machine with their legs hanging over the end. The driver of plaintiff's vehicle stopped it suddenly, and the following truck, which was negligently driven too closely, bumped into it, striking plaintiff's legs before she could draw them up. *Held*, plaintiff could recover. She assumed the risks of danger ordinarily incident to the position she took, such as swaying of the truck; hence, she might have had no remedy if bounced off during ordinary driving, just as a passenger in a railroad car who puts his or her arm or head outside the window and is struck by some object properly there cannot recover. But she did not assume the risk of any unusual danger created by defendant's negligence; and the driver of the second car, seeing her position, was bound to regulate the speed of his vehicle and the distance from the first car. (64 C.A. 256.)

(2) *Familiar Premises*. In *Russo v. Burch* (1964) 224 C.A.2d 403, 36 C.R. 682, plaintiff, leaving the flat where she took her music lesson, fell down the stairs. Defendant landlord had negligently failed to replace a burned-out light bulb. But the judge instructed that "[w]alking through an unlighted, unfamiliar area in the dark constitutes negligent conduct." *Held*, the instruction was erroneous. Plaintiff had been going to the place for 2 years and was familiar with the stairway. The jury could therefore have found that she acted reasonably in trying to descend because of her knowledge of the staircase based on her prior experience. (224 C.A.2d 413.)

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a. Voluntary Exposure to Danger.

3. Exception: Rescue of Person or Property.

aa. The Rescue Rule.

6 *Witkin Sum. Cal. Law Torts* § 1306

[§ 1306] The Rescue Rule.

"The cases have developed the rule that persons injured in the course of undertaking a necessary rescue may, absent *rash or reckless* conduct on their part, recover from the person whose negligence created the peril which necessitated the rescue." (*Solgaard v. Guy F. Atkinson Co.* (1971) 6 C.3d 361, 368, 99 C.R. 29, 491 P.2d 821; see *Henshaw v. Belyea* (1934) 220 C. 458, 461, 31 P.2d 348, *infra*, §1308; *Scott v. Texaco* (1966) 239 C.A.2d 431, 434, 48 C.R. 785, *infra*, §1307; *Bryant v. Glastetter* (1995) 32 C.A.4th 770, 38 C.R.2d 291, *supra*, §862; 57B Am.Jur.2d (2004 ed.), *Negligence* §§926, 927; 7 Proof of Facts 3d 415 [imminent peril inviting rescue attempt]; 91 A.L.R.3d 1202 [liability to person other than firefighter who attempts to control fire or to save life or property]; 75 A.L.R.4th 875 [applicability of comparative negligence principles to rescue doctrine].)

In *Solgaard v. Guy F. Atkinson Co.*, *supra*, defendant contractor, building a dam, violated safety orders in excavating for a spillway, and two of his employees were pinned in a trench by a landslide. Plaintiff doctor, who had contracted to furnish emergency medical care to employees on the job, went to the site and was escorted by another employee down a steep slope to the trapped men. On the way down, he slipped and fell, sustaining serious injuries, but nevertheless completed the task of treating the injured employees. In plaintiff's action for personal injuries, defendant offered the analogy of the firefighter who cannot complain of negligence in setting the fire because his very occupation exposes him to that risk (see *supra*, §845 et seq.). *Held*, judgment for plaintiff affirmed. He had agreed only to furnish medical aid to injured employees; he did not agree to expose himself to the risk of the steep, slippery embankment or any other hazards not necessarily inherent in the performance of his services. (6 C.3d 369.)

Three aspects of the rescue rule necessarily call for separate treatment:

(1) The normal requirement of a duty of care owed to the plaintiff (*supra*, §§835, 836) is subjected to a policy exception; i.e., the rescuer may sue, despite the fact that the defendant is negligent only toward a third party victim, not the rescuer. (See *Solgaard v. Guy F. Atkinson Co.*, *supra*, 6 C.3d 368.) Some decisions have gone so far as to allow recovery by the rescuer where the rescued person was the negligent defendant. (See 57A Am.Jur.2d (2004 ed.), *Negligence* §649; cf. 53 A.L.R.2d 1002 [standing in highway to warn motorists of danger].)

(2) The independent intervening act of the rescuer is not considered a superseding cause. "The theory which underlies the rescue rule is, in essence, that 'rescuers, as a class, are always foreseeable when the defendant's negligence endangers anyone.' ... Thus, if defendant creates a situation of peril for one person (the victim), defendant properly may be charged with having proximately caused not only that peril but also the rescue and any injury suffered during its course." (*Solgaard v. Guy F. Atkinson Co.*, *supra*, 6 C.3d 368.)

(3) The doctrine of contributory negligence is inapplicable; i.e., it is not a defense that the plaintiff voluntarily left a position of safety and exposed himself or herself to the danger. The question for the jury is whether under all the circumstances, including the extent of the peril, the amount of the risk, and the chance of success, the plaintiff acted reasonably or in so reckless a manner as to affect his or her right of recovery. (*Henshaw v. Belyea*, *supra*; *Solgaard v. Guy F. Atkinson Co.*, *supra*, 6 C.3d 368; *Lolli v. Market Street Ry. Co.* (1941) 43 C.A.2d 166, 169, 110 P.2d 436; *Paris v. Los Angeles Ry. Corp.* (1947) 78 C.A.2d 950, 952, 179 P.2d 1 [concurring opinion].) Mere negligence on the rescuer's part will not prevent recovery. (*Petersen v. Lang Trans. Co.* (1939) 32 C.A.2d 462, 467, 90 P.2d 94.)

West's Key Number Digest, Negligence k.510(4), 510(5)

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bb. Peril Not Created by Defendant.

6 *Witkin Sum. Cal. Law Torts* § 1307

[§ 1307] Peril Not Created by Defendant.

In its basic form, the rescue rule applies where a third person is placed in danger by the *defendant's* negligence.

In *Scott v. Texaco* (1966) 239 C.A.2d 431, 48 C.R. 785, defendant Renault driver negligently overturned his car in the left lane of a two-lane transition road connecting freeways. Plaintiff drove by, stopped in the same lane, got out to set flares, and stood there, shouting warnings to other cars. A Volkswagen driver stopped in the right lane in response to plaintiff's signal. Defendant Texaco driver, with a heavy load on his truck, negligently came around the turn too fast, saw both lanes blocked, but was unable to stop, and hit plaintiff, her car, and the Volkswagen. The jury verdict was for all defendants. *Held*, reversed for failure to instruct on the rescue rule.

The rule was clearly applicable against defendant Renault driver whose negligence created the original peril. Was it also applicable to the Texaco driver, not involved in the original negligence? In holding that it was, the court said of Texaco's argument: "We do not accept this narrow view ... which would focus attention on the person creating the original danger and not on the person of the rescuer. We think the force of the rule should properly be centered on the rescuer, for it is the quality of his conduct which is being weighed. Whether he was induced to enter a position of danger as a result of the act of a particular defendant or as a result of some outside force is inconsequential to the process of evaluating the quality of his behavior. ... The critical element in the rule lies in the rescuer's behavior in the face of the crisis which confronts him and not in the factors which brought him there. We hold the rescue rule applies to all defendants, regardless of the source and creation of the original peril." (239 C.A.2d 435.)

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cc. Rescue of Property.

6 *Witkin Sum. Cal. Law Torts* § 1308

[§ 1308] Rescue of Property.

There is some disagreement among the authorities where the danger is only to property. In *Henshaw v. Belyea* (1934) 220 C. 458, 31 P.2d 348, plaintiff ran from a safe place on the sidewalk in an attempt to save his employer's truck from slipping downhill by placing a block under a wheel, and his foot was crushed. The court approved the extension of the rescue doctrine to such a case. (220 C. 463.) (See 23 *Cal. L. Rev.* 110; 8 *So. Cal. L. Rev.* 159.)

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b. Forgetfulness of Known Danger.

6 *Witkin Sum. Cal. Law Torts* § 1309

[§ 1309] Forgetfulness of Known Danger.

Sometimes the plaintiff exposes himself or herself to a danger known but forgotten. The older cases took the view that, where the danger is familiar and easily discernible, the plaintiff's conduct is negligent, provided the forgetfulness is not induced by sudden peril, emergency, or other adequate disturbing cause. (*Jacobson v. Oakland Meat & Packing Co.* (1911) 161 C. 425, 430, 119 P. 653; *Reynolds v. Los Angeles Gas & Elec. Co.* (1912) 162 C. 327, 328, 122 P. 962; *Meindersee v. Meyers* (1922) 188 C. 498, 503, 205 P. 1078; *Benard v. Vorlander* (1948) 87 C.A.2d 436, 443, 197 P.2d 42 [workman carrying long steel rods swung them into contact with uninsulated power wire, of which he was aware and which was plainly marked "High Voltage"]; *Lazzarotto v. Atchison, Topeka & Santa Fe Ry. Co.* (1958) 157 C.A.2d 455, 461, 321 P.2d 29 [failure of auto driver to look for trains at familiar railroad track].)

Other cases find excuses for momentary forgetfulness. And, despite occasional decisions such as *Benard* and *Lazzarotto*, the theory that forgetfulness of a known danger is contributory negligence as a matter of law has been virtually abandoned.

In *Schleif v. Grigsby* (1927) 88 C.A. 174, 181, 263 P. 255, defendant negligently maintained a telephone wire strung over a highway so low that plaintiff, standing on the body of his loaded truck, was struck and knocked off. The evidence showed that, several months before, plaintiff had struck the same wire, and had observed it thereafter occasionally; but it was practically concealed by heavy foliage, and difficult to discern. *Held*, the jury might find that plaintiff was not contributorily negligent. (88 C.A. 183.)

In *Andre v. Allyn* (1948) 84 C.A.2d 347, 190 P.2d 949, nonslip cork covering on a ramp connecting floors of a high school building had been worn and slippery for over a year, and many children had slipped on it. Plaintiff, a 16-year-old boy, who knew of the condition but was greeting a friend and "wasn't thinking of it," fell, breaking his leg. *Held*, judgment of nonsuit reversed. "The courts are getting away from the principle established in *Reynolds v. Los Angeles Gas & Elec. Co.* ... to the effect that the sudden and disturbing cause which excuses forgetfulness of a known peril, and takes it out of the category of contributory negligence as a matter of law, must be an extreme situation of emergency." (84 C.A.2d 355.) *Spendlove v. Pacific Elec. Ry. Co.* (1947) 30 C.2d 632, 634, 184 P.2d 873, "illustrates the fact that in the last few years the tendency of the Supreme Court has been away from the stricter view of preceding years, where frequently contributory negligence was established as a matter of law, to the present situation in which

such cases 'are rare'." (84 C.A.2d 354.) "In our case, at the very least, the question of whether the accident could have resulted only from plaintiff's momentary forgetfulness and raising his hand to greet a friend is one upon which reasonable minds may differ, and therefore, one which must be left to the jury." (84 C.A.2d 352.)

In *Rogers v. Los Angeles Transit Lines* (1955) 45 C.2d 414, 289 P.2d 226, plaintiff, a passenger in defendant's bus on a hot day, rested his arm on the window sill with his elbow protruding outside 2 to 4 inches. Defendant L's truck was parked with an open door extending 4 inches beyond the fender. The bus driver went too close, and plaintiff's elbow was struck by the truck door. *Held*, sustaining a verdict for plaintiff, resting the arm on the sill was not contributory negligence as a matter of law, and the jury could conclude that plaintiff did not have actual knowledge and appreciation of the danger involved so as to consent to the risk. (45 C.2d 418.)

In *Ross v. San Francisco Unified School Dist.* (1953) 120 C.A.2d 185, 260 P.2d 663, plaintiff, a junior high school student in a machine shop class, buffed leather reins without goggles, and suffered an eye injury. *Held*, reversing judgment of nonsuit: (a) Defendant school district was negligent in failing to keep an adequate supply of unbroken goggles on hand and in failing to supervise the boy's use of the buffer or to warn of the danger of buffing long flexible reins. (b) The evidence was sufficient to sustain a finding of contributory negligence in that the boy admitted that he knew goggles should be worn, that he had been instructed on safety precautions, and that he had used the buffer with goggles 75 or 80 times. But this did not compel a finding of contributory negligence as a matter of law. Plaintiff's testimony, which the jury could believe, was that, although he searched, he found no good set of goggles. Moreover, knowledge of the existence of a danger, which might bar an adult, will not necessarily bar a child. (120 C.A.2d 190.) (See *Neel v. Mannings* (1942) 19 C.2d 647, 655, 122 P.2d 576, *supra*, §1125; *Austin v. Riverside Portland Cement Co.* (1955) 44 C.2d 225, 234, 282 P.2d 69; *De La Torre v. Valenzuela* (1951) 102 C.A.2d 586, 592, 228 P.2d 13; *Bickham v. Southern Calif. Edison Co.* (1953) 120 C.A.2d 815, 822, 263 P.2d 32; 57B Am.Jur.2d (2004 ed.), *Negligence* §818 et seq.; 74 A.L.R.2d 950 [momentary forgetfulness of danger as contributory negligence].)

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c. Negligent Failure To Discover Danger.

1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1310

[§ 1310] In General.

The most common form of contributory negligence is the plaintiff's failure to look around to discover a danger arising from the defendant's negligence. The many cases dealing with pedestrians walking along highways or crossing streets, and failing to keep a lookout for streetcars or automobiles or other pedestrians, are illustrations. (See 41 Proof of Facts 3d 65 [application of "plain view doctrine" to trip and fall cases]; 88 A.L.R.2d 1143 [collision between pedestrians]; BAJI, No. 5.50 et seq.; CACI, Nos. 710, 711.)

Negligence may consist not only in failure to look, but also in failure to *observe* what is in plain sight. In *White v. Davis* (1930) 103 C.A. 531, 542, 284 P. 1086, the court said: "Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury." (See *Burgesser v. Bullock's* (1923) 190 C. 673, 677, 214 P. 649; *Callahan v. Gray* (1955) 44 C.2d 107, 111, 279 P.2d 963; *Ross v. Pacific Elec. Ry. Co.* (1919) 39 C.A. 658, 660, 179 P. 538 [failure of person alighting from streetcar to look for other cars from opposite direction before attempting to cross street]; *Nickell v. Rosenfield* (1927) 82 C.A. 369, 374, 255 P. 760; *Long v. Barbieri* (1932) 120 C.A. 207, 210, 7 P.2d 1082; *Francis v. Riddle* (1936) 15 C.A.2d 282, 285, 59 P.2d 532; *Taha v. Finegold* (1947) 81 C.A.2d 536, 539, 184 P.2d 533 [discussing instructions on duty of pedestrian crossing street]; *Mitchell v. Kluber* (1961) 196 C.A.2d 18, 20, 16 C.R. 292 [collision of two pedestrians]; *Richardson v. Oliveri* (1966) 244 C.A.2d 369, 373, 53 C.R. 59, quoting the text.)

It has been said that there is a continuing duty of care while crossing a street, which in some circumstances may not be satisfied by a mere preliminary look before starting. (*Gibb v. Cleave* (1936) 12 C.A.2d 468, 471, 55 P.2d 938; *Fischer v. Keen* (1941) 43 C.A.2d 244, 249, 110 P.2d 693.)

But this theory is not carried to extremes. (See *King v. Unger* (1938) 25 C.A.2d 632, 634, 78 P.2d 255 [no further duty to look to left after traffic signal had stopped vehicles coming from that direction]; *Amendt v. Pacific Elec. Ry. Co.* (1941) 46 C.A.2d 248, 256, 115 P.2d 588 ["it was not incumbent upon him to oscillate his head like the pendulum of a

clock to avoid colliding with others ahead of him and at the same time to watch the approach of the car behind him"].) And in *Salomon v. Meyer* (1934) 1 C.2d 11, 14, 32 P.2d 631, and *Francis v. San Francisco* (1955) 44 C.2d 335, 339, 282 P.2d 496, it was held error to instruct, in unqualified form, that there is a continuing duty that is not met by looking once. Whether an ordinary and prudent person, crossing at that time and place and under the existing conditions of traffic, would have maintained such a constant lookout is a jury question.

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2. Reliance on Defendant's Duty of Care.

aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1311

[§ 1311] In General.

An important qualification of the rule governing failure to discover danger (*supra*, §1310) is that it is not contributory negligence to place reasonable reliance upon another's duty of care. "The general rule is that one to whom a duty of care is owing by another has the right to assume that the person who owes such duty will perform it; and in the absence of reasonable ground to think otherwise, it is not negligence on the part of the one to whom the duty is owing to assume that he will not be exposed to a danger which can come to him only through a violation of that duty by the person owing it." (*Gornstein v. Priver* (1923) 64 C.A. 249, 259, 221 P. 396; see *Laird v. T.W. Mather* (1958) 51 C.2d 210, 217, 331 P. 617 [elderly woman fell from lower step of store basement stairway where handrail ended; "it is not necessarily negligent to fail to watch for dangers in a business establishment when the ordinarily prudent person would not in fact expect to find the condition where it is, or where he is likely to have his attention distracted as he approaches it"]; *Hechler v. McDonnell* (1941) 42 C.A.2d 515, 517, 109 P.2d 426 [restaurant patron who saw employee mop under her seat could assume that it was mopped properly so as to dry surface]; *Shearer v. Pacific Gas & Elec. Co.* (1941) 43 C.A.2d 306, 308, 110 P.2d 690 [plaintiff who notified defendant of fallen power line, could assume 3 hours later that power had been turned off]; *Rice v. Southern Pac. Co.* (1967) 247 C.A.2d 701, 709, 55 C.R. 840, citing the text; 57B *Am.Jur.2d* (2004 ed.), *Negligence* §811 et seq.; BAJI, Nos. 3.13, 3.14; CACI, No. 411.) (On motorist's right to rely on signals at railroad crossing, see *infra*, §1322; cf. *Boots v. Potter* (1954) 122 C.A.2d 927, 933, 266 P.2d 176 [motorist was not entitled to rely absolutely on directions of flagman on construction job]; *Pekus v. Lake Arrowhead Boat Co.* (1967) 255 C.A.2d 864, 869, 63 C.R. 672 [although plaintiff may have relied on skill of expert welder, this did not preclude finding of contributory negligence in standing by operation and giving some directions].)

A person about to board or leave a train or streetcar has a right to assume that the railroad company will regulate car movements so that the tracks he or she must cross or stand by will be kept safe. (*MacGregor v. Pacific Elec. Ry. Co.* (1936) 6 C.2d 596, 600, 59 P.2d 123; *Lagomarsino v. Market Street Ry. Co.* (1945) 69 C.A.2d 388, 393, 158 P.2d 982; see BAJI, No. 6.55; CACI, No. 800.) And a person standing in a safety zone may rely on appearances, and need not anticipate that the rear of a turning streetcar will substantially overlap the zone. (*Brandenburg v. Pacific Gas & Elec. Co.* (1946) 28 C.2d 282, 287, 169 P.2d 909.)

Williamson v. Pacific Greyhound Lines (1949) 93 C.A.2d 484, 209 P.2d 146, held that a passenger in a bus was not bound to examine the condition of the overhead luggage rack. Hence, when she was injured by a falling suitcase, it was error to submit to the jury the question of contributory negligence, and a judgment for defendant was reversed. (93 C.A.2d 487.)

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2. Reliance on Defendant's Duty of Care.

bb. Employees.

6 *Witkin Sum. Cal. Law Torts* § 1312

[§ 1312] Employees.

An employee may rely on the employer to provide a safe place to work. (*Devens v. Goldberg* (1948) 33 C.2d 173, 180, 199 P.2d 943 [employee may rely on employer's duty to inspect working place, and need not inspect for defects]; *Pike v. Frank G. Hough Co.* (1970) 2 C.3d 465, 473, 85 C.R. 629, 467 P.2d 229; *Emery v. Pacific Tel. & Tel. Co.* (1941) 43 C.A.2d 402, 409, 110 P.2d 1079 [lineperson was not guilty of contributory negligence in failing to inspect telegraph pole for latent defects]; *Jacobs v. Bozzani Motors, Ltd.* (1952) 109 C.A.2d 681, 684, 241 P.2d 642.)

A laborer or foreperson employed on a public street may devote his or her attention to work, and need not keep a continuous lookout for approaching vehicles. (*State Comp. Ins. Fund v. Scamell* (1925) 73 C.A. 285, 290, 238 P. 780; *Mechem v. Crump* (1934) 137 C.A. 200, 203, 30 P.2d 568; *Hedding v. Pearson* (1946) 76 C.A.2d 481, 487, 173 P.2d 382 [worker engaged in welding on driveway within plant]; *Scott v. San Francisco* (1949) 91 C.A.2d 887, 889, 206 P.2d 45 [laborer working in street]; cf. *Milton v. Los Angeles Motor Coach Co.* (1942) 53 C.A.2d 566, 573, 128 P.2d 178 [excuse was not available to commercial photographer who set up his camera in the street].)

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cc. Pedestrians.

6 *Witkin Sum. Cal. Law Torts* § 1313

[§ 1313] Pedestrians.

A person alighting from a streetcar may assume that an automobile will be driven on the right hand side of the street. (*Harris v. Johnson* (1916) 174 C. 55, 58, 161 P. 1155.) A pedestrian traveling on a highway and keeping a reasonable lookout in the direction that he or she is going is not required, in the absence of a warning signal, to look back to discover vehicles approaching from the rear. (*Devecchio v. Ricketts* (1924) 66 C.A. 334, 340, 226 P. 11.) A pedestrian crossing a street may rely on a streetcar to sound its usual warning when approaching. (*Amendt v. Pacific Elec. Ry. Co.* (1941) 46 C.A.2d 248, 253, 115 P.2d 588.)

In *Kirk v. Los Angeles Ry. Corp.* (1945) 26 C.2d 833, 161 P.2d 673, plaintiff, with two companions, was part way across the street when the signal changed. One companion grasped her arm, her purse fell, she snatched at it and was struck by defendant's streetcar. The defense of contributory negligence as a matter of law was rejected. (a) A pedestrian, caught on the street when a traffic signal changes, may assume that due care will be exercised by the vehicles released; and that pedestrian, faced with the dilemma of continuing across or retreating, is not guilty of contributory negligence merely because his or her judgment appears to have been faulty. (26 C.2d 839.) (b) Under the emergency caused by the change of signal and the oncoming streetcar, her instinctive act in reaching for her purse (rescue of property) was not so unreasonable as to constitute a lack of due care. (26 C.2d 840.)

The same rule applies to street defects; i.e., a pedestrian may assume that the sidewalk is in reasonably safe condition, and need not be on a constant lookout for danger. "Even if a defect is one which might be visible to a person who is looking for such a condition, it does not follow that a pedestrian is guilty of negligence as a matter of law in failing to see and avoid it. ... Whether plaintiff made reasonable use of her faculties and whether she should have observed the condition which caused her injury were questions of fact." (*Peters v. San Francisco* (1953) 41 C.2d 419, 424, 260 P.2d 55.) (See BAJI, No. 8.52; CACI, Nos. 1007, 1008.)

The rule of the *Peters* case applies to the elderly and handicapped to the same extent as to others. Thus, in *Garber v. Los Angeles* (1964) 226 C.A.2d 349, 38 C.R. 157, plaintiff, walking in broad daylight with no distraction to prevent her seeing what was ahead, stumbled on a sidewalk depression; her bifocal glasses obscured her vision of what was

directly below her. *Held*, she was not guilty of contributory negligence as a matter of law; the city had a duty to keep its public ways "in a condition safe for use by persons such as plaintiff who suffer only from the infirmities common to most persons who have reached middle age and to many even younger." (226 C.A.2d 358, 359.)

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d. Vehicle Guest's Failure To Protest.

6 *Witkin Sum. Cal. Law Torts* § 1314

[§ 1314] Vehicle Guest's Failure To Protest.

(1) *General Rule.* The negligence of a driver is not imputed to his or her guest. (See *infra*, §1324.) But the guest himself or herself may be negligent. Thus, where the driver is obviously negligent or reckless, reasonable prudence may require the guest to warn the driver or protest, or in some cases to attempt to leave the car; and failure to do so presents a question for the jury whether this was actual contributory negligence on the part of the guest. (See *Marchetti v. Southern Pac. Co.* (1928) 204 C. 679, 681, 269 P. 529; *Curran v. Earle C. Anthony* (1926) 77 C.A. 462, 471, 247 P. 236; *Bencich v. Market Street Ry. Co.* (1937) 20 C.A.2d 518, 528, 67 P.2d 398; *Valencia v. San Jose Scavenger Co.* (1937) 21 C.A.2d 469, 472, 69 P.2d 480; *Miller v. Western Pac. R. Co.* (1962) 207 C.A.2d 581, 590, 24 C.R. 785; 17 Cal. L. Rev. 433; 1 So. Cal. L. Rev. 158; 84 A.L.R.2d 448 [guest in vehicle engaging in racing or similar contests]; 1 A.L.R.4th 556 [motor vehicle passenger's contributory negligence or assumption of risk where accident resulted from driver's drowsiness, physical defect, or illness].) (On riding with driver known to be intoxicated, see *supra*, §1304.)

(2) *Exception: Guest Unaware of Driver's Negligence.* A guest is under no duty to warn of an approaching train where the driver appears to be vigilant; nor is it proper for the guest, even where danger of collision is imminent, to interfere with the control of the vehicle. (See *Carpenter v. Atchison, Topeka & Santa Fe Ry. Co.* (1921) 51 C.A. 60, 62, 195 P. 1073; *Aungst v. Central Calif. Traction Co.* (1931) 115 C.A. 113, 118, 1 P.2d 56; cf. *Martindale v. Atchison, Topeka & Santa Fe Ry. Co.* (1948) 89 C.A.2d 400, 408, 201 P.2d 48 [extent of guest's duty is jury question]; BAJI, No. 3.72.)

In *Robinson v. Cable* (1961) 55 C.2d 425, 11 C.R. 377, 359 P.2d 929, plaintiffs, passengers in an automobile, were injured by the negligence of defendant and their own driver (decedent). The trial judge instructed that if any of the plaintiffs could by the exercise of reasonable care have discovered the approach of the other vehicle in time to warn the decedent and failed, they could not recover. *Held*, reversible error. The instruction put an unwarranted burden of care on plaintiff passengers to observe traffic and warn the driver. "In the absence of some fact brought to his attention which would cause a person of ordinary prudence to act otherwise, a person riding in an automobile is not charged with the responsibility of observing the condition of the traffic on the highway, and his mere failure to do so, without more, will not support a finding of contributory negligence." (55 C.2d 427.)

On the other hand, in *Pobor v. Western Pac. R. Co.* (1961) 55 C.2d 314, 324, 11 C.R. 106, 359 P.2d 474, plaintiff's

proposed instruction that an automobile rider "is not necessarily contributorily negligent" because he does not request the driver to stop at a railroad crossing was properly rejected as incomplete; it did not explain when the guest is not required to protest.

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a. In General.

1. Violation of Statute.

6 *Witkin Sum. Cal. Law Torts* § 1315

[§ 1315] Violation of Statute.

The plaintiff's violation of a statute or other regulation may be contributory negligence per se, and the rules are the same as those governing negligence per se (see *supra*, §871 et seq.). (*Mark v. Pacific Gas & Elec. Co.* (1972) 7 C.3d 170, 183, 101 C.R. 908, 496 P.2d 1276, *infra*, §1323, citing the text [ordinance making it unlawful to extinguish a public light was designed to protect public property and assure adequate lighting, not to prevent injury or death from electrocution; hence, plaintiff was not one of class of persons for whose protection it was enacted]; *Ferrell v. Santa Monica* (1972) 26 C.A.3d 374, 379, 102 C.R. 705 [intoxicated plaintiff asleep on beach, in violation of ordinance, run over by beach cleaning tractor]; *Rest.3d, Torts: Apportionment of Liability* §7, Comment d; 57B *Am.Jur.2d* (2004 ed.), *Negligence* §843 et seq.; *supra*, §§892, 893.)

West's Key Number Digest, Negligence k.222, 525

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a. In General.

2. Causation.

6 *Witkin Sum. Cal. Law Torts* § 1316

[§ 1316] Causation.

As in the cases previously discussed (see *supra*, §§895, 1299), causation is a frequent issue, and the plaintiff's violation of a statute or other regulation will not bar full recovery if the jury can find, on sufficient evidence, that it did not contribute to the injury. (See *Rest.3d, Torts: Apportionment of Liability* §7, Comment f; 46 *A.L.R.3d* 964 [antihitchhiking laws].)

In *Farole v. Eichman* (1952) 39 *C.2d* 822, 249 *P.2d* 261, plaintiff boy was riding on the handlebars of a bicycle in a pedestrian crosswalk. Defendant truck driver went into the intersection at 50 miles per hour without warning or applying the brakes and struck the bicycle. *Held*, judgment for plaintiff affirmed. An ordinance forbade riding on handlebars, plaintiff's violation was not excusable or justifiable, and it therefore constituted negligence per se. But he had a right to be in the crosswalk at the time and place, and the jury could find that the accident would have happened even if he were on foot, i.e., that his riding on handlebars was not a "proximately contributing cause" of the accident. (39 *C.2d* 884.)

In *Green v. Menveg Properties* (1954) 126 *C.A.2d* 1, 271 *P.2d* 544, plaintiff was an unregistered electrician working on replacement of floodlights without a permit for the work, and was injured when a defective lighting pole collapsed. *Held*, defendant owner or possessor was liable for negligent failure to inspect, and there was no causal connection between plaintiff's violation of law and the accident. "A rotten pole is as apt to fall with a registered electrician working under a permit as with one who is unregistered and holds no permit. The purpose of the code is to insure proper performance of electrical work in order that property owners be not defrauded, and that the public safety be preserved. ... There is no reason to believe that there would have been less likelihood of an accident if [plaintiff] had been a registered electrician and a permit had been issued." (126 *C.A.2d* 11.) (See *Sharick v. Galloway* (1937) 19 *C.A.2d* 693, 697, 66 *P.2d* 185 [plaintiff walking on right-hand side of highway; proximate cause was jury question].)

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a. In General.

3. Excuse.

6 *Witkin Sum. Cal. Law Torts* § 1317

[§ 1317] Excuse.

Violation of law may be excusable (*supra*, §890). In *Freeman v. Nickerson* (1946) 77 C.A.2d 40, 174 P.2d 688, plaintiff, engaged to sand a hardwood floor of an apartment, disposed of highly flammable oak dust by dumping it into the incinerator, in reliance on defendant owner's negligent assurance that there was no fire there. The resulting flash fire caused injuries to plaintiff, but defendant contended that plaintiff's contributory negligence in removing the hopper from the incinerator, thus exposing herself to the flames, was a bar, citing a statute prohibiting the removal of safety devices. The court held that if, as the jury believed, defendant had assured plaintiff that there was no fire burning, there was no danger to be anticipated in removing the hopper. (77 C.A.2d 50, 51.)

In *Espinoza v. Rossini* (1966) 247 C.A.2d 40, 55 C.R. 205, plaintiff and other farm laborers were in their employer's farm tractor and trailer combination, traveling to a location to pick almonds. An inexperienced driver was at the wheel. Plaintiff stood on the drawbar (trailer hitch) to warn the driver of vehicles approaching from the rear and to advise him on driving. Defendant, driving his car at 30 to 35 miles per hour, struck the tractor-trailer with such violence that the occupants were thrown to the road. The evidence of defendant's negligence was sufficient, but the trial judge granted a motion notwithstanding the verdict on the ground of contributory negligence per se. *Held*, reversed. (a) Riding on the unauthorized part of the vehicle, in violation of *Veh.C.* 21712, could have been justified under the exception in the statute, for the jury could infer that plaintiff was performing implied duties of his job. (247 C.A.2d 47.) (b) The impact was so severe that the jury might have concluded that the injuries would have occurred even if plaintiff had been in the trailer with the other occupants who were thrown out. (247 C.A.2d 49.)

An employee's violation of a safety order may be excused where the evidence fails to show his or her awareness of it. In *Morgan v. Stubblefield* (1972) 6 C.3d 606, 100 C.R. 1, 493 P.2d 465, plaintiff electricians were working on a rolling scaffold. It moved, a wheel fell into an unguarded hole, and the scaffold overturned, causing serious injuries. Defendants contended that plaintiffs were deliberately moving the scaffold, in violation of a safety order, and sought an instruction on contributory negligence per se. The court pointed out that most safety orders are directed to the employer's conduct; and, although some relate to employees, it cannot be presumed that a worker would be acquainted with numerous and complex regulations. "We hold here, without considering other possible factual concepts, that where there is no substantial evidence an employee was actually aware of a safety order directed to his conduct he may not be

deemed negligent as a matter of law for his violation of the order." (6 C.3d 615.) (See BAJI, No. 3.45, Use Note; CACI, No. 420 [rebuttal of presumption of negligence per se (violation excused)], No. 421 [rebuttal of presumption of negligence per se (violation by minor excused)].)

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b. Violation of Traffic Rules.

6 *Witkin Sum. Cal. Law Torts* § 1318

[§ 1318] Violation of Traffic Rules.

Contributory negligence per se is frequently found in violation of traffic rules laid down by the Vehicle Code or local ordinances. Examples are:

(1) Where city traffic is controlled by stop and go signals and bells, and a pedestrian crosses after the first bell that stops cross traffic, but before the second bell gives the "go" signal to the pedestrian. (*Leek v. Western Union Tel. Co.* (1937) 20 C.A.2d 374, 376, 66 P.2d 1232.)

(2) Where, on the open highways outside of business or residence districts, a pedestrian fails to walk close to the left-hand edge. (See *Veh.C.* 21956 [right side is acceptable if there is no safe way to cross]; *Buchignoni v. De Haven* (1937) 23 C.A.2d 76, 79, 72 P.2d 159; cf. *Sharick v. Galloway* (1937) 19 C.A.2d 693, 695, 66 P.2d 185 [may not be proximate cause of accident]; see 45 A.L.R.3d 658 [noncompliance with statute regulating pedestrian's travel along highway].)

(3) Where an automobile driver does not sound the horn before overtaking and passing another car. (*Moore v. Miller* (1942) 51 C.A.2d 674, 679, 125 P.2d 576.) (See BAJI, No. 5.50 et seq.; CACI, No. 700.)

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c. Passenger in Wrong Place.

6 *Witkin Sum. Cal. Law Torts* § 1319

[§ 1319] Passenger in Wrong Place.

Veh.C. 21712 makes it unlawful for a person (except an employee) to ride on any portion of a vehicle "not designed or intended for the use of passengers." Thus, riding on the steps or top of a streetcar, in violation of an ordinance, is contributory negligence per se. (*Combs v. Los Angeles Ry. Corp.* (1947) 29 C.2d 606, 609, 177 P.2d 293, supra, §891; *Schultheiss v. Los Angeles Ry. Corp.* (1936) 11 C.A.2d 525, 527, 54 P.2d 49.) But temporary use of the steps or platform, prior to alighting from the car, is not. (*Connard v. Pacific Elec. Ry. Co.* (1939) 14 C.2d 375, 377, 94 P.2d 567.)

In *Gerritsma v. Vogelaar* (1968) 266 C.A.2d 210, 72 C.R. 89, plaintiff went with defendant, her sister, to buy plywood sheets. They were loaded on top of defendant's Volkswagen microbus in the luggage carrier. On the return trip, plaintiff lay face down on the plywood, with arms stretched to hold the side rails of the luggage rack. Defendant drove at 25 miles per hour, in a breeze, and plaintiff fell off when the car passed a sharp curve in the road. *Held*, nonsuit affirmed. The argument that safety rules such as *Veh.C. 21712* apply only to defendants was answered by a quotation from Prosser: "[I]t seems clear that safety statutes, such as speed laws and traffic rules, usually are designed for the broad purpose of preventing accidents or dangerous situations, in which the plaintiff is quite as likely to be hurt as the defendant; and it is not difficult to discover a purpose to protect him by setting up a standard of his own conduct, the unexcused violation of which is negligence in itself." (266 C.A.2d 218.)

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d. Drunken Pedestrian.

6 Witkin Sum. Cal. Law Torts § 1320

[§ 1320] Drunken Pedestrian.

It has been held that mere drunkenness of a pedestrian who is struck by a negligent automobile driver is not contributory negligence as a matter of law, but presents a question for the jury whether it contributed to the injury. (*Coakley v. Ajuria* (1930) 209 C. 745, 749, 290 P. 33; see BAJI, No. 5.42.)

On the other hand, in *Cloud v. Market Street Ry. Co.* (1946) 74 C.A.2d 92, 168 P.2d 191, the decedent, while drunk, was walking or standing on a streetcar track and was struck by a car. In upholding a judgment for defendant, the court observed: "If there is any doubt whether a person who is dead drunk and unable to move can be guilty of contributory negligence ... there is none that an ambulatory person in a state of intoxication can be guilty of contributory negligence and is held to the standard of care of an ordinarily prudent person." (74 C.A.2d 97.)

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e. Jay Walking.

6 *Witkin Sum. Cal. Law Torts* § 1321

[§ 1321] Jay Walking.

In certain districts in cities, it is customary to provide marked crosswalks or lanes for pedestrians to cross streets. However, *Veh.C. 21954(a)* recognizes that the crosswalks might not be used, by providing that a pedestrian crossing outside the crosswalk must yield the right of way to vehicles "so near as to constitute an immediate hazard." On the other hand, some municipal ordinances have provided in substance that no pedestrian may cross outside the crosswalk. The issue of contributory negligence per se is thus complicated by the inconsistency between state and local law.

Where there is no ordinance and the Vehicle Code alone is invoked, or where the ordinance, like the Vehicle Code, merely requires the pedestrian to yield the right of way, it is not contributory negligence as a matter of law to cross outside the lane, and the question is for the jury. (See *Genola v. Barnett* (1939) 14 C.2d 217, 220, 93 P.2d 109; *Quinn v. Rosenfeld* (1940) 15 C.2d 486, 490, 102 P.2d 317; *Watkins v. Nutting* (1941) 17 C.2d 490, 495, 110 P.2d 384; *Shipway v. Monise* (1943) 59 C.A.2d 565, 571, 139 P.2d 60.) The situation is explained in *Mitrovitch v. Graves* (1938) 25 C.A.2d 649, 653, 78 P.2d 227, as follows: The pedestrian crossing outside the lane must yield the right of way, i.e., must stop and permit an automobile to pass; but this does not give vehicles a monopoly of streets or highways, or make the pedestrian venture out at his or her peril. Accordingly, where traffic was light, the street was wide and clear, and plaintiff stopped, but defendant unexpectedly changed course and struck him, recovery was possible. (25 C.A.2d 653.)

Where there is a prohibitory jaywalking ordinance, *Meinke v. Oakland Garage* (1938) 11 C.2d 255, 256, 79 P.2d 91, held that its violation, when causally connected with the injury, was a bar to recovery. In *Pipoly v. Benson* (1942) 20 C.2d 366, 369, 125 P.2d 482, this holding was substantially nullified, for the court reached the conclusion that a prohibitory ordinance was unconstitutional, because the Legislature, by *Veh.C. 21954(a)*, had occupied the field. But subsequently, in 1943, *Veh.C. 21961* was adopted to restore the *Meinke* rule. It states that the Vehicle Code "does not prevent local authorities from adopting ordinances prohibiting pedestrians from crossing roadways at other than crosswalks." (See 32 Cal. L. Rev. 341, 390.) However, *Veh.C. 21961* merely authorizes local regulations that prohibit crossing except at crosswalks. In other respects, the Vehicle Code is supreme, and a local ordinance on the same subject is void under the *Pipoly* rule. (*Holman v. Viko* (1958) 161 C.A.2d 87, 93, 326 P.2d 551.)

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f. Stop, Look, and Listen Rule Abrogated.

6 *Witkin Sum. Cal. Law Torts* § 1322

[§ 1322] Stop, Look, and Listen Rule Abrogated.

Following the holding of the United States Supreme Court in *Baltimore & Ohio R. Co. v. Goodman* (1927) 275 U.S. 66, 48 S.Ct. 24, 72 L.Ed. 167, a number of decisions established the following rule: A motorist approaching a railroad crossing where the view is obstructed must stop, look, and listen for trains, and, if necessary to obtain a sufficient view, must get out of the car. Failure to take these precautions is, under the rule, contributory negligence as a matter of law. (See *Koster v. Southern Pac. Co.* (1929) 207 C. 753, 761, 279 P. 788; *Young v. Pacific Elec. Ry. Co.* (1929) 208 C. 568, 576, 283 P. 61; *Stephenson v. Northwestern Pac. R. Co.* (1930) 208 C. 749, 752, 284 P. 913; 16 Cal. L. Rev. 238; 18 Cal. L. Rev. 203; 1 So. Cal. L. Rev. 395; 16 So. Cal. L. Rev. 40.)

A few years after *Goodman*, the United States Supreme Court virtually overruled it by holding that there is no absolute duty to get out and reconnoiter, and that the question of contributory negligence in these situations is for the jury. (*Pokora v. Wabash Ry. Co.* (1934) 292 U.S. 98, 54 S.Ct. 580, 78 L.Ed. 1149; see 23 Cal. L. Rev. 112.)

California decisions first relaxed the rule in situations where the driver relied on a flagman or signal that failed to work. In these cases, the issue of contributory negligence was properly left to the jury. (See *Sheets v. Southern Pac. Co.* (1931) 212 C. 509, 513, 299 P.71; *Sheets v. Southern Pac. Co.* (1934) 1 C.2d 408, 35 P.2d 121; *Crawford v. Southern Pac. Co.* (1935) 3 C.2d 427, 434, 45 P.2d 183; *Toschi v. Christian* (1944) 24 C.2d 354, 359, 149 P.2d 848; *Startup v. Pacific Elec. Ry. Co.* (1947) 29 C.2d 866, 870, 180 P.2d 896; *Spendlove v. Pacific Elec. Ry. Co.* (1947) 30 C.2d 632, 634, 184 P.2d 873; *Vaca v. Southern Pac. Co.* (1928) 91 C.A. 470, 475, 267 P. 346; *Robbins v. Southern Pac. Co.* (1929) 102 C.A. 744, 755, 283 P. 850; *Ogburn v. Atchison, Topeka & Santa Fe Ry. Co.* (1930) 110 C.A. 587, 591, 294 P. 491; *Lindsey v. Pacific Elec. Ry. Co.* (1931) 111 C.A. 482, 488, 296 P. 131; 19 Cal. L. Rev. 337; 16 So. Cal. L. Rev. 40, 45; 74 A.L.R. 2d 242 [motorist's liability for collision at intersection as affected by absence, displacement, or malfunctioning of traffic signal].)

In *Green v. Key System Transit Lines* (1953) 116 C.A.2d 512, 253 P.2d 780, plaintiff, driving a milk truck standing up, approached a blind intersection, slowed to 4 to 6 miles per hour, looked to the right and left, but did not stop, and was struck by a train. *Held*, judgment for plaintiff on verdict affirmed. The court referred to the "considerable change" in the law since the "unrealistic" doctrine was evolved and said: "A fair summation of the present rule with reference to the duty of a vehicle driver approaching a railroad crossing is that he is not necessarily required to stop. He is required

to look. However, he does not necessarily have to look from the best possible available spot as long as the spot selected gives him a reasonably assuring view of the track." (116 C.A.2d 519.) "Nor does the fact that his view down the track in the direction from which the train eventually appears, is somewhat obstructed, make him necessarily guilty of contributory negligence as a matter of law. Whether his failure to stop, the place from which he looks, and the character and extent of the obstruction, if any, are such that a reasonably prudent person would not have conducted himself as the driver did, are questions for the jury in determining whether he was guilty of contributory negligence as a matter of fact." (116 C.A.2d 519.)

In *Anello v. Southern Pac. Co.* (1959) 174 C.A.2d 317, 344 P.2d 843, plaintiff drove across the tracks and was struck by a freight train. The atmosphere was dry and clear, the area level, the tracks and highway straight, and no buildings or other structures were located within 900 feet of the crossing. *Held*, it was reversible error to give the strict stop, look, and listen instruction. (174 C.A.2d 322.) (See *Pennington v. Southern Pac. Co.* (1956) 146 C.A.2d 605, 615, 304 P.2d 22; *Martindale v. Mountain View* (1962) 208 C.A.2d 109, 122, 25 C.R. 148; 65 A.L.R.2d 703 [duty of person with physical handicap, such as impaired vision or hearing, approaching railroad crossing]; BAJI, Nos. 6.40, 6.41, 6.42, 6.43; CACI, No. 806.)

Sometimes the court, in rejecting the strict rule, finds evidence supporting the signal exception. Thus, in *Lucas v. Southern Pac. Co.* (1971) 19 C.A.3d 124, 96 C.R. 356, decedent drove his truck onto the tracks of defendant railroad and was killed by the train. Defendant argued that decedent had an unobstructed view for 32 feet before reaching the track, that he was only going 5 miles per hour, and that therefore he had time to see the train and stop. *Held*, judgment for plaintiff affirmed. The stop, look, and listen rule in its strict form of a positive rule of law is no longer recognized (19 C.A.3d 138); and here the record contained evidence to support the inference that decedent relied on a wigwag and whistle to warn him of approaching trains, and that neither signal was given (19 C.A.3d 139).

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g. Exposure to Electrical Shock.

6 *Witkin Sum. Cal. Law Torts* § 1323

[§ 1323] Exposure to Electrical Shock.

The danger of electrical shock is generally known. Hence, a person who, with this actual or presumed knowledge, disregards the risk and takes a position where he or she might come in contact with uninsulated wires carrying current or exposed terminals is often held guilty of contributory negligence as a matter of law. (See *Andrews v. Valley Ice Co.* (1914) 167 C. 11, 20, 138 P. 699; *Mark v. Pacific Gas & Elec. Co.* (1972) 7 C.3d 170, 180, 101 C.R. 908, 496 P.2d 1276, citing *Andrews* and *Rest.2d, Torts* §290, Illus. 1; 6 *Hastings L. J.* 396.)

However, in *Mark v. Pacific Gas & Elec. Co.*, *supra*, a split court held that the question was one of fact. C and three roommates rented an apartment. A bright street lamp maintained by defendant utility adjacent to their bedroom window disturbed their sleep. Acting upon their complaints, the city's street and lighting department directed defendant to examine the lamp, and an unsuccessful attempt was made by defendant to reduce the glare by a plastic canopy and black paint. Subsequently an automobile crashed into the pole, bending it toward the building. Defendant repaired the bulb and canopy, but left the bent pole 10 inches from the fire escape and 55 inches from the window, easily accessible to the tenants. C and his roommates thereafter, on several occasions, extinguished the light by removing the canopy and unscrewing the bulb. There was nothing in the appearance of the lamp to indicate any danger of high voltage, and defendant's employee, who screwed the bulb back, was unable to locate anyone to warn. One day C, attempting to remove the bulb, touched an uninsulated wire lead and was electrocuted. In plaintiffs' action for wrongful death, a nonsuit was granted in favor of defendant Co. *Held*, reversed. A duty of care, owed to the trespasser, was breached by failure to warn. (7 C.3d 178; see *supra*, §1096.) And contributory negligence was not established:

(a) *No contributory negligence per se.* A city ordinance made it unlawful for an unauthorized person to extinguish a public light. However, applying the elements of *Ev.C.* 669 (*supra*, §§873, 874), the purpose of the ordinance was to protect public property and assure adequate lighting, not to prevent injury or death from electrocution, and it was designed to protect the street-using public; hence, C was not within the class of persons for whose protection it was adopted. (7 C.3d 183, and footnote 10, citing the text.)

(b) *No contributory negligence as matter of law.* Although touching a high voltage power line has been held contributory negligence as a matter of law, there was no evidence that C knew or suspected that the street lamp carried high voltage current, and it was not shown that this was a matter of common knowledge. On retrial, defendant could

attempt to prove such common knowledge, but in the absence of this proof the question was for the jury. (7 C.3d 181.)

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4. Imputed Contributory Negligence.

a. Nature and Scope of Rule.

6 Witkin Sum. Cal. Law Torts § 1324

[§ 1324] Nature and Scope of Rule.

(1) *In General.* The principles governing imputed negligence determine imputed contributory negligence. A person's contributory negligence will be imputed to the plaintiff so as to bar his or her recovery only where the plaintiff would have been liable for that person's negligence. The important situations are *agency*, *joint enterprise*, and *partnership* (partners being liable as mutual agents). (See generally *Bryant v. Pacific Elec. Ry. Co.* (1917) 174 C. 737, 742, 164 P. 385; *Pope v. Halpern* (1924) 193 C. 168, 174, 223 P. 470; *Peccolo v. Los Angeles* (1937) 8 C.2d 532, 537, 66 P.2d 651; *Williamson v. Fitzgerald* (1931) 116 C.A. 19, 24, 2 P.2d 201; *Wessling v. Southern Pac. Co.* (1931) 116 C.A. 455, 457, 3 P.2d 25; *Collins v. Graves* (1936) 17 C.A.2d 288, 294, 61 P.2d 1198; 57B Am.Jur.2d (2004 ed.), *Negligence* §1121 et seq.; 53 A.L.R.3d 604 [agency]; BAJI, No. 13.41.)

The negligence of another person is generally imputed to a plaintiff "whenever the negligence would have been imputed had the plaintiff been a defendant." (*Rest.3d, Torts: Apportionment of Liability* §5.) This provision adopts the so-called both ways rule, i.e., when a party would be responsible as a defendant for the negligence of a third person, the negligence of the third person is imputed to the party as a plaintiff. (*Rest.3d, Torts: Apportionment of Liability* §5, Comment b.) When negligence is imputed, the party who committed the tortious act or omission and the party to whom liability is imputed are treated as a single unit for the assignment of responsibility under the comparative negligence doctrine. (*Rest.3d, Torts: Apportionment of Liability, Comment* §7, Comment j.)

(2) *Distinction: Action Between Joint Adventurers.* The contributory negligence of one joint adventurer will bar the right of the other against a negligent third party, but where one nonnegligent joint adventurer sues for injuries resulting from the other joint adventurer's negligence, he or she can recover. To impute negligence to the plaintiff in this situation would permit the guilty defendant to gain protection from his or her own wrong. (*Ledgerwood v. Ledgerwood* (1931) 114 C.A. 538, 542, 300 P. 144; *Williamson v. Fitzgerald* (1931) 116 C.A. 19, 24, 2 P.2d 201; see *Roberts v. Craig* (1954) 124 C.A.2d 202, 209, 268 P.2d 500 [restating rule as alternative ground of recovery, assuming that parties were engaged in a joint enterprise]; 20 Cal. L. Rev. 458.)

(3) *Distinction: Guest in Vehicle.* A guest in a vehicle, including a person jointly engaged with the driver in a pleasure excursion, without a common purpose or right of control over the operation of the vehicle, is not affected by the contributory negligence of the driver. (*Pope v. Halpern* (1924) 193 C. 168, 173, 223 P. 470; *Hoover v. Striegel*

(1950) 99 C.A.2d 833, 839, 222 P.2d 963.) (On guest's failure to protest, see supra, §1314.)

(4) *Driving With Permission*. The owner of a motor vehicle is liable for the negligence of a driver with permission (see supra, §1260), and contributory negligence of the driver was likewise imputed to the owner under the former provision of *Veh.C. 17150* that negligence "shall be imputed to the owner for all purposes of civil damages." (See *Milgate v. Wraith* (1942) 19 C.2d 297, 299, 121 P.2d 10.) This provision was deleted in 1967, and in *Hertz Corp. v. Pippin* (1974) 38 C.A.3d 796, 113 C.R. 698, the court concluded that the legislative intent was to reinstate the original common law rule allowing an innocent bailor to recover from a tortfeasor for damages to a vehicle despite the contributory negligence of its bailee. (38 C.A.3d 799.)

The negligence of another person is not imputed to a plaintiff "solely because of the plaintiff's ownership of a motor vehicle or permission for its use by the other person." (*Rest.3d, Torts: Apportionment of Liability* §5.) However, this provision "does not preclude proving that the owner of the motor vehicle was independently negligent, such as by negligently entrusting the vehicle to the operator." (*Rest.3d, Torts: Apportionment of Liability* §5, Comment c.)

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C. Contributory Negligence.

4. Imputed Contributory Negligence.

b. What Constitutes Joint Enterprise.

6 *Witkin Sum. Cal. Law Torts* § 1325

[§ 1325] What Constitutes Joint Enterprise.

Although some recreational or social purposes may be the subject of a joint enterprise (see *supra*, §1235), usually there must be a business purpose. Thus, a minister, riding with another minister to mail tracts prepared for a Sunday School teachers' convention, was held not engaged in a joint enterprise with the other. (*Wessling v. Southern Pac. Co.* (1931) 116 C.A. 455, 457, 3 P.2d 25.) And plaintiff, riding home with her fiance' after a trip made to file a notice of intention to marry, was held not barred by his contributory negligence. (*Morrissey v. Kirkelie* (1935) 5 C.A.2d 183, 184, 42 P.2d 361.) (See *Campagna v. Market Street Ry. Co.* (1944) 24 C.2d 304, 309, 527, 149 P.2d 281 [plaintiff, adult son assisting father in vegetable delivery business in exchange for living expenses and pocket money, was employee, not engaged in joint enterprise]; *Clark v. Janss* (1940) 39 C.A.2d 523, 527, 103 P.2d 175; 12 Cal. L. Rev. 238; 14 Cal. L. Rev. 421; 57B Am.Jur.2d (2004 ed.), *Negligence* §1136 et seq.)

In *Roberts v. Craig* (1954) 124 C.A.2d 202, 268 P.2d 500, defendant C had an "instruction permit" under *Veh.C.* 12509, allowing her to drive when "accompanied by, and under the immediate supervision of," a licensed operator. C had to go on a business trip, and R, a licensed driver, agreed to go as an accommodation. R was injured through the negligent driving of C. *Held*, judgment for plaintiff R affirmed. Defendant's theory was that under the statute, the licensed operator shared control of the vehicle, thus fulfilling the primary test of joint enterprise (*supra*, §1235). But the court held that the operator supervises the *driver*, not the vehicle, and that neither the statute nor common law established a joint enterprise under these circumstances. (124 C.A.2d 208.)

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4. Imputed Contributory Negligence.

c. Rule Is Inapplicable to Domestic Relationships.

6 *Witkin Sum. Cal. Law Torts* § 1326

[§ 1326] Rule Is Inapplicable to Domestic Relationships.

The relationships of parent and child or husband and wife in themselves furnish no basis for imputation of contributory negligence. (See *Harpst v. Kirkpatrick* (1972) 26 C.A.3d 482, 486, 102 C.R. 621; 57B Am.Jur.2d (2004 ed.), *Negligence* §1143 et seq.; BAJI, Nos. 3.60, 3.61, 3.62, 3.63.)

(1) *Husband and Wife*. In *Workman v. San Diego* (1968) 267 C.A.2d 36, 72 C.R. 509, plaintiff, an elderly wife getting around only in a wheelchair, visited defendant's Sea World. While her husband was propelling the wheelchair, it dropped at an abrupt curb, injuring her. *Held*, it was error to instruct that the husband was her agent and that contributory negligence on his part was imputable to her. The husband was neither an agent nor an employee, and the parties were not engaged in a joint enterprise. The relationship was simply that of husband and wife, with the husband performing a duty of care arising from that relationship. (267 C.A.2d 40.) The former community property rule denying recovery for a wife's injuries where the husband was guilty of contributory negligence has been changed by statute. (See supra, §725; 11 *Summary* (10th), *Community Property*, §186.)

(2) *Parent and Child*. There is no imputation of negligence even though the parent fails to control and protect the child, as where the parent permits the child to roam about the streets. The child, suing in his or her own right, may recover in these situations. (*Zarzana v. Neve Drug Co.* (1919) 180 C. 32, 35, 179 P. 203; see *Bowen v. Kizirian* (1930) 105 C.A. 286, 290, 287 P. 570.)

If, however, the parent sues for damages for loss of services of the child, the parent's negligence in permitting the child to play in dangerous places on the street will affect the parent's recovery. (*Seperman v. Lyon Fire Proof Storage Co.* (1929) 97 C.A. 654, 658, 275 P. 980.) And the parents' negligent supervision may become relevant in determining whether the defendant is in fact negligent, and whether causation is established. (*Akins v. Sonoma* (1967) 67 C.2d 185, 198, 60 C.R. 499, 430 P.2d 57; see *Cardenas v. Turlock Irr. Dist.* (1968) 267 C.A.2d 352, 360, 73 C.R. 69, supra, §274 [following *Seperman*; parents left young children unattended, they went swimming in irrigation canal and drowned]; *Smith v. Americana Motor Lodge* (1974) 39 C.A.3d 1, 8, 113 C.R. 771; 62 A.L.R.3d 541 [permitting child to walk to school unattended].)

(3) *Person Gratuitously Caring for Child*. The negligence of a third person gratuitously rendering the familial

service of care at a parent's request will not be imputed to the parent who brings an action for injury or death of the child. (*Casas v. Maulhardt Buick* (1968) 258 C.A.2d 692, 703, 66 C.R. 44; *Harpst v. Kirkpatrick*, *supra* [distinguishing cases on hired nurse or babysitter, where employment relation is created].)

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1. Nature and Purpose of Doctrine.

6 *Witkin Sum. Cal. Law Torts* § 1327

[§ 1327] Nature and Purpose of Doctrine.

(1) *Criticisms of Contributory Negligence Defense.* The objections to the traditional "all or nothing" doctrine of contributory negligence (see *supra*, §1295) are summed up in Prosser & Keeton as follows: "It places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage; the plaintiff's deviation from the community standard of conduct may even be relatively slight, and the defendant's quite extreme. The injured person is in all probability, for the very reason of his injury, the less able of the two to bear the financial burden of his loss, and the answer of the law to all this is that the defendant goes scot free of all liability, and the plaintiff bears it all. Nor is it any answer to say that the contributory negligence rule promotes caution by making the plaintiff responsible for his own safety. It is quite as reasonable to say that it encourages negligence, by giving the defendant reason to hope that he will escape the consequences. Actually any such idea of deterrence is quite unrealistic. In the usual case, the negligence on both sides will consist of mere inadvertence or inattention, or an error in judgment, and it is quite unlikely that forethought of any legal liability will in fact be in the mind of either party. No one supposes that an automobile driver, as he approaches an intersection, is in fact meditating upon the golden mean of the reasonable person or ordinary prudence, and the possibility of tort damages, whether for himself or for another." (See *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 812, 119 C.R. 858, 532 P.2d 1226, *infra*, §1329; 21 U.C.L.A. L. Rev. 1594.)

(2) *Comparative Negligence Doctrine.* Some states responded to these criticisms legislatively by enacting comparative negligence statutes. Other states, including California, adopted the doctrine by judicial decision. (See 4 Harper, James & Gray 2d §22.15; Dobbs, *The Law of Torts* §201 et seq.; 57B *Am.Jur.2d* (2004 ed.), *Negligence* §1128 et seq.; C.E.B., *Tort Damages* 2d, §15.2 et seq.; 21 *Am.Jur. Trials* 715 [comparative negligence defense]; 41 *Cal. L. Rev.* 1; 78 *A.L.R.3d* 339 [modern development of comparative negligence doctrine having applicability to negligence actions generally]; *infra*, §§1329, 1330.)

The three basic types of comparative negligence systems have been described in Prosser and Keeton as pure, modified, and slight-gross. Under the pure form (adopted in California; see *infra*, §1329), the plaintiff's contributory negligence reduces damages in proportion to his or her fault. The system in this form is said to be designed to compensate an injured party for all of the harm attributable to the wrongdoing of the defendant; when multiple defendants are involved, all are liable to the plaintiff for their respective shares of the loss, even though some may have been less negligent than the plaintiff.

(3) *Uniform Act*. The Uniform Comparative Fault Act, 12 U.L.A. (Master Ed.), p. 123, was approved by the National Conference of Commissioners on Uniform State Laws in 1977, and has been adopted in two states. It approves the pure form and seeks to solve the major problems involved in application of the doctrine. (See Prefatory Note, and 14 *Pacific L. J.* 835.)

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(2) *Comparative Negligence Doctrine*. See 4 Harper, James & Gray 3d §22.15.

(3) *Uniform Act*. See Uniform Comparative Fault Act, 12 U.L.A. (Master Ed.), p. 121.



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2. Restatement 3d.

6 *Witkin Sum. Cal. Law Torts* § 1328

[§ 1328] Restatement 3d.

Rest.3d, Torts: Apportionment of Liability adopts comparative *responsibility*. A plaintiff's negligence "that is a legal cause of an indivisible injury to the plaintiff reduces the plaintiff's recovery in proportion to the share of responsibility the factfinder assigns to the plaintiff." (*Rest.3d, Torts: Apportionment of Liability* §7.) This replaces the rule of contributory negligence as an absolute bar to plaintiff's recovery provided in *Rest.2d, Torts* §467. (*Rest.3d, Torts: Apportionment of Liability* §7, Comment a.)

The comparative responsibility doctrine also governs the negligence of another for whose negligence the plaintiff is responsible. (*Rest.3d, Torts: Apportionment of Liability* §7.)

An injury is indivisible if "the plaintiff and each relevant person caused the entire injury." (*Rest.3d, Torts: Apportionment of Liability* §7, Comment e.)

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3. Adoption of Doctrine in California.

6 *Witkin Sum. Cal. Law Torts* § 1329

[§ 1329] Adoption of Doctrine in California.

In *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, the court abrogated the complete defense of contributory negligence and substituted a judicially created system of comparative negligence. Plaintiff, driving north, made a left turn 70 feet before an intersection in order to enter the driveway of a service station. Defendant P, driving a cab south on the same street, came over the crest of a hill, passed through the intersection, and struck the rear of plaintiff's car, causing personal injury and property damage. The trial judge, sitting without a jury, found that (a) defendant P was traveling too fast at the time and place (30 miles an hour), and entered the intersection while the traffic light was yellow; (b) plaintiff's left turn across the southbound lanes was made when a vehicle was approaching from the opposite direction so close as to constitute an immediate hazard. He therefore concluded that plaintiff was barred by contributory negligence and entered judgment for defendants. *Held*, reversed.

(a) *Traditional doctrine of "all or nothing" contributory negligence.* The doctrine that any negligence of the plaintiff that is a legally contributing cause bars recovery is rooted in the principle that one should not recover for damages brought on oneself. It has been the law of California since the state began, is embodied in the Second Torts Restatement (§§463, 467), and has weathered attempts in California to change it by legislation or judicial decision. (13 C.3d 809, 810.) It has, however, been criticized by law writers as harsh and inequitable because it fails to distribute responsibility in proportion to fault. (13 C.3d 810, 811.) Also, practical experience shows that juries often, in a haphazard and unsatisfactory manner, do by compromise allow recovery in cases of contributory negligence. (13 C.3d 811.) Thus, logic, practical experience, and fundamental justice counsel against retention of the doctrine. (13 C.3d 812.)

(b) *Abrogation of doctrine in other states.* In 25 states, legislation has provided for assessment of liability in proportion to fault (negligence). (13 C.3d 812, footnote 6.) In Federal Employees' Liability Act cases since 1908 and Jones Act cases since 1920, the same change has taken place. (See 2 *Summary* (10th), *Workers' Compensation*, §123.) And in 1973, Florida judicially abrogated the contributory negligence defense. (13 C.3d 812.)

(c) *Major argument against abrogation.* The chief obstacle to a judicial institution of a system of comparative negligence was the codification of the contributory negligence principle in C.C. 1714, a part of the original 1872 code and never amended. But defendants' contention that any change in the rule must come from the Legislature is unsound:

(1) The Civil Code was thought to have the advantages of codification of unwritten law as well as of systematic

revision of statute law. But its brevity led to uncertainty whether it should be regarded as the exclusive or primary source of the law of private rights; and eventually the contrary position was taken by our Supreme Court. "The Civil Code was not designed to embody the whole law of private and civil relations, rights and duties; it is incomplete and partial; and except in those instances where its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning a particular subject matter, a section of the code purporting to embody such doctrine or rule will be construed in light of common-law decisions on the same subject." (13 C.3d 815.)

(2) The doctrine of contributory negligence is of common law origin. The Code Commissioners, in drafting C.C. 1714 (see *supra*, §833), intended simply to insure that the contributory negligence rule adopted would not be the harsh New York version but the rule as mitigated by the emerging doctrine of last clear chance. (13 C.3d 820.) The Legislature did not intend to restrict the courts from further development of these concepts according to evolving standards of duty, causation, and liability. Thus, although the statute expressly speaks of causation in terms of actual cause or cause in fact, this has not prevented judicial development of the twin concepts of proximate causation and duty of care, and has not hindered development of special rules permitting a finding of liability in the absence of direct evidence of causation. "By the same token we do not believe that the general language of section 1714 dealing with defensive considerations should be construed so as to stifle the orderly evolution of such considerations in light of emerging techniques and concepts. On the contrary we conclude that the rule of liberal construction ... together with the code's peculiar character as a continuation of the common law ... permit if not require that section 1714 be interpreted so as to give dynamic expression to the fundamental precepts which it summarizes." (13 C.3d 822.)

(d) *Practical difficulties in judicial adoption of comparative negligence doctrine.* An additional argument against abrogation stresses four main difficulties in implementing a judicial abrogation of contributory negligence:

(1) *Multiple parties.* When not all the responsible parties are before the court, it may be difficult for the jury to evaluate relative negligence, and the evaluation would not be *res judicata* in a subsequent suit against the absent wrongdoer; also problems of contribution and indemnity among joint tortfeasors can arise. (13 C.3d 823.) However, these problems are not involved in the instant case and they will not be considered at this time. (13 C.3d 826.)

(2) *Process of factfinding.* Assigning a specific percentage factor to the degree of negligence attributable to a particular party can be difficult; and this may involve personal attitudes and prejudices of jurors, and induce resort to a quotient verdict. (13 C.3d 824.) "These inherent difficulties are not, however, insurmountable. Guidelines might be provided the jury which will assist it in keeping focused upon the true inquiry ... and the utilization of special verdicts or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence." (13 C.3d 824.)

(3) *Last clear chance and assumption of risk.* The status of these doctrines calls for a definition of the specific form of comparative negligence doctrine to be adopted. The better reasoned position is that when a true comparative negligence doctrine is adopted, the need for last clear chance as a palliative disappears and its retention results only in a windfall to the plaintiff. In the overlap area where assumption of risk is merely a variant of contributory negligence, it should be merged into the general scheme of assessment of liability in proportion to fault. (13 C.3d 824, 825.)

(4) *Wilful misconduct.* This is at present regarded as different in kind and not subject to the defense of contributory negligence; but in reality, it is a rule of comparative fault, and a comprehensive system of comparative negligence should allow apportionment of damages in cases of wilful misconduct falling short of intentional acts. (13 C.3d 825, 826.)

As to all of these practical objections, the comments set forth above should be sufficient guidance to enable trial courts to meet and resolve particular problems as they arise: "Our decision in this case is to be viewed as a first step in what we deem to be a proper and just direction, not as a compendium containing the answers to all questions that may be expected to arise." (13 C.3d 826.)

(e) *Precise form of comparative negligence now adopted.* The "50%" system is rejected. This calls for apportionment only up to the point where the plaintiff's negligence is equal to or greater than that of the defendant; after that, the plaintiff is barred from any recovery on the theory that one more at fault should not recover from one less at fault. But this view is strongly criticized by scholars as distorting the very principle of apportionment according to the extent of negligence, and leading to many appeals on the crucial issue whether the plaintiff was 49% or 50% responsible. (13 C.3d 827, 828.) The "pure" form, favored by most scholars and commentators, apportions liability in all cases; and this is adopted here. (13 C.3d 828, 829.)

(f) *Conclusion.* "For all of the foregoing reasons we conclude that the 'all-or-nothing' rule of contributory negligence as it presently exists in this state should be and is herewith superseded by a system of 'pure' comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the fault of the persons whose negligence has brought such damage about. Therefore, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of fault attributable to that person. The doctrine of last clear chance is abolished, and the defense of assumption of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; both of these are to be subsumed under the general process of assessing liability in proportion to fault. Pending future judicial or legislative developments, the trial courts of this state are to use broad discretion in seeking to assure that the principle stated is applied in the interest of justice and in furtherance of the purposes and objectives set forth in this opinion." (13 C.3d 828, 829.)

Two justices joined in a dissent from the substantive holding, contending that abrogation of contributory negligence was a function of the Legislature and accusing the majority of "judicial chauvinism." (13 C.3d 834.)

The *Li* opinion and its problems has been the subject of much critical comment. (See 4 Harper, James & Gray 2d §22.15 et seq.; 65 Cal. L. Rev. 4, 239; 7 Pacific L. J. 747, 770; 50 So. Cal. L. Rev. 73, 1029; 8 Southwestern U L. Rev. 1; 11 U.S.F. L. Rev. 405, 541; 8 West L.A. L. Rev. 23.)

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Critical comment: See 4 Harper, James & Gray 3d §22.15 et seq.



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4. Limited Retroactivity.

6 Witkin Sum. Cal. Law Torts § 1330

[§ 1330] Limited Retroactivity.

Li v. Yellow Cab Co. (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, supra, §1329, laid down the following rules to govern application of the new doctrine of comparative negligence to pending cases:

(a) *Present plaintiff: Retroactive and applicable.* Sometimes considerations of fairness and public policy require a purely prospective operation of a holding, as in *Westbrook v. Mihaly* (1970) 2 C.3d 765, 87 C.R. 839, 471 P.2d 487, 7 Summary (10th), *Constitutional Law*, §308. On the other hand, to apply a new rule to the litigants who seek it provides an incentive in future cases for parties to raise issues involving renovation of unsound or outmoded legal doctrines. Hence, although the present litigant may be a chance beneficiary of a rule otherwise made prospective, sound principles call for applying the new rule to this case. (13 C.3d 829, 830.) (See concurring opinion, 13 C.3d 831, 832, approving this result, but asserting that the majority has impliedly overruled *Westbrook* and similar cases in which retroactive application was denied to litigants who helped develop new rules of law.)

(b) *Cases in which trial not begun before Li decision final: Retroactive and applicable.* (13 C.3d 829.)

(c) *Cases in which the trial was begun before that date: Prospective and not applicable.* However, if the judgment is reversed on appeal for other reasons, the new rule applies on the retrial. (13 C.3d 829.) (See 78 A.L.R.3d 421 [judicial adoption of comparative negligence as applicable retrospectively]; on application of the doctrine on retrial, see *Hasson v. Ford Motor Co.* (1977) 19 C.3d 530, 551, 138 C.R. 705, 564 P.2d 857.)

The *Li* rule was held inapplicable to a case in which the defendant's demurrer was sustained without leave to amend on the contributory negligence defense and a dismissal was entered prior to the effective date of *Li*; i.e., the hearing on demurrer was a "trial." (See *Venzor v. Santa Barbara Elks Lodge* (1976) 56 C.A.3d 209, 214, 128 C.R. 353; *Kindt v. Kauffman* (1976) 57 C.A.3d 845, 862, 129 C.R. 603; *Rose v. International Brotherhood of Electrical Workers* (1976) 58 C.A.3d 276, 279, 129 C.R. 736; 37 A.L.R.3d 1438 [retrospective application of state statute substituting rule of comparative negligence for that of contributory negligence].)

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5. Joint and Several Liability Retained.

6 *Witkin Sum. Cal. Law Torts* § 1331

[§ 1331] Joint and Several Liability Retained.

In *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, an action by a participant in a cross-country race against the American Motorcycle Association (AMA) and the Viking Motorcycle Club, defendant AMA contended that *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, *supra*, §1329), undermined the theory of joint and several liability of concurrent tortfeasors, and established a new rule of proportionate liability under which each concurrent tortfeasor would be liable only for a portion of plaintiff's recovery, determined on a comparative fault basis. *Held*, this contention is unacceptable.

(a) In some cases, it is impossible to determine whether a particular concurrent tortfeasor's negligence would alone have caused an indivisible injury, and a defendant would have no equitable claim to be relieved from liability to the injured plaintiff, because some other tortfeasor's negligence may also have caused the same harm. "In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury." (20 C.3d 589.)

(b) Abandonment of the joint and several liability rule is not warranted by the claim that a plaintiff is no longer innocent. (1) In many instances, a plaintiff will be entirely free from negligence; yet, under AMA's theory, he or she would be forced to bear a portion of the loss if any one of the concurrent tortfeasors should be financially unable to satisfy his or her share of the damages. (20 C.3d 589.) (2) Even if the plaintiff is partially at fault, his or her culpability is not equivalent to that of a defendant; i.e., the plaintiff's negligence is only a failure to use due care for his or her own safety, which is not tortious, while a defendant's negligence is a lack of due care for the safety of others, which is a tort. (20 C.3d 589, 590.)

(c) The BAJI Committee concluded that *Li* did not intend that the plaintiff's conduct be compared with each individual tortfeasor's negligence, but rather that the contributory negligence of the plaintiff should be proportioned to the combined negligence of the plaintiff and of all the tortfeasors whether joined or not (BAJI, No. 14.90). This is sound. "In determining to what degree the injury was due to the fault of the plaintiff, it is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence; moreover, inasmuch as a plaintiff's actual damages do not vary by virtue of the particular defendants who happen to be before the court, we do not think that the damages which a plaintiff may recover against defendants who are jointly and severally liable should

fluctuate in such a manner." (20 C.3d 590, footnote 2.)

(d) Abandonment of the joint and several liability rule would have an adverse effect on the ability of the injured person to obtain full recovery despite the financial inability of one or more of the defendants to cover their liability. Fairness dictates that the wrongdoers should be left to work out any apportionment among themselves. (20 C.3d 590.)

(e) The overwhelming majority of jurisdictions that have adopted comparative negligence have retained the joint and several liability doctrine. (20 C.3d 591, citing the Uniform Comparative Fault Act §2(c) (12 U.L.A. (Master Ed.), p. 123).) Hence, "we hold that after *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.' " (20 C.3d 591.) (On contribution and indemnity generally, see *supra*, §§103 et seq., 112 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See Uniform Comparative Fault Act §2(c), 12 U.L.A. (Master Ed.), p. 135.



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6. Assigning Shares of Responsibility.

6 Witkin Sum. Cal. Law Torts § 1332

[§ 1332] Assigning Shares of Responsibility.

Under Rest.3d, Torts: Apportionment of Liability, factors for assigning percentages of responsibility to each person whose legal responsibility has been established include the following:

(1) The "nature of the person's risk-creating conduct," including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct. (*Rest.3d, Torts: Apportionment of Liability §8(a).*) The nature of the person's risk-creating conduct includes such things as how unreasonable the conduct was under the circumstances, the extent to which the conduct failed to meet the applicable legal standard, the circumstances surrounding the conduct, the person's abilities and disabilities, and the person's awareness, intent, or indifference with respect to the risks. (*Rest.3d, Torts: Apportionment of Liability §8, Comment c.*)

(2) The "strength of the causal connection between the person's risk-creating conduct and the harm." (*Rest.3d, Torts: Apportionment of Liability §8(b).*) The comparative strength of the causal connection between the conduct and the harm depends on how attenuated the causal connection is, the timing of the person's conduct in causing the harm, and a comparison of the risks created by the conduct and the actual harm suffered by the plaintiff. (*Rest.3d, Torts: Apportionment of Liability §8, Comment c.*)

Under the Restatement, evidence may be relevant and admissible for the purpose of assigning percentages of responsibility, even if it is not relevant to the existence of a necessary element of the underlying claim or defense. (*Rest.3d, Torts: Apportionment of Liability §8, Comment c.*)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Defendant's Negligence or Other Fault.

6 *Witkin Sum. Cal. Law Torts* § 1333

[§ 1333] Defendant's Negligence or Other Fault.

(1) *Negligence and Causation*. The plaintiff cannot recover without first establishing a prima facie case by proving that the defendant was negligent, and that his or her negligence was a proximate cause of the plaintiff's injuries; until then, there is nothing against which the plaintiff's negligence can be compared. Hence, a nonsuit is justified where either element of proof is lacking. (*Elder v. Pacific Tel. & Tel. Co.* (1977) 66 C.A.3d 650, 657, 136 C.R. 203; see Uniform Comparative Fault Act §1(b) (12 U.L.A. (Master Ed.), p. 123), and Comment.)

(2) *Defendant's Wilful Misconduct*. In *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 826, 119 C.R. 858, 532 P.2d 1226, supra, §1329, the court observed that a comprehensive system of comparative negligence should allow apportionment of damages in cases of wilful misconduct. And cases decided after extension of the comparative negligence doctrine to strict liability cases (see infra, §§1360, 1542) applied the doctrine to situations in which the defendant was guilty of this type of misconduct. (See *Sorensen v. Allred* (1980) 112 C.A.3d 717, 725, 169 C.R. 441; *Southern Pac. Trans. Co. v. California* (1981) 115 C.A.3d 116, 121, 171 C.R. 187 [following *Sorensen*]; *Zavala v. Regents of Univ. of Calif.* (1981) 125 C.A.3d 646, 650, 178 C.R. 185 [same]; *Allen v. Sundean* (1982) 137 C.A.3d 216, 225, 186 C.R. 863 [same]; 10 A.L.R.4th 946 [Sorensen]; Uniform Comparative Fault Act §1(b), and Comment (12 U.L.A. (Master Ed.), p. 123).)

(3) *Distinction: Intentional Tort*. The comparative fault system does not apply to intentional torts. (See *Allen v. Sundean*, supra, 137 C.A.3d 226.)

West's Key Number Digest, Negligence k.502(2), 459(5)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Negligence and Causation*. See Uniform Comparative Fault Act §1(b) and Comment, 12 U.L.A. (Master Ed.), p. 125.

(2) *Defendant's Wilful Misconduct*. See Uniform Comparative Fault Act §1(b) and Comment, 12 U.L.A. (Master Ed.), p. 125.



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8. Plaintiff's Contributory Fault Generally.

6 Witkin Sum. Cal. Law Torts § 1334

[§ 1334] Plaintiff's Contributory Fault Generally.

The Uniform Comparative Fault Act §1(b) (12 U.L.A. (Master Ed.), p. 123) defines "fault" as applied to conduct of either party, and the Comment explains its broad meaning as applied to the plaintiff or other claimant: " 'Contributory fault chargeable to the claimant' includes legally imputed fault as in the cases of principal and agent and of an action for loss of services of a spouse. It also covers a situation in which fault is not imputed but would still have barred recovery prior to passage of the Act--as, for example, a wrongful-death action in which the decedent's contributory negligence would have barred recovery even though it was not imputed to the person bringing the action." (See *Potter v. Firestone Tire & Rubber Co.* (1993) 6 C.4th 965, 1011, 25 C.R.2d 550, 863 P.2d 795 [action for damages for fear of cancer engendered by exposure to toxic substances; plaintiffs' smoking did not reduce recovery, because defendant failed to establish causal link between their smoking and fear of increased risk of cancer]; 22 Western State L. Rev. 191 [*Potter*]; 25 A.L.R.5th 343 [smoking as basis for reduction of damages].)

The Act (§1(a)) provides that contributory fault diminishes recovery "whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance." (On abrogation of last clear chance doctrine, see *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 824, 119 C.R. 858, 532 P.2d 1226, supra, §1329; on plaintiff's assumption of risk as form of contributory negligence, see infra, §1336 et seq.)

West's Key Number Digest, Negligence k.459(6)

SUPPLEMENT: [This section is current through the latest supplement]

See Uniform Comparative Fault Act §1(b), 12 U.L.A. (Master Ed.), p. 125.



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9. Instructions.

6 *Witkin Sum. Cal. Law Torts* § 1335

[§ 1335] Instructions.

(1) The following BAJI instructions are relevant to contributory and comparative negligence:

(a) *Contributory Negligence and Assumption of Risk.*

No. 3.00 [negligence; essential elements].

No. 3.50 [contributory negligence; definition].

No. 3.52 [recovery for intentional harm not diminished by contributory negligence].

No. 3.53 [contributory negligence of decedent].

No. 3.60 [contributory negligence; suit only for injury to minor 5 years or older].

No. 3.61 [contributory negligence; suit only for injury to minor under 5 years of age].

No. 3.62 [contributory negligence; suit for injury to minor 5 years or older and parents' special damages].

No. 3.63 [contributory negligence; suit for injury to minor under 5 years of age and for parents' special damages].

No. 3.72 [duty of passenger for own safety].

No. 4.30 [express assumption of risk].

(b) *Damages.*

No. 14.90 [reduction of recovery because of contributory negligence; general verdict].

No. 14.91 [guidelines in determining comparative negligence].

No. 16.00 [form of special verdict; negligence].

(c) *Implied Indemnity.*

No. 12.69 [implied indemnity; comparative fault among defendants].

No. 16.72 [form of special verdict; comparative implied indemnity; multiple defendants; negligence by plaintiff's employer] (see 2 *Summary* (10th), *Workers' Compensation*, §92).

No. 16.73 [form of special verdict; comparative implied indemnity; multiple defendants; contributory negligence an issue].

(d) *Products Liability.*

No. 9.03 [products liability; negligence; comparative fault].

No. 9.04 [reduction of damages because of comparative fault; general verdict only].

No. 16.10 [form of special verdict; products liability; comparative fault].

No. 16.11 [form of special verdict; negligence and products liability; comparative fault].

No. 16.12 [form of special verdict; products liability; comparative fault and comparative implied indemnity between defendants].

(2) The following CACI instructions are relevant:

(a) *Contributory Negligence and Assumption of Risk.*

No. 400 [essential factual elements].

No. 405 [plaintiff's contributory negligence].

No. 406 [apportionment of responsibility].

No. 407 [decedent's contributory negligence].

No. 451 [express assumption of risk].

No. 711 [passenger's duty of care for own safety].

(b) *Damages.*

No. 3960 [contributory negligence; general verdict].

No. VF-401 [verdict form; negligence; single defendant; plaintiff's negligence at issue; fault of others not at issue].

No. VF-402 [verdict form; negligence; fault of plaintiff and others at issue].

(c) *Equitable Indemnity.*

No. 3800 [comparative fault between and among tortfeasors].

(d) *Products Liability.*

No. 1207 [strict liability; comparative fault; contributory negligence].

No. VF-1200 [verdict form; strict products liability; manufacturing defect; comparative negligence at issue].

No. VF-1204 [verdict form; products liability; negligence; plaintiff's contributory negligence at issue].

West's Key Number Digest, Negligence k.1746

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1. Former Law: Overlapping Defenses.

6 *Witkin Sum. Cal. Law Torts* § 1336

[§ 1336] Former Law: Overlapping Defenses.

The term "assumption of risk" is often loosely applied to one form of contributory negligence, namely, the voluntary unreasonable exposure to danger created by the defendant's negligence, or assumption of the risk of negligent conduct. In other words, the defendant is guilty of a breach of a duty of care toward the plaintiff, but the plaintiff cannot recover, because his or her own negligence contributed to the injury. (Rest.2d, §466(a) and Comment d; §496A, Comment d; see *Gornstein v. Priver* (1923) 64 C.A. 249, 256, 221 P. 396; *Doggett v. Lacey* (1932) 121 C.A. 395, 397, 9 P.2d 257 [voluntarily riding with one-armed driver]; *Potts v. Crafts* (1935) 5 C.A.2d 83, 84, 42 P.2d 87; *Ury v. Fredkin's Markets* (1938) 26 C.A.2d 501, 502, 79 P.2d 749; 57B Am.Jur.2d (2004 ed.), *Negligence* §772.)

The overlap was described in *Fonseca v. Orange* (1972) 28 C.A.3d 361, 104 C.R. 566, supra, §1291, as follows: "[T]he plaintiff's conduct in encountering a known risk may be in itself unreasonable, because the danger is out of all proportion to the advantage which he is seeking to obtain If that is the case, his conduct is a form of contributory negligence, in which the negligence consists in making the wrong choice and voluntarily encountering a known unreasonable risk. In such cases, it is clear that the defenses of assumption of risk and contributory negligence overlap, and are as intersecting circles, with a considerable area in common, where neither excludes the possibility of the other." (28 C.3d 369, quoting Prosser.)

In *Grey v. Fibreboard Paper Products Co.* (1966) 65 C.2d 240, 53 C.R. 545, 418 P.2d 153, the overlap led to an extraordinary result. The opinion discloses no substantial evidence of negligence on the part of defendant, and overwhelming evidence of plaintiff's assumption of risk and contributory negligence; nevertheless, verdict and judgment for plaintiff were affirmed.

Plaintiff machinist was sent by his employer to repair defendant's paper cutting machine. To smooth a set of rollers, he held emery cloth against the bottom roller while they were in motion. The cloth caught in the toothed wheels, drawing his hand between the rollers; he could not reach the power switch to turn off the machine, and no employee of defendant was near enough to help. The evidence showed that plaintiff was experienced in the characteristics of this type of machine; that he worked with it for about 3 hours before the accident; that he knew there were no employees in the area for emergency assistance; that he refused assistance by defendant's employee, stating that the job could best be performed by one man; and that he failed to position himself near a cut-off switch so that he could stop the machine. Judgment on a verdict for plaintiff was reversed by the Court of Appeal for error in refusing to instruct on assumption

of risk, but the Supreme Court affirmed on the ground that an instruction on contributory negligence rendered the error harmless in this situation in which the two doctrines overlap.

(a) Plaintiff, aware of the specific danger that the machine would continue to operate and that he would be unable to stop it in time to avoid injury, continued to work under these conditions; hence, the evidence would have justified a finding of the element of knowledge for application of the doctrine of assumption of risk. (65 C.2d 244.)

(b) However, where a plaintiff unreasonably undertakes to encounter a specific known risk created by a defendant's negligence, the assumption of risk "is but a variant of contributory negligence." (65 C.2d 246.)

(c) Here, the jury was instructed that plaintiff could not recover if contributorily negligent; and their verdict "absolved plaintiff of any misconduct in jeopardizing his well-being, and necessarily determined that he did not unreasonably undertake to encounter a specific known risk, the prerequisite upon which the particular defense of assumption of risk must be based." (65 C.2d 246.)

The opinion follows settled law in its discussion of the nature and similarity of the two defenses, and the peculiar result is perhaps explained by the limited nature of the point raised on appeal (error in refusing to instruct). (See *Dorobek v. Ride-A-While Stables* (1968) 262 C.A.2d 554, 559, 68 C.R. 774 [following *Grey*].)

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2. Unreasonable Assumption of Risk: Defense Abolished.

6 *Witkin Sum. Cal. Law Torts* § 1337

[§ 1337] Unreasonable Assumption of Risk: Defense Abolished.

The defense of unreasonable assumption of risk, to the extent that it is a form of contributory negligence, was abolished as a separate defense by the decision in *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 824, 829, 119 C.R. 858, 532 P.2d 1226, supra, §1329, and merged into the comparative negligence system. (See *Gonzalez v. Garcia* (1977) 75 C.A.3d 874, 881, 142 C.R. 503; 4 Harper, James & Gray 2d §22.15; 64 Cal. L. Rev. 260; 7 Pacific L. J. 755; 16 A.L.R.4th 700 [effect of adoption of comparative negligence rules on assumption of risk].)

In *Gonzalez v. Garcia*, plaintiff was a passenger in a car driven by defendant. He knew that defendant was intoxicated, and had time to get out, but chose to remain in the car and was injured when defendant lost control and crashed. *Held*, defendant's proposed instruction on assumption of risk was properly refused. (a) The distinction between implied assumption of risk and contributory negligence is unclear (75 C.A.3d 878), but the "all or nothing" aspect of assumption of risk has made it a disfavored defense (75 C.A.3d 879). (b) Plaintiff's conduct fell into the overlapping area of "choosing an unreasonable alternative when reasonable ones were available, thereby evidencing a lack of due care for his own safety." Thus, it was both contributory negligence and assumption of risk, and under the *Li* holding, it was not available as a complete defense. (75 C.A.3d 881.)

West's Key Number Digest, Negligence k.549(6), 551, 552(4)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §22.15.



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3. Reasonable Assumption of Risk: Conflict of Authority

6 Witkin Sum. Cal. Law Torts § 1338

[§ 1338] Reasonable Assumption of Risk: Conflict of Authority

(1) *Defense Abolished. Segoviano v. Housing Authority* (1983) 143 C.A.3d 162, 191 C.R. 578, not only abolished *reasonable* assumption of risk as a separate defense, but also held that, under the comparative negligence doctrine, it could not be used to reduce the plaintiff's recovery. Plaintiff played in a flag football game sponsored by defendant, and was injured when S, an opposing player, violated the rules by pushing him out of bounds. In this personal injury action, plaintiff objected to the introduction of any evidence on assumption of risk. After being instructed on contributory negligence, the jury found S negligent, but also found that plaintiff was negligent (30% at fault), and rendered its verdict accordingly. On appeal, plaintiff contended that it was prejudicial error for the trial judge to have instructed on contributory negligence. *Held*, this contention was meritorious, because it was conceded that plaintiff was not negligent during the game, and there was no evidence that his decision to play was unreasonable.

(a) *Abolition of contributory negligence and unreasonable assumption of risk. Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 824, 829, 119 C.R. 858, 532 P.2d 1226, *supra*, §1329, abolished contributory negligence as a separate defense, including that type of assumption of risk in which a plaintiff *unreasonably* undertakes to encounter the risk imposed by defendant's negligence; this is in reality a form of contributory negligence. Both defenses were merged into the comparative negligence system. (143 C.A.3d 167.)

(b) *Abolition of defense of reasonable assumption of risk.* The *Li* language of "held to agree" has been thought by some authorities to retain both express and implied agreement to face the risk as separate defenses. (143 C.A.3d 168.) Others have interpreted the phrase as referring only to express assumption of risk. (143 C.A.3d 168, 169.) The latter view is more persuasive. "We interpret *Li* to mean that the separate defense of implied assumption of the risk is abolished under the comparative negligence law. It is only when the plaintiff expressly agrees to assume the risk that the defendant is relieved of a duty of care toward the plaintiff, thus barring any recovery." (143 C.A.3d 169.)

(c) *Conclusion.* The defense of reasonable assumption of risk "plays no part in the comparative negligence system of California; it is neither a bar to plaintiff's recovery on the theory that it forecloses the existence of a duty of care by the defendant toward the plaintiff nor is it a partial defense justifying allocation of a portion of the fault for the accident to the plaintiff on the theory that he or she was contributorily negligent in confronting the risk. It is only when the defendant proves that the plaintiff's decision to participate in the activity was *unreasonable* that a jury may allocate damages between the plaintiff and the defendant. Such an allocation is permissible because the defendant has proved

that the plaintiff was negligent. Whether the plaintiff's decision to expose himself or herself to the risk of injury was unreasonable under all of the circumstances will be a question for the jury unless it can be held as a matter of law that the decision was reasonable. (143 C.A.3d 164.)

(2) *Defense Not Abolished.* In *Nelson v. Hall* (1985) 165 C.A.3d 709, 211 C.R. 668, *infra*, §1410, the court held that *Li* applied only to the unreasonable assumption of a known risk. (165 C.A.3d 713.) A reasonable assumption of risk, such as that encountered in the firefighting and veterinary professions, remains a complete defense. (165 C.A.3d 714.) (See *Baker v. Superior Court* (1982) 129 C.A.3d 710, 719, 181 C.R. 311; 20 U.S.F. L. Rev. 225 [arguing for *Nelson* position].)

Segoviano was rejected and *Nelson* was approved in *Ordway v. Superior Court* (1988) 198 C.A.3d 98, 243 C.R. 536, holding that reasonable implied assumption of risk remains a viable defense after the adoption of comparative fault. "The correct analysis is this: The doctrine of reasonable implied assumption of risk is only another way of stating that the defendant's duty of care has been reduced in proportion to the hazards attendant to the event. Where no duty of care is owed with respect to a particular mishap, there can be no breach; consequently, as a matter of law, a personal injury plaintiff who has voluntarily--and reasonably--assumed the risk cannot prevail. Or stated another way, the individual who knowingly and voluntarily assumes a risk, whether for recreational enjoyment, economic reward, or some similar purpose, is deemed to have agreed to reduce the defendant's duty of care." (198 C.A.3d 104.)

In *Von Beltz v. Stuntman* (1989) 207 C.A.3d 1467, 255 C.R. 755, plaintiff, a stuntperson, was engaged by defendants to participate in a movie in which she was a passenger in an Aston-Martin sports car driven by N, a stunt driver. The stunt involved an encounter by the southbound Aston-Martin with northbound cars, including a Ford van. N was directed by defendant to cut across the opposing traffic onto the shoulder and then return to the highway. On the first take the maneuver was performed without incident. On the second take, defendant directed N to double the speed and weave in and out of oncoming cars in serpentine fashion, and this time N's car collided with the Ford van. Plaintiff sustained injuries resulting in permanent total paralysis. The court held that, under *Ordway*, reasonable assumption of risk remained a complete defense, but that it was inapplicable in this case, because defendant changed the nature of the stunt, without plaintiff's knowledge, and thereby increased the risk. However, plaintiff was contributorily negligent for failing to request an available seat belt. (207 C.A.3d 1480.) (See *King v. Magnolia Homeowners Assn.* (1988) 205 C.A.3d 1312, 1315, 253 C.R. 140 [following *Ordway*]; 25 U.S.F. L. Rev 647 [Von Beltz].) (On resolution of conflict by distinguishing primary from secondary assumption of risk, see *infra*, §1339 et seq.)

West's Key Number Digest, Negligence k.

West's Key Number Digest, Negligence k.549(6), 551, 552(4), 554(6), 549(6), 551, 552(4), 554(6)

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4. Primary Versus Secondary Assumption of Risk.

a. In General.

1. Adoption of Theory

6 *Witkin Sum. Cal. Law Torts* § 1339

[§ 1339] Adoption of Theory

In *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, the court, in a plurality opinion of three justices, with two justices concurring and dissenting in separate opinions, and one justice dissenting, sought to resolve the conflict in Court of Appeal decisions on the proper application of the doctrine of assumption of risk (see *supra*, §1338).

Plaintiff and defendant participated in an informal game of touch football with other guests at the home of a mutual friend. In the course of the game, defendant ran into plaintiff, knocking her over, and stepped on her right hand, injuring the hand and little finger. After several operations, plaintiff's finger was amputated, and she brought this action for damages on theories of negligence and assault and battery. Defendant, relying on *Ordway v. Superior Court* (1988) 198 C.A.3d 98, 243 C.R. 536, *supra*, §1338, moved for summary judgment, contending that reasonable implied assumption of risk continues to operate as a complete defense after *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226. He asserted that the facts showed no intentional or reckless conduct, and that plaintiff was familiar with the risks associated with the sport of football. Plaintiff, relying on *Segoviano v. Housing Authority* (1983) 143 C.A.3d 162, 191 C.R. 578, *supra*, §1338, contended that the doctrine of reasonable implied assumption of risk had been eliminated by the adoption of comparative fault principles, and that plaintiff was entitled to have the action proceed under those principles. The trial court granted defendant's motion for summary judgment. The Court of Appeal affirmed, concluding that *Ordway* should be followed. The Supreme Court affirmed the judgment of the Court of Appeal, but applied different reasoning.

(a) *Lead opinion of three justices.*

(1) The assumption of risk doctrine has long caused confusion both in definition and application, because the phrase "assumption of risk" has been used in a number of very different factual settings involving analytically distinct legal concepts. (3 C.4th 303.) In some settings, e.g., sports-related injuries, the decisions largely have been concerned with the legal duty owed by a class of defendants (owners of baseball stadiums, ice hockey rinks, etc.). (3 C.4th 303; see *supra*, §1286.) In other settings, the terminology was applied in situations in which it was clear that the defendant had breached a legal duty of care to the plaintiff, and the issue was whether the plaintiff knowingly and voluntarily had chosen to encounter the specific risk of harm. (3 C.4th 304; see *supra*, §1281.)

(2) Prior to the adoption of comparative fault principles, there often was no need to distinguish between the different categories, because if a case fell into either category, recovery was totally barred. But the decision in *Li v. Yellow Cab Co.* made it necessary to determine which category should be merged into the comparative fault system and which should not. (3 C.4th 304, 305.)

(3) The *Li* decision "clearly contemplated that the assumption of risk doctrine was to be *partially* merged or subsumed into the comparative negligence scheme." (3 C.4th 306.) But a number of appellate decisions, focusing on *Li* language indicating that assumption of risk is in reality a form of contributory negligence where a plaintiff *unreasonably* undertakes to encounter a specific known risk, concluded that *Li* subsumed into the comparative fault scheme cases in which the plaintiff acts *unreasonably*, but retained the doctrine as a complete bar in cases in which the plaintiff acts *reasonably*. (3 C.4th 306, 307, and footnote 2.)

(4) "In our view, these decisions--regardless whether they reached the correct result on the facts at issue--have misinterpreted *Li* by suggesting that our decisions contemplated less favorable legal treatment for a plaintiff who reasonably encounters a known risk than for a plaintiff who unreasonably encounters such a risk." (3 C.4th 307.) "[T]he distinction to which the *Li* court referred was between (1) those instances in which the assumption of risk doctrine embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk--the category of assumption of risk that the legal commentators generally refer to as 'primary assumption of risk'--and (2) those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty--what most commentators have termed 'secondary assumption of risk.' Properly interpreted, the relevant passage in *Li* provides that the category of assumption of risk cases that is not merged into the comparative negligence system and in which the plaintiff's recovery continues to be completely barred involves those cases in which the defendant's conduct did not breach a legal duty of care to the plaintiff, i.e., 'primary assumption of risk' cases, whereas cases involving 'secondary assumption of risk' properly are merged into the comprehensive comparative fault system adopted in *Li*." (3 C.4th 308.)

(5) Although the difference in terminology may appear at first blush to be only semantic, the significance extends beyond mere rhetoric. "First, in 'primary assumption of risk' cases--where the defendant owes no duty to protect the plaintiff from a particular risk of harm--a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was reasonable or *unreasonable*. Second, in 'secondary assumption of risk' cases--involving instances in which the defendant has breached the duty of care owed to the plaintiff--the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff's conduct in encountering the risk of such an injury was *reasonable* rather than *unreasonable*. Third and finally, the question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport. For these reasons, use of the 'reasonable implied assumption of risk' 'unreasonable implied assumption of risk' terminology, as a means of differentiating between the cases in which a plaintiff is barred from bringing an action and those in which he or she is not barred, is more misleading than helpful." (3 C.4th 309.)

(6) "Our reading of *Li* ... is supported not only by the language of *Li* itself and the authorities it cites, but also, and perhaps most significantly, by the fundamental principle that led the *Li* court to replace the all-or-nothing contributory negligence defense with a comparative fault scheme. In 'primary assumption of risk' cases, it is consistent with comparative fault principles totally to bar a plaintiff from pursuing a cause of action, because when the defendant has not breached a legal duty of care to the plaintiff, the defendant has not committed any conduct which would warrant the imposition of any liability whatsoever. ... By contrast, in the 'secondary assumption of risk' context, the defendant has breached a duty of care owed to the plaintiff. When a risk of harm is created or imposed by a defendant's breach of duty and a plaintiff who chose to encounter the risk is injured, comparative fault principles preclude automatically placing all of the loss on the plaintiff, because the injury in such a case may have been caused by the combined effect of the defendant's and the plaintiff's culpable conduct. To retain assumption of risk as a complete defense in such a case would fly in the face of *Li*'s basic holding that when both parties are partially at fault for an injury, a rule which places all of

the loss on one of the parties is inherently inequitable." (3 C.4th 310.)

(7) In criticizing the primary-secondary assumption of risk approach adopted in place of the traditional *implied consent* approach, the dissenting opinion suggests that, even when a defendant has breached its duty of care, a plaintiff who reasonably has chosen to encounter a known risk has "impliedly consented" to any harm. This contention does not withstand analysis:

First, this argument would logically apply as much to a plaintiff who *unreasonably* has chosen to encounter a known risk as to a plaintiff who *reasonably* has chosen to do so. But *Li* explicitly held that a plaintiff who *unreasonably* undertakes to encounter a specific known risk is *not* completely barred; thus, the implied consent argument is irreconcilable with *Li*. (3 C.4th 311.)

Second, the implied consent rationale rests on a legal fiction that is untenable, at least as applied to conduct that represents a breach of a defendant's duty of care. "[I]t is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even where the participating individual is aware of the possibility that such misconduct may occur." (3 C.4th 311.) "[L]egal liability for an injury which occurs during a sporting event is significantly affected by the assumption of risk doctrine, but only because the doctrine has been utilized in framing the duty of care owed by a defendant in the context of a sporting event, and not because the plaintiff in such a case has, in any realistic sense of the term, 'consented' to relieve the defendant of liability." (3 C.4th 312.)

Third, the implied consent analysis is untenable for another reason: "If the application of the assumption of risk doctrine in a sports setting turned on the particular plaintiff's subjective knowledge and awareness, summary judgment rarely would be available in such cases, for, as the present case reveals, it frequently will be easy to raise factual questions with regard to a *particular* plaintiff's *subjective* expectations as to the *existence* and *magnitude* of the risks the plaintiff voluntarily chose to encounter. By contrast, the question of the existence and scope of a defendant's duty of care is a *legal* question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." (3 C.4th 313, citing the text.)

(8) "It may be helpful at this point to summarize our general conclusions as to the current state of the doctrine of assumption of risk. ... In cases involving 'primary assumption of risk'--where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury--the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving 'secondary assumption of risk'--where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty--the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." (3 C.4th 314.)

(9) "Accordingly, in determining the propriety of the trial court's grant of summary judgment in favor of the defendant in this case, our inquiry does not turn on the reasonableness or unreasonableness of plaintiff's conduct in choosing to subject herself to the risks of touch football or in continuing to participate in the game after she became aware of defendant's allegedly rough play. Nor do we focus upon whether there is a factual dispute with regard to whether plaintiff subjectively knew of, and voluntarily chose to encounter, the risk of defendant's conduct, or impliedly consented to relieve or excuse defendant from any duty of care to her. Instead, our resolution of this issue turns on whether, in light of the nature of the sporting activity in which defendant and plaintiff were engaged, defendant's conduct breached a legal duty of care to plaintiff." (3 C.4th 315.)

(10) Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, they do have a duty to use due care not to increase those risks. (3 C.4th 315.) In some situations, however, the careless conduct of others is treated as an *inherent risk* of a sport, thus barring recovery by the plaintiff. (3 C.4th 316, citing cases of carelessly thrown baseball and carelessly extended elbow in basketball.) The question how

courts are to determine when careless conduct properly should be considered an inherent risk is best answered by the duty approach, rather than the implied consent approach. Liability turns on whether the defendant had a legal duty to avoid this conduct or to protect the plaintiff against a particular risk of harm. (3 C.4th 316.) "As already noted, the nature of a defendant's duty in the sports context depends heavily on the nature of the sport itself. Additionally, the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport." (3 C.4th 317.) This point is illustrated by cases involving injuries sustained by a spectator at a baseball game. (3 C.4th 317, discussing *Ratcliff v. San Diego Baseball Club of Pac. Coast League* (1938) 27 C.A.2d 733, 81 P.2d 625, *infra*, §1290.) These and cases dealing with ski resorts demonstrate that the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is in issue. (3 C.4th 318.)

(11) In the present case, the question involves the circumstances under which a participant in a sport may be held liable for an injury sustained by another participant. The overwhelming majority of the cases have concluded that it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport, e.g., a carelessly thrown ball or bat during a baseball game, and that liability may be imposed only when he or she intentionally injures another player or engages in reckless conduct totally outside the range of the ordinary activity involved in the sport. (3 C.4th 318, 319, 320, listing many cases.) "In our view, the reasoning of the foregoing cases is sound." (3 C.4th 320.)

(12) "As applied to the present case, the foregoing legal principle clearly supports the trial court's entry of summary judgment in favor of defendant. The declarations ... establish that defendant was, at most, careless or negligent in knocking over plaintiff, stepping on her hand, and injuring her finger. Although plaintiff maintains that defendant's rough play as described in her declaration and the declaration of [witness] properly can be characterized as 'reckless,' the conduct alleged in those declarations is not even closely comparable to the kind of conduct--conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport--that is a prerequisite to the imposition of legal liability upon a participant in such a sport." (3 C.4th 320.)

(b) *First concurring and dissenting opinion of one justice.* This justice concurred in the result and much of the analysis in the lead opinion, but would go farther: "I believe the time has come to eliminate implied assumption of risk entirely. The all-or-nothing aspect of assumption of risk is as anachronistic as the all-or-nothing aspect of contributory negligence." (3 C.4th 321.) This change would eliminate the doctrinal confusion that now surrounds apportionment of fault, and comparative fault principles would determine liability. (3 C.4th 322.)

(c) *Second concurring and dissenting opinion of two justices.* This opinion concurs solely with respect to the result reached--upholding the summary judgment. But on the governing law, these justices prefer the "consent-based" analysis set forth in the dissenting opinion. (3 C.4th 322.)

(d) *Dissenting opinion of one justice.* In an elaborate discussion of the background of case law before and after *Li*, the justice concludes that the lead opinion is wrong both in its decision to affirm summary judgment for defendant and in its analytic approach to the defense of assumption of risk. (3 C.4th 324.)

A number of decisions address the primary assumption of risk theory. (See *Lucas v. Fresno Unified School Dist.* (1993) 14 C.A.4th 866, 872, 18 C.R.2d 79 [in view of school district's supervisory duty, student who was injured during recess by thrown rock did not, as matter of law, assume risk under either duty or consent analysis of implied assumption of risk]; *Marquez v. Mainframe* (1996) 42 C.A.4th 881, 885, 50 C.R.2d 34 [firefighter's rule (*supra*, §845 et seq.) is variant of primary assumption of risk doctrine, as stated in *Knight*]; *Allabach v. Santa Clara County Fair Assn.* (1996) 46 C.A.4th 1007, 1012, 54 C.R.2d 330 [distinguishing implied assumption of risk cases from cases involving express or written release (see *supra*, §1292 et seq.); release is effective without analysis of activity and relationship of parties to that activity required under *Knight*]; *Distefano v. Forester* (2001) 85 C.A.4th 1249, 1272, 102 C.R.2d 813 [primary assumption of risk doctrine requires participants in activity to refrain from intentionally injuring each other or acting recklessly; this doctrine is not abrogated by statutory duties, breach of which creates presumption of negligence]; *Moser v. Ratnoff* (2003) 105 C.A.4th 1211, 1223, 130 C.R.2d 198 [fact that defendant violated Vehicle Code provisions and

was thus negligent per se did not eliminate assumption of risk defense; citing with approval *Distefano*]; *Whelihan v. Espinoza* (2003) 110 C.A.4th 1566, 1573, 2 C.R.3d 883 [*Harb. & Nav.C.* 655(a) and 655.7, setting standards for safe operation of boats and water skis, do not abrogate doctrine of primary assumption of risk, because statutes do not explicitly demonstrate clear intent to do so]; 29 Cal Western L. Rev. 409; 28 Loyola L.A. L. Rev. 1495 [criticizing *Knight*]; 20 Pepperdine L. Rev. 1649; 21 Pepperdine L. Rev. 372; 28 San Diego L. Rev. 477; 68 A.L.R.5th 663 [liability for accidents occurring during school athletic events].)

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SUPPLEMENT: [This section is current through the latest supplement]

See 45 San Diego L. Rev. 383 [assumption of risk; California's no-duty-for-sport regime]; 79 So. Cal. L. Rev. 265 [concept of duty in assumption of risk analysis]; 79 So. Cal. L. Rev. 329 [criticizing current assumption of risk theory].



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4. Primary Versus Secondary Assumption of Risk.

a. In General.

2. Extension to Noncompetitive Recreational Activity.

6 *Witkin Sum. Cal. Law Torts* § 1340

[§ 1340] Extension to Noncompetitive Recreational Activity.

In *Ford v. Gouin* (1992) 3 C.4th 339, 11 C.R.2d 30, 834 P.2d 724, a companion case to *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, supra, §1339, the lead opinion, by one justice, was followed by a separate concurring opinion by three justices, a separate concurring and dissenting opinion by two justices, and a separate dissenting opinion by one justice.

Plaintiff, an experienced water-skier, was skiing barefoot and backward in a river channel. Defendant, his friend, was driving the boat that towed plaintiff. Plaintiff was injured when the back of his head struck a tree limb that extended over the channel from one of the river banks. In this action, plaintiff alleged that the accident was proximately caused by defendant's negligence in driving the boat too close to the river bank. Defendant moved for summary judgment, relying on the reasonable implied assumption of risk doctrine as reflected in *Ordway v. Superior Court* (1988) 198 C.A.3d 98, 243 C.R. 536, supra, §1338. The trial court granted summary judgment, the Court of Appeal affirmed, and the Supreme Court affirmed the judgment of the Court of Appeal.

(a) *Lead opinion.*

(1) Defendant was a coparticipant in the sports activity, and was, at most, careless in steering the boat. (3 C.4th 344.) Plaintiff argued, however, that the limited duty applied to a "competitive" sport such as the touch football game involved in *Knight* should not apply in the context of a "cooperative" sport such as waterskiing. (3 C.4th 345.)

(2) Although most of the authorities cited in *Knight* did involve competitive sport, the rationale of the decisions is equally applicable to waterskiing, an active sport, even when the parties are engaged in it on a noncompetitive basis. "[T]he skier has undertaken vigorous, athletic activity, and the ski boat driver operates the boat in a manner that is consistent with, and enhances, the excitement and challenge of the active conduct of the sport. Imposition of legal liability on a ski boat driver for ordinary negligence in making too sharp a turn, for example, or in pulling the skier too rapidly or too slowly, likely would have the same kind of undesirable chilling effect on the driver's conduct that the courts in other cases feared would inhibit ordinary conduct in various sports. As a result, holding ski boat drivers liable for their ordinary negligence might well have a generally deleterious effect on the nature of the sport of waterskiing as a

whole. Additionally, imposing such liability might well deter friends from voluntarily assisting one another in such potentially risky sports. Accordingly, the general rule limiting the duty of care of a coparticipant in active sports to the avoidance of intentional and reckless misconduct, applies to participants engaged in noncompetitive but active sports activity, such as a ski boat driver towing a water-skier." (3 C.4th 345.)

(3) *Harb. & Nav.C. 658(d)* provides in part: "No person shall operate or manipulate any vessel, towrope, or other device by which the direction or location of water skis, an aquaplane, or a similar device may be affected or controlled so as to cause the water skis, aquaplane, or similar device, or any person thereon, to collide with or strike against, any object or person." Plaintiff contended that defendant violated this provision, and that under *Ev.C. 669* (codifying the doctrine of negligence per se; see supra, §871 et seq.), there was a rebuttable presumption that defendant breached his duty of care. (3 C.4th 346.) The question is whether the statute was adopted only for the protection of third persons with whom a water-skier might collide or whose property might be damaged by a collision with the water-skier, or whether it was also intended to protect water-skiers themselves from collisions caused by their boat drivers. (3 C.4th 348.)

(4) Water-skiers are within the class of persons whose conduct the statute was intended to regulate. But the statute was not designed to create a duty of care on the part of the driver of the vessel to the persons being towed; it was intended to safeguard only the lives and property of third persons. Whether water-skiers also are within the class of persons whom the statute was intended to protect is another matter. (3 C.4th 349, 350.)

(b) *Concurring opinion of three justices.* In this opinion the author of the dissenting opinion in *Knight* again reviewed the case law and restated the arguments supporting the implied consent theory. (3 C.4th 351; see footnote 1: "Three justices embrace the primary-secondary approach to implied assumption of risk, three justices adhere to the traditional consent approach, and one justice would openly abolish the doctrine.") The concurring opinion asserts that "the justices forming the plurality in *Knight* ... , are in this case forced to take positions that defy either logic or common sense." (3 C.4th 352.) But the opinion concludes that the evidence submitted on the summary judgment motion established as a matter of law the complete defense of implied assumption of risk. (3 C.4th 364.)

(c) *Concurring and dissenting opinion of two justices.* In this opinion, the author concurred with the lead opinion on the duty approach to assumption of risk endorsed by the majority in *Knight*, as applicable to a ski boat driver towing a water-skier. (3 C.4th 364.) But he disagreed with the lead opinion's interpretation of *Harb. & Nav.C. 658(d)*, concluding that the Legislature intended to protect not only third parties but also the towed water-skier. (3 C.4th 365, 367.) Accordingly, because the declarations raised a triable issue of fact whether defendant's conduct breached a legislatively created duty of care owed to plaintiff under *Harb. & Nav.C. 658(d)* and *Ev.C. 669*, he thought the judgment of the Court of Appeal should have been reversed to permit the case to proceed to trial. (3 C.4th 368.)

(d) *Dissenting opinion of one justice.* In a brief statement the dissenter (1) agreed with the prior concurring and dissenting opinion of two justices that *Harb. & Nav.C. 658* required reversal of the Court of Appeal judgment; and (2) reiterated the position taken by him in his concurring and dissenting opinion in *Knight*, that California should abolish the anachronistic doctrine of implied assumption of risk. (3 C.4th 369.) (See *Cheong v. Antablin* (1997) 16 C.4th 1063, 1066, 68 C.R.2d 859, 946 P.2d 817, infra, §1349 [following *Ford*]; 29 Cal Western L. Rev. 409; 20 Pepperdine L. Rev. 1649.)

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3. Restatement 3d.

6 *Witkin Sum. Cal. Law Torts* § 1341

[§ 1341] Restatement 3d.

Rest.3d, Torts: Apportionment of Liability abrogates the Second Restatement rule recognizing implied assumption of risk as an independent defense. (See *Rest.3d, Torts: Apportionment of Liability* §2, Comment i; *infra*, §1293.) However, "questions of a defendant's primary liability (or duty) under tort law ... are not addressed" by the Third Restatement, which "neither supports nor precludes a determination that a particular actor has limited or no liability (or duty) in specific circumstances." (*Rest.3d, Torts: Apportionment of Liability* §2, Comment j.)

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a. In General.

4. Determining Whether Primary Assumption of Risk Doctrine Applies.

6 *Witkin Sum. Cal. Law Torts* § 1342

[§ 1342] Determining Whether Primary Assumption of Risk Doctrine Applies.

The procedure for resolving whether primary assumption of risk is a bar was discussed in *Staten v. Superior Court* (1996) 45 C.A.4th 1628, 53 C.R.2d 657, *infra*, §1348.

(a) *Primary assumption of risk requires absence of duty.* The Supreme Court's opinion in *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *supra*, §1339, distinguishes between cases of primary assumption of risk, in which the defendant owes no duty to protect the plaintiff from a particular risk of harm, and cases of secondary assumption of risk, in which the defendant does owe a duty of care but the plaintiff knowingly encounters the risk. In the secondary assumption situation, liability is apportioned by comparative fault, while in the primary assumption situation, the lack of duty operates as a complete bar to recovery. The existence of a duty depends on the nature of the sport or other activity in question and on the parties' general relationship to the activity. (45 C.A.4th 1632.)

(b) *Existence of duty is question of law.* Whether the defendant owes a duty to the plaintiff is a legal question. Thus, the question of assumption of risk is often amenable to resolution by summary judgment, with the trial judge determining the question of duty as a function of the scope and definition of the activity's inherent risks. In many active sport cases, this principal determination of duty leads to a second duty analysis. While the defendant owes no duty to protect against the risks inherent in a sport, the defendant generally owes a duty not to increase the risks of the activity beyond the risks inherent in the sport. This second determination of duty, however, still hinges on the trial judge's determination of the question of duty in the first instance, by defining the risks inherent in the particular sport in issue. (45 C.A.4th 1632.)

(c) *Expert opinions are irrelevant in determining duty.* An expert witness' declaration is not admissible on the legal question of duty and should not be considered. It is thoroughly established that experts may not give opinions on matters that are essentially within the province of the court to decide. In *Knight*, the Supreme Court determined that legal questions of duty in primary assumption of risk cases are to be resolved by the trial judge without factual input by experts. The determinant of duty, i.e., inherent risk, is to be decided solely as a question of law and based on the general characteristics of the activity and the parties' relationship to it. This determination is necessarily reached from the common knowledge of judges, and not the opinion of experts. However, the Supreme Court "would do well to provide

further guidance" in this area. Trial courts deciding these questions on summary judgment should not be faced with determining the inherent risks of an unfamiliar sport while bereft of the helpful factual input of experts. Perhaps, "a trial judge could receive expert evidence on the factual nature of an unknown or esoteric sports activity, but not expert evidence on the ultimate legal question of inherent risk and duty. This however, is not our call: it is for the Supreme Court, in baseball parlance, to declare this suggestion fair or foul." (45 C.A.4th 1635, 1636.)

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4. Primary Versus Secondary Assumption of Risk.

b. Sports or Recreation.

1. Baseball.

6 *Witkin Sum. Cal. Law Torts* § 1343

[§ 1343] Baseball.

(1) *Participant or Player.* In *Wattenbarger v. Cincinnati Reds* (1994) 28 C.A.4th 746, 33 C.R.2d 732, plaintiff, who was trying out as a pitcher for a major league baseball team, informed team personnel that he had "popped" his arm. They nevertheless gave him permission to continue pitching, and when he did so he suffered serious injury to the arm. In this action against the team and the team's supervisor of scouting, the trial judge granted defendants' motion for summary judgment. *Held*, reversed.

(a) The primary assumption of the risk doctrine would bar plaintiff's recovery if he had stopped pitching after he "popped" his arm. There is no doubt that arm injuries are a risk inherent in the sport of baseball. However, viewing the evidence in the light most favorable to plaintiff, a 17-year-old, it is reasonable to infer that when he informed team personnel he had "popped" his arm, he was seeking guidance as to how to proceed. (28 C.A.4th 752, 753.) Defendants were not coparticipants but were in control of the activity. "Under these circumstances, defendants owed a duty to plaintiff and the other participants not to increase the risks inherent in the game of baseball." (28 C.A.4th 754.)

(b) In addition to the foreseeability of the harm resulting from further use of an already injured limb, there are policy reasons why the primary assumption of the risk doctrine should not apply. The tryout was conducted for defendants' benefit. Imposition of a duty on them to prevent the aggravation of existing injuries would help prevent harm and would not unduly burden them or injured players. Moreover, the evidence indicated that the team was not only able to, but did, maintain insurance for tryout injuries. (28 C.A.4th 755, 756.)

In *Balthazor v. Little League Baseball* (1998) 62 C.A.4th 47, 72 C.R.2d 337, plaintiff, an 11-year-old baseball player, sued for injuries sustained when he was struck by an errant pitch during a game sponsored by defendant Little League. Plaintiff went to bat a few minutes before sunset, when it was difficult to see. He was wearing the standard uniform required by defendant, including a batting helmet without faceguard. He ducked to avoid the first pitch, but the second pitch struck him in the face. The pitcher had previously struck two other players in the game. The trial court granted defendant's request for summary judgment, concluding that recovery was barred by the doctrine of primary assumption of risk. *Held*, affirmed. Defendant did not breach its duty not to increase the risks inherent in baseball.

(a) Where a sport or activity, like baseball, is subject to the primary risk doctrine, liability attaches only when the defendant breaches its duty not to increase the risks inherent in the sport or activity. (62 C.A.4th 49.) Plaintiff contended that defendant breached this duty. However, there was nothing done in this game, no specific acts or directions given by defendant's officials, that increased the risk of injury beyond that present in any other game. (62 C.A.4th 51.)

(b) Plaintiff argued that defendant negligently supervised the game by failing to end it as sunset approached, contending that diminished lighting increased the risk of being hit by the ball. This argument is unpersuasive. Baseball is played under various lighting conditions, even during the day. Changing lighting conditions are inherent in the sport. (62 C.A.4th 51.)

(c) Plaintiff's contention that defendant was negligent in failing to remove the "wild pitcher" from the game is even more tenuous. Accuracy in pitching, especially from a teenager, has never been a prerequisite to being allowed to pitch. To so hold would alter the fundamental nature of the game and most certainly chill vigorous participation. (62 C.A.4th 52.)

(d) Plaintiff claimed that defendant had a duty to reduce the risk of injury from being struck by a baseball by providing helmets with faceguards. This shows a misunderstanding of the Supreme Court's mandate in *Knight*. Under primary assumption of risk, the defendant has a duty not to increase the risks inherent in the sport, not a duty to decrease the risks. (62 C.A.4th 52.) (See *West v. Sundown Little League of Stockton* (2002) 96 C.A.4th 351, 357, 116 C.R.2d 849 [primary assumption of risk case; risk of 10-year-old baseball player being hit by ball during practice due to sun's glare is risk inherent in baseball]; *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 C.A.4th 703, 711, 128 C.R.2d 529 [whether use of aluminum bat significantly increased risk that pitcher would be struck by batted ball was factual question that could not be decided on summary judgment].)

(2) *Spectator*. In *Lowe v. California League of Professional Baseball* (1997) 56 C.A.4th 112, 65 C.R.2d 105, plaintiff spectator was seriously injured when struck by a foul ball while attending a professional baseball game, and sued the baseball club and the league to which it belonged for negligence. At its home games, defendant club featured a dinosaur mascot standing seven feet tall and having a protruding tail. The person outfitted as the dinosaur, while performing his antics in the stands along the left field foul line, touched plaintiff from behind with the tail of the costume. Plaintiff was thereby distracted and turned toward the mascot. In the next moment, just as plaintiff returned his attention to the playing field, he was struck by a foul ball before he could react. *Held*, summary judgment for defendants reversed.

(a) Defendants persuaded the trial court, under the doctrine of primary assumption of the risk, that defendants owed no duty to plaintiff, as a spectator, to protect him from foul balls. This rationalization was faulty. Although *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, supra, §1339, held that sports participants and spectators assume certain risks when they engage in or watch a particular sport, *Knight* also held that defendants have a duty not to increase the inherent risks to the participant or spectator. A triable issue of fact remained under the evidence here, namely, whether the mascot cavorting in the stands and distracting plaintiff's attention while the game was in progress constituted negligence by increasing the inherent risk to plaintiff of being struck by a foul ball. (56 C.A.4th 114.)

(b) Appellate review of a summary judgment is independent of that in the trial court but mirrors what occurs there; i.e., the appellate court makes a de novo evaluation whether there are disputed issues of material fact. The first step is to define the issues framed by the pleadings. (56 C.A.4th 122.) Plaintiff alleged that the mascot's antics distracted plaintiff and "prevented plaintiff from being able to protect himself from any batted ball and foreseeably increased the risk to [plaintiff] over and above those inherent in the sport." Thus, the complaint anticipated the doctrine of primary assumption of the risk as a defense and, on defendants' allegation of that defense, framed the dispositive issue of fact, namely, whether the mascot's antics and their resulting distraction of the plaintiff operated to increase the inherent risks assumed by him as a spectator at a baseball game. (56 C.A.4th 123.)

(c) The next step in the summary judgment analysis is to determine whether defendants' evidentiary filings in

support of their motion were sufficient to provide the factual basis for their affirmative defense of primary assumption of risk, and shift the burden to plaintiff to demonstrate a triable issue of fact with reference to that defense. As prescribed by *Knight*, the burden to be surmounted by these filings was to show that any risk to spectators caused by the antics of the mascot did not operate to increase those inherent risks to which spectators at baseball games are unavoidably exposed. In other words, the key inquiry here is whether the risk that led to plaintiff's injury involved some feature or aspect of the game that is inevitable or unavoidable in the actual playing of the game. In the first instance, foul balls hit into the spectators' area clearly create a risk of injury. If foul balls were to be eliminated, however, it would be impossible to play the game. Thus, foul balls represent an inherent risk to spectators attending baseball games. Under *Knight*, this risk is assumed. But the same thing cannot be said about the antics of the mascot. The person who performed as the mascot stated in his deposition that there were occasional games played when he was not there. In view of this testimony, as a matter of law, it must be held that the antics of the mascot are not an essential or integral part of playing a baseball game. (56 C.A.4th 123.) Therefore, the summary judgment burden never shifted to plaintiff. Whether the mascot's antics increased the inherent risk to plaintiff is an issue of fact to be resolved at trial. (56 C.A.4th 124.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Participant or Player.* See *Avila v. Citrus Community College Dist.* (2006) 38 C.4th 148, 163, 41 C.R.3d 299, 131 P.3d 383 [primary assumption of risk barred negligence action against community college by opposing college's baseball player who was allegedly intentionally hit in head with pitch during game, because being hit by pitch, including one intentionally thrown at batter, is inherent risk of game; fact that game was allegedly illegal did not increase inherent risks].



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b. Sports or Recreation.

2. Boating and Rafting.

6 *Witkin Sum. Cal. Law Torts* § 1344

[§ 1344] Boating and Rafting.

In *Stimson v. Carlson* (1992) 11 C.A.4th 1201, 14 C.R.2d 670, defendant sailboat owner and his six-person crew, including plaintiff, were sailing on San Francisco Bay. Plaintiff was an experienced sailor who had sailed with defendant at least 15 times and had been a member of defendant's crew in approximately 10 sailing competitions. As such, he knew that one of the dangers of sailing was being struck by the boom or mainsheets (the lines connecting the boom to the mainsail) during a course change called a jibe, in which the boom swings violently in the opposite direction. To minimize the danger of being struck by the boom, defendant customarily warned his crew before executing a jibe. However, on the occasion in question, defendant gave no warning, and plaintiff sustained injuries when he was struck by the mainsheets. In the subsequent personal injury action, defendant raised assumption of risk as a defense. *Held*, summary judgment for defendant affirmed; defendant had no duty to protect plaintiff from the risk involved.

(a) In primary assumption of the risk cases, the defendant owes no duty to protect the plaintiff from a particular risk of harm, regardless of whether the plaintiff's conduct in undertaking the activity was reasonable or unreasonable. Whether the defendant owes such a duty to the plaintiff must be determined in light of the nature of the activity in which they are engaged. (11 C.A.4th 1205, citing *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *supra*, §1339.)

(b) Generally, defendants have no duty to protect plaintiffs against risks inherent in an active sport, and a swinging boom is a risk inherent in the sport of sailing. When an inherent sports risk is involved, the defendant is liable only if he or she intentionally injures another player or engages in conduct that is so reckless that it is totally outside the range of the ordinary activity involved in an active sport. That was not the case here. Defendant's failure to call out a course change was negligent, but it did not amount to intentional or reckless conduct. While defendant's conduct was unexpected, it did not alter the fundamental risk of sailing, i.e., the boom and its sheets remained the danger. (11 C.A.4th 1206.)

(c) "Particularly in the area of athletics and recreation, the doctrine of primary assumption of the risk prevents lawsuits among participants who are knowingly engaged in the normal activities, and inherent risks, of an active sport.

By eliminating liability for unintended accidents, the doctrine ensures that the fervor of athletic competition will not be chilled by the constant threat of litigation from every misstep, sharp turn and sudden stop. ... On a larger scale, participation in amateur athletics is a socially desirable activity that improves the mental and physical well-being of its participants. The freedom to enjoy such activity is preserved through application of the doctrine of primary assumption of the risk." (11 C.A.4th 1206.) (See *Ferrari v. Grand Canyon Dories* (1995) 32 C.A.4th 248, 252, 38 C.R.2d 65 [defendant had no duty to prevent plaintiff from striking her head in raft that used metal bar, which was industry norm; inherent risk of river rafting]; *Shannon v. Rhodes* (2001) 92 C.A.4th 792, 795, 112 C.R.2d 217 [primary assumption of risk doctrine did not constitute defense, where child was injured when she fell from ski boat in which she was riding as passenger; recreational boating cannot be grouped with competitive sports and, unlike sports, would not be altered if boat drivers were required to exercise due care]; *Whelihan v. Espinoza* (2003) 110 C.A.4th 1566, 1571, 2 C.R.3d 883 [primary assumption of risk doctrine applied to sport of jet skiing]; *Peart v. Ferro* (2004) 119 C.A.4th 60, 78, 13 C.R.3d 885 [primary assumption of risk doctrine applied, notwithstanding legislation pertaining to regulation and use of personal watercraft].)

SUPPLEMENT: [This section is current through the latest supplement]

In *Ford v. Polaris Industries* (2006) 139 C.A.4th 755, 43 C.R.3d 215, plaintiff was riding as a passenger on a two-seat personal watercraft with a jet-powered nozzle at the rear of the craft (referred to as jet skiing). She suffered severe orifice injuries when she fell to the rear and landed a foot from the jet nozzle. Plaintiff brought a negligence action against the owner-operator and a products liability action against the manufacturer based on design defect, i.e., inadequate method of holding on when gripping the operator was not feasible. The trial court entered summary judgment for defendant owner-operator under the primary assumption of risk doctrine, holding that, at most, her failure to call plaintiff's attention to certain warnings was mere negligence. The case proceeded to trial against defendant manufacturer, and judgment was entered for plaintiff. In rejecting the defense of primary assumption of risk with respect to defendant manufacturer, the trial court reasoned that plaintiff, by proving a design defect, established that defendant had increased the risks inherent in the sport of jet skiing and that, therefore, a special instruction that plaintiff must prove that defendant increased the risks was unnecessary. *Held*, affirmed.

(a) *Milwaukee Elec. Tool Corp. v. Superior Court* (1993) 15 C.A.4th 547, 19 C.R.2d 24, text, §1355, and *Bunch v. Hoffinger Industries* (2004) 123 C.A.4th 1278, 20 C.R.3d 780, text, §1350, stand for the proposition that a manufacturer's duty to produce defect-free products is not obliterated by primary assumption of the risk. However, *Milwaukee Tool* was not a sports case, and thus there was no need for the court to address the issue of inherent risks in assessing the scope and existence of the defendant's duty. On the other hand, *Bunch* was a sports case, but the issue was inadequate warnings, not design defect, and there was no charge in *Bunch* that imposing a duty on the manufacturer to provide effective and adequate warnings *would change* the nature of the sport or chill participation in it. Thus, these decisions did not deal with the *scope* of the manufacturer's duty to make nondefective products, a question that often arises in a recreational equipment defect case such as this when the defendant asserts that the purported defect is the failure of the product to eliminate or provide protection against an inherent risk of the sport. Under these circumstances, the court must assess the risks inherent in the sport as part and parcel of ascertaining the scope of the manufacturer's duty. (139 C.A.4th 771.)

(b) The norm in jet skiing is to hold on; orifice injuries and the conduct that causes them do not belong to the fundamental nature or habit of the sport. Thus, providing an alternative that would allow a jet skier to maintain a secure grip when holding onto the operator was not feasible would not alter the fundamental nature of the sport or deter vigorous participation. Under these facts, the trial court properly denied defendant manufacturer's motion for summary judgment on primary assumption of the risk. (139 C.A.4th 772.)

(c) Defendant maintained that its design met the standard of the industry, that this standard defined the sport and its inherent risks, and that the standard could not be attacked without running afoul of the doctrine of primary assumption of the risk. However, none of the cases cited by defendant stand for the proposition that primary assumption of the risk will preclude a strict products liability/design defect claim against a recreational equipment manufacturer simply

because its equipment is essentially the same in design as that of other manufacturers. Moreover, a risk is inherent if its absence would significantly change the sport or deter enthusiastic participation, and not all design features that are "essentially the same" throughout an industry meet this definition. (139 C.A.4th 772.)

(d) Examination of duty under a primary assumption of risk inquiry also takes into account the defendant's role in, or relationship to, the sport in question. For example, in the process of analyzing the duty of proprietors of sports facilities, it is proper to define the risks inherent in the sport not only by virtue of the nature of the sport itself, but also by reference to the steps that the sponsoring business entity reasonably should take in order to minimize the risks without altering the nature of the sport. This approach is equally applicable to the role of manufacturing, supplying, and distributing defective recreational equipment. Thus, where the asserted design defect is the failure to incorporate protection against a serious injury into the design of the recreational equipment, the manufacturer's duty to design nondefective products can be rephrased as a duty to take reasonable steps to minimize inherent risks without altering the nature of the sport. (139 C.A.4th 774.)

(e) Defendant argued that a special instruction should have been given to the effect that, because a defendant generally has a duty to use due care not to increase the risks to a sports participant over and above those inherent in the sport, it could not be held liable absent a finding, supported by substantial evidence, that its design of the watercraft increased the risk of harm. Here, however, the trial court determined that a finding of a design defect in itself established that defendant increased the risk of harm inherent in jet skiing, i.e., simply falling into the water. Therefore, a special instruction also requiring plaintiff to prove that the defect increased the harm associated with that risk would be redundant and confusing. In other words, the very nature of the defect necessarily increased the likelihood that a passenger would fall rearward and suffer the extreme harm of orifice injuries, and thus, as a matter of law, the defect escalated the risk of harm beyond the inherent risk of falling into the water. With the jury's findings that the watercraft was defectively designed and that the defect caused plaintiff's injury, the standard instruction requiring defendant to prove that the benefits of the design outweighed the danger inherent in that design was adequate. (139 C.A.4th 775.)

Primary assumption of risk is a defense even though the person injured or killed in a collision involving a personal watercraft is merely a passenger. Like the operator, a passenger is a participant in an activity on a high-speed, open craft that involves enjoyment or thrill, requires physical exertion as well as skill, and includes a potential risk of injury. Moreover, primary assumption of risk is a defense even if operation of the personal watercraft is "casual," as opposed to the "extreme" operation that occurs in racing or exhibitions; the distinction between "casual" and "extreme" would prove impossible to apply on any consistent basis. (*Truong v. Nguyen* (2007) 156 C.A.4th 865, 879, 890, 67 C.R.3d 675.)



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3. Dancing.

6 *Witkin Sum. Cal. Law Torts* § 1345

[§ 1345] Dancing.

In *Bush v. Parents Without Partners* (1993) 17 C.A.4th 322, 21 C.R.2d 178, plaintiff was injured when she slipped and fell while dancing. The dance, which was held in a dance hall owned by defendant public agency, was sponsored by defendant club. On the evening of her accident, plaintiff observed a white substance on the dance floor which she knew from past experience was placed there to make it easier for the dancers' feet to slide over the floor. As was her normal practice, plaintiff did not begin to dance until the floor had been swept. It was during her third dance of the evening that plaintiff's accident occurred. Based on the theory that plaintiff had assumed the risk of injury, the trial judge granted defendants' motion for summary judgment. *Held*, reversed.

(a) Under the primary assumption of risk doctrine set forth in *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, supra, §1339, a defendant's freedom from liability is based on the fact that he or she had no legal duty to eliminate the risks involved in a particular activity, or to protect the plaintiff from them. *Knight* applied this doctrine to the sports world, holding that the defendant had no duty to protect the plaintiff from the risks inherent in active sports. (17 C.A.4th 327.)

(b) *Knight* specifically declined to decide whether this limited duty of care rule applies to less active sports, such as archery or golf, but it indicated that the rule would apply only when one was engaging in a potentially dangerous activity or sport. Recreational dancing is not such a dangerous activity. Consequently, the present situation involves what *Knight* referred to as a "secondary assumption of risk" case, i.e., one where the defendant owes a duty of care to the plaintiff, who then proceeds to encounter the known risk imposed by the defendant's breach of duty. In this situation, the doctrine of assumption of risk, instead of constituting a complete bar to recovery, is merged into the comparative fault scheme. (17 C.A.4th 328.)

(c) Even assuming that falling is an inherent risk of social dancing and that this case, therefore, falls under primary assumption of risk, plaintiff correctly argued that defendants should nevertheless be held liable because they increased her risk beyond that inherent in the activity. Just as a ski resort has a duty to use due care to maintain its tow ropes in safe condition so as not to expose skiers to an increased risk of harm, so do dance hall operators and owners have a duty to maintain the dance floor in a safe and usable condition. Here, defendants breached that duty by adding a substance to

the floor that made it too slippery, thereby increasing the dancers' risk of harm by falling. (*17 C.A.4th 329.*) Hence, whatever fault may have attached to plaintiff for dancing on the slippery floor, that fault does not operate as a complete bar to her recovery. (*17 C.A.4th 330.*)

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4. Equestrian Activities.

6 *Witkin Sum. Cal. Law Torts* § 1346

[§ 1346] Equestrian Activities.

In *Harrold v. Rolling J Ranch* (1993) 19 C.A.4th 578, 23 C.R.2d 671, plaintiff, a member of a resort operated by defendant, took advantage of the horseback riding offered by the resort. While riding with two friends, two other riders, and two wranglers, plaintiff wrapped the reins around the saddle horn and started to remove her jacket in order to give it to another rider, who was cold. Plaintiff's horse spooked and plaintiff was thrown to the ground. Plaintiff sued defendant, alleging that defendant negligently failed to warn her of her horse's unstable temperament and tendency to throw riders and failed to provide her with a safe horse. In opposing defendant's summary judgment motion, plaintiff presented evidence indicating that she was an experienced rider and that her horse, earlier the same day, had spooked and thrown another rider. Nevertheless, the trial judge granted the summary judgment motion. *Held*, affirmed.

(a) Commercial riding stables owe a narrow duty of due care to members of the general public who rent horses from them. This duty includes not providing faulty saddles, bridles, and other equipment, not providing dangerous trails, and not providing horses that are poorly shod. It does not include providing "ideal" riding horses. (19 C.A.4th 588.)

(b) While a riding stable would owe a duty of care to warn of the dangerous propensities of a particular horse, in this case the one prior incident did not rise to this level. "[T]o impose some sort of duty on a lessor of horses when a 'horse acts as a horse' is to tell the commercial world that strict liability is imposed for any action of a horse inherent in horseback riding, with the concomitant result that in all probability all commercial horseback riding will cease because of the risk involved to those that are self-insured or by reason of the prohibitive expense to obtain liability insurance for such an enterprise." (19 C.A.4th 588.) (See *Parsons v. Crown Disposal Co.* (1997) 15 C.4th 456, 481, 482, 63 C.R.2d 291, 936 P.2d 70, *supra*, §911; *Shelly v. Stepp* (1998) 62 C.A.4th 1288, 1291, 73 C.R.2d 323 [primary assumption of risk doctrine applied to person who was exercising racehorse and was injured in collision with another horse; primary assumption of risk doctrine applies to practice as well as to competitive event]; *Giardino v. Brown* (2002) 98 C.A.4th 820, 829, 120 C.R.2d 77 [in action against provider of horses to girls' camp, plaintiff raised issues of fact whether horse causing injury was unsafe, whether this was known to defendant, and whether it increased inherent risk for child involved in beginners' horseback riding program; distinguishing *Harrold*].)

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See *Cohen v. Five Brooks Stable* (2008) 159 C.A.4th 1476, 1491, 72 C.R.3d 471 [issue of material fact whether trail guide, while leading other horseback riders, suddenly accelerated to gallop in such reckless way as to be outside range of ordinary activity involved in horseback riding precluded summary judgment for trail ride operator on basis of doctrine of primary assumption of risk].



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5. Football.

6 *Witkin Sum. Cal. Law Torts* § 1347

[§ 1347] Football.

In *Fortier v. Los Rios Community College Dist.* (1996) 45 C.A.4th 430, 52 C.R.2d 812, a student sued a community college district to recover for injuries suffered in a "noncontact" advanced football class when he attempted to catch a pass and collided with another student who was attempting to intercept the pass. *Held*, summary judgment for defendant affirmed. The injuries were inherent in the sport of football, and thus plaintiff's claim was barred by primary assumption of the risk.

(a) Instructors, like commercial operators of recreational activities, have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. When an instructor acts so as to increase the risk of harm inherent in a particular sport, the instructor may not thereafter rely on primary assumption of the risk. (45 C.A.4th 435.)

(b) Here, however, the instructors did not increase the dangers to plaintiff by encouraging aggressive play or by keeping score of receptions and interceptions, because these are normal aspects of football. Although the game was called "noncontact," that meant that there was no tackling, and not that there would be no contact at all. Further, defendant did not increase the risk of harm by failing to require helmets. Even if a helmet would have prevented plaintiff's facial injuries, helmets are not a normal aspect of "noncontact" football, and they may actually increase the risk of harm by making players more aggressive. (45 C.A.4th 436.) (See *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *supra*, §1339.)

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6. Skating.

6 *Witkin Sum. Cal. Law Torts* § 1348

[§ 1348] Skating.

In *Staten v. Superior Court* (1996) 45 C.A.4th 1628, 53 C.R.2d 657, plaintiff figure skater was cut on the arm during a group skating session by the blade of another skater practicing an "outward backward spiral" with one leg extended. Plaintiff sued the other skater, the skating club that rented the rink, and the owner of the rink. Defendants moved for summary judgment, which the trial judge denied. *Held*, reversed. Being cut by the blade of another skater during a group skating session is an inherent risk of the sport, and the doctrine of primary assumption of risk bars the injured skater from recovery for personal injuries.

(a) *Distinction between primary and secondary assumption of risk.* The Supreme Court's opinion in *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, supra, §1339, has become the operative statement of the law of assumption of risk in California. *Knight* distinguishes between cases of primary assumption of risk, in which a defendant owes no duty to protect the plaintiff from a particular risk of harm and the plaintiff is completely barred from recovery, and cases of secondary assumption of risk, in which the defendant does owe a duty of care but the plaintiff knowingly encounters the risk and in which liability is apportioned by comparative fault. Generally, the participation in an active sport is governed by primary assumption of risk, and a defendant owes no duty of care to protect a plaintiff against risks inherent in the sport. The existence of a duty depends on the nature of the sport or other activity in question and on the parties' general relationship to the activity. (45 C.A.4th 1632.)

(b) *No duty of care owed.* In the present case, the court must determine whether being cut by the blade of a fellow skater during a group skating session is, as a matter of law, a risk inherent in the sport of figure skating. (45 C.A.4th 1632.) The *Knight* rule is not limited to contact sports. Collisions with other skaters in group skating sessions, and the injuries that may result, are inherent risks of the sport of figure skating. Thus, skating is covered by the doctrine of primary assumption of risk, and plaintiff is completely barred from recovery. (45 C.A.4th 1633.) (See 33 A.L.R.3d 316 [liability of ice skater for injury to another skater].)

SUPPLEMENT: [This section is current through the latest supplement]

See *McGarry v. Sax* (2008) 158 C.A.4th 983, 998, 70 C.R.3d 519 [primary assumption of risk barred negligence action against promoter by spectator at skateboard exhibition, who was injured in melee when professional skateboarder threw

skateboard into crowd; activity had aspects of competitive sporting event, because desirable product was thrown into group of young athletic people who attempted to retrieve it].



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7. Skiing and Snowboarding.

6 Witkin Sum. Cal. Law Torts § 1349

[§ 1349] Skiing and Snowboarding.

In *Cheong v. Antablin* (1997) 16 C.4th 1063, 68 C.R.2d 859, 946 P.2d 817, the Supreme Court applied the principles of *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, supra, §1339, and *Ford v. Gouin* (1992) 3 C.4th 339, 11 C.R.2d 30, 834 P.2d 724, supra, §1340, in the context of a skiing accident and a related safety ordinance. Plaintiff was injured in a collision with a fellow skier and sued him for negligence. Defendant admitted skiing too fast for existing conditions but denied intentionally colliding with plaintiff or acting recklessly. A county safety ordinance concerning skiing delineated certain "skier duties" relating to care on the slopes, violation of which constituted an infraction, but also stated that skiers assume the inherent risks of skiing, including collisions. *Held*, summary judgment for defendant affirmed.

(a) Primary assumption of the risk, when applicable, completely bars a plaintiff's recovery, while the doctrine of secondary assumption of the risk is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from an injury, considers the relative responsibilities of the parties. Whether primary or secondary assumption of the risk applies turns on whether, in light of the nature of the activity in which the defendant and the plaintiff were engaged, the defendant's conduct breached a legal duty of care to the plaintiff. The test is objective; it depends on the nature of the sport or activity in question and on the parties' general relationship to the activity rather than the particular plaintiff's subjective knowledge and awareness. (16 C.4th 1067.)

(b) The general duty to use due care to avoid injury to others does not apply to coparticipants in a sport, where conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. In this respect, the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant. Although defendants generally have no legal duty to eliminate risks inherent in the sport itself or protect a plaintiff against them, defendants generally have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. In some situations, the careless conduct of others is treated as an inherent risk of a sport, thus barring recovery by the plaintiff. Courts should not hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport, because in the heat of an active sporting event, a participant's normal energetic conduct often includes accidentally careless behavior. Thus, the general test is that a participant in an active sport breaches a legal duty of care to other participants, i.e., engages in conduct that properly may subject him or her to

financial liability, only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport. Applying these common law principles, the doctrine of primary assumption of the risk bars plaintiff's action, because a collision is an inherent risk of downhill skiing, and because defendant did not act recklessly and did not intentionally collide with plaintiff. (16 C.4th 1068.)

(c) Even assuming that a local ordinance can supplant the primary assumption of risk doctrine, the ordinance here does not impose a higher duty than that established by the doctrine. Although the ordinance delineates certain duties of skiers, these duties do not govern tort liability between skiers. Instead, the ordinance expressly states that skiers must assume the inherent risks of skiing, including collisions with other skiers, thereby incorporating the doctrine. Nor does *Ev.C. 669(a)* (supra, §§ 873, 874), providing that a violation of law raises a presumption of failure to exercise due care, provide plaintiff a cause of action, because plaintiff failed to demonstrate that he was a member of the class of persons the county ordinance was designed to protect. Because the ordinance specifically states that skiers assume the risk of collision, plaintiff cannot be a member of the protected class. (16 C.4th 1069.)

In *Mastro v. Petrick* (2001) 93 C.A.4th 83, 112 C.R.2d 185, plaintiff and defendant were at a resort to ski and snowboard, respectively. Both were descending a slope where they had a right to be when defendant, the snowboarder (then traveling at 30 to 35 miles per hour), collided with plaintiff, the skier. *Held*, summary judgment for defendant affirmed. Application of the doctrine of primary assumption of risk depends on the nature of defendant's activity and not on whether plaintiff and defendant were coparticipants in the same sport. Given the nature of snowboarding (descending a snow-covered mountain), and the relationship of plaintiff to that activity (descending the same snow-covered mountain on skis), it is clear that defendant owed no legal duty to protect plaintiff from the particular risk of harm that caused plaintiff's injuries (i.e., that a snowboarder may be negligent or careless). Put more generally, one who is pursuing a sport in an appropriate venue owes no duty of care to those who choose to occupy the same venue to engage in their (possibly different) activity simultaneously. Furthermore, assumption of risk protects a defendant from claims of negligence unless he or she creates a risk over and above those risks inherent in the sport in which he or she is engaged. Thus, even if plaintiff was correct in arguing that the nature of snowboarding increased the risk of harm to skiers on the same slope, "the snowboarder's duty is unaltered by this fact, because the nature of a defendant's duty is defined by the activity he or she engages in." (93 C.A.4th 90.)

A number of other decisions involve snow sports. (See *Freeman v. Hale* (1994) 30 C.A.4th 1388, 1391, 36 C.R.2d 418 [whether defendant's consumption of alcohol, which was not risk inherent to sport of skiing, increased chances of his colliding with plaintiff was question of fact]; *Connelly v. Mammoth Mountain Ski Area* (1995) 39 C.A.4th 8, 13, 45 C.R.2d 855, *Van Dyke v. S.K.I. Ltd.* (1998) 67 C.A.4th 1310, 1314, 79 C.R.2d 775 [primary assumption of risk did not apply to skiing accident where sign, both by its placement and method of erection, increased dangers inherent to skiing]; *Kane v. National Ski Patrol System* (2001) 88 C.A.4th 204, 209, 105 C.R.2d 600 [although ski patrol instructor had not properly assessed ability of his students or hazard posed by adjacent canyon, faulty assessment did not rise to level of recklessness needed to find instructor liable for injuries]; *Solis v. Kirkwood Resort Co.* (2001) 94 C.A.4th 354, 364, 114 C.R.2d 265 [whether ski resort had duty to warn skiers of unmarked ski jumps that it had constructed for race later on day of accident was question of fact; defendant resort failed to prove that injured skier could not prove that alterations were so profound and unforeseeable that duty to warn arose]; *Vine v. Bear Valley Ski Co.* (2004) 118 C.A.4th 577, 599, 13 C.R.3d 370 [in action by injured snowboarder against ski resort, trial court erred in failing to give resort's proposed secondary assumption of risk instruction that jury consider, in determining comparative fault, plaintiff's knowing encounter with risk of injury caused by defendant's breach of its duty of care]; 45 Proof of Facts 3d 115 [liability of ski area operator for skiing accident]; 46 Proof of Facts 3d 1 [liability of one skier for collision with another].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Mammoth Mountain Ski Area v. Graham* (2006) 135 C.A.4th 1367, 1372, 38 C.R.3d 422 [teenage snowboarder was engaged in snowball fight when he struck instructor, who was standing still at side of ski run; whether conduct in striking ski instructor was so reckless as to be totally outside range of ordinary activity, thereby precluding defense of primary assumption of risk, was factual question that could not be determined by summary judgment]; *Souza v. Squaw*

Valley Ski Corp. (2006) 138 C.A.4th 262, 266, 41 C.R.3d 389 [child skier's collision with plainly visible aluminum snow-making hydrant located on ski run was risk inherent in sport of skiing, even if ski resort failed to pad hydrant adequately, and thus doctrine of primary assumption of risk barred skier's negligence action against ski resort]; *Towns v. Davidson (2007) 147 C.A.4th 461, 468, 470, 54 C.R.3d 568* [primary assumption of risk doctrine applied even though person with whom plaintiff collided was ski resort employee, who was coparticipant at time of accident; fact that employee was traveling 25 to 30 mph while practicing slalom technique and turned without looking when he collided with plaintiff did not establish conduct totally outside range of ordinary activity involved in sport of skiing]; *15 A.L.R.6th 161* [snowboarder's liability for injuries to or death of another person].



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8. Other Sports.

6 Witkin Sum. Cal. Law Torts § 1350

[§ 1350] Other Sports.

The distinction between primary and secondary assumption of risk enunciated in *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, supra, §1339, has been applied to numerous other sports. The following are illustrative:

(1) *Golf*. (See *Morgan v. Fuji Country USA* (1995) 34 C.A.4th 127, 130, 40 C.R.2d 249 [golfer primarily assumed risk of being hit by ball of another golfer, but only secondarily assumed risk that defendant golf club owner, by layout of the 4th and 5th holes and removal of trees, would increase risks inherent in golf]; *Dilger v. Moyles* (1997) 54 C.A.4th 1452, 1454, 63 C.R.2d 591 [primary assumption of risk doctrine protected golfer who hit another golfer with errant ball; getting hit by ball is inherent risk of golfing, and fact that golfing etiquette calls for warning does not create duty towards fellow golfers nor does failure to comply with this rule of etiquette constitute intentional conduct].)

(2) *Track and Field*. (See *Yancey v. Superior Court* (1994) 28 C.A.4th 558, 565, 33 C.R.2d 777 [primary assumption of risk doctrine did not apply in action by discus participant who was struck by another discus when she walked onto field to retrieve her own discus; careless conduct of discus player in throwing discus without first ascertaining that target area is clear is not inherent risk of sport].)

(3) *Bicycle and Vehicle Racing*. (See *Branco v. Kearny Moto Park* (1995) 37 C.A.4th 184, 189, 43 C.R.2d 392 [whether owner of bicycle motocross course had increased risks inherent in sport by alleged improperly designed jump was question of fact]; *Distefano v. Forester* (2001) 85 C.A.4th 1249, 1261, 102 C.R.2d 813 [parties were engaged in sport of "off-roading," where ordinary rules of road are inapplicable, and collided at top of blind hill when traveling in opposite directions; no liability under primary assumption of risk doctrine]; *Moser v. Ratinoff* (2003) 105 C.A.4th 1211, 1219, 130 C.R.2d 198 [that coparticipant will swerve into one's path is risk inherent in sport of bicycle racing].)

(4) *Fishing*. (See *Mosca v. Lichtenwalter* (1997) 58 C.A.4th 551, 553, 68 C.R.2d 58 [being struck in eye by sinker as nearby fisherman was attempting to free his line was inherent risk of sportfishing; it was irrelevant that neighboring fisherman used wrong technique to free line].)

(5) *Rodeo*. (See *Domenghini v. Evans* (1998) 61 C.A.4th 118, 121, 70 C.R.2d 917 [primary assumption of risk

doctrine barred recovery by participant in cattle roundup, described as "sporting event," for injury sustained in wrestling calf to ground].)

(6) *Wrestling*. (See *Lilley v. Elk Grove Unified School Dist.* (1998) 68 C.A.4th 939, 942, 80 C.R.2d 638 [student broke arm while being instructed by coach on proper wrestling technique; under primary risk analysis, broken limbs are risk inherent to wrestling, and application of this theory is not precluded by *Educ.C. 44807*, which imposes on school authorities general duty of supervision].)

(7) *Flying*. (See *Gordon v. Havasu Palms* (2001) 93 C.A.4th 244, 249, 112 C.R.2d 816 [airport owner owed duty to pilot to design and maintain airstrip in compliance with applicable regulations; hence, primary assumption of risk doctrine was not applicable, and it did not become applicable merely because flying was dangerous activity and crashes were possible].)

(8) *Distance Running*. (See *Saffro v. Elite Racing* (2002) 98 C.A.4th 173, 178, 119 C.R.2d 497 [secondary assumption of risk; race organizer increased risks associated with marathon racing by failing to provide sufficient water and electrolyte replacement drinks].)

(9) *Hockey*. (See *Nemarnik v. Los Angeles Kings Hockey Club, L.P.* (2002) 103 C.A.4th 631, 635, 127 C.R.2d 10 [under primary assumption of risk theory, defendant owed plaintiff no duty to take extraordinary measures (screens) to prevent her from being struck by flying puck; fact that plaintiff's view was temporarily blocked by other spectators is one of risks inherent to watching hockey game].)

(10) *Scootering*. (See *Childs v. Santa Barbara* (2004) 115 C.A.4th 64, 68, 8 C.R.3d 823 [record did not establish as matter of law that child injured while riding scooter over uneven sidewalk was engaged in sport covered by primary assumption; scootering may be sport when done as part of contest or to test limits of one's ability, but there was no evidence that child was so engaged when injured].)

(11) *Miscellaneous Water Activities*. (See *Kahn v. East Side Union High School Dist.* (2003) 31 C.4th 990, 1002, 4 C.R.3d 103, 75 P.3d 30 [question of fact whether swimming coach increased dangers of team swimming by having novice swimmer execute racing dive into shallow water, even though swimmer was afraid to do so and had had little instruction in technique]; *Record v. Reason* (1999) 73 C.A.4th 472, 479, 86 C.R.2d 547 [for purposes of primary assumption of risk, tubing (riding inner tube connected to boat) is a sport; fact that plaintiff asked defendant, who was going faster than recommended speed, to slow down did not create cause of action, because negligence was inherent risk of sport that could not be unilaterally changed]; *Bunch v. Hoffinger Industries* (2004) 123 C.A.4th 1278, 1300, 20 C.R.3d 780 [manufacturer of liner for above-ground shallow pool had duty to provide defect-free product, and by supplying defective product increased risks inherent in sport of shallow pool diving; primary assumption of risk doctrine did not preclude liability].)

There is also extensive commentary involving sports litigation. (See 54 *Hastings L. Rev.* 1641 [criminal and civil liability of sports co-participants]; 29 *U.C. Davis L. Rev.* 971 [College Athletics: Testing the Boundaries of Contract and Tort]; 34 *U.C. Davis L. Rev.* 1029 [analyzing recreational sports injury cases]; 51 *U.C.L.A. L. Rev.* 339 [Rethinking Assumption of Risk and Sports Spectators]; 38 *U.S.F. L. Rev.* 599 [extreme sports and assumption of risk]; 29 *Western State L. Rev.* 125; 30 *Proof of Facts* 3d 161 [assumption of risk defense in sports or recreation injury litigation]; 31 *Proof of Facts* 3d 87 [errant golf ball shots]; 71 *Am.Jur. Trials* 337 [bicycle litigation]; 89 *Am.Jur. Trials* 405 [fitness club and health spa injuries]; 34 *A.L.R.5th* 77 [liability for injury or death of waterskier]; 35 *A.L.R.5th* 731 [liability insurance policy exclusions for athletic or sports injuries]; 66 *A.L.R.5th* 1 [liability for accidents occurring in school physical education classes]; 92 *A.L.R.5th* 473 [liability for skydiving, parachuting, or parasailing accidents].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Golf*. See *Shin v. Ahn* (2007) 42 C.4th 482, 499, 64 C.R.3d 803, 165 P.3d 581 [summary judgment for golfer in action against another golfer whose tee shot hit plaintiff in head was improper; whether defendant acted recklessly was issue of fact, and evidence did not conclusively establish when plaintiff and defendant made eye contact before defendant hit his shot and how far he was from plaintiff]; *Hemady v. Long Beach Unified School Dist.* (2006) 143 C.A.4th 566, 576, 49 C.R.3d 464 [being hit in head by golf club is not inherent risk in game of golf; thus, applying prudent person standard of care, rather than limited duty of care applicable to primary assumption of risk doctrine, did not require fundamental alteration of game of golf].

(3) *Bicycle and Vehicle Racing*. See *Huff v. Wilkins* (2006) 138 C.A.4th 732, 741, 41 C.R.3d 754 [in negligence action against father and minor son arising from collision of off-road vehicles, defendants were not entitled to summary judgment on ground of primary assumption of risk; defendants failed to show that minor's violation of statute and safety rule placing conditions on operation of all-terrain vehicles by minors did not increase inherent risk of sport of off-roading]. (11) *Miscellaneous Water Activities*. See *Capri v. L.A. Fitness Int., LLC* (2006) 136 C.A.4th 1078, 39 C.R.3d 425 [question of material fact whether algae on pool deck was known recreational hazard invoking primary assumption of risk defense precluded summary judgment for fitness club in action by member who slipped and fell on club's pool deck; distinguishing *Kahn v. East Side Union High School Dist.* (2003) 31 C.4th 990, 4 C.R.3d 103, 75 P.3d 30, text, p. 763]; 44 Cal. Western L. Rev. 557 [tort liability in surfing].

(12) *(New) Use of Exercise Equipment*. See *Zipusch v. LA Workout* (2007) 155 C.A.4th 1281, 1291, 66 C.R.3d 704 [health club's alleged negligent inspection and maintenance of exercise equipment, resulting in sticky substance remaining on treadmill for unreasonable length of time, was not inherent risk of exercising at club and did not bar member's negligence action against club for personal injuries sustained on treadmill].

Commentary involving sports litigation: See 37 *Loyola L.A. L. Rev.* 1273 [Fine Tuning California's Approach to Injured Participants in Active Sports].



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b. Sports or Recreation.

9. Athletic Instruction.

6 *Witkin Sum. Cal. Law Torts* § 1351

[§ 1351] Athletic Instruction.

In *Tan v. Goddard* (1993) 13 C.A.4th 1528, 17 C.R.2d 89, plaintiff, a 26-year-old man who wanted to be a jockey, enrolled in defendant racing school, where he was instructed by defendant D. Approximately 8 months after his enrollment, plaintiff was injured when the horse he was riding, Faraway Falcon, stepped on an object and went down. Immediately prior to this incident, plaintiff had informed D that Faraway Falcon was "off" due to an injury to its left foot, but D had nevertheless instructed plaintiff to jog the horse on the outside portion of the track even though there was a greater concentration of rocks in that location. In plaintiff's subsequent negligence action, defendants moved for summary judgment, arguing that plaintiff had released them from liability by reasonably assuming the risk of the injuries he had suffered. *Held*, summary judgment for defendants reversed.

(a) Under *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, supra, §1339, reasonable implied assumption of the risk may diminish but does not bar recovery. Under *Ford v. Gouin* (1992) 3 C.4th 339, 11 C.R.2d 30, 834 P.2d 724, supra, §1340, the assumption of risk doctrine is a complete bar to a plaintiff's action only where, in view of the nature of the activity at issue and the parties' relationship to that activity, the defendant's conduct did not breach a legal duty of care owed to the plaintiff. (13 C.A.4th 1534.)

(b) Although there are precedents reaching back for most of this century that find an absence of duty between coparticipants in a sports activity and, often, to spectators at sporting events, the law is otherwise as applied to coaches and students. Although coaches are not insurers and students may be held to notice of that which is obvious and to ask appropriate questions, the general rule is that coaches owe a duty of due care to the persons in their charge. (13 C.A.4th 1535.)

(c) Here, D, instead of being a coparticipant in the sport with plaintiff, was charged with teaching him how to ride a horse. It was D who assigned Faraway Falcon to plaintiff, knowing that the horse was "off" due to an injury; it was D who told plaintiff to jog the horse on the outer track; and it was D who knew, or should have known, of the rocky condition of that track. Under these circumstances, D owed plaintiff a duty of ordinary care to ensure that the horse he assigned to plaintiff was safe to ride under the conditions that he prescribed for that activity. And whether D breached that duty is a triable issue of fact. (13 C.A.4th 1535.)

A number of decisions apply the primary assumption of risk doctrine to athletic instruction. (See *Galardi v. Seahorse Riding Club* (1993) 16 C.A.4th 817, 823, 20 C.R.2d 270 [following *Tan*; instructor teaching plaintiff horse show jumping had duty to ensure that jumps were not beyond ability of horse or rider]; *Regents of Univ. of Calif. v. Superior Court* (1996) 41 C.A.4th 1040, 1044, 48 C.R.2d 922 [primary assumption of risk doctrine applied where student in defendant's rock climbing school was killed in fall when anchor system gave way; risk was inherent in rock climbing and there was no evidence that double-checking work of instructors would have prevented fall]; *Bushnell v. Japanese-Amer. Religious & Cultural Center* (1996) 43 C.A.4th 525, 529, 50 C.R.2d 671 [under primary assumption of risk doctrine, defendant judo school was not liable for injury received by student, who was merely being urged to learn skill more quickly, an inherent part of judo]; *Allan v. Snow Summit* (1996) 51 C.A.4th 1358, 1365, 59 C.R.2d 813 [under primary assumption of risk doctrine, ski instruction school was not liable for its instructor's negligence, where dangers faced by plaintiff, i.e., being challenged by instructor to do more, falling down, and slippery conditions, were risks inherent to ski instruction]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 C.A.4th 1112, 1117, 75 C.R.2d 801 [primary assumption of risk doctrine applies in action against instructor or coach, as well as coparticipant; cheerleader injured practicing gymnastic stunt was barred by doctrine where inherent danger of stunt was not increased and there was no evidence that defendant took team beyond its level of experience and capability]; *Rodrigo v. Koryo Martial Arts* (2002) 100 C.A.4th 946, 956, 960, 122 C.R.2d 832 [primary assumption of risk doctrine applied to tae kwon do student who, while in line waiting to kick leather pad, was injured, apparently by another student practicing while waiting; fact that student did not expect to be kicked was irrelevant in determining duty owed by instructor, and instructor did not increase risks when he warned students in line not to practice, but did not supervise to see whether his instructions were being followed].)

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c. Job Performance.

1. Animal Care.

6 *Witkin Sum. Cal. Law Torts* § 1352

[§ 1352] Animal Care.

In *Cohen v. McIntyre* (1993) 16 C.A.4th 650, 20 C.R.2d 143, defendant brought her dog, Lobo, to plaintiff veterinarian for a preneutering examination. Lobo had bitten three people in the past 2 years, and defendant believed that neutering would "mellow" him. When Lobo snapped at plaintiff while he was preparing to lift the dog from the floor, plaintiff had defendant muzzle the animal. Plaintiff then performed the preneutering examination, placed Lobo back on the floor, and, without seeking assistance from defendant, removed the muzzle. Lobo promptly bit plaintiff several times. Plaintiff did not ask for, and defendant did not volunteer, any information about whether Lobo had a propensity to bite. In this action, plaintiff alleged that defendant, despite knowing of Lobo's vicious propensities, failed to warn and concealed them from plaintiff. *Held*, summary judgment for defendant affirmed; defendant had no duty to warn plaintiff.

(a) This case falls within the "primary" category of assumption of the risk referred to in *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, supra, §1339. Plaintiff, a licensed veterinarian, was injured during the course of treating an animal under his control, an activity for which he was employed and compensated and one in which the risk of being attacked and bitten is well known. "Thus, this is a classic situation where a defendant's ordinary duty of care is *negated* due to the nature of the activity and the relationship of the defendant to the plaintiff." (16 C.A.4th 655, citing *Nelson v. Hall* (1985) 165 C.A.3d 709, 211 C.R. 668, *infra*, §1410, and *Willenberg v. Superior Court* (1986) 185 C.A.3d 185, 229 C.R. 625, *infra*, §1410.)

(b) In the sporting context, *Knight* held that the defendant is liable only for intentional or reckless conduct. Applying this reasoning to the veterinary context, it follows that defendant owed no duty of care to plaintiff unless either she engaged in intentional concealment or misrepresentation, or her conduct was so reckless as to fall totally outside the range of behavior ordinarily expected of those who avail themselves of veterinary services. (16 C.A.4th 655.)

(c) Here, plaintiff did not ask why defendant wanted Lobo neutered, and she had no reason to believe that she needed to tell him. This was particularly so in view of Lobo's display of behavior that was so aggressive that it caused plaintiff to insist that the dog be muzzled. Hence, defendant's silence did not amount to the type of intentional or

reckless conduct that would justify an exception to the normal "no duty" rule in a primary assumption of the risk case. (16 C.A.4th 656.)

(d) Relying on *Lipson v. Superior Court* (1982) 31 C.3d 362, 182 C.R. 629, 644 P.2d 822, supra, §853, and *Von Beltz v. Stuntman* (1989) 207 C.A.3d 1467, 255 C.R. 755, supra, §1338, plaintiff argued that this case falls within the exception to the primary assumption of the risk doctrine where the defendant misrepresents or changes the nature of the hazard that is encountered. However, *Lipson* and *Von Beltz* do not control here. In both of those cases, the defendants significantly altered the risk without the plaintiff's knowledge, and that type of behavior would logically fall within the reckless or intentional misconduct exception referred to in *Knight*. Here, however, the risk that Lobo might bite remained the same and was acknowledged by both parties. The only alteration of that risk was brought about by plaintiff when he removed the muzzle at the conclusion of the examination, thereby exposing himself to the very danger against which he had just guarded. (16 C.A.4th 656.) (See *Neighbarger v. Irwin Industries* (1994) 8 C.4th 532, 545, 34 C.R.2d 630, 882 P.2d 347, supra, §850 ["veterinarian's rule" is on shaky ground to extent that it rests on veterinarian's subjective acceptance of foreseeable occupational hazard of dog bites; however, it may be sound if based on defendant-veterinarian relationship, and defendant's conduct in entrusting animal to veterinarian]; 39 Proof of Facts 3d 133 [assumption of risk as defense in dog bite case].) (On veterinarian's assumption of risk as defense to strict liability for injuries caused by dog, see *infra*, §1410.)

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2. Medicine.

6 *Witkin Sum. Cal. Law Torts* § 1353

[§ 1353] Medicine.

In *Herrle v. Estate of Marshall* (1996) 45 C.A.4th 1761, 53 C.R.2d 713, plaintiff, a nurse's aide in a convalescent hospital, was struck by a patient who suffered from senile dementia and Alzheimer's disease. Plaintiff sued the patient's estate, and the trial court ruled for defendant. *Held*, affirmed; the primary assumption of risk doctrine barred plaintiff from recovery.

(a) The situation here is precisely that covered under the primary assumption of risk doctrine. Plaintiff was engaged as an aide in a convalescent hospital to assume responsibility to care for mentally incompetent patients, many of whom are occasionally violent. The decedent was placed specifically in the hospital's care in part to protect her from injuring herself and others because of her violent tendencies. In the words of *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *supra*, §1339: "The nature of the activity" was the protection of the patient from doing harm to herself or others; "the parties' relationship to the activity" was plaintiff's professional responsibility to provide this protection, and the "particular risk of harm that caused the injury" was the very risk plaintiff and her employer were hired to prevent. (45 C.A.4th 1765.)

(b) Plaintiff argues that C.C. 41, imposing civil liability on mentally incompetent persons for their tortious acts (*supra*, §§25, 26), precludes assertion of an assumption of risk defense. The short answer to this argument is that C.C. 41 is intended to place the incompetent person in the same posture as the competent person, not in a legally worse position. Where no duty exists in the first place, C.C. 41 does not create one. The doctrine of primary assumption of risk is available to the incompetent as well as the competent. (45 C.A.4th 1766.)

(c) Because of the nature of the activity (caring for the mentally infirm) and the relationship between the parties (patient and caregiver), mentally incompetent patients should not owe a legal duty to protect caregivers from injuries suffered in attending to them. It is the health care provider, not the patient, who is in the best position to protect against the risks to the provider rooted in the very reason for treatment. (45 C.A.4th 1770.) Furthermore, the caregiver is covered for work-related injuries by workers' compensation. (45 C.A.4th 1771.)

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3. Public or Private Safety.

6 *Witkin Sum. Cal. Law Torts* § 1354

[§ 1354] Public or Private Safety.

In *Donohue v. San Francisco Housing Authority* (1993) 16 C.A.4th 658, 20 C.R.2d 148, plaintiff firefighter conducted an unannounced fire safety inspection of an apartment building owned by defendant housing authority (SFHA). The building consisted of three floors with a flight of concrete stairs leading from the third floor to a penthouse door, which opened out onto the roof. These steps were wet, a condition that plaintiff noticed, and they did not have skid-resistant treads on them. As part of his inspection, plaintiff climbed the stairway to see if the penthouse door was open, as required by the fire code. While descending the stairway, plaintiff slipped and fell. In this action to recover for injuries plaintiff suffered in the fall, defendant moved for summary judgment based on the theory that plaintiff's recovery was barred by either the firefighter's rule or traditional common law assumption of risk. Without specifying the ground for his ruling, the trial judge granted the motion. *Held*, reversed; this case falls within the secondary assumption of the risk category specified in *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *supra*, §1339, and defendant breached the duty of care that it owed to plaintiff. (On rejection of the firefighter rule defense, see *supra*, §855.)

(a) "After *Knight*, whether a plaintiff's cause of action is barred by assumption of the risk or is a mere variant of contributory negligence no longer turns on the reasonableness of the plaintiff's conduct or his or her subjective awareness of the nature and magnitude of the danger. ... Instead, the central question is whether, in light of the nature of the activity and relationship of the parties, the defendant breached a duty of care toward the plaintiff or had no duty to remedy the danger which the plaintiff confronted. If the former, the defense is subsumed by comparative negligence principles and the claim survives. If the latter, the defense presents an absolute bar to the claim." (16 C.A.4th 664.)

(b) Here, defendant, as a landowner, owed a general duty to tenants and visitors to maintain its premises in reasonably safe condition. Defendant breached this duty. "Evidence was submitted showing that the concrete stairs had been heavily watered down just prior to plaintiff's visit and lacked skid-resistant treading, which might have increased traction and prevented the accident. From this evidence a jury could conclude that SFHA breached its duty of care owed toward plaintiff. Plaintiff's conduct in proceeding to traverse the stairs despite full appreciation of the risk created by such negligence was no more than a species of contributory negligence, to be considered by the jury in apportioning comparative fault." (16 C.A.4th 665, citing *Prescott v. Ralphs Grocery Co.* (1954) 42 C.2d 158, 265 P.2d 904, *supra*, §1282.)

(c) Defendant's reliance on *Danieley v. Goldmine Ski Associates* (1990) 218 C.A.3d 111, 266 C.R. 749, supra, §1126, for the proposition that plaintiff's action is barred by the "obvious hazard" rule, is unavailing. In holding that a ski resort was not liable for injuries suffered when a skier collided with an off-course tree, *Danieley* made it clear that its holding was based on the sports setting of the case and the fact that collision with an off-course tree is one of the inherent risks that skiers accept when they engage in the sport. Hence, unlike the present case, *Danieley* is an instance where the absence of duty is traceable to the nature of the activity involved, i.e., it is a primary assumption of risk case. (16 C.A.4th 665.) (See *Marquez v. Mainframe* (1996) 42 C.A.4th 881, 885, 50 C.R.2d 34 [private security guard injured in slip and fall was not barred by primary assumption of risk, though job duties included looking for safety hazards].)

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4. Other Jobs.

6 *Witkin Sum. Cal. Law Torts* § 1355

[§ 1355] Other Jobs.

In *Milwaukee Elec. Tool Corp. v. Superior Court* (1993) 15 C.A.4th 547, 19 C.R.2d 24, plaintiff was an experienced glazier who was injured on the job while using a drill manufactured by defendant. At the time of the accident, plaintiff was on a ladder, and drilling through angle iron. He was holding the drill with only one hand, although the instructions provided by defendant cautioned users to keep the other hand on the drill's side handle. When the drill hung up and stopped, the body rotated in a counter-clockwise direction, causing plaintiff to fall from the ladder. Plaintiff was familiar with both the instruction concerning use of the side handle and the tendency of drills manufactured by defendant to "bind up" while drilling through iron. Plaintiff's complaint included a products liability cause of action, and defendant moved for summary adjudication establishing that the cause of action was barred by the defense of assumption of risk. The motion was denied. *Held*, this was correct; under the duty analysis set forth in *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *supra*, §1339, which is applicable to a products liability action, defendant failed to meet the burden of showing that it owed no legal duty to plaintiff.

(a) Although a strict products liability cause of action need not be pleaded in terms of classic negligence elements, i.e., duty, breach, causation, and damages, the cause of action is based on the manufacturer's breach of its duty to provide consumers with defect-free products. In view of this functional similarity between negligence theory and strict products liability insofar as duty and breach are concerned, there is no reason prohibiting application of the *Knight* duty analysis here, even though *Knight* and its companion case, *Ford v. Gouin* (1992) 3 C.4th 339, 11 C.R.2d 30, 834 P.2d 724, *supra*, §1340, discussed assumption of risk as it applied to a complaint sounding in negligence. (15 C.A.4th 559.)

(b) The determination whether the defendant owes a legal duty to protect the plaintiff from a particular risk of harm requires an examination of (1) the nature of the activity in which the defendant is engaged; and (2) the relationship of the defendant and the plaintiff to that activity. (15 C.A.4th 561.)

(c) With respect to the nature of the activity, plaintiff alleged that the activity that injured him was defendant's production of a defective product, and claimed that defendant should be held strictly liable for those injuries. "We find nothing in the nature of the manufacturing activity to indicate that a finding of no duty on the manufacturer's part should be made. To the contrary, we believe there is a sound basis in the development of strict products liability doctrine to

support analysis of a products liability case, even one involving an assertion of assumption of the risk, in terms of a duty on the part of the manufacturer to produce defect-free products." (15 C.A.4th 562.)

(d) With respect to the relationship of the parties to the activity, there is nothing to support the theory that defendant was relieved of its duty toward plaintiff because the risk of injury from a defective tool is one that is inherent in a worker's job. "In the relationship of the defendant and the plaintiff to the activity, the use of the tool, it cannot be said that the plaintiff user undertook to act as a product tester or guinea pig. In other words, those defendants in primary assumption of the risk cases who have been found not to owe any duty to an injured plaintiff (for example, a negligent person who started a fire or an owner of a dangerous dog) are in a different position than is a manufacturer of a tool which ultimately causes injury to its user, because the user was not necessarily a professional employed to confront the very danger posed by the injury-causing agent." (15 C.A.4th 563.)

(e) Because defendant failed to meet its burden, as the moving party, to show the absence of a legal duty toward plaintiff, this is a case of secondary assumption of risk and is inappropriate for summary judgment. Plaintiff's assumption of the risk is merged into the comparative fault scheme so that the trier of fact may consider the relative responsibility of the parties in apportioning the loss and damage resulting from the injury. (15 C.A.4th 565.) (See *Wright v. Stang Mfg. Co.* (1997) 54 C.A.4th 1218, 1232, 63 C.R.2d 422 [whether manufacturer of deck gun had duty to user was question of fact; as matter of law, injury allegedly caused by defectively designed tool is not risk that is inherent to worker's job]; *Rosenbloom v. Hanour Corp.* (1998) 66 C.A.4th 1477, 1479, 78 C.R.2d 686 [under primary assumption of risk doctrine, defendant club was not liable for shark bite sustained by employee hired to handle sharks]; *Hamilton v. Martinelli & Associates* (2003) 110 C.A.4th 1012, 1021, 2 C.R.3d 168 [correctional officer, who was injured while performing training maneuver during required course, was prevented by primary assumption of risk doctrine from recovering from instructor; doctrine applied because officer was hired to confront very risks that caused her injury, i.e., restraining violent juvenile offender].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Patterson v. Sacramento City Unified School Dist.* (2007) 155 C.A.4th 821, 837, 66 C.R.3d 337 [primary assumption of risk did not bar action by student in adult truck driver training course against school district for injury suffered while loading bleachers onto flat-bed trailer; loading trailer was not inherently dangerous activity, student was not employee covered by workers' compensation or by other insurance, and district's failure to properly supervise loading was conduct that public policy desired to chill].



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E. Comparative Negligence: Assumption of Risk as Contributory Negligence.

4. Primary Versus Secondary Assumption of Risk.

d. Miscellaneous Activities.

6 *Witkin Sum. Cal. Law Torts* § 1356

[§ 1356] Miscellaneous Activities.

(1) *Dog Bite*. In *Davis v. Gaschler* (1992) 11 C.A.4th 1392, 14 C.R.2d 679, plaintiff, an experienced breeder and handler of dogs, stopped his vehicle to render assistance to two persons who were attempting to lift an injured dog into their car. While rendering this aid, plaintiff was bitten. Because the dog had not been vaccinated against rabies and the initial tests on the animal were equivocal, plaintiff underwent a series of inoculations for rabies. In this action against defendant owners, the trial judge granted defendants' motion for summary judgment on the ground that plaintiff's reasonable implied assumption of risk barred recovery. *Held*, reversed.

(a) Defendants, as the moving parties, had the burden of establishing the absence of any basis for recovery under plaintiff's causes of action for negligence and negligent infliction of emotional distress. Under *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *supra*, §1339, this means that they had the burden of showing that this is a case of primary assumption of risk, i.e., that, by virtue of the nature of the activity and the parties' relationship to it, defendants owed no legal duty to plaintiff. Defendants failed to meet this burden. (11 C.A.4th 1398.)

(b) Plaintiff's complaint alleged facts sufficient to impose a duty on the part of defendants, i.e., that they owned and negligently controlled the dog that bit plaintiff. This duty is found in C.C. 3342(a) (*infra*, §§1408, 1409), which imposes on a dog owner liability for damages suffered by a person bitten by the dog while in a public place. This statute was not designed merely to prevent dogs from doing harm while they rove but to prevent dogs from becoming a hazard to the community without regard to whether they are running free or restrained. And plaintiff's voluntary act of helping the injured dog did not remove her from the class of persons to be protected by the statute. (11 C.A.4th 1399.)

(c) A duty of care to plaintiff is also found in former Health & Saf.C. 1920 (now *Health & Saf.C. 121690*), which requires every owner of a dog over the age of 4 months to have the dog vaccinated against rabies at prescribed intervals. Defendants do not dispute that their dog was over 4 months old when it bit plaintiff and that it had not been vaccinated against rabies. Defendant also failed to show that a violation of the rabies laws would not give rise to a presumption of breach of a duty of care in this case. (11 C.A.4th 1400.)

(d) Defendants' argument that they should prevail because of the veterinarian's rule, which is kindred to the firefighter's rule, is without merit. Under either rule, the absence of duty is based on the fact that the plaintiff is

employed and compensated for work that carries with it certain hazards. Here, however, plaintiff was not employed or otherwise compensated for helping injured dogs. Nor was there an employment relationship or any other relationship between plaintiff and defendants. (11 C.A.4th 1401.) (On veterinarian's rule, see *supra*, §1352.)

(2) *Slip and Fall*. In *Curties v. Hill Top Developers* (1993) 14 C.A.4th 1651, 18 C.R.2d 445, plaintiff, a tenant in defendant's apartment complex, was injured when he slipped and fell on a sloping lawn on defendant's property. At the time of the accident, plaintiff was taking the trash to a Dumpster located behind his apartment and was using the route that he normally took. Several witnesses testified that the sloping lawn was heavily used and dangerous, and that this condition had been reported to defendant's manager. In plaintiff's action to recover for his injuries, the jury found that defendant's negligence was the legal cause of plaintiff's injuries but that plaintiff had assumed the risk of those injuries. Accordingly, the trial judge entered judgment for defendant. *Held*, reversed; the doctrine of implied assumption of risk does not apply under these facts.

(a) The "duty analysis" employed in *Knight v. Jewett* (1992) 3 C.4th 296, 11 C.R.2d 2, 834 P.2d 696, *supra*, §1339, "is based upon a distinction between (1) the situation where the assumption of risk doctrine embodies a legal conclusion that there is no duty on the part of the defendant to protect the plaintiff from a particular risk, known as 'primary assumption of risk,' and (2) the situation where the defendant owes a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty, known as 'secondary assumption of risk.' " Primary assumption of risk is not merged into the comparative negligence system; secondary assumption of risk is. (14 C.A.4th 1655.)

(b) This case falls within the secondary assumption of risk category. Defendant, as a property owner or manager, was required to use due care to eliminate dangerous conditions on its property in order to avoid exposing tenants such as plaintiff to unreasonable risks of harm. The evidence supports a conclusion that defendant breached its duty by maintaining the sloping lawn configuration, despite reports that persons had fallen on it. (14 C.A.4th 1656.)

(c) Based on evidence that plaintiff chose to traverse the sloping lawn regularly despite knowing that it was slippery, defendant argued that plaintiff had agreed to relieve defendant of any obligation of reasonable conduct toward him. This argument is without merit. In determining whether the assumption of risk applies under the *Knight* duty approach, the focus is not on the reasonableness or unreasonableness of plaintiff's conduct. Instead, it is on whether, in light of the nature of the activity in which the parties were involved, defendant's conduct breached a legal duty of care to plaintiff. (14 C.A.4th 1656.) Thus, the case is remanded with instructions to conduct a partial retrial on the issues of the degree of defendant's negligence, plaintiff's comparative fault, if any, and damages, if any. (14 C.A.4th 1657.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) (New) *Fitness Training*. In *Rostai v. Neste Enterprises* (2006) 138 C.A.4th 326, 41 C.R.3d 411, plaintiff, a 46-year-old man who was overweight and out of shape, asked defendant S, a personal trainer, to make him look "buff." Defendant S agreed and took plaintiff to defendant gym, which, for a fee, allowed defendant S to use the gym facilities to train his clients. In their first training session, defendant S had plaintiff engage in several rigorous activities, and when plaintiff complained of being tired, defendant urged and taunted him to continue. As a result, plaintiff had a heart attack. He sued both defendants, who moved for summary judgment on the ground of primary assumption of risk. *Held*, summary judgment for defendants affirmed.

(a) Contrary to plaintiff's contention that the primary assumption of risk doctrine applies only to sports, the doctrine applies to any physical activity that involves an element of risk or danger as an integral part of the activity. "Fitness training under the guidance of a personal trainer is such an activity. The obvious purpose of working out with a personal trainer is to improve physical fitness and appearance. In order to accomplish that goal, the participant must engage in strenuous physical activity. ... Stress on the cardiovascular system as a result of the physical exertion that is an integral part of fitness training with a personal trainer is a risk inherent in the activity. Eliminating that risk would alter the fundamental nature of the activity." (138 C.A.4th 333.)

(b) It is not enough to determine that physical stress and injury are inherent risks of working out. It is also necessary to consider the role of defendant S in relation to that activity. Although plaintiff phrased his claim against defendant S in terms of failing to adequately assess plaintiff's physical condition, the essence of plaintiff's claim was that defendant S, in his capacity as plaintiff's personal fitness trainer, challenged plaintiff to perform beyond his level of physical ability and fitness. That challenge, however, is the very essence of fitness training, and is precisely the reason that one would pay for the services of a personal trainer. Inherent in that process are the risks that the trainer will not accurately assess the participant's ability and that the participant will suffer injury as a result. (138 C.A.4th 334.)

(c) In order to state a cause of action against a personal fitness trainer, the plaintiff must allege and prove that the trainer acted with intent to cause injury or that the trainer acted recklessly in that the conduct was totally outside the range of ordinary activity involved in personal fitness training. In this case, plaintiff did neither. The evidence established that at most defendant S did not accurately assess plaintiff's level of physical fitness and that he might have interpreted plaintiff's physical complaints as the usual signs of physical exertion due to lack of conditioning rather than as symptoms of a heart attack. There was no evidence that defendant S acted recklessly or with intention to harm. (138 C.A.4th 335.)

(d) Defendant gym is not vicariously liable to plaintiff, because defendant S himself did not owe a duty of due care to plaintiff. With respect to direct liability, defendant gym, as the provider of the venue in which the physical activity of fitness training took place, did not have a duty to eliminate the risks inherent in that activity. Defendant gym's duty did not extend beyond ensuring that its equipment was in safe, working order. (138 C.A.4th 336, and footnote 3.)



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CHAPTER IX - Torts

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F. Comparative Negligence: Comparative Partial Indemnity.
1. In General.
a. Adoption of Doctrine.

6 *Witkin Sum. Cal. Law Torts* § 1357

[§ 1357] Adoption of Doctrine.

In *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, plaintiff Glen, a teenage boy, was a participant in a cross-country motorcycle race for novices sponsored by defendants AMA (American Motorcycle Association) and Viking (Viking Motorcycle Club). He suffered serious injuries and sued AMA and Viking, alleging that they negligently failed to give the novice participants reasonable instructions necessary for their safety, failed to segregate the entrants into reasonable classes of equivalently skilled participants, and failed to limit the entry of participants to prevent the racecourse from becoming overcrowded and hazardous. AMA filed an answer denying the allegations of negligence and setting up the affirmative defense of plaintiff's negligence.

Thereafter, AMA sought leave to file a cross-complaint against Glen's parents, alleging that they knew that the sport was dangerous, were fully aware of the training he had received, and directly participated in his decision to enter the race by signing a parental consent form; that in permitting him to participate, they negligently failed to exercise their power of supervision over him; and that AMA's negligence, if any, was "passive" and that of the parents was "active." The cross-complaint sought indemnity from the parents if AMA were found liable to Glen. An additional count of the cross-complaint asked for a declaration of the "allocable negligence" of the parents in order that any damages awarded against AMA might be reduced by the percentage of damages allocable to the parents' negligence. The trial judge denied leave to file the cross-complaint, the Court of Appeal issued mandamus, and the Supreme Court ordered a hearing on its own motion. *Held*, writ granted to compel leave to file.

(a) *Partial indemnity among concurrent tortfeasors.*

(1) The allocation of damages among multiple tortfeasors has historically been analyzed in terms of two mutually exclusive doctrines, contribution and indemnification. But the common goal of both doctrines--the equitable distribution of loss among multiple tortfeasors--calls for a reexamination of the twin concepts. (20 C.3d 592.)

(2) The 1957 contribution statute forecloses any evolution of the California common law contribution doctrine beyond its pre-1957 "no contribution" rule. Hence, in the past two decades, common law developments have been channeled through the equitable indemnity doctrine, as an exception to the no contribution rule. (20 C.3d 592, 593.) However, because common law precepts precluded any attempt to ascertain comparative fault, "equitable indemnity,

like the contributory negligence doctrine, developed as an all-or-nothing proposition." (20 C.3d 594.)

(3) Throughout the long history of the equitable indemnity doctrine, the courts struggled to find a linguistic formulation to determine relative culpability sufficiently disparate to warrant placing the entire loss on one party. The struggle was largely futile; the formulations (active, primary, or positive, and passive, secondary, or negative) were artificial and lacking in objective criteria. (20 C.3d 594, 595.) And some courts and commentators "have candidly eschewed any pretense of an objectively definable equitable indemnity test," concluding that indemnity may be allowed "where in equity and good conscience" the burden should be shifted. (20 C.3d 595.)

(4) The difficulty with equitable indemnity is not a question of terminology, but rather the all-or-nothing nature of the doctrine itself. *Ford Motor Co. v. Robert J. Poeschl* (1971) 71 C.A.3d 694, 98 C.R. 702, supra, §116, urging adoption of a rule of contribution or partial indemnification, recognized that the common law was capable of evolving the equitable indemnity doctrine into a rule permitting the equitable *sharing* of loss between multiple tortfeasors. (20 C.3d 597.) And the New York Court of Appeals, in *Dole v. Dow Chemical Co.* (1972) and *Kelly v. Long Island Lighting Co.* (1972) took this step by modifying the traditional indemnity doctrine to permit one tortfeasor to obtain partial indemnification from another on the basis of comparative fault. (20 C.3d 597, 598.) Other courts have done the same. (20 C.3d 599.)

(5) Pursuant to the basic principle laid down in *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, supra, §1329, "the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (20 C.3d 599.)

(b) *Contribution statutes do not bar adoption of comparative partial indemnity rule.* The contention that C.C.P. 875 et seq., the contribution statutes, preclude this judicial development is unsound:

(1) The New York court in *Dole*, supra, adopted a similar partial indemnity rule despite the existence of a comparable statutory contribution scheme. (20 C.3d 601.) And the legislative history of the California statute contains no suggestion that the Legislature intended to foreclose future judicial developments that further the principal purpose of ameliorating the harshness of the no contribution rule. (20 C.3d 602.) Moreover, the California statute, unlike that of New York, expressly preserves the right of indemnity, stating that the right of contribution shall be subordinate to it. (20 C.3d 602; see C.C.P. 875(f), supra, §105.)

(2) California's statute, again unlike New York's, states that the right of contribution "shall be administered in accordance with the principles of equity." The Legislature "obviously intended the judiciary to elaborate" on these principles, and thus did not intend to curtail judicial discretion in expanding the common law equitable indemnity doctrine so as to apportion damages among multiple tortfeasors. (20 C.3d 603.)

(3) The alternative argument is that adoption of a comparative indemnity doctrine would undermine the legislative policy encouraging settlement, expressed in C.C.P. 877, discharging from liability a tortfeasor who enters into a good faith settlement. This is not true; the policy should be preserved as an integral part of the partial indemnity doctrine: Although C.C.P. 877 by its terms, releases a settling tortfeasor only from liability for contribution and not partial indemnity, "from a realistic perspective the legislative policy underlying the provision dictates that a tortfeasor who has entered into a 'good faith' settlement ... must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor." (20 C.3d 604.)

(c) *Cross-complaint for partial indemnity.* AMA is entitled to cross-complain against Glen's parents to obtain partial indemnification, for if they were in fact negligent as alleged, they could be held liable for the resulting damages. (20 C.3d 608.)

(1) Under *Roylance v. Doelger* (1962) 57 C.2d 255, 19 C.R. 7, 368 P.2d 535, 5 Cal. Proc. (4th), Pleading, §1082, and its codification in C.C.P. 428.10 and 428.20, 5 Cal. Proc. (4th), Pleading, §§1097, 1098, a defendant may cross-complain for indemnity against a person not named in the complaint. (20 C.3d 605, 606.)

(2) The objection that this will complicate the litigation and deprive the plaintiff of the asserted "right" to control the size and scope of the proceeding is answered by *Roylance* and *C.C.P. 1048(b)*: The court in its discretion may order a separate trial of the cause of action asserted by the cross-complaint. (20 C.3d 606; see 4 Cal. Proc. (4th), *Pleading*, §338.)

(3) In exercising its discretion, the court must consider the fact that each third party cross-defendant may litigate the question of the plaintiff's proportionate fault, and that in this event, severance may not be an attractive alternative. But in view of the fact that a plaintiff's recovery should be diminished only by the proportion that his or her negligence bears to that of *all tortfeasors*, a defendant who may be jointly and severally liable for all the damages should be permitted to bring other concurrent tortfeasors into the suit. (20 C.3d 607.)

(4) There are some exceptions to the general rule laid down here. (a) When an employee is injured in the scope of employment, *Lab.C. 3864* would normally preclude a third party tortfeasor from obtaining indemnification from the employer, even if the employer's negligence was a concurrent cause. (20 C.3d 607, footnote 9, citing *E.B. Wills Co. v. Superior Court* (1976) 56 C.A.3d 650, 128 C.R. 541, 2 Summary (10th), *Workers' Compensation*, §102.) (b) A partial indemnification claim cannot properly be brought against a concurrent tortfeasor who has entered into a good faith settlement with the plaintiff. (20 C.3d 607, footnote 9.)

A single justice dissented. (See 30 *Hastings L. J.* 1464 [Report to Joint Committee of Legislature on Problems of *American Motorcycle*]; 12 *Loyola L.A. L. Rev.* 179 [Comparative Fault and Intentional Torts]; 14 *Loyola L.A. L. Rev.* 775 [comparative fault and insolvent defendant]; 10 *Pacific L. J.* 729 [Settlements After *Li*: But is it "Fair"?]; 14 *Pacific L. J.* 835 [Extending the Fairness Principle of *Li* and *American Motorcycle*: Adoption of the Uniform Comparative Fault Act]; 18 *Pacific L. J.* 201 [indemnity in California after *American Motorcycle*]; 6 *Pepperdine L. Rev.* 1 [allocation of responsibility after *American Motorcycle*]; 6 *San Diego L. Rev.* 833; 19 *San Diego L. Rev.* 773 [effect of comparative fault on California contribution and indemnification rights]; 18 *Santa Clara L. Rev.* 779 [Contribution and Indemnity Collide With Comparative Negligence--The New Doctrine of Equitable Indemnity]; 53 *A.L.R.3d* 184 [contribution or indemnity between joint tortfeasors on basis of relative fault].)

In *Ventura v. Camarillo* (1978) 80 C.A.3d 1019, 144 C.R. 296, the court referred to recent holdings on limited retroactivity of decisions establishing new rules (80 C.A.3d 1023), and concluded that the law of equitable indemnification should be applied retroactively under the formula of *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 144 C.R. 380, 575 P.2d 1162, *infra*, §1542. (80 C.A.3d 1024.) (See *Safeway Stores v. Nest-Kart* (1978) 21 C.3d 322, 333, 146 C.R. 550, 579 P.2d 441, *infra*, §1360; *Sears, Roebuck & Co. v. International Harvester Co.* (1978) 82 C.A.3d 492, 495, 147 C.R. 262, footnote 1.)

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SUPPLEMENT: [This section is current through the latest supplement]
Roylance case:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1156.

Codification of Roylance case:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §§1171, 1172.

Separate trial:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §377. *Correction:* Page 774, line 3 of paragraph (4), the citation for *Ford Motor Co. v. Robert J. Poeschl* should be 21 C.A.3d 694.



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1. In General.
b. No Apportionment Among Defendants.

6 Witkin Sum. Cal. Law Torts § 1358

[§ 1358] No Apportionment Among Defendants.

In *Klemme v. Hoag Memorial Hosp. Presbyterian* (1980) 103 C.A.3d 640, 163 C.R. 109, plaintiff sued a hospital and two doctors for malpractice. The hospital settled with her and was dismissed as a party defendant. At the conclusion of the trial, at plaintiff's request and over defendants' objections, special verdict forms were given the jury to determine the proportion of negligence attributable to all persons involved; and the jury percentages were plaintiff 5%, defendant Dr. B 27%, defendant Dr. E 3%, and "other persons" 65%. *Held*, this was error (although not prejudicial in the present case). The proportionate fault of defendant doctors and the hospital, among themselves, was not in issue, and plaintiff had no legitimate interest in having the jury determine it. As concurrent tortfeasors, defendants were jointly and severally liable for the entire judgment. They may have had claims for partial indemnity among themselves, but they were not required to litigate them in the main action or at all. (103 C.A.3d 644.)

Under the Uniform Comparative Fault Act §2(a)(2) (12 U.L.A. (Master Ed.), p. 123), the trial judge *must* instruct the jury to answer special interrogatories (in the absence of a jury, the findings must be made by the judge) indicating the percentage of fault of *each* of the parties, including the defendant, as well as any third-party defendants and persons who have been released from liability.

SUPPLEMENT: [This section is current through the latest supplement]

See Uniform Comparative Fault Act §2(a)(2), 12 U.L.A. (Master Ed.), p. 135.



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1. In General.
c. Where One Defendant Is Judgment Proof.

6 *Witkin Sum. Cal. Law Torts* § 1359

[§ 1359] Where One Defendant Is Judgment Proof.

(1) *Shortfall*. In *Paradise Valley Hosp. v. Schlossman* (1983) 143 C.A.3d 87, 191 C.R. 531, Mr. and Mrs. M sued P Hospital and Doctors L and S for negligence. The verdict was for \$ 1.5 million and liability was apportioned as follows: hospital 10%, Dr. L 40%, Dr. S 50%. The hospital paid two-thirds of the judgment, Dr. L paid the remaining one-third, and Dr. S filed a petition for bankruptcy. The hospital sought contribution against Dr. L for the difference between the amount it paid and the amount due as derived from the ratio of responsibility, i.e., one-fourth. On a review of the case law and law review commentary and *Restatement of Restitution* §85, Comment h, the court concluded that this approach was correct: "[W]here there is a fault-free plaintiff, any shortfall should be shared by the solvent defendants in proportion to their relative proportionate degree of culpability." (143 C.A.3d 91.) (See *Sagadin v. Ripper* (1985) 175 C.A.3d 1141, 1172, 221 C.R. 675.)

The same conclusion was reached in *Ambriz v. Kress* (1983) 148 C.A.3d 963, 196 C.R. 417, involving a plaintiff who was also a cross-defendant; the court held that she, along with other solvent defendants, should share in the shortfall caused by an insolvent defendant. The reasoning of *Paradise Valley Hosp.* "should apply to all defendants, including any cross-defendant who, fortuitously, happens to be a plaintiff." (148 C.A.3d 969.)

In *Lyly & Sons Trucking Co. v. California* (1983) 147 C.A.3d 353, 195 C.R. 116, the *Paradise Valley Hosp.* formula was applied where the shortfall involved the judgment proof status of a settling defendant. The settling defendant was 50% at fault, two solvent defendants were 10% and 40% at fault, and the total net damages were \$ 875,000. The 40%-at-fault defendant, who had paid the entire damages, sought indemnity from the 10%-at-fault defendant, and the trial judge determined that this defendant's liability should be limited to 10%, i.e., \$ 87,500. *Held*, this was error. As between the two solvent defendants, they should share liability on a ratio of 1 to 4. Hence, the defendant who was 10% at fault was liable for 20% of the damages, i.e., \$ 175,000. (147 C.A.3d 356.)

(2) *Overpayment*. In *Bracket v. California* (1986) 180 C.A.3d 1171, 226 C.R. 1, the formula applied in the shortfall cases was applied to an overpayment by a settling defendant. As the result of a motor vehicle accident, G settled with plaintiff for \$ 350,000. At trial against B, the jury awarded plaintiff \$ 2.5 million, and B satisfied the remainder of the judgment, i.e., \$ 2.15 million. In B's indemnity action against the state, the percentages of fault were determined to be: G 5%; B 85%; and the state 10%. The trial judge decided that after subtracting the amount of the settlement, B and the

state should share in the judgment in proportion to their fault. Hence, judgment was entered for B for \$ 226,315.66, computed by subtracting \$ 350,000 from \$ 2.5 million and multiplying by 10/95. *Held*, this was correct.

(a) The \$ 2.15 million paid by B was \$ 25,000 more than it would have paid solely on the basis of its comparative fault (85% of \$ 2.5 million). Hence, the state argued that its liability to B should be limited by this amount. However, this solution would be palpably inequitable. It would allow the state to receive the entire benefit of G's overpayment, while ultimately contributing a much smaller percentage than the 10% attributed to it by the jury, while B would continue to be liable for a full 85% share of the loss. (180 C.A.3d 1175.)

(b) By crediting both parties with the amount of the settlement and then apportioning the remainder of the judgment according to their comparative fault, the trial judge followed the directive of *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, supra, §1331, "to achieve wherever possible an equitable sharing of the loss among joint tortfeasors on a comparative fault basis." (180 C.A.3d 1177.)

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SUPPLEMENT: [This section is current through the latest supplement]



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F. Comparative Negligence: Comparative Partial Indemnity.

2. Implied Indemnity Upheld.

a. Where Indemnitor Is Strictly Liable.

6 *Witkin Sum. Cal. Law Torts* § 1360

[§ 1360] Where Indemnitor Is Strictly Liable.

In *Safeway Stores v. Nest-Kart* (1978) 21 C.3d 322, 146 C.R. 550, 579 P.2d 441, plaintiff E was injured in a Safeway supermarket when her shopping cart broke and fell on her foot. She sued Safeway (owner of the cart) and Nest-Kart (manufacturer of the cart) on theories of strict liability and negligence. The jury returned a verdict for \$ 25,000 against both defendants, with special findings that (a) Safeway was liable on both negligence and strict liability; (b) Nest-Kart was liable solely on strict liability; and (c) Safeway's comparative fault was 80% and Nest-Kart's 20%. Safeway satisfied the judgment, and moved for contribution from Nest-Kart, seeking a 50-50 apportionment under the general contribution provisions of C.C.P. 875 and 876 (supra, §105 et seq.). The trial judge expressed the view that "common sense" called for an apportionment based on the percentage of fault, but that he lacked the power to apportion; he granted Safeway's motion, ordering Nest-Kart to pay 50%. *Held*, reversed; apportionment on comparative fault should be made.

(a) *Apportionment between strictly liable and negligent defendants.*

(1) The traditional approach made apportionment among multiple tortfeasors solely an issue of contribution. *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, supra, §1331, changed the rule and permits apportionment on a comparative fault basis. (21 C.3d 328.)

(2) The comparative indemnity doctrine recognized in *American Motorcycle* as a basis for apportioning liability among negligent tortfeasors may properly be applied where liability of one or more derives from strict liability. The fundamental failing of the traditional indemnity doctrine was as apparent in cases involving strict products liability as in negligence cases; and in *Ford Motor Co. v. Robert J. Poeschl* (1971) 71 C.A.3d 694, 98 C.R. 702, supra, §116, a products liability case prominently relied on in *American Motorcycle*, the court declared that a wise rule of law would allow partial indemnification. "[E]ven in cases in which one or more tortfeasor's liability rests on the principle of strict liability, fairness and other tort policies, such as deterrence of dangerous conduct or encouragement of accident-reducing behavior, frequently call for an apportionment of liability among multiple tortfeasors. Indeed, the instant case itself provides another apt example of such an instance, for here the jury evidently concluded that while the defectiveness of the shopping cart partially caused the accident, the primary fault for the accident lay with Safeway because of its negligent failure properly to maintain the cart in safe working condition." (21 C.3d 330.)

(3) Apportionment in this situation has been attacked on the theory that there is no basis for comparing relative fault of a negligent defendant with that of a defendant whose liability rests on the "no fault" concept of strict product liability. But as *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 741, 144 C.R. 380, 575 P.2d 1162, *infra*, §1542, explains, the difficulties are more theoretical than practical, and experience in other jurisdictions demonstrates that juries are competent to apply comparative fault principles between negligent and strictly liable defendants. (21 C.3d 331.)

(4) A contrary conclusion would place the negligent manufacturer in a better position than one free from negligence: The negligent manufacturer would be permitted to shift the bulk of liability to more negligent tortfeasors. (21 C.3d 332.) Because the jury found Safeway itself negligent, there is no reason to consider whether the comparative indemnity doctrine should be applied where a party's liability is entirely derivative or vicarious. (21 C.3d 332, footnote 5.)

(b) *Retroactivity of decision.* The case was tried before the decision in *American Motorcycle*. In *Daly*, it was held that retroactive application would unfairly undermine many litigants' reasonable reliance on pre-*Daly* law. The situation here is different. *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, *infra*, §1329, put multiple defendants on notice that apportionment of their liability might ultimately be grounded on comparative fault principles, and unlike *Daly*, where *Horn v. General Motors Corp.* (1976) 17 C.3d 359, 366, 131 C.R. 78, 551 P.2d 398, *infra*, §1449, intervened after *Li*, no post-*Li* decision had reaffirmed the vitality of the pre-*Li* equitable indemnity doctrine prior to *American Motorcycle*. And because trial courts have used special verdicts as advised in *Li*, in many cases, special findings will have been made allocating responsibility among multiple defendants. Hence, appellant Nest-Kart should be accorded the benefit of *American Motorcycle*'s equitable indemnity doctrine. (21 C.3d 333, 334.)

Two justices dissented. (See *McGee v. Cessna Aircraft Co.* (1978) 82 C.A.3d 1005, 1022, 147 C.R. 694 [following *Safeway Stores*]; *Gentry Const. Co. v. Superior Court* (1989) 212 C.A.3d 177, 181, 260 C.R. 421 [applying principles stated in *Safeway Stores* to situation involving two strictly liable tortfeasors]; *Yamaha Motor Corp., U.S.A. v. Paseman* (1990) 219 C.A.3d 958, 971, 268 C.R. 514 [in action by victim injured while riding defective moped, manufacturer could file cross-complaint for comparative indemnity against victim's parents based on their negligent failure to maintain and repair]; 6 *Pepperdine L. Rev.* 571; 19 *Santa Clara L. Rev.* 497.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 780, third line on page, the citation for *Ford Motor Co. v. Robert J. Poeschl* should be 21 C.A.3d 694.



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6 *Witkin Sum. Cal. Law Torts* § 1361

[§ 1361] Where Indemnitor Is Not Joined in Original Action.

In *GEM Developers v. Hallcraft Homes of San Diego* (1989) 213 C.A.3d 419, 261 C.R. 626, Hallcraft, the owner of land, had it mass-graded and filled, and hired architects and engineers to draw up plans and construct condominiums. It then sold the graded land and drawings to Clearwater, which transferred to Bicentennial, which transferred to defendant GEM. GEM's engineers tested the soil, their landscape subcontractors fine-graded it, and their construction contractors built condominiums that were sold to the public. Plaintiff Bonita, the condominium owners association, sued GEM and others on the theory of strict liability for damages due to soil subsidence. Hallcraft was not named in the complaint, and GEM cross-complained against Hallcraft and others for equitable indemnity. In plaintiff Bonita's action, the judge awarded damages of over \$ 3 million plus costs. It did not resolve the issues of GEM's cross-complaint. GEM's insurer paid about a million dollars in partial satisfaction of the judgment, and assigned indemnity rights against Hallcraft to Bonita. In the trial on the cross-complaint for indemnity, the judge entered judgment on the pleadings in favor of Hallcraft. *Held*, reversed.

(a) Hallcraft first contended that GEM could not seek comparative equitable indemnity on a strict liability theory because the parties were commercial entities, and under leading cases strict liability is intended only to protect the consumer. (213 C.A.3d 425, citing *U.S. Financial v. Sullivan* (1974) 37 C.A.3d 5, 112 C.R. 18, *Kaiser Steel Corp. v. Westinghouse Elec. Corp.* (1976) 55 C.A.3d 737, 127 C.R. 838, *Sacramento Regional Transit Dist. v. Grumman Flxible* (1984) 158 C.A.3d 289, 204 C.R. 736, and *Sumitomo Bank v. Taurus Developers* (1986) 185 C.A.3d 211, 229 C.R. 719.) "In sum, these cases hold that when a lawsuit arises in a commercial setting between two businesses and involves only a business loss, the parties should use normal commercial remedies (e.g., the Uniform Commercial Code) rather than a theory developed for the benefit of customers (i.e., strict products liability)." (213 C.A.3d 426.)

(b) The foregoing cases focus on the rationale behind the adoption of *strict products liability* theory. "In contrast to the doctrine of strict liability which is designed to benefit the consumer-plaintiff, the doctrine of comparative equitable indemnity is designed to do equity among defendants. ... The purpose of equitable indemnification is to avoid the unfairness, under joint and several liability theory, of holding one defendant liable for the plaintiff's entire loss while allowing another responsible defendant to escape 'scot free.'" (213 C.A.3d 426, quoting *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, *supra*, §1331.) Originally applied in *American Motorcycle* to defendants whose negligence caused the plaintiff's loss, the doctrine was later expanded to allow

apportionment of loss between a negligent plaintiff and a strictly liable defendant (*Daly v. General Motors Corp.* (1978) 20 C.3d 725, 144 C.R. 380, 575 P.2d 1162, *infra*, §1542), and between a defendant liable in strict liability and negligence and a defendant strictly liable (*Safeway Stores v. Nest-Kart* (1978) 21 C.3d 322, 146 C.R. 550, 579 P.2d 441, *supra*, §1360). (213 C.A.3d 427.)

(c) Hallcraft argued that *Safeway* is factually distinguishable because there the plaintiff sued and recovered against both defendants who were joined in the action and owed a duty to the plaintiff consumer, whereas here Hallcraft owed no duty to plaintiff Bonita. This argument confuses the concept of "duty" with that of equitable allocation of loss among multiple defendants. The manufacturer's duty to provide defect-free products exists independently of any lawsuit filed by a consumer that seeks to enforce that preexisting duty; and the lack of a consumer's lawsuit is not equivalent to a determination that the manufacturer owed no duty or was not responsible for the injuries. Here, the lack of a lawsuit does not bar the complaint for equitable indemnity, which seeks to make those determinations. (213 C.A.3d 428.) As the Supreme Court pointed out in *Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 1198, 246 C.R. 629, 753 P.2d 585, plaintiffs no longer have the unilateral right to determine which defendant should be included in an action for comparative equitable indemnity; and Hallcraft's theory "would place a defendant's right to equitable indemnity at the mercy of plaintiff's pleadings and the fortuity of consolidation of cross-complaints for trial with the plaintiff's action." (213 C.A.3d 428.)

(d) Hallcraft further argued that GEM's action was nothing more than a claim by one business against another for a business loss. This reasoning ignores the origin of the loss: Bonita's loss and award of damages. "Whether a defendant is held directly to the consumer/plaintiff for the plaintiff's loss or is held indirectly liable through a complaint for equitable indemnity, it is the same loss that is being apportioned--the loss suffered by the plaintiff/consumer. We conclude any theory which would have been available to the Association in a direct action against Hallcraft and upon which basis loss could have been apportioned in the Association's action is available to GEM here seeking equitable indemnification." (213 C.A.3d 429.)

(e) Hallcraft contended that it was not subject to a claim for equitable indemnity because it was not joined as a joint or concurrent tortfeasor with GEM in Bonita's action. But the term "joint tortfeasor" as used in the comparative equitable indemnity context does not mean that the defendants were "joined" as such by the plaintiff; here, the facts alleged would support a finding that the acts of Hallcraft and GEM combined to cause Bonita's injury, and that is sufficient. (213 C.A.3d 431.)

(f) Hallcraft also contended that the strict liability doctrine was inapplicable because it provided only "raw material," not a "product." This raises a factual question. *Avner v. Longridge Estates* (1969) 272 C.A.2d 607, 77 C.R. 633, *infra*, §1503, held that a developer who mass-graded land into finished lots for residential housing had produced a "product," and *Rest.2d, Torts §402A* (now *Rest.3d, Torts: Products Liability*, §5; *infra*, §1448), points out that the supplier of a defective product may be held strictly liable even though the product may undergo processing or other substantial change. Hallcraft's assertion that it only rough-graded the tract and that GEM did further grading and soils testing "are factors which may reduce Hallcraft's share of the loss suffered by the Association, possibly even to zero, but these contentions do not nullify the factual question." (213 C.A.3d 432.)

(g) Hallcraft's final contention was that it was not liable on a strict products liability theory because it did not sell the lots directly to the public; but the doctrine does not require a direct sale to the consumer--a sale may be made to the consumer by a middleman. (213 C.A.3d 432.) "Logically, there is no reason to allow strict liability in the situation when the grader/manufacturer sells directly to the public but disallow it when the grader/manufacturer sells indirectly to the public through a developer/builder who sells a structure in addition to the grader/manufacturer's lot. In either case, the grader/manufacturer has produced a product for ultimate sale to the public." (213 C.A.3d 433.) (See *Time for Living v. Guy Hatfield Homes/All Amer. Dev. Co.* (1991) 230 C.A.3d 30, 40, 280 C.R. 904 [under *GEM Developers*, allegations raised factual issue whether previous owner who graded property and defendants who later developed it were joint tortfeasors for purposes of equitable indemnity].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Willdan v. Sialic Contractors Corp.* (2007) 158 C.A.4th 47, 54, 69 C.R.3d 633 [city's negligence action against consulting firm in connection with increased construction costs was based on theory of latent defects that were expressly excepted from settlement agreement, such that firm was not precluded from pursuing indemnity claim against general contractor that was party to settlement but was not joined as defendant; city's alleging negligent design did not preclude firm from seeking to prove that deficiencies were due to latent defects attributable to contractor].



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6 *Witkin Sum. Cal. Law Torts* § 1362

[§ 1362] Where Indemnatee Settles.

The Uniform Comparative Fault Act §4(b) (12 U.L.A. (Master Ed.), p. 123) permits a settling defendant to recover contribution only "(1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable."

In *Sears, Roebuck & Co. v. International Harvester Co.* (1978) 82 C.A.3d 492, 147 C.R. 262, the court did not impose these limitations in holding that recognition of the indemnity claim of a settling defendant who filed a presettlement cross-complaint for indemnity did not defeat the primary policy of *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, supra, §1329, to maximize recovery by injured persons, and it both encourages settlements and effectuates equitable apportionment among concurrent tortfeasors. (82 C.A.3d 496.)

In *American Bankers Ins. Co. v. Avco-Lycoming Div.* (1979) 97 C.A.3d 732, 159 C.R. 70, the settling tortfeasor did not file a cross-complaint and the principal action was dismissed with prejudice as to all defendants. *Held*, although it may be simpler and more expeditious for the settling tortfeasor to file a presettlement cross-complaint in the principal action, its failure to do so does not result in forfeiture of its right to partial indemnity; the right may be asserted in an independent suit. (97 C.A.3d 736, 738.) "If an insurer concludes it has the good faith obligation to settle a claim, it should not be required as part of its settlement package and in order to apportion its loss among those truly liable, to file a cross-complaint in the principal suit. After the case has been settled and the action dismissed, the insurer who has, through its efforts set a ceiling on damages, may still continue to negotiate among those liable for an equitable apportionment of damages. If a settlement cannot be reached, it should still have the opportunity to pursue its rights in court. Defendants are not prejudiced. No elements of res judicata or collateral estoppel are present, for defendants are entitled to a trial on the merits with the added benefit that in all likelihood the negotiated settlement imposing the lid on damages involves a sum which, in many cases, will be less than the open-ended and uncertain amount if each party were to blame the other at trial. If they did not answer the principal action, they could still assert their claim, if any, against the plaintiff." (97 C.A.3d 736.) (See *Teachers Ins. Co. v. Smith* (1982) 128 C.A.3d 862, 865, 180 C.R. 701 [insurance company may negotiate settlement with injured boy's parents without notifying them of intention to seek comparative indemnification from them thereafter].)

In *Mullin Lumber Co. v. Chandler* (1986) 185 C.A.3d 1127, 230 C.R. 122, plaintiff, a carpenter building a house for

C, sued defendant lumber company for injuries sustained when a scaffolding board, allegedly supplied by defendant, broke and caused him to fall. Defendant settled with plaintiff and cross-complained against C for indemnification. C argued that defendant was not entitled to indemnification unless it could prove its own liability to plaintiff, and that it was unable to do this because it could not establish that it had supplied the board that broke (other parties had supplied some of the lumber used). The trial judge accepted this contention and entered judgment of nonsuit. *Held*, reversed; requiring settling defendants to prove their own liability would undermine the basic policies of maximizing the injured party's recovery, encouraging settlements, and apportioning fault.

(a) "If a defendant concludes, for any of a variety of legitimate reasons, it is in its best interests to settle with the injured party, it should be encouraged to do so. If a settling defendant must nevertheless prove its own fault to a judge or jury in order to obtain indemnity from other tortfeasors it has precious little incentive to settle. From a defendant's point of view, settlement *avoids* a finding of fault. It also avoids the publicity, costs and inconvenience of a trial. Requiring the defendant to prove its own fault would deny it these benefits." (185 C.A.3d 1132.)

(b) "Another advantage of a good faith settlement is it puts a lid on the amount of damages the settling defendant must pay. ... This inducement would be seriously undermined in a case such as the one at bar where there is a catastrophic injury and pressing need for money but the would-be settlor's fault is doubtful. If the defendant declines settlement and the plaintiff cannot establish fault, the defendant pays nothing. If the plaintiff does prove fault defendant pays damages but is entitled to seek an equitable apportionment with other tortfeasors who contributed to the plaintiff's injury. However, if the defendant settles and then is unable to prove its own fault it must pay the settlement without contribution from others who may have been more at fault. Given these alternatives, the would-be settlor may well elect not to settle and let the plaintiff prove fault if he is able. Or, if the defendant does settle, it settles for much less than it would if the opportunity for eventual equitable apportionment of damages existed." (185 C.A.3d 1132.)

(c) In order to obtain indemnity, the settling defendant must prove the nonsettling defendant's fault and the payment and reasonableness of the settlement amount. These requirements are sufficient to protect nonsettling defendants from collusion. (185 C.A.3d 1134.) (See *Tatum v. Armor Elevator Co.* (1988) 203 C.A.3d 1315, 1321, 250 C.R. 775 [settling tortfeasor has standing to appeal from judgment denying indemnification, notwithstanding jury finding that it was not negligent]; *Gross v. Allen* (1994) 22 C.A.4th 354, 361, 27 C.R.2d 429 [citing *Mullin Lumber Co.*; psychiatrist who settled with patient and sought indemnity from two other psychiatrists needed only to prove that settlement was based on reasonable estimate of liability and did not need to prove that his settlement payment exceeded his "inchoate liability"]; *Expressions at Rancho Niguel Assn. v. Ahmanson Dev.* (2001) 86 C.A.4th 1135, 1139, 103 C.R.2d 895 [strictly liable defendant who settled with other roofing subcontractors was entitled to indemnity from nonsettling roofing subcontractor on equitable indemnity basis, rather than under joint and several liability principles; nonsettling subcontractor was not liable for all roofing damage minus amounts paid by other roofing subcontractors, but only for its comparative fault].)

SUPPLEMENT: [This section is current through the latest supplement]

See Uniform Comparative Fault Act §4(b), 12 U.L.A. (Master Ed.), p. 142.



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6 *Witkin Sum. Cal. Law Torts* § 1363

[§ 1363] Where Indemnatee's Liability Is Not Based on Tort.

In *San Mateo v. Berney* (1988) 199 C.A.3d 1489, 245 C.R. 738, involving a homeowners' inverse condemnation action against a county based on destruction of lateral support for their property, the county cross-complained against the developers of the property, alleging that the developers' fraud in using improper landfill and preparing the tentative subdivision map contributed to the damage. *Held*, the doctrine of partial or total equitable indemnity applies even though the liability of the party seeking indemnity is not based on tort. "Although we have found no case which expressly so holds, we see no logical reason which would serve to prevent a public entity subjected to liability for inverse condemnation from seeking indemnification from third parties whose negligent or fraudulent acts were causative factors in the damaging or taking of private property. While it is true that a public entity is liable in inverse condemnation for 'any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed' ... , where, as is here alleged, a third party's fraudulent concealment caused or contributed to the injury, the third party should indemnify the public entity to the extent such conduct has contributed to a damage award against the public entity." (199 C.A.3d 1494.)

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e. Where Cause of Action Against Indemnitor Is Dismissed.

6 *Witkin Sum. Cal. Law Torts* § 1364

[§ 1364] Where Cause of Action Against Indemnitor Is Dismissed.

In *Frank v. California* (1988) 205 C.A.3d 488, 252 C.R. 410, involving a two-car accident, Mitchell sued Frank, for negligently operating his vehicle, and the state, for negligently issuing a license to Frank. Frank cross-complained against the state for indemnification, alleging that it created a dangerous condition at an intersection. After dismissing Mitchell's action against the state for failure to state a cause of action, the trial judge dismissed Frank's cross-complaint on res judicata grounds. *Held*, reversed. Res judicata is inapplicable here. The dismissal of Mitchell's action against the state simply established that the state was not negligent in issuing Frank a license. The dismissal did not determine whether the state maintained a dangerous condition at an intersection, which was the basis of Frank's cross-complaint. (205 C.A.3d 494.) "A contrary result would be inequitable, in that Frank's rights against State would be entirely dependent upon Mitchell's litigation strategy, and be cut off simply because Mitchell chose not to pursue various theories against State." (205 C.A.3d 495.)

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f. Intentional Tortfeasors.

6 *Witkin Sum. Cal. Law Torts* § 1365

[§ 1365] Intentional Tortfeasors.

In *Baird v. Jones* (1993) 21 C.A.4th 684, 27 C.R.2d 232, plaintiff, a prospective purchaser of real estate, recovered judgment against the seller and the seller's agent for intentional and negligent misrepresentation. Although both defendants were guilty of intentional misconduct, the trial judge found the agent's conduct to be much more egregious than the seller's, and held that the seller was thus entitled to equitable indemnification in the full amount of any damages he had paid to plaintiff. *Held*, this was proper; the comparative equitable indemnity doctrine applies to concurrent intentional tortfeasors. Requiring the seller to pay the entire judgment without hope of recovering some portion of it from the agent would be unconscionable. This conclusion would only reward the intentional tortfeasor who successfully hides his assets from a judgment creditor. (21 C.A.4th 693.) "If it is equitable and just to allocate loss between concurrent negligent tortfeasors, a negligent tortfeasor and an intentional tortfeasor, or a negligent tortfeasor and a strictly liable defendant, then there is little logic in prohibiting an intentional tortfeasor from forcing another intentional tortfeasor to bear his or her share of liability." (21 C.A.4th 693.)

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g. Other Situations.

6 *Witkin Sum. Cal. Law Torts* § 1366

[§ 1366] Other Situations.

(1) *Concurrently Negligent Employer*. A negligent employer may receive a credit or reimbursement for compensation benefits only to the extent that these payments exceed his or her proportional share of the injured employee's recovery from a negligent third party. (*Associated Const. & Engineering Co. v. Work. Comp. App. Bd.* (1978) 22 C.3d 829, 842, 150 C.R. 888, 587 P.2d 684, 2 Summary (10th), *Workers' Compensation*, §93 [credit]; *Aceves v. Regal Pale Brewing Co.* (1979) 24 C.3d 502, 512, 156 C.R. 41, 595 P.2d 619 [reimbursement]; see *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 670, 151 C.R. 399 [reimbursement]; *Kramer v. Cedu Foundation* (1979) 93 C.A.3d 1, 155 C.R.552, supra, §1370 [reimbursement].) (On statutory bar to implied indemnity claim against negligent employer, see *infra*, §1369.)

(2) *Indemnity Against Public Entities*. Sovereign immunity does not bar a claim for implied indemnity based on grounds for which liability would be imposed. (*E.L. White v. Huntington Beach* (1978) 21 C.3d 497, 511, 146 C.R. 614, 579 P.2d 505, supra, §123; *Wagner v. California* (1978) 86 C.A.3d 922, 927, 150 C.R. 489.)

(3) *Successive Tortfeasors*. Although *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, supra, §1331, dealt with concurrent tortfeasors, the comparative indemnity doctrine also applies to successive tortfeasors. (*Blecker v. Wolbart* (1985) 167 C.A.3d 1195, 1203, 213 C.R. 781 [first tortfeasor, whose negligence caused injuries requiring operation, was entitled to indemnity from second tortfeasor, whose negligence during operation caused injured party's death].)

(4) *Parents Liable for Child's Acts*. A parents' liability for a minor's wrongful act under C.C. 1714.1 may form the basis of a partial indemnity claim by a concurrent tortfeasor, even though neither the minor nor the parents are named defendants. (See *Curry v. Superior Court* (1993) 20 C.A.4th 180, 188, 189, 24 C.R.2d 495, supra, §1230.)

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a. Homeowners Association.

6 *Witkin Sum. Cal. Law Torts* § 1367

[§ 1367] Homeowners Association.

(1) *Condominium Board of Directors*. In *Jaffe v. Huxley Architecture* (1988) 200 C.A.3d 1188, 246 C.R. 432, a homeowners association in a condominium complex sued the developers for construction defects. A settlement was reached under which the association agreed to dismiss the action without prejudice to the developers' right to seek indemnification against the association's board of directors. In return, the developers agreed to restrict their indemnity claim to the limits of the directors' errors and omissions policy. The developers then filed a cross-complaint against the board, seeking equitable indemnification for that part of the association's damages attributable to the board's negligent management of the complex. *Held*, judgment on demurrer for the board affirmed.

(a) Because the negligence of the board, as the chosen representative of the association, was, in legal effect, the negligence of the association itself, it could have been asserted by the developers against the association under either the doctrine of comparative negligence or the doctrine of avoidable consequences. Hence, there was no potential for injustice to the developers and no reason to allow them to interfere with the relationship between the association and its board. (200 C.A.3d 1192.)

(b) Allowing the doctrine of equitable indemnification to be utilized in cases such as this would jeopardize the special relationship that exists between a homeowners association and its board of directors (1) by discouraging persons, for fear of being held personally liable, from serving on the boards, and (2) by creating a potential conflict of interest between the directors' duty to the association and their desire to avoid personal liability. (200 C.A.3d 1193.) (See *Lauriedale Associates, Ltd. v. Wilson* (1992) 7 C.A.4th 1439, 1444, 9 C.R.2d 774 [in association's action against former directors for not collecting adequate fees from unit owners to make repairs, directors were not entitled to indemnity from owners on ground that they had caused damage].)

(2) *Excessive Repair Costs*. In *Woodward-Gizienski & Associates v. Geotechnical Exploration* (1989) 208 C.A.3d 64, 255 C.R. 800, a condominium project's homeowners association, on the recommendation of the project's soil engineers, expended \$ 1 million to repair damages caused by the settling of various structures, and then sought to recover this amount from the project's developers. Fearing an unsympathetic jury, the developers settled for \$ 731,400, even though they claimed that the repairs were excessive due to the engineers' negligence. The developers then sought equitable indemnity from the engineers. *Held*, judgment on demurrer for the engineers affirmed. Under fundamental

principles of damages, the developers were liable only for the *reasonable* costs of the repairs (see *infra*, §1728). (208 C.A.3d 68.) Any claim that the costs were excessive could have been raised in the context of challenging their reasonableness. Hence, fairness does not require resorting to the doctrine of equitable indemnity. (208 C.A.3d 69.)

(3) *No Indemnity From Contractor Who Cannot Be Joint Tortfeasor for Damages Purposes.* In *Newhall Land & Farming Co. v. McCarthy Const.* (2001) 88 C.A.4th 769, 106 C.R.2d 10, a homeowners association filed an action against a developer for defective construction of a condominium project. In a cross-complaint, the developer sought equitable indemnity from subcontractors on the project, as well as from a contractor who, several years later, was hired to do repair work following an earthquake. *Held*, summary judgment for the contractor affirmed. The contractor was not a participant in the construction or design of the condominium project and thus could not be held to be a joint tortfeasor for purposes of damages incurred in the faulty construction. (88 C.A.4th 773.) At most, the developer's experts declared that the subsequent repair work was unnecessary and excessive, but similar allegations were held to be subject to demurrer in *Woodward-Gizienski*. (88 C.A.4th 774.)

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6 *Witkin Sum. Cal. Law Torts* § 1368

[§ 1368] Practice of Law.

(1) *Legal Malpractice Claims. Commercial Standard Title Co. v. Superior Court* (1979) 92 C.A.3d 934, 155 C.R. 393, following *Held v. Arant* (1977) 67 C.A.3d 748, 134 C.R. 422, 1 Cal. Proc. (4th), Attorneys, §349, holds that a defendant cannot seek partial indemnity against the plaintiff's former attorney for alleged malpractice. (a) A negligent attorney is not a joint tortfeasor, for the client must be damaged by the malpractice and will not suffer damage if he or she recovers from the defendant. (92 C.A.3d 941, 942.) (b) The claim would place the attorney in a position of not being able to conduct his or her defense without violating the continuing ethical obligations to his or her former client. (92 C.A.3d 945.)

The same result was reached in *Rowell v. TransPacific Life Ins. Co.* (1979) 94 C.A.3d 818, 156 C.R. 679, where defendant attempted to file a cross-complaint against plaintiff's attorneys conducting the action. The fundamental policy of avoiding claims that would conflict with the attorney's duty of undivided loyalty to his or her client must prevail. (94 C.A.3d 821, 822.)

(2) *Attorneys' Fees. Davis v. Air Technical Industries* (1978) 22 C.3d 1, 6, 148 C.R. 419, 582 P.2d 1010, *infra*, §1432, held that a manufacturer is not liable for the attorneys' fees of implied indemnitees in a products liability case. The same result was reached after *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, *supra*, §1331, in *Harbor City Discount Auto Center v. Firestone Tire & Rubber Co.* (1979) 95 C.A.3d 886, 157 C.R. 438. "American Motorcycle is ... a doctrine of substantive law and has no logical impact on the *Davis* rule that litigants are responsible for legal costs in vindicating substantive rights, in whatever area of law." Moreover, to attempt to allocate fees between efforts in defending the indemnitor's product and separate claims against an indemnitee would impose an intolerable burden on the courts. (95 C.A.3d 893.) Each entity in the chain of liability for a defective product must bear its own fees regardless of its involvement or noninvolvement. (95 C.A.3d 894.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Legal Malpractice Claims.*

Held case:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §333.



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c. Other Situations Where Indemnity Is Denied.

6 *Witkin Sum. Cal. Law Torts* § 1369

[§ 1369] Other Situations Where Indemnity Is Denied.

(1) *Third Party's Claim Against Concurrently Negligent Employer.* *Lab.C. 3864* bars claims for implied indemnity by a third-party defendant against an employer whose negligence contributed to the injuries of the employee-plaintiff. (See *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, supra, §1331, footnote 9.)

(2) *Claim Must Be Made in Trial Court.* In *Silveira v. Imperial Irr. Dist.* (1978) 85 C.A.3d 705, 149 C.R. 653, two defendants were held jointly and severally liable, and on appeal contended that the partial indemnity doctrine should have been applied to them on a comparative fault basis. *Held*, the benefits of the doctrine were waived when the jury asked if it should apportion negligence and the parties gave a negative answer; i.e., they failed to embrace the opportunity for a special verdict. (85 C.A.3d 708.)

(3) *Express Indemnity Claims.* The partial indemnity rule does not affect the right of all-or-nothing indemnification by express contract. (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 676, 151 C.R. 399.)

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d. Implied Contractual Indemnity.

6 *Witkin Sum. Cal. Law Torts* § 1370

[§ 1370] Implied Contractual Indemnity.

In *Kramer v. Cedu Foundation* (1979) 93 C.A.3d 1, 155 C.R. 552, the court, reasoning that implied contractual indemnity was a form of equitable indemnity, held that comparative indemnity applied to such claims. (93 C.A.3d 12.)

In *Bear Creek Planning Com. v. Title Ins. & Trust Co.* (1985) 164 C.A.3d 1227, 211 C.R. 172, the court disagreed: "[T]he theoretical underpinnings of implied contractual indemnity are entirely different than those underlying equitable indemnity, which is concerned with the difference between the primary and secondary liability of joint tortfeasors. ... An action for implied contractual indemnity is not a claim for contribution from a joint tortfeasor; it is not founded upon a tort or upon any duty which the indemnitor owes to the injured party. It is grounded upon the indemnitor's breach of duty *owing to the indemnitee* to properly perform its contractual duties." (164 C.A.3d 1238.) Also, "[i]mplied contractual indemnity is not based upon equitable considerations, but upon a contractual relationship between the indemnitee and indemnitor from which is implied an obligation on the part of the indemnitor to assume and pay any foreseeable damages assessed against the indemnitee as a result of the indemnitor's breach of contract." (164 C.A.3d 1239.)

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1. Applicability of Doctrine in Particular Cases.

6 *Witkin Sum. Cal. Law Torts* § 1371

[§ 1371] Applicability of Doctrine in Particular Cases.

(1) *Workers' Compensation*. Comparative negligence principles are applicable in determining the extent of the recovery of the employer and employee in actions involving third-party tortfeasors. (See 2 *Summary* (10th), *Workers' Compensation*, §92 et seq.)

(2) *Actions Against Public Entities*. The comparative negligence doctrine applies in negligence actions against public entities. (*Levine v. Los Angeles* (1977) 68 C.A.3d 481, 488, 137 C.R. 512.)

(3) *Strict Products Liability*. The Uniform Comparative Fault Act §1(b) (12 U.L.A. (Master Ed.), p. 123.) defines "fault" as including acts or omissions that subject one to strict liability. In *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 741, 144 C.R. 380, 575 P.2d 1162, *infra*, §1542, the court relied on this provision in extending the comparative negligence doctrine to products liability cases.

(4) *Cases Not Sounding in Tort*. The Uniform Comparative Fault Act §1(a) (12 U.L.A. (Master Ed.), p. 123) is limited to actions to recover for physical harm to persons or property. Hence, actions that are *fully contractual* are excluded. (§1, Comment.)

(5) *Wrongful Death*. Under comparative negligence principles, the negligence of the decedent or heirs reduces, but does not bar, recovery. (See *infra*, §§1400, 1401.)

(6) *Loss of Consortium*. One spouse's recovery for loss of consortium cannot be reduced by the other spouse's contributory negligence. (*Lantis v. Condon* (1979) 95 C.A.3d 152, 159, 157 C.R. 22, *infra*, §1682.)

(7) *Intentional Tort Cases*. Liability for an intentional tort is not diminished by the victim's negligence. It would be contrary to sound policy to reduce a plaintiff's damages under the comparative fault doctrine where the plaintiff is merely negligent in encountering the defendant's deliberately inflicted harm. (*Heiner v. Kmart Corp.* (2000) 84 C.A.4th 335, 347, 100 C.R.2d 854 [battery case].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Strict Products Liability*. See Uniform Comparative Fault Act §1(b), 12 U.L.A. (Master Ed.), p. 125.



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2. Setoff.

6 Witkin Sum. Cal. Law Torts § 1372

[§ 1372] Setoff.

(1) *In General.* The Uniform Comparative Fault Act §3 (12 U.L.A. (Master Ed.), p. 123) deals with the situation where there is a claim and cross-complaint, and provides that on motion, if the court finds that the obligation of either party is likely to be uncollectible, it may order both parties to make payment into court for distribution. The Comment states that if a setoff is applied categorically to all situations, it may produce unfair results in some of them; hence, consideration should be given to whether each party is able to pay his or her obligation and whether the payment comes from liability insurance.

(2) *Where Both Parties Are Insured.* In *Jess v. Herrmann* (1979) 26 C.3d 131, 161 C.R. 87, 604 P.2d 208, plaintiff J and defendant H were both injured in an automobile collision in which each was negligent. Jess filed this action and H cross-complained. The jury allocated 40% of the fault to J and 60% to H, assessed damages at \$ 100,000 to Jess and \$ 14,000 to H, and accordingly determined that Jess was entitled to recover \$ 60,000 and H \$ 5,600. The trial judge, over objections of both parties, offset the two awards and entered a single judgment of \$ 54,400 in favor of J. Both appealed, contending that a separate judgment should have been entered in favor of each party. *Held*, reversed; the traditional view of automatic setoff cannot be equitably applied in a comparative fault setting without considering the insurance coverage of the parties, and on remand, the trial court must do so.

(a) *Automatic setoff is proper where neither party is insured.* If neither party is insured, setoff eliminates an unproductive exchange of money and protects each party from the potential insolvency of the other; it would operate simply as an accounting mechanism and would not affect either party's net recovery. In such cases, the doctrine of comparative negligence does not call for an exception to the traditional setoff rule. (26 C.3d 137.)

(b) *Automatic setoff is improper where both parties are insured.* Although the record on appeal does not indicate whether the parties were insured, the briefs assert that they were, and this justifies a reexamination of the setoff rule to give consideration to the effect of insurance. (26 C.3d 142, footnote 6.)

(1) The facts of the instant case disclose the inequity of automatic setoff. In the absence of setoff, J would receive \$ 60,000 from H's insurer and H would receive \$ 5,600 from J's insurer; under the setoff rule, J received only \$ 54,400 and H received nothing. Thus, the setoff rule "diminishes *both* injured parties' actual recovery and accords both insurance companies a corresponding fortuitous windfall at their insureds' expense." (26 C.3d 138.)

(2) This result is directly contrary to the main objective of the Financial Responsibility Law. "The purpose of liability insurance is not only to protect the insured against the adverse impact of liability but to assure that the victim be actually compensated for his tort loss instead of having merely an empty claim against a judgment-proof defendant." (26 C.3d 139, quoting 30 *Hastings L. J.* 1470.)

(3) Virtually all of the commentators agree that setoff is improper under comparative negligence law when the parties are insured. (26 C.3d 139.) And this view was taken in the 1977 Florida case of *Stuyvesant Ins. Co. v. Bournazian*, where the court observed that an insured does not authorize the insurer to reduce its own liability by appropriating to its own benefit a separate asset of the insured (the right to recover for his or her own injuries). (26 C.3d 140.)

(4) The setoff statutes (C.C.P. 431.70, 666; see 5 *Cal. Proc.* (4th), *Pleading*, §§1091, 1092; 7 *Cal. Proc.* (4th), *Judgment*, §91) do not establish an automatic rule that would preclude the consideration of the equities or compel setoff over objections of both parties. They "cannot properly be interpreted to require setoff in cases in which such a setoff will defeat the principal purpose of California's financial responsibility law and will provide an inequitable windfall to an insurance carrier at the expense of the carrier's insured." (26 C.3d 143.)

The court left open the question of what rule should apply where one of the parties is uninsured. (26 C.3d 141, footnote 5.) Three justices dissented, characterizing the majority opinion as an intrusion into the legislative domain, which "can only lead to confusion and perplexity." (26 C.3d 143.)

(3) *Restatement 3d*. Each of two parties who are liable to each other in the same suit is generally entitled to a setoff of any recovery owed by the other party. (*Rest.3d, Torts: Apportionment of Liability* §9.) Thus, the verdicts are offset to form one net judgment. (*Rest.3d, Torts: Apportionment of Liability* §9, Comment a.)

In cases in which one or both have liability insurance, setoff does not reduce the payment of a liability insurer unless an applicable rule of law, statute, or policy provision so provides. (*Rest.3d, Torts: Apportionment of Liability* §9 and Comment a.) Thus, when both parties have liability insurance for all the damages, each party's liability insurer is liable for the judgment based on the verdict running against its insured. When one party is uninsured or partially insured, any insurance funds are paid first to the party who is the net-judgment creditor and then to the party who is the net-judgment debtor. (*Rest.3d, Torts: Apportionment of Liability* §9, Comment a.)

West's Key Number Digest, Negligence k.549(10)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See Uniform Comparative Fault Act §3, 12 U.L.A. (Master Ed.), p. 140.

(2) *Where Both Parties Are Insured*. Setoff statutes:

Cross-References: 5 *Cal. Proc.* (5th), *Pleading*, §§1165, 1166; 7 *Cal. Proc.* (5th), *Judgment*, §91.



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3. Release.

6 Witkin Sum. Cal. Law Torts § 1373

[§ 1373] Release.

(1) *No Joinder of Released Tortfeasor.* In *Stambaugh v. Superior Court* (1976) 62 C.A.3d 231, 132 C.R. 843, decedent's heirs claimed damages for wrongful death against S, Pacific Gas and Electric Co., and other tortfeasors. S settled for \$ 25,000, the full amount of his insurance coverage, and obtained a release. The heirs then sued the other tortfeasors. Pacific Gas and Electric Co. cross-complained against S, seeking a determination of the extent to which S's negligence contributed to the death. The theory of the cross-complaint was that, under *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, supra, §1329, every contributory tortfeasor, whether joined or not, is liable to the plaintiff, but only in the proportion that his or her negligence bears to the total negligence (of all tortfeasors and plaintiff), and that the apportionment of fault and assignment of liability of each tortfeasor can only be accomplished by bringing them before the court; i.e., that by virtue of *Li*, they have become indispensable parties under C.C.P. 389. The cross-complainant disclaimed any purpose to seek indemnity or contribution; it sought only to have the extent of its liability determined so that it would not be required to pay any more of the judgment than called for by its degree of fault. *Held*, S was entitled to summary judgment on the cross-complaint.

(a) Under C.C.P. 877, a settlement in good faith, followed by a release, discharges the obligation of the tortfeasor. (See supra, §§71, 73.) The release might place a disproportionate burden on the nonsettling tortfeasors, contrary to the object of the contribution statutes (see supra, §105). But the strong policy favoring settlement, carried out by the express terms of C.C.P. 877, would be frustrated by a holding that the settlement lacks finality, and the *Li* opinion discloses no purpose to modify the statutory rule. (62 C.A.3d 235, 236.)

(b) Joinder of S to determine whether the release was given in "good faith" (C.C.P. 877; see supra, §77 et seq.) would be unwarranted, for the record contained neither evidence of nor a charge of bad faith, and the good faith of the settlement was not in issue. (62 C.A.3d 239). Moreover, good faith is not determined by the proportion the settlement bears to the damages claimed, and it would be rare that a tortfeasor who settles for the full amount of his insurance coverage could reasonably be charged with bad faith. (62 C.A.3d 238, 239.)

(2) *Amount To Be Deducted From Claim.* Under C.C.P. 877, a good faith settlement resulting in a release of one or more tortfeasors reduces the claim against other tortfeasors by the amount stipulated in the release. *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, supra, §1331, made the following observation concerning this provision: "[T]o preserve the incentive to settle which section 877 provides to injured

plaintiffs, we conclude that a plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has *actually recovered* in a good faith settlement, rather than by an amount measured by the settling tortfeasor's *proportionate responsibility* for the injury." (20 C.3d 604.) (See 64 Cal. L. Rev. 258.)

In *Jaramillo v. California* (1978) 81 C.A.3d 968, 146 C.R. 823, an action against the state and two private defendants, plaintiff settled with the latter for \$ 350,000. In the trial against the state, the jury found that plaintiff's damages were \$ 500,000, and that he was responsible for 33.3% of the damage, while the state and one of the other defendants were responsible for 66.7%. From the resulting award of \$ 333,000 against the state, the trial judge set off the \$ 350,000 settlement. Plaintiff argued that the award should have been reduced by the proportion of liability attributable to the settling defendants. *Held*, the setoff was proper. Had there been no settlement, plaintiff's maximum recovery would have been \$ 333,000, an amount already exceeded by the settlement. Plaintiff's method would have permitted him to recover damages stemming from his own negligence and would also have violated the prohibition against double recovery. (81 C.A.3d 971.)

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4. Parties.

6 *Witkin Sum. Cal. Law Torts* § 1374

[§ 1374] Parties.

Li v. Yellow Cab Co. (1975) 13 C.3d 804, 823, 119 C.R. 858, 532 P.2d 1226, supra, §1329, did not reach the issue of apportioning fault when not all of the responsible parties are before the court. (13 C.3d 823.) In *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, supra, §1331, the court observed that plaintiff's negligence could be compared (a) with each individual tortfeasor's negligence, (b) with the cumulative negligence of all joined defendants, or (c) with all the negligent conduct that contributed to the harm. (20 C.3d 589, footnote 2.) In adopting the third possibility, the court said: "[I]t is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence; moreover, inasmuch as a plaintiff's actual damages do not vary by virtue of the particular defendants who happen to be before the court, we do not think that the damages which a plaintiff may recover against defendants who are joint and severally liable should fluctuate in such a manner." (20 C.3d 589, footnote 2.)

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5. Special Verdict.

6 *Witkin Sum. Cal. Law Torts* § 1375

[§ 1375] Special Verdict.

Li v. Yellow Cab Co. (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, supra, §1329, suggested the use of special verdicts in comparative negligence cases, but held that this was a matter within the trial judge's discretion. (13 C.3d 824, footnote 18.) (For special verdict forms, see BAJI, Nos. 16.10, 16.11, 16.12, 16.72, 16.73; CACI, Nos. VF-1200, VF-1204; on defendants' power to prevent apportionment of fault among themselves, see *Klemme v. Hoag Memorial Hosp. Presbyterian* (1980) 103 C.A.3d 640, 645, 163 C.R. 109, supra, §1358; on sufficiency of verdict where same nine jurors do not agree on liability and apportionment, see *Juarez v. Superior Court* (1982) 31 C.3d 759, 765, 183 C.R. 852, 647 P.2d 128, 7 Cal. Proc. (4th), Trial, §361.)

West's Key Number Digest, Negligence k.1750

SUPPLEMENT: [This section is current through the latest supplement]
Juarez case:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §352.



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6. Judgment.

6 Witkin Sum. Cal. Law Torts § 1376

[§ 1376] Judgment.

(1) *Determination of Award*. The correct procedure is to first reduce the total award by an amount based on the percentage of the plaintiff's contributory fault, and then to reduce the resulting amount by any pretrial settlement received by the plaintiff. (*Lemos v. Eichel* (1978) 83 C.A.3d 110, 118, 147 C.R. 603; see 71 A.L.R.4th 1108 [calculation of net recovery by applying percentage of plaintiff's fault before or after subtracting amount of settlement by less than all joint tortfeasors].)

(2) *New Trial*. After verdict, a party may seek a new trial on the grounds that the fact-finder's assignment of one or more percentages of comparative responsibility is excessive or inadequate. (*Rest.3d, Torts: Apportionment of Liability* §7, Comment i.)

(3) *Costs*. Costs are awarded to the party receiving a net judgment; they are not apportioned according to comparative fault. (*Hyatt v. Sierra Boat Co.* (1978) 79 C.A.3d 325, 348, 145 C.R. 47.)

(4) *Appellate Review*. The substantial evidence rule (see 9 Cal. Proc. (4th), *Appeal*, §359 et seq.) applies to the jury's apportionment of fault. (*Metzger v. Barnes* (1977) 74 C.A.3d 6, 9, 141 C.R. 257.)

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(4) *Appellate Review*.

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §365 et seq.



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XV. WRONGFUL DEATH

A. In General.

1. No Common Law Right of Action.

6 *Witkin Sum. Cal. Law Torts* § 1377

[§ 1377] No Common Law Right of Action.

At common law, a right of action for injuries to the person did not survive the death of either the wrongdoer or the person injured, and there was no civil action for the wrongful death of another. Lord Campbell's Act (1846) established the right of action for wrongful death, and statutes in all the states now provide for it. (See *Van Beeck v. Sabine Towing Co.* (1937) 300 U.S. 342, 57 S.Ct. 452, 453, 81 L.Ed. 685, 686; *Sea-Land Services v. Gaudet* (1974) 414 U.S. 573, 94 S.Ct. 806, 810, 39 L.Ed.2d 9, 18, 2 *Summary* (10th), *Workers' Compensation*, §145; *McLaughlin v. United R. of San Francisco* (1915) 169 C. 494, 495, 147 P. 149; *Clark v. Goodwin* (1915) 170 C. 527, 529, 150 P. 357; *Buckley v. Chadwick* (1955) 45 C.2d 183, 190, 289 P.2d 242; *Norman v. Murphy* (1954) 124 C.A.2d 95, 97, 268 P.2d 178, *infra*, §1382; *Georgie Boy Mfg. v. Superior Court* (1981) 115 C.A.3d 217, 221, 171 C.R. 382; *Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 825, 174 C.R. 348, *infra*, §1578; *Rest.2d, Torts* §925; 4 Harper, James & Gray 2d §24.1; Dobbs, *The Law of Torts* §294 et seq.; 22A *Am.Jur.2d* (2003 ed.), *Death* §1 et seq.; 25 *Cal. L. Rev.* 170; 24 *Hastings L. J.* 1067 [innovative Massachusetts decision recognizing common law right]; 28 *So. Cal. L. Rev.* 400; 29 *So. Cal. L. Rev.* 344; 61 *A.L.R.3d* 906 [present status of general rule denying common law right].)

West's Key Number Digest, Death k.7

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §24.1.



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XV. WRONGFUL DEATH

A. In General.

2. Statutory Cause of Action.

a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1378

[§ 1378] In General.

(1) *Nature of Cause of Action.* In some states, the decedent's right of action for his or her injuries survives, and the recovery goes to the decedent's estate. However, the usual statute creates a new cause of action in favor of the heirs as beneficiaries. The former California statute was of this type (*C.C.P.* 377), but the current statute (*C.C.P.* 377.60 et seq.), while generally similar, does not refer to "heirs," but instead lists specific persons entitled to sue for wrongful death (see *infra*, §§1389, 1394, 1397). The cause of action is based upon the plaintiffs' own independent pecuniary injury suffered by loss of the decedent, and is distinct from any action that the decedent might have maintained had he or she survived. (See *C.C.P.* 377.60; 377.22; *Earley v. Pacific Elec. Ry. Co.* (1917) 176 C. 79, 81, 167 P. 513; *Justus v. Atchison* (1977) 19 C.3d 564, 572, 573, 139 C.R. 97, 565 P.2d 122, *infra*, §1382; *Horwich v. Superior Court* (1999) 21 C.4th 272, 283, 87 C.R.2d 222, 980 P.2d 927, *infra*, §1661, citing the text [wrongful death in California creates new cause of action that is not derivative but distinct from any action that deceased might have maintained]; *Carr v. Duncan* (1949) 90 C.A.2d 282, 284, 202 P.2d 855; *Von Batsch v. American Dist. Tel. Co.* (1985) 175 C.A.3d 1111, 1119, 222 C.R. 239 [employer of decedent is not entitled to sue]; *Rest.2d*, Torts §925; 4 Harper, James & Gray 2d §24.2; 22A *Am.Jur.2d* (2003 ed.), *Death* §§27, 28; Cal. Civil Practice, 2 Torts, Wrongful Death, Chap. 23; 4 Proof of Facts 71 [wrongful death]; 51 Proof of Facts 3d 81 [liability for air crash]; 11 *Am.Jur.* Trials 1 [representing survivors in death action]; 69 *Am.Jur.* Trials 1 [wrongful death of child in police custody]; 17 *Stanf. L. Rev.* 1043; 4 *Cal. Proc.* (4th), *Pleading*, §126.) (On survival of cause of action after death of tortfeasor, see *supra*, §23; on joinder of action under *C.C.P.* 377.30 (surviving cause of action) and action under *C.C.P.* 377.60 and consolidation of action under *C.C.P.* 377.60 with action under *C.C.P.* 377.31 (pending action), see *C.C.P.* 377.62, 14 *Summary* (10th), *Wills and Probate*, §521.)

(2) *Estate Administration.* The cause of action is an asset for purposes of administration. (See *Estate of Waits* (1944) 23 C.2d 676, 678, 146 P.2d 5; 14 *Summary* (10th), *Wills and Probate*, §352.) However, the executor or administrator sues only as a statutory trustee; the recovery belongs to the persons entitled to maintain the action, not to the estate. (*Webster v. Norwegian Mining Co.* (1902) 137 C. 399, 400, 70 P. 276 [using term "heirs"]; *Jones v. Leonardt* (1909) 10 C.A. 284, 286, 101 P. 811 [same].)

(3) *Required Persons.* Ordinarily, there can be no action if there are no persons entitled to bring the action, and a complaint by an administrator or any other person that fails to allege the existence of these persons is fatally defective. (See *Webster v. Norwegian Mining Co.*, *supra*, 137 C. 399; *Davis v. Southern Arizona Freight Lines, Ltd.* (1938) 30

C.A.2d 48, 49, 85 P.2d 897; Estate of Bright v. Western Air Lines (1951) 104 C.A.2d 827, 831, 232 P.2d 523.)

(4) *Workers' Compensation.* The workers' compensation exclusive remedy rule (see 2 *Summary* (10th), *Workers' Compensation*, §24 et seq.) bars nondependents from bringing a wrongful death action against the employer of a decedent who was killed in the course and scope of employment. (*Hisel v. Los Angeles (1987) 193 C.A.3d 969, 974, 238 C.R. 678, 2 Summary* (10th), *Workers' Compensation*, §42.)

West's Key Number Digest, Death k.7, 9, 11

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Cause of Action.* See *Fitch v. Select Products Co. (2005) 36 C.4th 812, 817, 31 C.R.3d 591, 115 P.3d 1233* [because survivors' wrongful death damages are separate from decedent's damages and are not attributable to costs of decedent's medical treatment, statutory scheme authorizing recovery of costs of Medi-Cal-provided treatment from parties who caused injury did not authorize assertion of Medi-Cal lien against wrongful death recovery that did not include compensation for decedent's medical expenses]; 4 Harper, James & Gray 3d §24.2; 101 Proof of Facts 3d 1 [wrongful death claim against emergency service workers]; 108 Am.Jur. Trials 637 [wrongful death of pedestrian]. *Cross-Reference:* 4 *Cal. Proc.* (5th), *Pleading*, §145.



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XV. WRONGFUL DEATH

A. In General.

2. Statutory Cause of Action.

b. Statute of Limitations.

6 *Witkin Sum. Cal. Law Torts* § 1379

[§ 1379] Statute of Limitations.

The wrongful death statute of limitations is 2 years. (*C.C.P.* 335.1.) It runs from the date of death, not the date of the accident. (*Walton v. Southern Pac. Co.* (1935) 8 *C.A.2d* 290, 304, 48 *P.2d* 108; see 22A *Am.Jur.2d* (2003 ed.), *Death* §45 et seq.) The former rule that, if the cause of action ran against an adult heir (e.g., a widow), it also barred the right of a minor heir was repudiated in *Cross v. Pacific Gas & Elec. Co.* (1964) 60 *C.2d* 690, 692, 36 *C.R.* 321, 388 *P.2d* 353. (See 3 *Cal. Proc.* (4th), *Actions*, §642.)

Under *C.C.P.* 340.5 (see 3 *Cal. Proc.* (4th), *Actions*, §533 et seq.), the statute of limitations on a cause of action for medical malpractice begins to run from the time of "injury." The statute does not change the rule in wrongful death actions. Because the word "injury" is construed as referring to the wrongfully caused *death* of the plaintiff's decedent, the statute does not begin to run at the time of the acts constituting malpractice but only from the time that they result in the patient's death. (*Larcher v. Wanless* (1976) 18 *C.3d* 646, 659, 135 *C.R.* 75, 557 *P.2d* 507.)

Although the claims of all persons entitled to sue must be determined in a single wrongful death action (see *infra*, §§1385, 1386), the statute of limitations runs separately against each person's cause of action. (*Andersen v. Barton Memorial Hosp.* (1985) 166 *C.A.3d* 678, 680, 212 *C.R.* 626, 3 *Cal. Proc.* (4th), *Actions*, §543 [intervenor's complaint tendered new claims and issues, and was barred; term "heirs" used].)

An administrator who brings a timely action on behalf of a person without standing to sue should be allowed to amend the complaint to name persons entitled to sue, even though the statute of limitations has run against an action by these persons. The amendment does not change the cause of action but merely adds matters necessary to make it complete, and the relation back doctrine applies (see 5 *Cal. Proc.* (4th), *Pleading*, §1151). (*Mayo v. White* (1986) 178 *C.A.3d* 1083, 1092, 224 *C.R.* 373.)

West's Key Number Digest, *Death* k.37 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

Relation back doctrine: The relation back doctrine does not apply in a wrongful death action to save the claims of an omitted heir after the statute of limitations has expired, because the addition of an omitted heir under these

circumstances necessarily inserts a new cause of action that seeks to enforce an independent right. (*San Diego Gas & Elec. Co. v. Superior Court* (2007) 146 C.A.4th 1545, 1549, 53 C.R.3d 722 [distinguishing *Mayo v. White* (1986) 178 C.A.3d 1083, 224 C.R. 373 text, p. 800, on ground that it involved technical change that did not introduce new cause of action].)

Repudiation of former rule:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §707.

C.C.P. 340.5:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §578 et seq.

Andersen case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §590.

Amendment does not change cause of action:

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §1219.



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XV. WRONGFUL DEATH

A. In General.

2. Statutory Cause of Action.

c. Lump Sum Verdict.

6 *Witkin Sum. Cal. Law Torts* § 1380

[§ 1380] Lump Sum Verdict.

There is no statutory provision for apportionment of the damages by the jury among the plaintiffs in accordance with their respective rights, and accordingly, it has been held that the verdict should be in a single lump sum, leaving it to the plaintiffs to adjust their interests informally or in a separate proceeding. (See *Robinson v. Western States Gas & Elec. Co.* (1920) 184 C. 401, 409, 194 P. 39; *Rose v. San Diego Elec. Ry. Co.* (1933) 133 C.A. 646, 651, 24 P.2d 838; 25 Cal. L. Rev. 170, 183.) The court's power of apportionment is set forth in C.C.P. 377.61 [court determines "respective rights"].)

Canavin v. Pacific Southwest Airlines (1983) 148 C.A.3d 512, 196 C.R. 82, declared that judicial apportionment does not impair the right to a jury trial:

(a) "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (148 C.A.3d 535.)

(b) However, the trial judge on the plaintiffs' request, should instruct the jury to return special findings as to each plaintiff where the evidence permits these findings. "In other words, in this case special interrogatories as requested should have been submitted to the jury regarding its determination of both the total unapportioned loss of past and future economic loss. Regarding the remaining recoverable damages related to nonmonetary support, where the evidence discloses the expectations for recovery of the various heirs would vary, the jury should be permitted to render special findings on a joint request by all plaintiffs. Although the findings would normally be advisory to the trial court at a later apportionment proceeding, valid stipulations by all parties should make them binding. We see no potential prejudice to either party. Assuming valid stipulations, we anticipate no potential conflict of interest among the plaintiffs and their respective counsel who may ethically argue each client's cause in an attempt to maximize the size of the lump-sum award." (148 C.A.3d 537.) (On special interrogatories and findings, see 7 Cal. Proc. (4th), Trial, §356 et seq.)

West's Key Number Digest, Death k.105

SUPPLEMENT: [This section is current through the latest supplement]
Special interrogatories and findings:

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §347 et seq.



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XV. WRONGFUL DEATH

A. In General.

2. Statutory Cause of Action.

d. Scope of Action.

6 Witkin Sum. Cal. Law Torts § 1381

[§ 1381] Scope of Action.

(1) *Negligent or Intentional Tort.* A wrongful death action may be maintained "for the death of a person caused by the wrongful act or neglect of another." (C.C.P. 377.60.) Hence, recovery is authorized when death results from either a negligent or an intentional wrongful act. (See *Moxon v. Kern* (1965) 233 C.A.2d 393, 398, 43 C.R. 481; 4 Harper, James & Gray 2d §24.3; 22A Am.Jur.2d (2003 ed.), *Death* §25 et seq.; 9 So. Cal. L. Rev. 375; on liability for wrongful death after failure to stop and render aid, see *Brooks v. E.J. Willig Truck Trans. Co.* (1953) 40 C.2d 669, 678, 255 P.2d 802.)

The action probably does not lie where the death arises out of a mere *breach of contract*. (See *Johnson v. Union Furniture Co.* (1939) 31 C.A.2d 234, 235, 87 P.2d 917 [question left open]; *Moxon v. Kern*, *supra*, 233 C.A.2d 399 [action in tort, not contract]; *Kaiser Foundation Hosp. v. Superior Court* (1967) 254 C.A.2d 327, 335, 62 C.R. 330; 4 Harper, James & Gray 2d §24.3.) However, "a duty of care can arise from a contractual relationship, and a cause of action in tort may sometimes be allowed where there is a failure to perform a contractual duty, or where such duty is negligently performed." (*Duff v. Harrah South Shore Corp.* (1975) 52 C.A.3d 803, 806, 125 C.R. 259 [wrongful death complaint showed that any contractual relationship ended prior to or concurrently with its alleged breach].) (On breach of legal duty arising out of contract, see 4 Harper, James & Gray 2d §24.3; 3 Cal. Proc. (4th), *Actions*, §139 et seq.; *supra*, §2.)

(2) *Strict Products Liability Action.* "Wrongful act," as used in the wrongful death statute, refers to any tortious act, including the tortious act of placing defective products into the stream of commerce. Thus, strict liability will support a cause of action for wrongful death. (See *Barrett v. Superior Court* (1990) 222 C.A.3d 1176, 272 C.R. 304, *infra*, §1513 [former statute].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Negligent or Intentional Tort.* See 4 Harper, James & Gray 3d §24.3. *Breach of legal duty arising from contract:*

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §144 et seq.



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XV. WRONGFUL DEATH

A. In General.

2. Statutory Cause of Action.

e. No Action for Death of Unborn Child.

6 *Witkin Sum. Cal. Law Torts* § 1382

[§ 1382] No Action for Death of Unborn Child.

(1) *In General.* A child eventually born alive may sue for injuries incurred prior to his or her birth. (See *supra*, §728.) And if the defendant's wrongful act results in the death of an unborn child, some states recognize a cause of action in the parent for wrongful death. (See *Bayer v. Suttle* (1972) 23 C.A.3d 361, 363, 100 C.R. 212, footnote 1 [listing cases; fetus was viable at time of accident but was delivered stillborn]; 62A *Am.Jur.2d* (2005 ed.), *Prenatal Injuries; Wrongful Life, Birth, and Conception* §41 et seq.; 19 *Proof of Facts* 3d 107 [wrongful death of fetus]; 22 *Pepperdine L. Rev.* 933 [liability for death of unborn child]; 28 *So. Cal. L. Rev.* 400; 2 *U.C.L.A. L. Rev.* 150; 27 *A.L.R.2d* 1256 [prenatal injury as ground of action]; 84 *A.L.R.3d* 411 [action for death of unborn child].)

(2) *Norman Case.* In *Norman v. Murphy* (1954) 124 C.A.2d 95, 268 P.2d 178, California was committed to the opposing view. The court reasoned that (a) the cause of action for wrongful death is wholly statutory; (b) the statute creates a right of action for an adult or "a minor person"; (c) the period of minority commences at the date of birth; (d) an unborn child is deemed "an existing person" only "in the event of its subsequent birth" (see *supra*, §728); hence, there is no statutory authority for treating an unborn child as "a minor person." (124 C.A.2d 99.) The result has been criticized and both judicial and legislative correction have been urged. (See 2 *U.C.L.A. L. Rev.* 150; 28 *So. Cal. L. Rev.* 400.)

(3) *Justus v. Atchison.* The reasoning of *Norman*, was largely rejected in *Justus v. Atchison* (1977) 19 C.3d 564, 576, 139 C.R. 97, 565 P.2d 122, but the right to sue was nevertheless denied on an interpretation of the word "person."

(a) *Existing out-of-state authority.* A cause of action for wrongful death of a fetus is recognized in 25 states, while 12 states reject it. (19 C.3d 569, 570, footnotes 4, 5.) Most commentators oppose it. (19 C.3d 571, footnote 7.)

(b) *California statute.* The history of former C.C.P. 377 (now C.C.P. 377.60 et seq.) makes it clear that the Legislature intended to occupy this field; hence, the remedy remains wholly statutory. (19 C.3d 572, 573, 574, 575.) And the California statute precludes recovery for the death of a fetus: (1) An action may be brought for death of "a person," and ordinarily, a fetus is not considered a person. (19 C.3d 577.) (2) Recovery for prenatal injuries to a child is permitted by the statute only where the child is born alive. (19 C.3d 578.) (3) In criminal statutes where protection has been given to an unborn child, the Legislature has specially identified the object of its concern. Thus, P.C. 270, on failure to support a minor child, abrogated the holding of *People v. Yates* (1931) 114 C.A. Supp. 782, 298 P. 961, 2 *Cal.*

Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §143, by expressly stating that a child conceived but not yet born is to be deemed an existing person under that section; and P.C. 187, on murder, abrogated the holding of *Keeler v. Superior Court* (1970) 2 C.3d 619, 87 C.R. 481, 470 P.2d 617, 1 Cal. Crim. Law (3d), *Crimes Against the Person*, §96, by making murder include the killing of a fetus. (19 C.3d 578, 579.)

(c) *No denial of equal protection.* The Legislature, in conferring new rights of action upon particular classes of persons, may make reasonable determinations as to how far the new right will extend. (19 C.3d 580.) And the determination not to provide a cause of action for death of a fetus is not arbitrary or irrational. The purpose of the wrongful death statute is to enable heirs and specified dependents to recover compensation for economic loss and deprivation of consortium. A fetus has no dependents and its only possible heirs are its parents; and it is not a wage-earner, hence, its death causes no appreciable economic loss (medical and burial costs are recoverable by the mother in her action for personal injuries). Thus, the parents' loss of consortium is all that is left. "Without in any way denying the reality of that loss, we are compelled to observe that the class of parents who suffer the greater deprivation of this nature are those whose child has been born alive. The parents of a stillborn fetus have never known more than a mysterious presence dimly sensed by random movements in the womb; but the mother and father of a child born alive have seen, touched, and heard their baby, have witnessed his developing personality, and have started the lifelong process of communicating and interacting with him. These are the rich experiences upon which a meaningful parent-child relationship is built, and they do not begin until the moment of birth." (19 C.3d 581.) (See *Zavala v. Arce* (1997) 58 C.A.4th 915, 932, 68 C.R.2d 571, supra, §1029 [*Justus* is not relevant to claim asserted by mother of dead fetus for negligent infliction of emotional distress]; *Rest.2d, Torts* §869(2) ["[i]f the child is not born alive, there is no liability unless the applicable wrongful death statute so provides"]; 66 Cal. L. Rev. 410; 67 Cal. L. Rev. 525; 5 *Pepperdine L. Rev.* 589; 18 *Santa Clara L. Rev.* 1083; 18 *Southwestern U. L. Rev.* 335; 27 *Southwestern U. L. Rev.* 325.)

Reyna v. San Francisco (1977) 69 C.A.3d 876, 138 C.R. 504, reached the same result, but adds: "We do not consider the situation where the death of the child occurs during the course of its actual birth." (69 C.A.3d 881.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 62A *Am.Jur.2d* (2005 ed.), *Prenatal Injuries; Wrongful Life, Birth, or Conception* §41 et seq.



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XV. WRONGFUL DEATH

A. In General.

3. Federal Acts.

a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1383

[§ 1383] In General.

(1) *Death at Sea*. The right of action for death on the high seas is governed by the Federal Death on the High Seas Act (46 U.S.C., §761 et seq.). (See *Gordon v. Reynolds* (1960) 187 C.A.2d 472, 477, 10 C.R. 73; *Cairl v. Boeing Co.* (1974) 39 C.A.3d 137, 138, 113 C.R. 925; *Chromy v. Lawrance* (1991) 233 C.A.3d 1521, 1526, 285 C.R. 400 [California courts have no jurisdiction to try actions based on Death on the High Seas Act, because wrongful death statute (former C.C.P. 377) does not expressly cover deaths occurring outside the state]; *Garofalo v. Princess Cruises* (2000) 85 C.A.4th 1060, 1082, 102 C.R.2d 754 [California courts have concurrent jurisdiction over Death on High Seas claims; disagreeing with *Chromy* on ground that basing concurrent jurisdiction on extraterritorial reach of each state's wrongful death statute would not be uniform and would lead to confusion]; 51 *Cal. L. Rev.* 389; 71 *Harv. L. Rev.* 1152; 7 *Stanf. L. Rev.* 409; cf. *Rodrigue v. Aetna Cas. & Surety Co.* (1969) 395 U.S. 352, 89 S.Ct. 1835, 1837, 23 L.Ed.2d 360, 364 [death on artificial oil-drilling island on continental shelf off Louisiana; Death on High Seas Act was not exclusive remedy].)

"The Death on the High Seas Act ... announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. ... The Act does not address every issue of wrongful death law, ... but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." (*Mobil Oil Corp. v. Higginbotham* (1978) 436 U.S. 618, 98 S.Ct. 2010, 2014, 56 L.Ed.2d 581, 587 [holding that *Sea-Land Services v. Gaudet* (1974) 414 U.S. 573, 94 S.Ct. 806, 810, 39 L.Ed.2d 9, 18, supra, §1377, allows recovery for nonpecuniary loss of society only in state territorial waters cases].)

(2) *F.E.L.A. Cases*. In a wrongful death action arising under the Federal Employers' Liability Act (45 U.S.C., §51 et seq.), the measure of recovery is "the damages ... that flow from the deprivation of the pecuniary benefits that the beneficiaries might have reasonably received." (See *Norfolk & Western Ry. Co. v. Liepelt* (1980) 444 U.S. 490, 100 S.Ct. 755, 757, 62 L.Ed.2d 689, 693 [state court erred in excluding evidence, and in refusing jury instruction, on impact of federal income taxation on damage award]; 21 *Santa Clara L. Rev.* 873 [*Norfolk*]; BAJI, No. 11.43.1 [award will not be subject to income taxes and these taxes should not be considered]; CACI, No. 2940; 2 *Summary* (10th), *Workers' Compensation*, §118, 119.)

West's Key Number Digest, Death k.7, 13

SUPPLEMENT: [This section is current through the latest supplement]

(2) *F.E.L.A. Cases*. See 29 *A.L.R. Fed* 2d 1 [construction and application of FELOA--Supreme Court cases].



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XV. WRONGFUL DEATH

A. In General.

3. Federal Acts.

b. Action Under Federal Civil Rights Act.

6 Witkin Sum. Cal. Law Torts § 1384

[§ 1384] Action Under Federal Civil Rights Act.

In *Ochoa v. Superior Court* (1985) 39 C.3d 159, 216 C.R. 661, 703 P.2d 1, Rudy Ochoa, a 13-year-old boy in the custody of the county juvenile hall, died as a result of allegedly negligent medical treatment. Mr. and Mrs. Ochoa, his parents, who were present and observed defendant county employees allegedly ignoring the child's medical needs, brought this action, setting forth two main causes of action: (a) negligent infliction of emotional distress (*supra*, §1008), and (b) violation of civil rights under the Federal Civil Rights Act, 42 U.S.C., §1983 (see 8 *Summary* (10th), *Constitutional Law*, §816 et seq.). In an elaborate opinion, the court held that a cause of action for negligent infliction of emotional distress was stated. (See *supra*, §1013.) The court also held that a §1983 cause of action was stated by Mrs. Ochoa as special administrator of her deceased son's estate.

(a) The statute is silent on the question whether the action survives the death of the victim of the alleged violations. But 42 U.S.C., §1988 has been interpreted to make the state law on survival applicable (39 C.3d 173); and under former Prob.C. 573 (replaced by C.C.P. 377.20), the tort action for injury to the person survives the death of the victim or wrongdoer. (39 C.3d 174, citing the text; see *supra*, §23.)

(b) Inadequate medical treatment may constitute a violation of §1983 (39 C.3d 176, 177), and the complaint sufficiently alleged "woefully inadequate" treatment: "Mrs. Ochoa brought her son's symptoms to the attention of the defendants when she visited with him on March 24. When she visited him a second time, Rudy was exhibiting alarming symptoms, including a soaring temperature, dehydration, vomiting, hallucinations, the beginnings of convulsions and severe pain on his left side. He was also observed vomiting blood. These conditions indicated, even to a lay person, that emergency measures were needed. Significantly, it was left to Mrs. Ochoa to make use of the facilities in order to care for her son. Although penicillin was prescribed, it is unclear that any was ever administered. Mrs. Ochoa's requests for treatment for her son were met only with the observation that he had a 'bug.' It is also alleged that no radiological, blood or urine tests were undertaken in order to diagnose Rudy's condition." (39 C.3d 177.) (See 48 Am.Jur. Trials 587 [educator's liability under 42 U.S.C., §1983 for wrongful death of student due to excessive punishment or failure to supervise].)

SUPPLEMENT: [This section is current through the latest supplement]



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XV. WRONGFUL DEATH

B. Cause of Action and Parties.

1. Single Joint Cause of Action.

a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1385

[§ 1385] In General.

(1) *Statutory Development.* Prior to 1949, the wrongful death statute provided for suit by the father alone for wrongful death of a minor child, apart from exceptional circumstances allowing action by the mother, a guardian, or a surviving spouse or child. (See *Fuentes v. Tucker* (1947) 31 C.2d 1, 10, 187 P.2d 752; *Wexler v. Los Angeles* (1952) 110 C.A.2d 740, 746, 243 P.2d 868.) However, the 1949 Legislature abolished these rules, and former C.C.P. 377 was enacted, giving a cause of action to all the heirs or the personal representative, whether the child was a minor or an adult. In 1992, former C.C.P. 377 was repealed and restated in C.C.P. 377.60 et seq. Under C.C.P. 377.60, the cause of action is for the death of "a person" and is given to specified individuals (see *infra*, §1388 et seq.) or to the decedent's personal representative. This statute, which does not mention "heirs," applies to any action arising on or after January 1, 1993. (C.C.P. 377.60(d), (e); see 29 *McGeorge L. Rev.* 453.)

(2) *Joinder of Persons Entitled To Sue.* A single joint cause of action is given to all of the persons entitled to sue, and only one action can be brought. Hence, unless the suit is by the personal representative as trustee for these persons, all of them must be joined, either as plaintiffs or defendants, in order to recover. (See *Salmon v. Rathjens* (1907) 152 C. 290, 294, 92 P. 733; *Watkins v. Nutting* (1941) 17 C.2d 490, 498, 110 P.2d 384; *Rose v. San Diego Elec. Ry. Co.* (1933) 133 C.A. 646, 651, 24 P.2d 838; *Christiana v. Rose* (1950) 100 C.A.2d 46, 53, 222 P.2d 891.)

When it is said that a wrongful death action is joint, it is meant that all persons entitled to sue should join or be joined in the action and that a single verdict should be rendered for all recoverable damages. When it is said that the action is single, it is meant that only one action for wrongful death may be brought whether, in fact, it is instituted by all or only one of these persons, or by the personal representative of the decedent. When it is said that the action is indivisible, it is meant that there cannot be a series of suits by the persons entitled to sue against the tortfeasor for their individual damages. (*Smith v. Premier Alliance Ins. Co.* (1995) 41 C.A.4th 691, 696, 48 C.R.2d 461, *infra*, §1386.)

(3) *Joinder of Defendants.* The plaintiffs need not join all causes of action and all potential defendants in one action. Hence, in a statutory action for wrongful death, as in other tort actions, joint tortfeasors may be sued either jointly or severally, although there can be only one satisfaction. (See *Helling v. Lew* (1972) 28 C.A.3d 434, 437, 438, 439, 104 C.R. 789 [separate actions could be brought against negligent automobile driver (and owner) and against doctor and hospital for malpractice].)

(4) *Effect of Arbitration Provision*. Where a decedent's health plan included a provision requiring arbitration of any claim arising under the plan asserted by a member or a member's heirs, the arbitration provision was applicable to all the heirs, including (a) the widow and five minor children who were members of the plan, and (b) three adult heirs who were not members of the plan. (*Herbert v. Superior Court* (1985) 169 C.A.3d 718, 722, 725, 215 C.R. 477, 3 Cal. Proc. (4th), Actions, §297 [binding nonmember heirs effectuates legislative purpose that single cause of action exists for wrongful death of decedent].)

(5) *One Heir's Abandonment of Claim*. In *National Metal & Steel Corp. v. Colby Crane & Mfg. Co.* (1988) 200 C.A.3d 1111, 246 C.R. 435, the court pointed out that, despite the requirement of a single action where all the heirs are joined, the cause of action of each heir is personal and separate, and may be abandoned by that heir. (200 C.A.3d 1116.)

West's Key Number Digest, Death k.31, 41, 42

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Effect of Arbitration Provision*.

Herbert case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §314.



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XV. WRONGFUL DEATH

B. Cause of Action and Parties.

1. Single Joint Cause of Action.

b. Effect of Settlement by One Plaintiff.

6 *Witkin Sum. Cal. Law Torts* § 1386

[§ 1386] Effect of Settlement by One Plaintiff.

In *Estate of Kuebler v. Superior Court* (1978) 81 C.A.3d 500, 146 C.R. 481, three minor children and their paternal grandparents were killed in the crash of an airplane piloted by the grandparents. Because the father refused to join in a wrongful death action as a plaintiff, the mother filed the action against the estates of the grandparents, joining the father as a nominal defendant under C.C.P. 382 (see 4 Cal. Proc. (4th), *Pleading*, §190). The father then brought his own action against the estates under former Prob.C. 721 (limited to the amount of insurance coverage), and named the mother as a defendant because she refused to join in that action. Before the two actions could be consolidated, the mother settled her claim and dismissed her action with prejudice. The insurance carriers for defendant estates then brought summary judgment on the ground that the dismissal of the mother's action was a bar to the maintenance of the father's action. *Held*, summary judgment was properly denied.

(a) Defendants relied on *Mayerhoff v. Kaiser Foundation Health Plan* (1977) 71 C.A.3d 803, 138 C.R. 319, where a wife was killed; the husband and son filed one action, and the dependent parents filed another; the husband and son settled and dismissed with prejudice, and the court held that the dismissal was a bar to maintenance of the action by the dependent parents. But *Mayerhoff* did not show that the husband and son had joined the dependent parents in their action. (81 C.A.3d 503.)

(b) Here, the father, though a nominal defendant in the mother's action, was in reality a plaintiff; and the settlement by one party plaintiff ordinarily does not bar the actions of other plaintiffs. (81 C.A.3d 504.) Here, the estates and insurance carrier had actual knowledge of the father's claim and did not regard the settlement as final. (81 C.A.3d 504.)

In *Smith v. Premier Alliance Ins. Co.* (1995) 41 C.A.4th 691, 48 C.R.2d 461, a decedent's two children brought suit against a wrongful death defendant's insurer that had omitted them from a settlement with the decedent's wife. Plaintiffs had been nominal defendants in the wrongful death action. *Held*, summary judgment for the insurer affirmed.

(a) A wrongful death defendant can settle the case with either all the heirs or fewer than all. Just as a judgment on behalf of some heirs will not preclude a future action by a known but omitted heir, a wrongful death settlement will not terminate the action if the settlement includes fewer than all the named heirs. By settling with fewer than all the known heirs, a wrongful death defendant waives the right to face only a single wrongful death action, and the nonsettling heirs

may continue to pursue the action. This remains true even if the nonsettling heirs are nominally defendants in the case. (41 C.A.4th 698.)

(b) Plaintiffs did not have a right as a matter of law to share in the settlement and would be entitled to share only if they were included in the settlement agreement. Although the insurer apparently told the wife's attorney that its payment of the policy limits was meant to include the claims of plaintiffs and submitted draft releases with signature blocks for them, plaintiffs never signed these releases. Because plaintiffs simply did not settle with the insurer, the settlement agreement encompassed the claim of the wife only, and plaintiffs were entitled to continue to pursue their action against the wrongful death defendant. Moreover, the single-action rule would not have been a bar to the continued prosecution of their wrongful death action. Thus, because the insurer deprived plaintiffs of no rights by settling with the wife alone, that settlement could not give rise to any cause of action by plaintiffs against the insurer. (41 C.A.4th 699.)

SUPPLEMENT: [This section is current through the latest supplement]
C.C.P. 382:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §209.



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CHAPTER IX - Torts

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XV. WRONGFUL DEATH

B. Cause of Action and Parties.

1. Single Joint Cause of Action.

c. Action by Omitted Heir.

6 Witkin Sum. Cal. Law Torts § 1387

[§ 1387] Action by Omitted Heir.

(1) *General Rule: No Action.* An heir wholly omitted from a wrongful death action generally cannot bring a subsequent action. A wrongful death defendant cannot be subjected to a second recovery by another heir of whose existence the defendant had no knowledge at the time of the initial action. (*Smith v. Premier Alliance Ins. Co.* (1995) 41 C.A.4th 691, 697, 48 C.R.2d 461, citing the text; *Hall v. Superior Court* (2003) 108 C.A.4th 706, 715, 133 C.R.2d 806, 1 Cal. Proc. (4th), Attorneys, Supp., §326 [attorney representing wife in wrongful death action based on death of daughter had no duty to name estranged husband as nominal defendant; duty belonged to wife, as plaintiff heir, to join omitted heirs as nominal defendants].)

(2) *Exception.* In *Valdez v. Smith* (1985) 166 C.A.3d 723, 212 C.R. 638, a widow brought an action for wrongful death of her husband, on behalf of herself and four minor children. Her complaint alleged (incorrectly) that they were the sole surviving heirs, and the case was settled and dismissed with prejudice. Then plaintiff, a surviving child of the decedent by a former marriage, who resided with his mother in Mexico, filed the present action. At the hearing of defendants' motion for summary judgment, the trial judge granted the motion on the ground that the action was barred by the one-action rule. *Held*, reversed; under the facts, there was an exception to the aforementioned rule.

(a) A number of cases have held that an heir who was not a party to a wrongful death action will be barred by the judgment in that action, despite the fact that the heirs who brought the initial action knew of the existence of another heir. (166 C.A.3d 726, citing *Helling v. Lew* (1972) 28 C.A.3d 434, 437, 438, 439, 104 C.R. 789, supra, §1385; *Mayerhoff v. Kaiser Foundation Health Plan* (1977) 71 C.A.3d 803, 138 C.R. 319; and *Canavin v. Pacific Southwest Airlines* (1983) 148 C.A.3d 512, 530, 196 C.R. 82, supra, §1380.) These cases note that the omitted heir has the remedy of suit against the other heirs for failing to join him or her in their action. (166 C.A.3d 727, citing *Watkins v. Nutting* (1941) 17 C.2d 490, 498, 110 P.2d 384, and *Helling*.)

(b) The facts of the present case bring it within a recognized exception to the one-action rule. There was no indication that plaintiff and his mother, residing in Mexico, knew of the death of the decedent or the pendency of the earlier wrongful death action, and both the widow who had initiated the prior action and defendants were aware of the existence of another heir and made no attempt to join him. Prior cases have upheld the right of the omitted heir to maintain a subsequent independent action under these circumstances. (166 C.A.3d 727, 729, citing *Davis v. Robinson*

(1942) 50 C.A.2d 700, 702, 123 P.2d 894, *Estate of Kuebler v. Superior Court* (1978) 81 C.A.3d 500, 146 C.R. 481, supra, §1386, and an Idaho case directly in point.) As in *Davis v. Robinson*, the failure of defendants to make timely objection and have the action abated, or to require joinder of the omitted heir, was a waiver of the objection. (166 C.A.3d 728.)

(c) When, as in the present case, "the defendant in a pending action has actual knowledge of the existence, identity and status of an omitted heir and fails to have said omitted heir made a party to the action, a settlement and dismissal with prejudice of the pending action will not bar a subsequent action by the omitted heir against the defendant." (166 C.A.3d 731.) (See *Ruttenberg v. Ruttenberg* (1997) 53 C.A.4th 801, 815, 62 C.R.2d 78 [allowing omitted heir to sue is not only consistent with single-action rule, but is mandated by it].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule: No Action.*

Hall case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §302.

(2) *Exception.* See *Romero v. Pacific Gas & Elec. Co.* (2007) 156 C.A.4th 211, 218, 67 C.R.3d 236 [fact that defendant tortfeasor was unaware that known heir joined as nominal defendant in wrongful death action, as required by C.C.P. 382, was not served was no defense to rule that tortfeasor waives protection of one-action rule by settling wrongful death claim with less than all known heirs if such heirs are not party to action; burden is on tortfeasor wishing to avail itself of protections of one-action rule to ascertain whether heirs named as defendants have been *properly* joined].



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XV. WRONGFUL DEATH

B. Cause of Action and Parties.

2. Persons Entitled To Sue.

a. Heirs Under Former Law.

6 *Witkin Sum. Cal. Law Torts* § 1388

[§ 1388] Heirs Under Former Law.

(1) *In General.* The "heirs" referred to in former C.C.P. 377 were those entitled to succeed from the decedent at death under the laws of succession. (See *Fiske v. Wilkie* (1945) 67 C.A.2d 440, 444, 154 P.2d 725 [wrongful death of mother; father died shortly afterwards; daughters were entitled to sue]; *Wilson v. San Francisco* (1951) 106 C.A.2d 440, 444, 235 P.2d 81 [wrongful death of brother, action by sister]; see 22A *Am.Jur.2d* (2003 ed.), *Death* §78 et seq.; 31 *A.L.R.3d* 379 [brothers and sisters].) (On action by adopted child, see 94 *A.L.R.2d* 1237; on action by parent against unemancipated child, see 62 *A.L.R.3d* 1299; on action by unemancipated minor child against one parent for wrongful death of other parent, see 87 *A.L.R.3d* 849.)

(2) *Relatives Who Are Not Heirs.* Relatives who would not be entitled to take a share in the estate under the rules of succession could not sue. In *Evans v. Shanklin* (1936) 16 C.A.2d 358, 60 P.2d 554, decedent, an adult son, separated from his wife and children, lived with and supported his mother. *Held*, the mother could not sue, for where the decedent leaves a widow and children, the estate goes to them, to the exclusion of the parents. Thus, the mother was barred, though actually dependent on the decedent, while the wife and children were not. (16 C.A.2d 362.) (See *Davis v. Southern Arizona Freight Lines, Ltd.* (1938) 30 C.A.2d 48, 85 P.2d 897 [same result]; *California State Auto. Assn., Inter-Ins. Bureau v. Jacobson* (1972) 24 C.A.3d 850, 853, 101 C.R. 366 [stepfather was not entitled to recover for wrongful death of stepdaughter]; 22A *Am.Jur.2d* (2003 ed.), *Death* §78 et seq.; 25 *Cal. L. Rev.* 177; 27 *Cal. L. Rev.* 481.) (On abrogation by statute, see *infra*, §1392.)

(3) *Putative Spouse.* A putative wife, an heir of the deceased putative husband, could bring the action. (*Kunakoff v. Woods* (1958) 166 C.A.2d 59, 63, 332 P.2d 773.) (On right of spouse to sue where injury occurred before marriage and resulting death occurred after marriage, see 69 *A.L.R.3d* 1046.)

(4) *Illegitimate Child.* It was formerly the rule in California that an illegitimate child neither legitimated nor acknowledged for inheritance was not an heir and therefore was not entitled to recovery. But in *Levy v. Louisiana* (1968) 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, denial of the right of an illegitimate child to sue for wrongful death of his mother was held to be an unconstitutional discrimination. (See 8 *Summary* (10th), *Constitutional Law*, §780.) Thereafter, the reference to "heirs" in the former California statute was given an enlarged meaning in conformity with the *Levy* holding. (See *Arizmendi v. System Leasing Corp.* (1971) 15 C.A.3d 730, 737, 740, 93 C.R. 411 [illegitimate

children entitled to sue for wrongful death of father].) (On elimination of distinction between legitimate and illegitimate children under Uniform Parentage Act, see 10 *Summary* (10th), *Parent and Child*, §17.)

(5) *Stepchild*. In *Steed v. Imperial Airlines* (1974) 12 C.3d 115, 115 C.R. 329, 524 P.2d 801, the court, construing the term "heirs" strictly, held that a stepchild could not recover. The court rejected a constitutional challenge based on the analogy of an illegitimate child, and concluded that the legislative judgment did not infringe any constitutional protection: "The plaintiff, like any number of other persons who, in particular cases, may suffer injury and economic and personal loss by the death of an individual, is without legal recourse absent specific statutory remedy." (12 C.3d 126.) (See 63 Cal. L. Rev. 343; 1 *Pepperdine L. Rev.* 425; 68 A.L.R.3d 1220 [action for death of stepparent by or for benefit of stepchild]; and see *Reynolds v. Los Angeles* (1986) 176 C.A.3d 1044, 1049, 222 C.R. 517 [rejecting contention that person who had custody of child with intention of to adopt, but who never did obtain adoption decree, could sue for wrongful death of child].) (For statutory revision, see *infra*, §1389.)

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SUPPLEMENT: [This section is current through the latest supplement]



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2. Persons Entitled To Sue.
b. Listed Persons Under Current Law.

6 *Witkin Sum. Cal. Law Torts* § 1389

[§ 1389] Listed Persons Under Current Law.

The 1975 Legislature revised former C.C.P. 377 to increase the number of persons entitled to bring a wrongful death action. (See 9 *Pacific L. J.* 672.) This statute was repealed in 1992 and substantially restated in C.C.P. 377.60 et seq. Instead of specifically defining the term "heirs," C.C.P. 377.60 provides that the action may be asserted by the following persons or by the decedent's personal representative on their behalf:

(1) "The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession." (C.C.P. 377.60(a); on intestate succession, see *Prob.C.* 6400 et seq.; 14 *Summary* (10th), *Wills and Probate*, §74 et seq.)

(2) The putative spouse, children of the putative spouse, stepchildren, or parents, if they were dependent on the decedent, regardless of whether they are entitled to succeed. (C.C.P. 377.60(b); see *infra*, §1390 et seq.)

(3) A minor, whether or not qualified under the first two classes, "if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support." (C.C.P. 377.60(c).)

C.C.P. 377.60 applies to any action arising on or after January 1, 1993, and does not adversely affect the standing of any party under prior law. (C.C.P. 377.60(d), (e).) (See *Desplancke v. Wilson* (1993) 14 C.A.4th 631, 635, 17 C.R.2d 586 [C.C.P. 377.60(a) codifies rule of *Fiske v. Wilkie* (1945) 67 C.A.2d 440, 154 P.2d 725, *supra*, §1388, that decedent's children are heirs even if decedent's entire estate is community property that passes to surviving spouse]; *Fraizer v. Velkura* (2001) 91 C.A.4th 942, 944, 110 C.R.2d 918 [neither termination of rights of decedent child's parents at hearing under Welf.C. 366.26, nor placement of decedent for adoption shortly before her death, affected standing of decedent's grandmother to bring wrongful death action]; *Nelson v. Los Angeles* (2003) 113 C.A.4th 783, 789, 6 C.R.3d 650 [mother's uncontradicted statement constituted substantial evidence that her deceased adult son had no children, and established her standing to bring wrongful death action].)

West's Key Number Digest, Death k.31(1), 41

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XV. WRONGFUL DEATH

B. Cause of Action and Parties.

2. Persons Entitled To Sue.

c. Putative Spouse.

6 *Witkin Sum. Cal. Law Torts* § 1390

[§ 1390] Putative Spouse.

C.C.P. 377.60(b) defines "putative spouse" as "the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid." (See *Wagner v. Imperial* (1983) 145 C.A.3d 980, 983, 193 C.R. 820 [good faith belief was sufficient to establish status of putative spouse under former C.C.P. 377(b)(2); no need to show solemnization ceremony]; 7 *Pacific L. J.* 562.)

In *Centinela Hosp. Med. Center v. Superior Court* (1989) 215 C.A.3d 971, 263 C.R. 672, plaintiff's action for the wrongful death of Ann, the woman he had lived with for 23 years, was based on the argument that he qualified as a putative spouse under former C.C.P. 377(b)(2) (now *C.C.P. 377.60(b)*) because of his good faith belief that he and Ann were validly married. *Held*, as a matter of law, plaintiff could not reasonably have believed in the validity of the marriage.

(a) A good faith belief, which is tested by an objective standard, requires a reasonable belief in the existence of a lawful California marriage. (215 C.A.3d 975.)

(b) Plaintiff asserted that he believed that he and Ann had entered into a valid common law marriage based on the following factors: their exchange of private marital vows; Ann's change of name to plaintiff's; their shared bank account; and the purchases made and debts incurred by them together. However, because California abolished common law marriages in 1895 (see 11 *Summary* (10th), *Husband and Wife*, §42), plaintiff's belief was unreasonable as a matter of law. (215 C.A.3d 975.)

(c) Plaintiff admitted that, although he and Ann exchanged private vows, he made no attempt to comply with the procedural requirements of a valid marriage (see 11 *Summary* (10th), *Husband and Wife*, §42 et seq.). Without this effort, the factors relied on by plaintiff were not sufficient to support a reasonable good faith belief in a lawful California marriage. (215 C.A.3d 975.)

(4) "We respectfully decline to follow" *Wagner v. Imperial*, which held that a good faith belief in the validity of a marriage was the *only* requirement for establishing putative spouse status. (215 C.A.3d 976.) And the holding in *Elden v. Sheldon* (1988) 46 C.3d 267, 250 C.R. 254, 758 P.2d 582, *supra*, §1020, is broad enough to preclude plaintiff's

wrongful death action. (215 C.A.3d 976.)

West's Key Number Digest, Death k.31(6), 41

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XV. WRONGFUL DEATH

B. Cause of Action and Parties.

2. Persons Entitled To Sue.

d. Domestic Partner.

6 Witkin Sum. Cal. Law Torts § 1391

[§ 1391] Domestic Partner.

A cause of action for wrongful death may be asserted by the decedent's surviving domestic partner. (*C.C.P.* 377.60(a).) For this purpose, the term "domestic partner" refers to a person who, at the time of decedent's death, was the domestic partner of the decedent in a registered domestic partnership established under *Family C. 297(b)* (see 11 *Summary* (10th), *Husband and Wife*, §27). (*C.C.P.* 377.60(f)(1); see *C.C.P.* 377.60(f)(2) [exception for death occurring before January 1, 2002].)

In *Holguin v. Flores* (2004) 122 C.A.4th 428, 18 C.R.3d 749, plaintiff instituted a wrongful death action when his partner of the opposite sex was killed in a traffic accident. Although neither party was over age 62, plaintiff contended that he and decedent, although of the opposite sex, were nevertheless "domestic partners" within the meaning of *Family C. 297(a)* ("domestic partners" defined) and that he therefore, under *C.C.P.* 377.60, had standing to sue. The trial court disagreed, and entered judgment on demurrer for defendant. *Held*, affirmed; to be entitled to sue as a domestic partner, an individual must meet the criteria of both *Family C. 297(a)* and (b).

(a) *Family C. 297(b)(5)(B)* states that persons of the opposite sex may not constitute a domestic partnership unless one or both are over the age of 62. Moreover, the 2001 amendment allowing a surviving domestic partner to sue for wrongful death was part of a series of statutory amendments enlarging the definition of a domestic partnership and expanding the rights and benefits of its members. The evidence is thus overwhelming that in enacting these amendments, the Legislature only intended to extend the rights and benefits of members of domestic partnerships as defined in *Family C. 297*, not to create new rights and benefits for unmarried cohabiting couples in general. (122 C.A.4th 435.)

(b) According to the Legislative Counsel, the 2001 amendment to *Family C. 299(a)* expanded the legal effect of the registration of a domestic partnership to any provision of law specifically referring to domestic partners. The wrongful death statute is such a statute, and thus in order to sue, the plaintiff must be a registered domestic partner of the decedent. However, the plaintiff can only be a registered domestic partner if the partners were of the same sex or one of them was at least 62 years of age and eligible for benefits under the Social Security Act based on age. (122 C.A.4th 436.)

(c) The legislative history of the 2001 amendments clearly states that the amendments would confer various new legal rights on registered domestic partners " 'including rights ... to bring an action and recover damages for wrongful death and emotional distress.' " The history also notes that the amendments would confer on same-sex couples most of the rights pertaining to married couples, but that unmarried cohabitants would remain without any rights. (122 C.A.4th 436.)

(d) Plaintiff contended that *C.C.P. 377.60* discriminated on the basis of his gender and age and that, therefore, to justify the discrimination, there must be a compelling state interest, rather than merely a rational basis. This contention is without merit, because the statute does not discriminate against plaintiff on the basis of his gender or age, but on the basis of his marital status, i.e., unmarried, but with the right to wed. Hence, the "rational basis" test governs this case. (122 C.A.4th 438.)

(e) Here, the Legislature rationally could have concluded the survivors of same-sex couples and couples with a member eligible for Social Security benefits based on age are deserving of solicitude, because they are as likely to suffer economic loss from the death of their partners as are spouses, but, because of other statutory schemes, they are legally or practically prevented from marrying. However, couples such as plaintiff and decedent are not entitled to the same solicitude, because the law does not prevent them from marrying. Furthermore, the Legislature could also reasonably have concluded that in the case of married couples and domestic partners, the permanency of the relationship is evidenced by the marriage license and Declaration of Domestic Partnership, respectively. No equivalent public record exists for unmarried cohabiting couples who are of the opposite sex, and thus compensation for loss of monetary support is too speculative to calculate. (122 C.A.4th 442.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Retroactivity:* In *Bouley v. Long Beach Memorial Med. Center* (2005) 127 C.A.4th 601, 25 C.R.3d 813, decedent died in May 2001, i.e., when *C.C.P. 377.60(a)* did not allow domestic partners to bring a wrongful death action. However, the statute was amended in 2001, effective January 1, 2002, to add domestic partners to the list of those who could maintain a wrongful death action. In May 2002, plaintiff, decedent's domestic partner, filed a wrongful death action. *Held*, plaintiff had standing. *C.C.P. 377.60(d)* states that the statute applies to causes of action arising on or after January 1, 1993, thereby clearly indicating that the Legislature intended the 2001 amendment to be retroactive. (127 C.A.4th 606.) (See *Armijo v. Miles* (2005) 127 C.A.4th 1405, 1409, 26 C.R.3d 623 [2004 amendment, which reflected Legislature's clear intent that 2002 amendment was to have retroactive application, was enacted pending appeal of case and applied retroactively].)



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XV. WRONGFUL DEATH

B. Cause of Action and Parties.

2. Persons Entitled To Sue.

e. Dependent Parents.

6 *Witkin Sum. Cal. Law Torts* § 1392

[§ 1392] Dependent Parents.

Evans v. Shanklin (1936) 16 C.A.2d 358, 60 P.2d 554, supra, §1388, denied recovery to the decedent's dependent parent. In 1968, the wrongful death statute was amended to overcome this holding.

Hazelwood v. Hazelwood (1976) 57 C.A.3d 693, 129 C.R. 384, construing the 1968 statute, held that "dependent parents" are those who, at the time of the child's death, are "actually dependent, to some extent, upon the decedent for the necessities of life." (57 C.A.3d 698.) Hence, plaintiff parents, who were gainfully employed and self-supporting, were not entitled to share in the recovery. (See *Perry v. Medina* (1987) 192 C.A.3d 603, 610, 237 C.R. 532 [applying *Hazelwood* test; whether groceries and \$ 50 a month provided by son to mother made mother a dependent parent was a triable factual issue, in light of mother's "meager" \$ 400 monthly income, \$ 200 of which paid her rent]; *Coats v. K-Mart Corp.* (1989) 215 C.A.3d 961, 969, 264 C.R. 12 [widow not dependent on decedent for necessities of life cannot sue]; *Chavez v. Carpenter* (2001) 91 C.A.4th 1433, 1445, 111 C.R.2d 534 [24-year-old decedent paid his parents \$ 100 per month, regularly provided groceries and grocery money, and contributed maintenance services; whether parents had standing to bring wrongful death action as "dependent parents" was disputed factual question].)

West's Key Number Digest, Death k.31(7), 41

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B. Cause of Action and Parties.

2. Persons Entitled To Sue.

f. Child of Presumed Parent.

6 *Witkin Sum. Cal. Law Torts* § 1393

[§ 1393] Child of Presumed Parent.

In *Gabehart v. Simonsen* (1986) 176 C.A.3d 672, 222 C.R. 336, decedent lived with D, his nonmarital cohabitant. She gave birth to a son, K, and decedent openly held the child out as his own. D brought this action for wrongful death on behalf of K. However, C, decedent's mother, also sued on the theory that because K's paternity had never been adjudicated, decedent died without issue and she was the sole heir under former Prob.C. 225 (now *Prob.C. 6402*). In the hearing on defendants' motion for summary judgment, C produced a complaint and verified answer in a paternity action previously filed on behalf of K, in which decedent denied paternity. The trial court granted summary judgment and C appealed. *Held*, reversed.

(a) C's contention that paternity cannot be established after the alleged father's death is incorrect. Under former Prob.C. 255(a), succession by a child is dependent on the *existence* of the relationship prior to death, and this would seem to preclude a civil action to establish paternity after the death. But former Prob.C. 255(d) stated that a parent and child relationship "exists" when it is established by action or is "presumed and not rebutted" pursuant to C.C. 7000 et seq. (Uniform Parentage Act, see 10 *Summary* (10th), *Parent and Child*, §17 et seq.). (176 C.A.3d 677.)

(b) Under former C.C. 7004 (now *Family C. 7611*), a man is presumed to be the natural father of a child if he receives the child into his home and openly holds him out as his natural child; and that was the case here. Where the relationship is based on the presumption, it "exists" as of the time of the occurrence of the facts giving rise to the presumption; i.e., the relationship exists prior to the death of the decedent even though no use of the presumption is made until after the decedent's death. (176 C.A.3d 677.)

(c) Thus, there was evidence to support the conclusion that K was the son of decedent and thus entitled to bring a wrongful death action, and also evidence to the contrary (decedent's verified answer in the paternity action). Hence, a triable issue of fact was presented, and the summary judgment was improper. (176 C.A.3d 677, 678.)

In *Cheyanna M. v. A.C. Nielsen Co.* (1998) 66 C.A.4th 855, 78 C.R.2d 335, D and A had a brief affair, and A became pregnant with plaintiff. D never acknowledged to A that he was the father, although testimony by other people tended to establish his paternity. Before plaintiff was born, D was killed. About 6 months after plaintiff's birth, two wrongful death actions were brought: one by plaintiff through a guardian ad litem, and one by D's parents, who

successfully moved for summary judgment on the ground that plaintiff lacked standing to bring a wrongful death action. D's parents contended that, to have standing, plaintiff had to be an "heir" within the meaning of the intestate succession law, while plaintiff argued that standing to maintain a wrongful death action should be determined by the Uniform Act on Blood Tests to Determine Paternity. *Held*, reversed; the laws of succession governed, but, nevertheless, there was a triable issue of fact whether plaintiff had standing.

(a) Former C.C.P. 377 authorized a decedent's "heirs" to maintain a wrongful death action, and the word "heirs" was interpreted as applying only to those who would have been eligible to have inherited from the decedent's estate had he or she died intestate. (66 C.A.4th 861, citing *Justus v. Atchison* (1977) 19 C.3d 564, 139 C.R. 97, 565 P.2d 122, supra, §1382.) In 1992, the current statute, C.C.P. 377.60, substituted the word "children" for "heirs." However, the Law Revision Commission stated that this change simply reiterated the former statute without substantive change. Moreover, as *Phraner v. Cote Mart* (1997) 55 C.A.4th 166, 63 C.R.2d 740, infra, §1397, makes clear, the purpose of the change was to allow a wrongful death claim by those children who were not heirs only because the estate of the decedent consisted entirely of community property. (66 C.A.4th 862.)

(b) Whether plaintiff is an "heir" under the laws of intestate succession is a disputed question of fact: (1) Because D died without a spouse, his entire estate passed to his issue; (2) the "issue" of a person is defined as the lineal descendants of all generations having the relationship of parent and child; (3) a parent and child relationship exists between a person and that person's natural parents regardless of their marital status; (4) a biological father is a "natural parent" if paternity is established by clear and convincing evidence that the father has openly held out the child as his own, or if it is impossible for the father to hold the child out as his own, the biological father is a "natural parent" if paternity is established by clear and convincing evidence. Thus, if D could have held plaintiff out as his child, and there is clear and convincing evidence that he did so, plaintiff would be an heir under the intestacy laws. Or if it was impossible for D to hold plaintiff out as his child, she would be an heir if there was clear and convincing evidence of paternity. (66 C.A.4th 866.)

(c) Whether it was possible for D to have held plaintiff out as his child depends on the definition of "child." D's parents contended that D could have held plaintiff out as his "child," because the word "child" included a fetus, and the fact that he did not do so meant that plaintiff was not an "heir." On the other hand, plaintiff argued that the term "child" referred only to a human being born alive and that it was thus impossible for D to have held plaintiff out as his child. Plaintiff's position is correct. (66 C.A.4th 867.)

(d) Although C.C. 43.1 states that an unborn child is deemed an existing person so far as necessary for the child's interests in the event of its subsequent birth, California law, with a few exceptions, has not treated the fetus as equivalent to the born child. (66 C.A.4th 869.) Moreover, as indicated by the statutory language, C.C. 43.1 applies only to the extent that it *benefits* a child. And plaintiff's interests would hardly be served by applying this statute to construe the term "child," as used in the intestacy laws, as including a fetus, because such an application would preclude plaintiff from bringing a wrongful death action. (66 C.A.4th 870.)

West's Key Number Digest, Death k.31(8), 41

SUPPLEMENT: [This section is current through the latest supplement]



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g. Other Persons.

6 *Witkin Sum. Cal. Law Torts* § 1394

[§ 1394] Other Persons.

In *Lozano v. Scalier* (1996) 51 C.A.4th 843, 59 C.R.2d 346, plaintiff was the natural father of decedent, and had never married defendant, decedent's mother. When decedent was killed in a car accident, plaintiff brought a wrongful death action against defendant, who was driving at the time. There was evidence that plaintiff had contributed to the support of decedent and that, 5 months before decedent's birth, plaintiff had acknowledged that decedent was his child, both orally to numerous persons and in writing by signing a policy for medical care as decedent's father. Plaintiff brought this action under C.C.P. 377.60(a) as one who would be entitled to decedent's property by intestate succession. *Held*, plaintiff was a proper person to bring the action. Under Prob.C. 6452, the parent of a child born out of wedlock may inherit from the child if he or she both contributed to the child's support and acknowledged the child. Here, it was established that the contribution to support requirement was met, and the acknowledgment was also sufficient. There is no requirement that the acknowledgment be in writing, that it be witnessed, or that it occur after decedent's birth. (51 C.A.4th 845.)

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3. Persons Not Entitled To Sue.

a. Nonmarital Cohabitant.

6 *Witkin Sum. Cal. Law Torts* § 1395

[§ 1395] Nonmarital Cohabitant.

A nonmarital cohabitant who is not a domestic partner does not have standing to bring a wrongful death action for the death of his or her cohabitant. (*Holguin v. Flores* (2004) 122 C.A.4th 428, 432, 18 C.R.3d 749, supra, §1391.) Moreover, a nonmarital cohabitant of the opposite sex is not a putative spouse and is not entitled to sue as an heir. (*Harrod v. Pacific Southwest Airlines* (1981) 118 C.A.3d 155, 158, 173 C.R. 68 [exclusion of these persons is reasonable legislative limitation on the statutory right, and not a denial of equal protection]; *Garcia v. Douglas Aircraft Co.* (1982) 133 C.A.3d 890, 894, 184 C.R. 390 [same]; *Nieto v. Los Angeles* (1982) 138 C.A.3d 464, 472, 188 C.R. 31 [same]; *Rosales v. Battle* (2003) 113 C.A.4th 1178, 1182, 7 C.R.3d 13 [woman declared concubine by Mexican court could not bring wrongful death action, because concubinage does not confer all rights and duties of common law marriage, and, although she was heir under Mexican law, she was not, as required, heir under California law].) (See 13 *Pacific L. J.* 125 [arguing that courts should recognize cause of action]; 20 *San Diego L. Rev.* 417 [arguing that exclusion of cohabitants is proper].)

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b. Heir When Statutory Heirs Disclaim.

6 *Witkin Sum. Cal. Law Torts* § 1396

[§ 1396] Heir When Statutory Heirs Disclaim.

In *Lewis v. Regional Center of the East Bay* (1985) 174 C.A.3d 350, 220 C.R. 89, decedent, a child of 13, was living with plaintiffs, his grandparents, who had become his legal guardians. He died by drowning, and his natural parents and half-brother filed disclaimers waiving any interest in his estate. Plaintiff grandparents, who became heirs to his estate by reason of the disclaimers filed by heirs with statutory priority, brought this wrongful death action. Defendants moved for summary judgment on the ground that the disclaimers only permitted plaintiffs to inherit, and had no effect on the right to maintain an action for wrongful death. *Held*, summary judgment for defendants affirmed.

(a) Plaintiffs contended that the statutes on intestate succession and disclaimer should be read together, with the result that the disclaimer of interest includes a waiver of all other indices of heirship. This view has no support. "The two sections concern different legal interest and property rights and are contained in separate parts of the Probate Code. The wrongful death statute provides a right to be compensated for a tort which is personal and cannot be assigned. The disclaimer statutes allow an heir in either testate or intestate estates to disclaim his interest in decedent's property. To read together statutory provisions which the Legislature adopted for different purposes would place a judicial gloss on the statutes which the plain meaning and legislative history does not support." (174 C.A.3d 354.)

(b) Considerations of policy do not call for a different result. "The purpose of the wrongful death statute is to permit recovery of compensation by heirs for economic loss and loss of consortium resulting from the death. ... The plaintiffs in such action stand in such a close relation to the decedent as to be presumed to be injured by his death. ... On the other hand, the disclaimer provisions are unrelated to any tort compensation scheme. These provisions concern *all* beneficiaries, whether heirs or not." (174 C.A.3d 355.)

(c) The wrongful death action is statutory, and the right to maintain the action cannot be created for equitable reasons. (174 C.A.3d 355, citing *Steed v. Imperial Airlines* (1974) 12 C.3d 115, 115 C.R. 329, 524 P.2d 801, *supra*, §1388.) Plaintiffs could have achieved their object if they had adopted the minor, but they had not; and the Legislature must decide whether to create a new category of guardians entitled to sue for wrongful death. (174 C.A.3d 355.)

Lewis was followed in *Mayo v. White* (1986) 178 C.A.3d 1083, 224 C.R. 373. Decedent child died from drowning, his parents renounced heirship, and plaintiff special administrator brought the action on behalf of decedent's siblings.

Held, a demurrer was properly sustained. "As in *Lewis*, the brother and sisters of the deceased minor in the instant case would not have standing to bring an action for wrongful death, despite the parents' alleged renunciation of heirship (which we will assume is the equivalent of a disclaimer as provided for in the Probate Code). By the same token, plaintiff, as the personal representative of the deceased minor, cannot maintain the action on their behalf. The disclaimer was the functional equivalent of an assignment of the parents' cause of action for wrongful death to persons not qualified to maintain such a suit." (178 C.A.3d 1090.)

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c. Other Persons.

6 *Witkin Sum. Cal. Law Torts* § 1397

[§ 1397] Other Persons.

(1) *Killer of Decedent. Marks v. Lyerla* (1991) 1 C.A.4th 556, 2 C.R.2d 63, held that the paternal grandmother of a child allegedly murdered by her mother could not bring a wrongful death action, because under former C.C.P. 377, the only heir entitled to bring the action was the decedent's mother. (1 C.A.4th 560.) This rule was changed by the enactment of Prob.C. 258 in 1992: "A person who feloniously and intentionally kills the decedent is not entitled to bring an action for wrongful death of the decedent or to benefit from the action brought by the decedent's personal representative. The persons who may bring an action for wrongful death of the decedent and to benefit from the action are determined as if the killer had predeceased the decedent."

(2) *Adopted Children.* Under C.C.P. 377.60(a), an adopted child is not one of the "children" of its biological mother, because adoption severs the parent-child relationship. Thus, an adopted child cannot bring a wrongful death action for the biological mother's death. Not allowing adopted children to sue for wrongful death in this instance does not violate equal protection. (*Phraner v. Cote Mart* (1997) 55 C.A.4th 166, 168, 63 C.R.2d 740.)

(3) *Where Issue of Decedent Dies Before Action Is Filed.* In *Chavez v. Carpenter* (2001) 91 C.A.4th 1433, 111 C.R.2d 534, decedent, who was killed in a traffic accident, was survived by both his parents and a daughter. Under C.C.P. 377.60, standing to bring a wrongful death action resided in the daughter, but she was killed 2 months later in a unrelated accident. A wrongful death action was then filed by decedent's parents as heirs. *Held*, the parents lacked standing. Under the statute, only the daughter had standing, assuming that she "survived" her father's death. As such, all that is required is that she have outlived her father, not that she have lived long enough to file the action. (91 C.A.4th 1440.) "Whatever our perceptions of the equities in this case, we are powerless to recognize standing that does not exist under the statute." (91 C.A.4th 1443.)

(4) *Former Spouse.* A former spouse, whose marriage with the decedent has been dissolved, is not within the class of persons entitled to sue. (*Villacampa v. Russell* (1986) 178 C.A.3d 906, 910, 224 C.R. 73 [rejecting constitutional challenge].)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *(New) Child of Parent Whose Parental Rights Have Been Terminated.* An order terminating parental rights severs

the parent-child relationship and extinguishes all rights and obligations between the child and his or her parents. (Welf.C. 366.26(i).) Thus, a minor whose natural mother's parental rights have been terminated has no standing to bring a wrongful death action arising from the death of the natural mother. (*Jackson v. Fitzgibbons* (2005) 127 C.A.4th 329, 333, 25 C.R.3d 478.)



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B. Cause of Action and Parties.

4. Right by Compromise and Estoppel.

6 *Witkin Sum. Cal. Law Torts* § 1398

[§ 1398] Right by Compromise and Estoppel.

In *Changaris v. Marvel* (1964) 231 C.A.2d 308, 41 C.R. 774, decedent was killed by the negligence of a tortfeasor, and Attorney C instituted a wrongful death action for the widow and four adult children. The suit was compromised for \$ 45,000, and, after deducting costs and compensation, C had the sum of \$ 29,317.39 to distribute. The four children then challenged the widow's claim on the theory that she had not been legally married to decedent. C brought an interpleader action, was discharged, and judgment was given distributing the bulk to the widow. The children appealed. *Held*, affirmed, on two grounds.

(a) The compromise of the action determined the widow's status as a surviving wife. The basis of wrongful death recovery is the pecuniary loss to each heir, and, although there is a lump sum award, it consists of the amount of damage suffered by all, added together. If a judge tries the case, he or she knows what items were added together to make the whole and can distribute it simply. If a jury brings in a lump sum, the judge uses the evidence taken to determine the distribution. In neither case does the judge reexamine the right to recovery. (231 C.A.2d 312.) In a compromise, by analogy, each party has contributed to the sum; and none can properly contest the right of another, for this would not increase his or her own right to any part of the award. So, in the interpleader action, the judge took evidence of the damage suffered by each, and made the apportionment. The challenge to the widow's right was properly rejected, because the other heirs' interests would not be affected by the award to her. (231 C.A.2d 313.)

(b) The children were estopped. They had full knowledge of whatever challenge they could make when the suit was begun; they relied on the widow to bring and press the suit because her claim was the only large one. It would be inequitable to permit them to attack, belatedly, the widow's claim, to obtain for themselves money to which they had no claim. (231 C.A.2d 314.) (See *Hernandez v. Fujioka* (1974) 40 C.A.3d 294, 301, 114 C.R. 844 [allocation of award].)

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XV. WRONGFUL DEATH
C. Necessity of Pecuniary Loss.

6 Witkin Sum. Cal. Law Torts § 1399

[§ 1399] Necessity of Pecuniary Loss.

(1) *General Rule.* There can be no recovery unless an heir has suffered pecuniary loss. Although the judgment must be for a single lump sum, the damages are shared among the heirs in proportion to the loss suffered by each, and an heir who has suffered no pecuniary loss is not entitled to any part of the recovery. (See *Burk v. Arcata & Mad River R. Co.* (1899) 125 C. 364, 367, 57 P. 1065; *Estate of Ricconi* (1921) 185 C. 458, 461, 197 P. 97; *Ginocchio v. San Francisco* (1924) 194 C. 159, 167, 228 P. 428; *Horwich v. Superior Court* (1999) 21 C.4th 272, 276, footnote 3, 87 C.R.2d 222, 980 P.2d 927, *infra*, §1661, citing the text; *Bowen v. Kizirian* (1930) 105 C.A. 286, 289, 287 P. 570; *Zeller v. Reid* (1938) 26 C.A.2d 421, 424, 79 P.2d 449 [mother of 18-year-old decedent was not dependent on him and received none of his earnings; held improper to award \$ 1,000 damages]; *Changaris v. Marvel* (1964) 231 C.A.2d 308, 312, 41 C.R. 774, *supra*, §1398; *Estate of D'India* (1976) 63 C.A.3d 942, 947, 134 C.R. 165, citing the text [entire award to decedent's husband; mother's claim of loss of support, based on conflicting evidence, rejected and judgment affirmed]; 4 Harper, James & Gray 2d §25.14; 22A *Am.Jur.2d* (2003 ed.), *Death* §§191, 192.) (On parent's desertion, abandonment, or failure to support child as affecting right or measure of recovery for wrongful death of child, see 53 *A.L.R.3d* 566; on recovery of punitive damages, see *infra*, §§1578, 1586; on recovery for loss of consortium, see *infra*, §1691.) The statute no longer refers to "heirs." (See *supra*, §1389.)

(2) *Reasonable Expectation of Benefits.* If one spouse has been deserted the other, the basis of the recovery for the other's death is an enforceable right to support. (*Powers v. Sutherland Auto Stage Co.* (1923) 190 C. 487, 489, 213 P. 494 [wife deserted by husband]; see 7 *Stanf. L. Rev.* 409.) However, pecuniary loss is not based solely on a legal right to support, but rather upon the reasonable expectation of the heir to benefits during the lifetime of the decedent, which may originate in a purely moral obligation. So where decedent, plaintiff's 20-year-old son, had enlisted in the Navy, and sent home only small sums, an award of \$ 5,000 was nevertheless upheld. The objection that his minority would have ended before his term of enlistment was held immaterial. (*Karwoski v. Grant* (1938) 30 C.A.2d 171, 179, 85 P.2d 944.) (See *Rickards v. Noonan* (1940) 40 C.A.2d 266, 268, 104 P.2d 839 [interlocutory decree granted without alimony, but, at time of decedent husband's death, parties were about to become reconciled; plaintiff widow was entitled to damages]; *Luis v. Cavin* (1948) 88 C.A.2d 107, 118, 198 P.2d 563 [interlocutory decree granted under former statute, incorporating property settlement agreement in which wife waived all right to support; widow was entitled to damages where, after entry of decree, decedent sought reconciliation, parties discussed it, and widow eventually intended to grant it]; 22 *So. Cal. L. Rev.* 478.)

West's Key Number Digest, Death k.18(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* See *Corder v. Corder* (2007) 41 C.4th 644, 651, 660, 61 C.R.3d 660, 161 P.3d 172 [right to apportionment applies to lump sum settlement, as well as to lump sum award, but apportionment giving widow only 10%, based on decedent's alleged intent to divorce widow, was unjustified where substantial evidence failed to support finding that marriage between parties was about to end]; 4 Harper, James & Gray 3d §25.14.



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XV. WRONGFUL DEATH
D. Defenses.
1. Negligence of Decedent.

6 Witkin Sum. Cal. Law Torts § 1400

[§ 1400] Negligence of Decedent.

Cases decided under the former doctrine of contributory negligence held that contributory negligence of the decedent was a bar to recovery by the heirs. (See *Buckley v. Chadwick* (1955) 45 C.2d 183, 199, 288 P.2d 12, 289 P.2d 242; *Keena v. United R. of San Francisco* (1922) 57 C.A. 124, 127, 207 P. 35; *Carroll v. Beavers* (1954) 126 C.A.2d 828, 832, 273 P.2d 56; 42 Cal. L. Rev. 310 [raising doubts later resolved by *Buckley*]; 7 *Hastings L. J.* 332; 29 So. Cal. L. Rev. 344 [exhaustive analysis and criticism of result in *Buckley*]; 4 Harper, James & Gray 2d §§23.8, 24.4; 22A *Am.Jur.2d* (2003 ed.), *Death* §§175, 176.) Also, the contributory negligence of the decedent's employee was imputed to the decedent under the usual rules of imputed negligence. (*Buckley v. Chadwick*, *supra*; see *supra*, §1324.)

Under the doctrine of comparative negligence (see *supra*, §1329), contributory negligence of the decedent will be given the same effect in a wrongful death action as it would have in a personal injury action: The damages awarded to the heirs must be diminished in proportion to the amount of negligence attributable to the decedent. (See *Hasson v. Ford Motor Co.* (1977) 19 C.3d 530, 552, 138 C.R. 705, 564 P.2d 857 [products liability action, recognizing rule in wrongful death]; *Lemos v. Eichel* (1978) 83 C.A.3d 110, 118, 147 C.R. 603; BAJI, Nos. 3.53, 3.60 et seq., 14.90, 14.91; CACI, Nos. 407, 3960.)

A concurring opinion in *Willis v. Gordon* (1978) 20 C.3d 629, 636, 143 C.R. 723, 574 P.2d 794, argues that *Buckley* should no longer be controlling, and that neither contributory nor comparative negligence of the decedent should be allowed as a defense in a wrongful death action. (See 11 *Pacific L. J.* 775.)

West's Key Number Digest, Death k.23

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §§23.8, 24.4.



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D. Defenses.

2. Negligence of Heir.

6 *Witkin Sum. Cal. Law Torts* § 1401

[§ 1401] Negligence of Heir.

Under the former doctrine of contributory negligence, the contributory negligence of an heir was a bar to his or her claim, but other heirs free from this negligence could recover fully for their loss. (*Bowler v. Roos* (1931) 213 C. 484, 485, 2 P.2d 817; *Bowen v. Kizirian* (1930) 105 C.A. 286, 290, 287 P. 570; *Kasunich v. Kraft* (1962) 201 C.A.2d 177, 185, 19 C.R. 872; see 4 Harper, James & Gray 2d §23.8; 22A *Am.Jur.2d* (2003 ed.), *Death* §177 et seq.; 2 *A.L.R.2d* 785 [contributory negligence of beneficiary as affecting action under death or survival statute].)

This principle was invoked in an unusual fact situation in *Perkins v. Robertson* (1956) 140 C.A.2d 536, 295 P.2d 972. Defendant stepfather, by wilful misconduct in driving, caused the death of decedent mother. He contended that, because there is only one joint action by all the heirs (supra, §§1385, 1386), he, as an heir, was a necessary party plaintiff, and could not sue himself. The court held, however, that, just as an heir contributorily negligent must join, but cannot recover damages, so the wrongdoer may be joined pursuant to the statute but will not be entitled to a share in the award. (See 95 *A.L.R.2d* 585 [beneficiary who is tortfeasor].)

Under the doctrine of comparative negligence (see supra, §1329), contributory negligence of an heir will merely be a ground for reducing of his or her damages.

A beneficiary remains responsible for his or her own negligence, and negligence of one beneficiary for that reason alone is not imputed to any other beneficiary. Moreover, the negligence of a nominal plaintiff, such as the representative of the estate or guardian of a beneficiary, is not for that reason alone imputed to the real parties in interest. (*Rest.3d, Torts: Apportionment of Liability* §6, Comment c.) (See 26 *A.L.R.4th* 396 [effect of negligence of one parent contributing to child's death on action by other parent for death of child].)

West's Key Number Digest, Death k.24

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §23.8.



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D. Defenses.

3. Prior Action or Release.

6 Witkin Sum. Cal. Law Torts § 1402

[§ 1402] Prior Action or Release.

(1) *By Heir*. Because the action is single (see *supra*, §1385), a prior recovery by one heir will constitute a bar to another action. But an heir from whom the action is fraudulently concealed may sue the other heirs and obtain his or her share of the recovery. (See *Daubert v. Western Meat Co.* (1903) 139 C. 480, 481, 69 P. 297, 73 P. 244; *Brown v. Beck* (1923) 63 C.A. 686, 695, 220 P. 14; *Roach v. Drew* (1925) 72 C.A. 45, 48, 236 P. 568; 22A Am.Jur.2d (2003 ed.), *Death* §162 et seq.; 21 A.L.R.4th 275 [effect of settlement with and acceptance of release from one wrongful death beneficiary on liability to other beneficiaries or personal representative].) (On effect of settlement by one plaintiff, see *supra*, §1386; on action by omitted heir, see *supra*, §1387.)

(2) *By Decedent*. Because the right of action is a new one and not a survival of the decedent's right to sue for his or her injuries (see *supra*, §1377), neither the recovery of damages by the decedent, nor a release of claims before his or her death will be a bar to the action for wrongful death. (*Sea-Land Services v. Gaudet* (1974) 414 U.S. 573, 94 S.Ct. 806, 814, 39 L.Ed.2d 9, 20, 2 Summary (10th), *Workers' Compensation*, §145; *Earley v. Pacific Elec. Ry. Co.* (1917) 176 C. 79, 81, 167 P. 513; *Blackwell v. American Film Co.* (1922) 189 C. 689, 693, 209 P. 999; *Madison v. Superior Court* (1988) 203 C.A.3d 589, 250 C.R. 299, *supra*, §1294; cf. *Interinsurance Exchange of the Auto. Club of Southern Calif. v. Campbell* (1986) 187 C.A.3d 242, 243, 232 C.R. 27 [exclusion of liability for bodily injury to named insured or relative barred claim of adult children for wrongful death of their father, the named insured]; and see 4 Harper, James & Gray 2d §24.6; 22A Am.Jur.2d (2003 ed.), *Death* §§156, 157.) (On effect of judgment as collateral estoppel, see *Secrest v. Pacific Elec. Ry. Co.* (1943) 60 C.A.2d 746, 749, 141 P.2d 747, 7 Cal. Proc. (4th), *Judgment*, §361; *Evans v. Celotex Corp.* (1987) 194 C.A.3d 741, 746, 238 C.R. 259, 7 Cal. Proc. (4th), *Judgment*, §397; *Brown v. Rahman* (1991) 231 C.A.3d 1458, 1463, 282 C.R. 815 [following *Evans*]; 20 *Pacific L. J.* 221 [adverse judgment in personal injury action as barring subsequent wrongful death action].)

In *Scroggs v. Coast Community College Dist.* (1987) 193 C.A.3d 1399, 239 C.R. 916, decedent enrolled in a scuba diving class offered by defendant college, and executed a release providing that the participant waived any claims that the participant or his or her heirs, etc., might have for injury or death resulting from participation in scuba diving. During a dive, decedent was drowned, and plaintiff widow filed a complaint for wrongful death, alleging that the drowning was a result of defendant's negligence. Defendant answered, setting up the release as an affirmative defense, and the trial court granted summary judgment for defendant. *Held*, reversed.

(a) In *Earley v. Pacific Elec. Ry. Co.*, supra, it was not clear whether the release sought to bind the heirs, and it was executed after the injury occurred. In *Coates v. Newhall Land & Farming* (1987) 191 C.A.3d 1, 8, 236 C.R. 181, supra, §1292, the decedent executed a release expressly assuming the risk of injury and waiving liability for injuries or death. The *Coates* opinion, denying recovery, failed to distinguish between "facts giving rise to a complete defense to a wrongful death action, and facts precluding a wrongful death action." (193 C.A.3d 1402.)

(b) The wrongful death action is a separate and distinct right belonging to the heirs, and it does not arise until the decedent's death; hence, any contract intending to limit or destroy that cause of action should be construed with caution. (193 C.A.3d 1403.) In the release involved here, there was no language indicating that decedent intended to assume all risks of the activity, nor was there a clear and unequivocal waiver of defendant's negligence. (193 C.A.3d 1404.)

(c) "[I]t is of no moment that scuba diving is of little public importance and serves no significant public purpose. Contracts seeking to release in advance the right to bring a wrongful death action are not binding on the decedent's heirs, and there is no compelling reason to create an exception in the case of so-called 'sports risk' cases. A surviving heir of a sports enthusiast is entitled to the same protection as the surviving heir of the victim of an automobile accident. If the decedent has provided the defendant with a partial or total defense, the defendant may assert it in response to the lawsuit. The release in this case fails to provide defendants with such protection." (193 C.A.3d 1404.)

West's Key Number Digest, Death k.25 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *By Decedent*. See 4 Harper, James & Gray 3d §24.6.

Secrest case:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §421.

Evans case:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §460.



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1. In General.
a. Necessity of Knowledge.

6 *Witkin Sum. Cal. Law Torts* § 1403

[§ 1403] Necessity of Knowledge.

One who possesses or harbors a dangerous animal, whether wild or domestic, is absolutely liable for injuries inflicted by it, where he or she knows or should know of its dangerous propensities. (See *Rest.2d, Torts* §§507, 509; 3 Harper, James & Gray 2d §14.11; Dobbs, *The Law of Torts* §343 et seq.; 11 *U.C. Davis L. Rev.* 381 [domestic animals]; 4 *Am.Jur.2d* (1995 ed.), *Animals* §96 et seq.; 1 *Proof of Facts* 597 [animals]; 17 *A.L.R.2d* 459 [liability of owner or operator of public resort to patron injured by animal or insect]; 57 *A.L.R.2d* 242 [wild animals; property damage]; 73 *A.L.R.2d* 1032 [cats]; 85 *A.L.R.2d* 1161 [horses]; 21 *A.L.R.3d* 603 [wild animals; injury or death]; 48 *A.L.R.3d* 1257 [liability of owner or operator of business premises for injuries caused by insect or small animal]; 86 *A.L.R.3d* 829 [bees]; 6 *A.L.R.4th* 358 [bailor's liability for injury to bailee inflicted by horse hired by bailee]; 67 *A.L.R.4th* 976 [liability of business owner or operator to patron for injury by dog or cat]; 68 *A.L.R.4th* 823 [injuries from cats]; 68 *A.L.R.5th* 599 [horse, dog, or other domestic animal exhibited at show]; *BAJI*, Nos. 6.65, 6.66; *CACI*, Nos. 461, 462.)

It is commonly said that scienter, or knowledge of dangerous propensities, must be proved in the case of domestic animals but is presumed in the case of wild animals. (*Gooding v. Chutes Co.* (1909) 155 C. 620, 623, 102 P. 819; *Opelt v. Al G. Barnes Co.* (1919) 41 C.A. 776, 779, 183 P. 241; *Heath v. Fruzia* (1942) 50 C.A.2d 598, 600, 123 P.2d 560 [horse that had previously kicked other persons]; *Baugh v. Beatty* (1949) 91 C.A.2d 786, 791, 205 P.2d 671 [chimpanzee; "presumed to be vicious"]; *Hagen v. Laursen* (1953) 121 C.A.2d 379, 382, 263 P.2d 489 [playful dogs not vicious]; *Mann v. Stanley* (1956) 141 C.A.2d 438, 441, 296 P.2d 921 [domestic bull not presumed vicious]; *Chandler v. Vaccaro* (1959) 167 C.A.2d 786, 789, 334 P.2d 998 [bitch protecting pups not vicious].)

The Torts Restatement reaches the same result by stating that the possessor of a wild animal is liable for harm resulting from dangerous propensities characteristic of wild animals of its class, whether or not he or she believes it to be safe. (*Rest.2d, Torts* §507(2).) (See 4 *Am.Jur.2d* (1995 ed.), *Animals* §97.)

In *Talizin v. Oak Creek Riding Club* (1959) 176 C.A.2d 429, 1 C.R. 514, defendants were conducting a horse jumping exhibition. They allowed a skillful rider to ride one of the horses. The animal bolted, jumped over the gate, and struck plaintiff, a spectator. *Held*, judgment for plaintiff affirmed. It is not necessary to show the type of malignancy exhibited by a biting dog, i.e., a propensity to attack human beings; any propensity that is likely to cause injury under the circumstances is a dangerous or vicious propensity within the meaning of the law. (176 C.A.2d 435.) The trial judge

found that (a) defendants did not know of the propensities, but (b) could have ascertained them in the exercise of reasonable care. This was based on evidence that they knew the horse had jumped out of the ring shortly before, but did nothing to find out whether he had this propensity, despite notice putting them on inquiry. This finding that they could have ascertained was equivalent to a finding that they should have known. (176 C.A.2d 437.)

West's Key Number Digest, Animals k.68, 69

SUPPLEMENT: [This section is current through the latest supplement]

See 3 Harper, James & Gray 3d §14.11; 4 *Am.Jur.2d* (2007 ed.), *Animals* §§62 et seq., 67 et seq.



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6 *Witkin Sum. Cal. Law Torts* § 1404

[§ 1404] Liability Based on Negligence.

Even though the animals are not of the type that justifies the imposition of absolute liability, recovery may often be had on the theory of ordinary negligence. (See *Porter v. Thompson* (1946) 74 C.A.2d 474, 477, 169 P.2d 40 [cattle auction held in enclosure with low (four-feet, eight-inches) fence, slightly sagging; nervous cow broke loose, jumped over fence, and injured plaintiff].) (On liability for animals at large, see *Roberts v. Griffith Co.* (1929) 100 C.A. 456, 457, 280 P. 199 [owner of mules permitted them to be at large on streets of municipality]; *Shively v. Dye Creek Cattle Co.* (1994) 29 C.A.4th 1620, 35 C.R.2d 238, *infra*, §1406 [bull allowed to stray onto public highway]; 34 A.L.R.2d 1285 [legislation forbidding domestic animals to run at large on highways]; 21 A.L.R.4th 132 [liability of nonowner of animal for damage to motor vehicle or injury to passenger from collision with domestic animal at large]; 21 A.L.R.4th 159 [liability of owner or operator of vehicle for such damage or injury]; 29 A.L.R.4th 431 [liability of owner of animal for such damage or injury]; and see *Food & Ag.C. 16441 et seq.* [remedies for violation of provisions governing animals at large].) (On open range law, see *infra*, §1406.)

West's Key Number Digest, Animals k.74.1

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6 *Witkin Sum. Cal. Law Torts* § 1405

[§ 1405] Liability to Trespasser.

Under the general rule, there is no legal duty to an unknown trespasser, and hence no absolute liability. (See 76 *Harv. L. Rev.* 1310.) But liability was imposed, prior to *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, in favor of a trespasser who was known or should have been known. In *Radoff v. Hunter* (1958) 158 C.A.2d 770, 323 P.2d 202, defendants, pet store owners, kept a large German shepherd as a watchdog, in a packing crate shelter. Plaintiff, a patron of an adjacent service station, while technically trespassing on defendant's land to deposit an old battery cable in a trash can near the dog, was bitten. *Held*, defendants were liable. Although they had no actual knowledge of plaintiff's presence, defendants' store was located near a shopping and parking area, and defendants should have anticipated the presence of trespassers near the watchdog. Under these circumstances, keeping him concealed from view with no warning of his presence was similar to maintaining a trap. (158 C.A.2d 774.) (See 64 A.L.R.3d 1039 [liability of owner of dog known to be vicious for injuries to trespasser].)

Under the *Rowland* rule, it would seem that liability could be imposed, in a proper case, in favor of an unknown trespasser.

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d. Liability for Trespassing Animal.

6 *Witkin Sum. Cal. Law Torts* § 1406

[§ 1406] Liability for Trespassing Animal.

The common law rule imposes strict liability on the owner of trespassing animals for all harm to persons and property reasonably to be expected from the intrusion. (See *Rest.2d, Torts* §504; 3 Harper, James & Gray 2d §14.9; 4 Am.Jur.2d (1995 ed.), Animals §123 et seq.; 49 A.L.R.4th 710 [liability for injury or death caused by trespassing or intruding livestock].)

The rule is applicable to most domestic animals, such as horses, cattle, pigs, sheep, and poultry, but not to dogs and cats. (See *Rest.2d, Torts* §504, Comment b; 3 Harper, James & Gray 2d §14.9; on statutes imposing strict liability on dog owners, see *infra*, §1407 et seq.) Nor is it applicable to harm done by animals straying onto abutting land while being driven on a highway or to harm brought about by an unforeseeable intervening cause, i.e., an act of God or action of a third person or another animal. (See *Rest.2d, Torts* §504; 3 Harper, James & Gray 2d §14.9.)

In *Williams v. Goodwin* (1974) 41 C.A.3d 496, 116 C.R. 200, the court applied the common law rule to personal injuries suffered by a possessor of land. Defendants owned 36 Black Angus bulls, which they pastured in land under a rental agreement. Plaintiff, by permission of his employer, a construction company engaged in developing the land, lived in a house trailer adjacent to the pasture and cultivated a vegetable garden for himself and other employees. The garden area was fenced, but bulls occasionally escaped and got into the garden. One day, while plaintiff was working in the garden, a bull suddenly broke the fence, knocked plaintiff down, and trampled him, causing serious injuries to him and the plants. *Held*, reversing judgment of nonsuit, defendants were strictly liable for damages for plaintiff's injuries.

(a) *History of liability for animals.* Two kinds of strict liability developed at common law: (1) liability for damage by trespassing livestock; and (2) liability apart from trespass for damage by animals inherently dangerous or that in the particular case possessed known dangerous propensities. (41 C.A.3d 501.) The historical theory of liability for livestock trespass--identification of the possessor with his wandering livestock so as to make their trespass equivalent to his own--has largely been abandoned; the modern foundation is the defendant's power of control of the animals, with the additional practical consideration that his or her activity for profit should be burdened with the expense incident to their predictable wanderings. (41 C.A.3d 502.)

(b) *Common law rule in California.* Originally abrogated by the "fencing out" statutes, the common law rule was

revived by the Estray Act of 1915 (now *Food & Ag.C. 17001* et seq.), which repealed the fencing out laws except in six listed counties devoted chiefly to grazing. (41 C.A.3d 503.) The common law rule was applied in a number of cases involving damage to crops, pasture, or feed. (41 C.A.3d 503.)

(c) *Liability for personal injuries.* Liability for personal injuries depends on whether they are within the scope of the risk created by the trespass. Clearly, they are where the owner is injured in an attempt to put the animal out; logically, they should be also where the animal makes an unprovoked attack, as in this case, where plaintiff had no opportunity to expel the animal, retreat, or defend himself. "The sequence of events from entry upon the land to attack upon plaintiff, without interposition of any independent operative agency, compels the conclusion that plaintiff's injuries were the direct consequence of the trespass. Moreover, to conclude under these circumstances that an attack such as occurred with resulting injury was not reasonably to be expected would require a departure from logic. The manifest danger that inheres in exposure of the person to the immediate presence of an uncontrolled bull is strongly suggested by human experience and common sense. Thus, it is of no significance that defendant's bull did not pause to forage plaintiff's crop either before the attack, after the attack, or at all, or that plaintiff's injuries were not sustained in the course of an effort to expel the animal or to protect his property." (41 C.A.3d 506.)

The open range law (*Food & Ag.C. 17001* et seq.) provides that cattle owners in open range counties are not required to fence in their cattle. It does not exempt the owners from the duty of ordinary care to motorists on highways. In *Shively v. Dye Creek Cattle Co.* (1994) 29 C.A.4th 1620, 35 C.R.2d 238, plaintiffs sued for injuries sustained in a nighttime collision between their automobile and defendant's large bull, which was lying on a state highway in a county "devoted chiefly to grazing" within the meaning of the open range law. *Held*, the trial judge erred in granting defendant summary judgment on the ground that defendant owed plaintiffs no duty.

(a) The open range law relates only to the requirement of fencing livestock. It does not purport to define comprehensively the duty of a cattle owner, and it does not repeal or exempt cattle owners from the general duty of C.C. 1714 to exercise reasonable care (see *supra*, §833). A cattle owner who negligently fails to keep cattle from straying on a highway may be held liable for damages arising from a collision with the livestock even at a point where the highway is unfenced. (29 C.A.4th 1631.)

(b) The result here does not render the open range law meaningless. Only public highways are involved, a small part of "open range" country. The central focus of the open range law--livestock trespassing on another's property--is maintained. The cattle owner is still not required to fence along highways or anywhere else in open range areas. However, the cattle owner, like everyone else, is responsible for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property. (29 C.A.4th 1632.) (On liability based on negligence, see *supra*, §1404.)

West's Key Number Digest, Animals k.89.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 3 Harper, James & Gray 3d §14.9; 4 *Am.Jur.2d* (2007 ed.), *Animals* §90 et seq.



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a. Statutory Liability.

6 *Witkin Sum. Cal. Law Torts* § 1407

[§ 1407] Statutory Liability.

(1) *Injury to Domestic Animals.* The "owner, possessor, or harbinger" of a dog or other animal is liable for its killing or wounding of livestock, poultry, etc., except where this occurs accidentally in the course of driving them off the premises. (C.C. 3341.)

(2) *Injury to Person: Dog Bite Statute.* The general common law rule that liability depends on knowledge or notice of dangerous propensities (*supra*, §1403) formerly applied to dogs. (See *Hensley v. McBride* (1931) 112 C.A. 50, 51, 296 P. 316.) But a statute, first enacted in 1931, makes the owner of a dog liable, under certain conditions, to a person bitten by the dog, even though the owner lacked knowledge of any dangerous propensities. (See C.C. 3342, *infra*, §1408; 1 A.L.R.4th 994 [ordinances relating to unrestrained dogs, cats, or other domesticated animals]; 51 A.L.R.4th 446 [modern status of rule of strict liability for dog bite]; 67 A.L.R.4th 976 [liability of business owner or operator to patron for injury by dog or cat]; 68 A.L.R.5th 599 [liability for injury inflicted by dog or other domestic animal exhibited at show].)

(3) *Distinction: Person Frightened by Dog.* In *Nava v. McMillan* (1981) 123 C.A.3d 262, 176 C.R. 473, plaintiff alleged that, while walking on a public sidewalk past defendants' fenced-in property, she became frightened by dogs on the property and went into the street, where she was struck by an automobile. *Held*, no cause of action was stated. Even if the dogs had been barking or jumping against the fence (not alleged), "those are harmless activities ordinarily associated with, and expected from, dogs." (123 C.A.3d 267.) (See 30 A.L.R.4th 986 [liability of dog owner for injuries sustained by person frightened by dog].)

West's Key Number Digest, Animals k.68, 81

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1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1408

[§ 1408] In General.

"The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owners of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness." (C.C. 3342(a); see *Hicks v. Sullivan* (1932) 122 C.A. 635, 639, 10 P.2d 516; *DeLay v. Braun* (1944) 63 C.A.2d 8, 10, 146 P.2d 32; *Ellsworth v. Elite Dry Cleaners, Dyers & Laundry* (1954) 127 C.A.2d 479, 483, 274 P.2d 17 [sufficiency of evidence of ownership of dog]; *Davis v. Gaschler* (1992) 11 C.A.4th 1392, 1399, 14 C.R.2d 679, supra, §1356 [C.C. 3342 imposes liability on owner regardless of whether dog is running loose or restrained, or is on or off owner's premises]; *Drake v. Dean* (1993) 15 C.A.4th 915, 19 C.R.2d 325; *Johnson v. McMahan* (1998) 68 C.A.4th 173, 175, 80 C.R.2d 173 [plaintiff who pleaded that he was injured in falling from ladder after dog had grasped his leg alleged "bite" under C.C. 3342, even though skin was not broken and no wound inflicted]; 64 A.L.R.4th 963 [who "harbors" or "keeps" dog under dog bite statute]; BAJI, No. 6.67; CACI, No. 463; cf. *Menches v. Inglewood Humane Soc.* (1942) 51 C.A.2d 415, 417, 124 P.2d 870 [no liability where defendant sold dog to plaintiff, and delivery and acceptance took place before bite].)

West's Key Number Digest, Animals k.68, 74(1), 79, 81-

SUPPLEMENT: [This section is current through the latest supplement]
See 85 Proof of Facts 3d 95 [proof of death or injury from rabid animal].



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2. Private Place.

6 *Witkin Sum. Cal. Law Torts* § 1409

[§ 1409] Private Place.

The provision in C.C. 3342 (see *supra*, §1408) that the person must be "lawfully in a private place" is augmented by a special definition: "A person is lawfully upon the private property of such owner within the meaning of this section when he is on such property in the performance of any duty imposed upon him by the laws of this State or by the laws or postal regulations of the United States, or when he is on such property upon the invitation, express or implied, of the owner."

The effect of this provision is to deny liability to a trespasser, and the language was given a strict construction in *Fullerton v. Conan* (1948) 87 C.A.2d 354, 197 P.2d 59. Plaintiff, a 5-year-old child, was taken by her mother on a social visit to defendant's home, the two women being old friends. The mother parked her car in the driveway, and the child was told to stay in the front yard. Instead, the child opened the gate to the backyard where she was bitten by the dog. In classifying the child as a trespasser to whom defendant was not liable, the court declared that "gates and doors have been the generally accepted means of indicating privacy for centuries; their use for such a purpose is traditional and is still sanctioned by universal custom. A gate is a barrier just as a door to a home. ... It would be presumptuous indeed to assume that a social invitation includes authorization or permission to ignore the customary formalities." (87 C.A.2d 357.) This language would hardly appear to be appropriate in connection with the conduct of a small child who was lawfully on the premises and who arguably had the implied permission to enter the backyard. If the danger had been merely the maintenance of a contrivance amounting to an attractive nuisance, the trespasser rule would have been relaxed in favor of a child who had not even been invited to enter on any portion of the premises. That the child, ignorant of dangers lurking behind a simple gate, so exceeds the scope of its invitation as to be without the protection of a statute imposing absolute liability, seems a dubious conclusion. (See *Smythe v. Schacht* (1949) 93 C.A.2d 315, 319, 209 P.2d 114 [plaintiff child, who came on land to play with defendant's child, was entitled to recover as implied invitee--lawfully in a private place]; cf. *Bauman v. Beaujean* (1966) 244 C.A.2d 384, 388, 53 C.R. 55 [plaintiff girl, 31/2 years old, played with defendant's daughter, but without invitation to play alone in backyard where dog was kept; verdict for defendants upheld].)

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3. Veterinarian's Assumption of Risk.

6 *Witkin Sum. Cal. Law Torts* § 1410

[§ 1410] Veterinarian's Assumption of Risk.

In *Nelson v. Hall* (1985) 165 C.A.3d 709, 211 C.R. 668, defendants' 100-pound Labrador-German shepherd, in need of minor surgery, was brought to the veterinary hospital in which plaintiff was employed as a veterinary assistant. The dog had been previously treated there, and a notation of "careful" was written on his treatment card, but neither defendants nor plaintiff had any knowledge of vicious propensities. While the dog was on the treatment table after injection of a sedative, it suddenly turned and bit plaintiff in the face, causing severe injuries. On motion for summary judgment, defendants offered a declaration of Dr. D, plaintiff's employer, in which he stated that any animal may react dangerously while receiving treatment, and that dog bites are an occupational hazard in the veterinary profession. *Held*, summary judgment for defendants affirmed.

(a) Assumption of the risk has been a recognized defense to strict liability for injuries caused by a dangerous animal, and the same holding has been made in cases decided under the dog bite statute. (165 C.A.3d 713; see *infra*, §1413.) Where assumption of risk is not merely a form of contributory negligence, it remains unaffected by the doctrine of comparative negligence. (165 C.A.3d 714; see *supra*, §1337.)

(b) "This is a case of 'true' or 'primary' assumption of the risk whereby the defendant is impliedly relieved of any duty of care by the plaintiff's acceptance of employment involving a known risk or danger. ... A veterinary assistant cannot be deemed to have unreasonably encountered a risk that is inherent in his or her job." (165 C.A.3d 714.) The owner who turns his dog over to a qualified veterinarian for medical treatment should not be liable unless he or she purposefully or negligently conceals a particular known hazard. (165 C.A.3d 715, and footnote 4.) (See *Willenberg v. Superior Court* (1986) 185 C.A.3d 185, 187, 229 C.R. 625 [following *Nelson*, despite fact that dog did not bite plaintiff, but leaped on her, injuring her shoulder]; *Cohen v. McIntyre* (1993) 16 C.A.4th 650, 655, 20 C.R.2d 143, *supra*, §1352; 39 Proof of Facts 3d 133 [assumption of risk as defense in dog bite case]; 4 A.L.R.4th 349 [liability of owner of dog for dog's biting veterinarian or veterinarian's employee].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Priebe v. Nelson* (2006) 39 C.4th 1112, 1120, 47 C.R.3d 553, 140 P.3d 848 ["veterinarian's rule" barred kennel worker's statutory strict liability claim against dog owner for injuries sustained from dog bites while caring for dog at

kennel; citing *Nelson v. Hall* (1985) 165 C.A.3d 709, 211 C.R. 668, text, p. 833].



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4. Immunity for Military and Police Dogs.

6 Witkin Sum. Cal. Law Torts § 1411

[§ 1411] Immunity for Military and Police Dogs.

C.C. 3342 provides immunity from dog bite liability for governmental agencies using dogs in military or police work, if the bite occurred while the dog was (1) "defending itself from an annoying, harassing, or provoking act," or (2) assisting an agency employee in (a) apprehending or holding a person reasonably suspected to be involved in criminal activity; (b) investigating a crime; (c) executing a warrant; or (d) defending a peace officer or other person. (C.C. 3342(b).)

For the immunity to exist, the agency must have adopted a written policy on the necessary and appropriate use of dogs in police or military work. (C.C. 3342(d).) There is no immunity if the victim was not a party or participant (or suspected party or participant) in the act that prompted the use of the dog. (C.C. 3342(c).) (See *74 A.L.R.4th 1120* [liability to public officer or employee bitten by dog].)

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6 *Witkin Sum. Cal. Law Torts* § 1412

[§ 1412] Liability Independent of Statute.

The following situations are outside the scope of the special statutes set forth in the previous sections, and liability depends on proof of knowledge of dangerous propensities or negligence. (For case finding that the knowledge requirement was not satisfied, see *Martinez v. Bank of America* (2000) 82 C.A.4th 883, 889, 98 C.R.2d 576 [dogs were owned by previous owners of property; bank that had foreclosed was not liable].)

(1) *Defendant Is Not Owner of Dog*. Where the defendant keeps or harbors a dog but is not its owner, and the dog bites a person, liability cannot be imposed under C.C. 3342 (supra, §1408), but the plaintiff may recover by proof of knowledge of dangerous propensities or ordinary negligence (supra, §§1403, 1404). (See *Radoff v. Hunter* (1958) 158 C.A.2d 770, 773, 323 P.2d 202 [large German shepherd tied and used as watchdog by pet shop operator who was not his owner; inference of knowledge of vicious propensities was properly drawn].)

(2) *Injury Is Inflicted Without Biting*. In *Brotemarkle v. Snyder* (1950) 99 C.A.2d 388, 221 P.2d 992, the complaint alleged that defendant's dog dashed against plaintiff, who was riding a motor scooter, and threw him to the pavement. *Held*, a cause of action was stated under a local ordinance prohibiting the owner from allowing a dog to run at large off his premises without a leash. The ordinance created the legal duty, and the breach was negligence toward the plaintiff. (99 C.A.2d 390.) (See *Frederickson v. Kepner* (1947) 82 C.A.2d 905, 908, 187 P.2d 800 [two dogs jumped on plaintiff's back and threw him over bank]; *Northon v. Schultz* (1955) 130 C.A.2d 488, 490, 279 P.2d 103 [excitable cocker spaniel, in habit of jumping on people, was released and ran against plaintiff's legs, throwing her to floor; nonsuit reversed]; *Drake v. Dean* (1993) 15 C.A.4th 915, 19 C.R.2d 325; 41 A.L.R.3d 888 [owner's liability for damages from automobile accident resulting from attempt to avoid collision with dog].)

No liability may be imposed, however, where there is neither knowledge of dangerous propensities nor negligence. (See *Hillman v. Garcia-Ruby* (1955) 44 C.2d 625, 627, 283 P.2d 1033; *Hagen v. Laursen* (1953) 121 C.A.2d 379, 382, 263 P.2d 489 [two normally playful Irish setters, while playing together, ran against plaintiff, causing her to fall].)

(3) *Landlord's Liability Where Dog Is Owned by Tenant*. Under the theory of *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, supra, §1086, a landlord may be held liable for injuries inflicted by a tenant's dog if the landlord has knowledge of the danger and sufficient control as to make it possible to protect against it. (*Uccello v.*

Laudenslayer (1975) 44 C.A.3d 504, 512, 118 C.R. 741, 12 Summary (10th), *Real Property*, §644; *Portillo v. Aiassa* (1994) 27 C.A.4th 1128, 1135, 32 C.R.2d 755, 12 Summary (10th), *Real Property*, §647 [commercial landlord has duty of reasonable inspection for presence of dangerous dogs; landlord cannot avoid liability by failing to inspect and claiming that he or she had no actual knowledge of dog's dangerous propensities]; *Donchin v. Guerrero* (1995) 34 C.A.4th 1832, 1841, 41 C.R.2d 192 [landlord may be liable for off-site dog bites caused by tenant's dog, provided that bites result from failure to exercise proper control over tenant's premises; citing *Uccello*].) However, as pointed out in *Uccello*, no duty of care may be imposed on a landlord without proof that he or she knew of the tenant's dog and its dangerous propensities. (See *Lundy v. California Realty* (1985) 170 C.A.3d 813, 821, 216 C.R. 575; *Yuzon v. Collins* (2004) 116 C.A.4th 149, 159, 10 C.R.3d 18.)

(4) *Carrier Passenger's Dog*. Where a carrier permits a passenger to bring a dog into a passenger car, it must exercise reasonable care and supervision to prevent injury to other passengers. (*Westwater v. Southern Pac. Co.* (1940) 38 C.A.2d 369, 371, 101 P.2d 154.)

(5) *Injury to Dog*. Where the defendant's dog injures the plaintiff's dog, the usual rule of scienter (supra, §1403) applies. (*Roos v. Loeser* (1919) 41 C.A. 782, 785, 183 P. 204.)

(6) *Local Leash Laws*. A local ordinance penalizing an owner whose dog is allowed to roam public streets unleashed is an animal control law enacted to protect public health and safety and imposes strict criminal liability, regardless of the presence or absence of mens rea in the dog owner. Therefore, in a civil action for personal injuries inflicted by an unsecured dog, violation of such a regulatory law constitutes negligence per se. (*Delfino v. Sloan* (1993) 20 C.A.4th 1429, 1431, 25 C.R.2d 265 [trial judge erred in refusing to instruct on negligence per se on ground that word "allow" in ordinance reached only wilful or intentional conduct].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Defendant Is Not Owner of Dog*. See *Salinas v. Martin* (2008) 166 C.A.4th 404, 413, 82 C.R.3d 735 [homeowner could owe duty of care to invitees even though he was not aware of dangerous propensities of pit bull dog kept on property by workers during remodeling project; workers were not homeowner's tenants, homeowner was not absentee landlord with limited access to property, homeowner did not surrender possessory interest in property, and homeowner gave permission for dog to be kept on property].

(3) *Landlord's Liability Where Dog Is Owned by Tenant*. See *Chee v. Amanda Goldt Property Management* (2006) 143 C.A.4th 1360, 1369, 50 C.R.3d 40 [landlord had no duty, giving rise to premises liability or negligence cause of action, to plaintiff injured when tenant's unleashed dog jumped on her, in absence of actual knowledge of dog's dangerous propensities; although landlord knew tenant owned dog, he had not seen dog or received complaints, and dog had not previously jumped on or bitten anyone]. (5) *Injury to Dog*. See 90 Proof of Facts 3d 1 [actions involving injuries to animals].



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XVI. ABSOLUTE AND STRICT LIABILITY
A. Liability for Dangerous Animals.
3. Causation and Contributory Fault.

6 *Witkin Sum. Cal. Law Torts* § 1413

[§ 1413] Causation and Contributory Fault.

(1) *Intervening Acts and Unforeseeable Consequences.* *Rest.2d, Torts* §510 takes the position that intervening acts normally do not supersede, and that the defendant is liable despite the unexpected character of the harm or the intervention of natural forces or negligent acts of third persons.

(2) *Contributory Fault.* Prior to the adoption of the comparative negligence doctrine (*supra*, §1329), ordinary contributory negligence did not bar recovery, but contributory fault of a higher degree could be a defense; e.g., intentional or unreasonable exposure to obvious danger, sometimes treated as "assumption of risk." (*Rest.2d, Torts* §515(2); see *Opelt v. Al G. Barnes Co.* (1919) 41 C.A. 776, 780, 183 P. 241 [10-year-old boy disregarding warnings, walked up to leopard's cage, within reach of beast's paws]; *Rest.2d, Torts* §496A, Comment d.) In *Smythe v. Schacht* (1949) 93 C.A.2d 315, 209 P.2d 114, although no contributory fault was found, the court declared that the defenses of assumption of risk and wilfully inviting injury would be recognized in a proper case. "[G]ood morals and sound reasoning dictate that if a person lawfully upon the portion of another's property where the biting occurred should kick, tease, or otherwise provoke the dog, the law should and would recognize the defense that the injured person by his conduct invited injury and therefore, assumed the risk thereof." (93 C.A.2d 321.) (See 39 Proof of Facts 3d 133 [contributory fault as defense in dog bite case]; 11 A.L.R.5th 127 [contributory or comparative negligence or assumption of risk as defense to action for injury by dog].) (Cf. *Greene v. Watts* (1962) 210 C.A.2d 103, 105, 26 C.R. 334 [3-year-old child was not barred by contributory negligence or assumption of risk].)

Because the comparative negligence doctrine has been held applicable to strict products liability cases (see *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 144 C.R. 380, 575 P.2d 1162, *infra*, §1542), it is likely that both types of contributory negligence, having been subsumed within that doctrine (see *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, *infra*, §1329), will now be considered in determining the amount of recovery. (See *Garcia v. Estate of Norton* (1986) 183 C.A.3d 413, 421, 228 C.R. 108, *infra*, §1417 [suggestion that comparative negligence principles should apply to ultrahazardous activity actions].)

Rest.3d, Torts: Apportionment of Liability §§1, 7, adopting the comparative responsibility doctrine for tort claims generally, applies the doctrine "even though the conduct of a defendant ... is governed by strict liability." (*Rest.3d, Torts: Apportionment of Liability* §7, Comment b.)

(3) *Assumption of Risk*. The plaintiff's assumption of the risk of harm from a dog is a valid defense to strict liability. (*Rest.2d, Torts* §515(3).) And the defense may be established by a good deal less than the reckless conduct described in *Smythe*. In *Gomes v. Byrne* (1959) 51 C.2d 418, 333 P.2d 754, a salesman approached the gate to defendant's yard, and despite the continuous barking of her dog, opened it and walked in, whereupon the dog bit him. Judgment for defendant was affirmed, for, in the face of the dog's display of hostility, plaintiff voluntarily exposed himself to the obvious hazard. "[I]f plaintiff recognized the *danger* that the dog would bite him, his knowledge was sufficient although he did not know whether the dog had a history of viciousness." (51 C.2d 420.) (See dissent of three justices 51 C.2d 421, attacking inference of danger from mere barking of small dog.)

In *Prays v. Perryman* (1989) 213 C.A.3d 1133, 262 C.R. 180, a dog bite case initiated by plaintiff dog groomer, the trial judge entered summary judgment for defendant owner on the ground that plaintiff had assumed the risk. *Held*, reversed. The "veterinarian's rule" stated in *Nelson v. Hall* (1985) 165 C.A.3d 709, 211 C.R. 668, *supra*, §1410, warned that a veterinarian's assumption of risk extended only to the danger that he had knowingly assumed, i.e., the danger the dog would bite *while being treated*. "This caveat is applicable here. Plaintiff testified that at the time of the bite she was not grooming the dog and had told defendant she had not yet decided whether it was safe for her to do so. A trier of fact could find that the beast remained at all times under the exclusive control of defendant, who had uncaged it and was holding it on a leash. When defendant brought a growling dog into her shop, plaintiff was not required, to avoid assuming the risk of bloodshed, either to summarily eject the customer or to take flight." (213 C.A.3d 1137.) (See 39 Proof of Facts 3d 133 [assumption of risk as defense in dog bite case].)

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XVI. ABSOLUTE AND STRICT LIABILITY
B. Ultrahazardous Activity: Liability Without Fault.
1. Theory of Ultrahazardous Activity.

6 *Witkin Sum. Cal. Law Torts* § 1414

[§ 1414] Theory of Ultrahazardous Activity.

In *Rylands v. Fletcher* (1868) 3 H.L. 330, defendants built a reservoir over an old mine shaft. Water brought into the reservoir escaped into the shaft, and from there flooded plaintiff's adjoining mine. The court held the defendants liable, without proof of negligence, laying down the rule that "the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." As ultimately developed, the doctrine of this case established an absolute liability for escape of dangerous substances brought on the land in the course of a nonnatural use of the land. (See generally 3 Harper, James & Gray 2d §14.2 et seq.; 33 Cal. L. Rev. 642; 35 Cal. L. Rev. 316; 61 Harv. L. Rev. 515.)

Liability without fault is now imposed without much relation to the "escape" of substances or nonnatural use of land. The modern theory is that certain activities create such a serious risk of danger that it is justifiable to place liability for the loss on the person engaging in them, regardless of lack of culpability. These activities are sometimes called "extrahazardous" or "ultrahazardous," and the liability is termed "absolute" or "strict." (See *Smith v. Lockheed Propulsion Co.* (1967) 247 C.A.2d 774, 785, 56 C.R. 128, *infra*, §1421 [question of law]; *Rest.2d, Torts* §519 et seq.; 3 Harper, James & Gray 2d §14.4; Dobbs, *The Law of Torts* §346 et seq.; Cal. Civil Practice, 1 Torts, Strict Liability, Chap. 2; 25 Proof of Facts 3d 473 [dioxin contamination]; 37 Proof of Facts 3d 439 [injury from environmental condition on neighboring land]; 57 Am.Jur. Trials 395 [toxic tort litigation]; 37 Cal. L. Rev. 269; 61 Harv. L. Rev. 515; 30 Loyola L.A. L. Rev. 1599 [liability of firearms manufacturers]; 29 San Diego L. Rev. 93 [liability of predecessor in title for accumulation of hazardous waste]; 5 So. Cal. L. Rev. 263; 28 So. Cal. L. Rev. 327; 45 U.C.L.A. L. Rev. 611 [rule of strict liability only for abnormally dangerous activities as preferable to enterprise liability in absence of contractual relationship between business and injured party]; for classification of activities, see *infra*, §1418 et seq.)

The following types of liability should be distinguished:

(1) *Nuisance*. Certain kinds of activities interfering with another's enjoyment of his or her rights may amount to nuisances, and civil and criminal remedies to abate them are available, regardless of negligence. (See *Snow v. Marian Realty Co.* (1931) 212 C. 622, 625, 299 P. 720; 13 Summary (10th), *Equity*, §139.) Ultrahazardous activity differs in that it is not unlawful and cannot be abated: the doctrine merely holds the defendant responsible for any injury legally caused by him or her. (See 23 Cal. L. Rev. 427; 65 Harv. L. Rev. 984.)

(2) *Lateral Support*. An excavator of land is, under certain conditions, absolutely liable for damages to adjoining buildings or other structures where he or she fails to comply with statutory requirements. (C.C. 832; see 12 *Summary* (10th), *Real Property*, §379.)

(3) *Eminent Domain*. Where property is damaged by a governmental agency or public corporation in pursuance of a public use, an obligation to compensate for the loss is imposed under the law of eminent domain. (See *Tormey v. Anderson-Cottonwood Irr. Dist.* (1921) 53 C.A. 559, 568, 200 P. 814; *Ketcham v. Modesto Irr. Dist.* (1933) 135 C.A. 180, 187, 26 P.2d 876; 8 *Summary* (10th), *Constitutional Law*, §1132 et seq.)

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See 3 Harper, James & Gray 3d §14.2 et seq.



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2. Development of California Law.
a. Earlier Cases.

6 *Witkin Sum. Cal. Law Torts* § 1415

[§ 1415] Earlier Cases.

At one time, it was difficult to determine to what extent the strict liability doctrine was applicable in California. In *Sutliff v. Sweetwater Water Co.* (1920) 182 C. 34, 186 P. 766, defendant impounded water by a dam across a river. The reservoir was properly constructed, but an unprecedented flood washed out the dam, and the water flooded plaintiff's land. *Held*, defendant was not liable on two grounds: First, the proximate cause of the damage was the flood--an agency beyond human control; second, in this state liability for a broken reservoir has always been held dependent upon negligence. (182 C. 37.) (See 8 *Cal. L. Rev.* 192.)

In *Kall v. Carruthers* (1922) 59 C.A. 555, 211 P. 43, irrigating waters on the land of a rice grower escaped by percolation, injuring an adjoining orchard. The court, following *Parker v. Larsen* (1890) 86 C. 236, 24 P. 989, held defendant liable, but the precise ground, whether nuisance or absolute liability, is not clear. (59 C.A. 561.) (See 11 *Cal. L. Rev.* 197; 28 *So. Cal. L. Rev.* 328.)

In *Green v. General Petroleum Corp.* (1928) 205 C. 328, 270 P. 952, an oil well that defendant was drilling suddenly erupted with unexpected force, breaking the protective valve, and showering the adjoining property with mud and oil. No negligence was proved. The court held defendant liable, referring to the maxim: "One must so use his own rights as not to infringe upon the rights of another." (C.C. 3514.) Although defendant was making a lawful use of its property, the effect, i.e., the eruption, was a proximate result of sinking the well. The rule was said to be that "where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any exterior or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use or maintenance of the object or instrumentality that may have caused the injury." (205 C. 334.) This case resulted in the imposition of strict liability for the release of substances naturally on the land. The exact theory of liability was not stated by the court, but it has been suggested that drilling for oil in a populous neighborhood is, like blasting, an ultrahazardous activity, that should give rise to absolute liability. (See 17 *Cal. L. Rev.* 188; 2 *So. Cal. L. Rev.* 90; 5 *So. Cal. L. Rev.* 263.)

In *Nola v. Orlando* (1932) 119 C.A. 518, 6 P.2d 984, water escaped from an irrigation flume, causing damage. No negligence was shown, but the court, relying on *Green*, held defendant liable. *Sutliff* was distinguished on the ground

that there the proximate cause was the unprecedented storm. (119 C.A. 520.) The alternative ground of decision in *Sutliff*, that impounding waters did not involve absolute liability in this state, is difficult to reconcile with the holding in *Nola v. Orlando*. (See 20 Cal. L. Rev. 665; 5 So. Cal. L. Rev. 263, 268.)

In *Fredericks v. Fredericks* (1951) 108 C.A.2d 242, 238 P.2d 643, plaintiff granted defendant a right of way through his adjoining land for a ditch to irrigate his rice fields. Defendant brought so much water through that the level was higher than plaintiff's land, and seepage injured plaintiff's almond trees and grapevines. *Held*, an injunction was proper. The court cited *Kall* and *Parker*, regarding them as nuisance cases. (108 C.A.2d 244.) The easement was no defense, because the seepage did not come directly from the ditch; water seeped into defendant's land in such quantities as to seep onto plaintiff's land. (See *Shields v. Wondries* (1957) 154 C.A.2d 249, 254, 316 P.2d 9 [following *Fredericks*]; *Clark v. Di Prima* (1966) 241 C.A.2d 823, 827, 51 C.R. 49, *infra*, §1424.)

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B. Ultrahazardous Activity: Liability Without Fault.

2. Development of California Law.

b. Adoption of Restatement Rule.

6 *Witkin Sum. Cal. Law Torts* § 1416

[§ 1416] Adoption of Restatement Rule.

In *Luthringer v. Moore* (1948) 31 C.2d 489, 190 P.2d 1, *infra*, §1419, the court, quoting extensively from the Torts Restatement, adopted its analysis and terminology, but treated the question whether the activity is ultrahazardous as one for the trial judge. Regardless of the present effect of the holding in *Rylands v. Fletcher* (1868) 3 H.L. 330, *supra*, §1414, the principle of liability without fault is established in California by *Green v. General Petroleum Corp.* (1928) 205 C. 328, 270 P. 952, *supra*, §1415. "It is not significant that a property damage, as distinguished from a personal injury, was there involved. The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy." (31 C.2d 500; see BAJI, No. 6.60.) (See, using the Restatement test but finding no absolute liability, *Beck v. Bel Air Properties* (1955) 134 C.A.2d 834, 842, 286 P.2d 503, *infra*, §1426; *Clark v. Di Prima* (1966) 241 C.A.2d 823, 829, 51 C.R. 49, *infra*, §1424, citing the text; and see, supporting liability, *Smith v. Lockheed Propulsion Co.* (1967) 247 C.A.2d 774, 785, 56 C.R. 128, *infra*, §1421; *Garcia v. Estate of Norton* (1986) 183 C.A.3d 413, 419, 228 C.R. 108, *infra*, §1422; cf. *Travelers Indem. Co. v. Redondo Beach* (1994) 28 C.A.4th 1432, 1444, 34 C.R.2d 337 [following Restatement Rule, but concluding that whether activity (here, oil drilling) is ultrahazardous cannot be decided on demurrer].)

In *Gallin v. Poulou* (1956) 140 C.A.2d 638, 295 P.2d 958, defendant landlord engaged a contractor to construct garages in the basement of an apartment house, and the vibration caused a piece of plaster to fall on plaintiff's head. Upholding a nonsuit, the court pointed out that there was neither an intentional wrong nor negligence, and under the Restatement test, "there is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of engaging in an extrahazardous activity." (140 C.A.2d 645.) (See 45 Cal. L. Rev. 390.)

In *SKF Farms v. Superior Court* (1984) 153 C.A.3d 902, 200 C.R. 497, *infra*, §1420, the court discussed how ultrahazardousness is determined.

(a) *Rest.2d, Torts* §520 sets forth the factors to be considered in determining whether an activity is abnormally dangerous or ultrahazardous: "(a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to

the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes." (153 C.A.3d 906.)

(b) The issue is one for the court, which must consider all of the factors and the weight to be given to each on the facts in evidence (*Rest.2d, Torts* §520, Comment l). "The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability from the harm that results from it, even though it is carried on with all reasonable care. In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes without the need of a finding of negligence" (*Rest.2d, Torts* §520, Comment f). (153 C.A.3d 906.)

The nature and scope of the doctrine were discussed in *Goodwin v. Reilley* (1985) 176 C.A.3d 86, 221 C.R. 374.

(a) "The tort concept of an abnormally dangerous or ultrahazardous activity presupposes that the activity has some social value and that reasonable care is insufficient to eliminate its risk of harm. The principle that those who engage in such an activity should be held strictly liable for the consequences reflects a social-policy determination that 'the defendant's enterprise, while it will be tolerated by the law, must pay its way.' " (176 C.A.3d 91, quoting Prosser & Keeton.)

(b) "This policy frequently has found expression where the defendant's activity is unusual and abnormal in the community, and the danger which it threatens to others is unduly great--and particularly where the danger will be great even though the enterprise is conducted with every possible precaution. The basis of the liability is the defendant's intentional behavior in exposing those in his vicinity to such a risk. ... It is conduct which does not so far depart from social standards as to fall within the traditional boundaries of negligence--usually because the advantages which it offers to the defendant and to the community outweigh even the abnormal risk; but which is still so far socially unreasonable that the defendant is not allowed to carry it on without making good any actual harm which it does to his neighbors." (176 C.A.3d 91, quoting Prosser & Keeton.)

(c) The rule of strict liability applies only to harm that is within the scope of the abnormal risk that is the basis of the liability, and is limited to the class of persons who are threatened by the abnormal danger. (176 C.A.3d 92, citing *Rest.2d, Torts* §519, Comment e, and Prosser & Keeton.) "The same practical necessity for the restriction of liability within some reasonable bounds, which arises in connection with problems of 'proximate cause' in negligence cases, demands here that some limit be set. It might be expected that this limit would be a narrower one where no initial departure from a social standard is to be found. In general, this has been true. Just as liability for negligence had tended to be restricted within narrower boundaries than when intentional misconduct is involved, there is a visible tendency to restrict it still further when there is not even negligence." (176 C.A.3d 92, quoting Prosser & Keeton.)

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6 *Witkin Sum. Cal. Law Torts* § 1417

[§ 1417] Causation and Contributory Fault.

(1) *Intervening Acts and Unforeseeable Consequences.* Although *Rest.2d, Torts* §522, as in the case of liability for animals (see *supra*, §1413), rejects the view that an intervening act or natural force is a superseding cause, one California case involving an ultrahazardous activity suggests that an unforeseeable intervening agency, such as an act of God, may absolve the defendant. (*Sutliff v. Sweetwater Water Co.* (1920) 182 C. 34, 39, 186 P. 766, *supra*, §1415; see *Smith v. Lockheed Propulsion Co.* (1967) 247 C.A.2d 774, 779, 780, 56 C.R. 128, *infra*, §1421 [cause in fact and proximate cause are jury questions unless there is only one reasonable hypothesis]; 75 *Harv. L. Rev.* 1691.)

(2) *Contributory Fault.* Under the Restatement rule, the plaintiff is not barred by ordinary contributory negligence, but intentional or reckless contributory fault, such as exposure to a known risk, is a defense. (See *Rest.2d, Torts* §524; *Rozewski v. Simpson* (1937) 9 C.2d 515, 520, 71 P.2d 72 [defendant was not liable where escape of impounded waters was due to acts of plaintiffs themselves].) In an unusual case involving inductive interference by defendant's power lines with plaintiff's telegraph line, it was held that neither could recover where both the plaintiff and the defendant made an extraordinary, nonnatural use of their property. (*Postal Tel.-Cable Co. v. Pacific Gas & Elec. Co.* (1927) 202 C. 382, 385, 260 P. 1101; see *Rest.2d, Torts* §524A; 16 *Cal. L. Rev.* 331; 1 *So. Cal. L. Rev.* 373.)

Garcia v. Estate of Norton (1986) 183 C.A.3d 413, 228 C.R. 108, held that welding with a blowtorch on a waste oil tanker truck was an ultrahazardous activity and that plaintiff, engaged to assist in the operation, could recover for injuries under the strict liability doctrine. (See *infra*, §1422.) The defense of plaintiff's contributory fault was rejected on the grounds that there was no evidence that plaintiff knew of the potential danger and that he had relied on the welder's assurance that the tanker was "absolutely clean." (183 C.A.3d 422.) Nevertheless, the court suggested that principles of comparative fault, applicable to strict products liability actions (see *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 144 C.R. 380, 575 P.2d 1162, *infra*, §1542), should also apply to ultrahazardous activity actions. "There are many obvious parallels between strict products liability and ultrahazardous activity cases, and the rationale for applying comparative negligence or fault to the former would seem equally pertinent to the latter." (183 C.A.3d 421, citing the text.)

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4. Activities Classed as Ultrahazardous.
a. Using Explosives.

6 *Witkin Sum. Cal. Law Torts* § 1418

[§ 1418] Using Explosives.

Blasting with explosives in a city or other thickly populated place comes within the doctrine. The liability is imposed regardless of whether the damage results from the impact of debris, or from concussion of air alone. (*Colton v. Onderdonk* (1886) 69 C. 155, 159, 10 P. 395; *McKenna v. Pacific Elec. Ry. Co.* (1930) 104 C.A. 538, 543, 286 P. 445; *McGrath v. Basich Bros. Const. Co.* (1935) 7 C.A.2d 573, 576, 46 P.2d 981; *Alonso v. Hills* (1950) 95 C.A.2d 778, 783, 214 P.2d 50; *Wilson v. Rancho Sespe* (1962) 207 C.A.2d 10, 20, 24 C.R. 296; *Balding v. D.B. Stutsman* (1966) 246 C.A.2d 559, 564, 54 C.R. 717 [in vicinity of residential area]; see *Rest.2d, Torts* §520; 3 Harper, James & Gray 2d §14.6; 19 *Cal. L. Rev.* 94; 3 *So. Cal. L. Rev.* 447; 31A *Am.Jur.2d* (2002 ed.), *Explosions and Explosives* §§18, 21, 23, 24; 24 *Proof of Facts* 1 [blasting]; 11 *Am.Jur. Trials* 357 [blasting damage litigation]; 56 *A.L.R.3d* 1017 [injury or damage not directly caused by debris or concussion from explosion]; 75 *A.L.R.3d* 770 [recovery for emotional distress resulting from blasting operations]; *BAJI*, No. 6.60; *CACI*, No. 460.)

There is no liability, however, for blasting in an isolated place, in the absence of negligence. (*Houghton v. Loma Prieta Lumber Co.* (1907) 152 C. 500, 506, 93 P. 82.) (See 35 *A.L.R.3d* 1177 [liability in connection with storage or transportation of explosives].)

West's Key Number Digest, Explosives k.7; Negligence k.306

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Harper, James & Gray 3d §14.6.



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b. Fumigating.

6 *Witkin Sum. Cal. Law Torts* § 1419

[§ 1419] Fumigating.

In *Luthringer v. Moore* (1948) 31 C.2d 489, 190 P.2d 1, defendant, a pest exterminator, released hydrocyanic acid gas in a restaurant at midnight to kill cockroaches, and the gas seeped into an adjacent drug store, injuring plaintiff. *Held*, the trial court properly instructed the jury on liability without negligence for injuries resulting from "an ultra-hazardous activity," and judgment for plaintiff was affirmed. Torts Restatement test is appropriate: An activity is ultrahazardous where it necessarily involves the risk of serious harm that cannot be eliminated by the exercise of the utmost care, and it is not a matter of common usage. Here, the common use of the gas by the relatively few persons engaged in the specialized work of fumigating did not constitute a common usage or everyday practice by the public. (31 C.2d 500.) (See 3 Harper, James & Gray 2d §14.16; 17 Proof of Facts 2d 459 [breach of warranty as to effectiveness of insecticide]; 37 Cal. L. Rev. 269; 29 A.L.R.4th 987 [exterminator's liability for injury or death from operations].)

SUPPLEMENT: [This section is current through the latest supplement]
See 3 Harper, James & Gray 3d §14.16.



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c. Crop Dusting.

6 *Witkin Sum. Cal. Law Torts* § 1420

[§ 1420] Crop Dusting.

Crop dusting with toxic chemicals has been held to be an ultrahazardous activity in a few agricultural jurisdictions. (See 19 *Hastings L. J.* 476; 6 *Stanf. L. Rev.* 69, 81; 37 *A.L.R.3d* 833 [liability for injury caused by spraying or dusting of crops].)

In *SKF Farms v. Superior Court* (1984) 153 *C.A.3d* 902, 200 *C.R.* 497, plaintiffs grew lettuce and other broad-leaf crops; defendants, owners of a large neighboring farm, grew wheat and other grain crops. Defendants had their wheat crop dusted with a herbicide (2,4-D) which is used to kill weeds in narrow-leafed crops, but is extremely toxic to broad-leafed crops. The dust drifted onto plaintiffs' land, causing severe crop damage. In this action, the trial judge sustained a demurrer, ruling that crop dusting is "a matter which is in common usage in connection with the agricultural aspect of the State of California and therefore does not constitute an ultrahazardous activity." *Held*, it was error to decide the issue on demurrer: The judge considered only one of the six factors set forth in the Restatement (see *supra*, §1416), and necessarily went beyond the pleadings. (153 *C.A.3d* 906.)

Thus, the court did not decide that crop dusting is an ultrahazardous activity: "Our holding simply means the determination of whether real parties' crop dusting activity was ultrahazardous is not appropriate at the pleading stage. Petitioners are entitled to plead both negligence and strict liability. The court must determine, upon hearing the evidence and weighing the various factors listed in section 520, whether the jury should be instructed that crop dusting is an ultrahazardous activity." (153 *C.A.3d* 906, footnote 2.)

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d. Testing Rocket Motor.

6 *Witkin Sum. Cal. Law Torts* § 1421

[§ 1421] Testing Rocket Motor.

In *Smith v. Lockheed Propulsion Co.* (1967) 247 C.A.2d 774, 56 C.R. 128, plaintiffs owned a 160-acre ranch with a high quality water well. Defendant acquired 9,100 adjoining acres to test rocket motors. It held a static test, by firing motors nose down on "thrust collectors" affixed to a concrete base in the ground. The firing lasted 132 seconds, creating a maximum of 350,000 pounds of thrust and strong earth tremors. About 80 minutes later, the well water became muddy, and an examination later showed that it had been sheared at its 95-foot level and was beyond repair. A substitute well proved unsatisfactory. Plaintiff sued on theories of negligence and liability without fault. *Held*, judgment of nonsuit reversed. There was no negligence; i.e., the evidence showed prudent engineering practices in selecting the site and conducting the test. But, applying the Restatement test, the activity was ultrahazardous: (a) The rocket motor was the largest ever tested; (b) test firing such a device is not a matter of common occurrence; (4) defendant had found it necessary to acquire a huge area and had also indicated a desire to acquire plaintiff's property. (247 C.A.2d 785.) The cases of blasting in an undeveloped area (not a basis for absolute liability) are distinguishable: Here, though the site was in an undeveloped area, plaintiff's property was immediately adjoining. (247 C.A.2d 787.) (See 29 A.L.R.3d 556.)

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e. Using Blowtorch Near Oil.

6 *Witkin Sum. Cal. Law Torts* § 1422

[§ 1422] Using Blowtorch Near Oil.

In *Garcia v. Estate of Norton* (1986) 183 C.A.3d 413, 228 C.R. 108, N was in the business of obtaining waste oil, processing it, and selling it to refineries. He engaged independent contractors to drive his tanker trucks, locate oil, purchase it, and then sell it to him. N had a used truck that needed modifications, and told plaintiff, one of his independent contractors, to assist in cutting a hole in the tank with a blowtorch to enable him to climb inside and do necessary welding. N assured plaintiff that the tank was clean, and plaintiff climbed on top of it to open the hatch, but when N lit the blowtorch, waste oil exploded, killing N and injuring plaintiff. The trial judge ruled that the activity of welding with a blowtorch on a waste oil tank was ultrahazardous, and granted plaintiff's motion for a directed verdict as to liability. *Held*, the ruling was correct.

(a) Plaintiff's expert witness testified that waste oil contains gasoline and solvents and is extremely explosive, and that even taking the precaution to purge the inside of the tank with an inert gas was not an absolute guarantee of safety in cutting through the tank with a blowtorch. This evidence supported the judge's determination under the Restatement test approved in *Luthringer v. Moore* (1948) 31 C.2d 489, 190 P.2d 1, *supra*, §1419. The activity was "incredibly dangerous" not only to N but to anyone else within a relatively large area. It was also neither commonplace nor customary. (183 C.A.3d 419.)

(b) Defendant contended that the strict liability doctrine cannot be applied unless the decedent is aware of the abnormally dangerous condition or activity. This is unsound. One who carried on such an activity is liable to a person "whom the actor reasonably should recognize as likely to be harmed, even though 'the utmost care is exercised to prevent the harm.' " (183 C.A.3d 420, quoting *Luthringer*.)

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f. Using Electrical Transformers Containing PCBs.

6 *Witkin Sum. Cal. Law Torts* § 1423

[§ 1423] Using Electrical Transformers Containing PCBs.

In *Ahrens v. Superior Court* (1988) 197 C.A.3d 1134, 243 C.R. 420, an office building was contaminated when an underground electrical transformer containing polychlorinated biphenyls (PCBs) exploded and burned. The trial judge found, as a matter of law, that the use of such transformers was not an ultrahazardous activity, because it was not uncommon. *Held*, this was error. Disputed issues of material fact existed concerning the question "whether it is commonplace and within the experience of the great mass of people in the community that electrical transformers containing a hazardous, toxic substance are located in densely populated commercial locations." (197 C.A.3d 1145, 1149.) "The court must consider the totality of the surrounding circumstances, rather than merely accepting the bald assurance of the utility or the industry that this type of transformer is of common usage. While the common nature of some activities may be an appropriate subject of judicial notice, the frequency of use of underground PCB-containing transformers in a central urban setting is not one of them." (197 C.A.3d 1149.)

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a. Impounding Water.

6 *Witkin Sum. Cal. Law Torts* § 1424

[§ 1424] Impounding Water.

There is no absolute liability in California for the escape of water from land. (See *supra*, §1415; cf. *Shanander v. Western Loan & Bldg. Co.* (1951) 103 C.A.2d 507, 511, 229 P.2d 864 [absolute liability rule of *Green v. General Petroleum Corp.* (1928) 205 C. 328, 270 P. 952, *supra*, §1415, does not apply to landlord furnishing water to apartment or other building]; see 51 A.L.R.3d 965 [applicability of rule of strict liability to overflow or escape of water caused by dam failure]; on liability on theory of nuisance, see *supra*, §1415.)

In *Clark v. Di Prima* (1966) 241 C.A.2d 823, 51 C.R. 49, defendant, a farmer, irrigated his land by flooding from an irrigation district ditch. He failed to clean the ditch, and a large quantity of water escaped and flooded plaintiff's adjoining almond orchard, causing damage to the trees. Soon after, defendant's irrigator offered to help plaintiff get the water off, and a district ditch tender offered to get a pump to remove it, but plaintiff refused, asserting that the trees were already ruined, and that pumping would not be feasible. Plaintiff recovered damages. *Held*, reversed. Plaintiff's theory of absolute liability under *Rylands*, 3 H.L. 330, *supra*, §1414, is unacceptable. Applying the modern doctrine of ultrahazardous activity, irrigation of farmland, by transportation of water through ditches, is an ordinary and customary practice, not within the doctrine. (241 C.A.2d 829.) The court did not attempt to decide the unsettled question whether the *Rylands* rule would apply to impounding water by damming the flow of a stream or collecting it in a reservoir. (241 C.A.2d 827.)

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b. Aviation.

6 *Witkin Sum. Cal. Law Torts* § 1425

[§ 1425] Aviation.

(1) *Early View of Ultrahazardous Activity.* The First and Second Torts Restatement adopted the rule of strict liability. Operators of aircraft and owners who have permitted the operation are strictly liable for harm to land or persons or chattels on the ground caused by an aircraft's ascent, descent, or flight, or by an object dropping or falling from it. (*Rest.2d, Torts* §520A and Comment c; see 3 Harper, James & Gray 2d §14.13.)

(2) *Modern View: Not Ultrahazardous Activity.* The Restatement view has now been widely rejected. In *Boyd v. White* (1954) 128 C.A.2d 641, 651, 276 P.2d 92, the court approved the modern rule in the following quotation from A.L.R.: "[P]roperly handled by a competent pilot exercising reasonable care, an airplane is not an inherently dangerous instrument, so that in the absence of statute the ordinary rules of negligence control, and the owner (or operator) of an airship is only liable for injury inflicted upon another when such damage is caused by a defect in the plane or its negligent operation."

In *Boyd v. White*, *supra*, defendant L, the operator of a flying school, leased a plane from defendant W and rented it to G, a student flyer. G crashed, causing property damage to plaintiff. *Held*, a nonsuit was properly granted as to W (lessor-bailor); the legislative refusal to adopt statutory absolute liability leaves applicable the general law of bailments and negligence. The argument of entrustment of a dangerous instrumentality to an incompetent person (*supra*, §1221) is rejected. A student pilot is not per se incompetent, reckless, or inexperienced. (128 C.A.2d 655.) (See 43 Cal. L. Rev. 309; for arguments in favor of liability, see 5 *Hastings L. J.* 1, 181; 2 *U.C.L.A. L. Rev.* 598.)

Boyd was followed in *Southern Calif. Edison Co. v. Coleman* (1957) 150 C.A.2d Supp. 829, 310 P.2d 504, where defendants' plane, approaching an airport, was caught in a downdraft and struck plaintiff's electric wires. The lower court found no negligence and judgment for defendants was affirmed.

Under the Warsaw Convention, international air carriers are liable for "accidents," i.e., "unexpected or unusual event or happening that is external to the passenger." (See *Air France v. Saks* (1985) 470 U.S. 392, 105 S.Ct. 1338, 1345, 84 L.Ed.2d 289, 300; *Olympic Airways v. Husain* (2004) 540 U.S. 644, 124 S.Ct. 1221, 1222, 157 L.Ed.2d 1146, 1147 [flight attendant's unexpected and unusual conduct in three times refusing to move asthmatic passenger to another seat further away from smoking section constituted "accident" within meaning of Warsaw Convention].)

Commentary on aviation is extensive. (See 3 Harper, James & Gray 2d §14.13; 8 *Am.Jur.2d* (1997 ed.), *Aviation* §109; 82 *Am.Jur. Trials* 243 [handling aviation disaster cases]; 39 *Cal. L. Rev.* 541 [air carrier's high degree of care]; 43 *Cal. L. Rev.* 309; 23 *Stanf. L. Rev.* 569 [proposed absolute liability for commercial aircraft]; 22 *Proof of Facts* 2d 329 [wake turbulence]; 51 *Proof of Facts* 3d 81 [liability for air crash]; 13 *Am.Jur. Trials* 557 [light aircraft accident litigation]; 4 *A.L.R.2d* 615 [negligence in operation on take-off]; 74 *A.L.R.2d* 628 [negligence in landing]; 74 *A.L.R.2d* 654 [injury from taxiing aircraft]; 74 *A.L.R.2d* 867 [state liability as affecting liability under Federal Tort Claims Act]; 75 *A.L.R.2d* 848 [air carrier's liability for injury to passenger from changes in air pressure]; 75 *A.L.R.2d* 858 [interference with pilot or controls as negligence or contributory negligence]; 75 *A.L.R.2d* 868 [liability for overloading]; 76 *A.L.R.2d* 1070 [liability for injury to person servicing airplane]; 5 *A.L.R.3d* 707 [helicopter accidents]; 73 *A.L.R.4th* 416 [negligence in ascent, descent, or flight.] (On liability in connection with operation of control tower, see 46 *A.L.R. Fed* 24 [liability of United States for negligence of air traffic controller]; on airports, see 43 *So. Cal. L. Rev.* 631; 4 *Southwestern U. L. Rev.* 229; 34 *A.L.R.3d* 1449; on aircraft noise, see 74 *Harv. L. Rev.* 1581; 1 *Pacific L. J.* 581; 9 *Santa Clara Lawyer* 189 [supersonic transport]; 21 *Stanf. L. Rev.* 50 [sonic booms; strict liability]; on governmental liability for vibration, fumes, and noise, see *supra*, §339.)

West's Key Number Digest, Aviation k.141; Negligence k.307

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Early View of Ultrahazardous Activity*. See 3 Harper, James & Gray 3d §14.13.

(2) *Modern View: Not Ultrahazardous Activity*. *Commentary*: See 3 Harper, James & Gray 3d §14.13. *Correction*: Page 849, second line of last paragraph, volume for *Am.Jur.2d* reference should be 8A.



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c. Excavation and Earth Moving.

6 *Witkin Sum. Cal. Law Torts* § 1426

[§ 1426] Excavation and Earth Moving.

An attempt to ground tort liability on general maxims and catch phrases was discouraged in *Daniels v. McPhail* (1949) 93 C.A.2d 479, 209 P.2d 19. Defendants, owners of a large hillside, excavated and leveled a building lot, leaving a steep, 40-foot-high sloping bank at the rear. Plaintiffs, with full knowledge of all the circumstances and without reliance on representations or warranties, bought the lot and built on it. During the following year, much dirt slid from the bank, damaging plaintiffs' property. *Held*, defendants were not liable. (a) Clearly, C.C. 832, on lateral and subjacent support, did not apply. (See 12 *Summary* (10th), *Real Property*, §377.) (b) Under C.C. 3514, "[o]ne must so use his own rights as not to infringe upon the rights of another." Like other maxims, it does not create a right or interest but is merely an aid in determining the just application of common law or statutory principles. (C.C. 3509.) (c) No fraud, warranty, or negligence on the part of defendants was alleged or proved, nor was this a case involving a dangerous activity giving rise to liability without fault. (93 C.A.2d 481.)

The same approach was taken in *Beck v. Bel Air Properties* (1955) 134 C.A.2d 834, 286 P.2d 503. Earthmoving incident to subdividing and grading hills and slopes "is a matter of common usage." Hence, there was no absolute liability for injuries to property when rainfall poured streams of mud and debris on plaintiffs' land. (134 C.A.2d 842.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Other Activities.

6 Witkin Sum. Cal. Law Torts § 1427

[§ 1427] Other Activities.

(1) *Fire*. Liability for the escape of fire is based on negligence. (See *Health & Saf.C. 13007* et seq. [fire liability law]; *Paiva v. California Door Co.* (1925) 75 C.A. 323, 330, 242 P. 887; *Ventura v. Southern Calif. Edison Co.* (1948) 85 C.A.2d 529, 532, 193 P.2d 512; 3 Harper, James & Gray 2d §14.15; 17 A.L.R.5th 547 [property owner's liability for damage resulting from spread of accidental fire originating on premises].) The liability extends to the costs incurred in suppressing the fire and providing emergency medical services, as well as to those relating to investigating and accounting for the fire. (*Health & Saf.C. 13009, 13009.1.*) (See *Department of Forestry & Fire Protection v. LeBrock* (2002) 96 C.A.4th 1137, 1139, 117 C.R.2d 790; 19 Pacific L. J. 623; 90 A.L.R.2d 873 [statutes imposing on owner or occupant liability for expense of fighting fire starting on property].)

However, *Pub.Res.C. 4435* creates a presumption ("prima facie evidence") of negligence where a fire originates from the operation of "any engine, machine, barbecue, incinerator, railroad rolling stock, chimney, or any other device which may kindle a fire."

(2) *Discharge of Firearms*. One who handles firearms is bound to use extraordinary care (see *supra*, §920), but is not subject to liability without fault. (*Orser v. George* (1967) 252 C.A.2d 660, 672, 60 C.R. 708.)

(3) *Fireworks Display*. A fireworks display, being a matter of common usage and capable of being made safe through the exercise of utmost care, is not an ultrahazardous activity. (*Ramsey v. Marutamaya Ogatsu Fireworks Co.* (1977) 72 C.A.3d 516, 527, 140 C.R. 247, footnote 2.)

(4) *Weeds*. There is no absolute liability for the escape of weed seeds. (*Boarts v. Imperial Irr. Dist.* (1947) 80 C.A.2d 574, 575, 182 P.2d 246.)

(5) *Driving Under the Influence of Alcohol*. The act of driving under the influence, although unquestionably dangerous, is not an ultrahazardous activity for purposes of tort liability. (*Goodwin v. Reilley* (1985) 176 C.A.3d 86, 92, 221 C.R. 374.)

(6) *Nuclear Reactors*. The issue of liability arising from accidents with industrial nuclear reactors has produced

little case law, but has been widely discussed by commentators. (See 46 *Cal. L. Rev.* 3, 14; 71 *Harv. L. Rev.* 750; 77 *Harv. L. Rev.* 644; 13 *Stanf. L. Rev.* 865 [American and European legislation]; 21 *A.L.R.3d* 1356 [tort liability incident to nuclear accident or explosion].)

The Atomic Energy Act of 1954 (42 U.S.C., §2011 et seq.), although preempting the field of safety regulation, does not preclude the use of state tort remedies. (*Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 104 S.Ct. 615, 622, 78 L.Ed.2d 443, 457, 7 *Summary* (10th), *Constitutional Law*, §21 [award of punitive damages was not preempted by federal law].) However, the Price-Anderson Act of 1957 (42 U.S.C., §2210) limits the liability for a single nuclear incident (a) to \$ 500,000 plus the amount of required financial protection, or (b) if the required financial protection exceeds \$ 60,000, to \$ 560,000 or the amount of the required protection, whichever is greater. (42 U.S.C., §2210(e).) This limitation is constitutional. (*Duke Power Co. v. Carolina Environmental Study Group* (1978) 438 U.S. 59, 98 S.Ct. 2620, 2636, 57 L.Ed.2d 595, 618; see 6 *Hastings Const. L. Q.* 129; 8 *Hastings Const. L. Q.* 371; 20 *Santa Clara L. Rev.* 381; 12 *West L.A. L. Rev.* 137.)

(7) *Delivery of Electricity*. High voltage power systems do not constitute an ultrahazardous activity. (*Pierce v. Pacific Gas & Elec. Co.* (1985) 166 C.A.3d 68, 85, 212 C.R. 283, *infra*, §1447; see 82 *A.L.R.3d* 218 [applicability of rule of strict liability to injury from electrical current escaping from power line].)

(8) *Miscellaneous Activities*. Other activities, not classified as ultrahazardous, have been discussed by decisions or commentators. (See *Edwards v. Post Trans. Co.* (1991) 228 C.A.3d 980, 986, 279 C.R. 231 [use of sulphuric acid in waste treatment facility]; 13 *Pacific L. Rev.* 99 [genetic engineering]; 99 *Harv. L. Rev.* 986 [hazardous waste]; 100 *Harv. L. Rev.* 1086 [genetic engineering]; 19 *San Diego L. Rev.* 891 [hazardous waste]; 22 *Santa Clara L. Rev.* 117 [recombinant DNA technology]; 51 *So. Cal. L. Rev.* 1355 [same]; 22 *U.S.F. L. Rev.* 31 [contaminated property]; 16 *A.L.R.4th* 1300 [X-ray radiation]; 31 *A.L.R.4th* 658 [carriage of hazardous substances; carrier's "public duty" exception]; 13 *A.L.R.5th* 600 [liability of prior landowner to subsequent owner for hazardous waste contamination].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Fire*. See 3 Harper, James & Gray 3d §14.15.(6) *Nuclear Reactors*. See 198 *A.L.R. Fed* 147 [preemption issues under Atomic Energy Act of 1954].



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1. In General.

a. Background: Negligence and Warranty.

6 *Witkin Sum. Cal. Law Torts* § 1428

[§ 1428] Background: Negligence and Warranty.

(1) *Liability Based on Negligence.* The celebrated New York case of *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382, 111 N.E. 1050, established a duty of care of a manufacturer of any potentially dangerous product to any person who might foreseeably be expected to be injured by it. (See *supra*, §1168.) This basis of liability, however, posed difficult problems of proof of negligence, and was subject to the defense of contributory negligence.

(2) *Liability Based on Warranty.* Liability on implied warranty has long been recognized, irrespective of negligence, where goods are sold. But (a) this liability is contractual, and requires privity between the person damaged by a defective article and the person liable; (b) timely notice of breach of warranty must be given; and (c) warranties may be excluded by disclaimers in the contract of sale. (See 4 *Summary* (10th), *Sales*, §§84, 98, 199.)

(3) *Warranty Without Privity.* The principal obstacle to warranty recovery against a manufacturer was lack of privity between it and the consumer who bought from a retail dealer. But progressive courts devised various theories to overcome the defense, first in food and drugs and cosmetics cases, and later in cases involving potentially dangerous industrial products. (See *Rest.3d, Torts: Products Liability* §1, Comment a [historical development of products liability]; Cal. Civil Practice, 2 Torts, Products Liability, Chap. 24; 4 *Summary* (10th), *Sales*, §§101, 112, 113.) This "warranty" without privity was not contractual warranty at all, but really a strict tort liability. (See *Grinnell v. Charles Pfizer & Co.* (1969) 274 C.A.2d 424, 433, 79 C.R. 369, footnote 3; *Rest.2d, Torts* §402A, Comment m; 5 Harper, James & Gray 2d §28.16; Dobbs, *The Law of Torts* §351 et seq.; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §529; 67 *Cal. L. Rev.* 435 [Understanding Products Liability]; 18 *Hastings L. J.* 16; 17 *Stanf. L. Rev.* 1077 [policy bases of products liability].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Warranty Without Privity.* See 5 Harper, James & Gray 3d §28.16.



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b. Liability Irrespective of Fault.

6 *Witkin Sum. Cal. Law Torts* § 1429

[§ 1429] Liability Irrespective of Fault.

In *Escola v. Coca Cola Bottling Co. of Fresno* (1944) 24 C.2d 453, 461, 150 P.2d 436, Justice Traynor suggested that a manufacturer's liability should be imposed irrespective of fault. (See 13 *Stanf. L. Rev.* 804; 15 *Stanf. L. Rev.* 388.) In *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, an opinion by Justice Traynor for a unanimous court established this basis of manufacturer's liability in California.

Plaintiff, relying on a manufacturer's brochure, purchased a combination power tool. It was defectively designed and constructed, and, while in use, caused serious personal injuries to plaintiff. Notice of breach of warranty was long delayed, and this was urged as a defense by both the retailer and the manufacturer. The court first held that the express warranty in the brochure made notice of breach unnecessary (see 4 *Summary* (10th), *Sales*, §202), but then declared that there was no need to rely on warranty. "A manufacturer is *strictly liable in tort* when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective." (59 C.2d 62.)

"Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law ... , and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products ... make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed." (59 C.2d 63.)

"We need not recanvass the reasons for imposing strict liability on the manufacturer. ... The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sale warranties serve this purpose fitfully at best. ... In the present case, for example, plaintiff was able to plead and prove an express warranty only because he read and relied on the representations ... contained in the manufacturer's brochure. Implicit in

the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do. ... To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use." (59 C.2d 63.)

The decision was the subject of extensive comment. (See 5 Harper, James & Gray 2d §28.27; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §530; 53 *Cal. L. Rev.* 202; 107 *Harv. L. Rev.* 895 [Harnessing Madison Avenue: Advertising and Products Liability Theory]; 18 *Hastings L. J.* 17; 4 Santa Clara Lawyer 218; 38 *So. Cal. L. Rev.* 30; 21 *Stanf. L. Rev.* 1777; 39 *U.C.L.A. L. Rev.* 731 [declining plaintiff success rate in products liability cases]; 19 *U.S.F. L. Rev.* 119; 93 *A.L.R.5th* 103 [advertisements as affecting liability for injury caused by product other than tobacco]; and see, restating and discussing the *Greenman* doctrine, *Cronin v. J.B.E. Olson Corp.* (1972) 8 C.3d 121, 129, 104 C.R. 433, 501 P.2d 1153; *Brown v. Superior Court* (1988) 44 C.3d 1049, 1056, 245 C.R. 412, 751 P.2d 470, *infra*, §1486; *Silverhart v. Mount Zion Hosp.* (1971) 20 C.A.3d 1022, 1026, 98 C.R. 187, *infra*, §1520; *Kasel v. Remington Arms Co.* (1972) 24 C.A.3d 711, 724, 101 C.R. 314, *infra*, §1500; 65 *A.L.R.4th* 346 [product malfunction or occurrence of accident as evidence of defect]; 17 *Am.Jur. Trials* 1 [drug products liability litigation].) (On pleading in strict liability action, see 4 *Cal. Proc.* (4th), *Pleading*, §587 et seq.; on *res ipsa loquitur* instruction where plaintiff relies on both negligence and strict liability theories, see *Jiminez v. Sears, Roebuck & Co.* (1971) 4 C.3d 379, 387, 93 C.R. 769, 482 P.2d 681; for instructions, see BAJI, Nos. 9.00, 9.01; CACI, No. 1200 et seq.; on products liability claims in bankruptcy, see 17 *U.C. Davis L. Rev.* 1247; on punitive damages, see *infra*, §1593; on comparative fault, see *infra*, §1542; on strict products liability as part of admiralty law, see *East River Steamship Corp v. Transamerica Delaval* (1986) 476 U.S. 858, 106 S.Ct. 2295, 90 *L.Ed.2d* 865.)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §28.27. *Pleading in strict liability action:*

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §627 et seq.



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C. Strict Products Liability.

1. In General.

c. Restatement.

6 *Witkin Sum. Cal. Law Torts* § 1430

[§ 1430] Restatement.

The rule of *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, supra, §1429, found quick acceptance in a number of jurisdictions outside California (see 18 *Hastings L. J.* 15) and was embodied in *Rest.2d, Torts* §402A. The terse language of that section was amplified in extensive Comments, and both the section and the Comments were constantly cited by the courts as authoritative statements of the law. (See 5 Harper, James & Gray 2d §28.27; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §517; 22 *Stanf. L. Rev.* 713.) On occasion, however, the California Supreme Court found it necessary to go beyond the Restatement (see *Elmore v. American Motors Corp.* (1969) 70 C.2d 578, 75 C.R. 652, 451 P.2d 84, infra, §1511), and in one significant decision, took a contrary position (see *Cronin v. J.B.E. Olson Corp.* (1972) 8 C.3d 121, 131, 104 C.R. 433, 501 P.2d 1153, infra, §1436).

In 1997, the American Law Institute adopted a new element of the Third Restatement of Torts, entitled Products Liability. Acting after more than a quarter of a century, the Institute had to respond to questions not then "part of the legal landscape," e.g.: What should be the governing standard for design and warning defect liability (as opposed to manufacturing defect liability)? Is there a cause of action for defective prescription drug design? What rule should govern when a plaintiff establishes that enhanced harm was suffered as a result of a defect in a defendant's product, beyond that which would have resulted from other causes, but the plaintiff cannot quantify the amount of the enhancement? Thus, it was necessary for the new Products Liability Restatement to largely restate the Second Restatement as it concerns the liability of commercial sellers of products. (*Rest.3d, Torts: Products Liability*, p. 3.)

The Third Restatement is divided into the following four chapters:

Chapter 1: Liability of Commercial Product Sellers Based on Product Defects at Time of Sale (§1 et seq.). Topic 1 contains the liability rules applicable to products generally. Topic 2 sets forth the liability rules applicable to special products or product markets (component parts, drugs, food products, and used products).

Chapter 2: Liability of Commercial Product Sellers Not Based on Product Defects at Time of Sale (§9 et seq.). Included are rules for determining liability for harm caused by misrepresentation, by postsale failure to warn, and by postsale failure to recall a product.

Chapter 3: Liability of Sellers and Apparent Manufacturers (§12 et seq.). Included are principles governing liability of a successor for harm caused by defective products sold commercially by a predecessor, of a successor for harm caused by the successor's own postsale failure to warn, and for selling or distributing as one's own a product manufactured by another.

Chapter 4: Provisions of General Applicability (§15 et seq.). Topic 1 concerns causation, Topic 2 sets forth affirmative defenses, and Topic 3 contains definitions.

The general rule of strict liability is set forth as follows: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." (*Rest.3d, Torts: Products Liability §1*; on what constitutes defective product, see *infra*, §1435.) (See *111 Harv. L. Rev.* 2366 [Restatement redesign of products liability]; *27 Southwestern U. L. Rev.* 487 [cigarette litigation under *Rest.3d, Torts: Products Liability*].)

West's Key Number Digest, Products Liability k.1, 5; Torts k.14.1

SUPPLEMENT: [This section is current through the latest supplement]

See 5 Harper, James & Gray 3d §28.27; 55 *Hastings L. J.* 1377 [*Rest.2d, Torts §402A*, Comment j, as implying that manufacturer's warning cancels its duty of safe design].



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d. Negligence Liability Compared.

6 *Witkin Sum. Cal. Law Torts* § 1431

[§ 1431] Negligence Liability Compared.

"Prior cases of this court have assumed without discussing the point that a plaintiff in a products liability case could seek recovery at the same time on theories of strict liability in tort and in negligence. ... No valid reason appears to require a plaintiff to elect. ... It is apparent that in this products liability case instructions on negligence in addition to those on strict liability might have been of great aid to the plaintiff." (*Jiminez v. Sears, Roebuck & Co. (1971) 4 C.3d 379, 387, 93 C.R. 769, 482 P.2d 681*; see *63 Am.Jur.2d (1997 ed.), Products Liability* §532; *52 A.L.R.3d 101* [instructing on negligence and breach of warranty, where strict liability instruction is also given]; *BAJI*, No. 9.19 et seq.; *CACI*, No. 1220 et seq.)

The similarity of the proof in both kinds of cases is stressed in an early article by Prosser: "In a negligence case the plaintiff has the initial burden of establishing three things. The first is that he has been injured by the product. This is no less true of strict liability. It is not enough to show that the plaintiff ate the defendant's food and became ill, so long as he ate other things, and others who ate the food were not made ill. The second is that the injury occurred because the product was defective; and this also is no less true of strict liability. Proof that an airplane has crashed does not make out a case against the manufacturer, where there is no evidence to show that it was not due to negligent flying. The third is that the defect existed when the product left the hands of the defendant; and this again is no less true of strict liability. When meat has been exposed in the air for a considerable time by a dealer, and might have spoiled in the process, the burden of proof against the original supplier of the meat is not sustained. The elimination of negligence as the basis of recovery does not relieve the plaintiff of the necessity of making out his case as to all of these three elements." (*18 Hastings L. J. 50.*) (For comparison of two theories of liability, see *Balido v. Improved Machinery (1972) 29 C.A.3d 633, 640, 105 C.R. 890*, infra, §1526 ["Although separate counts for negligence, warranty, and strict liability have been pleaded, we view them as stating a single cause of action, in that the complaint seeks damages for personal injuries caused by deficiencies in the design of a manufactured product"]; *Khan v. Shiley (1990) 217 C.A.3d 848, 855, 266 C.R. 106*, infra, §1526, citing the text [element of causation].)

In *DeLeon v. Commercial Mfg. & Supply Co. (1983) 148 C.A.3d 336, 195 C.R. 867*, infra, §1454, the court, quoting Prosser and *Balido*, pointed out that in product design cases, strict liability and negligence claims merge. As Prosser puts it: "[T]he liability of the manufacturer, even though it may occasionally be called strict, appears to rest primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence." (*148 C.A.3d 336.*)

"With only slight editing we could take our discussion of the strict liability cause of action and convert it into the language of negligence. The same summary judgment rationale applies when the products liability window dressing is removed." (148 C.A.3d 350.)

Although under *Jiminez* a plaintiff need not elect to proceed under strict liability or negligence, the trial judge's rejection of negligence instructions is not necessarily error in a non-res ipsa loquitur case involving only a manufacturing defect. (*Montez v. Ford Motor Co. (1980) 101 C.A.3d 315, 318, 319, 161 C.R. 578.*)

West's Key Number Digest, Products Liability k.5, 6

SUPPLEMENT: [This section is current through the latest supplement]



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e. Indemnity.

6 *Witkin Sum. Cal. Law Torts* § 1432

[§ 1432] Indemnity.

The doctrine of indemnity, invoked by a person secondarily liable against a tortfeasor primarily liable, is applied in numerous negligence cases (see *supra*, §112 et seq.), but has received little attention in strict liability cases. Implied indemnity has, however, been recognized. (See *Ford Motor Co. v. Robert J. Poeschl* (1971) 21 C.A.3d 694, 697, 98 C.R. 702, *supra*, §116 ["Wrongs other than negligence may create dual liability to the third party and produce the claim of indemnity. In products liability cases such as this, a manufacturer's or retailer's strict liability in tort may form the springboard for the indemnity claim"].)

Where express indemnity provisions are involved, the construction of the clause, and particularly the requirement of precise and unequivocal language to impose the obligation (see *supra*, §119 et seq.), is the same as in negligence cases. (*Price v. Shell Oil Co.* (1970) 2 C.3d 245, 258, 85 C.R. 178, 466 P.2d 722; *Dart Trans. Service v. Mack Trucks* (1970) 9 C.A.3d 837, 848, 88 C.R. 670; see 22 *Hastings L. J.* 1202.) In *Price* the indemnity clause stated that the lessee would indemnify the lessor against "any and all claims and liability for injury or death of persons or damage to property caused by or happening in connection with the equipment or the condition, maintenance, possession, operation or use thereof." In affirming a nonsuit of defendant lessor's cross-complaint for indemnity, the court said: "No language of such essential specificity indicates that the lessee is to be held responsible for the negligent acts of the lessor, much less for the strict liability in tort imposed upon the lessor for placing on the market a defective article. Indeed it would do violence to the doctrine of strict liability and thwart its basic purpose, if we were to interpret so general a clause as transferring the liability for a defective article from the party putting the article in the stream of commerce, to the user or consumer of the article who is within the class the doctrine was designed to protect." (2 C.3d 258.) (See *Maryland Cas. Co. v. Bailey & Sons* (1995) 35 C.A.4th 856, 869, 41 C.R.2d 519 [strict liability of real estate developer is not same as active negligence, so as to preclude recovery under general indemnity provision; distinguishing *Price*].)

An automobile dealer who sells a car is not entitled to indemnity from the driver of the car. In *Bill Loper Ford v. Hites* (1975) 47 C.A.3d 828, 121 C.R. 131, H bought a car from plaintiff dealer and drove it. In a collision the gas tank exploded, injuring two of his passengers. The passengers sued the dealer on strict liability and received a substantial settlement. The dealer then brought this action against the driver for indemnity, on the theory that the driver's negligence was the primary cause of the injury to the passengers and that the dealer's liability for defective design was passive and secondary. *Held*, judgment for defendant driver on demurrer affirmed. "To allow indemnification because

[H] was actively negligent in driving the automobile is the antithesis of strict liability. Plaintiff attempts to shift the liability for selling a defective automobile to the driver simply because he used the automobile in such a way as to expose the design defect. The present status of strict liability prohibits this avoidance of accountability." (47 C.A.3d 836.) (See 79 A.L.R.4th 278 [seller's right to indemnity from *manufacturer*].)

In an action against a manufacturer and a retailer, in which the retailer cross-complains against the manufacturer for indemnity, the manufacturer is not liable for attorneys' fees incurred by the retailer in defense of his or her own alleged wrongdoing. (*Davis v. Air Technical Industries* (1978) 22 C.3d 1, 6, 148 C.R. 419, 582 P.2d 1010.)

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f. Recovery for Emotional Distress.

6 *Witkin Sum. Cal. Law Torts* § 1433

[§ 1433] Recovery for Emotional Distress.

In *Shepard v. Superior Court* (1977) 76 C.A.3d 16, 142 C.R. 612, members of the Shepard family were passengers in a Ford Pinto driven by the father on a highway. The Pinto was struck by a car negligently driven by G. The Pinto door opened and daughter J was thrown out; then she was run over and killed by G's car. This action was brought by the father, mother, and brother for damages for physical injuries resulting from the emotional shock of observing the accident and J's death. As to the negligent defendant driver, the complaint clearly stated a cause of action under *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, supra, §1008. But the complaint also named Ford Motor Co., the manufacturer, as a defendant, on allegations of defective manufacture or design of the door lock. The trial court sustained Ford's demurrer. *Held*, this was error.

(a) Although language in *Dillon* refers to negligence, no issue of strict products liability was raised in that case. And other decisions recognize the plaintiff's right to proceed on both negligence and strict liability theories. (76 C.A.3d 20, citing *Jiminez v. Sears, Roebuck & Co.* (1971) 4 C.3d 379, 387, 93 C.R. 769, 482 P.2d 681, supra, §1431.)

(b) The injuries suffered as a result of emotional shock are as much a foreseeable consequence of a defect in design and manufacture of an automobile as the negligence of the driver. Hence, to permit recovery against the negligent driver but not the manufacturer would be inconsistent; and to permit recovery against the manufacturer would be in accord with the purpose of the doctrine of strict liability--to relieve the plaintiff of the problems of proof in negligence actions. (76 C.A.3d 21.)

A dissenting justice condemned the result as the creation of a new cause of action. (76 C.A.3d 28.) (See *Kately v. Wilkinson* (1983) 148 C.A.3d 576, 586, 195 C.R. 902, infra, §1509, citing *Shepard*; 11 West L.A. L. Rev. 109; 90 A.L.R.5th 179 [bystander recovery for emotional distress from witnessing another's injury in products liability context].)

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g. No Avoidance of Liability by Written Agreement.

6 Witkin Sum. Cal. Law Torts § 1434

[§ 1434] No Avoidance of Liability by Written Agreement.

In *Westlye v. Look Sports* (1993) 17 C.A.4th 1715, 22 C.R.2d 781, plaintiff, who had rented skiing equipment from defendant, was injured when the safety binding failed to release the ski from the boot. The rental agreement contained an appendix in which plaintiff (1) accepted the equipment "as is"; (2) agreed to release defendant from all liability resulting from negligence or the election, inspection, or adjustment of the equipment; and (3) expressly assumed the risk of any injury resulting from use of the equipment. The trial judge concluded that this agreement was a bar to plaintiff's cause of action for strict products liability. *Held*, this was error.

(a) The rule that contractual disclaimers do not defeat strict products liability in tort is well established by California case law. (17 C.A.4th 1744, citing *Vandermark v. Ford Motor Co.* (1964) 61 C.2d 256, 37 C.R. 896, 391 P.2d 168, *infra*, §1480, *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, *supra*, §1429, and *Seely v. White Motor Co.* (1965) 63 C.2d 9, 45 C.R. 17, 403 P.2d 145, *infra*, §1514.) And the Restatement Second of Torts contains the following comment regarding the strict products liability of product suppliers: "The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands." (17 C.A.4th 1745, quoting *Rest.2d, Torts §402A*, Comment m; on contractual exculpation under *Rest.3d, Torts: Products Liability*, see *infra*, §1544.)

(b) The fact that the agreement here contains not only a disclaimer by the product supplier but also an express assumption of risk by the consumer does not change the result. "[A]s we have seen, there is a strong policy against allowing product suppliers to disclaim liability for injuries caused by defects in products they place on the market. To allow product suppliers to achieve this prohibited result merely by substituting assumption of risk language for disclaimer language would too easily allow circumvention of these policies. In effect, such an agreement is nothing more than a disclaimer in another form. Were we to enforce such agreements, we would revisit the problems that led to the rule invalidating contractual disclaimers in the first place." (17 C.A.4th 1747.)

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- C. Strict Products Liability.
 - 2. What Constitutes Defective Product.
 - a. In General.
 - 1. Restatement 3d.

6 Witkin Sum. Cal. Law Torts § 1435

[§ 1435] Restatement 3d.

For purposes of Rest.3d, Torts: Products Liability, a "*product*" is defined as "tangible personal property distributed commercially for use or consumption." However, other items, such as real property and electricity, are products "when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement." (*Rest.3d, Torts: Products Liability §19(a)*.) Services, even when provided commercially, are not products. (*Rest.3d, Torts: Products Liability §19(b)*.) Also, human blood and human tissue, even when provided commercially, are not subject to the Restatement rules. (*Rest.3d, Torts: Products Liability §19(c)*.) (See *Brooks v. Eugene Burger Management Corp.* (1989) 215 C.A.3d 1611, 1624, 264 C.R. 756 [apartment complex, allegedly defective because it was unfenced, did not constitute "product" within meaning of products liability law]; 105 Harv. L. Rev. 1147 [false statements in book is not "product"]; 63 A.L.R.4th 127 [live animal as "product"].)

A product is *defective* when any of the following circumstances exist at the time of sale or distribution:

(1) The product contains a "manufacturing defect," i.e., when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product. (*Rest.3d, Torts: Products Liability §2(a)*.)

(2) The product is "defective in design," i.e., when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe. (*Rest.3d, Torts: Products Liability §2(b)*; see *infra*, §1450.)

(3) The product is "defective because of inadequate instructions or warnings," i.e., when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe. (*Rest.3d, Torts: Products Liability §2(c)*; see *infra*, §1467.)

Liability for design defects or defects based on inadequate instructions or warnings is predicated on a different concept of responsibility than is liability for manufacturing defects. The rule for manufacturing defects imposes liability whether or not the manufacturer's quality control effects satisfy standards of reasonableness. Design defects and defects based on inadequate instructions or warnings cannot be determined by reference to the manufacturer's own design or marketing standards because those standards are the very ones that the plaintiffs attack as unreasonable. An independent assessment of advantages and disadvantages, to which some attach the label "risk-utility balancing," is necessary. (*Rest.3d, Torts: Products Liability* §2, Comment a.)

It may be *inferred* that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff (1) was of a kind that ordinarily occurs as a result of product defect, and (2) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution. (*Rest.3d, Torts: Products Liability* §3.) There is no requirement that the plaintiff prove what aspect of the product was defective. (*Rest.3d, Torts: Products Liability* §3, Comment c.)

With respect to liability for defective design or inadequate instructions or warnings, a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation. (*Rest.3d, Torts: Products Liability* §4(a).) With respect to those types of liability, a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation. However, compliance does not preclude as a matter of law a finding of product defect. (*Rest.3d, Torts: Products Liability* §4(b).)

Certain liability rules are applicable to particular products or product markets. (See *infra*, §1448.)

West's Key Number Digest, Products Liability k.8-

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2. What Constitutes Defective Product.

a. In General.

2. Product Need Not Be Unreasonably Dangerous.

6 *Witkin Sum. Cal. Law Torts* § 1436

[§ 1436] Product Need Not Be Unreasonably Dangerous.

(1) *Second Restatement*. Under *Rest.2d, Torts* §402A (see supra, §1430), liability depended on a showing that the product was both defective and unreasonably dangerous. However, in California, *Cronin v. J.B.E. Olson Corp.* (1972) 8 C.3d 121, 133, 104 C.R. 433, 501 P.2d 1153, held that the plaintiff did not need to show that the product was unreasonably dangerous, but only that it was defective. Defendant was a sales agent for an assembled bread delivery truck, parts of which were manufactured by others. Plaintiff, a route salesman, was involved in a collision. The impact broke an aluminum safety hasp located behind the driver's seat and designed to hold the bread trays in place. The loaded trays, driven forward by the abrupt stop, struck plaintiff in the back and hurled him through the windshield. Plaintiff's evidence showed that the metal hasp was flawed and lacked the tensile strength of a nonflawed metal. Verdict and judgment were for plaintiff, and defendant appealed, claiming error in the judge's failure to instruct in accordance with the Restatement's "unreasonably dangerous" qualification. *Held*, judgment affirmed.

(a) The formulation of *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, supra, §1429, did not include this element; it "crept into our jurisprudence without fanfare after its inclusion in Section 402A of the Restatement." (8 C.3d 129.) As defined in Comment i, "unreasonably dangerous" means that the article "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer." Prosser suggests that this qualification was added to foreclose the possibility that the manufacturer of a product with inherent possibilities for harm (e.g., butter, drugs, whiskey, and automobiles) would become liable as an insurer. (8 C.3d 132.)

(b) The requirement is unsound for two reasons. (1) It burdens the plaintiff with proof of an element "which rings of negligence." Thus, if the trier of fact determines that the "ordinary consumer" would have expected the defective condition, the seller is not strictly liable regardless of the expectation of the injured plaintiff. "In fact, it has been observed that the Restatement formulation of strict liability in practice rarely leads to a different conclusion than would have been reached under laws of negligence." (8 C.3d 133.) (2) It imposes a bifurcated standard requiring proof that the product is defective and also that it is unreasonably dangerous. This places upon the plaintiff "a significantly increased burden" and is "a step backward in the area pioneered by this court." (8 C.3d 133.)

(c) "[T]o require an injured plaintiff to prove not only that the product contained a defect but also that such defect

made the product unreasonably dangerous to the user or consumer would place a considerably greater burden upon him than that articulated in *Greenman*. We believe the *Greenman* formulation is consonant with the rationale and development of products liability law in California because it provides a clear and simple test for determining whether the injured plaintiff is entitled to recovery." (8 C.3d 135.) (See 61 Cal. L. Rev. 656; 8 Golden Gate L. Rev. 263; 6 Southwestern U. L. Rev. 669; 10 U.S.F. L. Rev. 492, 725.)

(2) *Third Restatement*. Rest.3d, Torts: Products Liability no longer requires that the defect be one that makes the product "unreasonably dangerous." (Rest.3d, Torts: Products Liability §§1, 2; see *Valentine v. Baxter Healthcare Corp.* (1999) 68 C.A.4th 1467, 1484, 81 C.R.2d 252, 7 Cal. Proc. (4th), Trial, Supp., §352 [independent cause of action for failure to test and inspect cannot stand if product is found not to be defective]; 64 A.L.R.4th 125 [admissibility of experimental or test evidence to disprove defect in motor vehicle].)

West's Key Number Digest, Products Liability k.8

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Third Restatement*.

Valentine case:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §343.



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6 Witkin Sum. Cal. Law Torts § 1437

[§ 1437] Jury Instructions.

BAJI, No. 9.00 defines "defective product," and Nos. 9.00.3 and 9.00.5 state the elements of a products liability cause of action based on a manufacturing defect or a design defect, respectively. CAJI, No.1200 states the essential factual elements. Nos. 1201 and 1202 state the elements of an action based on a manufacturing defect. Nos. 1203 and 1204 state the elements of an action based on a design defect. Nos. 1205 and 1206 state the elements of an action based on failure to warn.

In *Henderson v. Harnischfeger Corp.* (1974) 12 C.3d 663, 117 C.R. 1, 527 P.2d 353, *infra*, §1466, the jury was instructed that "defendant manufacturer of a product is not required under the law so to create and deliver its product as to make it accident proof." Plaintiff contended that this was equivalent to the disapproved "unavoidable accident" instruction (see *supra*, §902). *Held*, the two were different, and the instruction given was not objectionable. It conveyed the concept that a product need not be free from all risk of harm, hence that it is not to be found defective simply because an accident has occurred. Thus, it did not state a separate basis for nonliability, but merely attempted "to delineate the outer limits of legal responsibility in a products liability action." (12 C.3d 676.) (See *In re Coordinated Latex Glove Litigation* (2002) 99 C.A.4th 594, 600, 121 C.R.2d 301 [to establish manufacturing defect, plaintiff must show either that product differed from manufacturer's intended result or that it differed from other ostensibly identical units of same product line]; 65 A.L.R.4th 346 [product malfunction or occurrence of accident as evidence of defect].)

SUPPLEMENT: [This section is current through the latest supplement]

In an appropriate case, it is proper to instruct that action or inaction by the Food and Drug Administration, though not dispositive, may be considered to show whether a pharmaceutical product is safe or not safe. (*O'Neill v. Novartis Consumer Health* (2007) 147 C.A.4th 1388, 1393, 55 C.R.3d 551 [while FDA's standards and decisions do not immunize drug manufacturer from liability, they are nevertheless entitled to serious consideration on issue of drug's safety at time of plaintiff's alleged injuries].)



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1. Asbestos.

6 *Witkin Sum. Cal. Law Torts* § 1438

[§ 1438] Asbestos.

Persons exposed to asbestos for a long period of time are often parties in strict products liability actions. (See *Sparks v. Owens-Illinois* (1995) 32 C.A.4th 461, 473, 38 C.R.2d 739, *infra*, §1456 [asbestos-containing product]; *Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 C.A.4th 1529, 1534, 40 C.R.2d 22 [same]; *Armstrong World Industries v. Aetna Cas. & Surety Co.* (1996) 45 C.A.4th 1, 36, 52 C.R.2d 690; *Jenkins v. T&N PLC* (1996) 45 C.A.4th 1224, 1227, 53 C.R.2d 642 [strict liability applies to bulk supplier of asbestos, even though it has not made finished consumer product]; *Arena v. Owens Corning Fiberglas Corp.* (1998) 63 C.A.4th 1178, 1191, 74 C.R.2d 580 [holding in *Jenkins* is not changed by proposed Rest.3d, Torts]; 97 *Harv. L. Rev.* 739 [asbestos insurance liability]; 34 *Hastings L. J.* 845 [asbestos-related diseases]; 31 *Pepperdine L. Rev.* 1 [asbestos litigation]; 39 *Proof of Facts* 3d 181 [cigarette manufacturer's liability for mesothelioma caused by asbestos fibers in cigarette filters]; 60 *Am.Jur. Trials* 73 [asbestos injury litigation]; 39 *A.L.R.4th* 399 [inhalation of asbestos].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Jones v. John Crane* (2005) 132 C.A.4th 990, 999, 35 C.R.3d 144 [asbestos fibers released from manufacturer's products were substantial factor in cancer suffered by plaintiff exposed to asbestos at work during 27-year naval career, even if level of asbestos from products was comparable to ambient level of asbestos found in atmosphere]; *Andrews v. Foster Wheeler LLC* (2006) 138 C.A.4th 96, 107, 41 C.R.3d 229 [expert's declaration that plaintiff had been exposed to asbestos, which was released from defendant's condensers during ship overhaul, and later "re-entrained" into ship's air almost two decades before plaintiff came on board, lacked sufficient factual basis, and offered virtually no explanation or reasoning, making it impossible to determine how expert reached his conclusions]; *Garza v. Asbestos Corp., Ltd.* (2008) 161 C.A.4th 651, 659, 74 C.R.3d 359 [raw asbestos is product subject to strict liability]; 34 *Pepperdine L. Rev.* 883 [asbestos litigation in California]; 45 *Santa Clara L. Rev.* 1 [asbestos litigation system in San Francisco Bay Area].



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 - 2. Machinery and Equipment.

6 *Witkin Sum. Cal. Law Torts* § 1439

[§ 1439] Machinery and Equipment.

Many products liability cases involve defective machinery and equipment. (See *Lewis v. American Hoist & Derrick Co.* (1971) 20 C.A.3d 570, 580, 97 C.R. 798 [crane]; 63 Am.Jur.2d (1997 ed.), *Products Liability* §736 et seq.; 8 Proof of Facts 3d 615 [forklift trucks]; 19 Proof of Facts 3d 1 [escalators]; 66 Proof of Facts 3d 183 [grinding wheels]; 78 Proof of Facts 3d 107 [underground storage tank]; 95 A.L.R.3d 541 [forklift trucks]; 99 A.L.R.3d 693 [manufacturer's or seller's obligation to supply or recommend safety accessories]; 1 A.L.R.4th 748 [heating equipment]; 2 A.L.R.4th 262 [conveyor belts]; 8 A.L.R.4th 20 [industrial presses]; 10 A.L.R.4th 554 [transformers and other electrical equipment]; 13 A.L.R.4th 476 [cranes and other lifting apparatuses]; 22 A.L.R.4th 206 [mechanical or chain saw or components]; 33 A.L.R.4th 1189 [stud or staple guns]; 36 A.L.R.4th 170 [office furnishings]; 37 A.L.R.4th 47 [burglar or fire alarm]; 72 A.L.R.4th 90 [industrial refrigeration equipment]; 74 A.L.R.4th 904 [scaffolds and scaffolding equipment]; 80 A.L.R.4th 972 [lubricating products and systems]; 84 A.L.R.4th 1123 [cutting or heating torches]; 59 A.L.R.5th 461 [computer hardware and software].)

SUPPLEMENT: [This section is current through the latest supplement]

See 95 Am.Jur. Trials 91 [welding rods]; 3 A.L.R.6th 355 [office furnishings; superseding 36 A.L.R.4th 170, text, p. 865]; 4 A.L.R.6th 401 [mechanical or chain saw or components; superseding 22 A.L.R.4th 206, text, p. 865].



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- 3. Food and Beverages.

6 *Witkin Sum. Cal. Law Torts* § 1440

[§ 1440] Food and Beverages.

Claims of strict products liability often involve food and beverages. (See *Mexicali Rose v. Superior Court* (1992) 1 C.4th 617, 633, 4 C.R.2d 145, 822 P.2d 1292, 4 Summary (10th), Sales, §108 [food containing bone]; *Ford v. Miller Meat Co.* (1994) 28 C.A.4th 1196, 1202, 33 C.R.2d 899 [bone fragment in ground meat sold by supermarket; following *Mexicali Rose*]; *DiRosa v. Showa Denko K.K.* (1996) 44 C.A.4th 799, 805, 52 C.R.2d 128 [dietary supplement]; 16 U.C. Davis L. Rev. 677 [infant formula]; 30 Proof of Facts 2d 1 [foreign objects in food]; 47 Proof of Facts 3d 47 [food poisoning]; 36 A.L.R.4th 419 [explosion or breakage of beverage bottle]; 42 A.L.R.4th 253 [alcoholic beverages]; 87 A.L.R.4th 804 [spoilage or contamination of beverage]; 90 A.L.R.4th 12 [foreign substance in beverage]; 64 A.L.R.5th 205 [excessively hot food or beverage].) (On application of Restatement rules, see *infra*, §1448.)

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6 *Witkin Sum. Cal. Law Torts* § 1441

[§ 1441] Drugs, Medical Devices, and Personal Care Products.

Defects involving drugs, medical devices, and personal care products have been treated in numerous cases and articles. (See *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, *infra*, §1486 [diethylstilbestrol (DES)]; *Brown v. Superior Court* (1988) 44 C.3d 1049, 245 C.R. 412, 751 P.2d 470 [same]; *Carlin v. Superior Court* (1996) 13 C.4th 1104, 56 C.R.2d 162, 920 P.2d 1347, *infra*, §1477 [sleeping pills]; *Grinnell v. Charles Pfizer & Co.* (1969) 274 C.A.2d 424, 435, 79 C.R. 369 [Sabin oral polio vaccine]; *West v. Johnson & Johnson Products* (1985) 174 C.A.3d 831, 849, 220 C.R. 437 [toxic shock syndrome from use of vaginal tampon]; 7 Proof of Facts 3d 1 [injuries from drugs]; 78 Proof of Facts 3d 233 [latex products]; 80 Proof of Facts 3d 1 [failure of emergency medical equipment]; 55 Am.Jur. Trials 1 [cosmetic silicone breast implants]; 56 *Cal. L. Rev.* 149; 65 *Cal. L. Rev.* 754 [Tort Law and Mass Immunization]; 34 *Golden Gate L. Rev.* 393 [prescription drugs]; 43 *Hastings L. J.* 301 [Bendectin litigation]; 40 *Stanf. L. Rev.* 989 [Drug Product Liability and Health Care Delivery Systems]; 7 *U.C. Davis L. Rev.* 487 [manufacturers of prescription drugs]; 49 *U.C.L.A. L. Rev.* 737 [alternative safer design test for drugs and medical devices]; 54 *A.L.R.3d* 258 [liability of hospital or medical practitioner for harm caused by drug]; 54 *A.L.R.3d* 258 [medical instruments or similar devices]; 1 *A.L.R.4th* 921 [prostheses or surgical implants]; 2 *A.L.R.4th* 1091 [*Sindell*]; 29 *A.L.R.4th* 1045 [animal medicines]; 34 *A.L.R.4th* 532 [medical machinery]; 46 *A.L.R.4th* 1197 [perfumes, colognes, or deodorants]; 54 *A.L.R.4th* 574 [personal soap]; 57 *A.L.R.4th* 911 [pertussis vaccine]; 59 *A.L.R.4th* 50 [toxic shock syndrome]; 63 *A.L.R.4th* 105 [mascara and other eye cosmetics]; 65 *A.L.R.4th* 346 [product malfunction or occurrence of accident as evidence of defect]; 84 *A.L.R.4th* 1090 [hair straighteners and relaxants]; 54 *A.L.R.5th* 1 [contraceptives].) (On application of Restatement rules, see *infra*, §1448.)

SUPPLEMENT: [This section is current through the latest supplement]

See 40 *U.S.F. L. Rev.* 515 [burden on defendant moving for summary judgment based on federal preemption in medical device cases]; 34 *Western State L. Rev.* 191 [medical instruments, implants, and prosthetic devices]; 87 Proof of Facts 3d 1 [Vioxx]; 87 Proof of Facts 3d 119 [antidepressants]; 95 Am.Jur. Trials 115 [cosmetics]; 98 Am.Jur. Trials 1 [hip replacement implants]; 23 *A.L.R.6th* 223 [cardiac pacemakers]; 104 Am.Jur. Trials 179 [cardiac assist devices].



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 - 5. Household Furnishings and Appliances.

6 Witkin Sum. Cal. Law Torts § 1442

[§ 1442] Household Furnishings and Appliances.

Numerous articles deal with defective household equipment, furnishings, and supplies. (See 43 Am.Jur. Trials 315 [preparing portable kerosene heater cases]; 45 Am.Jur. Trials 637 [trying portable kerosene heater cases]; 89 *A.L.R.3d* 210 [television sets]; 93 *A.L.R.3d* 99 [stoves]; 1 *A.L.R.4th* 748 [heating equipment]; 6 *A.L.R.4th* 1262 [clothes dryers]; 22 *A.L.R.4th* 206 [mechanical or chain saws or components]; 34 *A.L.R.4th* 95 [appliances relating to cleaning, washing, personal care, and water supply, quality, and disposal]; 36 *A.L.R.4th* 170 [home furnishings]; 37 *A.L.R.4th* 47 [burglar or fire alarms]; 61 *A.L.R.4th* 94 [overhead garage doors and openers]; 122 *A.L.R.5th* 515 [household equipment relating to storage, etc., of food].)

SUPPLEMENT: [This section is current through the latest supplement]
See 3 *A.L.R.6th* 355 [home furnishings; superseding 36 *A.L.R.4th* 170, text, p. 867].



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 - 6. Motor Vehicle Equipment.

6 *Witkin Sum. Cal. Law Torts* § 1443

[§ 1443] Motor Vehicle Equipment.

Defective motor vehicles are the basis of many strict products liability actions. (See *Hinckley v. La Mesa R. V. Center* (1984) 158 C.A.3d 630, 642, 205 C.R. 22 [motor home]; *Bresnahan v. Chrysler Corp.* (1995) 32 C.A.4th 1559, 1568, 38 C.R.2d 446 [air bag]; 63 Am.Jur.2d (1997 ed.), *Products Liability* §786 et seq.; 4 Proof of Facts 3d 131 [seat belts]; 6 Proof of Facts 3d 93 [all-terrain vehicles]; 7 Proof of Facts 3d 225 [golf carts]; 20 Proof of Facts 3d 1 [batteries]; 21 Proof of Facts 3d 1 [airbag restraint systems]; 21 Proof of Facts 3d 115 [child safety restraints]; 59 Proof of Facts 3d 73 [automobile design defects]; 77 Proof of Facts 3d 85 [child safety seats]; 36 Am.Jur. Trials 339 [defective automobile door latches]; 37 Am.Jur. Trials 401 [defective seatbelts]; 38 Am.Jur. Trials 231 [all-terrain vehicle litigation]; 39 Am.Jur. Trials 333 [golf cart cases]; 47 Am.Jur. Trials 145 [tractors]; 82 Am.Jur. Trials 1 [automobile airbag malfunction litigation]; 82 Am.Jur. Trials 123 [snowmobile litigation]; 42 A.L.R.3d 583 [defect enhancing injury from accident otherwise caused]; 81 A.L.R.3d 318 [tires]; 96 A.L.R.3d 264 [vehicular gasoline tanks]; 98 A.L.R.3d 317 [motorcycles]; 99 A.L.R.3d 179 [braking systems]; 100 A.L.R.3d 158 [steering systems]; 100 A.L.R.3d 471 [drive train systems]; 100 A.L.R.3d 912 [suspension systems]; 3 A.L.R.4th 489 [windows]; 5 A.L.R.4th 483 [bumpers]; 5 A.L.R.4th 662 [electrical systems]; 16 A.L.R.4th 137 [tire rims and wheels]; 65 A.L.R.4th 346 [product malfunction or occurrence of accident as evidence of defect]; 66 A.L.R.4th 20 [sudden or unexpected acceleration of motor vehicle]; 66 A.L.R.4th 622 [golf cart]; 72 A.L.R.4th 62 [motor vehicle exhaust systems]; 75 A.L.R.4th 312 [tractors]; 83 A.L.R.4th 70 [all-terrain vehicles]; 39 A.L.R.5th 267 [motor vehicle air bag systems]; 48 A.L.R.5th 1 [seat belts, shoulder harnesses, and restraint systems]; 61 A.L.R.5th 473 [mobilehomes or trailers]; on inadmissibility of animal experimentation evidence in products liability action involving motor vehicle, see *Ev.C. 1159*.)

SUPPLEMENT: [This section is current through the latest supplement]



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- 7. Sports and Recreational Equipment.

6 Witkin Sum. Cal. Law Torts § 1444

[§ 1444] Sports and Recreational Equipment.

Numerous strict products liability actions involve defective sports and recreational equipment. (See 71 Am.Jur. Trials 337 [bicycles]; 72 Am.Jur. Trials 331 [actions against shoe manufacturers for sports and other injuries]; 95 A.L.R.3d 391 [toys and games]; 1 A.L.R.4th 411 [boats or parts, supplies, or equipment]; 6 A.L.R.4th 492 [swimming pools and accessories]; 76 A.L.R.4th 117 [bicycles and accessories]; 76 A.L.R.4th 145 [exercise and related equipment]; 76 A.L.R.4th 171 [trampolines and similar devices]; 76 A.L.R.4th 201 [competitive sports equipment]; 76 A.L.R.4th 256 [skiing equipment]; 77 A.L.R.4th 1121 [general recreational equipment]; 77 A.L.R.4th 1152 [mechanical amusement rides and devices]; 60 A.L.R.5th 413 [cement and concrete]; 65 A.L.R.5th 105 [swimming pools and accessories]; 92 A.L.R.5th 473 [skydiving, parachuting, and parasailing equipment].)

SUPPLEMENT: [This section is current through the latest supplement]

See 101 Proof of Facts 3d 375 [liability for design, manufacture, distribution, or sale of bicycle]; 106 Am.Jur. Trials 375 [playground equipment].



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 - 8. Miscellaneous Products.

6 *Witkin Sum. Cal. Law Torts* § 1445

[§ 1445] Miscellaneous Products.

Defective chemicals, explosives, and construction equipment and supplies are among the numerous miscellaneous products for which the manufacturer or another party in the stream of commerce has been held strictly liable. (See *Cravens, Dargan & Co. v. Pacific Indem. Co.* (1972) 29 C.A.3d 594, 601, 105 C.R. 607 [insecticide]; *Fluor Corp. v. Jeppesen & Co.* (1985) 170 C.A.3d 468, 474, 216 C.R. 68 [navigational charts]; *Edwards v. A.L. Lease & Co.* (1996) 46 C.A.4th 1029, 1035, 54 C.R.2d 259, *infra*, §1498 [residential drain pipe]; 87 *Cal. L. Rev.* 269 [software]; 20 *San Diego L. Rev.* 439 [computer software]; 29 *San Diego L. Rev.* 203 [contaminated blood]; 72 *So. Cal. L. Rev.* 1 [trademark licenses]; 17 *Southwestern U. L. Rev.* 497; 24 *Southwestern U. L. Rev.* 1237 [tobacco]; 27 *Southwestern U. L. Rev.* 487 [cigarette litigation under Rest.3d, Torts: Products Liability]; 29 *U.S.F. L. Rev.* 741 [aircraft]; 23 *Western State L. Rev.* 549 [antihemophilic factor concentrate (AHF)]; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §§733 et seq., 827 et seq.; 46 *Proof of Facts* 2d 145 [lead poisoning]; 3 *Proof of Facts* 3d 225 [formaldehyde fumes emitted by building materials]; 20 *Proof of Facts* 3d 113 [ladders]; 23 *Proof of Facts* 3d 159 [electric signs]; 51 *Proof of Facts* 3d 81 [aircraft]; 65 *Proof of Facts* 3d 407 [hand tools]; 68 *Proof of Facts* 3d 333 [software]; 37 *Am.Jur. Trials* 1 [baby cribs]; 61 *Am.Jur. Trials* 95 [defending multiple chemical sensitivity claims]; 84 *Am.Jur. Trials* 109 [litigating against firearm industry]; 85 *A.L.R.3d* 727 [chemical drain cleaners]; 94 *A.L.R.3d* 291 [air guns and BB guns]; 97 *A.L.R.3d* 627 [aircraft or parts]; 1 *A.L.R.4th* 251 [flammable clothing]; 2 *A.L.R.4th* 1284 [snowthrowers]; 4 *A.L.R.4th* 13 [farm machinery]; 7 *A.L.R.4th* 155 [glue and other adhesive products]; 12 *A.L.R.4th* 462 [fertilizers, insecticides, fungicides, weedkillers]; 18 *A.L.R.4th* 206 [blasting materials and supplies]; 19 *A.L.R.4th* 326 [firefighting equipment]; 27 *A.L.R.4th* 815 [protective clothing and equipment]; 45 *A.L.R.4th* 751 [construction materials containing formaldehyde]; 59 *A.L.R.4th* 129 [polyvinyl chloride (vinyl plastic) giving off toxic fumes when heated]; 61 *A.L.R.4th* 121 [building and construction lumber]; 3 *A.L.R.5th* 851 [roofs and roofing materials]; 4 *A.L.R.5th* 667 [prefabricated buildings]; 14 *A.L.R.5th* 47 [lighters and lighter fluid]; 36 *A.L.R.5th* 541 [cigarettes and other tobacco products]; 42 *A.L.R.5th* 699 [theatrical equipment and props]; 69 *A.L.R.5th* 137 [paints, stains, and similar products]; 96 *A.L.R.5th* 239 [firearms, ammunition, and chemical weapons]; 117 *A.L.R.5th* 267 [elevators].)

West's Key Number Digest, Products Liability k.35 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 35 *Golden Gate L. Rev.* 429 [modeling suit against automobile and petroleum industries on tobacco tort litigation]; 32 *Pepperdine L. Rev.* 983 [silica litigation]; 95 Am.Jur. Trials 1 [airplane seats]; 99 Am.Jur. Trials 141 [use of discovery in product-related burn injury cases].



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 - 9. Electrical Facilities and Power.
 - aa. Electrical Facilities: No Strict Liability.

6 *Witkin Sum. Cal. Law Torts* § 1446

[§ 1446] Electrical Facilities: No Strict Liability.

In *United Pac. Ins. Co. v. Southern Calif. Edison Co.* (1985) 163 C.A.3d 700, 209 C.R. 819, a large kite, flown in a gusting wind, became entangled in defendant's electric conductors, pulling them so close that an arc occurred, causing emission of molten aluminum; this ignited brush and grass, resulting in a disastrous fire destroying 200 homes and injuring a number of people. In consolidated actions, plaintiffs, homeowners and insurance companies subrogated to the rights of the homeowners, sued defendant power company on theories of negligence and strict products liability, offering evidence that an alternative arrangement of the conductors would have prevented arcing. The jury verdict was for defendant on the negligence issue, and the trial judge (on demurrer and nonsuit) ruled that there was no strict liability. *Held*, affirmed.

(a) *General law.* The issue whether the strict products liability doctrine should apply to facilities used by a public utility for transmission of electrical energy is one of first impression in California, but a number of other state courts have held the doctrine inapplicable. (163 C.A.3d 706.) The opinions point out that the cable is not "packaging" for the current, and is not sold to the consumer but is owned by and is under the control of the utility. Also, until actually delivered, the electricity has not been placed in the stream of commerce. (163 C.A.3d 707.)

(b) *Marketing requirement.* The rule of *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, *supra*, §1429, does not apply unless an article is placed on the market or put in the stream of commerce. (163 C.A.3d 707.) Thus, in *Shook v. Jacuzzi* (1976) 59 C.A.3d 978, 981, 129 C.R. 496, an employee sought recovery from his employer for injuries suffered while operating a defective machine manufactured by the employer for use in its own business. The court held that the strict products liability doctrine did not apply, because the employer did not sell the machine or in any way place it in the stream of commerce. (163 C.A.3d 708.) Defendant could have placed its transmission system in the stream of commerce by sale, lease, or license to another, but did not: "Here there was no transfer whatsoever. Edison simply used its own facilities to transmit its own energy for sale down the line." (163 C.A.3d 708.)

(c) *Policy considerations.* In support of their proposed extension of the products liability doctrine, plaintiffs

stressed the basic objective of spreading the risk of loss. Here, however, defendant was the only user of the product claimed to be defective, and it is a public utility, subject to governmental regulation of its rates; hence, imposition of strict liability will not necessarily pass the burden of paying damages from the utility to its customers. (163 C.A.3d 708.) Nor will the imposition of strict liability provide an economic incentive to improve product safety. The Public Utilities Commission regulates the utility's operation, and if its order did not cover maximum sag in lines (the defect claimed by plaintiffs), the order may be modified. "In the case of a regulated public utility there is less need than in the case of an unregulated manufacturer to motivate safety precautions by the economic sanction of strict liability." (163 C.A.3d 709.)

United Pac. Ins. Co. was followed in *Thibos v. Pacific Gas & Elec. Co.* (1986) 187 C.A.3d 337, 232 C.R. 11. As plaintiff pedestrian stepped off a curb, the city street light blew out, and a car traveling in the darkness struck him. *Held*, defendant public utility could not be sued on strict products liability, for it made use of its own equipment in providing the city with lighting and did not place any product in the stream of commerce. (187 C.A.3d 340.) (See *Fong v. Pacific Gas & Elec. Co.* (1988) 199 C.A.3d 30, 38, 245 C.R. 436 [rejecting contention that electricity had become a product when delivery lines had crossed plaintiffs' property line; test is whether it was metered].)

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 - bb. Delivery of Electricity: Strict Liability.

6 Witkin Sum. Cal. Law Torts § 1447

[§ 1447] Delivery of Electricity: Strict Liability.

(1) *In General.* In *Pierce v. Pacific Gas & Elec. Co.* (1985) 166 C.A.3d 68, 212 C.R. 283, a lightning storm damaged two of defendant's power transformers on plaintiff's property, causing loss of her electricity. One of the replaced transformers had been previously used and was not tested before connecting it to the power line. When connected, it exploded and caused a fire in a ruptured propane gas tank. Plaintiff, attempting to shut off the gas, received an electric shock causing serious injuries. The evidence showed that the transformer malfunction had energized the house wiring, designed for 120 and 240 volts, with approximately 7,000 volts; that the wiring was poorly insulated; and that a ground wire unlawfully connected the electrical system to the propane gas system. Plaintiff went to trial on the issues of negligence, ultrahazardous activity, and strict products liability. The jury verdict on negligence was for defendant, and the trial judge granted a nonsuit on the issue of products liability. *Held*, reversed; plaintiff stated a cause of action for strict liability.

(a) *Pleading defect and theory of trial.* Plaintiff's complaint alleged that her injuries were caused by defective electrical *equipment*, i.e., the transformer. The transformer, however, was not manufactured by defendant and was never placed on the market by defendant; i.e., defendant was a consumer rather than manufacturer of the product, and cannot be held strictly liable for its defects. (166 C.A.3d 76.) Nevertheless, at the hearing on the motion for nonsuit and on plaintiff's motion for a directed verdict, plaintiff made the argument that electricity itself is a product for strict liability purposes. (166 C.A.3d 78, 79, 80.) Hence, in spite of plaintiff's failure to amend her complaint, the issue was properly considered under the doctrine of theory on which the case is tried. (166 C.A.3d 78, 81.)

(b) *No recovery on theory of ultrahazardous activity.* Plaintiff's motion for a directed verdict urged this theory, but it is inapplicable: "The doctrine of ultrahazardous activity focuses not on a product and its defects but upon an activity intentionally undertaken by the defendant, which by its nature is very dangerous . . . However, the doctrine scrutinizes not the accident itself but the activity which led up to the accident--in this case, the maintenance of high-voltage powerlines and transformers." (166 C.A.3d 85.) High voltage power systems are now commonplace and their maintenance cannot be considered an ultrahazardous activity. (166 C.A.3d 85.)

(c) *Recovery possible on strict products liability: electricity is a product.*

(1) Defendant, relying on *Shepard v. Alexian Bros. Hosp.* (1973) 33 C.A.3d 606, 109 C.R. 132, *infra*, §1522, and *Fogo v. Cutter Laboratories* (1977) 68 C.A.3d 744, 137 C.R. 417, *infra*, §1522, contended that furnishing electricity is a service, and that electricity is not a product. But *Shepard* and *Fogo* are distinguishable: Both involved the supply of blood, and applied a legislative policy determination that this was a service. (166 C.A.3d 82.)

(2) Although no California case has yet considered the question, "the courts of other states have had little trouble in concluding that electricity delivered to homes and businesses is a 'product.'" (166 C.A.3d 82, citing non-California cases.) As a Wisconsin case put it: "The distribution might well be a service, but the electricity itself, in the contemplation of the ordinary user, is a consumable product." (166 C.A.3d 82.) And defendant's other principal product--methane gas--provides an analogy: If the gas line delivered explosive hydrogen gas to a customer's range or dryer, "we would have little trouble concluding that gas is a 'product' for tort liability purposes." (166 C.A.3d 82, footnote 7.)

(3) Policy considerations underlying strict liability also call for this result. (a) Proof of negligence requires presentation of evidence of the inner workings of an electrical power system, the technical operation of which is far beyond the knowledge of the average juror; and the expert witnesses are concentrated within the industry itself. (166 C.A.3d 83.) (b) Where a huge surge of injury-causing electricity is traceable to a defective component in the utility's system, imposition of strict liability creates an incentive for utilities to avoid accidents by obtaining safer products. (166 C.A.3d 83.) (c) "[S]trict liability in tort spreads the costs of personal injuries among millions of consumers of electricity instead of imposing those costs upon blameless victims chosen by chance." (166 C.A.3d 83.)

(d) *Limitations and qualifications.*

(1) "We emphasize that our holding is limited to cases where the electricity is actually in the 'stream of commerce,' and expected to be at marketable voltage. In most cases this will mean the electricity must be delivered to the customer's premises, to the point where it is metered . . . We concur in the limitations uniformly adopted by other jurisdictions which have excluded the 'antenna cases' [plaintiff, installing TV antenna, accidentally touches antenna to powerline] and the 'plaintiff-touches-downed-power-line cases' from liability-without-fault because in those cases contact with the power line comes at a point where the electricity is not in the stream of commerce or is not in marketable form." (166 C.A.3d 84.)

(2) "Nor do we have occasion in this case to examine whether a commercial supplier of electricity should be strictly liable for property damage or for any specie of damage caused by delivery of electricity at *less than* marketable voltage, i.e., damage caused by a 'brownout.' Those situations may well involve policy considerations not present in the scenario currently before us." (166 C.A.3d 84.)

(3) "Nothing in our opinion should be construed as limiting" defenses based on plaintiff's failure to exercise due care in maintaining the electrical system (e.g., defective insulation on a power cable, improper grounding of propane gas system, and private well as inadequate ground for electrical system). (166 C.A.3d 84, footnote 11.) (See *Stein v. Southern Calif. Edison Co.* (1992) 7 C.A.4th 565, 571, 8 C.R.2d 907 [meter exploded when electrical arc caused by faulty transformer sent high voltage into it; electricity was product even though it had not actually passed through meter]; 20 *Loyola L.A. L. Rev.* 973 [*Pierce*]; 54 *A.L.R.4th* 667 [failure of power]; 46 *A.L.R.5th* 423 [electric company's liability for nonemployee's injury or death from commencement or resumption of service].)

(2) *Lightning-Generated Electricity.* In *Mancuso v. Southern Calif. Edison Co.* (1991) 232 C.A.3d 88, 283 C.R. 300, a severe lightning stroke hit defendant power company's pole or transformer located adjacent to plaintiff's business. The lightning-generated electricity traversed the service conductor to plaintiff's building, where its extraordinarily high level of energy caused one of the meter panels on the premises to explode. The resulting fire destroyed plaintiff's business. *Held*, plaintiff had a cause of action for negligence in the design of defendant's transmission and distribution

facilities, but not one for products liability. "The excessive voltage that reached plaintiff's premises was generated not by Edison, but by a stroke of lightning, a natural event. Thus, no *product* marketed by Edison was sold or delivered to plaintiff which could form the basis for strict product liability." (232 C.A.3d 105.)

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10. Restatement Rules Applicable to Particular Products.

6 *Witkin Sum. Cal. Law Torts* § 1448

[§ 1448] Restatement Rules Applicable to Particular Products.

Rest.3d, Torts: Products Liability (see supra, §1430) sets forth several liability rules applicable to particular products or product markets:

(1) *Products into Which Components Are Integrated*. One who is engaged in the business of selling or otherwise distributing product components and sells or distributes a component is subject to liability for harm caused by a product into which the component is integrated in either of the following circumstances (*Rest.3d, Torts: Products Liability* §5):

(a) The component is defective in itself, and the defect causes the harm.

(b) The seller or distributor of the component substantially participates in the integration of the component into the design of the product; the integration of the component causes the product to be defective; and the defect in the product causes the harm.

(2) *Prescription Drugs and Medical Devices*. A manufacturer of a prescription drug or medical device who sells or otherwise distributes the drug or device is subject to liability for harm to persons caused by the defect. (*Rest.3d, Torts: Products Liability* §6(a).) For this purpose, a prescription drug or medical device is defective when any of the following circumstances exist at the time of sale or other distribution:

(a) The drug or medical device contains a manufacturing defect. (*Rest.3d, Torts: Products Liability* §6(b)(1); on what constitutes manufacturing defect, see supra, §1435.)

(b) The drug or medical device is not reasonably safe due to defective design. (*Rest.3d, Torts: Products Liability* §6(b)(2); see infra, §1449 et seq.) A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health care providers, knowing of these foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients. (*Rest.3d, Torts: Products Liability* §6(c).)

(c) The drug or medical device is not reasonably safe due to inadequate instructions or warnings. (*Rest.3d, Torts:*

Products Liability §6(b)(3); see *infra*, §1467 et seq.) A prescription drug or medical device is not reasonably safe due to inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risks of harm are not provided to (1) prescribing and other health care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; or (2) the patient when the manufacturer knows or has reason to know that health care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings. (*Rest.3d, Torts: Products Liability* §6(d).)

A retail seller or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device in either of the following circumstances (*Rest.3d, Torts: Products Liability* §6(e)):

(a) At the time of sale or other distribution, the drug or medical device contains a manufacturing defect.

(b) At or before the time of sale or other distribution, the retail seller or other distributor fails to exercise reasonable care and that failure causes harm to persons.

A prescription drug or medical device is defined as one that may be legally sold or otherwise distributed only pursuant to a health care provider's prescription. (*Rest.3d, Torts: Products Liability* §6(a).)

(3) *Food Products.* Generally, liability for harm caused by defects in commercially distributed food products is determined under the same rules as those generally applicable to nonfood products. (*Rest.3d, Torts: Products Liability* §7 and Comment a; on general rules for determining defectiveness of product, see *supra*, §1435.)

A harm-causing ingredient of a food product constitutes a manufacturing defect if a reasonable consumer would not expect the food product to contain that ingredient. (*Rest.3d, Torts: Products Liability* §7 and Comment a; on what constitutes a manufacturing defect generally, see *supra*, §1435.)

(4) *Used Products.* Commercial sellers of used products are subject to liability without fault only under special circumstances. (*Rest.3d, Torts: Products Liability* §8, Comment b.) One who is engaged in the business of selling or otherwise distributing used products and who sells or distributes a defective used product is subject to liability for harm caused by the defect in any of the following circumstances (*Rest.3d, Torts: Products Liability* §8):

(a) The defect arises from the seller's failure to exercise reasonable care.

(b) The defect is a manufacturing defect under *Rest.3d, Torts: Products Liability* §2(a) (see *supra*, §1435) or a defect that may be inferred under *Rest.3d, Torts: Products Liability* §3 (see *supra*, §1435), and the seller's marketing of the product would cause a reasonable person in the position of the buyer to expect the used product to present no greater risk of defect than if the product were new.

(c) The defect is a defect under *Rest.3d, Torts: Products Liability* §2 or §3 (see *supra*, §1435) in a used product remanufactured by the seller or a predecessor in the commercial chain of distribution of the used product.

(d) The defect arises from a used product's noncompliance under *Rest.3d, Torts: Products Liability* §4 (see *supra*, §1435) with a product safety statute or regulation applicable to the used product.

A used product is a product that, prior to the time of sale or other distribution, is commercially sold or otherwise distributed to a buyer not in the commercial chain of distribution and used for some period of time. (*Rest.3d, Torts: Products Liability* §8.)

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6 Witkin Sum. Cal. Law Torts § 1449

[§ 1449] In General.

(1) *General Rule.* A defect in design, such as lack of a safety device, may give rise to strict liability. "[A] product may be equally defective and dangerous if its design subjects protected persons to unreasonable risk as if its manufacture does so." (*Pike v. Frank G. Hough Co.* (1970) 2 C.3d 465, 475, 477, 85 C.R. 629, 467 P.2d 229 ["no rationale has been suggested to justify imposing strict liability with respect to a faultlessly made product ... produced without safety warnings, while refusing to impose strict liability with respect to a product ... produced without safety devices"]); see 63 Am.Jur.2d (1997 ed.), *Products Liability* §546; Dobbs, *The Law of Torts* §360 et seq.; BAJI, No. 9.00.5.)

Many decisions illustrate this basis of strict liability. (See *Jiminez v. Sears, Roebuck & Co.* (1971) 4 C.3d 379, 384, 93 C.R. 769, 482 P.2d 681; *Cronin v. J.B.E. Olson Corp.* (1972) 8 C.3d 121, 129, 104 C.R. 433, 501 P.2d 1153, supra, §1436; *Luque v. McLean* (1972) 8 C.3d 136, 141, 104 C.R. 443, 501 P.2d 1163, infra, §1465; *Ault v. International Harvester Co.* (1974) 13 C.3d 113, 116, 117 C.R. 812, 528 P.2d 1148 [gear box in motor vehicle, using aluminum 380 that allegedly developed metal fatigue and broke during driving; evidence of subsequent change by manufacturer to malleable iron, a stronger material, was admissible despite *Ev.C.* 1151]; *Horn v. General Motors Corp.* (1976) 17 C.3d 359, 366, 131 C.R. 78, 551 P.2d 398 [horn cap easily knocked off in collision and exposing sharp prongs in hub of steering wheel, capable of causing aggravated injury to driver]; *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 434, 143 C.R. 225, 573 P.2d 443, infra, §1455; *Campbell v. General Motors Corp.* (1982) 32 C.3d 112, 117, 184 C.R. 891, 649 P.2d 224, infra, §1459; *Garcia v. Halsett* (1970) 3 C.A.3d 319, 323, 82 C.R. 420 [washing machine not equipped with micro safety switch to shut off power when door opened]; *Balido v. Improved Machinery* (1972) 29 C.A.3d 633, 641, 105 C.R. 890, infra, §1526 [plastic injection molding press with safety devices inadequate to protect operator]; *Culpepper v. Volkswagen of America* (1973) 33 C.A.3d 510, 517, 109 C.R. 110 [tendency of car to roll over under certain conditions]; *Foglio v. Western Auto Supply* (1976) 56 C.A.3d 470, 473, 128 C.R. 545 [rotary power lawnmower with inadequate protective devices to prevent objects from being expelled from it]; *Heap v. General Motors Corp.* (1977) 66 C.A.3d 824, 831, 136 C.R. 304 [lack of positive connection between accelerator pedal and its linkage]; *McGee v. Cessna Aircraft Co.* (1978) 82 C.A.3d 1005, 1012, 147 C.R. 694 [nosewheel structure of aircraft subject to failure in crash]; *Wright v. Stang Mfg. Co.* (1997) 54 C.A.4th 1218, 1228, 63 C.R.2d 422 [strict products liability extends to products that are "perfectly" manufactured but are unsafe because of absence of safety device]; *Lambert v.*

General Motors (1998) 67 C.A.4th 1179, 1182, 79 C.R.2d 657 [finding of negligent design (as opposed to negligence in some other respect) is precluded if jury finds no defect in design].) (On degree to which design protects against "second impact" injuries, see *McGee v. Cessna Aircraft Co.* (1983) 139 C.A.3d 179, 194, 188 C.R. 542; 5 *Golden Gate L. Rev.* 161; 6 *Southwestern U. L. Rev.* 1; on defendant's evidence of industry custom or practice, see 38 *U.C.L.A. L. Rev.* 439; 47 *A.L.R.4th* 621.)

(2) *Distinction: Drugs and Medical Devices.* *Brown v. Superior Court* (1988) 44 C.3d 1049, 245 C.R. 412, 751 P.2d 470, *infra*, §1533, established that drug manufacturers may not be held strictly liable for design defects in prescription drugs; proof of negligence is required. This design defect exception was extended to penile prostheses in *Hufft v. Horowitz* (1992) 4 C.A.4th 8, 23, 5 C.R.2d 377, *infra*, §1533, and breast implants in *Artiglio v. Superior Court* (1994) 22 C.A.4th 1388, 1393, 27 C.R.2d 589.

(3) *Commentary.* Commentary on defective design has been extensive. (See 58 *Cal. L. Rev.* 282; 69 *Cal. L. Rev.* 919 [consideration of knowledge of risks and possible remedies gained after distribution date]; 87 *Cal. L. Rev.* 269 [products liability and deficient software design]; 84 *Harv. L. Rev.* 1023; 86 *Harv. L. Rev.* 923; 34 *Hastings L. J.* 529 [argument that "design defect" theory should be eliminated]; 33 *San Diego L. Rev.* 385 [strict liability of nondesigning manufacturer for design defect]; 19 *Santa Clara L. Rev.* 77 [automobile designed with capacity for excessive speed]; 8 *Southwestern U. L. Rev.* 109 [criticism of uncertainty in law]; 18 *Proof of Facts* 2d 117 [role of human factors]; 33 *Proof of Facts* 2d 447 [rotary power mower]; 59 *Proof of Facts* 3d 73 [automobile design defects]; 41 *A.L.R.3d* 995, 998 [power lawnmower]; 96 *A.L.R.3d* 22 [modern cases determining whether product is defectively designed].)

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(3) *Commentary.* See 55 *Hastings L. J.* 1377 [manufacturer's warning as eliminating duty of safe design].



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 - 2. Restatement 3d.

6 *Witkin Sum. Cal. Law Torts* § 1450

[§ 1450] Restatement 3d.

Under Rest.3d, Torts: Products Liability (see *supra*, §1430), a commercial seller or distributor is liable for harm caused by a product that is "defective in design." (*Rest.3d, Torts: Products Liability* §§1, 2.) A product is defective in design if (1) the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and (2) the omission of the alternative design renders the product not reasonably safe. (*Rest.3d, Torts: Products Liability* §2(b).)

These provisions adopt a reasonableness ("risk-utility balancing") test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, reduce the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain renders the product not reasonably safe. (*Rest.3d, Torts: Products Liability* §2, Comment d.) Consumer expectations do not constitute an independent standard for judging the defectiveness of product designs. (*Rest.3d, Torts: Products Liability* §2, Comment g.)

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6 *Witkin Sum. Cal. Law Torts* § 1451

[§ 1451] All Components Considered.

In *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 144 C.R. 380, 575 P.2d 1162, *infra*, §1542, the jury was instructed that in determining whether a vehicle was defective they should consider "all of the equipment." Plaintiff contended that only the precise malfunctioning component should be considered. *Held*, the instruction was correct. "Product designs do not evolve in a vacuum, but must reflect the realities of the market place, kitchen, highway, and shop. Similarly, a product's components are not developed in isolation, but as part of an integrated and interrelated whole. Recognizing that finished products must incorporate and balance safety, utility, competitive merit, and practicality under a multitude of intended and foreseeable uses, courts have struggled to evolve realistic tests for defective design which give weight to this necessary balancing. Thus, a number of California cases have recognized the need to 'weigh' competent considerations in an overall product design, in order to determine whether the design was 'defective.' " (20 C.3d 746.)

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 - 4. Possibility of Alternative Design.

6 *Witkin Sum. Cal. Law Torts* § 1452

[§ 1452] Possibility of Alternative Design.

In *Baker v. Chrysler Corp.* (1976) 55 C.A.3d 710, 127 C.R. 745, the trial judge gave the following instruction: "A defective design is one which proximately causes or increases foreseeable and unnecessary injury to the user or to another in the course of the intended use of the product if the product can reasonably be designed and produced for its intended purpose without causing or increasing injury to the user or to another." *Held*, the instruction was correct. "Requiring an injured plaintiff who seeks damages against a manufacturer on the basis of strict liability in tort for a defective design to show that alternative designs for the product could reasonably have been developed does not enlarge plaintiff's burden of proof. An injured plaintiff has always had the burden to prove the existence of the defect. The reasonableness of alternative designs, where a design defect is claimed, is part of that burden." (55 C.A.3d 716.) (See *Rest.3d, Torts: Products Liability* §2(b), *supra*, §1450 [product is defective in design when foreseeable risks of harm posed by product could be reduced or avoided by reasonable alternative design and its omission renders product not reasonably safe]; 49 U.C.L.A. L. Rev. 737 [alternative safer design test for drugs and medical devices]; 78 A.L.R.4th 154 [burden of proving feasibility of alternative safe design]; cf. *Bernal v. Richard Wolf Med. Instruments Corp.* (1990) 221 C.A.3d 1326, 1332, 272 C.R. 41, *infra*, §1462 [disagreeing with holding in *Baker* that plaintiff has burden of proving feasibility of reasonable alternate design].)

The burden was met in *Buccery v. General Motors Corp.* (1976) 60 C.A.3d 533, 132 C.R. 605. Plaintiff, driving a pickup truck, was struck in the rear. Although the impact was relatively mild, it caused plaintiff's head to strike the window in the back of the cab of his truck. Federal safety standards required head restraints for passenger vehicles only, but the governing statute states that compliance with standards does not exempt a person from liability under common law. Plaintiff sued the manufacturer and seller of the truck on the theory that the absence of a head restraint was a design defect. *Held*, judgments of nonsuit for defendants reversed. What constitutes a design defect is the subject of some uncertainty, and the cases have not formulated a precise definition. (60 C.A.3d 545, quoting *Self v. General Motors Corp.* (1974) 42 C.A.3d 1, 116 C.R. 575, *infra*, §1454.) However, they teach that "any product so designed that it causes injury when used or misused in a foreseeable fashion is defective if the design feature which caused the injury created a danger which was readily preventable through the employment of existing technology at a cost consonant with the economical use of the product." (60 C.A.3d 547.) Here, plaintiff's expert testified that the occupant of the kind of

truck plaintiff was driving was exposed to the hazard of cranial impact in a low-speed rear-end collision; that head restraints were an acceptable means of eliminating the hazard; and that the cost of their installation was insignificant in relation to the cost of the vehicle. (60 C.A.3d 547.) (Cf. *Nissan Motor Corp. v. Superior Court* (1989) 212 C.A.3d 980, 982, 261 C.R. 80, *infra*, §1539 [disagreeing with holding in *Buccery* that permitted common law action despite manufacturer's compliance with federal standards].)

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[§ 1453] Product Need Not Be Unreasonably Dangerous.

The rule of *Cronin v. J.B.E. Olson Corp.* (1972) 8 C.3d 121, 133, 104 C.R. 433, 501 P.2d 1153, *supra*, §1436, that the product need not be unreasonably dangerous, is not restricted to defects in manufacture; it also applies to design defects. (*Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 425, 426, 143 C.R. 225, 573 P.2d 443, *infra*, §1455; *Foglio v. Western Auto Supply* (1976) 56 C.A.3d 470, 475, 128 C.R. 545; *McGee v. Cessna Aircraft Co.* (1978) 82 C.A.3d 1005, 1015, 147 C.R. 694.)

In *Barker*, the court said: "[O]ur rejection of the use of the 'unreasonably dangerous' terminology in *Cronin* rested in part on a concern that a jury might interpret such an instruction, as the Restatement draftsman had indeed intended, as shielding a defendant from liability so long as the product did not fall below the ordinary consumer's expectations as to the product's safety ... [T]he dangers posed by such a misconception by the jury extend to cases involving design defects as well as to actions involving manufacturing defects: indeed, the danger of confusion is perhaps more pronounced in design cases in which the manufacturer could frequently argue that its product satisfied ordinary consumer expectations since it was identical to other items of the same product line with which the consumer may well have been familiar." (20 C.3d 425.)

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6 Witkin Sum. Cal. Law Torts § 1454

[§ 1454] Dangerous Location.

In *Hyman v. Gordon* (1973) 35 C.A.3d 769, 111 C.R. 262, defendant home builder was sued for damages resulting from burns sustained when gasoline from an overturned can ignited a gas-fired water heater. The theory of the complaint was that the builder had selected a defective location for the heater--the floor of the garage--where a fire of this kind would be likely to occur. *Held*, judgment on nonsuit reversed; whether the location constituted a defective design and the foreseeability of harm resulting from it were jury questions. An article or machine may function safely in one location but not in another; hence, the doctrine of strict products liability "may be applied where, as the proximate result of a defect in the design of a residential building, and installation of an article pursuant thereto, injury results to a human being." (35 C.A.3d 773.)

Self v. General Motors Corp. (1974) 42 C.A.3d 1, 116 C.R. 575, extends the notion of dangerous location to the placement of a fuel tank in the left rear fender section of an automobile. *Held*, in considering the conflicting views of experts, the jury could find the design defective.

(a) Defendant manufacturer contended that the intended use of the car was for normal driving, and that the design could not be considered defective merely because the tank ruptured and caused a fire when a collision occurred. However, "a motor vehicle manufacturer must take into account the possibility of high-speed collisions when it selects a location for the fuel tank in the vehicle." (42 C.A.3d 7.) More generally, "the law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse." (42 C.A.3d 7.)

(b) The "prosecution of a lawsuit is a poor way to design a motor vehicle, for the suit will almost invariably emphasize a single aspect of design to the total exclusion of all others." (42 C.A.3d 7.) However, manufacturers should find ways "to bring home, even in a courtroom, the difficulties and hard choices inherent in designing a complicated product so as to forestall to the fullest extent practicable the multitudinous possibilities of the product's abuse and misuse." (42 C.A.3d 8.)

(c) The abuse or misuse may be such that the defective design will be immaterial to the injuries suffered. Thus,

defendant argued that the violence of the collision was so great that the fuel tank would have caught fire even if located underneath the body (the "safe" place urged by plaintiff). On this issue of superseding cause, the conflicting expert opinions raised a question of fact properly submitted to the jury. (42 C.A.3d 9.)

In *DeLeon v. Commercial Mfg. & Supply Co.* (1983) 148 C.A.3d 336, 195 C.R. 867, the court, reversing a summary judgment for defendant, stated the issue as follows: "Is custom-made factory equipment which is safe to use in some locations 'defective' because in a particular location its use may bring the operator in contact with an adjacent rotating line shaft built and maintained by the plant owners?" (148 C.A.3d 340.)

(a) Plaintiff, an employee of a cannery, while cleaning a holding bin in the canning plant, stood on a conveyor belt, and her arm was severed by an overhead line shaft that had nothing to do with the operation of the bin. The bin had been specially manufactured by defendant to meet the requirements of the canning company, and the bin itself was not defective. The court examined the evidence in the light of the case law, and concluded that there were triable issues of fact: (a) whether the bin's design presented an excessive preventable danger in its intended use because of its proximity to the line shaft; (b) whether it was foreseeable that someone would climb onto the belt to get next to the bin for hosing it down. (148 C.A.3d 344.)

(b) "[I]n combination with the bin--the need to clean the bin, steps nearby, a conveyor belt which when stopped would become a temporary higher platform for cleaning the bin--the rotating line shaft became a danger. At that time the entire system became a source of danger to the worker. Irrespective of the significance in some cases of the nature and extent of the 'product'--whether the bin or the bin and its surrounding--the principal issue of fact presented below was that of responsibility for design, including location." (148 C.A.3d 346.)

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6 *Witkin Sum. Cal. Law Torts* § 1455

[§ 1455] Consumer Expectations and Risk-Benefit Tests: In General.

The nature and tests of a design defect were explored in *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443. Plaintiff, an employee of a contractor engaged in construction, was injured while operating a high-lift loader manufactured by defendant L Co. He brought this action on the theory of defective design, and produced expert testimony about the machine's instability due to its relatively narrow base, the absence of safety devices such as seat belts, the absence of an automatic locking device on the leveling lever, and the improper placement of the leveling lever. Defendant responded with evidence that the machine was neither unstable nor lacking in necessary safety devices; that plaintiff had used it on steep terrain for which it was unsuited, and for which a crane should have been employed; and that the probable cause of the accident was plaintiff's inexperience and improper handling of the machine. The judge instructed the jury in terms of the Second Restatement "unreasonably dangerous" test, and the verdict was for defendant. *Held*, reversed; the instruction was reversible error (see *supra*, §1453).

(a) *Defining "defective design."* The contention of amici curiae for plaintiff, that no definition of "defect" should be given to the jury, is unacceptable. The term "is neither self-defining nor susceptible to a single definition applicable in all contexts." (20 C.3d 427.) And commentators have pointed out that an instruction that requires the plaintiff to prove a product defect without explaining its meaning in a particular context may be misleading. (20 C.3d 428.)

(b) *Criteria for Ascertaining Design Defect.* California courts have developed two alternative criteria for ascertaining whether there is a design defect:

(1) The product may be found defective if the plaintiff demonstrates that it failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. This initial standard is somewhat similar to the U.C.C. warranty of fitness and merchantability, and "reflects the warranty heritage upon which California product liability doctrine in part rests." (20 C.3d 429.) Under this standard, the plaintiff may be able to demonstrate defectiveness by circumstantial evidence, even when the accident itself precludes identification of the specific defect. (20 C.3d 430.)

(2) These expectations are not the exclusive yardstick, for in many situations the consumer would not know what to

expect, because he would have no idea how safe the product could be made. California decisions have made clear, through varying linguistic formulations, that the product may be found defective in design even if it satisfies ordinary consumer expectations, if the jury through hindsight finds that "the risk of danger inherent in the challenged design outweighs the benefits of such design." (20 C.3d 430.)

(c) *Factors jury may consider under second criterion ("risk-benefit").* In evaluating the adequacy of a product's design under this standard, "a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." (20 C.3d 431.)

(d) *Allocation of burden of proof.* The authorities have not devoted much attention to this subject but it is important because one of the principal purposes of the strict liability doctrine is to relieve the plaintiff of many evidentiary burdens inherent in a negligence cause of action. Because most of the evidentiary matters relevant to adequacy of design under the "risk-benefit" standard are similar to issues in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer, "once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective." This burden is one affecting the burden of proof, not simply that of producing evidence. (20 C.3d 431.)

(e) *Test of negligence is distinguished.* Amici curiae for plaintiff contended that an instruction directing the jury to weigh a number of factors introduces an element of negligence into the determination of design defect, and that any consideration of "reasonableness" or "balancing" is contrary to *Cronin v. J.B.E. Olson Corp.* (1972) 8 C.3d 121, 133, 104 C.R. 433, 501 P.2d 1153, supra, §1436. This is unsound. In many design defect cases, it is impossible to eliminate balancing or weighing of risks; and an instruction that advises the jury that it may evaluate the adequacy of a design by weighing its benefits against the risk of danger inherent in a design is not the equivalent of an instruction requiring a determination whether the manufacturer was negligent in designing the product; the jury's focus in the products liability case is directed at the condition of the product, not the reasonableness of the manufacturer's conduct. (20 C.3d 434.) "Thus, the fact that the manufacturer took reasonable precautions in an attempt to design a safe product or otherwise acted as a reasonably prudent manufacturer would have under the circumstances, while perhaps absolving the manufacturer of liability under a negligence theory, will not preclude the imposition of liability under strict liability principles if, upon hindsight, the trier of fact concludes that the product's design is unsafe to consumers, users, or bystanders." (20 C.3d 434.)

(f) *Proper instruction.* The judge may instruct the jury "that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design." (20 C.3d 435.) (See 1 Proof of Facts 3d 363 [unfeasibility of alternative design proposed by plaintiff]; 67 Cal. L. Rev. 435, 440, 448 et seq.; 8 Golden Gate L. Rev. 263; 7 Southwestern U. L. Rev. 823 [critical review of consumer expectations test]; 96 A.L.R.3d 22 [modern cases determining whether product is defectively designed]; 29 A.L.R.5th 534 [admissibility of government fact-finding evidence in products liability actions]; BAJI, No. 9.00.5; CACI, Nos. 1203, 1204.)

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See *Bullock v. Philip Morris USA* (2008) 159 C.A.4th 655, 675, 71 C.R.3d 775 [finding that ordinary consumer was not aware of dangers of cigarette smoking before date of preemption provision in Federal Cigarette Labeling and Advertising Act was supported by evidence of cigarette manufacturer's extensive efforts to mislead public about adverse health effects of smoking and create false controversy whether smoking caused lung cancer and other diseases, and by

evidence that smokers are particularly vulnerable to such manipulation].



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aa. Design Merits Are Irrelevant in Consumer Expectations Analysis.

6 *Witkin Sum. Cal. Law Torts* § 1456

[§ 1456] Design Merits Are Irrelevant in Consumer Expectations Analysis.

In *Sparks v. Owens-Illinois* (1995) 32 C.A.4th 461, 38 C.R.2d 739, plaintiff ship worker suffered injuries resulting from exposure to asbestos-containing insulation manufactured by defendant. Evidence was developed at trial that ordinary users of defendant's product during the period in issue did not expect to develop lung disease from breathing dust from the product. *Held*, jury verdict for plaintiff affirmed, applying the consumer expectations test.

(a) The consumer expectations test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and a product may thus be defective under the test regardless of expert opinion about the merits of its design. If the facts permit that conclusion, and if the violation of minimum safety assumptions resulted from the product's design, a finding of defect is warranted without further proof. The plaintiff need not show that there was a safer alternative design. Also, expert or other evidence of the relative risks and benefits of the design is irrelevant and inadmissible. (32 C.A.4th 473.)

(b) Application of the consumer expectations test is warranted here, because the characteristics and performance of the product were not beyond the understanding or common experience of those who used it. (32 C.A.4th 474, distinguishing *Soule v. General Motors Corp.* (1994) 8 C.4th 548, 566, 34 C.R. 2d 607, 882 P.2d 298, which involved complicated claim, requiring expert testimony, that defective design of automobile wheel assembly and front floorboard enhanced injuries sustained in collision.) (See *McCabe v. American Honda Motor Co.* (2002) 100 C.A.4th 1111, 1123, 1126, 123 C.R.2d 303 [air bag design defect case; main question under consumer expectations test is whether product, in context of facts and circumstances of its failure, is one about which ordinary consumer has minimum safety expectations; under risks-benefits test, defendant has burden to prove benefits outweigh risks, even if plaintiff did not raise that theory].)

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See *Stephen v. Ford Motor Co.* (2005) 134 C.A.4th 1363, 1371, footnote 6, 37 C.R.3d 9, [consumer expectations test applies only where defect can be determined by common knowledge regarding minimum safety expectations, not where expert must balance benefits of design against risk of danger]; *Buell-Wilson v. Ford Motor Co.* (2006) 141 C.A.4th 525,

543, 46 C.R.3d 147 [comparative data relating to SUV rollover rates was inadmissible in action alleging that design defect caused rollover accident; evidence that manufacturer met industry standards was irrelevant to issue whether SUV performed as ordinary consumer would expect, and evidence was misleading, because statistics included only fatal accidents, included all vehicle types, did not track cause of rollovers, and did not include most populous states].



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bb. Warning Is Relevant in Risk-Benefit Analysis.

6 *Witkin Sum. Cal. Law Torts* § 1457

[§ 1457] Warning Is Relevant in Risk-Benefit Analysis.

In *Hansen v. Sunnyside Products* (1997) 55 C.A.4th 1497, 65 C.R.2d 266, plaintiff was injured when a household cleaner containing hydrofluoric acid got on her hand. The product contained warnings that complied with the labeling guide of the Consumer Products Safety Commission. Nevertheless, although the jury returned a verdict for defendant supplier, the trial judge entered judgment notwithstanding the verdict for plaintiff on the ground that the warnings could not be considered in determining whether there was a design defect under the risk-benefit standard. *Held*, reversed.

(a) Plaintiff argued that the existence of a safer formula for the cleaner led to the conclusion that the product was defective in design. This is not the case, because many factors, such as the product's dangerousness, are also relevant when applying the risk-benefit standard. The ultimate question is whether the design embodies "excessive preventable danger," and in answering this query, any warnings are relevant. (55 C.A.4th 1512.)

(b) One of the risk-benefit factors is the likelihood that the danger will occur. Clearly, the answer to the question is directly related to warnings. The situation is analogous to that involved in *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 144 C.R. 380, 575 P.2d 1162, *infra*, §1542, which held that defective design is to be determined with respect to the product as a whole. Although *Daly* involved equipment, its reasoning, by extension, applies to warnings as well. (55 C.A.4th 1513.)

(c) Plaintiff further argued that considering warnings in determining whether a product is defective will require that a product, to be defective, must be "unreasonably dangerous," a requirement rejected in California (see *supra*, §1436). However, once the plaintiff has shown that a product's design caused the injury, the burden shifts to the defendant to show that, considering the risk-benefit factors, a product is not defective in design. Also, considering warnings does not permit the defendant to escape liability merely because of low consumer expectation. Instead, it potentially permits the defendant to escape liability because of a low likelihood of harm. Thus, the two main dangers in requiring a product to be unreasonably dangerous to be defective are avoided when warnings are considered. (55 C.A.4th 1514.)

(d) The test adopted here does not, as suggested by plaintiff, create a negligence standard that is improper in a strict

liability context. Instead, in a strict liability case, the focus remains on the product, while in a negligence action, it is on the conduct of the manufacturer. (55 C.A.4th 1515, citing *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443, supra, §1455.)

(e) Contrary to plaintiff's contention, considering warnings when applying the risk-benefit test does not amount to an improper merger of the design defect and the failure-to-warn theories of strict liability. Although there is some overlap, knowledge is a component of the latter theory, but not of the former. For example, strict liability for failure to warn does not subject defendants to liability for flaws in their products that they have not, and could not have, discovered. Moreover, a manufacturer's use of a warning may suffice to avoid liability under a failure to warn theory, but the manufacturer may still be found liable under the design defect risk-benefit analysis after the various factors have been balanced. (55 C.A.4th 1517.)

(f) "Finally, in determining whether product warnings may be considered in a risk-benefit calculation, we are mindful of the practical consequences of our conclusion. We do not think that the risk to the consumer of the design of many household products can be rationally evaluated without considering the product's warnings. Thus, for example, what is the risk of the design of a power saw, or other power tools or equipment, without considering the product's directions and warnings? We dare say that the risk would be astronomically, and irrationally, high. The same could be said about common garden pesticides, or even the household microwave oven. In our view, were we to ask jurors to evaluate the risks of the design of many household products without considering their directions or warnings, the practical result would be the withdrawal from the market of many useful products that are dangerous in the abstract but safe when used as directed." (55 C.A.4th 1519.)

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cc. Propriety of Instruction on Consumer Expectations Where Product Is Not Readily Available.

6 *Witkin Sum. Cal. Law Torts* § 1458

[§ 1458] Propriety of Instruction on Consumer Expectations Where Product Is Not Readily Available.

Akers v. Kelley Co. (1985) 173 C.A.3d 633, 219 C.R. 513, examines conflicting opinions of Courts of Appeal on the propriety of an instruction on the "consumer expectation" test where the product is "one not readily available on a supermarket shelf." (173 C.A.3d 649.)

(a) In *Lunghi v. Clark Equipment Co.* (1984) 153 C.A.3d 485, 497, 200 C.R. 387, the court said that "an ordinary consumer would not know what to expect from a piece of heavy machinery like the Bobcat loader"; *Bates v. John Deere Co.* (1983) 148 C.A.3d 40, 52, 195 C.R. 637, upheld an instruction on both tests where the product was a truck fuel tank; and *Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 174 C.R. 348, upheld an instruction mentioning only the consumer expectation test where the product was an automobile with a badly placed fuel tank. (173 C.A.3d 650.)

(b) The difference of opinion seems to stem from language in *Campbell v. General Motors Corp.* (1982) 32 C.3d 112, 184 C.R. 891, 649 P.2d 224, *infra*, §1459, which the *Lunghi* and *Bates* courts read to say that the consumer expectation test cannot be applied where the product is beyond the ken of the ordinary person on the street. (173 C.A.3d 650.) "[W]e read it to say simply that the plaintiff in that case was entitled to establish, and did establish, a *prima facie* case of failure to meet 'consumer expectations' without the benefit of expert testimony, because public transportation is a matter of common experience." (173 C.A.3d 650.)

(c) In this case, plaintiff, a loading dock supervisor at a freight terminal, was injured when a dockboard (an adjustable truck-loading platform) flew apart. The consumer expectation test is entirely appropriate. "There are certain kinds of accidents--*even where fairly complex machinery is involved*--which are so bizarre that the average juror, upon hearing the particulars, might reasonably think: 'Whatever the user may have expected from that contraption, it certainly wasn't that.' " (173 C.A.3d 651.)

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dd. Establishing Prima Facie Case.

6 *Witkin Sum. Cal. Law Torts* § 1459

[§ 1459] Establishing Prima Facie Case.

Campbell v. General Motors Corp. (1982) 32 C.3d 112, 184 C.R. 891, 649 P.2d 224, answers the question "what quantum of evidence must the plaintiff produce to establish a prima facie case of design defect under *Barker v. Lull Engineering Co.*?"

(a) *Tests and burden.* *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443, supra, §1455, established two alternative tests:

(1) The product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. This is a warranty analysis, based on the theory of *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, supra, §1429, i.e., that the manufacturer who places a product on the market impliedly represents that it is safe for the tasks it was designed to accomplish. (32 C.3d 118.)

(2) This case involves an evaluation of the design itself. Even if it satisfies ordinary consumer expectations, the jury finds that the risk of danger inherent in the design outweighs its benefits. (32 C.3d 118.) Under this second prong, the plaintiff must establish a prima facie case of causation; but then the *burden of proof* shifts to the defendant to persuade the trier of fact that the product is not defective. (32 C.3d 119)

(b) *Situations in which test is applied.* The plaintiff may show (1) an alleged malfunction of the product, as in *Cronin v. J.B.E. Olson Corp.* (1972) 8 C.3d 121, 126, 104 C.R. 433, 501 P.2d 1153, supra, §1436, and *Greenman*; (2) the absence of adequate warnings or directions, as in *Cavers v. Cushman Motor Sales* (1979) 95 C.A.3d 338, 349, 350, 157 C.R. 142, infra, §1468, and *Midgley v. S.S. Kresge Co.* (1976) 55 C.A.3d 67, 71, 127 C.R. 217, infra, §1475; or (3) the manufacturer's failure to provide a particular safety device, as in *Henderson v. Harnischfeger Corp.* (1974) 12 C.3d 663, 117 C.R. 1, 527 P.2d 353, infra, §1466, and *Luque v. McLean* (1972) 8 C.3d 136, 104 C.R. 443, 501 P.2d 1163, infra, §1465. (32 C.3d 120.)

(c) *Facts of Campbell.* Plaintiff, an elderly woman, was riding in a city bus manufactured by defendant General

Motors. The driver made a sharp turn, and plaintiff was propelled from her seat to the floor, suffering severe injuries. The allegation of defective design was that, where plaintiff sat--on the first forward-facing seat on the right side of the bus--there was no horizontal metal "grab bar" (that seat did not face the rear of another forward-facing seat). *Held*, nonsuit reversed.

(d) *Analysis and holding.* This type of claim presents a factual issue. (32 C.3d 120.) The plaintiff is required only to show that an inference may reasonably be drawn in his or her favor; the plaintiff need not show that it is the only one, and need not disprove every possible alternative explanation. (32 C.3d 121.) And whether an inference should be drawn may be properly influenced by a policy that makes the action favored or disfavored. (32 C.3d 122.) Here, a jury could reasonably infer from the evidence that a handrail or guardrail within her reach would have prevented the accident. (32 C.3d 122.) Expert testimony was not required: the need for a "grab bar" or pole to steady oneself when a bus turns a sharp corner is within the common experience of lay jurors. (32 C.3d 124, 125.)

(e) *Alternative holding: recovery under first prong of Barker.* Plaintiff testified about the accident (her use of the product), and also introduced photographic evidence of the design features of the bus; this was sufficient to establish the objective conditions of the product. The other essential aspect of this test involves the jurors' own sense of whether the product meets ordinary expectations of safety; because public transportation is a matter of common experience, no expert testimony was required; i.e., the thrust of this test is that the product must meet the safety expectations of the general public as represented by the ordinary consumer, not the industry or a government agency. (32 C.3d 126, 127.)

(f) *Conclusion.* "[I]f the product is one within the common experience of ordinary consumers, it is generally sufficient if the plaintiff provides evidence concerning (1) his or her use of the product; (2) the circumstances surrounding the injury; and (3) the objective features of the product which are relevant to an evaluation of its safety." (32 C.3d 127.) (See *McGee v. Cessna Aircraft Co.* (1983) 139 C.A.3d 179, 187, 188, 188 C.R. 542 [reviewing *Campbell* and applying its factors]; *Moreno v. Fey Mfg. Corp.* (1983) 149 C.A.3d 23, 25, 196 C.R. 487; *Pietrone v. American Honda Motor Co.* (1987) 189 C.A.3d 1057, 1061, 235 C.R. 137, *infra*, §1461; *Bernal v. Richard Wolf Med. Instruments Corp.* (1990) 221 C.A.3d 1326, 1061, 272 C.R. 41, *infra*, §1462; 35 A.L.R.4th 1050 [equipment and devices directly relating to passengers' standing or seating safety in land carriers].)

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aa. Breast Implants.

6 *Witkin Sum. Cal. Law Torts* § 1460

[§ 1460] Breast Implants.

Rosburg v. Minnesota Mining & Mfg. Co. (1986) 181 C.A.3d 726, 226 C.R. 299, applied both tests in rejecting strict liability. Plaintiff, in 1976, had a plastic surgeon install inflatable breast implants manufactured by defendant, and in 1982, the right implant spontaneously deflated.

(a) Where, as here, the product is not one commonly encountered (sale of implants is restricted to licensed physicians), expert evidence is necessary as to the ordinary expectations of product performance. The expert testimony supported the trial judge's finding that the implants were not expected to last a lifetime and that an ordinary consumer should expect a possibility of eventual deflation. (*181 C.A.3d 726.*)

(b) The trial judge properly found that the benefits of the implant outweighed the risk of injury due to deflation. The evidence showed that there was no better material available for the purpose. (*181 C.A.3d 734.*) Plaintiff's contention that the judge erroneously applied the negligence "state of the art" defense is unsound; the judge was merely indicating that no superior design options were available in 1976. "Unlike evidence of industry custom which is improperly offered to negate the existence of a defect, evidence that a product is designed in accordance with the existing state of the art is relevant in a risk-benefit analysis." (*181 C.A.3d 735.*)

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bb. Motorcycles.

6 *Witkin Sum. Cal. Law Torts* § 1461

[§ 1461] Motorcycles.

In *Pietrone v. American Honda Motor Co.* (1987) 189 C.A.3d 1057, 235 C.R. 137, plaintiff, riding as a passenger on her husband's Honda motorcycle, was injured when he had a collision with another vehicle and her leg came into contact with the exposed spokes of the rotating rear wheel of the Honda. Plaintiff's counsel offered this evidence in support of his theory that she met her burden of proof of a prima facie case of a design defect as a proximate cause of her injury. Defendant's counsel, pointing out that plaintiff had offered no expert testimony of an alternative design that could have prevented the unusual type of injury, contended that no prima facie case had been made, and presented no evidence in its defense. *Held*, verdict and judgment for plaintiff affirmed.

(a) The evidence conclusively established a design defect as the proximate cause of the injury. Alternative designs were so self-evident as to obviate the need for testimony, expert or otherwise, on this subject. (189 C.A.3d 1061.)

(b) Because defendant, for unknown tactical reasons, made no attempt to show that the risk of danger in the particular design selected for this machine was outweighed by the benefits of the design, it failed to meet its burden of proof. "Of course, had it sought to do so its efforts might well have proven successful for one can readily postulate potential economic, aesthetic and engineering reasons for the design selected." (189 C.A.3d 1062.)

One justice concurred under the compulsion of *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443, *supra*, §1455, but denounced the *Barker* rule as giving no consideration to the voluntary choice by a plaintiff to use a product that by its very nature is dangerous but highly utilitarian. (189 C.A.3d 1063.) Another justice dissented at length, arguing that the *Barker* rule was misapplied, and that "[t]he pragmatic effect of the manner in which the present case was tried amounts to an inappropriate interjection into a strict liability lawsuit of the concept of *res ipsa loquitur*." (189 C.A.3d 1069.)

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cc. Arthroscopic Scissors.

6 *Witkin Sum. Cal. Law Torts* § 1462

[§ 1462] Arthroscopic Scissors.

In *Bernal v. Richard Wolf Med. Instruments Corp.* (1990) 221 C.A.3d 1326, 272 C.R. 41, arthroscopic scissors manufactured by defendant broke during plaintiff's knee operation, causing severe injury. Plaintiff's experts testified that the break was due to "stress corrosion cracking" resulting from a combination of design considerations. The experts did not testify about a "defect" as such or to the availability of a reasonable alternative design. With respect to the risk-benefit test of design defect, the trial judge instructed that the burden was on plaintiff to show that a reasonable alternative was available. *Held*, judgment for defendant reversed; the instruction was prejudicial error.

(a) The risk-benefit test, as stated in *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443, *supra*, §1455, was designed to aid injured victims by relieving them of the burden of presenting evidence on technical matters that are peculiarly within the manufacturer's knowledge. Hence, once plaintiff presented a *prima facie* case that the design of the scissors was a proximate cause of their failure, defendant had the burden of showing that, on balance, the benefits of the design as a whole outweighed the danger inherent in the design considering, among other factors, the feasibility of a safer alternate design. (221 C.A.3d 1332, disagreeing with *Baker v. Chrysler Corp.* (1976) 55 C.A.3d 710, 127 C.R. 745, *supra*, §1452, and *Garcia v. Joseph Vince Co.* (1978) 84 C.A.3d 868, 148 C.R. 843, *infra*, §1528, both of which placed the burden of proving alternate design on the plaintiff.)

(b) This ruling does not render defendant an insurer of its surgical instruments. "Under the risk-benefit test, the defendant has the burden, and thus the opportunity, to highlight all of the benefits of its product's design before the jury. ... Among other things, the defense may show any alternate design would entail unreasonable costs, be uneconomic or impractical, interfere with the product's performance, or create other or increased risks. The case before us is a prime example. Here, the defense produced strong evidence the surgical instrument was made with the best steel available and was reasonably safe for its intended use, but had inherent dangers no human skill or knowledge has yet been able to eliminate. But for the erroneous burden of proof instruction, we would not hesitate to affirm the jury's verdict on this record." (221 C.A.3d 1334.)

(c) Defendant argued that *Baker* still requires the plaintiff to always prove a "defect," whether by alternate design

or not, and that plaintiff's experts failed to testify to a defect. "The short answer is this: Accepting the premise, for the moment, that plaintiff has the burden to prove a 'defect,' the Supreme Court in *Barker* solved the riddle of defining 'defect' by articulating its two-pronged test and holding once plaintiff proves the design caused the injury, the defect has been proven." (221 C.A.3d 1334.)

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6 *Witkin Sum. Cal. Law Torts* § 1463

[§ 1463] Firearms and Ammunition.

In products liability actions involving firearms and ammunition, former C.C. 1714.4 limited the second prong of *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443, *supra*, §1455.

Former C.C. 1714.4(a) provided that "no firearm or ammunition *shall be deemed defective in design* on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged."

Former C.C. 1714.4(c) provided that the section "shall not affect a products liability cause of action based upon the improper selection of design alternatives." (See 97 *Harv. L. Rev.* 1912; 108 *Harv. L. Rev.* 1679 [absolute liability for ammunition manufacturers]; 15 *Pacific L. J.* 694; 27 *Santa Clara L. Rev.* 607 [argument that C.C. 1714.4 should not apply to "Saturday night specials"]; 88 *A.L.R.5th* 1 [firearm or ammunition manufacturer's or seller's liability for injuries from use of gun in commission of crime]; on design alternatives, see *supra*, §1452.)

In *Merrill v. Navegar* (2001) 26 C.4th 465, 110 C.R.2d 370, 28 P.3d 116, decedent, holding a grudge against a law firm, purchased several semiautomatic assault weapons and went to the firm's high-rise business location. Once there, he killed eight people and wounded six, before taking his own life. Plaintiffs, the survivors and the representative of some of the victims, sued defendant, the manufacturer of two of the three weapons used. Because the complaint was for *common law negligence*, plaintiffs contended that former C.C. 1714.4, which by its terms applies to *products liability* actions, was inapplicable. On the ground that California's common law does not impose a duty on gun manufacturers not to manufacture or sell assault weapons, the trial judge granted defendant's motion for summary judgment. Rejecting defendant's reliance on former C.C. 1714.4 (because plaintiffs were not asserting a products liability theory), the Court of Appeal reversed. *Held*, judgment of the Court of Appeal reversed; former C.C. 1714.4 barred plaintiffs' claim.

(a) A plaintiff may seek recovery in a products liability case either on the theory of strict liability in tort or on the theory of negligence. To recover from a manufacturer, a plaintiff, under either theory, must prove that a defect caused injury. Under a negligence theory, a plaintiff must also prove an additional element, i.e., that the defect was due to the

negligence of the defendant. (26 C.4th 478.)

(b) Whether a products liability claim is based on defective design of a product or is based on negligence in the design of a product, the question is whether the benefits of the challenged design outweigh the risks of danger inherent in the design (risk-benefit test). With respect to a negligence theory, even if a manufacturer reasonably warns about the risk inherent in a particular design, it can still be negligent, because a reasonable person might conclude that the foreseeable harm of the product as designed outweighs its utility. (26 C.4th 479.) "Under these principles, we reject plaintiffs' argument that section 1714.4 is inapplicable because this case 'is not a product[s] liability action.' " (26 C.4th 480.)

(c) Plaintiffs claimed that they sought to hold defendant liable for "negligent conduct" and that they made no assertion that defendant's liability should be based on the fact that the weapon's risks outweighed its benefits. However, the record indicates otherwise. In their brief, plaintiffs' asserted that defendant was liable because it designed and widely distributed a weapon uniquely suited for mass killing and lacking legitimate civilian uses. This and other allegations squarely fit within the risk-benefit test that applies in a products liability action under both negligence and strict liability theories. (26 C.4th 480.) "Thus, despite the contrary view of plaintiffs and the dissent ... , this is a products liability action based on negligence, which asserts that the TEC-9/DC9 was defective in design because the risks of making it available to the general public outweighed the benefits of that conduct, and that defendants knew or should have known this fact. Plaintiffs may not avoid this conclusion, or the legislative policy that section 1714.4 reflects, simply by declining to use the word 'defect' or 'defective.' " (26 C.4th 481.)

(d) Former C.C. 1714.4 was enacted as a response to the argument of victims of handguns that, because the dangers posed by handguns outweighed any social benefits, these weapons were inherently defective products. And the Senate analysis of the statute shows that it was enacted to protect manufacturers and sellers of firearms from being held liable in tort for selling firearms used to cause injury or death. Thus, it would obviously frustrate this purpose to permit plaintiffs to proceed with their claim that defendant was liable on the ground that the risks of selling the weapons in question outweighed the benefits. (26 C.4th 482.) (See 115 Harv. L. Rev. 717 [Merrill v. Navegar].)

Former C.C. 1714.4 was repealed in 2002. However, the authors of the repealing legislation stated that, in repealing the section, the Legislature did not intend to create a cause of action against manufacturers of firearms and ammunition based solely on the fact that the firearm or ammunition was capable of causing serious injury or death; but that the Legislature did intend to preserve those causes of action against manufacturers and sellers of firearms and ammunition, including but not limited to negligence actions, product liability actions alleging manufacturing, marketing, or design defects, public and private nuisance actions, and statutorily based actions, which would exist had former C.C. 1714.4 not been enacted. (Letters of legislative intent, reprinted in 2001-2002 Assembly Journal, pp. 8232, 8233, and in West's Annotated California Codes as Historical and Statutory Notes to former C.C. 1714.4; see 34 McGeorge L. Rev. 339 [effect of repeal of C.C. 1714.4].)

C.C. 1714 (supra, §833), as amended in 2002, provides: "The design, distribution, or marketing of firearms or ammunition is not exempt from the duty to use ordinary care and skill."

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ee. Other Decisions.

6 Witkin Sum. Cal. Law Torts § 1464

[§ 1464] Other Decisions.

The criteria of *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443, supra, §1455, and its requirements of proof, have been the subject of a number of later decisions. (See *Soule v. General Motors Corp.* (1994) 8 C.4th 548, 570, 34 C.R.2d 607, 882 P.2d 298 [declining to overrule consumer expectations prong of *Barker*, but holding that jury should not have been instructed on ordinary consumer expectations because plaintiff's theory was one of technical and mechanical detail]; *Campbell v. General Motors Corp.* (1982) 32 C.3d 112, 120, 184 C.R. 891, 649 P.2d 224, supra, §1459; *McGee v. Cessna Aircraft Co.* (1978) 82 C.A.3d 1005, 1014, 147 C.R. 694; *Titus v. Bethlehem Steel Corp.* (1979) 91 C.A.3d 372, 379, 154 C.R. 122; *Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 801, 803, 174 C.R. 348, infra, §1593 [because *Barker* standards are alternative, it is proper to instruct solely on consumer expectation standard; also, jury should not be instructed to consider industry custom or practice]; *Lunghi v. Clark Equipment Co.* (1984) 153 C.A.3d 485, 497, 200 C.R. 387; *Bracisco v. Beech Aircraft Corp.* (1984) 159 C.A.3d 1101, 1106, 206 C.R. 431 [instruction imposing more onerous burden of proof on plaintiff than required was prejudicial error]; *Akers v. Kelley Co.* (1985) 173 C.A.3d 633, 645, 219 C.R. 513, supra, §1458; *Williams v. Beechnut Nutrition Corp.* (1986) 185 C.A.3d 135, 139, 229 C.R. 605, 4 Cal. Proc. (4th), Pleading, §588; *Neal v. Montgomery Elevator Co.* (1992) 7 C.A.4th 1194, 1199, 9 C.R.2d 497 [where burden of proof instructions for design defect as set out in *Bernal v. Richard Wolf Med. Instruments Corp.* (1990) 221 C.A.3d 1326, 272 C.R. 41, supra, §1462, were given, it was not necessary to repeat them in detail in special verdict form]; *Benson v. Honda Motor Co., Ltd.* (1994) 26 C.A.4th 1337, 1344, 1345, 32 C.R.2d 322 [in action alleging design defect, safety history of product, including presence or absence of prior accidents, is relevant]; *Sparks v. Owens-Illinois* (1995) 32 C.A.4th 461, 472, 38 C.R.2d 739, supra, §1456]; *Bresnahan v. Chrysler Corp.* (1995) 32 C.A.4th 1559, 1569, 38 C.R.2d 446 [consumer expectations test was applicable to automobile air bag even though consumers were unfamiliar with technology; ordinary consumer would nevertheless be capable of forming expectation whether design satisfied minimal safety expectations]; *Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 C.A.4th 1529, 1536, 40 C.R.2d 22 ["state of the art" evidence was properly excluded in asbestos exposure case]; *Hansen v. Sunnyside Products* (1997) 55 C.A.4th 1497, 1512, 65 C.R.2d 266, supra, §1457; *Arena v. Owens Corning Fiberglas Corp.* (1998) 63 C.A.4th 1178, 1187, 74 C.R.2d 580 [miner's subjective plan of blasting raw asbestos out of ground, pounding and separating fibers, and marketing them for various uses, constitutes

design]; *Aetna Cas. & Surety Co. v. Farmers Bros. Co.* (1998) 65 C.A.4th 574, 578, 76 C.R.2d 587 [in products liability design defect case, jury was free to accept testimony of plaintiff's expert that heating element of coffeemaker reached sufficient number of degrees to ignite plastic handle, while rejecting testimony of defense expert that heat was not sufficiently high]; *Pruitt v. General Motors Corp.* (1999) 72 C.A.4th 1480, 1483, 86 C.R.2d 4 [because minimum safety standards for airbags were not within common knowledge of jury, it was not error for trial judge to reject instruction on consumer expectations test in case where airbag allegedly deployed after no more than mild collision]; *Morson v. Superior Court* (2001) 90 C.A.4th 775, 784, 109 C.R.2d 343 [allegations that latex gloves contained toxic materials that, either independently or in combination with other chemicals, caused allergic reactions did not describe defect readily apparent to common reason and experience and thus did not support application of consumer expectations test].)

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See *Boeken v. Philip Morris* (2005) 127 C.A.4th 1640, 1668, 26 C.R.3d 638 [sufficient evidence that "light" cigarettes were defective product under consumer expectations test; there was expert testimony that cigarettes delivered more nicotine and more tar per cigarette to smokers who compensated for less nicotine by inhaling deeper, which drew more dangerous carcinogens into lungs without them being aware of it]; *Jones v. John Crane* (2005) 132 C.A.4th 990, 1001, 35 C.R.3d 144 [consumer expectations test applied to design defect case alleging that cancer was caused by occupational exposure to asbestos from manufacturer's products during plaintiff's 27-year naval career; it was undisputed that some asbestos fibers were released during workers' replacement of packing, and there was nothing leading to reasonable inference that exposed workers did not expect to develop cancer from breathing dust]; *Gonzalez v. Autoliv ASP* (2007) 154 C.A.4th 780, 786, 64 C.R.3d 908 [by offering no evidence that benefits of design of automobile airbag component outweighed its inherent risks, manufacturer of component failed to negate evidence, offered by passenger whose eye was injured when airbag deployed during accident, that airbag's design was defective under strict liability risk-benefit theory, and thus manufacturer was precluded from summary judgment in its favor]. *Beechnut case:*

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §628.



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 - 1. Strict Liability for Obvious Defects.

6 Witkin Sum. Cal. Law Torts § 1465

[§ 1465] Strict Liability for Obvious Defects.

The supposed limitation that the defect was one of which the plaintiff was not aware, and its corollary that there is no strict liability for patent defects was repudiated in *Luque v. McLean* (1972) 8 C.3d 136, 104 C.R. 443, 501 P.2d 1163. Plaintiff's cousin, with whom he lived, bought a rotary power lawnmower. The machine rotates a blade at high speed and ejects grass through an unguarded hole. Plaintiff, using the mower on wet grass, left it with the motor running to remove an obstacle in its path. He slipped, fell backward, and his hand went into the unguarded hole, where it was severely mangled. In his action against the manufacturer, distributor, and retail seller, his expert testified that the mower was dangerous because of the hole, that the type of injury was foreseeable, and that the injury could have been prevented by a simple inexpensive piece of additional equipment. The judge instructed, at defendant manufacturer's request, that plaintiff had the burden of proving that he was not aware of the defect at the time of the accident. Verdict was for defendants. *Held*, judgment reversed; the instruction was prejudicial error.

(a) *The true Greenman rule.* In *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, supra, §1429, the court declared that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." This is the authoritative statement of the rule. "[I]n products liability cases a plaintiff has met his burden if he establishes the ingredients of this formulation." (8 C.3d 141.)

(b) *The spurious Greenman rule.* At the end of the *Greenman* opinion is an observation to the effect that it was sufficient for the plaintiff to prove that he was injured while using the product in a way intended as a result of a defect "of which plaintiff was not aware." (59 C.2d 64; see supra, §1429.) This language was incorporated in the BAJI instruction, and several Court of Appeal decisions referred to it as stating elements of the doctrine. But no Supreme Court opinion did so, and the *Greenman* opinion does not support that use of the observation. (8 C.3d 143, 144.)

(c) *Unawareness element is unsound.* Incorporating this element would mean that the manufacturer would be liable only where the product had latent defects. No California case makes this distinction, and *Pike v. Frank G. Hough Co.* (1970) 2 C.3d 465, 475, 85 C.R. 629, 467 P.2d 229, supra, §1449, laid it to rest: That decision, though dealing with negligence, discusses strict liability as well, and refers to the true *Greenman* rule and the Restatement section, neither of

which requires proof of unawareness. (8 C.3d 144.) Moreover, adoption of such a theory would be highly objectionable on policy grounds. "It would indeed be anomalous to allow a plaintiff to prove that a manufacturer was negligent in marketing an obviously defective product, but to preclude him from establishing the manufacturer's strict liability for doing the same thing. The result would be to immunize from strict liability manufacturers who callously ignore obvious dangers in their products while subjecting to such liability those who innocently market products with latent defects." (8 C.3d 145.)

(d) *Proper effect of Greenman awareness language.* Ordinary contributory negligence does not bar recovery in a strict liability action, but assumption of risk, consisting of "voluntarily and unreasonably proceeding to encounter a known danger," is a defense. (8 C.3d 145, citing the text.) Thus, while unawareness is not an element of the plaintiff's case, the defendant may set up awareness as a defense; but the burden of proof is on the defendant. (8 C.3d 146; see *infra*, §1541.) (See *Hauter v. Zogarts* (1975) 14 C.3d 104, 120, 120 C.R. 681, 534 P.2d 377, *supra*, §778 [following *Luque*; plaintiffs need not show that user was unaware of defect]; *Thompson v. Package Machinery Co.* (1971) 22 C.A.3d 188, 192, 99 C.R. 281 [decided before *Luque* but citing *Pike v. Frank G. Hough Co.* for same conclusion]; 6 Southwestern U. L. Rev. 671; 10 U.S.F. L. Rev. 725; 95 A.L.R.3d 1066 [duty of manufacturer to equip product with safety device to protect against patent or obvious danger]; 35 A.L.R.4th 861 [modern status of rule that there is no liability for obvious dangers].)

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 - 2. Contradictory Instructions.

6 Witkin Sum. Cal. Law Torts § 1466

[§ 1466] Contradictory Instructions.

In *Henderson v. Harnischfeger Corp.* (1974) 12 C.3d 663, 117 C.R. 1, 527 P.2d 353, decedent was employed on a construction project to keep an earthmoving crane lubricated and to assist the operator. While in the rear of the machine, he was struck by the counterweight and killed. His widow and children sued, offering expert testimony that the rear view of the operator was completely obstructed, that the blind spot could be eliminated by a mirror, and that a sounding device could have been installed to warn persons against entering the zone of danger. Defendant introduced contrary expert testimony to the effect that a mirror would divert the operator's attention from the movement of the boom, creating a major hazard; and that a sounding device would be ineffective because the danger of entering the area of the arc of the counterweight was obvious. Defendant also, in support of its defense of assumption of risk, offered evidence that decedent was alert, intelligent, and experienced in the operation of the crane, and that he had been warned of the danger shortly before the accident. The trial judge instructed on former BAJI No. 9.01, and the verdict and judgment were for defendant. *Held*, reversed.

(a) The instruction held erroneous in *Luque v. McLean* (1972) 8 C.3d 136, 104 C.R. 443, 501 P.2d 1163, *supra*, §1465, coupled with a correct instruction that the burden of proving the defense of assumption of risk was on the defendant, gave the jury contradictory and irreconcilable information on the issue of awareness or unawareness of the defect. "It is impossible to determine whether the jury returned a verdict for defendant because they found that plaintiffs had failed to prove that the deceased was not aware of the claimed defect or because they found that defendant had proved he was aware of it." (12 C.3d 671.)

(b) The bad instruction also could have given defendant the advantage of a less onerous defense to liability. In view of the evidence of decedent's familiarity with the crane and the warning of the dangerous condition, the verdict for defendant could have been based simply on a finding that plaintiffs had not sustained the burden of proving decedent's unawareness. "Had the jury made such a finding, they would have exonerated defendant manufacturer from liability even if they also believed that the crane was defective in design." (12 C.3d 671.) But awareness of risk is only one of several elements of assumption of risk in a products liability action; *Luque* shows that more is required: the user must become aware of the defect and danger and still proceed unreasonably to make use of the product. "The issue of awareness included neither the element of voluntariness nor the element of reasonableness." (12 C.3d 672.) Hence, it is

likely that the jury verdict may have been based on what was, in effect, a partial defense. (*12 C.3d 672.*)

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a. In General.

1. Duty To Warn.

6 Witkin Sum. Cal. Law Torts § 1467

[§ 1467] Duty To Warn.

(1) *In General.* Even though a product is flawlessly manufactured and designed, it may be "defective" if a reasonably foreseeable use involves a substantial danger not readily recognizable by the ordinary consumer, and the manufacturer fails to provide an adequate warning. (See *Finn v. G.D. Searle & Co.* (1984) 35 C.3d 691, 699, 200 C.R. 870, 677 P.2d 1147, *infra*, §1470; *Carlin v. Superior Court* (1996) 13 C.4th 1104, 1110, 56 C.R.2d 162, 920 P.2d 1347, *infra*, §1477; *Midgley v. S.S. Kresge Co.* (1976) 55 C.A.3d 67, 71, 127 C.R. 217, *infra*, §1475; *Burke v. Almaden Vineyards* (1978) 86 C.A.3d 768, 772, 150 C.R. 419; *Cavers v. Cushman Motor Sales* (1979) 95 C.A.3d 338, 349, 350, 157 C.R. 142, *infra*, §1468; *DeLeon v. Commercial Mfg. & Supply Co.* (1983) 148 C.A.3d 336, 343, 195 C.R. 867, *supra*, §1454; *Lunghi v. Clark Equipment Co.* (1984) 153 C.A.3d 485, 494, 200 C.R. 387; *Powell v. Standard Brands Paint Co.* (1985) 166 C.A.3d 357, 362, 212 C.R. 395, *infra*, §1469; *Gonzales v. Carmenita Ford Truck Sales* (1987) 192 C.A.3d 1143, 1147, 238 C.R. 18; *Wright v. Stang Mfg. Co.* (1997) 54 C.A.4th 1218, 1230, 63 C.R.2d 422; *Bresnahan v. Chrysler Corp.* (1998) 65 C.A.4th 1149, 1153, 76 C.R.2d 804; Dobbs, *The Law of Torts* §363 et seq.; 8 *Proof of Facts* 3d 547 [failure to warn as proximate cause]; 20 *Loyola L.A. L. Rev.* 867 [cigarette manufacturer's liability for failure to warn even though complying with federal warning requirement]; 37 *Loyola L.A. L. Rev.* 461 [presumption that product user would have heeded warning; distinguishing no warning from inadequate warning]; 5 *San Diego L. Rev.* 422; 41 *U.C.L.A. L. Rev.* 1193 [warning as substitute for safe design]; 53 *A.L.R.3d* 239 [failure to warn as basis for liability under doctrine of strict liability in tort]; 39 *A.L.R.4th* [duty of manufacturer of part to warn]; 45 *A.L.R.4th* 777 [effect on liability of manufacturer or seller of subsequent distributor's failure to warn of known defect]; 38 *A.L.R.5th* 683 [presumption or inference that product user would have heeded adequate warning had one been given]; 64 *A.L.R.5th* 205 [failure to warn of excessively hot food or beverage]; 92 *A.L.R.5th* 227 [successor corporation's liability for injury or damage from product produced by predecessor, based on successor's independent duty to warn third party of danger or defect]; BAJI, No. 9.00.7; CACI, Nos. 1205, 1206.)

If the danger is open and obvious, there is no duty to warn. Courts from other jurisdictions are divided over whether diving into shallow water is, as a matter of law, an open and obvious danger to an adult, but it is a factual question when children are involved. (*Bunch v. Hoffinger Industries* (2004) 123 C.A.4th 1278, 1290, 20 C.R.3d 780 [child of 11 was injured when diving into above ground pool that was four feet deep].)

A manufacturer may satisfy its duty to warn either by instructing the consumer on the proper use of the product or by informing the consumer of any known, or knowable, risks or side effects that might follow from its foreseeable use. (See *Finn v. G.D. Searle & Co.*, *supra*, 35 C.3d 699, *infra*, §1470; BAJI, No. 9.00.7.)

In *Vermeulen v. Superior Court* (1988) 204 C.A.3d 1192, 251 C.R. 805, the court said that "manufacturers may not be held strictly liable for failure to warn of risks of which they were unaware and could not have been aware by the reasonable application of scientific knowledge available at the time of distribution. Consequently, 'state of the art' evidence may well be relevant and admissible in a failure to warn case." (204 C.A.3d 1206.) (See *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 C.3d 987, 991, 1000, 281 C.R. 528, 810 P.2d 549, *infra*, §1477 [approving *Vermeulen*].)

(2) *Restatement Third*. Under Rest.3d, Torts: Products Liability (see *supra*, §1430), a commercial seller or distributor is liable for harm caused by a product that is "defective because of inadequate instructions or warnings." (Rest.3d, Torts: Products Liability §§1, 2.) A product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe. (Rest.3d, Torts: Products Liability §2(c).)

In most instances, the instructions and warnings originate with the manufacturer, but sellers down the chain of distribution must warn when doing so is feasible and reasonably necessary. In any event, sellers down the chain are liable if the instructions and warnings provided by predecessors in the chain are inadequate. (Rest.3d, Torts: Products Liability §2, Comment i.) Generally, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. (Rest.3d, Torts: Products Liability §2, Comment j.) The general rule in cases involving allergic reactions is that a warning is required when the harm causing ingredient is one to which a substantial number of persons are allergic. (Rest.3d, Torts: Products Liability §2, Comment k.)

West's Key Number Digest, Products Liability k.14-

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Jones v. John Crane* (2005) 132 C.A.4th 990, 1004, 35 C.R.3d 144 [substantial evidence supported finding that there was scientifically known or knowable medical probability that manufacturer's valve and pump packing products containing asbestos would increase risk of cancer, thereby supporting verdict against manufacturer on failure to warn theory; despite absence of formal studies on risks associated with packing, numerous articles connected packing to potential risk of asbestos-related disease].



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2. Risk-Benefit Analysis.

6 *Witkin Sum. Cal. Law Torts* § 1468

[§ 1468] Risk-Benefit Analysis.

In *Cavers v. Cushman Motor Sales* (1979) 95 C.A.3d 338, 157 C.R. 142, the court applied the balancing approach set forth in *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443, *supra*, §1455, in a failure to warn case. Plaintiff's theory was that defendants, the manufacturer and lessor of a golf cart, failed to warn of its propensity to tip over. The trial judge instructed that an article may be defective if the manufacturer-lessor fails to warn of a dangerous propensity that, in the absence of an adequate warning, renders the article "substantially dangerous" to the user. In his appeal from a judgment for defendants, plaintiff contended that use of the word "substantially" was contrary to *Cronin v. J.B.E. Olson Corp.* (1972) 8 C.3d 121, 133, 104 C.R. 433, 501 P.2d 1153, *supra*, §1436. *Held*, judgment affirmed.

(a) The weighing of degrees of danger is necessarily involved in ascertaining a manufacturer's duty to warn. Otherwise, the mere fact of injury would be enough to establish a product's "dangerousness," and each manufacturer would become an insurer. (95 C.A.3d 348.)

(b) The *Barker* balancing approach is consistent with the evaluation of degrees of danger and is adaptable to failure to warn cases. (95 C.A.3d 347, 348.) The relevant considerations to be weighed include "the normal expectations of the consumer as to how the product will perform, degrees of simplicity or complication in the operation or use of the product, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning." (95 C.A.3d 348.) Taken as a whole, the instructions here properly focused the jury's attention on these factors. (95 C.A.3d 350.) (See *Finn v. G.D. Searle & Co.* (1984) 35 C.3d 691, 699, 200 C.R. 870, 677 P.2d 1147, *infra*, §1470; *Brown v. Superior Court* (1988) 44 C.3d 1049, 1062, 245 C.R. 412, 751 P.2d 470, *infra*, §1470; *Persons v. Salomon North America* (1990) 217 C.A.3d 168, 175, 265 C.R. 773, *infra*, §1476, citing the text; 14 U.S.F. L. Rev. 309 [failure to warn after *Barker*]; 17 U.S.F. L. Rev. 743 [same].)

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a. In General.

3. Product of Another Manufacturer.

6 *Witkin Sum. Cal. Law Torts* § 1469

[§ 1469] Product of Another Manufacturer.

In *Powell v. Standard Brands Paint Co.* (1985) 166 C.A.3d 357, 212 C.R. 395, plaintiffs, stripping a tile floor with an electric buffer, used a lacquer thinner supplied by defendant Standard Brands. Their supply ran out and they obtained similar lacquer thinner manufactured by Grow. While using the latter, the buffer exploded, causing serious injuries. Plaintiffs' theory was that defendant Standard Brands failed to warn of the dangerous properties of its lacquer thinner, and that this failure was a proximate cause of the injuries. *Held*, summary judgment for defendant affirmed.

(a) "[N]o reported decision has held a manufacturer liable for its failure to warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else." (166 C.A.3d 362.)

(b) The manufacturer's duty is to warn of the characteristics of the manufacturer's own product; there is no requirement that he or she study the products of other manufacturers and warn users of the risks in using them. "Thus, even where the manufacturer erroneously omits warnings, the most the manufacturer could reasonably foresee is that consumers might be subject to the risks of the manufacturer's own product, since those are the only risks he is required to know." (166 C.A.3d 364.) Hence, if plaintiffs' theory has any validity, "it would be limited to situations where the risks of use of the product immediately causing injury are identical to the risks of use of the product previously used with inadequate warnings." (166 C.A.3d 364.)

(c) "[T]he theory of liability now asserted by plaintiffs would require at a minimum that: (a) the product immediately causing injury (product B) was subject to the same generic description as the product previously used with inadequate warnings (product A), e.g., 'lawnmower,' 'electric drill,' 'aspirin,' etc.; (b) product B was generally used for the same purposes as product A by consumers; (c) product B's warnings were inadequate; and (d) product B had risks of use identical to those of product A. This theory of liability gains credence to the extent a generically identical product (with presumably identical risks of use) is made by a limited number of manufacturers in an industry, and there is an industry-wide practice of omitting warnings on the product. ... In such a situation, each manufacturer has reason to know that the risks of use associated with its product are the same as the risks of the other products and that a consumer will receive no adequate warnings from the other products." (166 C.A.3d 365.)

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1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1470

[§ 1470] In General.

In *Finn v. G.D. Searle & Co.* (1984) 35 C.3d 691, 200 C.R. 870, 677 P.2d 1147, plaintiff, shortly after birth, developed a skin rash diagnosed as AE, for which the only known treatment was high doses of Diodoquin, an approved drug. After taking the drug for a considerable period, plaintiff suffered optic nerve atrophy and became almost totally blind. In this strict liability action against defendant manufacturer, based on failure to warn of the harmful side effects of the drug, the trial judge modified plaintiff's proposed instruction to read as follows: "The manufacturer of a drug is under a duty to exercise reasonable care to warn the medical profession of potential dangers reasonably foreseeable from use of its drug, even though the percentage of users who may be injured is not large. The duty of the drug manufacturer is to warn the medical profession and there is no duty by the drug manufacturer to insure that the warning reaches the patient for whom the drug is prescribed." The jury verdict was in favor of defendant, and on appeal, plaintiff contended that the instruction as modified improperly injected negligence concepts into the jury's consideration of his strict liability claim. *Held*, judgment for defendant affirmed; the instruction was not prejudicial error.

(a) Two lines of authority have developed in other states: (1) One imposes strict liability for a failure to warn regardless of the defendant's knowledge or ability to know of the side effect-causing injury. (2) The other focuses first on the manufacturer's actual or constructive knowledge. Here, neither position need be favored, because plaintiff's proposed instruction was based on the second; i.e., plaintiff's theory was that defendant's duty to warn extended only to defects that were or should have been known at the time he took the drug. (35 C.3d 699.)

(b) California cases have developed a distinct form of analysis in the strict liability arena. The jury cannot compare the product with other units or weigh the reasonableness of the design against alternative designs; instead, "they must decide whether a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning." (35 C.3d 699, quoting *Cavers v. Cushman Motor Sales* (1979) 95 C.A.3d 338, 349, 157 C.R. 142, *supra*, §1468.)

(c) The requisite warning may be of two kinds, each of which may have different implications: (1) The manufacturer may be required adequately to instruct the consumer as to how the product should be used. (2) A second form informs a consumer (or, in the case of prescription drugs, the physician) of potential risks or side effects that may

follow the foreseeable use of the product. "Within the prescription drug context, the giving of this second form of warning may cause a physician-user to refuse to prescribe the drug. The particular risk described in the warning may well persuade the physician and patient in determining the treatment of choice." (35 C.3d 700.) The two kinds of warnings perform distinct functions. "In some circumstances a warning or directions would have reduced the risk. In other circumstances the warning would simply have afforded the consumer an opportunity to make an informed choice." (35 C.3d 700.)

(d) Some California courts have held that where imposition of liability is contingent on finding of dangers that were or should have been known, "concepts from negligence law have been amalgamated into the doctrine of strict liability." (35 C.3d 700, quoting *Carmichael v. Reitz* (1971) 17 C.A.3d 958, 988, 95 C.R. 381, *infra*, §1476.) Another court has observed that because violation of a duty of care has always been an element in the definition of negligence, the rules in former *Rest.2d*, Torts §402A, Comment j, although stated as an adjunct to "strict" liability, are merely well settled rules of negligence law. (35 C.3d 700, citing *Oakes v. E.I. Du Pont de Nemours & Co.* (1969) 272 C.A.2d 645, 77 C.R. 709, and *Christofferson v. Kaiser Foundation Hosp.* (1971) 15 C.A.3d 75, 92 C.R. 825, *infra*, §1474.)

(e) After the decision in *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443, *supra*, §1455, *Cavers v. Cushman Motor Sales*, *supra*, applied the *Barker* balancing approach to a case involving asserted failure to warn. (35 C.3d 700.) "Arguably, the difference between negligence and strict liability standards in this situation is the focus: in the first, the jury must determine the reasonableness of the manufacturer's conduct; in the second, the determination is whether the product has been rendered defective because, applying an objective standard, and weighing the relevant costs and benefits, a warning was required. In light of the opinion in *Barker*, a balancing test as enunciated in *Cavers* may therefore be appropriate." (35 C.3d 700.)

(e) The quality of evidence supporting a causal connection between product and injury may range from extremely vague to highly certain. Knowledge of a potential side effect that is based on a single isolated report of a possible link between a prescription drug and an injury may not require a warning. (35 C.3d 701.) Overuse of warnings invites mass consumer disregard for the warning process; and, if every report of a possible risk imposed a duty to give some warning, a manufacturer would be required to inundate physicians indiscriminately with notice of any hint of danger, thereby diluting the force of any specific warning given. (35 C.3d 701.) "The strength of the causal link thus is relevant both to the issue of whether a warning should be given at all, and, if one is required, what form it should take. The trial court was justified in modifying the instruction to take into account the dangers of overwarning and plaintiff failed to offer an alternative approach." (35 C.3d 701.)

A lengthy dissent, on an elaborate review of the authorities, concludes that strict liability should be applicable to injuries caused by prescription drugs under the two-prong test of *Barker*, i.e., where the product fails to live up to the ordinary consumer's expectations, or the manufacturer fails to establish that the benefits of the drug outweigh its risks; and that strict liability should also be applicable to drugs rendered defective by the absence of a warning. (35 C.3d 725.) (See *Carlin v. Superior Court* (1996) 13 C.4th 1104, 1110, 56 C.R.2d 162, 920 P.2d 1347, *infra*, §1477 [manufacturer of prescription sleeping pill was strictly liable for failure to warn of known or reasonably scientifically knowable defects]; 19 *Pacific L. J.* 207; 71 *So. Cal. L. Rev.* 1387 [preemptive effect of FDA labeling rules for over-the-counter drugs]; 51 *Stanf. L. Rev.* 1343 [learned intermediary doctrine and patient package inserts].)

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2. Prescription Drugs.

6 *Witkin Sum. Cal. Law Torts* § 1471

[§ 1471] Prescription Drugs.

In *Brown v. Superior Court* (1988) 44 C.3d 1049, 245 C.R. 412, 751 P.2d 470, plaintiffs sued 170 drug companies that allegedly produced diethylstilbestrol (DES) used by their mothers to prevent miscarriage. The trial judge ruled against plaintiffs on the issue of strict liability based on design defect under the standards of *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443, *supra*, §1455, the Court of Appeal agreed, and the Supreme Court affirmed the judgment. Neither of the tests of *Barker* (consumer expectation and risk-benefit analysis weighed against risks) is applicable to a prescription drug such as DES.

(a) The consumer is not the plaintiff but the physician who prescribes the drug, and it is to him or her that the warnings are directed. "The manufacturer cannot be held liable if it has provided appropriate warnings and the doctor fails in his duty to transmit these warnings to the patient or if the patient relies on inaccurate information from others regarding side effects of the drug." (44 C.3d 1062.)

(b) The second *Barker* test contemplates that a safer alternative design is possible, and defendants contend that there is no way in which a drug like DES can be "redesigned." This position is unsound. Plaintiff may be able to demonstrate that a particular component of DES rendered it unsafe and that removal of that component would not have affected the efficacy of the drug; or plaintiff might be able to prove that other less harmful drugs were available to prevent miscarriage. (44 C.3d 1062.)

(c) There is, however, an important distinction between prescription drugs and such products as construction machinery, lawnmowers, or perfume. These products are used to make work easier or to provide pleasure; prescription drugs may be necessary to alleviate pain and suffering or to sustain life, and harm to some users is unavoidable. "Because of these distinctions, the broader public interest in the availability of drugs at an affordable price must be considered in deciding the appropriate standard of liability for injuries resulting from their use." (44 C.3d 1063.) As Prosser put it: "The argument that industries producing potentially dangerous products should make good the harm, distribute it by liability insurance, and add the cost to the price of the product, encounters reason for pause, when we consider that two of the greatest medical boons to the human race, penicillin and cortisone, both have their dangerous side effects, and that drug companies might well have been deterred from producing and selling them." (44 C.3d 1064.)

And many examples have been cited of products that have greatly increased in price or have been withdrawn or withheld from the market because of the fear of liability for large judgments. (44 C.3d 1064.) Hence, the drug manufacturer's liability should not be measured by the *Barker* standards. (44 C.3d 1065.)

In *Rodriguez v. Superior Court* (1990) 221 C.A.3d 1371, 271 C.R. 114, plaintiffs were a mother and her minor son. As a result of the son's developing Reyes Syndrome after ingesting defendant's baby aspirin, plaintiffs alleged that the use of the aspirin was reasonably foreseeable by defendant, its use involved a substantial, foreseeable danger, and adequate warnings were not given. *Held*, judgment on the pleadings for defendant reversed. The pleadings were precisely in conformity with the requirements set forth in *Finn v. G.D. Searle & Co.* (1984) 35 C.3d 691, 200 C.R. 870, 677 P.2d 1147, *supra*, §1470. And *Brown*, recognized that aspect of strict liability discussed in *Finn*--liability for failure to warn--by basing its holding freeing drug manufacturers from strict liability on the conditions that drugs be properly prepared and accompanied by warnings of any dangerous propensities of which the manufacturers had actual or constructive knowledge. Because plaintiffs' allegations sufficiently complied with these conditions, the court erroneously granted defendant's motion for judgment on the pleadings. (221 C.A.3d 1375.) (See 103 Harv. L. Rev. 773 [A Question of Competence: The Judicial Role in the Regulation of Pharmaceuticals]; on inapplicability of strict liability to design defect claims involving drugs and medical devices, see *supra*, §1449.)

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See *McKenney v. Purepac Pharmaceutical Co.* (2008) 167 C.A.4th 72, 79, 83 C.R.3d 810 [prescription drug user's claims against generic drug manufacturer based on alleged failure to warn of drug's dangers were not necessarily preempted by FDA regulations requiring generic drug to have same labeling as original listed drug; nothing in complaint alleged that manufacturer should have given warnings that FDA had expressly precluded it from giving].



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3. Warning in Languages Other Than English.

6 Witkin Sum. Cal. Law Torts § 1472

[§ 1472] Warning in Languages Other Than English.

Ramirez v. Plough (1993) 6 C.4th 539, 25 C.R.2d 97, 863 P.2d 167, held that a manufacturer may not be held liable in tort for failing to label a nonprescription drug with warnings in a language other than English. Plaintiff, a child less than 4 months old, exhibited symptoms of a respiratory infection, and his mother gave him a nonprescription drug (children's aspirin) manufactured by defendant. Plaintiff developed Reye's Syndrome, resulting in severe neurological damage, spastic quadriplegia, and mental retardation. The drug label and package insert contained a warning of Reye's Syndrome and its symptoms, in English. Plaintiff's mother, literate only in Spanish, was unable to read the warnings and did not ask anyone to translate them into Spanish, even though other members of her household could have done so. The Supreme Court, reversing the Court of Appeal, upheld summary judgment for defendant.

(a) *Standard of care is question of law for court.*

(1) In most cases, courts have fixed no standard of care more precise than that of a reasonably prudent person under like circumstances. But the proper conduct under particular situations may become settled by judicial decision or be prescribed by statute or ordinance. (6 C.4th 547.) As Justice Traynor explained in *Clinkscale v. Carver* (1943) 22 C.2d 72, 136 P.2d 777, supra, §875: "The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it." (6 C.4th 547.)

(2) Statutory standards of conduct are commonly invoked by plaintiffs in negligence actions to establish a breach of duty by the defendant. Less common is the use of a statutory standard by a defendant to establish that no breach of duty occurred. The standard defined is normally a minimum standard, and does not prevent a finding that a reasonable person would have taken additional precautions where the situation calls for them. (6 C.4th 547, 548, citing *Rest.2d, Torts* §288C, Comment a, *Elsworth v. Beech Aircraft Corp.* (1984) 37 C.3d 540, 208 C.R. 874, 691 P.2d 630, 7 Summary (10th), *Constitutional Law*, §20, and *Buccery v. General Motors Corp.* (1976) 60 C.A.3d 533, 132 C.R. 605, supra, §1452.)

(3) If, however, there are no unusual circumstances, the minimum standard prescribed by the legislation or

regulation may be accepted as sufficient; and here defendant manufacturer argues that the necessity or propriety of foreign language label and package warnings has been appropriately fixed by state and federal statutes and regulations. (6 C.4th 548.)

(b) *California law is consistent with federal law.* The federal Food, Drug, and Cosmetic Act (21 U.S.C., §352) requires labeling of nonprescription drugs, and the Food and Drug Administration has adopted detailed regulations to implement the statute, specifying both the subject matter of required warnings and the actual words to be used. (6 C.4th 549.) California parallels and reinforces federal law on these points. (6 C.4th 550.)

(c) *No legislative mandate that warning be in foreign language.* The Legislature has drawn clear lines so that persons and entities, in both the private and public spheres, know what is expected of them; and when it has extended a mandate to languages other than English and Spanish, it has provided a means to determine what languages are included. (6 C.4th 551.) Where a statute expressly requires that package warnings on nonprescription drugs be in English, "we think it is reasonable to infer that the Legislature has deliberately chosen not to require that manufacturers also include warnings in foreign languages." (6 C.4th 552.) (See 22 *Pepperdine L. Rev.* 1344 [Rodriguez]; 29 *U.S.F. L. Rev.* 837 [same].)

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4. Restatement 3d.

6 *Witkin Sum. Cal. Law Torts* § 1473

[§ 1473] Restatement 3d.

Under Rest.3d, Torts: Products Liability (see supra, §1430), the manufacturer of a prescription drug or medical device who sells or otherwise distributes it is subject to liability for harm to persons caused where the drug or medical device is not reasonably safe due to inadequate instructions or warnings. (*Rest.3d, Torts: Products Liability* §6(a), (b)(3).) A prescription drug or medical device is not reasonably safe, due to inadequate instructions or warnings, if reasonable instructions or warnings regarding foreseeable risks of harm are not provided to either of the following (*Rest.3d, Torts: Products Liability* §6(d)):

(1) Prescribing and other health care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings.

(2) The patient when the manufacturer knows or has reason to know that health care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.

Thus, while the "learned intermediary" rule is generally retained, the manufacturer has a duty in limited circumstances to warn the patient directly. (*Rest.3d, Torts: Products Liability* §6, Comments b and e.)

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c. Lack of Knowledge of Danger.

1. Unforeseeable Danger.

6 *Witkin Sum. Cal. Law Torts* § 1474

[§ 1474] Unforeseeable Danger.

The Second Restatement took the position that the seller was required to warn "if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger." (Former *Rest.2d, Torts* §402A, Comment j; see 5 Harper, James & Gray 2d §28.27.) This limiting rule was applied in two California cases.

In *Oakes v. E. I. DuPont de Nemours & Co.* (1969) 272 C.A.2d 645, 77 C.R. 709, plaintiff sued the manufacturer of weed-killing chemicals, alleging that, because of an allergy to an ingredient, he suffered severe systemic skin conditions. The complaint contained no allegation of defendant's knowledge. *Held*, judgment on demurrer affirmed: "To exact an obligation to warn the user of unknown and unknowable allergies, sensitivities and idiosyncrasies would be for the courts to recast the manufacturer in the role of an insurer beyond any reasonable application of the rationale expressed above." (272 C.A.2d 651.)

In *Christofferson v. Kaiser Foundation Hosp.* (1971) 15 C.A.3d 75, 92 C.R. 825, plaintiff, suffering from a severe skin ailment, took the prescription drug Aralen between 1954 and 1960. She developed an irreversible limitation of vision, and sued various defendants, including the manufacturer. On appeal from judgment for defendants, she urged error in refusing to instruct that the manufacturer was strictly liable for failure to warn of side effects of the drug, regardless of foreseeability. The judge had instead instructed that the manufacturer of a prescription drug is liable for failure to warn of effects that should or could have been foreseen. *Held*, judgment affirmed. "To require him to compose a warning of side effects not suggested by careful laboratory procedures such as preceded distribution of Aralen would seem to require either a semantically impossible sort of warning or one which would effectively bar the very experience which alone could give early hint of side effects of a new product extremely valuable in many cases of specific illnesses." (15 C.A.3d 79.) (See *Garman v. Magic Chef* (1981) 117 C.A.3d 634, 638, 173 C.R. 20; *Blackwell v. Phelps Dodge Corp.* (1984) 157 C.A.3d 372, 377, 203 C.R. 706; *Lee v. Electric Motor Div.* (1985) 169 C.A.3d 375, 388, 215 C.R. 195; *Livingston v. Marie Callenders* (1999) 72 C.A.4th 830, 834, 85 C.R.2d 528 [plaintiff was entitled to trial on issue whether any defendant is strictly liable for failure to warn of ingredient (MSG) to which substantial portion of population is allergic]; 53 A.L.R.3d 298 [allergenic reaction to product; *Christofferson*].) (For departure from this rule, see *Midgley v. S.S. Kresge Co.* (1976) 55 C.A.3d 67, 127 C.R. 217, *infra*, §1475; for criticism suggestion that warning

requirement is limited to unreasonably or unavoidably dangerous products, see *Gonzales v. Carmenita Ford Truck Sales* (1987) 192 C.A.3d 1143, 1150, 1151, 238 C.R. 18.)

Foreseeability retains its importance under the Third Restatement, which similarly requires that the harm must be reasonably foreseeable to require a warning. (*Rest.3d, Torts: Products Liability* §2, Comment m.)

West's Key Number Digest, Products Liability k.9

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See 5 Harper, James & Gray 3d §28.27.



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2. Duty Despite Lack of Knowledge.

6 *Witkin Sum. Cal. Law Torts* § 1475

[§ 1475] Duty Despite Lack of Knowledge.

In *Midgley v. S.S. Kresge Co.* (1976) 55 C.A.3d 67, 127 C.R. 217, the limiting rule of former *Rest.2d, Torts* §402A, Comment j (supra, §1474) was found unacceptable. Plaintiff, 13 years old, purchased a refracting telescope from defendant retailer. Its components were in a cardboard box with a booklet of instructions on assembly and use. One component was a sun filter, essential to direct viewing of the sun. The instructions warned against solar observation without attaching the filter, but contained no diagrammatic or pictorial illustrations of its proper installation. Plaintiff always used the filter, but assembled it improperly, and sunlight leaked through, eventually causing burns on the retina of his eye with irreparable damage to his vision. The court instructed the jury on failure to warn in the traditional language derived from negligence concepts, imposing a duty to warn only when there is actual or constructive knowledge of the danger. *Held*, this was prejudicial error.

(a) The instruction followed the view of *Rest.2d, Torts* §402A, Comment j. (55 C.A.3d 72, citing *Oakes v. E. I. DuPont de Nemours & Co.* (1969) 272 C.A.2d 645, 77 C.R. 709, and *Christofferson v. Kaiser Foundation Hosp.* (1971) 15 C.A.3d 75, 92 C.R. 825, supra, §1474.)

(b) Subsequently, *Cronin v. J.B.E. Olson Corp.* (1972) 8 C.3d 121, 133, 104 C.R. 433, 501 P.2d 1153, supra, §1436, rejected the "unreasonably dangerous" test, and this raises a question as to the extent that the *Oakes* holding has been eroded. (55 C.A.3d 73.) In any event, *Oakes* is distinguishable, for the danger of the product in that case was "a function of an idiosyncratic physiological reaction" of a limited number of users. (55 C.A.3d 73.)

(c) "By contrast, the defendant herein marketed a technically complex product intended for use by technically unsophisticated consumers, to be assembled and used by them in accordance with instructions prepared and supplied by the technically knowledgeable supplier. Failure to assemble or use the product in accordance with these directions may well cause physical injury and thus constitutes a potential danger. It begs the obvious to say that the supplier knows or reasonably should know that the directions furnished by him will form the unsophisticated consumer's only guide to assembly and use. Thus a product requiring assembly and use in conformity with the supplier's directions is defective if the supplier fails to warn adequately of conditions and circumstances created by such assembly or use which would render the product dangerous to the user. Therefore, the supplier is strictly liable for injury proximately resulting from

composing and furnishing a set of instructions for assembly and use which does not adequately avoid the danger of injury." (55 C.A.3d 74.) (See 33 A.L.R.4th 368 [liability for failure to warn as dependent on defendant's knowledge of danger].)

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d. Adequacy of Warning.

6 *Witkin Sum. Cal. Law Torts* § 1476

[§ 1476] Adequacy of Warning.

In *Harris v. Belton* (1968) 258 C.A.2d 595, 65 C.R. 808, plaintiff, a black woman with excessively dark skin, bought a tube of skin cream widely advertised as a skin lightener. She first gave herself a patch test, knowing of her sensitive skin; then, after experiencing no adverse reaction, she used the cream on several occasions. The result was irritation, burning, and ultimately a darker pigmentation. In this suit against the manufacturer and dealer, the jury's verdict was for defendants. *Held*, affirmed.

(a) There was no liability on warranty. The product was admittedly safe for at least 98% of the users; and the package, the tube, and the pamphlet used in its sale called attention to allergy and sensitivity, and warned against continued use if irritation appeared. (258 C.A.2d 600.)

(b) There was no strict liability. "Here the injury results from a combination of the ingredients of a product, ordinarily safe for use, and the particular susceptibility of the consumer. Under these circumstances where a proper warning is given, it is not unreasonable to put the burden on the consumer to protect himself." (258 C.A.2d 608.) However, "[n]o opinion is expressed in regard to the situation where the known possibility of serious injury is great, and the sensitive or allergic user, despite the warning, can only determine his susceptibility after use and consequent grave injury has occurred." (258 C.A.2d 609.)

In *Persons v. Salomon North America* (1990) 217 C.A.3d 168, 265 C.R. 773, plaintiff rented skis from defendant Cornice, a rental shop. Defendant Salomon's 444 bindings were incompatible with the rented thermoplastic ski boots, and plaintiff suffered injuries from a fall. Plaintiff settled with Cornice and brought this action against Salomon. Salomon presented evidence that it had warned Cornice about the incompatibility and had given Cornice instructions on how to recognize and treat thermoplastic boots to avoid the problem. Plaintiff contended, however, that the manufacturer had a duty to warn the ultimate user of the product. *Held*, judgment for defendant affirmed.

"[W]e hold that Salomon discharged its duty to warn by alerting Cornice to the danger posed by pairing Salomon 444 bindings with untreated thermoplastic ski boots. The evidence is sufficient to establish that Salomon had no feasible means of providing a warning directly to one who rents Salomon bindings from a ski shop. Moreover, a warning to the ultimate user would have been ineffectual because the ordinary user of rental skis and bindings lacks the expertise

necessary to understand and apply the requisite warning and, instead, relies on the ski shop technician to provide appropriate equipment with proper safety adjustments. Under the circumstances, Salomon reasonably could rely on the rental shop to notify the ultimate user of the danger and to take steps necessary to avoid the potential harm by properly treating the thermoplastic boots or refusing to rent the bindings to a skier who owns such a boot." (217 C.A.3d 171.)

In *Kearl v. Lederle Laboratories* (1985) 172 C.A.3d 812, 218 C.R. 453, where plaintiff child contracted polio from taking the Sabin vaccine, defendant had directly warned plaintiff about that risk, and had described the alternative Salk vaccine, stating that it carried no such risk but that most experts feel that it is not as effective in controlling polio. Moreover, the reader was invited to inquire further and ask any questions about polio and polio vaccination. *Held*, the warning was adequate. (172 C.A.3d 834.)

A number of additional decisions deal with the adequacy of a warning. (See *Ramirez v. Plough* (1993) 6 C.4th 539, 25 C.R.2d 97, 863 P.2d 167, supra, §1472 [no requirement that nonprescription drug carry warning in Spanish in addition to English]; *Carmichael v. Reitz* (1971) 17 C.A.3d 958, 95 C.R. 381 [duty to disclose hazards of drug Enovis was discharged by warnings to prescribing doctors; manufacturer need not undertake virtually impossible task of direct disclosure to patients]; *Hufft v. Horowitz* (1992) 4 C.A.4th 8, 23, 5 C.R.2d 377 [general warning of problems posed by inflatable penile prosthesis was adequate despite no mention of possibility of continual, painful erection if patient's abdomen was well-muscled]; *Plenger v. Alza Corp.* (1992) 11 C.A.4th 349, 361, 13 C.R.2d 811 [warning that IUD could cause pelvic infection, without mention that death could result, was adequate; risk of death from infection is universally known risk that need not be warned against]; *Schwoerer v. Union Oil Co.* (1993) 14 C.A.4th 103, 112, 17 C.R.2d 227 [warning on solvent that mentioned injury from inhalation and dermal exposure, but not risk of vital organ damage, was not adequate]; *Huynh v. Ingersoll-Rand* (1993) 16 C.A.4th 825, 834, 20 C.R.2d 296, infra, §1531; *Bunch v. Hoffinger Industries* (2004) 123 C.A.4th 1278, 20 C.R.3d 780 [warning stating no diving in shallow water and containing picture of man making vertical dive was inadequate as applied to child of 11, because it did not state that diving could cause serious injury]; 23 *Hastings L. J.* 1526 [criticism of ineffective warnings of dangers of birth control pills]; 34 *Proof of Facts* 3d 239 [failure to provide foreign language or symbolic warning]; 26 *A.L.R.4th* 377 [admissibility of expert or opinion evidence as to adequacy of warning]; 27 *A.L.R.5th* 608 [failure to provide warning in foreign language]; 38 *A.L.R.5th* 683 [presumption or inference that product user would have heeded adequate warning had one been given]; 57 *A.L.R.5th* 1 ["learned intermediary doctrine" that prescription drug manufacturer or supplier has no duty to warn consumer of drug's dangerous propensities where adequate warning provided to prescribing physician].)

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3. Failure To Warn.
e. Knowledge or Knowability.

6 *Witkin Sum. Cal. Law Torts* § 1477

[§ 1477] Knowledge or Knowability.

Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 C.3d 987, 281 C.R. 528, 810 P.2d 549, involved the issue "whether a defendant in a products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (53 C.3d 990.)

Plaintiff sued defendant manufacturers of products containing asbestos, alleging that he contracted asbestosis and other lung ailments through exposure to asbestos products while working as an electrician. The complaint contained a cause of action in strict liability, and defendants' pleadings raised the state-of-the-art defense. The jury returned a verdict for defendants, on a special finding that defendants' products had no design defects. Thereafter the judge granted plaintiff's motion for new trial on two grounds: the evidence did not support the jury's special finding, and the judge erred in precluding proof of liability on a failure to warn theory. Plaintiff urged that knowledge or knowability, and thus state-of-the-art evidence, was irrelevant to strict liability for failure to warn. The Court of Appeal upheld the order granting a new trial, and review was granted. Defendants contended that, if knowledge or knowability is irrelevant in a failure to warn case, the manufacturer's potential liability is absolute, rendering it a virtual insurer. Plaintiff argued that to impose the knowledge or knowability requirement improperly infuses a negligence standard into strict liability. *Held*, judgment of Court of Appeal affirmed, with directions that the matter be remanded to the trial court for proceedings in accord with the Supreme Court's decision.

(a) Strict liability has been invoked for three types of defects--manufacturing defects, design defects, and warning defects (inadequate warnings or failures to warn). (53 C.3d 995.) California cases on the doctrine of strict liability to date have focused principally on the concept of design defect; "[o]ur task in the case before us is to shape the doctrine insofar as it is applicable to a product whose *only* defect may be that the manufacturer or distributor failed to warn of inherent dangers." (53 C.3d 995.)

(b) Court of Appeal decisions have recognized that strict liability can be based on the absence of a warning that creates an unreasonable risk to the consumer. (53 C.3d 995, citing and discussing numerous cases and the text.) These cases did not discuss the knowledge or knowability component, although, in accord with the majority view, it "clearly was included as an implicit condition." (53 C.3d 997.)

(c) Only when the danger was "unknowable" did the knowledge component come into focus in the Court of Appeal opinions. (53 C.3d 997, discussing *Oakes v. E.I. Du Pont de Nemours & Co.* (1969) 272 C.A.2d 645, 77 C.R. 709, supra, §1474, and *Christofferson v. Kaiser Foundation Hosp.* (1971) 15 C.A.3d 75, 92 C.R. 825, supra, §1474.) The issue then came before the Supreme Court in *Finn v. G.D. Searle & Co.* (1984) 35 C.3d 691 200 C.R. 870, 677 P.2d 1147, but was not decided. (53 C.3d 998.) However, *Brown v. Superior Court* (1988) 44 C.3d 1049, 245 C.R. 412, 751 P.2d 470, reversed the authorities and concluded that "a manufacturer is not strictly liable for injuries caused by a prescription drug so long as it was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution." (53 C.3d 999.) Thus, California follows the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn. (53 C.3d 1000.)

(d) The issue in the present case is whether the requirement applies to failure to warn in cases other than those involving prescription drugs, and *Vermeulen v. Superior Court* (1988) 204 C.A.3d 1192, 251 C.R. 805, supra, §1467, correctly holds that it does. (53 C.3d 991, 1000.)

(e) The proponents of the minority rule argue that the knowability requirement and admission of state-of-the-art evidence improperly infuse negligence concepts into strict liability cases by directing the trier of fact's attention to the conduct of the manufacturer or distributor rather than to the condition of the product. "However, the claim that a particular component 'rings of' or 'sounds in' negligence has not precluded its acceptance in the context of strict liability." (53 C.3d 1001, discussing *Luque v. McLean* (1972) 8 C.3d 136, 104 C.R. 443, 501 P.2d 1163, supra, §1465, and *Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 143 C.R. 225, 573 P.2d 443, supra, §1455.)

(f) "As these cases illustrate, the strict liability doctrine has incorporated some well-settled rules from the law of negligence and has survived judicial challenges asserting that such incorporation violates the fundamental principles of the doctrine. It may also be true that the 'warning defect' theory is 'rooted in negligence' to a greater extent than are the manufacturing--or design-defect theories. The 'warning defect' relates to a failure extraneous to the product itself. Thus, while a manufacturing or design defect *can be* evaluated without reference to the conduct of the manufacturer ... the giving of a warning cannot. The latter necessarily requires the communicating of something to someone. How can one warn of something that is unknowable? If every product that has no warning were defective per se and for that reason subject to strict liability, the mere fact of injury by an unlabelled product would automatically permit recovery. That is not, and has never been, the purpose and goal of the failure to warn theory of strict liability. Further, if a warning automatically precluded liability in every case, a manufacturer or distributor could easily escape liability with overly broad, and thus practically useless, warnings." (53 C.3d 1002.)

(g) "We therefore reject the contention that every reference to a feature shared with theories of negligence can serve to defeat limitations on the doctrine of strict liability. Furthermore, despite its roots in negligence, failure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure to warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial." (53 C.3d 1002.)

(h) "Stated another way, a reasonably prudent manufacturer might reasonably decide that the risk of harm was such as not to require a warning as, for example, if the manufacturer's own testing showed a result contrary to that of others in the scientific community. Such a manufacturer might escape liability under negligence principles. In contrast, under strict liability principles the manufacturer has no such leeway; the manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product. Whatever may be reasonable from the point of view of the manufacturer, the user of the product must be given the option either to

refrain from using the product at all or to use it in such a way as to minimize the degree of danger." (53 C.3d 1003.)

One justice dissented. (53 C.3d 1005.)

The *Anderson* analysis was reaffirmed in *Carlin v. Superior Court* (1996) 13 C.4th 1104, 56 C.R.2d 162, 920 P.2d 1347. Plaintiff brought suit against defendant drug manufacturer for injuries allegedly sustained from side effects of the sleeping pill Halcion, which was prescribed by her physician for several years. Plaintiff claimed that defendant was strictly liable for failure to warn of these known side effects. The trial judge sustained defendant's demurrer without leave to amend, and plaintiff petitioned for mandamus. The Court of Appeal issued the writ, directing the trial judge to overrule the demurrer. *Held*, affirmed.

(a) *Prescription drug manufacturers are strictly liable for failure to warn.* In *Anderson*, an asbestos case, the court held that manufacturers generally are strictly liable for injuries caused by their failure to warn of dangers known to the scientific community at the time they manufacture and distribute products. There is no sound reason to reject the *Anderson* strict liability standard in prescription drug cases. California courts have expressly and repeatedly applied a strict liability standard to prescription drug manufacturers for failure to warn of "known or reasonably scientifically knowable" risks. The court merely reaffirms these precedents here. (13 C.4th 1110.)

(b) *Knowledge or knowability requirement.* Strict liability is not absolute liability; it is not intended to make the manufacturer or distributor of a product its insurer. Actual or constructive knowledge of potential risk or danger is required before strict liability for failure to warn may be imposed. (13 C.4th 1110.) This requirement applies to all products, including prescription drugs. (13 C.4th 1111.)

(c) *Strict and negligence liabilities compared.* Although *Anderson*, following *Brown*, incorporated certain negligence concepts into the standard of strict liability for failure to warn, it did not thereby adopt a simple negligence test. Negligence law in a failure to warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons that fell below the acceptable standard of care. Strict liability is not concerned with the standard of due care or the reasonableness of a defendant's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. (13 C.4th 1112.)

(d) *Effect of FDA regulation.* The need to comply with Food and Drug Administration regulations and labeling requirements does not preclude application of *Anderson* to prescription drugs. As numerous courts have concluded, Congress has evinced no intention of preempting state tort liability for injuries from prescription drugs. This does not mean, however, that FDA regulations are irrelevant in a common law action for failure to warn. In appropriate cases, FDA action or inaction, though not dispositive, may be admissible to show whether a risk was known or reasonably scientifically knowable. (13 C.4th 1113.)

(e) *Overlabeling concerns.* Defendant's assertion that applying strict liability to claims of injury for failure to warn will inevitably result in manufacturers of prescription drugs inundating consumers with warnings of speculative risks is unpersuasive. The application of the failure to warn theory to drugs requires determinations whether available evidence established a causal link between an alleged side effect and the drug, whether any warning should have been given, and, if so, whether the warning was adequate. Thus, the risk must be one that, in light of accepted scientific norms, is more than merely speculative or conjectural. (13 C.4th 1116.) In the case of prescription drugs, the duty to warn runs to the physician, not to the patient. There is no duty by a drug manufacturer to insure that the warning reaches the patient for whom the drug is prescribed. Nor is the manufacturer required to warn of a risk known to the medical community. (13 C.4th 1116.)

(f) *Public policy considerations.* Likewise unpersuasive is defendant's argument, purportedly derived from the court's reasoning in *Brown*, that manufacturers of prescription drugs should be exempt from the strict liability duty to

warn, because they might otherwise refrain from developing and marketing drugs. *Brown*, though a prescription drug case, involved strict liability for *design defects*. Unlike strict liability for design defects, strict liability for failure to warn does not potentially subject drug manufacturers to liability for product flaws that they have not, and could not have, discovered. The manufacturer should bear the costs, in terms of preventable injury or death, of its own failure to provide adequate warnings. (13 C.4th 1117.) (See *McKinney v. Revlon* (1992) 2 C.A.4th 602, 607, 3 C.R. 72; *Valentine v. Baxter Healthcare Corp.* (1999) 68 C.A.4th 1467, 1484, 81 C.R.2d 252, 7 Cal. Proc. (4th), Trial, Supp., §352; 23 Pacific L. J. 1992; 19 Pepperdine L. Rev. 846.)

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See *Johnson v. American Standard* (2008) 43 C.4th 56, 71, 74 C.R.3d 108, 179 P.3d 905, Supp., supra, §1174A

[sophisticated user defense, which exempts manufacturers from duty to provide sophisticated users with warnings about product hazards, is applicable to strict liability causes of action]. *Valentine* case:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §343.



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3. Failure To Warn.

f. Postsale Failure To Warn.

6 *Witkin Sum. Cal. Law Torts* § 1478

[§ 1478] Postsale Failure To Warn.

Rest.3d, Torts: Products Liability (see supra, §1430) provides that one engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by its failure to provide a warning after the time of sale or distribution "if a reasonable person in the seller's position would provide such a warning." (*Rest.3d, Torts: Products Liability* §10(a).)

A reasonable person in the seller's position would provide a warning after the time of sale if all of the following circumstances exist (*Rest.3d, Torts: Products Liability* §10(b)):

(1) The seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property.

(2) Those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm.

(3) A warning can be effectively communicated to and acted on by those to whom a warning might be provided.

(4) The risk of harm is sufficiently great to justify the burden of providing a warning.

This duty to warn exists whether or not the product is defective at the time of the original sale within the meaning of other sections of the Restatement. (*Rest.3d, Torts: Products Liability* §10, Comment a; on what is defective product under the Third Restatement, see supra, §1435.)

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6 *Witkin Sum. Cal. Law Torts* § 1479

[§ 1479] Failure To Recall Product.

Under Rest.3d, Torts: Products Liability (supra, §1430), one engaged in the business of selling or otherwise distributing products may be subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution. The duty arises in either of the following circumstances (*Rest.3d, Torts: Products Liability* §11(a)):

(1) A governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product.

(2) The seller or distributor, in the absence of a recall requirement, undertakes to recall the product.

Liability then accrues if the seller or distributor fails to act as a reasonable person in recalling the product. (*Rest.3d, Torts: Products Liability* §11(b).)

Liability for postsale failure to recall must be distinguished from liability for the sale or other distribution of defective products. When a product is defective at the time of sale and the defect causes harm, the seller is subject to liability whether or not the seller attempts to eliminate the defect by postsale recall. (*Rest.3d, Torts: Products Liability* §11, Comment d.) (On duty to recall defective product and breach of duty as form of negligence, see 42 *Stanf. L. Rev.* 103.)

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5. Scope of Liability.

a. Persons Liable.

1. Manufacturer: In General.

6 *Witkin Sum. Cal. Law Torts* § 1480

[§ 1480] Manufacturer: In General.

The manufacturer's strict liability was established in *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, *supra*, §1429. (See *Rest.3d, Torts: Products Liability* §20, Comment f; 5 Harper, James & Gray 2d §28.28; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §570; Dobbs, *The Law of Torts* §375; 23 *Cal. Western L. Rev.* 304 [products liability of small capital goods manufacturer]; 33 *San Diego L. Rev.* 385 [strict liability of nondesigning manufacturer for design defect]; 33 *Stanf. L. Rev.* 1087 [manufacturer's duty to notify of subsequent safety improvements]; 49 *U.C.L.A. L. Rev.* 1099 [imposition of products liability on trademark owners]; 13 *A.L.R.3d* 1057, 1088 [strict liability in tort]; 51 *A.L.R.3d* 1344 [identification of defendant as manufacturer or seller of product alleged to have caused injury]; 47 *A.L.R.5th* 395 [manufacturer's postsale obligation to modify, repair, or recall product].)

The rule has been broadly applied:

(1) A manufacturer is liable even though the defective part was supplied by someone else. "Since liability is strict it encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another." (*Vandermark v. Ford Motor Co.* (1964) 61 C.2d 256, 261, 37 C.R. 896, 391 P.2d 168.)

(2) A manufacturer is liable, despite an attempt to delegate assembling, adjustment, and inspection processes to dealers. (*Vandermark v. Ford Motor Co.*, *supra*, 61 C.2d 261 ["[s]ince Ford, as the manufacturer of the completed product, cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects, it cannot escape liability on the ground that the defect in Vandermark's car may have been caused by something one of its authorized dealers did or failed to do".])

(3) A manufacturer may be liable even where the product is made in accordance with the owner's plans. (*Rawlings v. D.M. Oliver* (1979) 97 C.A.3d 890, 894, 896, 159 C.R. 119.)

(4) A manufacturer may be liable to his or her injured employee, where the product was not only used in the employer's manufacturing, but was also sold to the public. (*Douglas v. E. & J. Gallo Winery* (1977) 69 C.A.3d 103, 113,

137 C.R. 797, 2 Summary (10th), *Workers' Compensation*, §48.)

(5) A successor who acquires the assets of the manufacturer may be liable. (See *infra*, §1481.)

In ordinary cases, the plaintiff must be able to identify the manufacturer of the defective product. In *Garcia v. Joseph Vince Co.* (1978) 84 C.A.3d 868, 148 C.R. 843, plaintiff, participating in a fencing meet as a member of his college team, received an injury to his eye when his opponent's sabre broke through plaintiff's fencing mask. He sued American as the alleged manufacturer of the sabre and Vince as the manufacturer of the mask. *Held*, judgment of nonsuit affirmed.

(a) There was evidence that the sabre blade was improperly thin and sharp, hence, that it was a defective product. But there was no evidence as to which manufacturer--American or Vince--supplied it; hence, a basic element of the cause of action--that the product was manufactured by the defendant, was lacking. (84 C.A.3d 874.)

(b) *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1, *supra*, §1194, is distinguishable. In that case, both defendants were negligent, and the burden of proof on causation shifted to them. Here, plaintiff failed to prove that either defendant violated a duty to him, i.e., by producing the defective product. (84 C.A.3d 875, citing federal district court case on point, distinguishing *Summers v. Tice*.) (For exception where fungible goods are involved, see *infra*, §1486.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §28.28.



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5. Scope of Liability.

a. Persons Liable.

2. Manufacturer: Successor Corporations.

aa. Liability Where Assets Are Acquired.

6 *Witkin Sum. Cal. Law Torts* § 1481

[§ 1481] Liability Where Assets Are Acquired.

(1) *Alad Case*. In *Schwartz v. McGraw-Edison Co.* (1971) 14 C.A.3d 767, 781, 92 C.R. 776, and *Ortiz v. South Bend Lathe* (1975) 46 C.A.3d 842, 846, 120 C.R. 556, the courts, in products liability actions, followed the general rule that, after a sale of assets in good faith for an adequate consideration, the successor corporation is not liable for the obligations of the former corporation. (See 9 *Summary* (10th), *Corporations*, §17.) The rule as applied to products liability was criticized (see 27 *Hastings L. J.* 1305), and was repudiated in *Ray v. Alad Corp.* (1977) 19 C.3d 22, 136 C.R. 574, 560 P.2d 3, disapproving contrary language in *Schwartz* and *Ortiz* (19 C.3d 34).

Alad I was a corporation that manufactured ladders. The business was acquired by Alad II, a corporation, which continued it in the same way, using the same equipment, designs, and personnel, and soliciting Alad I's customers through the same sales representatives, with no outward indication of any change in the ownership of the business. Plaintiff was injured in a fall from a defective ladder sold by Alad I. The injury occurred, however, after the transfer of the business, and plaintiff brought a strict products liability suit against Alad II. *Held*, summary judgment for defendant reversed.

(a) *Rule of no liability of successor corporation*. Generally, "the purchaser does not assume the seller's liabilities unless (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts." (19 C.3d 28.) None of these exceptional grounds appeared: The purchase was for adequate consideration, and there was no showing of continuation of officers, directors, or stockholders. (19 C.3d 29.)

(b) *Special exception for strict products liability*. Just as the policy supporting federal labor law may call for imposing obligations to employees on a successor corporation, the policies underlying strict products liability require an exception in this kind of case. "Justification for imposing strict liability upon a *successor* to a manufacturer under the circumstances here presented rests upon (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original

manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the business." (19 C.3d 31.) Each of these factors applies here:

(1) The injury took place more than 6 months after the dissolution of Alad I, and plaintiff, with a claim against a dissolved and assetless corporation, would face insuperable obstacles in attempting to obtain satisfaction from former stockholders or directors. (19 C.3d 32.) Any products liability insurance is usually limited to occurrences while the policy is in effect. (19 C.3d 32.) The products liability claimant is in an entirely different position from a creditor with a claim capable of being known at the time of dissolution. (19 C.3d 32.) And even if a solvent retail dealer could be sued, he or she would be cut off from an indemnity claim against the manufacturer. (19 C.3d 33.)

(2) Alad II acquired all the resources formerly available to Alad I for meeting its responsibilities to persons injured by defective ladders that it had produced; these resources included the plant, equipment, inventories, and know-how. Alad II also had the opportunity of passing on to purchasers of new products the costs of meeting the risks of defective products. (19 C.3d 33.)

(3) Alad II acquired its predecessor's trade name, goodwill, and customer lists, and held itself out as the same enterprise. This legitimate exploitation of Alad I's reputation gave Alad II a substantial benefit that its predecessor could not have enjoyed without the burden of potential liability for injuries from previously manufactured units. Imposing liability on the successor also precludes a windfall to the predecessor--an enhanced price paid by the successor for the assets because of the absence of any liability for existing defective products. (19 C.3d 34.) (For rule applied to distributor, see *infra*, §1499.)

(2) *Subsequent Decisions.* In *SCM Corp. v. Berkel* (1977) 73 C.A.3d 49, 140 C.R. 559, the predecessor corporation, a manufacturer of food processing equipment, sold part of its line of business to the successor corporation. The contract specified that the successor "agrees to assume all liabilities, obligations, contracts, orders for purchase of material and warranties of First Party." H was injured when operating a meat grinder that was no longer manufactured, and sued both corporations on strict products liability. Cross-complaints raised the issue of which party was obligated to satisfy any judgment that might be rendered in the personal injury action and therefore was required to defend that action at its own expense. *Held*, the trial judge's interpretation of the contract, as imposing the entire burden on the successor corporation, was supported by the evidence. (73 C.A.3d 59.) (See *Rawlings v. D.M. Oliver* (1979) 97 C.A.3d 890, 159 C.R. 119 [under *Alad*, successor corporation may be liable even where product was not mass-produced, and successor did not continue identical product line]; *Lundell v. Sidney Machine Tool Co.* (1987) 190 C.A.3d 1546, 1551, 1557, 236 C.R. 70; *Quemetco v. Pacific Auto. Ins. Co.* (1994) 24 C.A.4th 494, 501, 29 C.R.2d 627 [product-line successor liability rule was inapplicable to transfer insurance policy from predecessor corporation to corporation that had bought its assets and was being sued for hazardous waste pollution]; *Wright v. Stang Mfg. Co.* (1997) 54 C.A.4th 1218, 1223, footnote 1, 63 C.R.2d 422; *General Acc. Ins. Co. v. Superior Court* (1997) 55 C.A.4th 1444, 1449, 64 C.R.2d 781; *Petrini v. Mohasco Corp.* (1998) 61 C.A.4th 1091, 1094, 71 C.R.2d 910 [where two corporations merged, surviving corporation was responsible for all liabilities of merged corporation, both known and unknown, even though merged corporation had no assets at time of merger]; *Rosales v. Thermex-Thermatron* (1998) 67 C.A.4th 187, 193, 78 C.R.2d 861; *Chaknova v. Wilbur-Ellis Co.* (1999) 69 C.A.4th 962, 969, 81 C.R.2d 871; *Westoil Terminals Co. v. Harbor Ins. Co.* (1999) 73 C.A.4th 634, 638, 86 C.R.2d 636 [change of form of ownership from corporate to limited partnership, with same operations, same name, same equity interests, and identical control, constituted de facto merger]; *Franklin v. USX Corp.* (2001) 87 C.A.4th 615, 627, 105 C.R.2d 11 [refusal to extend *Alad* product-line exception beyond arena of products liability]; *Fisher v. Allis-Chalmers Corp. Product Liab. Trust* (2002) 95 C.A.4th 1182, 1185, 116 C.R.2d 310 [successor was liable where transfer agreement stated that successor assumed all liabilities arising from predecessor's business, and did not expressly exclude products liability claims]; *Henkel Corp. v. Hartford Acc. & Indem. Co.* (2003) 29 C.4th 934, 941, 129 C.R.2d 828, 62 P.3d 69 [plaintiff successor corporation was sued for injuries arising from predecessor's business, which had been acquired from preexisting corporation; plaintiff's liability for injuries caused by preexisting corporation arose from contract and was not imposed by operation of law].)

(3) *Restatement 3d*. Under Rest.3d, Torts: Products Liability (supra, §1430), a successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor in any of the following circumstances (*Rest.3d, Torts: Products Liability §12*):

- (a) The acquisition is accompanied by an agreement[<] for the successor to assume the liability.[>]
- (b) The acquisition results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor.
- (c) The acquisition constitutes a consolidation or merger with the predecessor.
- (d) The acquisition results in the successor becoming a continuation of the predecessor.

Lacking these circumstances, a successor company that buys productive assets from another company is not liable for harm caused by a defective product sold or distributed by the predecessor prior to the successor's acquisition of the assets. (*Rest.3d, Torts: Products Liability §12, Comment c.*)

(4) *Commentary and Practice Works*. (See 15 Cal. Western L. Rev. 338; 10 Loyola L.A. L. Rev. 584; 18 Santa Clara L. Rev. 556; 13 U.C. Davis L. Rev. 1000; 32 A.L.R.4th 196 [effect of form of business on successor's liability]; 46 Proof of Facts 2d 313 [products liability where of business enterprise or product line discontinued by successor corporation]; 47 Proof of Facts 2d 293 [products liability where business successor fails to warn of defect in predecessor's product]; 92 A.L.R.5th 227 [successor corporation's liability for injury or damage from product produced by predecessor, based on successor's independent duty to warn third party of danger or defect]; 109 A.L.R.5th 301 [liability of successor corporation for injury or damage from predecessor's product, based on merger or consolidation of corporations]; 112 A.L.R.5th 113 [liability of successor corporation for injury or damage from predecessor's product, based on agreement to assume liability or where transfer was fraudulent, in bad faith, or without adequate consideration].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Commentary and Practice Works*. See 118 Harv. L. Rev. 2357 [successor liability in mass tort cases]; 13 A.L.R.6th 355 [mere continuation or continuity of enterprise exceptions to nonliability of successor corporation for injury or damage caused by product issued by predecessor]; 18 A.L.R.6th 629 [liability of successor corporation for injury or damage caused by product issued by predecessor, based on "product line" successor liability]; 98 Proof of Facts 3d 1 [products liability where business successor fails to warn of defect in predecessor's product; superseding 47 Proof of Facts 2d 293, text, p. 924].



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6 *Witkin Sum. Cal. Law Torts* § 1482

[§ 1482] Distinction: Acquisition of Capital Stock.

In *Potlatch Corp. v. Superior Court* (1984) 154 C.A.3d 1144, 201 C.R. 750, Speedspace Corp. a division of Summer Bell, manufactured glue-laminated wood beams. Some of these beams were purchased for construction of a roof that collapsed and caused damage to an automobile dealership. Royal Insurance, the dealer's insurer, paid large sums in settlement of claims arising from the collapse, and brought this subrogation action to recoup its losses on the theory of strict products liability. However, after the purchase, Potlatch Corp. acquired 100% of the outstanding stock of Speedspace, which thereupon became a wholly owned subsidiary of Potlatch, but continued to manufacture the beams under the same division name (Summer Bell) at the same plant and with the same personnel. In December 1978, Speedspace was dissolved and the plant and equipment were liquidated; i.e., Potlatch did not take over the business. The collapse of the roof occurred in January 1979, and Royal Insurance filed its action against Potlatch. The trial judge granted summary judgment for plaintiff on the basis of *Ray v. Alad Corp.* (1977) 19 C.3d 22, 136 C.R. 574, 560 P.2d 3, supra, §1481. *Held*, mandamus granted to compel vacating that order and entering an order granting Potlatch's motion for summary judgment. Plaintiff argued that *Alad* should govern despite the fact that Potlatch did not purchase and incorporate in its own business the physical assets of Speedspace; i.e., that the acquisition of the capital stock was a matter of form only, not substance. This analysis is unsound, and *Alad* is distinguishable.

(a) When Potlatch acquired only the capital stock of Speedspace, it became only a shareholder, and a shareholder owns no part of the property of the corporation. Moreover, after the acquisition, it was Speedspace that carried on the business until its liquidation 11 years afterwards. (154 C.A.3d 1150, 1151.)

(b) The assets of Speedspace remained exactly the same after Potlatch acquired the stock, and those assets remained available to answer for damages resulting from injuries caused by defective products previously manufactured by it. When Speedspace was dissolved, Potlatch did not acquire the plant and equipment and did not continue the business. (154 C.A.3d 1151.)

(c) When Speedspace was dissolved, Potlatch received the net value of Speedspace's assets, but only as a sole shareholder; and a shareholder is not liable for debts of the corporation. It was immaterial that the shareholder happened

to be another corporation, i.e., that the dissolved corporation was a wholly owned subsidiary. (*154 C.A.3d 1151.*)

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6 *Witkin Sum. Cal. Law Torts* § 1483

[§ 1483] Distinction: Negligence Action.

In *Maloney v. American Pharmaceutical Co.* (1988) 207 C.A.3d 282, 255 C.R. 1, plaintiff's mother had taken the prescription drug diethylstilbestrol (DES) while pregnant, and this action was brought against defendant (APC II) for resulting injuries to plaintiff and plaintiff's minor son. The drug had been manufactured by APC I, which ran into financial difficulties and went out of business. W, its president, formed a new corporation, defendant APC II, which purchased the leftover bottles, labels, and goods from the liquidating creditor for \$ 32,500, and also paid \$ 500 for the right to use the name, goodwill, patents, and trademarks of APC I. The property thus acquired by APC II constituted about 10% of APC I's total liquidated assets. However, APC II did not acquire any of APC I's machinery, equipment, buildings, inventory, stock, or accounts receivable; and APC II never used any of the premises formerly occupied by APC I. Moreover, APC II does not make or sell prescription drugs and has never made, sold, or owned any DES. *Held*, summary judgment for defendant affirmed.

(a) *Brown v. Superior Court* (1988) 44 C.3d 1049, 245 C.R. 412, 751 P.2d 470, *supra*, §1471, held that a manufacturer of prescription drugs is not strictly liable for injuries caused by a design defect neither known nor knowable when it was distributed. Hence, plaintiffs' theory was that APC II was liable as a successor to APC I for *negligent* manufacture. (207 C.A.3d 286.)

(b) The characteristics of successor liability are stated in *Ray v. Alad Corp.* (1977) 19 C.3d 22, 136 C.R. 574, 560 P.2d 3, *supra*, §1481, and plaintiffs made a showing of two: APC II held itself out to customers and the public as a continuation of the enterprise conducted by APC I, and W, former president of APC I, became president of APC II. (207 C.A.3d 288.) But essential ingredients are missing: (1) The transfer was not for an inadequate consideration; adequacy of the consideration recited was not challenged. (2) The purchase of 10% of APC's assets was not the acquisition of its principal assets. (3) There was no direct sale of assets from the predecessor corporation to the successor corporation; the transfer was from a creditor that had taken over the predecessor's assets. (4) There was no continuity of employees; only a single officer of APC I became an officer of APC II. (207 C.A.3d 287, 288.)

(c) Apart from the absence of essential ingredients of successor liability under *Alad*, that decision was expressly

limited to cases in which *strict products liability* was the theory of recovery. (207 C.A.3d 289, citing the text.)

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6 *Witkin Sum. Cal. Law Torts* § 1484

[§ 1484] Distinction: Acquisition Through Bankruptcy.

In *Stewart v. Telex Communications* (1991) 1 C.A.4th 190, 1 C.R.2d 669, a manufacturer of radio antennas declared bankruptcy, and most of its assets were purchased from the trustee in bankruptcy by defendant. Six years later plaintiff was injured while installing an antenna that had been sold by the manufacturer prior to declaring bankruptcy. Plaintiff then brought a products liability action against defendant on a successor corporation theory. *Held*, summary judgment for defendant affirmed.

(a) Plaintiff argued that the exception to the general rule of successor nonliability established in *Ray v. Alad Corp.* (1977) 19 C.3d 22, 136 C.R. 574, 560 P.2d 3, *supra*, §1481, should be applied here, because this case was identical to *Alad*, except for the "insignificant" distinction that defendant here purchased the assets through the intermediary of the bankruptcy court rather than directly. Plaintiff is correct in his assertion that *Alad* should not be construed so narrowly as to be applied only to cases that are its virtual factual clones. (1 C.A.4th 196, citing *Rawlings v. D. M. Oliver* (1979) 97 C.A.3d 890, 159 C.R. 119, *supra*, §1481). However, his conclusion that the distinction is insignificant is incorrect. (1 C.A.4th 200.)

(b) One of the justifications noted in *Alad* for creating the exception is that the successor's acquisition of the assets causes the plaintiff's loss of remedies against the original manufacturer. And later decisions have emphasized the importance of this element of causation. (1 C.A.4th 197, citing *Kaminski v. Western MacArthur Co.* (1985) 175 C.A.3d 445, 220 C.R. 895, *infra*, §1499, *Lundell v. Sidney Machine Tool Co.* (1987) 190 C.A.3d 1546, 236 C.R. 70, *Phillips v. Cooper Laboratories* (1989) 215 C.A.3d 1648, 264 C.R. 311, and other-state and federal decisions.)

(c) Under these decisions, a causation element is necessary to ensure that a plaintiff does not actually gain a "windfall defendant" who would not otherwise be available. "Moreover, in the bankruptcy context, the policy in favor of discharge of debt in bankruptcy could be inhibited by a holding that assets of the bankrupt could be infected with the bankrupt's inchoate and unknown tort liability, since a reluctance on the part of purchasers would be certain to exist unless the value of the bankrupt's assets were further discounted." (1 C.A.4th 200.)

(d) Here, the causation element was not satisfied. The cause of plaintiff's loss of remedies was the manufacturer's voluntary bankruptcy, rather than defendant's purchase of the assets. And there was no showing that the bankruptcy was a mere subterfuge to avoid the holding of *Alad*. (1 C.A.4th 200.)

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6 *Witkin Sum. Cal. Law Torts* § 1485

[§ 1485] Liability for Failure To Warn.

Under Rest.3d, Torts: Products Liability (supra, §1430), a successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor if *both* of the following conditions exist (*Rest.3d, Torts: Products Liability* §13(a)):

(1) The successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor.

(2) A reasonable person in the position of the successor would provide a warning.

A reasonable person in the position of the successor would thus provide a warning if *all* of the following are present (*Rest.3d, Torts: Products Liability* §13(b)):

(1) The successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property.

(2) Those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm.

(3) A warning can be effectively communicated to and acted on by those to whom a warning might be provided.

(4) The risk of harm is sufficiently great to justify the burden of providing a warning. (On liability for failure to warn generally, see supra, §1467.)

Liability under §13 is similar to liability under *Rest.3d, Torts: Products Liability* §10 (supra, §1478), in which a seller is liable for harm caused by breach of a postsale duty to warn even if the product was not defective at the time of

original sale. Unlike the product seller there, the successor governed by §13 does not manufacture or sell the defective product. However, by virtue of succeeding to the predecessor's interests, the successor is often in a good position to learn of problems arising from use of the predecessor's product and to prevent harm to persons or property. (*Rest.3d, Torts: Products Liability §13*, Comment a.)

West's Key Number Digest, Products Liability k.14, 24

SUPPLEMENT: [This section is current through the latest supplement]

See 98 Proof of Facts 3d 1 [products liability where business successor fails to warn of defect in predecessor's product].



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6 *Witkin Sum. Cal. Law Torts* § 1486

[§ 1486] DES Case.

In *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, plaintiff brought a class action against named drug companies and Does 1 through 100, who were manufacturers of diethylstilbestrol (DES; a synthetic compound of estrogen) between 1941 and 1971 (the date the FDA ordered that marketing cease). The complaint alleged that DES, administered to pregnant women to prevent miscarriage, may cause several kinds of serious cancers in the daughters borne by these women; that during the period of marketing defendants knew or should have known of the dangers, but failed to test the drug for efficacy and safety, and failed to warn of its experimental nature and potential danger; and that plaintiff's mother took the drug, and plaintiff developed cancers requiring surgery and involving future complications. Compensatory damages of \$ 1 million and punitive damages of \$ 10 million were sought for plaintiff herself; for the class (other women similarly situated) the complaint sought equitable relief: warnings by defendants of the danger and need for testing, and establishment of free clinics in California for those tests.

Plaintiff conceded that she was unable to identify the manufacturer of the drug ingested by her mother, but attempted to overcome the lack of causation defense by alleging that defendants collaborated in marketing, promoting, and testing the drug, relied on each other's tests, and followed an industry-wide safety standard; and that DES was produced from a common and mutually agreed upon formula as a fungible drug interchangeable with other brands of the same product, and defendants knew or should have known that doctors prescribed it by its generic name and pharmacists filled prescriptions from any brand that was stocked.

The court stated the issue as follows: "[M]ay a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries a maker of a drug produced from an identical formula?" (26 C.3d 593.) *Held*, judgment for defendants on demurrer reversed; the complaint stated a cause of action.

(a) *Background of DES litigation.* A number of similar actions have been brought in the United States, based on evidence that from 1 to 3 million women took the drug and hundreds or perhaps thousands of daughters suffer from resulting cancers. Cases that have been decided, including *McCreery v. Eli Lilly & Co.* (1978) 87 C.A.3d 77, 150 C.R.

730, have denied recovery. (26 C.3d 597.)

(b) *Established tort principle precluding recovery.* Existing law requires that the plaintiff show that the injuries were caused by an act of the defendant or by an instrumentality under his or her control. (26 C.3d 597.) But exceptions have been recognized, and are here examined: Three are rejected and a fourth is accepted.

(1) *First rejected exception: Summers v. Tice or "alternative liability."* *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1, supra, §1194, relying in part on *Ybarra v. Spangard* (1944) 25 C.2d 486, 154 P.2d 687, supra, §1194, held that the plaintiff's inability to identify the defendant who caused his or her injury required a shifting of the burden of proof to the defendants to show that they were not responsible for the harm. (26 C.3d 598.) The *Summers* theory was adopted by *Rest.2d, Torts* §433B(3). (26 C.3d 599.) But *Summers* is distinguishable and not controlling here. Although *Summers* suggested that "ordinarily" defendants are in a better position to offer evidence on causation, this was not stated as a condition to shifting the burden of proof. Here, the circumstances make it impossible for either plaintiff or defendants to identify the manufacturer, for defendants sell to wholesalers who supply the product to doctors and pharmacies, and defendants do not maintain records of persons who take the drugs. (26 C.3d 601, distinguishing *Haft v. Lone Palm Hotel* (1970) 3 C.2d 756, 91 C.R. 745, 478 P.2d 465, supra, §1195.) But the fact that defendants do not have greater access to the essential information does not preclude application of the *Summers* theory. (26 C.3d 602.) In *Summers*, all the parties who could have been responsible for the harm were joined as defendants, and there was a 50% chance that one of them was responsible. Here, the possibility that one of the five defendants (out of 200 manufacturers) supplied the drug is so remote that it would be unfair to require each defendant to exonerate itself. (26 C.3d 603.)

(2) *Second rejected exception: concert of action.* The second principle upon which plaintiff relies is the so-called concert of action theory of *Rest.2d, Torts* §876 (see supra, §44). This principle calls for a common design or substantial participation in accomplishing the tortious result. (26 C.3d 604.) The complaint, however, does not show either a tacit understanding or common design. It alleges that defendants produced DES from an agreed formula, allowing pharmacists to treat it as a fungible commodity; but the formula is a scientific constant, and the complaint merely charges parallel or imitative conduct in which manufacturers relied on each others' testing and promotion methods--a common practice in industry. Application of the concert of action theory to this situation would render virtually any manufacturer liable for the defective products of an industry, even if it could be demonstrated that the defendant did not make the product that caused the injury. (26 C.3d 605.)

(3) *Third rejected exception: enterprise liability.* This theory was suggested in *Hall v. E.I. Du Pont de Nemours & Co.* (1972) 345 F. Supp. 353: 13 children injured by explosions of blasting caps in 12 separate incidents in 10 different states between 1955 and 1959 sued six blasting cap manufacturers comprising virtually the entire industry and their trade association. Although the holding was unclear, the court stressed the facts of industry-wide standards and a small number of units, and observed that its view might be unreasonable if applied to a decentralized industry composed of many producers. (26 C.3d 607.) A commentator explains that under this theory the industry-wide standard "becomes itself the cause of plaintiff's injury, just as defendants' joint plan is the cause of injury in the traditional concert of action plea." (26 C.3d 609.) This theory is untenable: The *Hall* opinion cautions against applying the doctrine to a large number of producers, and the standards followed by drug manufacturers are suggested or compelled by the *Food and Drug Administration*. (26 C.3d 609.) "[S]ince the government plays such a pervasive role in formulating the criteria for the testing and marketing of drugs, it would be unfair to impose upon a manufacturer liability for injuries resulting from the use of a drug which it did not supply simply because it followed the standards of the industry." (26 C.3d 610.)

(c) *Acceptable theory: fungible goods extension of Summers doctrine.*

(1) *Necessity of finding theory of recovery.* If plaintiff were required to identify the manufacturer, there would be no chance of recovery, for there is little likelihood that all the manufacturers are still in business or subject to the jurisdiction of California courts. However, "[I]n our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such

products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in *Escola v. Coca Cola Bottling Co. of Fresno* ... recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances. The Restatement comments that modification of the *Summers* rule may be necessary in a situation like that before us." (26 C.3d 610.) (On *Escola v. Coca Cola Bottling Co. of Fresno* (1944) 24 C.2d 453, 150 P.2d 436, see supra, §1429.)

(2) *Reasons for adopting fungible goods theory.* "The most persuasive reason" is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants the latter should bear the cost of the injury. (26 C.3d 610.) "From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product." (26 C.3d 611.) The manufacturer is in the best position to discover and guard against defects and warn of harmful effects; holding it liable for defects and failure to warn will provide an incentive to product safety. (26 C.3d 611.) These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself or herself. (26 C.3d 611.)

(d) *Rule adopted: modification of Summers.*

(1) *Market share.* An undiluted *Summers* rationale is inappropriate, because there is a possibility that none of the five defendants produced the offending substance. But "we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each ... bears to the entire production of the drug sold by all." If plaintiff is able to establish at trial (as she claims) that the 5 or 6 companies produced 90% of the DES marketed, "there is a corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiff's injuries, and only a 10 percent likelihood that the offending producer would escape liability." (26 C.3d 612.) Joining the manufacturers of a substantial share of the defective product significantly diminishes the injustice of shifting the burden of proof. (26 C.3d 612.)

(2) *Apportionment of damages.* The fact of a substantial share of the market also provides a ready means to apportion damages: "Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries." (26 C.3d 612.) And the joined defendants may cross-complain against other DES manufacturer "which they can allege might have supplied the injury-causing product." (26 C.3d 612.) Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. Some minor discrepancy in the correlation between market value and liability is inevitable, and it is probably impossible to determine market share exactly. "But just as a jury cannot be expected to determine the precise relationship between fault and liability in applying the doctrine of comparative fault ... or partial indemnity ... , the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt. As we said in *Summers* ... , where a correct division of liability cannot be made 'the trier of fact may make it the best it can.' " (26 C.3d 613.) The practical problems involved in defining the market and determining market share are largely matters of proof that cannot be determined at the pleading stage. (26 C.3d 613.)

One justice wrote a lengthy dissent. (26 C.3d 614.) (For cases distinguishing *Snidell*, see *Kennedy v. Baxter Healthcare Corp.* (1996) 43 C.A.4th 799, 812, 50 C.R.2d 736; *Edwards v. A.L. Lease & Co.* (1996) 46 C.A.4th 1029, 1033, 54 C.R.2d 259, infra, §1498.)

In *Brown v. Superior Court* (1988) 44 C.3d 1049, 245 C.R. 412, 751 P.2d 470, the court considered an issue not reached in *Sindell*: whether manufacturers are *jointly liable* in a market share action. The court declared that imposition of this liability would be inconsistent with the rationale of *Sindell* and would frustrate its goals of achieving a balance between the interests of DES plaintiffs and the drug manufacturers. (44 C.3d 1075.)

Comment in the area of unknown manufacturers of a fungible product has been voluminous and continuing. (See

69 *Cal. L. Rev.* 1179; 70 *Cal. L. Rev.* 881 [Beyond *Sindell*: Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs]; 94 *Harv. L. Rev.* 668; 17 *Pacific L. J.* 1445 [Punitive Damages in DES Market Share Litigation]; 23 *Santa Clara L. Rev.* 185 [same]; 33 *Stanf. L. Rev.* 937; 52 *U.C.L.A. L. Rev.* 151 [Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products]; 14 *U.S.F. L. Rev.* 461 [Extension of Federal Class Action Procedures to Generic Drug Litigation]; 2 *A.L.R.4th* 1091 [products liability: Diethylstilbestrol (DES)]; 63 *A.L.R.5th* 195 ["concert of activity," "alternative liability," "enterprise liability," or similar theory as basis for imposing liability on one or more manufacturers of defective uniform product, in absence of identification of manufacturer of precise unit or batch causing injury].) (On statute of limitations in toxic tort suits, see *Martinez-Ferrer v. Richardson-Merrell* (1980) 105 *C.A.3d* 316, 164 *C.R.* 591, 3 *Cal. Proc.* (4th), *Actions*, §544; 96 *Harv. L. Rev.* 1683.)

SUPPLEMENT: [This section is current through the latest supplement]

Martinez-Ferrer case:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §591. *Correction:* Page 929, line 15 of paragraph (1), citation for *Haft v. Lone Palm Hotel* should be 3 *C.3d* 756.



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bb. Drug Marketed for Different Purpose.

6 *Witkin Sum. Cal. Law Torts* § 1487

[§ 1487] Drug Marketed for Different Purpose.

Miles Laboratories v. Superior Court (1982) 133 C.A.3d 587, 184 C.R. 98, significantly extended the doctrine of *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, supra, §1486, to a different factual situation. Plaintiff, a DES child, named defendant Miles Laboratories as one of the drug manufacturers marketing DES. This defendant sought summary judgment on a showing that its tablet was sold under the trade name "Stilphostrol," solely for the treatment of prostatic carcinoma, and was never marketed, promoted, or sold for use by women. Upholding the denial of summary judgment the court said: "Admittedly, the allegations in the complaint before us are new, different and an extension of the allegations made in the *Sindell* case. ... [I]t is alleged that the defendant reaped a market share of the drug's use as a miscarriage preventative despite its production for another purpose. The allegations are that the defendant knew or should have known that its drug was being used as a miscarriage preventative and did nothing to prevent such use and by acquiescing in such use claimed for itself a share of the market." (133 C.A.3d 595.)

A strong dissent argues that the majority completely ignored the express language and social justification for *Sindell*, and that Miles Laboratories could not be held liable under any legally recognized theory. (133 C.A.3d 596, 598.)

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6 *Witkin Sum. Cal. Law Torts* § 1488

[§ 1488] Defective Vaccine.

In *Sheffield v. Eli Lilly & Co.* (1983) 144 C.A.3d 583, 192 C.R. 870, plaintiff in 1975 sued for damages for permanent disability resulting from injections of defective Salk polio vaccine in 1956 and 1957. The five defendants were all of the pharmaceutical manufacturers of the vaccine at the time of plaintiff's inoculation. Despite extensive discovery, plaintiff was unable to identify the manufacturer, and relied mainly on the market share liability theory of *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, supra, §1486. *Held*, summary judgment for defendants affirmed; the cases are not similar.

(a) In both *Sindell* and the present case, the manufacturers were making a generic pharmaceutical product according to a uniform formula and a process approved by the federal Government. Here, however, the injuries did not result from use of a drug generally defective, but because some manufacturer made and distributed a defective product, which was not a unit of the total generic pharmaceutical product but a deviant defective vaccine. (144 C.A.3d 594.)

(b) The necessity of allowing a market share approach in *Sindell* because the passage of time made identification impossible is not present in this case; delay in discovering the alleged causation was in no way related to the nature of the product or any other act or omission of the unknown tortfeasor. (144 C.A.3d 594.)

(c) The theory of *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1, supra, §1194, as expounded in *Sindell*, has no application to a case of alternative liability, where there is no proof that the conduct of more than one actor has been tortious at all. In such a case, the plaintiff has the burden of proof both as to the tortious conduct and the causal relation. (144 C.A.3d 596, citing *Rest.2d, Torts* §433(b)(3), Comment g.)

(d) The policy theory of *Sindell*, that the manufacturer is better able to bear the cost of injury and to guard against defects than the consumer, does not justify a shift of responsibility to innocent manufacturers. "The imposition of such a liability over that portion of the pharmaceutical industry producing the beneficial safe product would inhibit drug research and development, unreasonably raise the cost of health care, and punish drug manufacturers who have done no wrong." (144 C.A.3d 597.)

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dd. Insufficient Share of Market.

6 *Witkin Sum. Cal. Law Torts* § 1489

[§ 1489] Insufficient Share of Market.

In *Murphy v. E.R. Squibb & Sons* (1985) 40 C.3d 672, 221 C.R. 447, 710 P.2d 247, plaintiff sued defendant manufacturer, on an allegation and offer of proof that it supplied 10% of the national market of DES pills. *Held*, no cause of action was stated.

(a) *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, *supra*, §1486, generated many law review comments, some relating to the appropriate composition of the market for application of the market share doctrine and the meaning of the term "substantial share." The inquiry here is whether, as the trial judge determined, a 10% share of the market is insufficient. (40 C.3d 683.)

(b) Plaintiff contended that the doctrine was designed to accomplish a fair approximation of the damages that each defendant DES manufacturer would be required to pay under the principles of comparative fault, and that its applicability is unrelated to whether plaintiff has joined as defendants the manufacturers of a substantial share of the DES market. But *Sindell* makes it clear that in order to shift the burden of proof of causation in fact, a plaintiff must join the manufacturers of a substantial share of the DES that her mother might have taken. And although the defendant manufacturers could file cross-complaints against other DES manufacturers not joined, these pleadings would be filed only after plaintiff met her burden of joining the required defendants. (40 C.3d 683.)

(c) Plaintiff's position was that because Squibb was alleged to be the second largest seller of DES, its 10% market share must be deemed substantial. But this is contrary to the theoretical justification for the market share doctrine. In *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1, *supra*, §1194, both parties who could have been responsible were joined, there was a 50% chance that one was responsible, and this justified shifting of the burden of proof. In *Sindell*, only 5 of the 200 manufacturers were joined, and the court concluded "that the likelihood that one of the defendants supplied the DES should be determined not by the number of manufacturers joined in the action but by the percentage which the DES sold by each to prevent miscarriage bore to the entire production of the drug sold for that purpose." (40 C.3d 684.) And if the plaintiff joined the manufacturers of a substantial share of the DES that her mother might have taken, the injustice of shifting the burden of proof to the defendants would be significantly diminished. (40 C.3d 684.)

(d) Because Squibb had only a 10% share of the DES market, there is only a 10% chance that it produced the drug that caused plaintiff's injuries, and a 90% chance that another manufacturer was the producer. "In this circumstance, it must be concluded that she failed to meet the threshold requirement for the application of the market share doctrine." (40 C.3d 684.)

One justice, dissented. (40 C.3d 688.) (See *Setliff v. E.I. Du Pont de Nemours & Co.* (1995) 32 C.A.4th 1525, 1534, 38 C.R.2d 763 [allegation that plaintiff joined manufacturers of substantial market share was insufficient in absence of allegation that injury was caused by fungible product].)

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aa. Where Market Share Theory Is Inapplicable.

6 *Witkin Sum. Cal. Law Torts* § 1490

[§ 1490] Where Market Share Theory Is Inapplicable.

In *Mullen v. Armstrong World Industries* (1988) 200 C.A.3d 250, 246 C.R. 32, plaintiff homeowners brought a class action on behalf of persons who own homes built from 1912 through 1978 containing "friable" asbestos. They alleged that asbestos in that condition (capable of being reduced to powder and circulated into the air) is a known human carcinogen, and that its presence in various insulation, fireproofing, and decorative materials had significantly reduced the value of plaintiffs' homes. Defendants were more than 40 companies engaged in mining, manufacturing, or supplying friable asbestos or products containing it, and plaintiffs sought to proceed under the market share theory of liability set forth in *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, supra, §1486, by alleging that the products were functionally interchangeable; that there were no testing procedures available for identification of the manufacturer of a particular asbestos containing the product; and that the harm and threat to health from products of different manufacturers do not vary significantly; i.e., the materials and products are "fungible." The prayer was for compensatory damages to cover the costs of safety measures and alternative living accommodations during asbestos abatement, estimated by plaintiffs to be in excess of \$ 1 billion, and by one defendant at almost \$ 42 billion. *Held*, judgment on demurrer for defendants affirmed.

(a) Plaintiffs' theory was that DES and asbestos are simple equivalents; but this is not the case. DES was produced by hundreds of companies pursuant to one formula, with identical physical properties and chemical compositions, thereby creating the same risk of harm; asbestos is a "generic designation possessing a rainbow-like diversity and a bewildering array of potential users." (200 C.A.3d 250.)

(b) The market share liability was formulated where the injured parties attacked a product that carried with it a singular risk factor; here, plaintiffs seek recovery for damage to their persons and their property. (200 C.A.3d 257.)

(c) Because asbestos is not a product but a family of minerals, plaintiffs "are attacking an entire industry, not seeking recovery for damages caused by a single fungible product." (200 C.A.3d 257.)

(d) The great majority of jurisdictions have declined to extend the market share theory to asbestos-related injuries.

(200 C.A.3d 257.) (On liability of asbestos distributors, see *Dumin v. Owens-Corning Fiberglas Corp.* (1994) 28 C.A.4th 650, 33 C.R.2d 702, *infra*, §1498; on trial practice, see 60 Am.Jur. Trials 73 [asbestos injury litigation].)

In *Ferris v. Gatke Corp.* (2003) 107 C.A.4th 1211, 132 C.R.2d 819, decedent, before his death, sought damages against various manufacturers, suppliers, and distributors of asbestos, including manufacturers of friction brake products containing that mineral. On his death, his heirs amended the complaint to plead an additional cause for wrongful death. After the trial date, defendants filed motions in limine to exclude evidence supporting the market share theory of liability, and these motions were granted. Somewhat later, the trial court granted G corporation's motion for nonsuit, and judgment was entered for this defendant. *Held*, affirmed; on this record, the trial court did not err in barring plaintiffs from pursuing *Sindell* relief.

(a) *Sindell* was based on the fungibility of the drug involved in that case, and *Mullen* refused to extend the *Sindell* reasoning to asbestos. The *Mullen* court emphasized that asbestos products were not fungible, because they varied in such respects as the specific type of fiber used, the physical properties of the product itself, and the percentage of asbestos used in the product. However, in *Wheeler v. Raybestos-Manhattan* (1992) 8 C.A.4th 1152, 11 C.R.2d 109, *infra*, §1491, the plaintiff's request for relief was confined to friction brake pads, and the court concluded that these pads were sufficiently alike to meet the aforementioned objections, so that the plaintiffs at least should have been allowed to attempt to apply the market share theory. The *Wheeler* analysis was thrown into doubt by *Rutherford v. Owens-Illinois* (1997) 16 C.4th 953, 67 C.R.2d 16, 941 P.2d 1203, *infra*, §1492, another case that disapproved the extension of *Sindell* into the asbestos area and that emphasized the limits on the plaintiff's burden of proof on causation as a fundamental reason for rejecting a burden-shifting approach to asbestos personal injury litigation. "Given this line of development and the current state of the case law, we consider the question whether this court is now in a position to draw any firm conclusions about *Wheeler*'s ongoing vitality. Only a modest one, we will conclude--that the exception approved by this court in *Wheeler* has no application to the factual record made in this case. We also reach the complementary conclusion that because we are not required to, we do not here decide the contemporary validity of *Wheeler* in circumstances in which it might properly be applicable." (107 C.A.4th 1215.)

(b) Here, the pleadings indicated that decedent was exposed not only to asbestos dust from friction brake products while working on his and his neighbor's automobiles for nearly 40 years, but also while working in shipyards and while employed as a prison guard and as a furniture upholsterer. However, even assuming that plaintiffs had limited their request for *Sindell* relief to the manufacturers of friction brake pads and assuming that these pads satisfied the fungibility prong of that decision, there are other flaws in plaintiffs' proof on the *Sindell* issue, chief of which was the acknowledgement of their expert that he was unable to compute G corporation's share of the national market during the relevant time period. And it is plain from the language of the *Sindell* opinion and from the logic behind the market share theory itself that proof of an individual manufacturer's national market share is an essential predicate to relief, because each defendant will be held liable for the proportion of the judgment represented by its share of that market. (107 C.A.4th 1221.)

(c) In addition, decedent was able to identify two of the manufacturers to whose friction asbestos brake products he was exposed and conceded that he had no evidence substantiating exposure to any asbestos products manufactured by G Corporation. It was, of course, the *inability* of the plaintiff in *Sindell* to identify the causal source of her injuries that was held to justify reversing the usual burden of proving causation by allocating to the defendants the burden of negating their role in causing the plaintiff's injury. However, such a significant departure from conventional tort law doctrine, which is based on an Aristotelian conception of causation, should be undertaken only under truly compelling circumstances, a standard not met in the present case. (107 C.A.4th 1223.) (See *Chavers v. Gatke Corp.* (2003) 107 C.A.4th 606, 615, 132 C.R.2d 198 [defendant in asbestos case could not be found liable on either conspiracy theory or concert of action theory].)

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6 Witkin Sum. Cal. Law Torts § 1491

[§ 1491] Where Market Share Theory Is Applicable.

In *Wheeler v. Raybestos-Manhattan* (1992) 8 C.A.4th 1152, 11 C.R.2d 109, plaintiffs alleged personal injuries suffered from exposure to asbestos in brake pads. Each defendant was a manufacturer of brake products. The case was subject to San Francisco Superior Court order 21, which provides that the theory of market share liability is inapplicable to asbestos cases. After plaintiffs' offer of proof, the trial judge entered judgment of nonsuit for defendants. *Held*, reversed; order 21 is inapplicable here because of the peculiar facts presented by exposure to asbestos from brake pads, and plaintiffs' offer of proof stated facts sufficient to establish each of the prima facie elements of a case for market share liability under *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, *supra*, §1486.

(a) *Fungibility*. Plaintiffs offered to prove that the brake pads, although differing in size, were fungible to the extent that a pad of a given size, regardless of who made it, could be used on a variety of different vehicles, and that all the pads were composed solely of chrysotile asbestos fiber and contained between 40 and 60% asbestos by weight. This offer was sufficient. "It is irrelevant, of course, that pads come in various sizes and shapes. ... While brake pads are not absolutely interchangeable each for one another and hence are not fungible from the standpoint of an auto mechanic, they are fungible for the purposes of *Sindell* by virtue of containing roughly comparable quantities of the single asbestos fiber, chrysotile." (8 C.A.4th 1156.)

(b) *Inability to identify maker*. Plaintiffs alleged that the vast majority of their exposure to asbestos-containing brake dust came from used brake pads that were unidentifiable at that time because their trade names and trademarks had been worn off. Hence, the fact that plaintiffs may be able to identify some of the manufacturers of the *new* brake pads with which they worked should not be determinative. (8 C.A.4th 1157.)

(c) *Correlation between market share and liability*. The *Sindell* decision stated that at least over a large body of cases a defendant's market share should roughly equate to its liability. In this case that fit is much tighter as to each plaintiff. Because it is likely that no plaintiff was subjected only to pads of a single size and that each plaintiff was apt to have been exposed to the asbestos from brake pads of many, if not all, of the major manufacturers, there is a strong likelihood that each plaintiff was exposed to the products of any given manufacturer with roughly the same frequency

that that manufacturer's brake pads occupied the market. Of course, each defendant may still be able to show that it could not have been responsible for a particular plaintiff's injuries, such as by showing that plaintiff had retired before it began manufacturing brake pads. (8 C.A.4th 1158.)

(d) *Substantial share of makers of product.* Because this case arises on nonsuit, it is only necessary that plaintiffs have offered to prove that the named defendants constitute a substantial share of the makers of asbestos-containing brake pads. This they did. (8 C.A.4th 1158.)

(e) *Limited holding.* "Plaintiffs have not proven the elements of a market share case; we hold only that they should be allowed to attempt it." (8 C.A.4th 1158.) (See *Richie v. Bridgestone/Firestone* (1994) 22 C.A.4th 335, 339, 27 C.R.2d 418 [applying retroactively holding of *Wheeler* that market share theory of liability may be used when plaintiff has been exposed to asbestos fibers in brake pads].)

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cc. Erroneous Burden-Shifting Instruction.

6 *Witkin Sum. Cal. Law Torts* § 1492

[§ 1492] Erroneous Burden-Shifting Instruction.

In *Rutherford v. Owens-Illinois* (1997) 16 C.4th 953, 67 C.R.2d 16, 941 P.2d 1203, plaintiff died of lung cancer after exposure to asbestos over many years in the course of his employment. In accordance with a local court rule relating to asbestos cases, the jury was instructed that once plaintiff had proven that the asbestos product was defective, that plaintiff's injuries were caused by asbestos exposure generally, and that he was exposed to asbestos fibers from defendant's product specifically, the burden of proof shifted to defendant to prove that its product was not a legal cause of plaintiff's injuries or death. Thus, the primary issue was whether the alternative liability burden-shifting instruction approved in *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1, supra, §1194, applied to this asbestos case. Judgment was rendered for plaintiff. The Court of Appeal, on alternate theories, reversed. *Held*, judgment of the Court of Appeal reversed, but that court was correct in concluding that the trial judge had erred in giving the burden-shifting instruction.

(a) In *Summers v. Tice*, two hunters negligently fired their rifles in the direction of plaintiff, and he was injured. Because he was unable to prove which shot had caused his injury, he was allowed to place on each defendant the burden of proving that his shot had not caused the injury. However, the present situation differs from *Summers* in the following respects: (1) In asbestos cases, unlike in *Summers*, often many of the tortfeasors are, for various reasons, not before the court. Thus, it is unfair to shift the burden of proof to defendants when they might not even be the guilty party. (16 C.4th 972.) (2) Because of a combination of various factors, asbestos products have widely divergent toxicities. (16 C.4th 972.) (3) *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, supra, §1486, the case that established "market share liability" where all potential tortfeasors were not before the court, nevertheless rejected application of a pure *Summers* alternative liability theory. (16 C.4th 973.)

(b) The main reason why the *Summers* burden-shifting instruction is unnecessary in asbestos cases is that the plaintiff is not required to prove that a particular defendant's product was an actual cause of the injury. In other words, burden-shifting is unnecessary. In asbestos cases, it is impossible to reach absolute certainty with respect to causation. Even at the most fundamental level, there is scientific uncertainty regarding the biological mechanisms by which inhalation of certain microscopic fibers of asbestos leads to lung cancer. And it is often not clear that the plaintiff was even exposed to dangerous particles from a particular defendant. This is so because the long latency of asbestos-related

cancers means that memories are often dim and records incomplete. Finally, it is also often unclear whether exposure to a particular asbestos-containing product was significant enough to have been a legal cause of the plaintiff's injury, especially in the presence of numerous other factors, such as exposure to several cancer-causing agents or the length and intensity of the exposure to asbestos. As a result, it is only necessary that the plaintiff prove that a substantial factor in causing the risk of injury was exposure to a particular defendant's asbestos-containing product, not that it actually caused the disease. (16 C.4th 974.)

(c) The standard instructions on causation are insufficient in asbestos cases in that they do not adequately explain this "risk" factor. "Without such guidance, a juror might well conclude that the plaintiff needed to prove that fibers from the defendant's product were a substantial factor *actually contributing* to the development of the plaintiff's or decedent's cancer. In many cases, such a burden will be medically impossible to sustain, even with the greatest possible effort by the plaintiff, because of the irreducible uncertainty regarding the cellular formation of an asbestos-related cancer. We therefore hold that, in the trial of an asbestos-related cancer case, although no instruction 'shifting the burden of proof as to causation' to defendant is warranted, the jury should be told that the plaintiff's or decedent's exposure to a particular product was a substantial factor in causing or bringing about the disease if in reasonable medical probability it contributed to the plaintiff or decedent's *risk* of developing cancer." (16 C.4th 977, citing *Lineaweaver v. Plant Insulation Co.* (1995) 31 C.A.4th 1409, 37 C.R.2d 902, *supra*, §1194.) (See *McGonnell v. Kaiser Gypsum Co.* (2002) 98 C.A.4th 1098, 1104, 120 C.R.2d 23 [defendant manufacturers were entitled to summary judgment on causation issue, where decedent's deposition, given before his death, established that he had no knowledge of any exposure to defendants' products].)

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5. Manufacturer: Multiple Toxin Cases.

6 *Witkin Sum. Cal. Law Torts* § 1493

[§ 1493] Manufacturer: Multiple Toxin Cases.

The showing of causation required where injury results from long-term exposure to multiple toxins was discussed in *Bockrath v. Aldrich Chemical Co.* (1999) 21 C.4th 71, 86 C.R.2d 846, 980 P.2d 398, 4 Cal. Proc. (4th), Pleading, Supp., §589A, an action by an individual suffering from cancer against 55 manufacturers of numerous products to which he was allegedly exposed in the workplace over a 21-year period:

(a) The substantial factor standard, as set forth in *Rutherford v. Owens-Illinois* (1997) 16 C.4th 953, 968, 67 C.R.2d 16, 941 P.2d 1203, supra, §1492, in the context of products liability actions, requires that the plaintiff prove that a defective product supplied by a defendant was a substantial factor in bringing about the injury. In cases like this one, presenting complicated medical causation issues, the standard of proof ordinarily required is a reasonable medical probability based on competent expert testimony that the defendant's conduct contributed to the plaintiff's injury. However, the standard is relatively broad and requires only that the contribution of the individual cause be more than negligible or theoretical. (21 C.4th 79.)

(b) The plaintiff must show (1) that he or she was exposed to each of the toxic materials claimed to have caused a specific illness; (2) the identity of each product that allegedly caused the injury; (3) that as a result of the exposure, the toxins entered his or her body; (4) that plaintiff suffers from a specific illness, and that each toxin that entered his or her body was a substantial factor in bringing about, prolonging, or aggravating that illness; and (5) except in a case governed by market-share liability, as outlined in *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, supra, §1486, that each toxin was manufactured or supplied by a named defendant. (21 C.4th 79.)

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6. Manufacturer: Apparent Manufacturer.

6 Witkin Sum. Cal. Law Torts § 1494

[§ 1494] Manufacturer: Apparent Manufacturer.

Under Rest.3d, Torts: Products Liability (supra, §1430), one engaged in the business of selling or otherwise distributing products "who sells or distributes as its own a product manufactured by another" is subject to the same liability as though the seller or distributor were the product's manufacturer. (*Rest.3d, Torts: Products Liability §14.*)

In this circumstance, the seller is presumed to cause the product to be used or consumed, in part at least, in reliance on the seller. The seller's reputation is an implied assurance of the quality of the product, and the seller should be estopped from denying that it stands behind that assurance. (*Rest.3d, Torts: Products Liability §14, Comment c.*)

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7. Retail Dealer.

aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1495

[§ 1495] In General.

In *Vandermark v. Ford Motor Co.* (1964) 61 C.2d 256, 37 C.R. 896, 391 P.2d 168, the court brought the retail dealer under the rule of *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, supra, §1429. Plaintiff V bought a new Ford from a dealer. It developed brake trouble, plaintiff V lost control of it on the highway, and plaintiff V and plaintiff M, his passenger, were injured. The manufacturer, Ford, was held strictly liable under *Greenman*, but the dealer set up the warranty defenses of no timely notice and disclaimer of liability for personal injuries. *Held*, the same policy calls for the same basis of liability of manufacturers and retailers:

"Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. ... In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship. Accordingly, as a retailer engaged in the business of distributing goods to the public, [defendant] is strictly liable in tort for personal injuries caused by defects in cars sold by it." (61 C.2d 262.) (See *Rest.3d, Torts: Products Liability* §2; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §572; 2 *San Diego L. Rev.* 165; 13 *A.L.R.3d* 1057, 1099 [strict liability in tort]; 99 *A.L.R.3d* 671 [when person is "engaged in the business"].) (On nonliability of seller of secondhand goods, see *infra*, §1496.)

West's Key Number Digest, Products Liability k.25

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6 *Witkin Sum. Cal. Law Torts* § 1496

[§ 1496] Seller of Secondhand Goods.

In *Tauber-Arons Auctioneers Co. v. Superior Court* (1980) 101 C.A.3d 268, 161 C.R. 789, P, an employee of C, suffered an injury while operating an allegedly defective wood planer. He brought a strict products liability action against T, on the following theory: H, a manufacturer, was going out of business, and T conducted an auction sale of all of H's machinery; C bought the wood planer at this auction sale; hence T was the seller of the defective product, subject to strict liability under *Vandermark v. Ford Motor Co.* (1964) 61 C.2d 256, 37 C.R. 896, 391 P.2d 168, supra, §1495, as a commercial marketer participating in the business enterprise. T challenged this theory by showing that its function as auctioneer was merely to sell--not to maintain or repair; that it did not take title to the machinery but sold it as agent for H; that it sold all of the secondhand machinery "as is," with no inspection or testing or representations as to its safety or quality. The trial judge gave summary judgment for P on the severable issue of strict liability. *Held*, mandamus granted to compel setting aside the order.

(a) *Existing law on strict liability of participants in marketing enterprise.* The list of participants in a business enterprise, as summarized in *Kasel v. Remington Arms Co.* (1972) 24 C.A.3d 711, 101 C.R. 314, infra, §1500, includes lessor, developer, licensee, retailer, and wholesale-retail distributor. (101 C.A.3d 275.) The cases make it clear that the defendant's particular legal relationship is not determinative; e.g., if a manufacturer of "antiques" chose to market them exclusively through an "estate" auctioneer as its agent, the auctioneer would be a participant in the manufacturing-marketing system. But the defendant must also have participated in the enterprise that created consumer demand for and reliance on the particular product, not just a product of the same classification. (101 C.A.3d 276.)

(b) *Seller of secondhand goods.* Strict liability of the seller of secondhand products who has not modified them is a question of first impression in *California*. (101 C.A.3d 274, 277.) The very few cases from other jurisdictions are conflicting, but the 1979 Oregon case of *Tillman v. Vance Equipment Co.* is persuasive and is adopted as the *California* rule. (101 C.A.3d 278, 279.) The *Tillman* court pointed out that to hold every dealer in secondhand goods responsible regardless of fault would work a significant change in the nature of used goods markets, and declared that the sale of a used product, without more, does not generate the expectations of safety that give rise to strict liability. (101 C.A.3d 281.) Thus, a car dealer who sells trade-ins "may incur liability in respect of an original design defect in a car which he

did not originally sell, both as a participant in the enterprise that created consumer demand and by generating 'the kind of expectations of safety that the courts have held are justifiably created by the introduction of a new product into the stream of commerce.' ... The ordinary used products dealer, however, will not be strictly liable for such defects created by the manufacturer." (101 C.A.3d 282.)

(c) *Distinction: where secondhand dealer does something in connection with the goods.* In the instant case, the seller (auctioneer), like any ordinary used machinery dealer, had no special relationship to the manufacturer and played only "a random and accidental role" in the distribution of the product. "It is unnecessary to decide whether petitioner may be strictly liable if the defect proven is the result of subsequent modification, dilapidation or misuse." (101 C.A.3d 284.)

The *Tauber-Arons* holding rejecting strict liability has been followed. (See *LaRosa v. Superior Court* (1981) 122 C.A.3d 741, 761, 176 C.R. 224; *Wilkinson v. Hicks* (1981) 126 C.A.3d 515, 521, 179 C.R. 5 [fact that defendant, used machinery dealer, had facilities and employees to perform inspection, repair, and reconditioning was not sufficient reason to hold him strictly liable]; *Brejcha v. Wilson Machinery* (1984) 160 C.A.3d 630, 639, 641, 206 C.R. 688 [discussing *Tauber-Arons* and reaching same conclusion of nonliability where defendant auctioneer sold machine at public auction "as is, where is"]; 31 Proof of Facts 2d 639 [dealer's liability for defective used car]; 19 Cal. Western L. Rev. 330; 52 So. Cal. L. Rev. 805 [note written before *Tauber-Arons* decision]; 83 A.L.R.4th 1188 [nonliability of auctioneer]; 9 A.L.R.5th 1 [strict liability of seller of used product].)

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5. Scope of Liability.

a. Persons Liable.

7. Retail Dealer.

cc. Pharmacist.

6 *Witkin Sum. Cal. Law Torts* § 1497

[§ 1497] Pharmacist.

In *Murphy v. E.R. Squibb & Sons* (1985) 40 C.3d 672, 221 C.R. 447, 710 P.2d 247, plaintiff filed an action for personal injuries (cancer) resulting from the drug DES, taken by her mother during pregnancy. The defendants were (1) Squibb, a manufacturer of the drug, and (2) the pharmacist who sold the drug to the mother. *Held*, no cause of action on strict products liability was stated against the manufacturer (see *supra*, §1489) or the pharmacist.

(a) Plaintiff's theory was that a pharmacist selling prescription drugs is in the same position as a retailer of any other consumer product, and liable under *Vandermark v. Ford Motor Co.* (1964) 61 C.2d 256, 37 C.R. 896, 391 P.2d 168, *supra*, §1495. Defendant contended that a pharmacist dispensing a prescription drug is primarily furnishing a service rather than selling a product. No prior California case has dealt with this issue, but decisions in Florida, North Carolina, and New York have held that pharmacies are not liable. (40 C.3d 676.)

(b) Persons who sell services are not liable in the absence of negligence or intentional misconduct. Thus, a doctor who prescribes a drug purchased by the patient at a pharmacy is not the seller of the drug; a hospital is not strictly liable for injuries arising out of the use of a surgical needle that breaks during an operation (*Silverhart v. Mount Zion Hosp.* (1971) 20 C.A.3d 1022, 1026, 98 C.R. 187, *infra*, §1520); and a similar holding was made in out-of-state cases dealing with a dentist. (40 C.3d 677.)

(c) "It seems clear to us that the pharmacist is engaged in a hybrid enterprise, combining the performance of services and the sale of prescription drugs. It is pure hyperbole to suggest, as does plaintiff, that the role of the pharmacist is similar to that of a clerk in an ordinary retail store. With a few exceptions, only a licensed pharmacist may dispense prescription drugs, and ... there are stringent educational and professional requirements for obtaining and retaining a license. A pharmacist must not only use skill and care in accurately filling and labeling a prescribed drug, but he must be aware of problems regarding the medication, and on occasion he provides doctors as well as patients with advice regarding such problems. In counseling patients, he imparts the same kind of information as would a medical doctor about the effects of the drugs prescribed. A key factor is that the pharmacist who fills a prescription is in a different position from the ordinary retailer because he cannot offer a prescription for sale except by order of the

doctor. In this respect, he is providing a service to the doctor and acting as an extension of the doctor in the same sense as a technician who takes an X-ray or analyzes a blood sample on a doctor's order." (40 C.3d 678.)

(d) Nevertheless, a sale in fact occurs, and this distinguishes the pharmacist from the doctor or dentist or hospital: "The pharmacist is in the business of selling prescription drugs, and his role begins and ends with the sale. His services are rendered only in connection with the sale, and a patient who goes to a pharmacy to have a prescription filled generally is seeking to purchase the drug rather than to obtain the advice of the pharmacist." (40 C.3d 679.)

(e) These factors are not the only controlling ones; former B. & P.C. 4046 has made the practice of pharmacy a profession and refers to it as a service. This declaration is similar to that in *Health & Saf.C. 1606*, declaring that distribution or use of whole blood or plasma is a service and not a sale, thus making suppliers of blood immune from strict liability. (40 C.3d 679, 680.) "[A] pharmacist's role is more aptly characterized as the performance of a service than that of the manufacturer and seller of blood plasma." (40 C.3d 680.)

(f) If pharmacies were held strictly liable for the drugs they dispense, some of them might refuse to dispense drugs that pose even a potentially remote risk of harm; or the pharmacist might select the more expensive product of an established manufacturer when he or she has a choice of brands. (40 C.3d 680, 681.)

(g) The Legislature might have decided also that because the doctor who ordered the drug cannot be held liable, it would be unfair and burdensome to expose the pharmacy alone to strict liability, because it may provide the drug only on a doctor's prescription. (40 C.3d 681.)

(h) Plaintiff's contention that strict liability is proper because some pharmacies are owned by large chain store operations that are as capable as large drug manufacturers to respond in damages is not persuasive. Most pharmacies are not in this category. (40 C.3d 681.)

Two justices dissented. (See 21 U.S.F. L. Rev. 173; 44 A.L.R.5th 393 [liability of pharmacist who accurately fills prescription for resulting harm].)

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aa. In General.

6 Witkin Sum. Cal. Law Torts § 1498

[§ 1498] In General.

Rest.3d, Torts: Products Liability §20 includes wholesalers and distributors among those subject to products liability. (See *infra*, §1508; on "sales" under former *Rest.2d, Torts* §402A, see *Canifax v. Hercules Powder Co.* (1965) 237 C.A.2d 44, 52, 46 C.R. 552; *Barth v. B. F. Goodrich Tire Co.* (1968) 265 C.A.2d 228, 251, 71 C.R. 306; *Kaminski v. Western MacArthur Co.* (1985) 175 C.A.3d 445, 456, 220 C.R. 895, *infra*, §1499; 5 Harper, James & Gray 2d, §28.31; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §571; 13 *A.L.R.3d* 1057, 1098 [strict liability in tort].)

In *Dumin v. Owens-Corning Fiberglas Corp.* (1994) 28 C.A.4th 650, 33 C.R.2d 702, plaintiff, suffering from mesothelioma, an asbestos cancer, brought an action for personal injuries against a distributor of asbestos insulation products. As a boiler tender on several ships, plaintiff had regularly handled asbestos insulation. He could not identify defendant's product as one of the asbestos products that he had been exposed to, but there was evidence that he had been aboard the Pocono in 1953 and 1954, that defendant's product was used at the shipyard where the Pocono was homeported in the early 1950s, and that the ship's repair supplies were probably received from that shipyard. The trial judge entered a partial directed verdict in favor of defendant, ruling that plaintiff had failed to prove exposure to defendant's product. *Held*, affirmed.

(a) In light of the uncertainty of plaintiff's witness whether defendant's product was used in the shipyard in 1953 and 1954 when plaintiff's ship was home-ported there, any conclusion that plaintiff was exposed to the product requires "a stream of conjecture and surmise." The circumstantial evidence is of insufficient weight to support a reasonable inference of causation. (28 C.A.4th 656.)

(b) Plaintiff contends that he should be relieved of the burden of proving causation under *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1, *supra*, §1194, but the principle of that case acts only to shift the burden of proof from the plaintiff to *proven wrongdoers*. Plaintiff was unable to prove that defendant's product was aboard his ship. "By analogy to the hunting mishap of *Summers*, there was no proof that OCF ever fired a shot or, indeed, was even in the woods." (28 C.A.4th 657, 658.)

In *Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 C.A.4th 762, 59 C.R.2d 322, defendant was a supplier of nondefective resin used in polybutylene plumbing systems that were defective due to another product. However, defendant played an important role in marketing the plumbing systems, and it was on this theory that plaintiff attempted to hold defendant strictly liable. *Held*, defendant could, as a matter of law, be held strictly liable for defects in the polybutylene plumbing system, but the specific instructions were inadequate.

"[W]e disagree with [defendant] to the extent it is arguing that an entity involved in the marketing process, but outside the vertical distribution chain, may never be strictly liable regardless of the factual circumstances. The imposition of strict liability depends on whether the facts establish a sufficient causative relationship or connection between the defendant and the product so as to establish that the policies underlying the strict liability doctrine are satisfied. Specifically, a defendant involved in the marketing/distribution process has been held strictly liable if three factors are present: (1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process." (51 C.A.4th 776, citing *Kasel v. Remington Arms Co.* (1972) 24 C.A.3d 711, 101 C.R. 314, *supra*, §198.) The instructions given were too general in that they failed to incorporate these elements. (51 C.A.4th 777.)

In *Edwards v. A.L. Lease & Co.* (1996) 46 C.A.4th 1029, 54 C.R.2d 259, defectively manufactured pipe was installed during construction of a group of homes and subsequently failed. Various individual homeowners sued the manufacturers, the wholesalers, and the component suppliers for property damage. Plaintiffs alleged that, although they could identify the other defendants, they were unable to determine which wholesaler distributed the pipe that was installed in their homes. Plaintiff proceeded against the wholesalers, a group comprising "approximately" 100% of the wholesalers of the defective pipe, based on either a market share or alternative liability theory. The wholesalers' demurrers were sustained and the action against them was dismissed. *Held*, affirmed.

(a) *Need to identify defendant.* In a products liability action, every supplier in the stream of commerce or chain of distribution, from manufacturer to retailer, including, of course, wholesalers, is potentially liable. As a general rule, however, tort liability is dependent on the plaintiff's ability to demonstrate that his or her damages were caused by the defendant, and this rule applies in strict liability as well as negligence cases. (46 C.A.4th 1033.)

(b) *Market share theory of liability is inapplicable.* An exception to this causation requirement, the market share theory of liability of *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, *supra*, §1486, is not applicable.

(1) In *Sindell*, when plaintiffs were unable to determine which of several pharmaceutical companies manufacturing a defectively designed drug supplied the particular drug that caused their injuries, the court fashioned a market share theory of liability, permitting plaintiffs to join a substantial share of the manufacturers, and shifting the burden to the individual manufacturers to demonstrate that they did not manufacture the drug causing plaintiffs' injuries. (46 C.A.4th 1034.)

(2) The *Sindell* plaintiffs were unable to identify the manufacturer of the defective drug causing their injuries, and would have been without a remedy for extremely serious injuries absent market share liability. Plaintiffs here know who manufactured the defective pipe, know who supplied the defective components from which it was manufactured, and know the developers and builders of their homes. Consequently, plaintiffs have identifiable defendants, and are not otherwise without a remedy. (46 C.A.4th 1034.)

(3) Plaintiffs here, unlike those in *Sindell*, were not damaged by a fungible product that was uniformly manufactured from a common formula and that was inherently defective for its intended purpose due to its defective *design*. When properly manufactured, the pipe in question is fit for its intended purpose. In other words, plaintiffs were damaged by *manufacturing* defects caused during a discrete time period by a single manufacturer. (46 C.A.4th 1035.)

(c) *Alternative liability theory is inapplicable.* The alternative liability theory of *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1, supra, §1194, is also not applicable.

(1) In *Summers*, plaintiff was injured by one of two persons who negligently fired in plaintiff's direction during a hunting trip. Although plaintiff was unable to determine which of the named defendants fired the specific shot that struck him, the court held that because both defendants were negligent they were liable as joint tortfeasors, and the burden was imposed on them to prove that they did not cause plaintiff's injuries. *Summers* was based on *Rest.2d, Torts* §433B(3), which states: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." (46 C.A.4th 1035.)

(2) Much of the rationale for application of the *Summers* rule is missing in cases, such as the one here, where individual plaintiffs have identifiable defendants. In contrast to the *Summers* plaintiff, plaintiffs here are not without a remedy due to their inability to identify and join responsible defendants. (46 C.A.4th 1035.)

West's Key Number Digest, Products Liability k.23.1

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §28.31.



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bb. Successor Corporation.

6 *Witkin Sum. Cal. Law Torts* § 1499

[§ 1499] Successor Corporation.

In *Kaminski v. Western MacArthur Co.* (1985) 175 C.A.3d 445, 220 C.R. 895, the rule developed in *Ray v. Alad Corp.* (1977) 19 C.3d 22, 136 C.R. 574, 560 P.2d 3, supra, §1481, that holds a successor corporation to the manufacturer liable was applied to defendant, a successor to the distributor of a product.

(a) "Given the policies underlying strict liability, the 'stream of commerce' approach to liability should extend to successor entities. When a distributor or retailer acquires a corporation and takes advantage of its goodwill and other corporate assets and facilities to inject the predecessor's product line into the stream of commerce, it continues the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. ... To hold *Ray* inapplicable to successor distributors and retailers would be contrary to the policy of compensating injured plaintiffs from the resources of those better capable of estimating and spreading the risk of the marketing of defective products." (175 C.A.3d 456.)

(b) The argument that a distributor does not have the manufacturer's power to raise prices to spread the cost of compensation is inconsistent with the general rule of liability of distributors. "The solution to the distributor's fixed-cost dilemma is to seek indemnity against the responsible manufacturer, not to avoid successor liability vis-a-vis the injured plaintiff. [Defendant] also has the superior ability to estimate the risk of marketing defective products and provide for appropriate insurance." (175 C.A.3d 456.)

(c) The argument that the *Ray* rule is inapplicable because defendant did not purchase the "principal assets" of its predecessor is not persuasive: The record shows that it acquired "considerable" assets, including customer records, goodwill, and equipment, office furniture, and a large inventory. (175 C.A.3d 457.)

(d) The contention that defendant is not liable because it did not cause the dissolution of its predecessor is also untenable. All that is required is a causal connection between the successor's acquisition and the unavailability of the predecessor as a potential defendant. (175 C.A.3d 458.) "We may readily conclude that the transaction was an acquisition of principal assets which caused or at least substantially contributed to the absence of [defendant] from the

recovery pool of product liability plaintiffs." (175 C.A.3d 458.)

(e) The further contention, that the successor corporation should not be liable where the plaintiff has a remedy against the original stockholders of the predecessor, is likewise unpersuasive. In *Ray*, the court pointed to the "formidable and possibly insuperable obstacles" to recovery against stockholders, and concluded that this technical right was virtually meaningless to injured plaintiffs. (175 C.A.3d 459.)

(f) The final argument, that the *Ray* rule is only appropriate where the injured plaintiff has no other remedy against any other defendant, has no support in authority. "The presence of another legitimate target defendant in the case does not defeat successor liability against another legitimate defendant." (175 C.A.3d 459.) The phrase "complete denial of redress"--as used in *Ray*--means "the complete denial of redress against a major defendant in the chain of commerce, be it manufacturer or distributor." As in any products liability case, the original manufacturer may be unavailable or amenable to settlement only for substantially less than the amount of the eventual judgment. (175 C.A.3d 459.) (See *Phillips v. Cooper Laboratories* (1989) 215 C.A.3d 1648, 1657, 264 C.R. 311 ["[s]uccessor liability has generally been denied for a lack of causation in situations showing no contributory cause in the predecessor's demise, such as when the predecessor sells product line assets but dissolves at a later date and for an independent reason," quoting *Kaminski*].)

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9. Licensors or Franchisors.

6 Witkin Sum. Cal. Law Torts § 1500

[§ 1500] Licensors or Franchisors.

(1) *Licensors*. In *Garcia v. Halsett* (1970) 3 C.A.3d 319, 82 C.R. 420, *infra*, §1512, the court declared that a licensor, like a manufacturer, retailer, or lessor is part of the marketing enterprise; i.e., even though not engaged in distribution of the product, the licensor provides it for use by the public. Hence, imposition of strict liability on the operator of a launderette, in favor of a customer using a washing machine, was upheld. Defendant was a licensor, and plaintiff customer was a licensee using the machine with permission. (3 C.A.3d 326.)

(2) *Franchisors*. A much more difficult situation was presented in *Kasel v. Remington Arms Co.* (1972) 24 C.A.3d 711, 101 C.R. 314, *supra*, §198. Remington Arms Co. gave a franchise to a Mexican manufacturer, which produced a defective shotgun shell, and Remington was held strictly liable for the resulting injury to plaintiff. The opinion reasons as follows:

(a) The general principle is that tort liability should be imposed "upon the overall producing and marketing enterprise" responsible for placing defective products in the stream of commerce. (24 C.A.3d 724.)

(b) Prior cases have applied this doctrine *downward* through various links in the marketing chain, from the manufacturer to the distributor to the retailer, etc. (24 C.A.3d 724.) No case so far has applied the doctrine *upward* from a manufacturer or distributor to a franchisor or a trademark licensor. But commentators have suggested that this would be a proper step. (24 C.A.3d 725, and footnote 17.)

(c) The decisions adopting the stream of commerce approach indicate that no precise legal relationship is required. "It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not the defendant's legal relationship (such as agency) with the manufacturer or other entities involved in the manufacturing-marketing system) which calls for imposition of strict liability." (24 C.A.3d 725.)

(d) Application of the doctrine here was appropriate. Remington organized the Mexican manufacturer, participated in its financing, supplied it with machinery and specifications for manufacture, reserved control over quality of the

product, supervised the plant, and advertised the products under its trademarks. Thus, "Remington had more involvement in the enterprise which produced the defective shell than the typical retailer, distributor or wholesaler upon whom the courts have had no trouble imposing strict liability." (24 C.A.3d 727.) (See 72 So. Cal. L. Rev. 1 [strict liability for trademark licensors]; 90 A.L.R.4th 981 [trademark licensor's liability for injury or death allegedly due to defect in licensed product].)

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10. Mass-Produced Homes.

aa. Seller.

6 Witkin Sum. Cal. Law Torts § 1501

[§ 1501] Seller.

The *ordinary* builder of a dwelling or other structure on land has not been held strictly liable. But in *Kriegler v. Eichler Homes* (1969) 269 C.A.2d 224, 74 C.R. 749, the court brought the builder-seller of mass-produced tract houses under the rule of *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, *supra*, §1429. Defendant E, a large-scale builder of homes, built one in 1951. Because of a copper shortage during the Korean War, the radiant heating contractor used steel tubing in 4,000 E homes. In 1952, E sold to plaintiff's predecessor, and plaintiff bought the home in 1957. In 1959, the heating system failed due to corrosion of the pipe, and an entirely new system was put in. Plaintiff recovered damages of \$ 5,073.18. *Held*, affirmed. Plaintiff relied on the skill of defendant E in producing a home with a heating system reasonably fit for its intended purpose. "[T]here are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same." (269 C.A.2d 227.) (See *Fleck v. Bollinger Home Corp.* (1997) 54 C.A.4th 926, 934, 63 C.R.2d 407 [developer who devised plans for 11 homes built between 1984 and 1989 qualified as "mass" producer of homes; instruction that used term "substantial numbers," in place of "mass," was sufficient]; 30 *McGeorge L. Rev.* 299 [strict liability for construction defects]; 25 A.L.R.3d 383, 407 [liability of builder-vendor of new dwelling for loss, injury, or damage occasioned by defective condition]; 10 A.L.R.4th 385 [liability of builder of residence for latent defects, to subsequent purchasers from original vendee]; 25 A.L.R.4th 351 [liability for injury or damage caused by defects in building or land].)

Oliver v. Superior Court (1989) 211 C.A.3d 86, 259 C.R. 160, held that neither existing case law nor the policies underlying *Kriegler v. Eichler Homes* provided a basis for extending the doctrine of strict liability to a contractor/seller who built two homes, at two different times, in two different locations. "A home purchase through an occasional construction and sale does not involve the buyer reliance attending sales based upon an advertised model. Nor does it present a situation where the builder may protect himself from substantial financial loss by effectively spreading both the risk and actual costs of defective construction among a number of residences in a development. Since the rationale underlying the application of strict liability does not apply to the occasional or isolated construction and sale of a residence, we are not inclined to expand the concept beyond its current, limited application to mass-produced homes."

(211 C.A.3d 89.) (On recovery for construction defects in residential housing, see C.C. 895 et seq., supra, §1162 et seq.)

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6 *Witkin Sum. Cal. Law Torts* § 1502

[§ 1502] Manufacturer or Supplier of Component Part.

In *Jimenez v. Superior Court* (2002) 29 C.4th 473, 127 C.R.2d 614, 58 P.3d 450, plaintiffs were the owners of a home in a housing development, and defendants were the manufacturers and suppliers of windows that had been installed in the house. On behalf of all the homeowners in the development, plaintiffs instituted a strict products liability action alleging that defendants had manufactured and installed defective windows and that the defects caused property damage to other parts of the houses, i.e., the framing, floor coverings, insulation, drywall, etc. Defendant manufacturers moved for summary adjudication, arguing that the manufacturer of a product installed in a mass-produced home, unless the manufacturer has ownership and control over the housing development, cannot be strictly liable for a defective or dangerous condition in the home. In response, plaintiffs contended that the manufacturer of a component part of mass-produced houses is strictly liable for damage caused by the defective part. The trial judge granted defendants' motion, plaintiffs petitioned for mandamus, and the Court of Appeal directed the trial judge to vacate the order granting summary adjudication. *Held*, judgment of the Court of Appeal affirmed.

(a) *Strict products liability of component manufacturers.*

(1) *Kriegler v. Eichler Homes* (1969) 269 C.A.2d 224, 74 C.R. 749, *supra*, §1501, applied strict products liability to mass-produced homes, but *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 C.A.3d 1131, 261 C.R. 146, *infra*, §1505, and *Casey v. Overhead Door Corp.* (1999) 74 C.A.4th 112, 87 C.R.2d 603, *infra*, §1505, held that a subcontractor hired by a developer cannot be strictly liable for defects in mass-produced homes unless it also controls the housing development, regardless of whether the subcontractor provides services or a product. Citing *La Jolla Village*, defendants contended that extending strict liability to manufacturers of component parts, as opposed to the completed homes, would not serve the purposes of strict products liability. This argument is without merit. "Like manufacturers, suppliers, and retailers of *complete* products, *component* manufacturers and suppliers are 'an integral part of the overall producing and marketing enterprise,' may in a particular case 'be the only member of that enterprise reasonably available to the injured plaintiff,' and may be in the best position to ensure product safety. ... And component manufacturers and suppliers, like manufacturers, suppliers, and retailers of complete products, can adjust the costs of liability in the course of their continuing business relationship with other participants in the overall manufacture and

marketing enterprise." (29 C.4th 479.) *La Jolla* and *Casey* are disapproved to the extent that they hold or suggest that a manufacturer of components installed in a mass-produced home can never be strictly liable in tort for physical injuries caused by defects in those components. (29 C.4th 484.)

(2) Defendants argued that subjecting them to strict liability would be improper, because they had no physical control over the windows at the time of the alleged harm. However, it has never been held or implied that strict products liability applies only to those injuries that defective products cause while still under the manufacturer's ownership or control. Rarely, if ever, are defective products still in the control of a manufacturer, distributor, or retailer at the time of injury to the consumer. What matters is whether the windows were defective when they left the factory, and whether these defects caused the alleged injuries. (29 C.4th 480.)

(3) Defendants also contended that assembling the windows constituted a "substantial change," within the meaning of *Rest.2d, Torts §402A(1)(b)*, which would preclude liability. This contention is incorrect. The mere assembly of a product that is sold in parts is not a "substantial change." The issue is not whether the product was sold fully assembled or in parts, but whether the defect that resulted in the alleged damage existed when the windows left the manufacturers' control. (29 C.4th 480.)

(4) Finally, defendants predicted that manufacturers and distributors of component products used in the mass production of homes would regularly bring actions and cross actions against each other for indemnity and other claims, thus causing a massive increase in litigation. However, "the policy reasons favoring strict products liability for component manufacturers are the same as for other participants in the general enterprise of manufacturing and marketing consumer goods, and these interests, including the incentives for improved product safety, outweigh the burden imposed by increased litigation." (29 C.4th 481.)

(b) *Recovery is not barred under economic loss rule.*

(1) The economic loss rule, which originated with *Seely v. White Motor Co.* (1965) 63 C.3d 9, 45 C.R. 17, 403 P.2d 145, *infra*, §1514, allows a plaintiff to recover in strict products liability in tort when a product defect causes damage to "other property," that is, property other than the product itself. (The law of contractual warranty governs damage to the product itself.) Defendants argued that the "product" here was the entire house in which their windows were installed, and that the damage caused to "other parts" of the house by the allegedly defective windows was damage to the "product itself" within the economic loss rule, thus precluding application of strict liability. This argument is without merit. California decisional law has long recognized that the economic loss rule does not necessarily bar recovery in tort for damage that a defective product (e.g., a window) causes to other portions of a larger product (e.g., a house) into which the former has been incorporated. (29 C.4th 483, citing *Casey*, *Stearman v. Centex Homes* (2000) 78 C.A.4th 611, 92 C.R.2d 761, and *Aas v. Superior Court* (2000) 24 C.4th 627, 101 C.R.2d 718, 12 P.3d 1125, *supra*, §1162.) Thus, defendants' argument that the house is the relevant product for purposes of applying the economic loss rule is inconsistent with these and other decisions recognizing that the duty of a product manufacturer to prevent property damage does not necessarily end when the product is incorporated into a larger product. (29 C.4th 483.)

(2) "Applying this principle to the facts before us here, we conclude that the manufacturer of a defective window installed in a mass-produced home may be held strictly liable in tort for damage that the window's defect causes to other parts of the home in which it is installed. We have no occasion here to consider whether defective raw materials should be treated in the same manner as component parts or whether there may be situations in which the economic loss rule would bar recovery for damages that a defective component part causes to other portions of the finished product of which it is a part." (29 C.4th 484.)

Legislation governing recovery for construction defects in residential housing was adopted in 2002. (See C.C. 895 et seq., *supra*, §1162 et seq.) These provisions are generally applicable in actions against "material suppliers" and "individual product manufacturers," but not to strict liability claims against them. (C.C. 936, *supra*, §1167.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 955, second line of paragraph (1), citation for *Seely v. White Motor Co.* should be 63 C.2d 9.



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11. Vendor of Tract Lots.

6 *Witkin Sum. Cal. Law Torts* § 1503

[§ 1503] Vendor of Tract Lots.

(1) *In General.* In *Avner v. Longridge Estates* (1969) 272 C.A.2d 607, 77 C.R. 633, defendant L developed a tract of residential lots. Plaintiffs' predecessor bought a lot and built a house on it in 1960, and plaintiffs purchased the house and lot that year. In 1962, part of the rear slope failed. Defendant W, employed by plaintiff to investigate and repair, informed them that the failure was due to excessive rainfall and watering. In 1965, another failure of the rear slope occurred in a different place, and the lot settled. Plaintiffs sued in July 1966, naming as defendants L, the developer and vendor, H, the developer's original soil engineer, and W, plaintiffs' soil engineer. *Held*, judgment on demurrer for defendants reversed.

(a) *Applicability of Kriegler case.* Defendants argued that *Kriegler v. Eichler Homes* (1969) 269 C.A.2d 224, 74 C.R. 749, *supra*, §1501, was inapplicable because the land developer does not alter the basic characteristics of soil and must contend with natural and latent conditions. But it is common knowledge that in modern grading earth is moved considerable distances for fill, that imported soil may have different characteristics from that to which it is added, and that soil engineers are able to determine the stability of soil from tests. (272 C.A.2d 611.)

(b) *Other cases distinguished.* *Halliday v. Greene* (1966) 244 C.A.2d 482, 485, 53 C.R. 267, and *Conolley v. Bull* (1968) 258 C.A.2d 183, 195, 65 C.R. 689, refused to recognize strict liability of the builder of a structure on land. But in *Conolley*, recovery was affirmed on negligence and the discussion of strict liability was dictum. (272 C.A.2d 613.)

(c) *Strict liability of manufacturer of lot.* The complaint stated a cause of action under *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, *supra*, §1429. It was alleged that defendants "manufactured the lot" by cutting, grading, filling, and compacting for the purpose of sale to the public and construction of a house; that the manufacturing process was defective in its insufficient provision for drainage and its inadequate compacting; that the defects were not apparent to a purchaser; and that they could have been ascertained by subsurface soil tests and inspections. (272 C.A.2d 614.) (See *Stuart v. Crestview Mut. Water Co.* (1973) 34 C.A.3d 802, 811, 110 C.R. 543 [following *Avner*; developer strictly liable for plaintiff's loss of home by fire, when defective water distribution system installed by developer failed to produce sufficient water]; 25 A.L.R.4th 351 [liability for injury or damage caused by defects in building or land].)

In *Price v. Shell Oil Co.* (1970) 2 C.3d 245, 254, 85 C.R. 178, 466 P.2d 722, supra, §1506, the *Halliday* and *Conolley* cases were distinguished on another ground: that each was an isolated transaction (sale of single parcel of real estate) and not an activity in a continuous course of business.

(2) *Statute of Limitations*. The 10-year limitations period of C.C.P. 337.15 applies to a cause of action against a developer for damages resulting from improper repair, based on products liability. (*Stoneson Dev. Corp. v. Superior Court* (1987) 197 C.A.3d 178, 181, 242 C.R. 721, 3 Cal. Proc. (4th), Actions, §558.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statute of Limitations*.

Stoneson case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §608.



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6 Witkin Sum. Cal. Law Torts § 1504

[§ 1504] Developer of Planned Development Project.

In *Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 C.A.3d 898, 176 C.R. 886, defendants constructed a planned development consisting of residential units located on a scenic bluff. This action was brought after erosions and other defects caused substantial damages. *Held*, the reasoning of *Kriegler v. Eichler Homes* (1969) 269 C.A.2d 224, 74 C.R. 749, *supra*, §1501, and *Stuart v. Crestview Mut. Water Co.* (1973) 34 C.A.3d 802, 811, 110 C.R. 543, *supra*, §1503, applied. The case involved a multiple-unit, residential, planned development complex with 192 units in 27 residential buildings, and parking structures and recreational facilities. "Each purchaser of a dwelling unit equally relied upon the developer's skill and implied representation the project was erected in a workmanlike manner and reasonably fit for continued habitation. The members did not have an opportunity to participate in the design or construction of the project. The individual units appear to fit the classic mold of buyers of mass-produced housing." (123 C.A.3d 911.) (See 25 A.L.R.4th 351 [*Del Mar*]; on recovery for construction defects in residential housing, see C.C. 895 et seq., *supra*, §1162 et seq.)

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13. Subcontractor.

6 Witkin Sum. Cal. Law Torts § 1505

[§ 1505] Subcontractor.

In *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 C.A.3d 1131, 261 C.R. 146, a complaint filed by plaintiff homeowners' association included a strict liability cause of action against defendant general contractor and numerous subcontractors based on alleged construction defects in a condominium project. The trial judge ordered that the strict liability cause of action be limited to the general contractor, on the theory that strict liability does not extend to subcontractors providing services, rather than component products, and then granted defendant subcontractors' motion for judgment on the pleadings. Plaintiff sought mandamus. *Held*, denied.

(a) *Reasons for not extending strict liability to subcontractors.*

(1) Subcontractors need not be held strictly liable in order to spread the cost of a plaintiff's damages. "While the principle of risk distribution has been described as the fundamental policy underlying the doctrine of strict liability, ... a plaintiff is already protected because the developer is strictly liable for the negligence of its subcontractors." (212 C.A.3d 1144, citing *Price v. Shell Oil Co.* (1970) 2 C.3d 245, 85 C.R. 178, 466 P.2d 722, *infra*, §1507.)

(2) Precluding strict liability actions against subcontractors does not protect the culpable, because developers may proceed against subcontractors based on the conventional theories of breach of contract, warranty, or negligence. (212 C.A.3d 1145.)

(3) Because the developer has overall control of a project, it is usually the best capitalized and most heavily insured, while the subcontractor is typically a smaller entity, with less capital and insurance. And because the developer is normally in privity with the homeowner, it is the most readily available source of compensation. (212 C.A.3d 1145.)

(4) Decisions in the related area of strict liability for injuries caused by defective conditions on land placed major importance on possession and control as a basis of liability (see *Sprecher v. Adamson Cos.* (1981) 30 C.3d 358, 178 C.R. 783, 636 P.2d 1121, *supra*, §1089; *Preston v. Goldman* (1986) 42 C.3d 108, 227 C.R. 817, 720 P.2d 476, *supra*, §1159). "Similarly, a subcontractor who does not have any ownership or control over the project or over its portion of the project being built should not be held strictly liable for defective or dangerous conditions of the mass-produced

homes." (212 C.A.3d 1145.)

(5) "[T]he realities of the real estate construction/development business weigh heavily in deciding against an extension of strict liability to subcontractors. To extend the doctrine to the subcontractors would seriously impact that industry and the home buying public. The additional costs to the subcontractor for insurance premiums for the newly created exposure would be passed on to developers who in turn would pass the cost on to the consumer, resulting in higher housing costs." (212 C.A.3d 1145.)

(b) *Necessity of pleading special relationship.* *Gagne v. Bertran* (1954) 43 C.2d 481, 275 P.2d 15, supra, §820, *Stuart v. Crestview Mut. Water Co.* (1973) 34 C.A.3d 802, 110 C.R. 543, infra, §1520, and *Swett v. Gribaldo, Jones & Associates* (1974) 40 C.A.3d 573, 115 C.R. 99, infra, §1520, decisions dealing with "subcontractors" and strict liability, indicate that responsibilities of subcontractors may vary depending on the type of contract and status between the parties. If a special status or relationship exists, such as where a subcontractor is also the developer of a project, the subcontractor could conceivably be treated as part of the manufacturing link, and hence strictly liable, regardless of the fact that it also provided services to the project. However, the special status or relationship must be specifically pleaded before a strict liability cause of action can be stated against a subcontractor. (212 C.A.3d 1147.) This requirement was not met here where a typical general contractor-subcontractor relationship was alleged. (212 C.A.3d 1149.)

In *Monte Vista Dev. Corp. v. Superior Court* (1991) 226 C.A.3d 1681, 277 C.R. 608, defendant subcontractor's bid to install tile in the homes of a housing development was accepted. The work included installation of soap dishes and other tile fixtures that defendant purchased in bulk from the manufacturer. The developer paid defendant based on invoices showing an amount due for each residence, but not setting out separate charges for the materials or fixtures. Plaintiff homeowner was injured when one of the soap dishes broke. *Held*, defendant could not be held strictly liable for the defective product. Defendant was not a "seller" within the meaning of former *Rest.2d, Torts* §402A (supra, §1430), because its business was doing tile work, not selling soap dishes or any other fixtures. Although defendant purchased the soap dish that injured plaintiff, as well as other fixtures, it did so to complete its subcontract with the developer rather than to resell them. (226 C.A.3d 1687.) (See *Casey v. Overhead Door Corp.* (1999) 74 C.A.4th 112, 118, 87 C.R.2d 603 [*La Jolla* principles are applicable whether subcontractor is described as manufacturer or supplier]; *Rest.3d, Torts: Products Liability* §20, infra, §1508 [persons subject to products liability]; 30 *McGeorge L. Rev.* 299 [strict liability for construction defects].)

In *Jimenez v. Superior Court* (2002) 29 C.4th 473, 127 C.R.2d 614, 58 P.3d 450, supra, §1502, *La Jolla* and *Casey* were disapproved "insofar as they hold or suggest that a manufacturer of components installed in a mass-produced home can never be strictly liable in tort for physical injuries caused by defects in those components." (29 C.4th 484.)

Legislation governing recovery for construction defects in residential housing was adopted in 2002. (See C.C. 895 et seq., supra, §1162 et seq.) These provisions are generally applicable in actions against subcontractors, but not to strict liability claims against them. (C.C. 936, supra, §1167.)

SUPPLEMENT: [This section is current through the latest supplement]



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6 Witkin Sum. Cal. Law Torts § 1506

[§ 1506] Lessor of Personal Property.

In *Price v. Shell Oil Co.* (1970) 2 C.3d 245, 85 C.R. 178, 466 P.2d 722, a business lessor of personal property was brought within the class of persons subject to strict products liability. Flying Tiger airline used a gasoline tank truck with a movable ladder mounted on the tank to refuel certain types of aircraft. The truck was leased from defendant Shell, the lease providing that the lessee was to maintain it and make specified repairs, and that all other repairs were to be made by Shell on request. The lease also contained a provision that the lessee would indemnify Shell against personal or property damage liability arising from possession or use of the truck. At the lessee's request, Shell replaced the original ladder with one built by an undisclosed manufacturer, and both lessor and lessee inspected it. Two years later, plaintiff aircraft mechanic climbed the ladder, its legs split, and he fell. His action was brought against Shell alone. Shell cross-complained against the lessee for indemnity. The jury verdict and judgment were for plaintiff against Shell, and the trial judge gave judgment of nonsuit against Shell on its cross-complaint. *Held*, both judgments affirmed.

(a) *General principle applicable to lessors or bailors.* "[W]e can perceive no substantial difference between *sellers* of personal property and *non-sellers*, such as bailors and lessors. In each instance, the seller or non-seller 'places [an article] on the market, knowing that it is to be used without inspection for defects.' ... In the light of the policy to be subserved, it should make no difference that the party distributing the article has retained title to it. Nor can we see how the risk of harm associated with the use of the chattel can vary with the legal form under which it is held. Having in mind the market realities and the widespread use of the lease of personalty in today's business world, we think it makes good sense to impose on the lessors of chattels the same liability for physical harm which has been imposed on the manufacturers and retailers. The former, like the latter, are able to bear the cost of compensating for injuries resulting from defects by spreading the loss through an adjustment of the rental." (2 C.3d 251.)

(b) *C.C. 1955 not an obstacle.* C.C. 1955 has been construed as merely creating an implied warranty that the lessor or bailor has exercised reasonable care (see, e.g., *McNeal v. Greenberg* (1953) 40 C.2d 740, 742, 255 P.2d 810; 13 Summary (10th), *Personal Property*, §190). It is not in conflict with the present holding, for the statute does not purport to create an exclusive remedy. "Through that enactment the Legislature simply imposed certain duties upon lessors of personal property but in doing so manifested no intention to limit liability for their breach. There is no inconsistency between liability under this section, where it applies, and the rule of strict liability. Accordingly, the cases construing

this section cannot be dispositive of the issue of whether strict liability in tort applies to a lessor of personalty." (2 C.3d 252.)

(c) *Rule limited to business lessors.* The rule governing sellers, declared in *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, supra, §1429, and *Vandermark v. Ford Motor Co.* (1964) 61 C.2d 256, 37 C.R. 896, 391 P.2d 168, supra, §1495, and incorporated into the Second Restatement, does not apply to the occasional seller not engaged in that activity as a part of his or her business, or to isolated transactions. (See former Rest.2d, Torts §420A, Comment f.) Application of the rule to lessors should be subject to the same condition. "[F]or the doctrine of strict liability in tort to apply to a lessor of personalty, the lessor should be found to be in the business of leasing, in the same general sense as the seller of personalty is found to be in the business of manufacturing or retailing." (2 C.3d 254.)

(d) *Conditions were met here.* There was substantial evidence from which it could reasonably be inferred that Shell Co. was a commercial lessor: (1) It was engaged in an organized and continuing operation, leasing trucks to a number of lessees. (2) The lease itself was on a printed form, indicating that "Shell had a wide variety of refueler trucks which were leased under the provisions of its standard-form automotive equipment leases." (2 C.3d 255.) (See *Westlye v. Look Sports* (1993) 17 C.A.4th 1715, 1741, 22 C.R.2d 781; 5 Harper, James & Gray 2d §28:19; 59 Cal. L. Rev. 282; 18 U.C.L.A. L. Rev. 188; 52 A.L.R.3d 121 [application of strict liability in tort doctrine to lessor of personal property]; 28 A.L.R.4th 326 [inapplicability of doctrine to agency merely financing sale or lease-purchase].)

Fakhoury v. Magner (1972) 25 C.A.3d 58, 101 C.R. 473, is a considerable extension of the *Price* rule. Defendant rented a furnished apartment to plaintiff, containing a couch supplied by a manufacturer. The couch collapsed and plaintiff was injured. In this action against defendant lessor, the court, upholding recovery, declared that the lessor of a furnished apartment occupies a dual role, and that as lessor of the furniture the lessor is subject to the same strict liability as any commercial lessor of personal property. "There does not seem to be good reason for holding, as we surely would under existing case law, that the lessor of furniture who supplies it for an empty apartment should be held to strict liability, under appropriate circumstances, but holding the landlord exempt just because he is also the owner and lessor of real property." (25 C.A.3d 63.) The doctrine applies only to the business of commercial leasing, and not to a casual or isolated transaction. Here there was a commercial activity: "In the case at hand, the landlord furnished two apartments in San Francisco and three in Sacramento at the same time with the same kind of couch purchased from the same seller." (25 C.A.3d 64.) (See 9 Cal. Western L. Rev. 547.)

The holding in *Fakhoury* was itself extended in *Golden v. Conway* (1976) 55 C.A.3d 948, 128 C.R. 69. The lessor had a defective heater installed in the premises, and a fire damaged property of the tenant. The tenant sought an instruction on strict liability, and the judge refused it. *Held*, reversed. *Fakhoury* distinguished between defective furniture (strict liability) and defective fixtures (no strict liability), but the distinction is unsound. A lessor of real property engaged in the business of leasing apartments and commercial premises who equips the premises with an appliance without knowing whether it is defective because of the manner in which it was manufactured or installed, is strictly liable in tort if it proves to have defects that cause injury to persons or property when used in a normal manner. (55 C.A.3d 961.)

Rest.3d, Torts: Products Liability §20, adopted in 1997 and applicable to both sellers and nonsellers, specifically includes lessors among those subject to products liability. (See *infra*, §1508.)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §28.19.



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6 *Witkin Sum. Cal. Law Torts* § 1507

[§ 1507] Lessor of Residential Premises.

Becker v. IRM Corp. (1985) 38 C.3d 454, 213 C.R. 213, 698 P.2d 116, involved injuries suffered by a tenant as the result of a defective shower door. The court held that a landlord engaged in the business of leasing dwellings is part of the "stream of commerce," and hence is "strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were let to the tenant." (38 C.3d 464.) (For full discussion of *Becker*, see 13 *Summary* (10th), *Real Property*, §673.)

Becker was overruled in *Peterson v. Superior Court* (1995) 10 C.4th 1185, 43 C.R.2d 836, 899 P.2d 905, an action against a hotel owner by a guest injured when she slipped in the bathtub. A hotel proprietor or a residential landlord is not strictly liable for injuries caused by an alleged defect in the premises that the proprietor or landlord did not create or market. (10 C.4th 1188.) However, the landlord or proprietor may be liable for negligence for breaching the applicable standard of care, and the injured tenant or guest may pursue a strict liability cause of action against the manufacturer, distributor, or retailer of the product. (10 C.4th 1210.) (For full discussion of *Peterson*, see 12 *Summary* (10th), *Real Property*, §654.) (See 28 *Pacific L. J.* 373 [*Peterson*].)

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15a. (New) Finance Lessor.

6 *Witkin Sum. Cal. Law Torts § 1507A*

[§ 1507A] (New) Finance Lessor.

In *Arriaga v. CitiCapital Commercial Corp.* (2008) 167 C.A.4th 1527, 85 C.R.3d 143, Corporations A and J executed a finance lease as defined in U.C.C. 10103(a)(7) (see 13 *Summary* (10th), *Personal Property*, §199) governing a glue spreading and coating machine. The finance lease provided that J, the lessor, was not a dealer or manufacturer of the machine and that the machine met the standards specified by A, the lessee. Two days after the lease was executed, J bought the specified machine from K, who had obtained it from the manufacturer. J took title to the machine, paid for it, and leased it to A under a lease providing that A was to maintain the machine, could not modify it without J's permission, and had the option to purchase the machine at the end of the lease term. A used the machine for approximately 5 years, during which it modified it by removing part of a safety guard, and then, near the end of the lease term, sold it to O corporation, plaintiff's employer. O paid the purchase price directly to defendant C corporation, J's successor in interest, at which time O owned the machine free and clear of any liens or obligations. Due to the modification to the machine that had been made by A, plaintiff suffered injury and sued for personal injury under the strict liability doctrine. *Held*, summary judgment for defendant affirmed.

(a) *Liability as finance lessor.*

(1) Under the strict products liability doctrine, a manufacturer is strictly liable in tort when an article it places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a person. In addition to manufacturers, anyone identifiable as an integral part of the overall producing and marketing enterprise is subject to strict liability. Accordingly, retailers engaged in the business of distributing goods to the public are strictly liable in tort for personal injuries caused by defects in those goods. Others subject to strict products liability include lessors of personal property, wholesale and retail distributors, and licensors. To establish the required causative connection between the defendant and the product, the plaintiff must demonstrate that (a) the defendant received a direct financial benefit from its activities and from the sale of the product; (b) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (c) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process. (167 C.A.4th 1523; see *Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 C.A.4th 762, 59 C.R.2d 322, text, §1498.)

(2) Under a finance lease, the lessor usually performs a limited function, and thus the lessee looks almost entirely to the supplier for representations, covenants, and warranties. Moreover, although the finance lease is written in lease form, the finance lessor does not expect to retake the equipment at the end of the lease period. With a commercial lease on the other hand, the lessor supplies the particular equipment, i.e., selects the product and places it into the stream of commerce, and allows the lessee to use the equipment for some fraction of its useful life, but fully expects to retake the equipment at the end of the lease term and either resell or re-lease it. (167 C.A.4th 1536.)

(3) Strict liability is not imposed, even if the defendant is technically a link in the chain in getting the product to the consumer market, if the judicially perceived policy considerations, i.e., enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants, are not satisfied. Because a finance lessor, such as defendant, does not select the specific machine or manufacturer of the machine, it does not maintain an ongoing relationship with a particular manufacturer, and thus is not in a position to either directly or indirectly exert pressure on the manufacturer to enhance the safety of the product. Therefore, even if the finance lessor's tangential function of providing money to make the purchase possible is characterized as a "link" in the vertical chain of distribution, imposing strict liability on the finance lessor will not further a critical policy consideration. (167 C.A.4th 1537.)

(4) A finance lessor also does not play an integral role in the producing and marketing enterprise of a product and thus is not strictly liable under a marketing/distribution theory. Although it is arguable that the finance lessor's conduct in financing the purchase of the product is necessary to bring the product to the initial consumer market, any direct financial benefit received by the finance lessor is derived from having placed its *money*, not the product, into the stream of commerce. In other words, it is the lessee who selects, and the third-party supplier who supplies, the article to be placed in the stream of commerce, not the finance lessor. (167 C.A.4th 1538.)

(b) *Liability as seller of used goods.*

(1) Plaintiff asserted that because defendant, not A, held title to the machine when it was sold to O, defendant was the seller of a defective machine. However, a seller of used machinery is not strictly liable in tort, unless the seller rebuilds or reconditions the product and thus assumes a role analogous to that of a manufacturer (see *Peterson v. Superior Court* (1995) 10 C.4th 1185, 43 C.R.2d 836, 899 P.2d 905, text, §1507). Although the retailer of a product may play a substantial part in ensuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end, this risk reduction rationale is not applicable to a used goods dealer, who is normally entirely outside the original chain of distribution of the product. Thus, to impose strict liability in this situation would, as a practical matter, require all dealers in used goods routinely to dismantle, inspect for latent defects, and repair or recondition their products, thus effecting a radical change in the nature of the used product market. (167 C.A.4th 1540.)

(2) A used goods dealer's exemption from strict liability applies to subsequent defects as well. To impose such liability would, in effect, render used goods dealers as insurers against defects that came into existence after the original chain of distribution and while the product was under the control of previous consumers. (167 C.A.4th 1540.)

(3) Plaintiff argued that the used goods dealer's exemption did not apply here, because defendant was not a seller of used equipment, but rather was responsible for the initial distribution of the machine. However, defendant, being outside the original chain of distribution, was not strictly liable as an entity that was instrumental in placing the product in the stream of commerce. (167 C.A.4th 1541.)

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16. Scope of Liability Under Third Restatement.

6 Witkin Sum. Cal. Law Torts § 1508

[§ 1508] Scope of Liability Under Third Restatement.

Rest.2d, Torts §402A, approved in 1964, limited strict products liability to "one who sells a product in a defective condition." After the promulgation of §402A, courts began to extend strict liability for harm caused by product defects to various nonsale commercial transactions involving the distribution of products. Rather than stretching to call these transactions "sales," courts simply declared that the same policy objectives that supported strict liability in the sales context supported strict liability in these contexts as well. (See *Rest.3d, Torts: Products Liability §20*, Comment a.)

Rest.3d, Torts: Products Liability, adopted in 1997 (*supra*, §1430), broadly states the scope of liability. For purposes of the Restatement, "one who sells or otherwise distributes" a product, so as to subject itself to products liability, is defined in *Rest.3d, Torts: Products Liability §20*, as follows:

(1) One sells a product "when, in a commercial context, one transfers ownership either for use or consumption or for resale leading to ultimate use or consumption." Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.

(2) One otherwise distributes a product "when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption." Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of these products or some other commercial activity.

(3) One also sells or otherwise distributes a product when, in a commercial transaction, one "provides a combination of products and services" and either the transaction taken as a whole, or the product component, satisfies the above criteria for either a sale or a distribution.

However, persons assisting or providing services to product distributors, while indirectly facilitating the commercial distribution of products, are not subject to liability under the Restatement rules. Thus, commercial firms engaged in advertising products are outside these rules, as are firms engaged exclusively in the financing of product sale or lease transactions. Sales personnel and commercial auctioneers are also outside the Restatement rules. (*Rest.3d*,

Torts: Products Liability §20, Comment g.)

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1. Foreseeable User or Consumer.

6 *Witkin Sum. Cal. Law Torts* § 1509

[§ 1509] Foreseeable User or Consumer.

Strict liability extends to any foreseeable user or consumer of the product. (See *Rest.3d, Torts: Products Liability* §15 requiring causal connection between product defect and person harmed]; 5 Harper, James & Gray 2d §28.16; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §§566, 567; 18 *Hastings L. J.* 30; 13 *A.L.R.3d* 1057, 1092 [strict liability in tort]; 38 *A.L.R.3d* 1247 [right of member of armed forces to recover from manufacturer or seller of defective military material].) The wide range of the concepts of "user" and "consumer" was emphasized by former *Rest.2d, Torts* §402A, Comment l:

(1) He or she need not have acquired the product directly from the defendant seller, but may have gotten it through a dealer.

(2) He or she need not have purchased it at all, but may be a member of the buyer's family, or the buyer's employee, or the buyer's guest at table, or his or her donee.

(3) The user or consumer need not have actually consumed it; he may be a husband who opened a bottle of beverage for his wife to consume, or she may be a wife who prepared food for her husband to consume.

(4) Consumption includes all ultimate uses for which the product is intended, e.g., a permanent wave solution applied in a beauty shop.

(5) Users include those passively enjoying the benefit of a product, e.g., passengers in automobiles or airplanes.

In *Kately v. Wilkinson* (1983) 148 C.A.3d 576, 195 C.R. 902, plaintiff's daughter was killed in a waterskiing accident allegedly caused by a defect in the steering mechanism of the boat. R, a friend of the daughter who witnessed the accident, was denied recovery for negligent infliction of emotional distress. (See *supra*, §§1018, 1021.) But the court held that she could amend her complaint to state a cause of action for products liability, as a *user* of the product. *Harb. & Nav.C.* 658 requires the presence of a person at least 12 years of age in a boat to observe the progress of the person being towed; and it was reasonably foreseeable that she would be such a person, would witness any injury to the

waterskier, and would suffer emotional injury. "The user of a defective product is not a mere bystander but a primary and direct victim of the product defect; this is true whether the defective product directly and immediately injures the user or severely harms another while being operated by the user; it is equally true whether the user suffers physical or emotional injuries." (148 C.A.3d 588.)

In *U. S. Financial v. Sullivan* (1974) 37 C.A.3d 5, 112 C.R. 18, the court held that the beneficiary under a deed of trust could sue a developer for negligence in construction of a house that resulted in an impairment of the plaintiff's security. (See 4 Summary (10th), *Security Transactions in Real Property*, §86.) The court, however, rejected the theory of strict liability, on two grounds:

(a) Assuming the doubtful proposition that a developer could be held strictly liable to the purchaser of a defective home or residential lot, under *Kriegler v. Eichler Homes* (1969) 269 C.A.2d 224, 74 C.R. 749, supra, §1501, and *Avner v. Longridge Estates* (1969) 272 C.A.2d 607, 77 C.R. 633, supra, §1503, a lender of money is not in the same vulnerable position as a home buyer. The latter is a consumer, ordinarily without the means to protect himself from defective products; a lender may require a showing by the developer. Thus, the historical reason for imposing strict liability is absent. (37 C.A.3d 18.)

(b) Strict liability is imposed so as to require the manufacturer to absorb the cost of injuries from a defect, and thus, by insurance, distribute the risk among the public as a cost of doing business. "Unlike the consumer, user, or bystander, the lender is itself a link in the marketing chain of mass-produced homes and residential lots and is itself in a position to spread the risks of harm resulting from a defective lot or home." (37 C.A.3d 19.) (See *Sumitomo Bank v. Taurus Developers* (1986) 185 C.A.3d 211, 226, 229 C.R. 719 [following *U. S. Financial*].)

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See 5 Harper, James & Gray 3d §28.16.



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2. Commercial Customer.

6 *Witkin Sum. Cal. Law Torts* § 1510

[§ 1510] Commercial Customer.

In *International Knights of Wine v. Ball Corp.* (1980) 110 C.A.3d 1001, 168 C.R. 301, plaintiff corporation purchased bottled wine from defendant winery to be marketed under plaintiff's label and trade name. The bottles had defective metal caps, and the wine was damaged and rendered unmarketable. Defendant contended that *Kaiser Steel Corp. v. Westinghouse Elec. Corp.* (1976) 55 C.A.3d 737, 127 C.R. 838, *infra*, §1524, precluded recovery on a strict liability theory, and the trial judge granted a motion for judgment on the pleadings as to that count. *Held*, this was error.

(a) Although the traditional statement of the doctrine emphasizes the protection of ordinary consumers (110 C.A.3d 1005), it should operate in favor of "any person or entity, corporate or otherwise, having no significant bargaining power respecting the manufacturing process and which is thereby best calculated to be its victim." (110 C.A.3d 1006.) Thus, it would be anomalous to allow recovery on strict liability to an individual consumer when the item explodes in his house and to deny it to a commercial customer when its plant is similarly damaged, "where neither user had any ability to deal with such a risk." (110 C.A.3d 1006.)

(b) The crucial factors set forth in *Kaiser Steel* (parties in positions of relatively equal economic strength and able to negotiate concerning risk of loss from defects in the product) were not shown here by the pleadings. If they could be established at the trial, a nonsuit could be granted. (110 C.A.3d 1007.)

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3. Bystander.

6 *Witkin Sum. Cal. Law Torts* § 1511

[§ 1511] Bystander.

Should strict liability extend to nonusers of a product? Prosser observed that the answer must ultimately depend on which of two theories underlies strict liability: (1) The implied representation of safety made by placing the product on the market, relied on by the buyer; or (2) the social policy justifying placing the risk of harm on the manufacturer or seller of the product, who can insure against it and add the cost of insurance to the price. Under the first theory, the bystander could not recover (no representation or reliance); under the second, he or she could. (See *Canifax v. Hercules Powder Co.* (1965) 237 C.A.2d 44, 54, 46 C.R. 552 [mentioning point without deciding it]; 18 *Hastings L. J.* 31; 13 *A.L.R.3d* 1057, 1096 [strict liability in tort].)

The Second Restatement took no position on this issue, noting that the social pressure for the protection of bystanders was less than that for the protection of consumers, but the California Supreme Court disagreed. (See *supra*, §1430.)

Liability to the bystander was established in *Elmore v. American Motors Corp.* (1969) 70 C.2d 578, 75 C.R. 652, 451 P.2d 84. Plaintiff E and her husband bought a car manufactured by defendant American and sold by defendant M, a dealer. After 1,500 miles of driving, the car started to shimmy. On the day of the accident, after 2,751 miles of driving, a part fell out and dragged along the highway, causing a collision with another car. Plaintiff E was injured and sued for her injuries. The other driver was killed and plaintiff W sued for wrongful death. The cases were consolidated and nonsuits were granted. *Held*, reversed.

(a) With respect to the suit by plaintiff E, the conditions of strict liability were established for purposes of the motion for nonsuit; i.e., inferences from circumstantial evidence showed both the defect and causation. An expert testified that the drive shaft was probably disconnected because of a defect that existed at the time of sale, i.e., loose fastenings or metal failure--not normal driving; and there was no evidence that anyone handled the drive shaft after sale of the car. (70 C.2d 581, 584.)

(b) W was neither the buyer nor the user of the car that caused the wrongful death of her husband; hence, she came within the rough classification of "bystander." However, though the Second Restatement left the question open and the

meager case law is in conflict, the principles laid down in *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, supra, §1429, and *Vandermark v. Ford Motor Co.* (1964) 61 C.2d 256, 37 C.R. 896, 391 P.2d 168, supra, §1495, support liability. *Vandermark* pointed out that, because the theory is tort, a purported contractual restriction of liability is ineffective. (70 C.2d 585.) If strict liability is imposed even where the manufacturer has contracted against it, it cannot be avoided on the theory that no representation of safety has been made. (70 C.2d 586.) And injury to a bystander is often a foreseeable risk of the maker's enterprise. (70 C.2d 586.)

(c) "If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable dealers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders." (70 C.2d 586.)

(d) "An automobile with a defectively connected drive shaft constitutes a substantial hazard on the highway not only to the driver and passenger of the car but also to pedestrians and other drivers. The public policy which protects the driver and passenger of the car should also protect the bystander, and where a driver or passenger of another car is injured due to defects in the manufacture of an automobile and without any fault of their own, they may recover from the manufacturer of the defective automobile." (70 C.2d 586.) (See *Johnson v. Standard Brands Paint Co.* (1969) 274 C.A.2d 331, 79 C.R. 194 [following *Elmore*; defective aluminum ladder sold by defendant to electrical contractor; while his employee was using ladder it slipped and struck stepladder on which decedent was doing plumbing]; *Preissman v. Ford Motor Co.* (1969) 1 C.A.3d 841, 850, 82 C.R. 108 [parked automobile rolled down slope and injured plaintiff parking attendant]; and see 5 Harper, James & Gray 2d §28.16; 58 Cal. L. Rev. 335; 33 A.L.R.3d 415 [extension of strict liability in tort to permit recovery by bystander]; *Rest.3d, Torts: Products Liability* §15, infra, §1526 [requiring causal connection between product defect and person harmed]; 63 Am.Jur.2d (1997 ed.), *Products Liability* §568; 24 Southwestern U. L. Rev. 1237 [injuries from "secondhand" tobacco smoke].)

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See *Nelson v. Superior Court* (2006) 144 C.A.4th 689, 695, 50 C.R.3d 684 [even though no sale occurred and owner of water company was not ultimate user or consumer of gasoline, owner could maintain strict products liability cause of action against gasoline refiner for alleged leakage of additive from gas stations into owner's water system; storage and transfer of gasoline are foreseeable uses for which injured bystanders may recover under strict liability]; 5 Harper, James & Gray 3d §28.16.



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4. Licensee.

6 *Witkin Sum. Cal. Law Torts* § 1512

[§ 1512] Licensee.

In *Garcia v. Halsett* (1970) 3 C.A.3d 319, 82 C.R. 420, plaintiff, an 11-year-old boy, had been sent by his mother to defendant's laundrette to wash clothes. He had been instructed in the operation of the machines and had been doing this work for some time. On the day of the accident, a machine stopped, he opened it and inserted his hand to remove clothes, and the machine started, injuring his arm. *Held*, judgment for defendant on verdict reversed for refusal to instruct on strict liability. Defendant's contention that there was a bailment, with plaintiff as bailee assuming responsibility for safe operation, was untenable; plaintiff was a licensee who could have been prevented from using the machines, and who used them with permission. (3 C.A.3d 324.) A licensee is as much entitled to protection as the bystander in *Elmore v. American Motors Corp.* (1969) 70 C.2d 578, 75 C.R. 652, 451 P.2d 84, *supra*, §1511. In the instant case, plaintiff had less opportunity to avoid harm than a buyer, for the buyer can select his or her product, while plaintiff had to take at random a machine offered to the public. (3 C.A.3d 325.)

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c. Kinds of Injury or Damage.

1. Physical Injury or Wrongful Death.

6 *Witkin Sum. Cal. Law Torts* § 1513

[§ 1513] Physical Injury or Wrongful Death.

Strict liability, like negligence and warranty liability, is imposed for physical injury to the person or wrongful death. (See *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, supra, §1429, and *Vandermark v. Ford Motor Co.* (1964) 61 C.2d 256, 37 C.R. 896, 391 P.2d 168, supra, §1495; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §561; 13 *A.L.R.3d* 1057, 1089 [products liability: strict liability in tort].)

In *Barrett v. Superior Court* (1990) 222 C.A.3d 1176, 272 C.R. 304, decedent was transporting an earth mover loaded on a trailer, owned by defendant construction company. While he was attempting to drive the mover off the trailer, the mover rolled off and over, crushing and killing him. In this wrongful death action against the construction company and the manufacturer, by his widow and minor child, plaintiffs relied mainly on the theory of strict products liability. The trial court granted defendants' motion for summary judgment on the ground that strict liability will not support a cause of action for wrongful death. *Held*, mandamus granted to compel denial of the motion.

(a) Defendants contended that the term "wrongful act" as used in former C.C.P. 377 (now C.C.P. 377.60) means an intentional or "fault-based" act. Although no published opinion has expressly considered this point, most commentators and some courts have assumed that "wrongful act" means a "tortious act," and that the act of placing a defective product on the market is a tortious act, and is therefore a basis of recovery on strict products liability. (222 C.A.3d 1183, citing the text.)

(b) There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: (1) compensation for survivors, (2) deterrence of conduct, and (3) limitation, or lack of limitation, on the damages recoverable. (222 C.A.3d 1185.)

(c) "Given the three public policy considerations ... , our interpretation of the term 'wrongful act,' as it is used in that section, should be an interpretation that emphasizes the deterrent aspect of the section, rather than an interpretation which limits the measure of recovery, and an interpretation that recognizes that only conduct which is subject to conscious control or improvement can be deterred by the risk of potential liability for damages. The question then becomes whether interpreting the term 'wrongful act' to encompass the act of putting a defective product into the stream

of commerce, so as to allow a decedent's heirs to recover damages under a theory of strict liability (1) emphasizes the deterrent effect of the wrongful death act and (2) takes into account whether the placing of defective products into the stream of commerce is conduct which can be deterred. To answer that question, we must consider (1) the purpose behind the creation of strict products liability as a predicate for liability, (2) the effect of extending the use of strict products liability as a theory of recovery to persons other than the purchasers or users of the defective product, i.e., to the heirs of such persons, and (3) the nature of the conduct which forms the basis for liability for damages under such theory." (222 C.A.3d 1185.)

(d) The primary purpose of imposing strict products liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers. (222 C.A.3d 1186; see supra, §1429.) Other purposes or public policies are "(1) to provide a 'short cut' to liability where negligence may be present but difficult to prove, (2) to provide an economic incentive for improved product safety, (3) to induce the reallocation of resources toward safer products, and (4) to spread the risk of loss among all who use the product." (222 C.A.3d 1186.)

(e) These four public policies have been furthered by extending the right to recover to persons other than purchasers, e.g., to bystanders. (222 C.A.3d 1186, 1187.) Extending the strict liability theory to bystanders places strict liability on the same footing as negligence, by providing a cause of action as to all foreseeable injuries. Extending the right to a decedent's heirs does the same thing, and fulfills policies behind both former C.C.P. 377 and the doctrine of tort liability. Failure to extend the use of a strict products liability theory to a decedent's heirs would have the anomalous effect of 'rewarding' the manufacturer of a defective product" that *kills*, rather than *maims*, its user. (222 C.A.3d 1187.)

(f) Although there is language in opinions to the effect that strict products liability is imposed regardless of "fault," this is true only if the concept of "fault" is equated with negligence. If "fault" can be equated with the responsibility for placing a defective product into the stream of commerce, then strict tort liability requires a showing of this fault. (222 C.A.3d 1189.)

(g) Other indicators of the fault aspect of strict products liability are:

(1) The award of punitive damages where a manufacturer knowingly places a defective product into the stream of commerce with conscious disregard of the safety of others. (222 C.A.3d 1189, citing *Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 174 C.R. 348, *infra*, §1578.)

(2) Application of the principles of comparative fault, which presupposes fault on the part of both parties. (222 C.A.3d 1189, citing *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 144 C.R. 380, 575 P.2d 1162, *infra*, §1542.)

(3) Strict liability may not be imposed unless the injury results from a use that is reasonably foreseeable. (222 C.A.3d 1190, citing *Daly*.)

(h) *Ault v. International Harvester Co.* (1974) 13 C.3d 113, 117 C.R. 812, 528 P.2d 1148, *supra*, §1449, is inapplicable here. That case dealt with *Ev.C. 1151*, which excludes evidence of subsequent repairs or precautionary measures to prove negligence or culpable conduct. The *Ault* court held that the statute did not exclude this evidence in a strict liability case. The court interpreted *Ev.C. 1151* in a way that comported with both the public policy behind *Ev.C. 1151* and the public policy behind strict products liability. However, the Evidence Code policy (to encourage subsequent repairs by freeing negligent defendants from the fear that such repairs may be used as evidence of their earlier negligence) is not the same as the public policy behind strict products liability (to assure that survivors are compensated for their loss and to deter negligent or wrongful acts). (222 C.A.3d 1195.)

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 - aa. No Recovery Rule.

6 *Witkin Sum. Cal. Law Torts* § 1514

[§ 1514] No Recovery Rule.

(1) *In General.* "Economic loss" is the lessened value of a defective product that does not meet the user's or consumer's need as well as a product properly made. An ordinary buyer may get restitution--the difference between the purchase price and the lower market value, and a commercial buyer may recover for profits lost because the product was not fit for its intended use. Both kinds of recovery were traditionally sought on the theory of breach of warranty, and the common defenses (no privity, lack of timely notice, disclaimer) were available to the defendant.

In a New Jersey case in 1965, the court applied the strict tort liability doctrine to an ordinary user who suffered economic loss: He purchased a defective rug, and successfully sued the manufacturer for the difference between the price and the market value. (See 54 *Cal. L. Rev.* 1687; 18 *Hastings L. J.* 34.) But the California Supreme Court, in *Seely v. White Motor Co.* (1965) 63 *C.2d* 9, 45 *C.R.* 17, 403 *P.2d* 145, refused to make this extension, holding that the manufacturer cannot be charged with this responsibility, i.e., the manufacturer cannot be held for the level of performance of its products in the consumer's business unless it agrees that the product was designed to meet the consumer's demands. (63 *C.2d* 18; see 4 *Summary* (10th), *Sales*, §204; 13 *A.L.R.3d* 1057, 1091 [products liability: strict liability in torts].) Thus, recovery for economic loss is an aspect of the law of sales, governed by the warranty provisions of the Uniform Commercial Code. (See 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §565; 13 *Cal. Western L. Rev.* 297 [arguing that recovery should be permitted]; 17 *Hastings L. J.* 165; 3 *San Diego L. Rev.* 112; 12 *Southwestern U. L. Rev.* 4 [Defective Products or Realty Causing Economic Loss: Toward a Unified Theory of Recovery]; 16 *A.L.R.3d* 683 [privity of contract as essential in action against remote manufacturer or distributor for defects in goods not causing injury to person or to other property]; 15 *A.L.R.4th* 791 [preemption of strict liability in tort by provisions of U.C.C., Article 2]; 72 *A.L.R.4th* 12 [recovery for damage to product alone]; 89 *A.L.R.4th* 11 [loss of profits].)

There is no "life-safety" exception to the economic loss rule that would apply in the most compelling circumstances. (*KB Home v. Superior Court* (2003) 112 *C.A.4th* 1076, 1087, 5 *C.R.3d* 587 [no such exception where defective emission control devices resulted in damaged furnaces that were fire hazards].)

(2) *Distinction: Physical Injury to Property.* Damages for physical injury, including the defective product itself, are not within the rule of no recovery for economic loss. (See *Seely v. White Motor Co.*, *supra*, 63 C.2d 18, distinguishing economic loss [dictum; injury to defective vehicle causing personal injury]; *Ghera v. Ford Motor Co.* (1966) 246 C.A.2d 639, 649, 55 C.R. 94; *Golden v. Conway* (1976) 55 C.A.3d 948, 961, 128 C.R. 69; *Pisano v. American Leasing* (1983) 146 C.A.3d 194, 197, 194 C.R. 77; 63 Am.Jur.2d (1997 ed.), *Products Liability* §§563, 564; 13 A.L.R.3d 1057, 1090 [products liability: strict liability in tort]; 89 A.L.R.4th 11 [consequential loss of profits from injury to property].)

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bb. As Applied to Strict Liability Action.

6 *Witkin Sum. Cal. Law Torts* § 1515

[§ 1515] As Applied to Strict Liability Action.

The no recovery rule (*supra*, §1514) was reviewed and the rule was reaffirmed in *Sacramento Regional Transit Dist. v. Grumman Flxible* (1984) 158 C.A.3d 289, 204 C.R. 736. Plaintiff district operated a fleet of buses in Sacramento for public transportation. It purchased 103 new buses in 1975 from defendant manufacturer, and in 1980, discovered that they had cracked or cracking component parts. With the assistance of defendant's employees, 26 disabled buses were repaired, and corrective repairs were made to the others, so that all were restored to service. In 1980, long after the standard contractual warranty had expired, plaintiff brought this action for damages on theories of strict products liability and negligence. *Held*, judgment for defendant on demurrer affirmed.

(a) *Seely rule*. The rule of *Seely v. White Motor Co.* (1965) 63 C.2d 9, 45 C.R. 17, 403 P.2d 145, "reflects the line of demarcation between tort theory and contract theory." "Economic" loss or harm has been defined as "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits--without any claim of personal injury or damages to other property." (158 C.A.3d 294, quoting Illinois case.) By contrast, strict liability is imposed where there is a defect, and *further* damage to the plaintiff's property caused by the defect. "When the defect and the damage are one and the same, the defect may not be considered to have caused physical injury." (158 C.A.3d 294.)

(b) *Uniform Commercial Code is controlling*. The facts alleged by plaintiff demonstrate that, as a transit district, it had knowledge and skill peculiar to the goods (the buses) involved in the transaction, and was therefore a "merchant" as defined by U.C.C. 2104(1) (4 *Summary* (10th), *Sales*, §28). Thus, the various aspects of plaintiff's purchase of buses from defendant, including liability for defects based on express and implied warranties, were governed by the law of sales as set forth in the *Code*. (158 C.A.3d 295, quoting *Seely*, and *Kaiser Steel Corp. v. Westinghouse Elec. Corp.* (1976) 55 C.A.3d 737, 127 C.R. 838, *infra*, §1524.)

(c) *Policy supporting limitation*. Plaintiff contends that it is anomalous to allow a consumer to sue on strict liability when physical injury to a person has occurred, but not when a defect is discovered that will ultimately cause the physical injury; but this argument assumes that the purchaser has discovered the defect, and the policy question is

whether tort liability is reasonably necessary to prevent use of the known defective product with its potential for causing injury. With respect to plaintiff *merchant*, the answer is *no*: "As a merchant having peculiar knowledge of the goods ... , plaintiff would (and did) perceive the full potential for injury to persons that could occur if the defective product was put to its ordinary use. We will not assume a merchant who discovers a defect with the potential for causing injury will place the defective product in use unless the product's manufacturer bears the cost of repairs. Nothing in reason or experience supports such an assumption. Rather, the more reasonable view is that the merchant will repair the product as plaintiff did here. Since the question is not whether a defective product will be put in use, but rather who should bear the economic cost of repairs, we see no reason to disturb the allocation of those costs agreed to by knowledgeable merchants." (158 C.A.3d 298.)

In *Fieldstone Co. v. Briggs Plumbing Products* (1997) 54 C.A.4th 357, 62 C.R.2d 701, plaintiff developer sued various sink manufacturers for the cost of replacing the sinks in homes that had been developed by plaintiff. The defects, i.e., spot welding and insufficient coating, caused rusting and chipping to other, nondefective portions of the sinks. *Held*, this did not consist of damage to *other* property, within the meaning of the *Seely* rule, so as to render defendants liable in strict liability where economic loss is accompanied by injury to other property. Here, the spot welding and insufficient coating defects made the sinks prone to rusting and chipping and were the type of purely economic injury that is not compensable. (54 C.A.4th 363.)

The *Seely* rule was further refined in *Stearman v. Centex Homes* (2000) 78 C.A.4th 611, 92 C.R.2d 761, which drew the following distinctions between "economic loss," for which there is no recovery in strict liability, and "physical damage to property," for which recovery is permitted:

(a) "Economic damages" generally refers to pecuniary damage that occurs through loss of value or use of the goods sold or the cost of repair, together with consequential lost profits. (78 C.A.4th 620, citing *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 C.A.4th 1318, 44 C.R.2d 305.) "Property damage" is not considered to be "economic loss." (78 C.A.4th 617, citing *Huang v. Garner* (1984) 157 C.A.3d 404, 203 C.R. 800.)

(b) Strict liability applies to physical harm to person "or property." (78 C.A.4th 618, citing *Ghera v. Ford Motor Co.* (1966) 246 C.A.2d 639, 55 C.R. 94, *supra*, §1513.)

(c) To be recoverable in strict liability, the defective product must *cause* physical damage to property, but the damaged property may consist of the product itself. (78 C.A.4th 619, citing *Sacramento Regional Transit Dist.*, *supra*.)

(d) A person may not sue in products liability for physical injury to his or her property where that injury consists of nothing more than the product defect upon which liability is founded. (78 C.A.4th 620, citing *Sacramento Regional Transit Dist.*, *supra*.)

Applying these principles, the *Stearman* court allowed plaintiffs to recover for extensive cracks throughout their home caused by defective construction of the foundation. (78 C.A.4th 617.)

In distinguishing between "other property" and the defective product itself in a case involving component-to-component damage requires a determination whether the defective part is a sufficiently discrete element of the larger product that it is not reasonable to expect its failure invariably to damage other portions of the finished product. Resolution of this issue is for the trier of fact. (*KB Home v. Superior Court* (2003) 112 C.A.4th 1076, 1087, 5 C.R.3d 587 [whether furnaces damaged by defective emission control devices were "other property" was question of fact].)

Rest.3d, Torts: Product Liability §21(c) excludes lessened value of the product itself from products liability recovery. (See *infra*, §1517.) (See *Anthony v. Kelsey-Hayes Co.* (1972) 25 C.A.3d 442, 447, 102 C.R. 113 [loss of use of trucks and depreciation in their value; *Seely* followed]; *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 C.A.4th 502, 523, 53 C.R.2d 887 [damage to gas company's pipelines caused by transportation of gas containing PCBs was property damage rather than economic loss, and therefore compensable in damages in strict liability action, where cost

of remediation would have been unnecessary had pipelines not been contaminated]; *Casey v. Overhead Door Corp.* (1999) 74 C.A.4th 112, 123, 87 C.R.2d 603 [Seely rule applies to cause of action for either strict liability or negligence]; *Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 C.A.4th 281, 292, 112 C.R.2d 869, 3 Cal. Proc. (4th), Actions, Supp., §500 [Seeley analysis precludes recovery of damages under strict products liability theory for cost of replacing or repairing defective product].)

West's Key Number Digest, Products Liability k.17.1

SUPPLEMENT: [This section is current through the latest supplement]
Carrau case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §539.



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cc. As Applied to Negligence Action.

6 *Witkin Sum. Cal. Law Torts* § 1516

[§ 1516] As Applied to Negligence Action.

(1) *In General.* *Seely v. White Motor Co.* (1965) 63 C.2d 9, 45 C.R. 17, 403 P.2d 145, *supra*, §1514, added a dictum that the rule allowing no recovery for economic loss would apply to actions based on negligence (63 C.2d 18). The dictum was applied in a number of Court of Appeal decisions, including *Sacramento Regional Transit Dist. v. Grumman Flxible* (1984) 158 C.A.3d 289, 204 C.R. 736, where the court said: "This rule is necessary so that the Uniform Commercial Code ... is not completely subsumed by the law of tort." As a federal court put it: "[J]udicial expansion of negligence law to cover purely economic losses would only add more confusion in an area already plagued with overlapping and conflicting theories of recovery." (158 C.A.3d 299.) (See 4 Harper, James & Gray 2d §25.18A et seq.)

In *Ales-Peratis Foods Int. v. American Can Co.* (1985) 164 C.A.3d 277, 209 C.R. 917, the court listed the Court of Appeal cases applying the dictum (164 C.A.3d 285, footnote 2), but pointed out that the Supreme Court, although drafting the dictum, had, to that point, never applied it to a negligence cause of action. Hence, "this court arguably is free to conclude that in negligence cases--as opposed to strict liability cases--consumers as a general rule are entitled to recover from manufacturers for foreseeable economic losses even if they did not sustain any property damage or physical injury." (164 C.A.3d 285.) However, the issue was not reached, for the court held that a cause of action was stated for negligent interference with prospective advantage. (164 C.A.3d 290; see *supra*, §§752, 753.) (See *Pisano v. American Leasing* (1983) 146 C.A.3d 194, 196, 194 C.R. 77 [expressing approval of recovery for economic losses]; *Huang v. Garner* (1984) 157 C.A.3d 404, 420, 423, 203 C.R. 800 [same].)

The issue was resolved in *Aas v. Superior Court* (2000) 24 C.4th 627, 101 C.R.2d 718, 12 P.3d 1125, *supra*, §1162, a Supreme Court decision applying the *Seely* dictum to a negligence cause of action. "[T]he statement can be seen either as dictum or as part of the court's rationale for permitting the *Seely* plaintiff to recover his economic losses in warranty rather than in tort. Which label we attach to the statement is of no consequence. This is because the principle articulated in *Seely* has by critical examination and application in subsequent cases been confirmed as law. Courts routinely apply *Seely* in strict liability and *negligence* cases alike to distinguish recoverable damages for physical injury from unrecoverable damages representing the benefit of a contractual bargain." (24 C.4th 635.) (See *Zamora v. Shell Oil*

Co. (1997) 55 C.A.4th 204, 208, 63 C.R.2d 762 [homeowners who suffered only economic damage (defective pipes that might leak in the future) could not recover in negligence]; *Fieldstone Co. v. Briggs Plumbing Products* (1997) 54 C.A.4th 357, 367, 62 C.R.2d 701 [manufacturer was not liable in negligence for developer's economic loss in absence of special relationship; no showing that goods had been made specifically for developer as opposed to consumers generally].)

(2) *Seely Rule Limited to Cases Involving Furnishing of Goods*. The "economic loss" rule does not apply when the commercial relationship of the parties does not involve the sale of goods or products, nor the rules developed under the law merchant and the Uniform Commercial Code. In these cases, the policy concerns underlying the limitations on recovery of economic losses articulated by the court in *Seely v. White Motor Co.* are not present. Thus, the economic loss rule does not apply when the contract alleged to be negligently performed relates to the performance of services. (*North Amer. Chemical Co. v. Superior Court* (1997) 59 C.A.4th 764, 780, 69 C.R.2d 466 [negligence in performing packaging and shipping contract].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 4 Harper, James & Gray 3d §25.18A et seq.



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6 *Witkin Sum. Cal. Law Torts* § 1517

[§ 1517] Restatement Rule.

Under Rest.3d, Torts: Products Liability (see supra, §1430), "harm to persons or property," subject to tort recovery, may include "economic loss," but only when caused by one of the following (*Rest.3d, Torts: Products Liability* §21):

- (1) Harm to the plaintiff's person.
- (2) Harm to the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law.
- (3) Harm to the plaintiff's property other than the defective product itself.

The Comment explains the rationale as follows: "Two major constraints on tort recovery give content to this Section. First, products liability law lies at the boundary between tort and contract. Some categories of loss, including those often referred to as 'pure economic loss,' are more appropriately assigned to contract law and the remedies set forth in Articles 2 and 2A of the Uniform Commercial Code. When the Code governs a claim, its provisions regarding such issues as statutes of limitation, privity, notice of claim, and disclaimer ordinarily govern the litigation. Second, some forms of economic loss have traditionally been excluded from the realm of tort law even when the plaintiff has no contractual remedy for a claim." (*Rest.3d, Torts: Products Liability* §21, Comment a.)

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6 *Witkin Sum. Cal. Law Torts* § 1517A

[§ 1517A] (New) Distinction: Intentional Tort.

Robinson Helicopter Co. v. Dana Corp. (2004) 34 C.4th 979, 22 C.R.3d 352, 102 P.3d 268, addressed the following question: "[W]hether the economic loss rule, which in some circumstances bars a tort action in the absence of personal injury or physical damage to other property, applies to claims for intentional misrepresentation or fraud in the performance of a contract." (34 C.4th 984.) Plaintiff, a helicopter manufacturer, made two models that used the sprag clutch, a safety device manufactured by defendant. Plaintiff was required to obtain a "type certificate" from the Federal Aviation Administration (FAA), and every aircraft made pursuant to the certificate had to be manufactured exactly in accordance with that certificate. Under the certificate, the required level of hardness for the clutches was 50/55, and accordingly this degree of hardness was a requirement of the contract between plaintiff and defendant. For nearly 12 years, defendant complied with this requirement, but for 2 years, and without informing plaintiff or the FAA, defendant switched to a hardness level of 61/63. During the 2-year period, defendant, by issuing certificates of compliance, misled plaintiff into believing that the clutches were being manufactured as required by the FAA and the contract. Shortly thereafter, the 61/63 clutches experienced a failure rate substantially higher than the 50/55 clutches. Although the faulty clutches did not cause personal or property damage or damage to other parts of the helicopters, plaintiff was required by the FAA to recall and replace them. Because defendant disputed liability, this had to be done at plaintiff's expense. Plaintiff then successfully sued for intentional misrepresentation, and received a large punitive damages award based on a finding that defendant knowingly concealed material facts with intent to defraud. However, the Court of Appeal reversed on the ground that, under the economic loss rule, plaintiff was entitled to recover only economic damages. *Held*, judgment of the Court of Appeal reversed.

(a) *Erlich v. Menezes* (1999) 21 C.4th 543, 87 C.R.2d 886, 981 P.2d 978, text, §1037, held that conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract and arising from the principles of tort law. Here, the breach involved nonconforming clutches. However, defendant also issued false certificates stating that the clutches were in conformance with the contract; but for these false certificates, plaintiff would not have accepted delivery and used the nonconforming clutches, nor would it have incurred the cost of investigating the cause of the faulty clutches. Moreover, defendant's deceitful conduct exposed plaintiff to liability for

personal damages if a helicopter had crashed and to disciplinary action by the FAA. Accordingly, the economic loss rule does not bar plaintiff's fraud and intentional misrepresentation claims, because those claims were independent of defendant's breach of contract. (34 C.4th 989.)

(b) Public policy favors punishing intentional misrepresentations and deterring misrepresentations in the future, as well as preserving a business climate free of fraud and deceptive practices. Allowing plaintiff's claim for defendant's affirmative misrepresentation discourages such practices in the future while encouraging a business climate free of fraud and deceptive practices. (34 C.4th 991.)

(c) Defendant argued that the economic loss rule should apply to plaintiff's fraud and intentional misrepresentation claims in light of the public policy of promoting predictability in contracts in commercial transactions. This argument is without merit. When two parties make a contract, they agree upon the rules and regulations that will govern their relationship; i.e., the risks inherent in the agreement and the likelihood of its breach. Under this scenario, it is appropriate to enforce only those obligations that the parties voluntarily assumed, and to give them only the benefits that they expected to receive. This is the function of contract law. However, contracting parties cannot, and should not, be expected to anticipate fraud and dishonesty. Defendant's argument therefore proposes to increase the certainty in contractual relationships by encouraging fraudulent conduct at the expense of an innocent party. "No public policy supports such an outcome." (34 C.4th 993.)

(d) This holding will not open the floodgates to future litigation, because it is limited to a defendant's affirmative misrepresentations on which a plaintiff relies and that expose a plaintiff to liability for personal damages independent of his or her economic loss. In addition, in California, fraud must be pled specifically, and this particularity requirement necessitates pleading facts that show how, when, where, to whom, and by what means the representations were tendered. "We trust the trial courts of this state to enforce this pleading requirement." (34 C.4th 993.)

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6 Witkin Sum. Cal. Law Torts § 1518

[§ 1518] Enhancement of Harm.

When a product defect at the time of commercial sale or other distribution "is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes," the product seller is subject to liability for the increased harm. (*Rest.3d, Torts: Products Liability §16(a).*)

If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited to the increased harm attributable solely to the product defect. (*Rest.3d, Torts: Products Liability §16(b).*) If proof does not support this determination, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes. (*Rest.3d, Torts: Products Liability §16(c).*)

A seller of a defective product who is thus held liable for part or all of the harm suffered by the plaintiff is jointly and severally liable or severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability. (*Rest.3d, Torts: Products Liability §16(d).*)

Liability for increased harm arises most frequently in automobile crashworthiness cases, but may also arise in connection with other products. Typically, the plaintiff is involved in an automobile accident caused by conduct or circumstances other than a product defect and contends that the injuries were aggravated by the vehicle's failure reasonably to protect occupants in the event of an accident. (*Rest.3d, Torts: Products Liability §16, Comment a.*)

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 - 1. Sales Not in Course of Business.

6 *Witkin Sum. Cal. Law Torts* § 1519

[§ 1519] Sales Not in Course of Business.

The Third Restatement requires that one be engaged in the *business* of selling or otherwise distributing products. (*Rest.3d, Torts: Products Liability* §1.) Hence, strict liability does not apply to a casual transaction by a person not in business, such as a housewife selling a jar of jam or an automobile owner who trades it in to a dealer, or to a sale not in the usual course of business, such as an execution, bankruptcy, or bulk sale. (Former *Rest.2d, Torts* §402A, Comment f; see *Shook v. Jacuzzi* (1976) 59 C.A.3d 978, 981, 129 C.R. 496, citing the text [machine designed solely for use in manufacturer's own plant and not sold to public]; 99 A.L.R.3d 671 [when is person "engaged in business"].)

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 - aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1520

[§ 1520] In General.

The basis of strict liability is furnishing defective goods. "A significant common element running through the cases is that each of the defendants against whom the standard of strict liability has been applied played an integral and vital part in the overall production or marketing enterprise. At the very least the defendant in each case was a link in the chain of getting goods from the manufacturer to the ultimate user or consumer." (*Silverhart v. Mount Zion Hosp.* (1971) 20 C.A.3d 1022, 1026, 98 C.R. 187.) Thus, strict liability is not imposed for providing services. (See 5 Harper, James & Gray 2d §28.19; 5 Southwestern U. L. Rev. 297; 32 *Stanf. L. Rev.* 391 [Strict Liability in Hybrid Cases]; 22 *U.C.L.A. L. Rev.* 401; 29 *A.L.R.3d* 1425 [application of strict liability to person rendering services].)

When the same person provides both products and services in a commercial transaction, whether a product has been sold may be difficult to determine. When the product and service components are kept separate by the parties to the transaction, as when a lawn-care firm bills separately for fertilizer applied to a customer's lawn, the firm will be held to be the seller of the product. (*Rest.3d, Torts: Products Liability* §20, Comment d.) When the parties do not clearly separate the product and service components, the situation is more complicated. Thus, if the product component is *consumed* in the course of providing the service, as when a hair dye is used in treating a customer's hair in a salon, the transaction ordinarily is treated as a sale of the material that is consumed in providing the service, even when the service provider does not charge the customer separately for the dye. However, when the product component in the sale-service transaction is not consumed or permanently transferred to the customer--as when defective scissors are used in the hair salon--the transaction ordinarily is treated as one not involving a sale of the product to the customer. (*Rest.3d, Torts: Products Liability* §20, Comment d.) (For criticisms of the sale-service distinction, and argument that strict liability should apply to supply or use of defective products in the course of professional services, see 24 *Hastings L. J.* 111.)

A number of decisions illustrate the distinction between the sale of goods and the sale of services. (See *Slayton v. Wright* (1969) 271 C.A.2d 219, 237, 76 C.R. 494 [plumber who installed equipment was not liable]; *Stuart v. Crestview Mut. Water Co.* (1973) 34 C.A.3d 802, 811, 110 C.R. 543 [engineers who designed and constructed water system were not liable]; *Swett v. Gribaldo, Jones & Associates* (1974) 40 C.A.3d 573, 576, 115 C.R. 99 [upholding liability based on negligence; action against soil engineer for damages resulting from cracks in tract home; instruction on strict products

liability was error]; *Pena v. Sita World Travel* (1978) 88 C.A.3d 642, 644, 152 C.R. 17 [travel agency selecting transportation was not liable for injury suffered by plaintiff on travel bus]; *Ferrari v. Grand Canyon Dories* (1995) 32 C.A.4th 248, 257, 38 C.R.2d 65 [strict liability was not applicable to river raft operator, who provided service of conducting rafting trips; raft itself was incidental to this service].)

SUPPLEMENT: [This section is current through the latest supplement]
See 5 Harper, James & Gray 3d §28.19.



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 - bb. Medical Operation.

6 Witkin Sum. Cal. Law Torts § 1521

[§ 1521] Medical Operation.

(1) *Injury to Patient.* In *Silverhart v. Mount Zion Hosp.* (1971) 20 C.A.3d 1022, 1026, 98 C.R. 187, plaintiff had a satisfactory hysterectomy performed in defendant's hospital, followed by a normal convalescence. However, during the operation, a surgical needle broke and part of it became imbedded in dense tissue of the lower pelvic area. The doctors concluded that it could do no harm and did not remove it, and subsequent X-rays showed that it remained in its fixed position. In this action for damages, plaintiff sought an instruction on strict products liability. The trial judge refused, instructed on negligence, and the verdict was for defendant. *Held*, affirmed. A physician offering professional services is not in the business of selling or supplying a product. (20 C.A.3d 1027, citing *Carmichael v. Reitz* (1971) 17 C.A.3d 958, 978, 979, 95 C.R. 381.) The same is true of a hospital exercising its primary function: "The essence of the relationship between a hospital and its patients does not relate essentially to any product or piece of equipment it uses but to the professional services it provides." (20 C.A.3d 1027.) So here, the process of manufacturing and distribution ended with the person or firm that sold, leased, or otherwise supplied the defective needle; it left the stream of commerce when it came into defendant's possession, and became part of the surgical equipment used by the hospital in performing its medical services. (20 C.A.3d 1027.) (See criticism, 24 *Hastings L. J.* 127; 5 *Southwestern U. L. Rev.* 297.)

In *Hector v. Cedars-Sinai Med. Center* (1986) 180 C.A.3d 493, 500, 225 C.R. 595, the court said: "The essence of the relationship between hospital and patient is the provision of professional medical services necessary to effect the implantation of the pacemaker--the patient does not enter the hospital merely to purchase a pacemaker but to obtain a course of treatment which includes implantation of a pacemaker." (180 C.A.3d 504.) "In the instant case, the hospital does not select the pacemaker for the patient, but the selection is made by the treating physician. Thus, the hospital is in a poor position to protect itself by inquiring about or testing the devices, pressuring the manufacturer to promote product safety or selling a different pacemaker which is not defective. The imposition of strict liability would force the hospital to become involved in the selection process. This might provide added protection to the patient; it might also increase the cost of hospital services. But once the hospital began using its medical knowledge to aid in the selection of a pacemaker, it would be in the position of providing professional medical services, for which it could not be held

strictly liable. Thus, there would be no ultimate advantage to putting the hospital in the position of having to take part in the selection process." (180 C.A.3d 507.)

(2) *Injury to Physician.* In *San Diego Hosp. Assn. v. Superior Court* (1994) 30 C.A.4th 8, 35 C.R.2d 489, a physician sued a hospital and the manufacturer of a laser to recover damages for injuries sustained while performing surgery at the hospital. *Held*, the trial judge erred in overruling the hospital's demurrer to the physician's strict liability causes of action against it. Strict tort liability does not apply to a hospital supplying its medical staff with equipment to use in the care of their patients.

(a) The purpose of imposing strict liability is to insure that the costs of injuries resulting from defective products are placed on the manufacturer and others who place the product on the market instead of on injured persons who are powerless to protect themselves. (30 C.A.4th 15.) For a defendant to be strictly liable, it must play an integral and vital part in the overall production and marketing enterprise that has placed the product on the market or, at the very least, provide a link in the chain of getting the product to the ultimate user or consumer. The strictly liable defendant must be in "the business of" supplying the defective product to the user. (30 C.A.4th 16; citing *Silverhart*.)

(b) The hospital is not in the business of selling, leasing, bailing, or licensing equipment to the physician. It is in the business of providing medical services to its patients and providing the environment in which physicians may provide their own medical treatment to the patients. Instead of being a supplier or an entity that places a product in the stream of commerce, the hospital, like the physician, is an ultimate consumer of hospital equipment that is used in the treatment of patients. The fact that the hospital provides equipment for the physician's use is incidental to the overriding purpose of providing medical services. (30 C.A.4th 16.)

(c) Policy considerations underlying the imposition of strict liability are not served by imposing strict liability on a hospital that is itself an ultimate user of the product. Nor is it consistent with these policy considerations to extend recovery to a physician, who is in a far better position to inspect equipment for defects than a patient, who is denied recovery. To impose strict liability on a hospital would also ill serve the public good by discouraging hospitals that feared expanded liability from providing equipment utilizing recent technological advances. Although public policy requires that the hospital be responsible for faulty maintenance of the laser, strict liability is unnecessary (because the hospital remains liable for any intentional or negligent acts). (30 C.A.4th 17.)

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6 *Witkin Sum. Cal. Law Torts* § 1522

[§ 1522] Other Medical Procedure.

In *Shepard v. Alexian Bros. Hosp.* (1973) 33 C.A.3d 606, 109 C.R. 132, plaintiff alleged that he contracted serum hepatitis by reason of a blood transfusion administered to him while he was a patient in defendant hospital. *Held*, there was no liability on warranty and no strict liability in tort. The warranty theory was simply disposed of on the statutory provision that furnishing of blood is a service rather than a sale (see 4 *Summary* (10th), *Sales*, §106). But the court examined the products liability point in depth.

(a) The tests of *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, *supra*, §1429, and the Restatement (see *supra*, §1430) are not coextensive, but "there is a common denominator in both rules, namely, the requirement of a *defective product* which, when placed in the stream of commerce, causes injury." (33 C.A.3d 609.)

(b) Under *Health & Saf.C. 1606*, the distribution or use of blood is the rendition of a service, and may not be construed as a sale "for any purpose or purposes whatsoever." The statute codifies the holding of the New York *Perlmutter* case, and precludes the imposition of strict tort liability, because the blood transfusion is not the sale of a product. (33 C.A.3d 610.)

(c) The policy argument for extension of the strict liability doctrine to services is unconvincing. In the cases expanding its scope, a significant element has been that the defendant "played an integral and vital part in the overall production or marketing enterprise." This is not true of a hospital, which is not engaged in either the production or marketing of blood. (33 C.A.3d 612.) Its primary function is the care and healing of the sick; providing medicine or blood is subordinate to that function. (33 C.A.3d 611.) (See 24 *Hastings L. J.* 121; 7 *U.C. Davis L. Rev.* 196 [criticizing *Shepard*]; 20 *A.L.R.4th* 136 [liability of hospital or medical practitioner for injury or death from blood transfusion].)

Shepard was reaffirmed in *McDonald v. Sacramento Med. Foundation Blood Bank* (1976) 62 C.A.3d 866, 133 C.R. 444, another serum hepatitis case.

(a) Forty-two other states have followed California's lead in adopting the *Perlmutter* rule by statute. (62 C.A.3d

869.) It has been argued that, although the statute classifies furnishing of blood as a service and not a sale, it is still possible to impose strict liability on the service. (62 C.A.3d 870.) This argument is not persuasive; the general principle has been judicially established that strict liability should not be applied to true services. (62 C.A.3d 871.)

(b) The statute is not an unconstitutional denial of equal protection in classifying blood differently from other products. Blood injections are vital to the medical profession's struggle against illness, injury, and disease; the purpose of *Health & Saf.C. 1606* is to encourage and promote the constant availability of an adequate blood supply; and the Legislature, weighing the relatively minor risk of hepatitis, has reasonably determined that in the absence of negligence this risk must be accepted by the blood recipient. (62 C.A.3d 872, 873.) "The fact that the majority of the policy objectives behind strict liability do not apply to transfusion hepatitis cases is a further rational basis for the legislative distinction." (62 C.A.3d 874.)

In *Klaus v. Alameda-Contra Costa Med. Assn. Blood Bank* (1976) 62 C.A.3d 417, 133 C.R. 92, the court held that the policy considerations underlying the *Shepard* decision involving a hospital were equally applicable to a *blood bank*, despite the fact that the latter does put the blood on the market. In addition, the legislative intent was clearly to preclude suits against blood banks as well as hospitals. (62 C.A.3d 419.) (See *Carmichael v. Reitz* (1971) 17 C.A.3d 958, 978, 979, 95 C.R. 381 [physician who prescribed drug is not liable]; *Fogo v. Cutter Laboratories* (1977) 68 C.A.3d 744, 750, 752, 137 C.R. 417 [coagulant derived from blood plasma caused serum hepatitis; *Shepard* reasoning followed]; *Hyland Therapeutics v. Superior Court* (1985) 175 C.A.3d 509, 514, 220 C.R. 590 [rejecting constitutional challenges to statute]; 37 *Hastings L. J.* 1101 [hepatitis, AIDS, and *Health & Saf.C. 1606* exemption from strict liability]; 24 *A.L.R.4th* 508 [liability of blood supplier or donor]; 64 *A.L.R.5th* 333 [liability for donee's contraction of AIDS from blood transfusion]; 65 *A.L.R.5th* 357 [strict liability of hospital or medical practitioner for harm caused by drug, medical instrument, or similar device used in treating patient].)

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 - dd. Latent Defect in Hospital Premises.

6 Witkin Sum. Cal. Law Torts § 1523

[§ 1523] Latent Defect in Hospital Premises.

In *Pierson v. Sharp Memorial Hosp.* (1989) 216 C.A.3d 340, 264 C.R. 673, plaintiff's complaint alleged that, while visiting her husband's room at defendant's hospital, she suffered injuries from a fall caused by a defective carpet. To overcome the holdings in a number of cases that hospitals are providers of professional medical services and not producers or marketers of products (see *Hector v. Cedars-Sinai Med. Center* (1986) 180 C.A.3d 493, 500, 225 C.R. 595, supra, §1521; *Carmichael v. Reitz* (1971) 17 C.A.3d 958, 95 C.R. 381; *Silverhart v. Mount Zion Hosp.* (1971) 20 C.A.3d 1022, 98 C.R. 187, supra, §1520), she argued that the theory of strict liability of a landlord for latent defect in premises, announced in *Becker v. IRM Corp.* (1985) 38 C.3d 454, 213 C.R. 213, 698 P.2d 116, 12 Summary (10th), *Real Property*, §653, should be applied to a hospital furnishing a room. *Held*, judgment on the pleadings for defendant affirmed.

(a) *Becker* declared that landlords "are an integral part of the enterprise of producing and marketing rental housing" and plaintiff contended that hospitals are similarly "part of the enterprise of producing and marketing hospital rooms." (216 C.A.3d 343.) But the *Becker* opinion indicated that its extension of strict liability for injuries to a residential tenant was based on the implied warranty of habitability in a residential lease (see 12 Summary (10th), *Real Property*, §624 et seq.). In *Muro v. Superior Court* (1986) 184 C.A.3d 1089, 229 C.R. 383, 12 Summary (10th), *Real Property*, §653, the court observed that "*Becker* was intended to be restricted to landlords of residential property." (216 C.A.3d 343.) Hence, there is no reason to apply the *Becker* theory to a hospital providing a room as an integral part of its delivery of professional medical services. (216 C.A.3d 344.)

(b) Many cases emphasize the distinction between producing and marketing enterprises and furnishing of services. (216 C.A.3d 344, 345, 346, listing cases.) "We discern from these cases a fundamental and reasonable basis for imposing strict tort liability on persons providing products but not upon those rendering services. A product is a physical article which results from a manufacturing process and is ultimately delivered to a consumer. A defect in the article even if initially latent is ultimately objectively measurable. On the other hand, a service is no more than direct human action or human performance. Whether that performance is defective is judged by what is reasonable under the circumstances and depends upon the actor's skill, judgment, training, knowledge and experience. ... In light of the

infinite subtle nuances of human performance, the law reasonably imposes only a standard of negligence rather than strict liability in the provision of human services." (216 C.A.3d 345.)

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 - 3. Commercial Transaction.

6 *Witkin Sum. Cal. Law Torts* § 1524

[§ 1524] Commercial Transaction.

(1) *In General.* For there to be strict liability, the Third Restatement requires that the sale or distribution of the defective product be in a *commercial* context or transaction. (*Rest.3d, Torts: Products Liability* §§1, 20.) However, not all commercial transactions are subject to strict liability principles. Thus, a finance lessor is not subject to strict liability in the absence of active participation in the underlying commercial product distribution. With respect to product bailments, when products are made available as a convenience to customers who are on the defendant's premises primarily for different, although related purposes, and no separate charge is made, strict liability is not imposed, examples being bowling alleys that supply bowling balls for customer use and markets that supply shopping carts. And entities assisting or providing services to product distributors, i.e., advertising firms or those engaged exclusively in financing sales or leases, while indirectly facilitating the commercial distribution of products, are not subject to strict liability. (*Rest.3d, Torts: Products Liability* §20, Comments e, f, g.)

(2) *Parties With Relatively Equal Economic Strength.* In *Kaiser Steel Corp. v. Westinghouse Elec. Corp.* (1976) 55 C.A.3d 737, 127 C.R. 838, plaintiff alleged that it purchased an electric motor for use in its steel mill, with a warranty; that the motor was defective; and that its use caused heavy losses including a shut-down of the plant. The court, affirming a judgment of nonsuit, followed the reasoning of *Seely v. White Motor Co.* (1965) 63 C.2d 9, 45 C.R. 17, 403 P.2d 145, *supra*, §1514, that the rule of strict products liability should not apply to situations properly within the scope of the warranty provision of the Uniform Commercial Code.

(a) "The plaintiff-buyer and defendant-seller are commercial enterprises contracting from positions of relatively equal bargaining power for a product designed to negotiable specifications and not furnished off the shelf. Privy is no artificial barrier to recovery. Since the specifications of the product are negotiable, the tort doctrine of products liability as between the buyer and seller is no inducement to design and produce a safe product. Since the manufacturer and buyer have bargained in a commercial setting not only for the product but also for the measure and mode of reimbursement for defects in the product, any societal interest in loss shifting is absent. Whether the loss is thrust initially upon the manufacturer or customer, it is ultimately passed along as a cost of doing business included in the price of the products of one or the other and thus spread over a broad commercial stream." (55 C.A.3d 747.)

(b) The court reduced its reasoning to a definitive rule: "[T]he doctrine of products liability does not apply as between parties who: (1) deal in a commercial setting; (2) from positions of relatively equal economic strength; (3) bargain the specifications of the product; and (4) negotiate concerning the risk of loss from defects in it." (55 C.A.3d 748.) (See *Gentry Const. Co. v. Superior Court* (1989) 212 C.A.3d 177, 181, 260 C.R. 421; 15 A.L.R.4th 791 [preemption of strict liability in tort by provisions of U.C.C., Article 2].)

Where the special factors of equal economic strength and ability to negotiate are not present, a commercial customer may recover on strict products liability. (*International Knights of Wine v. Ball Corp.* (1980) 110 C.A.3d 1001, 1007, 168 C.R. 301, *supra*, §1510.)

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6 *Witkin Sum. Cal. Law Torts* § 1525

[§ 1525] Commercial Establishment.

In *Ernest W. Hahn v. Superior Court* (1991) 1 C.A.4th 1448, 3 C.R.2d 502, plaintiffs were injured when a tree fell on them while they were eating lunch in the courtyard of defendants' commercial establishment. To their action for negligence, plaintiffs added a cause of action for strict liability to which defendants demurred. The trial judge overruled the demurrer, and defendants sought mandamus. *Held*, writ granted. Plaintiffs argued that *Becker v. IRM Corp.* (1985) 38 C.3d 454, 213 C.R. 213, 698 P.2d 116, *supra*, §1507, which had extended strict liability principles to lessors of residential property, was applicable, but the court disagreed:

"The facts that were so crucial to the *Becker* analysis are not present here. In *Becker*, the extension of strict liability to owners of residential housing was founded upon the theory of an implied warranty of habitability and the need to provide safe, urban housing to the public. ... [Defendant] is not in the business of leasing residential property to the general public. Nor is it a producer or distributor of goods, placing its product in the stream of commerce. Instead, it is a commercial landlord holding its premises open to the public. In essence, [plaintiffs] urge the application of strict liability in tort for all invitees to the common areas of every commercial establishment, be it a supermarket, a restaurant, a theater or a department store, and the abolishment of the traditional requirement of some measure of fault for the imposing of liability. *Becker* does not require or portend such a comprehensive change in the law." (1 C.A.4th 1452.) (See 29 *San Diego L. Rev.* 525 [*Hahn*].)

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a. Defect Is Not Proximate Cause of Injury.

1. In General.

6 Witkin Sum. Cal. Law Torts § 1526

[§ 1526] In General.

Causation is as necessary an element of strict liability as it is of negligence liability; hence, the general rules of proximate cause apply (supra, §1181 et seq.). (See *Rutherford v. Owens-Illinois* (1997) 16 C.4th 953, 968, 67 C.R.2d 16, 941 P.2d 1203, supra, §1492 ["substantial factor" standard applies; plaintiff must prove that defective product supplied by defendant was substantial factor in bringing about injury]; *Bockrath v. Aldrich Chemical Co.* (1999) 21 C.4th 71, 79, 86 C.R.2d 846, 980 P.2d 398, 4 Cal. Proc. (4th), Pleading, Supp., §589A [same]; *Greening v. General Air-Conditioning Corp.* (1965) 233 C.A.2d 545, 549, 43 C.R. 662 [no sufficient evidence that defective heat pump was cause of fire that damaged building]; *Casetta v. United States Rubber Co.* (1968) 260 C.A.2d 792, 807, 67 C.R. 645; *Thompson v. Package Machinery Co.* (1971) 22 C.A.3d 188, 193, 99 C.R. 281 [error to refuse instruction on concurrent causes]; *Paverud v. Niagara Machine & Tool Works* (1987) 189 C.A.3d 858, 862, 234 C.R. 585 [superseding cause]; *Whiteley v. Philip Morris* (2004) 117 C.A.4th 635, 694, 11 C.R.3d 807 [no substantial evidence that negligent design of cigarettes, as opposed to cigarette smoking generally, was in reasonable medical probability substantial factor contributing to plaintiff's risk of developing lung cancer]; *Rest.3d, Torts: Products Liability* §15; 63 *Am.Jur.2d* (1997 ed.), *Products Liability* §558 et seq.; 49 *Proof of Facts* 2d 293 [proving that defect was not cause of injury]; 97 *Harv. L. Rev.* 851 [causation in mass exposure cases]; 14 *Pacific L. J.* 1173 [manufacturer's liability for criminally tampered-with products]; 38 *So. Cal. L. Rev.* 52; 13 *A.L.R.3d* 1057, 1058 [products liability; strict liability in tort]; 54 *A.L.R.3d* 1079 [proof that defect was present when product left hands of defendant]; 9 *A.L.R.4th* 494 [sufficiency of proof of injuries resulting from "second collision"]; BAJI, Nos. 9.00.3, 900.5; CACI, No. 1201 et seq.; for exception to requirement of proof of causation in cases involving mass-produced fungible goods, see supra, §1486.)

In *Khan v. Shiley* (1990) 217 C.A.3d 848, 266 C.R. 106, plaintiff in 1983 had one of defendant's mechanical heart valves implanted to replace a diseased mitral valve. She had been advised of the risks normally present, but was not told that there was a risk that the valve might fracture. In 1985, her surgeon informed her that defendant was recalling a group of valves due to a propensity to fracture. In 1986, she and her husband filed this action, alleging that the possibility of fracture of the valve and death as a result had caused her severe emotional distress. *Held*, no cause of action was stated under theories of strict products liability or negligent infliction of emotional distress:

(a) "No matter which theory is utilized ... , where a plaintiff alleges a product is defective, proof that the product

has malfunctioned is essential to establish liability for an injury *caused by the defect*. ... [Plaintiff's] alleged injury was not caused by any defect in the valve. Rather, it was caused, if at all, by the knowledge the valve may, at some future time, fracture." (217 C.A.3d 855.)

(b) The complaint did, however, state a cause of action for fraud, by allegations that defendant misrepresented the characteristics and safety of the valve and concealed material adverse information, with knowledge of the substantial risk of death; and that plaintiffs relied on these representations in making their selection. (217 C.A.3d 858.)

In *Balido v. Improved Machinery* (1972) 29 C.A.3d 633, 105 C.R. 890, defendant Improved Machinery designed and manufactured a plastic injection molding press in 1950, and sold it to Paper Mate in 1953. The machine had a lift safety gate covering the operating area that was inadequate and did not meet the standard of a 1949 California Industrial Safety Order. In 1954 Improved, after learning of the Safety Order and of injuries to operators of presses, put adequate safety devices in its new presses, and offered the devices to owners of earlier models for \$ 500. Paper Mate did not install the devices, and in 1958 sold the press to Olympic. Sales and service representatives of Improved notified Olympic of the defect and the Safety Order and offered the new devices at the \$ 500 price, but Olympic did not install them. In 1965 plaintiff, operating the press, injured her hand, and sued the three parties. Nonsuits were granted and plaintiff appealed. *Held*: Olympic, her employer, was liable for workers' compensation but not in tort; Paper Mate was only an occasional seller, and thus not strictly liable (see *supra*, §1519); but Improved could be strictly liable, and granting of the nonsuit was error.

(a) The first defense urged by Improved was the *long passage of time* between the manufacture and the injury (15 years). This could be a critical factor on the issue of causation, because of the possibility of bad maintenance, misuse, or wearing out of the product. But, in the absence of special statutes of limitation (as in malpractice and a few other situations), the effect of lapse of time on causation is a question of fact. (29 C.A.3d 642.) In extreme cases involving mass consumer products, a long period may create a high probability of superseding causes. But in the instant case, the product was a machine sold to a limited number of customers; Improved had notice of the defect from the beginning; and it kept track of the machine through repair and maintenance records. Hence, it could not be held as a matter of law that passage of time broke the chain of causation. (29 C.A.3d 644.)

(b) The second defense was that *multiple warnings were given* to the owners of the press (see *infra*, §1537), and the trial judge concluded that Olympic's use after receiving notice of the defect was a superseding cause. Superseding cause, however, depends on foreseeability (see *supra*, §1197); and the extent to which designers and manufacturers of dangerous machinery are required to anticipate third-party safety neglect is a question of fact. (29 C.A.3d 645.) In two New Jersey cases, the court held that, even though the custom in the trade at the time of sale was for the buyer, not the manufacturer, to install appropriate safety devices for the particular intended use, it was still a question of fact whether the manufacturer was immunized from liability or could have reasonably foreseen that the buyer would fail to install the devices. (29 C.A.3d 646.) And a federal case came to a similar conclusion where the machine itself contained a sign warning the operator against its use without a safety guard. "Obviously, if a warning affixed to the machine itself and given directly to its operator does not insulate the manufacturer from liability for deficient design, a warning given to the owner of the machine, a warning that may never reach the actual operator, is equally ineffective in creating such insulation." (29 C.A.3d 647.)

(c) While a manufacturer who has taken all reasonable steps to correct its error may sometimes avoid future liability, the question of reasonableness of the measures taken remains one of fact: Improved gave several warnings, but offered to correct the defect only at a cost of \$ 500, and it was for the trier of fact to determine whether Improved should have anticipated that the buyer would refuse to spend the money for additional safety equipment. (29 C.A.3d 649.)

Bunch v. Hoffinger Industries (2004) 123 C.A.4th 1278, 20 C.R.3d 780, held that an inadequate warning (*supra*, §1476) was a substantial factor in causing injury when plaintiff, a child of 11, dived into an above ground pool that was only four feet deep. Defendant, the manufacturer of the pool liner, argued that plaintiff's own actions were the proximate cause of her injuries, because she had ignored both her mother's admonition not to dive and the inadequate

warning that was attached to the liner. This contention is without merit. Although the inadequate warning was not the only cause of plaintiff's injuries, her evidence indicated that had she been warned that diving could result in serious injury, she would not have dived. (123 C.A.4th 1302.)

Causation may be established by circumstantial evidence. (See *Elmore v. American Motors Corp.* (1969) 70 C.2d 578, 583, 75 C.R. 652, 451 P.2d 84, supra, §1511; *Gherna v. Ford Motor Co.* (1966) 246 C.A.2d 639, 650, 55 C.R. 94; *Dimond v. Caterpillar Tractor Co.* (1976) 65 C.A.3d 173, 177, 181, 183, 184, 134 C.R. 895.)

West's Key Number Digest, Products Liability k.15

SUPPLEMENT: [This section is current through the latest supplement]
Brockrath case:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §630. *Correction:* Page 987, first line on page, "BAJI, No. 900.5" should be "BAJI, No. 9.00.5".



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2. Vehicle Cases.

6 *Witkin Sum. Cal. Law Torts* § 1527

[§ 1527] Vehicle Cases.

In *Douplik v. General Motors Corp.* (1990) 225 C.A.3d 849, 275 C.R. 715, plaintiff drank heavily at a reception and drove his car into a road marker; the car left the roadway, plunged down an embankment, and overturned. The driver's side of the roof collapsed from the forces imposed on defective welds in the roof pillar, and plaintiff suffered injuries that made him a paraplegic. In this action, the jury found that defendant was liable for the injury, that plaintiff suffered damages in the sum of \$ 6,666,212, and that 80% of the fault was his. In the appeal, defendant did not challenge the jury verdict that the roof pillar welds were defectively manufactured, but raised several issues relating to the jury instructions on causation. *Held*, judgment affirmed.

(a) "With respect to products liability the issue is one of comparative fault. ... With respect to causation the issue is one of concurrent cause. ... Given that the jury was directed that [plaintiff's] wrongful conduct was a legal cause of his injury the remaining question is whether the defective welds were also a legal cause of the injury." (225 C.A.3d 857.)

(b) A " 'manufacturer must evaluate the crashworthiness of his product and take such steps as may be reasonable and practicable to forestall particular crash injuries and mitigate the seriousness of others.' ... To this extent an automobile manufacturer has a legal duty to design and manufacture its vehicles to provide for the safety of the occupants in a vehicular accident." (225 C.A.3d 859.) In this case, the proper manufacture of the car roof supports bears directly on the protection of its occupant from injury that might occur from the collapse of the roof. (225 C.A.3d 859.)

(c) "The substantial factor test directs the attention of the trier of fact to the contribution which culpable conduct, among other causal factors, makes to the injury for which recompense is sought. If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries. That is, it could not be said that 'but for' the wrongful conduct the injuries would not have occurred." (225 C.A.3d 861, citing *Rest.2d, Torts* §432(1), and *Endicott v. Nissan Motor Corp.* (1977) 73 C.A.3d 917, 926, 141 C.R. 95.)

(d) One of the groups of concurrent cause is where both wrongful acts are necessary conditions of the harm. This case is in that group, adjusting the doctrine of contributory negligence to that of comparative fault. "At issue was

whether [plaintiff's] negligence in driving off the road released forces sufficient to cause *only a defectively* welded roof pillar to collapse, forcing his head over the top of the seat, crushing his vertebrae and thereby causing quadriplegia." (225 C.A.3d 866.)

(e) "To the extent that General Motors' argument rests on the premise that a latent defect cannot operate as a legal cause of injury in cases of complex causation it is incorrect. The concurrent cause instruction does not distinguish between active and passive legal causes. A legal cause may be a latent condition. That is frequently the case in products liability cases, including crashworthiness cases. When the concurrent cause instruction is read together with the substantial factor instruction, it is made clear that the forces released in the automobile accident must be sufficient only to cause the collapse of a *defective* roof pillar." (225 C.A.3d 867.)

(f) The jurors viewed the photographs and the car, and were able to integrate the evidence by "visualizing their own necks in the various attitudes pertinent to the actual deformation of the roof and the range of lesser deformation that would likely have occurred if the welds were flawless." (225 C.A.3d 870.) "We are unable to say that the shortcomings perceived by General Motors would preclude a reasonable trier of fact from concluding that, but for the defective welds, more likely than not the snapping point of [plaintiff's] neck would not have been reached." (225 C.A.3d 870.)

A number of other vehicle cases deal with causation. (See *Soule v. General Motors Corp.* (1994) 8 C.4th 548, 572, 581, 34 C.R.2d 607, 882 P.2d 298 [in light of other instructions actually given, failure to give defendant's proposed instruction, that any design defect was not substantial or contributing cause of plaintiff's injuries if same injuries would have occurred even with nondefective design, was harmless error]; *Romig v. Goodyear Tire & Rubber Co.* (1969) 271 C.A.2d 420, 422, 76 C.R. 479, citing the text; *Endicott v. Nissan Motor Corp.*, *supra*, 73 C.A.3d 926 [plaintiff lost control of car and crashed; no causal connection between allegedly defective seat belt and plaintiff's injuries]; *Visueta v. General Motors Corp.* (1991) 234 C.A.3d 1609, 1616, 286 C.R. 402 [alleged installation of parking brake in inaccessible location was not causally connected with collision]; *Springmeyer v. Ford Motor Co.* (1998) 60 C.A.4th 1541, 1558, 71 C.R.2d 190 [truck owner's negligent failure to replace fan in response to recall was not superseding cause that exonerated manufacturers of fan and truck from liability when fan blade broke off, injuring mechanic; third-party negligence is intervening cause only where so highly extraordinary as to be unforeseeable].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Stephen v. Ford Motor Co.* (2005) 134 C.A.4th 1363, 1373, 37 C.R.3d 9 [in products liability action brought by vehicle owner against tire manufacturer, nonsuit was proper where complexity of causation issue regarding alleged failure of tire was beyond common experience, and testimony offered by owner's expert witness was excluded for failure to establish substantial similarity between tire failures relied on by expert witness and owner's own tire failure].



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aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1528

[§ 1528] In General.

Walker v. Stauffer Chemical Corp. (1971) 19 C.A.3d 669, 96 C.R. 803, dealt with the liability of a seller where the product is not intended to reach the consumer unchanged, but is to be processed in some manner. The court rejected liability. Defendant S manufactured sulphuric acid that defendant J purchased and used in a drain cleaning product. Plaintiff was injured when the product exploded. *Held*, summary judgment for defendant S affirmed. "We do not believe it realistically feasible or necessary to the protection of the public to require the manufacturer and supplier of a standard chemical ingredient such as bulk sulphuric acid, not having control over the subsequent compounding, packaging or marketing of an item eventually causing injury to the ultimate consumer, to bear the responsibility for that injury. The manufacturer (seller) of the product causing the injury is so situated as to afford the necessary protection." (19 C.A.3d 674.) (See *Rest.3d, Torts: Products Liability* §5; 3 Proof of Facts 3d 623 [alteration of product]; 86 *Harv. L. Rev.* 923; 18 *Hastings L. J.* 22; for different result where safety devices are involved, see *supra*, §§1526, 1527.)

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bb. Raw Material and Sophisticated Buyer Defenses.

6 *Witkin Sum. Cal. Law Torts* § 1529

[§ 1529] Raw Material and Sophisticated Buyer Defenses.

In *Artiglio v. General Elec. Co.* (1998) 61 C.A.4th 830, 71 C.R.2d 817, plaintiffs were women who had received breast implants manufactured by M, using silicone supplied by defendant. M and other implant manufacturers would provide defendant with particular specifications for the physical properties of the silicone that they were purchasing, and defendant would then produce and supply silicone that met these specifications. The shipping documents stated that defendant disclaimed any responsibility for determining whether the silicone was suitable for medical applications. *Held*, summary judgment for defendant affirmed; under the circumstances, defendant's duty to warn did not extend to the ultimate consumers.

(a) In some situations, the manufacturer or supplier of raw material incorporated into a finished product may be liable. For example, if raw coffee beans are sold to a buyer who roasts and packages them for sale to the ultimate consumer, the seller of the beans will not be relieved of liability when the raw beans are contaminated with arsenic. The manufacturer or supplier has a general duty to provide a warning of the dangerous condition of its product to those who are likely to use it or be endangered by its probable use. (61 C.A.4th 835.)

(b) However, the duty of a component manufacturer or supplier to warn is not unlimited. For example, the manufacturer of pig iron, which is capable of a variety of uses, is not likely to be held to strict liability when the pig iron turns out to be unsuitable for the child's tricycle into which it is finally made by a remote purchaser. Federal cases involving Teflon have amplified what are referred to as the raw material and sophisticated buyer defenses. These cases have made it clear that knowledge of how a raw material will be used does not, by itself, create a duty to investigate the risks posed by the final product. (61 C.A.4th 837.)

(c) These defenses are addressed in *Rest.3d, Torts: Products Liability* §5. Component and raw material suppliers are not liable to ultimate consumers when the following conditions are met: the goods or materials are not inherently dangerous; the suppliers sell in bulk to a sophisticated buyer; the material is substantially changed during the manufacturing process; and the supplier has a limited role in developing and designing the end product. When these factors exist, the social cost of imposing a duty to the ultimate consumers far exceeds any additional protection

provided. (61 C.A.4th 839.)

(d) Applying these factors here, first, the silicone supplied by defendant was not inherently dangerous. Second, the manufacturers were highly sophisticated buyers under a legal duty to investigate the potential hazards of implants, and each one was in a position to test the risks of its products and each of their components. Defendant fully alerted the manufacturers to this duty by the disclaimer. Although defendant might have been privy to some risks posed by exposure to airborne silicon particles, there is nothing in the record to suggest that these risks would have altered the manner in which implant manufacturers used the silicone supplied by defendant. Third, the materials supplied by defendant were subject to substantial processing by the implant manufacturers over which defendant had no control. Finally, while defendant developed silicone to meet the manufacturers' specifications and consulted on a regular basis about those specifications and problems that the manufacturers were having, it did not exercise any control over the design, testing, or labeling of the implants. (61 C.A.4th 839, distinguishing *Putensen v. Clay Adams* (1970) 12 C.A.3d 1062, 91 C.R. 319, supra, §1174.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.* (2004) 129 C.A.4th 577, 580, 28 C.R.3d 744 [component parts defense was not available to excuse defendant's failure to warn, where complaint alleged that defendant manufactured grinders specifically designed for use with abrasive wheels, that wheels were harmless without power supplied by defendant's tools, and that, when tools were used for intended purpose, harmful dust was released, a nonobvious risk].



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6 *Witkin Sum. Cal. Law Torts* § 1530

[§ 1530] Unforeseeable Use.

(1) *In General.* The seller is entitled to assume that the product will be put to its intended use, and he or she is not liable--either on negligence or strict liability theories--for an unintended, unexpected, and abnormal use. Expressed in terms of causation, the alleged defect is not the proximate cause of the injury where the plaintiff has altered or otherwise misused the article. (See *Romito v. Red Plastic Co.* (1995) 38 C.A.4th 59, 69, 44 C.R.2d 834 [manufacturer of plastic skylight was not liable, under either negligence or strict liability theory, to electrician accidentally falling to death through skylight]; *Rest.3d, Torts: Products Liability* §15 [causal connection between product defect and harm]; 49 Proof of Facts 2d 379 [misuse of product]; 18 *Hastings L. J.* 36; 6 Southwestern U. L. Rev. 661 [abnormal use and burden of proof]; 17 Southwestern U. L. Rev. 541 [Criminal Product Tampering: A Manufacturer Is Only as Judgment-Proof as His Product Is Tamper-Proof]; 13 A.L.R.3d 1057, 1086 [products liability: strict liability in tort]; 54 A.L.R.3d 1079 [proof that defect was present when product left hands of defendant]; 41 A.L.R.4th 47 [alteration or modification of product after leaving hands of manufacturer or seller]; 65 A.L.R.4th 263 [product misuse defense]; 67 A.L.R.4th 964 [injury resulting from product that was tampered with]; 50 A.L.R.5th 275 [intentional inhalation of product's fumes or vapors to produce intoxicating effect].)

This limitation has been applied in a number of cases. (See *Erickson v. Sears, Roebuck & Co.* (1966) 240 C.A.2d 793, 799, 50 C.R. 143 [six-foot wooden stepladder sold with directions not to use on soft surfaces; plaintiff nailed wooden cleats on bottom legs, placed it on dirt and grass surface, and leg broke]; *Preston v. Up-Right* (1966) 243 C.A.2d 636, 639, 52 C.R. 679 [114-pound aluminum alloy scaffold with legs mounted on locking caster wheels; plaintiff placed 4-foot aluminum ladder on scaffold platform, mounted it, and scaffold moved, throwing him]; *Martinez v. Nichols Conveyor & Engineering Co.* (1966) 243 C.A.2d 795, 799, 52 C.R. 842 [800-pound platen of paper baler, altered to permit use of machine for additional purpose; unsanctioned change could have caused fracturing of bolt and resulting injury]; *Putensen v. Clay Adams* (1970) 12 C.A.3d 1062, 1073, 91 C.R. 319, supra, §1174 [tubing stretched, soaked, and drawn through another tube; could have impaired product]; *Dosier v. Wilcox-Crittendon Co.* (1975) 45 C.A.3d 74, 78, 119 C.R. 135.)

In *Garcia v. Joseph Vince Co.* (1978) 84 C.A.3d 868, 148 C.R. 843, plaintiff received an eye injury when his

opponent's sabre broke through plaintiff's fencing mask. (See *supra*, §1480.) In denying recovery, the court pointed out that there was no proof of a defect in manufacture or an improper design. The mask was intended to be used with a sabre having a rounded tip, and the penetration occurred with a sharp-edged sabre. (84 C.A.3d 878.) Moreover, plaintiff failed to show that a mask exists or could be designed to prevent penetration by a sharp-edged sabre. (84 C.A.3d 879.) (See *Bernal v. Richard Wolf Med. Instruments Corp.* (1990) 221 C.A.3d 1326, 1332, 272 C.R. 41, *supra*, §1462 [disagreeing with holding in *Garcia* that plaintiff has burden of proving feasibility of reasonable alternate design].)

A number of annotations deal with the misuse of particular products. (See 50 A.L.R.4th 1226 [misuse of athletic, exercise, or recreational equipment]; 52 A.L.R.4th 276 [misuse of wearing apparel]; 55 A.L.R.4th 1010 [misuse of electrical generation equipment]; 55 A.L.R.4th 1062 [misuse of lawnmower]; 58 A.L.R.4th 7 [misuse of food and drugs]; 58 A.L.R.4th 40 [misuse of cosmetics]; 58 A.L.R.4th 76 [misuse of paint, cleaners, or other chemicals]; 58 A.L.R.4th 131 [misuse of gas and electric appliances]; 58 A.L.R.4th 160 [misuse of bottles, cans, or other containers]; 59 A.L.R.4th 73 [misuse of ladders and scaffolds]; 59 A.L.R.4th 102 [misuse of weapons and ammunition]; 60 A.L.R.4th 678 [misuse of agricultural equipment]; 61 A.L.R.4th 156 [misuse of building components and materials]; 63 A.L.R.4th 18 [misuse of automobiles, boats, aircraft, and other vehicles]; 64 A.L.R.4th 10 [misuse of commercial or industrial equipment and machinery].)

(2) *Retailer's Ignorance of Intended Use.* In *Lewis v. American Hoist & Derrick Co.* (1971) 20 C.A.3d 570, 97 C.R. 798, defendant American manufactured a crane, which defendant Brown, its exclusive local distributor, sold to a contractor. American's regional sales manager directly participated in the sale negotiations, and was familiar with the contractor's needs and intended use. The original design of the crane was proper, but American had modified it to permit use of a smaller wire for its pendants. In operation the wire broke, the boom and suspension system fell, and plaintiffs, employees of the contractor, were injured. *Held*, as to defendant Brown, the strict liability instructions were erroneous and required reversal of the judgment. There was evidence that the crane was used in a manner not intended by Brown or reasonably anticipated by him, and he was entitled to a jury determination of that issue. (20 C.A.3d 586, 588.) A dissenting justice argued that the test is the expectation of the user, not the knowledge or intent of the seller, and that Brown should have anticipated that the crane would be used for a purpose that was the intention of the manufacturer and the expectation of the user. (20 C.A.3d 589.)

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[§ 1531] Foreseeable Use.

If the particular alteration or misuse by the customer was reasonably foreseeable, the manufacturer is not absolved. (See *Cronin v. J.B.E. Olson Corp.* (1972) 8 C.3d 121, 126, 104 C.R. 433, 501 P.2d 1153, *supra*, §1436 [although collision may not be normal or intended use, "vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products"]; *Thompson v. Package Machinery Co.* (1971) 22 C.A.3d 188, 196, 99 C.R. 281; *Schwoerer v. Union Oil Co.* (1993) 14 C.A.4th 103, 113, 17 C.R.2d 227 [plaintiff's "misuse" of solvent, which caused liver damage, did not bar recovery where only dangers warned against were those from inhalation and dermal contact].)

In *Thomas v. General Motors Corp.* (1970) 13 C.A.3d 81, 91 C.R. 301, plaintiff child was injured when she leaned against the top of a washing machine in a laundromat, and the glass top gave way. The glass was held in place by a gasket with a slot containing a rubber "bead." With the bead in place, the glass could withstand a heavy external pressure; without it, a slight force could cause the glass to fall in. The evidence showed that the bead was missing at the time of the accident. The trial judge instructed that, if the jury found that the bead had been removed, the machine was not being used for its intended purpose and its condition would not constitute a defective design. The verdict was in favor of defendant manufacturer. *Held*, reversed; the instruction was error. The jury could have found that the bead was missing because it was not properly installed, or that a safe design would have placed the ring on the outside of the door for easy discovery of its removal. (13 C.A.3d 90.)

In *Huynh v. Ingersoll-Rand* (1993) 16 C.A.4th 825, 20 C.R.2d 296, plaintiff applied for a position as a welder at Southwest Marine and was given a welding test, during which he was required to use a grinder. The grinder, which was handed to him by a Southwest employee, was manufactured by defendant and had a disk already attached. Shortly after he started using this tool, the disc "exploded" and severely injured plaintiff's eye. In this products liability action, defendant moved for summary judgment based on the "misuse" affirmative defense. The alleged misuse consisted of using a disc rated at only 24,000 revolutions per minute (r.p.m.s), while the grinder was rated at 30,000 r.p.m.s. There was a warning on the grinder's trigger (in tiny print) to the effect that it should be used with equipment rated "at Tool R.P.M.," followed by the words "Model DG220 Rated 30000." Plaintiff contended that the "misuse" was foreseeable

and that the warning against this misuse was inadequate. *Held*, summary judgment for defendant reversed; triable issues of fact remained concerning the cause of plaintiff's injury and the adequacy of the warning.

(a) *Whether misuse was actual cause of injury.* Defendant, as the moving party, had the burden of proving that the alleged misuse, instead of some other defect, was the cause of plaintiff's injury. Defendant could have discharged this obligation by producing expert testimony that it was more probable than not that the disc exploded because the grinder was operating at a speed in excess of the maximum that this type of disc could sustain. However, defendant introduced no such testimony. Nor was any other evidence introduced to show that what defendant presumed to be the cause of plaintiff's injury was in fact the cause. Defendant's argument that no evidence was required on the causation issue because "it speaks for itself" is without merit. Here, where the disc was spinning so fast that the human eye could not determine exactly what happened, the purported cause and effect relationship simply did not "speak for itself." (16 C.A.4th 832.)

(b) *Whether warning was adequate.*

(1) Plaintiff argued that even if the alleged misuse was the cause of his injury, it was a foreseeable misuse that required defendant to provide an adequate warning to escape liability. This position accurately reflects the current state of the law. As *Self v. General Motors Corp.* (1974) 42 C.A.3d 1, 116 C.R. 575, *supra*, §1454, and *Balido v. Improved Machinery* (1972) 29 C.A.3d 633, 105 C.R. 890, *supra*, §1526, make clear, the risks that must be warned against obviously include foreseeable dangerous "misuses" of the product, such as attaching an inappropriate grinding disc to a grinder. (16 C.A.4th 833.)

(2) Defendant argued that, even assuming that the warning was inadequate, that inadequacy could not have been the proximate cause of plaintiff's injuries because some of Southwest's employees had, in fact, read and understood the warning. This argument is without merit. Although there was testimony that at least a couple of Southwest's employees had read and understood the warning, there was no evidence that it was one of these employees that had given the grinder to plaintiff. It may well be that Southwest was negligent in not having its knowledgeable employees explain this warning to its less knowledgeable employees, but this sort of negligence is entirely foreseeable. And a manufacturer cannot satisfy its duty to warn by supplying a warning so vague and ambiguous that only some users are likely to read and comprehend the danger. (16 C.A.4th 834.)

(3) For these reasons, a triable issue remains whether plaintiff would have been supplied this combination of grinder and disc, and consequently been injured, had the grinder itself contained an "adequate" warning. A clearer warning may have alerted the employee who assembled these two elements that they formed a dangerous combination, and may have caused that employee to give plaintiff another tool for his welding test. Whether the language on the trigger of the grinder constituted an adequate warning of the danger of using discs rated below 30,000 r.p.m.s is a very close factual issue that cannot be resolved on summary judgment. (16 C.A.4th 834.)

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1. In General.

aa. Drugs and Vaccines.

6 *Witkin Sum. Cal. Law Torts* § 1532

[§ 1532] Drugs and Vaccines.

(1) *Background.* Many products are experimental or involve elements of danger that cannot be wholly eliminated. But their social value outweighs the risks, so the seller who prepares them carefully and markets them with appropriate restrictions or warnings is not strictly liable for injurious consequences. (Former *Rest.2d, Torts* §402A, Comment k; see 22 *Pacific L. J.* 43 [Comment k: A Prescription For The Over-The-Counter Drug Industry]; 66 *A.L.R.4th* 83 [liability of manufacturer of oral polio vaccine for injury or death from its administration].)

(2) *Unavoidably Dangerous Condition Rejected.* In *Kearl v. Lederle Laboratories* (1985) 172 *C.A.3d* 812, 218 *C.R.* 453, the court conditioned application of the Comment k exemption on a finding that the drug was "unavoidably dangerous," and devised an elaborate test to determine the issue. (172 *C.A.3d* 829, 830.) *Brown v. Superior Court* (1988) 44 *C.3d* 1049, 245 *C.R.* 412, 751 *P.2d* 470, *supra*, §1471, rejected the condition. "[I]f some method could be devised to confine the benefit of that standard to drugs that have proved useful while denying the privilege to those that are clearly harmful, the *Kearl* approach would deserve serious consideration. "But we know of no means by which this can be accomplished without substantially impairing the public interest in the development and marketing of new drugs, because the harm to this interest arises in the very process of attempting to make the distinction." (44 *C.3d* 1067.)

(a) Under the "mini-trial" directed by *Kearl*, a drug manufacturer has no assurance that his or her product will be measured by the standard of Comment k, because a trial judge could decide that the benefit of the drug was not "exceptionally important" so as to make its availability "highly desirable," or that the interest in its availability did not outweigh the public's interest in subjecting the producer to strict liability. And a manufacturer's incentive to develop what it might consider a superior product would be diminished if a trial judge could decide later that another available product would have accomplished the same. (44 *C.3d* 1068.)

(b) Different trial judges might reach different conclusions on the evidence in particular cases, and there may be inconsistency between the findings of the judge and jury in the same case. (44 *C.3d* 1068.) Thus, the eligibility of each drug for favorable treatment must be tested at a trial, with its attendant litigation costs, and the drug must survive two risk/benefit challenges--first by the judge and then by the jury. "In order to vindicate the public's interest in the

availability and affordability of prescription drugs, a manufacturer must have a greater assurance that his products will not be measured by a strict liability standard than is provided by the test stated in *Kearl*." (44 C.3d 1068.)

(c) "In conclusion, and in accord with almost all our sister states that have considered the issue, we hold that a manufacturer is not strictly liable for injuries caused by a prescription drug so long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution." (44 C.3d 1069.) (See 20 Pacific L. J. 1 [Brown].)

Rest.3d, Torts: Products Liability §6 sets forth rules governing liability of commercial sellers or distributors for harm caused by defective prescription drugs and medical devices. (See *supra*, §1448.)

West's Key Number Digest, Products Liability k.8, 26

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Background*. See 85 Proof of Facts 3d 95 [proof of death or injury from rabies vaccine].



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bb. Other Products.

6 *Witkin Sum. Cal. Law Torts* § 1533

[§ 1533] Other Products.

The "unavoidably unsafe product" defense has generally been raised only in cases involving drugs or vaccines. (See *Kearl v. Lederle Laboratories* (1985) 172 C.A.3d 812, 825, 218 C.R. 453, supra, §1532; 70 A.L.R.4th 16 [what is "unavoidably unsafe" product].)

In *Wilkinson v. Bay Shore Lumber Co.* (1986) 182 C.A.3d 594, 227 C.R. 327, an attempt to extend the defense beyond the medical field was rejected. Plaintiff carpenter, working on a gabled roof, stood on an outrigger (two-by-four plank). The plank was furnished by defendant as "construction/standard grade," which is free of dry rot; but the piece did have dry rot, not visible on its surface, and it gave way, causing plaintiff to fall. In this products liability action, the trial judge, at defendant's request, gave the Restatement Comment k instruction (supra, §1532). *Held*, this was reversible error. "Because we are unaware of a case wherein the comment k defense was applied to lumber, and because the reported decisions overwhelmingly concern products such as prescription drugs, vaccines and medical devices, it is evident that the trial court was breaking new ground in applying the defense here. ... [W]e are unable to detect any hint of evidence to support defendant's theory, for which defendant bore the burden of proof, that dry rot is an unavoidably unsafe defect in wood." (182 C.A.3d 602.)

In *Hufft v. Horowitz* (1992) 4 C.A.4th 8, 5 C.R.2d 377, involving a malfunctioning inflatable penile prosthesis, the court extended the reasoning of *Brown v. Superior Court* (1988) 44 C.3d 1049, 245 C.R. 412, 751 P.2d 470, supra, §1532, to implanted devices. "[A] manufacturer is not strictly liable for injuries caused by an implanted prescription medical product which has been (a) properly made and (b) distributed with information regarding risks and dangers of which the manufacturer knew or should have known at the time." (4 C.A.4th 20.) (See *Plenger v. Alza Corp.* (1992) 11 C.A.4th 349, 360, 13 C.R.2d 811 [reasoning of *Hufft v. Horowitz* is equally applicable to intrauterine device (IUD)]; *Rest.3d, Torts: Products Liability* §6 (supra, §1448) [rules governing liability of commercial sellers or distributors for harm caused by defective prescription drugs and medical devices].)

West's Key Number Digest, Products Liability k.26, 27

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6 *Witkin Sum. Cal. Law Torts* § 1534

[§ 1534] In General.

In a products liability action, a manufacturer or seller is not liable if both of the following conditions apply:

(1) "The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community." (C.C. 1714.45(a)(1).)

(2) "The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in comment i to *Section 402A of the Restatement (Second) of Torts*." (C.C. 1714.45(a)(2).) (*Rest.2d, Torts* §402A has been superseded by Rest.3d, Torts: Products Liability; see *supra*, §1435.)

For this purpose, a "products liability action" is "any action for injury or death caused by a product." The term "does not include an action based on a manufacturing defect or breach of an express warranty." (C.C. 1714.45(c); see BAJI, No. 9.00.6.)

As originally enacted, the statute applied to tobacco products, but amendments in 1997 revoked the immunity for tobacco manufacturers. The tobacco immunity continues for other persons, including retailers and distributors. (See *infra*, §§1535, 1536.)

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6 *Witkin Sum. Cal. Law Torts* § 1535

[§ 1535] Revocation of Immunity for Tobacco Manufacturers.

(1) *Background. American Tobacco Co. v. Superior Court* (1989) 208 C.A.3d 480, 255 C.R. 280, construed C.C. 1714.45 (supra, §1534) so as to immunize tobacco manufacturers from products liability. (See *Richards v. Owens-Illinois* (1997) 14 C.4th 985, 993, 60 C.R.2d 103, 928 P.2d 1181 [distinguishing *DaFonte v. Up-Right* (1992) 2 C.4th 593, 7 C.R.2d 238, 828 P.2d 140, supra, §57, and holding that C.C. 1714.45 is legislative determination that qualifying manufacturers, such as tobacco companies, are not just immune from fault, but that they are not at "fault" in first place]; *Rutherford v. Owens-Illinois* (1997) 16 C.4th 953, 985, 67 C.R.2d 16, 941 P.2d 1203, supra, §1492 [same]; 25 Cal. Western L. Rev. 239, 245, 252 [analyzing statute and out-of-state cases and agreeing with *American Tobacco* interpretation]; 62 So. Cal. L. Rev. 1449 [analyzing statute and disagreeing with *American Tobacco* reasoning on several issues].)

(2) *Revocation of Immunity.* As amended in 1997, C.C. 1714.45 "does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions." However, the statute "does exempt the sale or distribution of tobacco products by any other person, including, but not limited to, retailers or distributors." (C.C. 1714.45(b).)

The Legislative intent in enacting the 1997 amendments is "to declare that there exists no statutory bar to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others who have suffered or incurred injuries, damages, or costs arising from the promotion, marketing, sale, or consumption of tobacco products" and "to clarify that those claims that were or are brought shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense." (C.C. 1714.45(f).)

The statute "does not apply to, and never applied to," an action brought by a public entity to recover the value of benefits provided to individuals injured by a tobacco-related illness caused by the tortious conduct of a tobacco company or its successor in interest, including, but not limited to, an action brought pursuant to Welf.C. 14124.71 (recovery of Medi-Cal benefits; see 4 Cal. Proc. (4th), *Pleading*, §137). In the public entity's action, the fact that the

injured individual's claim against the defendant may be barred by a prior version of the statute is not a defense. This provision does not constitute a change in, but is declaratory of, existing law relating to tobacco products. (C.C. 1714.45(e).)

The statute may not be construed to grant immunity to a tobacco industry research organization. (C.C. 1714.45(g).) (See *Barker v. Brown & Williamson Tobacco Corp.* (2001) 88 C.A.4th 42, 45, 105 C.R.2d 531, 3 Cal. Proc. (4th), Actions, Supp., §434 [1997 amendments to C.C. 1714.45, which eliminated tobacco companies' total immunity, did not revive claims previously barred by statute of limitations]; 29 *McGeorge L. Rev.* 761 [removal of legal barriers preventing recovery for tobacco-related illness]; 38 *San Diego L. Rev.* 1051 [tobacco tort litigation and C.C. 1714.45]; 33 *U.S.F. L. Rev.* 459 [significance of *Richards v. Owens-Illinois* after 1997 amendments to C.C. 1714.45].)

(c) *Commentary.* Discussion of products liability with respect to tobacco related injuries has been extensive. (See 108 *Harv. L. Rev.* 525 [market share liability for smoking-related Medicaid expenditures]; 23 *San Diego L. Rev.* 1137 [smoking-related injuries]; 53 *So. Cal. L. Rev.* 1423 [cigarette dependency and civil liability]; 27 *Southwestern U. L. Rev.* 487 [cigarette litigation under Rest.3d, Torts: Products Liability]; 44 *Stanf. L. Rev.* 853 [A Sociolegal History of the Tobacco Tort Litigation]; on preemption by federal cigarette labeling and advertising statutes, see *Cipollone v. Liggett Group* (1992) 505 U.S. 504, 112 S.Ct. 2608, 2625, 120 L.Ed.2d 407, 431; *Whiteley v. Philip Morris* (2004) 117 C.A.4th 635, 666, 11 C.R.3d 807.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Background.* During the 10 years that the tobacco immunity statute was in effect, immunity attached only if the tobacco product was pure and unadulterated. (*Boeken v. Philip Morris* (2005) 127 C.A.4th 1640, 1672, 26 C.R.3d 638 [immunity instruction that omitted word "unadulterated" was erroneous].) *Recovery of Medi-Cal benefits:*

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §155.

Barker case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §461.

(c) *Commentary.* See 25 *A.L.R.6th* 435 [validity, construction, application, and effect of master settlement agreement between tobacco companies and various states, and state statutes implementing agreement; use and distribution of agreement proceeds].



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6 *Witkin Sum. Cal. Law Torts* § 1536

[§ 1536] Retroactivity.

Myers v. Philip Morris Cos. (2002) 28 C.4th 828, 123 C.R.2d 40, 50 P.3d 751, addressed the retroactivity of C.C. 1714.45 (supra, §1534). There are two versions of C.C. 1714.45. The former version (the immunity statute) granted tobacco companies complete immunity in certain products liability actions as of January 1, 1988. The present version (the repeal statute) rescinds that immunity as of January 1, 1998. How to treat tobacco company conduct during the 10 years of immunity (January 1, 1988, to December 31, 1997) was the issue in this case. Plaintiff smoked heavily from 1956 to 1997. Throughout this period, and until August 1998, she was also constantly around secondhand smoke. In April 1998, plaintiff was diagnosed with lung cancer allegedly caused by her exposure to tobacco, and the following year she filed a complaint against defendant tobacco manufacturers for products liability and other causes of action. After removing the case to federal district court, defendants moved to dismiss plaintiff's complaint for failure to state a claim. The district court granted the motion, with leave to amend, on the ground that C.C. 1714.45 barred actions for injuries occurring prior to January 1998. Plaintiff amended her complaint to allege that she was exposed to secondhand smoke from January to August 1998, but the court granted a second motion to dismiss, this time without leave to amend and on the ground that plaintiff had conceded that her lung cancer was not caused by her exposure to secondhand smoke after January 1, 1998. The case was appealed to the Ninth Circuit Court of Appeals, which certified to the California Supreme Court the following question: Whether the repeal statute governs a claim that accrued after January 1, 1998, but was based on *conduct* that occurred prior to that date. *Held*, the *immunity statute* applies to statutorily described conduct of tobacco companies that occurred *during* the 10-year immunity period, regardless of when the injuries resulting from that conduct were sustained or discovered.

(a) *Whether applying repeal statute during immunity period would be prospective or retroactive.* Plaintiff argued that applying the repeal statute in her case would be prospective, rather than retroactive, because she was diagnosed with cancer 3 months after that statute became effective. This contention is without merit. A statute that operates to increase a party's liability for past conduct is retroactive. To have the repeal statute apply to products liability actions against tobacco companies for supplying tobacco products to smokers during the immunity period would indeed be a retroactive application of that statute, because it would subject those companies to liability for *past conduct* for which

they were previously immune. (28 C.4th 839, citing *Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 246 C.R. 629, 753 P.2d 585, 7 Summary (10th), *Constitutional Law*, §634.)

(b) *Whether Legislature expressed intent that repeal statute govern during immunity period.* There is a presumption, grounded on various constitutional principles, that a statute operates prospectively, rather than retroactively. This presumption was not overcome in the present case for the following reasons:

(1) There is no express language in the repeal statute making it retroactive. Defendant tobacco manufacturers point to language in C.C. 1714.45(e) indicating that actions by individuals against tobacco companies continue to be precluded by a *prior version of this statute* as proof that the repeal statute was intended to operate prospectively. On the other hand, plaintiff claims that the following language in C.C. 1714.45(f) amounted to an express declaration in favor of retroactivity: (a) the 1997 amendments were intended to declare that *there exists no statutory bar* to tobacco-related claims against tobacco manufacturers; (b) the 1997 amendments apply to smokers *who have suffered or incurred injuries*; and (c) it is the intention of the Legislature to clarify that claims that *were or are brought* are to be determined on their merits, without the imposition of any claim of statutory bar. However, the italicized language states nothing more than that the repeal statute rescinded any former statutory immunity for tobacco companies. Moreover, even if plaintiff's interpretation were accepted, the repeal statute is at best ambiguous, because of the language indicating that individual suits continue to be precluded by a prior version of this statute, and a statute that is ambiguous with respect to retroactive application is construed to be "unambiguously prospective" under *Immigration & Naturalization Service v. St. Cyr* (2001) 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347. (28 C.4th 842.)

(2) The legislative history of the repeal statute provides no clear intention that it was to be applied retroactively. Plaintiff pointed out that the amendments to C.C. 1714.45(f) allegedly favoring retroactive application were made in direct response to a concern that the repeal statute would operate prospectively only, thereby comprising a clear indication that the repeal statute was to be applied retroactively. However, the legislative history merely cites the general rule in favor of prospective operation, and the amendments to C.C. 1714.45(f) do not supply an unavoidable implication that the Legislature intended to subject tobacco companies to potential tort liability for conduct during the 10-year period when the immunity statute declared that conduct to be lawful. Plaintiff also pointed to comments by the repeal statute's author supposedly reflecting the Legislature's intention to remedy past frauds by tobacco companies. However, these comments were simply reasons given in support of repeal and did not address the question of retroactivity. Also, comments by a bill's author are often ignored, because they reflect only the views of a single legislator, not that of the *Legislature as a whole*. (28 C.4th 844.)

(3) Construing the repeal statute to apply retroactively would raise serious constitutional questions about whether it was an unconstitutional taking in violation of the Fifth Amendment Due Process Clause or an unlawful ex post facto law. The rule of construction favoring the avoidance of constitutional infirmities reinforces treating the repeal statute as prospective. (28 C.4th 845.)

(c) *Whether immunity statute precludes recovery for conduct before immunity period.* Regarding that portion of plaintiff's claim attributable to her use of cigarettes that defendants manufactured or distributed *before* the 10-year immunity period, defendants contend that the immunity statute, although repealed, continues to shield them from liability. Defendants reason that (1) the immunity statute was expressively retroactive (it applied to all product liability actions pending on, or commenced after, January 1, 1988); (2) it was held in this case that the repeal statute was not retroactive; (3) therefore, the repeal statute could not remove any of the protection afforded by the immunity statute. This contention is without merit. Although the repeal statute has no retroactive effect, it nonetheless removed the protection that the immunity statute gave to tobacco companies for their conduct occurring *before* the immunity statute's effective date. This is so because a retroactive effect is one that impairs rights that a party possessed when he or she acted, and the repeal statute did not impair any rights that tobacco companies possessed before the immunity period. On the contrary, by abrogating the immunity statute, the repeal statute restored the law governing product liability for the manufacture or sale of tobacco products to what it had been before January 1, 1988, the effective date of the immunity statute, i.e., general tort principles governed a cigarette company's liability for manufacturing or distributing tobacco

products for sale to voluntary consumers. (28 C.4th 847, citing *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 114 S.Ct. 1483, 1490, 128 L.Ed.2d 229.)

One justice dissented.

Naegle v. R.J. Reynolds Tobacco Co. (2002) 28 C.4th 856, 123 C.R.2d 61, 50 P.3d 769, a companion case to *Myers v. Philip Morris Cos.*, dealt with the following question: "[W]hat forms of conduct by tobacco companies during the 10-year immunity period come within the protection conferred by the Immunity Statute." The Court of Appeal held that the immunity statute covers all conduct by tobacco companies acting as manufacturers or sellers of tobacco products (except that excluded by the statute itself). In reversing, the Supreme Court made the following points:

(a) As shown by the specific language of the immunity statute (former C.C. 1714.45(b)), the immunity conferred by that statute does not cover liability for either manufacturing defects in tobacco products or a tobacco company's breach of an express warranty. (28 C.4th 862.)

(b) Plaintiff argued that the immunity statute bars only product liability claims and not claims based on fraud. This is incorrect. The immunity statute defines "product liability" as "any action for injury or death caused by a product." This language is so broad that it compels the conclusion that whether based on allegations or theories of fraud, negligence, or manufacture of an inherently unsafe product, an action in which a plaintiff seeks damages for "personal injury or death" caused by a tobacco product clearly is a "product liability" action within the meaning of the statute. (28 C.4th 861, 863.)

(c) As applied to tobacco companies, the immunity statute is intended to protect tobacco companies for their conduct in making or selling tobacco products that are pure and unadulterated, when the dangers and risks are commonly known to be inherent in tobacco products. Accordingly, the immunity statute does not shield a tobacco company from product liability for injuries or deaths caused by something not inherent in the product itself, i.e., if some adulteration of the product makes it unreasonably dangerous. (28 C.4th 862, 863, 864, citing *Richards v. Owens-Illinois* (1997) 14 C.4th 985, 60 C.R.2d 103, 928 P.2d 1181, supra, §1535, and *Rest.2d, Torts* §402A, Comment i.)

(d) Plaintiff alleged that defendants manipulated the addictive properties of cigarettes via additives and that defendants controlled nicotine delivery to the smoker through adding ammonia. "The essence of these allegations is that defendant tobacco companies adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking. Because ... the statutory immunity does not shield a tobacco company from liability for injuries or deaths caused by something not inherent in the product itself, the Immunity Statute does not bar these claims." Hence, the trial judge erred in sustaining defendants' demurrer. (28 C.4th 865.)

(e) However, the trial judge was correct in sustaining defendants' demurrer to two other causes of action. The first alleged that defendants controlled nicotine content by developing high-nicotine tobacco and blended tobacco. "Because nicotine is naturally present in tobacco, the risks associated with nicotine are inherent in tobacco products. Therefore, an allegation that defendants increased the nicotine content of their cigarettes through blended or high-nicotine tobacco does not avoid the bar of the Immunity Statute because it does not allege that defendants exposed plaintiff to a risk other than those inherent in tobacco products." (28 C.4th 865, citing *American Tobacco Co. v. Superior Court* (1989) 208 C.A.3d 480, 255 C.R. 280, supra, §1535.) The other cause of action alleged that defendants lied about the addictive effects of tobacco in a campaign designed to deceive the public. These allegations do not suggest that the cigarettes that plaintiff smoked exposed him to risks other than those inherent in cigarette smoking. Hence, defendants' conduct falls squarely within the reach of the immunity statute. (28 C.4th 866, citing *American Tobacco Co. v. Superior Court*.)

One justice concurred and dissented, and two others concurred. (See *Souders v. Philip Morris* (2002) 104 C.A.4th 15, 21, 127 C.R.2d 748 [applying *Myers* and *Naegle*].)

Whiteley v. Philip Morris (2004) 117 C.A.4th 635, 654, 11 C.R.3d 807, held that "the trial court erred in refusing to instruct the jury that it could not hold defendants liable for fraud or negligence based upon their conduct during the

10-year period covered by the Immunity Statute, with one narrow exception for any injury caused by the adulteration of the product with additives." This error was prejudicial for the following reasons:

(a) Plaintiff's expert testimony showed that the risk of her developing lung cancer would have been much reduced had she successfully quit smoking during the immunity period. (117 C.A.4th 658.)

(b) Other evidence from the immunity period revealed that defendant tobacco companies not only failed to design a safer cigarette, but also manipulated the nicotine content to make cigarette smoking more addictive. (117 C.A.4th 658.)

(c) Defendants targeted youth during this time. (117 C.A.4th 660.)

(d) No other instruction lessened the prejudice of the erroneous instruction. (117 C.A.4th 660.)

(e) Plaintiff's closing argument focused on a *continuous* course of misconduct by defendants. (117 C.A.4th 664.)

(f) Defendants were prevented from telling the jury that their conduct was protected by law for 10 years. (117 C.A.4th 664.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Adequate Warning.

6 Witkin Sum. Cal. Law Torts § 1537

[§ 1537] Adequate Warning.

The seller, to avoid liability, may be required to give directions or warning about the use of the product (see *supra*, §1467), and may reasonably assume that the warning will be heeded. (See *Temple v. Velcro USA* (1983) 148 C.A.3d 1090, 1094, 196 C.R. 531 [warning was not on device, but was widely publicized and should have been read]; *Rest.3d, Torts: Products Liability* §2(c) (*supra*, §1467) [liability for inadequate warnings or instructions]; 34 Cal. Western L. Rev. 509 [minimizing product liability exposure].) This rule is probably inapplicable to the failure to install safety devices on a dangerous machine (see *supra*, §1526), but it has been applied to drugs and cosmetics in a number of cases. (See *Toole v. Richardson-Merrell* (1967) 251 C.A.2d 689, 709, 60 C.R. 398; *Harris v. Belton* (1968) 258 C.A.2d 595, 608, 65 C.R. 808, *supra*, §1476; *Carmichael v. Reitz* (1971) 17 C.A.3d 958, 988, 95 C.R. 381, *supra*, §1476.)

Where the product is sold in bulk by the manufacturer, with an adequate warning, and is subsequently packed, labeled, and marketed by a distributor, the duty to warn the ultimate consumer rests with the distributor.

In *Groll v. Shell Oil Co.* (1983) 148 C.A.3d 444, 449, 196 C.R. 52, stove and lantern fuel were sold by defendant manufacturer to the distributor, who packaged it and sold it to the public. *Held*, defendant's responsibility was absolved at the time it provided adequate warnings to the distributor.

(a) "To hold otherwise would impose an onerous burden on the bulk sales manufacturer to inspect the subsequent labeling of the packaged product. In addition the manufacturer would have severe enforcement problems if the bulk product purchaser failed to adhere to the recommended warnings." (148 C.A.3d 449.)

(b) "Cases which have imposed a duty on the *manufacturer* to warn the ultimate consumer have typically involved tangible items that could be labeled, or sent into the chain of commerce with the manufacturer's instruction, concerning: the proper assembly of a telescope ... , the danger in turning a golf cart ... , or the danger of unguarded machine gears on a kelp dryer Other cases have imposed such a duty when the manufacturer controlled the means to communicate the warning to the consumer, i.e., by packaging or labeling the ultimate product." (148 C.A.3d 449.)

West's Key Number Digest, Products Liability k.14

SUPPLEMENT: [This section is current through the latest supplement]



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d. Government Contractor Defense.

6 *Witkin Sum. Cal. Law Torts* § 1538

[§ 1538] Government Contractor Defense.

In *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442, an action against a government contractor for the wrongful death of a Marine Corps pilot who was killed in a helicopter crash, the Court determined the conditions under which a contractor providing military equipment to the federal Government is immune from liability under state tort law for injury caused by a design defect.

(a) The procurement of equipment by the United States is an area of uniquely federal interest justifying the displacement of state law by the so-called "federal common law." (108 S.Ct. 2514, 101 L.Ed.2d 452.) Imposing state tort law liability on government contractors will affect that interest, because it will cause contractors either to refuse to manufacture the design specified by the government or to raise prices. (108 S.Ct. 2515, 101 L.Ed.2d 454.)

(b) To justify displacing state law, it is not enough that there be an area of uniquely federal interest; there must also be a *significant conflict* between that interest and the applicable state law. (108 S.Ct. 2515, 101 L.Ed.2d 455.) This conflict is present here: The state-imposed duty of care that is the asserted basis for the contractor's liability, i.e., the duty to equip helicopters with a specific type of escape-hatch mechanism, is precisely contrary to the duty imposed by the government contract, i.e., the duty to manufacture helicopters with the type of escape-hatch required by the contract specifications. (108 S.Ct. 2516, 101 L.Ed.2d 456.)

(c) However, even in this type of situation it is unreasonable to say that there is always a *significant* conflict between the state law and a federal policy or interest. For example, if the government orders, by model number, a quantity of stock helicopters that happen to be equipped with a certain type of escape-hatch, it cannot be said that the government has a "significant" interest in that particular feature. (108 S.Ct. 2516, 101 L.Ed.2d 456.)

(d) The outline of what constitutes a significant conflict is suggested by 28 U.S.C., §1346(b), which immunizes the government from liability based on the performance of, or failure to perform, a discretionary function. The selection of the appropriate design for military equipment is clearly a discretionary function, and it makes little sense to immunize the government from liability when it produces the equipment itself, but not when it contracts for the production. (108 S.Ct. 2517, 101 L.Ed.2d 457.) Hence, "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be

displaced." (108 S.Ct. 2518, 101 L.Ed.2d 458.)

(e) The scope of displacement is as follows: "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated--i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would procure no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision." (108 S.Ct. 2518, 101 L.Ed.2d 458.)

Four justices dissented. (See *Jackson v. Deft* (1990) 223 C.A.3d 1305, 1317, 273 C.R. 214 [in view of evidence that military specifications set forth only minimum standards for paint label warnings, there was triable issue of fact as to existence of significant conflict between federal and state law required by *Boyle*]; 19 Southwestern U. L. Rev. 1067 [Boyle]; 53 A.L.R.5th 535 [government-contractor defense].)

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e. Compliance With Federal Standards.
1. Automobile Safety Equipment.

6 *Witkin Sum. Cal. Law Torts* § 1539

[§ 1539] Automobile Safety Equipment.

In *Nissan Motor Corp. v. Superior Court* (1989) 212 C.A.3d 980, 261 C.R. 80, plaintiffs alleged that a vehicle was defective because it did not have an automatic air bag. *Held*, a state common law requirement for air bags is contrary to Federal Motor Vehicle Safety Standard 208, which requires a three-point safety belt system (which the vehicle had) or an air bag, hence, the state common law requirement is preempted. "To hold otherwise would be to allow a potential flood of actions against manufacturers that have been following the custom of the industry and acting in compliance with federal regulations. The result would not only work a hardship to manufacturers, but also might so encourage litigation as to hamper the administration of justice." (The court disagreed with the contrary view of *Buccery v. General Motors Corp.* (1976) 60 C.A.3d 533, 132 C.R. 605, *supra*, §1452.)

The opposite result was reached in *Ketchum v. Hyundai Motor Co.* (1996) 49 C.A.4th 1672, 57 C.R.2d 595, involving the National Traffic and Motor Vehicle Safety Act (former 15 U.S.C., §1381 et seq.; now 49 U.S.C., §30102 et seq.). Respecting the seat belt system, defendant complied with the federal Act, but not with a state common law standard. Applicable to preemption, the Act provides: "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no state or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." (For the present preemption provision, see 49 U.S.C., §30130(b).) However, as to preemption of state common law standards, the Act further states: "Compliance with any Federal motor vehicle safety standard issue under this subchapter does not exempt any person from any liability under common law." (A similar provision is now in 49 U.S.C., §30130(e).) Based on these provisions, judgment was entered for plaintiff. *Held*, affirmed. "Congress clearly distinguished between motor vehicle safety standards, which are preempted, and common law standards for liability, which are not. This language unambiguously expresses the intent of Congress to preserve common law liability actions." (49 C.A.4th 1680.)

SUPPLEMENT: [This section is current through the latest supplement]

Notwithstanding the clause in the National Traffic and Motor Vehicle Safety Act providing that compliance with a

federal safety standard does not exempt any person from common law liability, *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914, held that a common law tort action alleging that defendant automobile manufacturer was negligent in failing to equip plaintiff's automobile with a driver's side airbag was preempted by a conflicting Department of Transportation standard promulgated under the federal Act. The savings clause was designed to leave adequate room for state tort law to operate, as where federal law creates only a minimum safety standard; it was not designed to foreclose or limit operation of ordinary preemption principles insofar as those principles require preemption of state laws that actually conflict with federal standards. (120 S.Ct. 1918, 146 L.Ed.2d 922.) (See *Williamson v. Mazda Motor of America* (2008) 167 C.A.4th 905, 914, 84 C.R.3d 545 [seatbelt case stating that *Geier* rejected approach for determining preemptive effect of federal safety standard set forth in *Ketchum v. Hyundai Motor Co.* (1996) 49 C.A.4th 1672, 57 C.R.2d 595, text, p. 1009].)



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e. Compliance With Federal Standards.

2. Medical Devices.

6 *Witkin Sum. Cal. Law Torts* § 1540

[§ 1540] Medical Devices.

In *Evraets v. Intermedics Intraocular* (1994) 29 C.A.4th 779, 34 C.R.2d 852, plaintiff was injured by an intraocular lens that had been surgically implanted in his eye, and sued the manufacturer and distributor for damages. Plaintiff alleged various tort causes of action, including strict liability, to all of which demurrers were sustained. *Held*, the strict liability and negligence claims were preempted by federal law. The Medical Device Amendments of 1976 to the federal Food, Drug and Cosmetic Act prohibit states from imposing "any requirement ... which is different from, or in addition to," federal requirements relating to the safety or effectiveness of medical devices intended for human use (21 U.S.C., §360k(a)). Under federal law, the intraocular lenses fall into a special category intended to encourage innovation by exempting promising experimental devices from the usual safety and efficacy requirements. State claims for strict liability would undermine the congressional purpose of allowing lens manufacturers leeway in developing and perfecting their product. Thus, suit should not be permitted under state law theories of either strict liability or negligence. (29 C.A.4th 787; on preemption by federal law, see 7 *Summary* (10th), *Constitutional Law*, §8 et seq.) (See *Scott v. CIBA Vision Corp.* (1995) 38 C.A.4th 307, 314, 44 C.R.2d 902 [Medical Device Amendments preempted state products liability claims against contact lens cleaning product manufacturer; following *Evraets*].)

The United States Supreme Court addressed the preemptive effect of the Medical Device Amendments in *Medtronic v. Lohr* (1996) 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700, holding that common law tort claims alleged in that action were *not* barred. Defendant manufactured pacemaker leads. The Food and Drug Administration (FDA) advised defendant, on its premarket notification to the FDA, that its pacemaker lead was "substantially equivalent" to devices introduced into interstate commerce prior to 1976, and thus exempt from the general requirement that premarket approval first be obtained. A heart patient was implanted with a pacemaker equipped with one of defendant's leads, the pacemaker failed as the alleged result of a defect in the lead, and the patient required emergency surgery. The patient filed an action in a state court, asserting claims based on negligent design, negligent manufacture, and negligent failure to warn or properly instruct the patient or her physicians of the tendency of the pacemaker to fail. Defendant removed the case to federal district court, which granted defendant summary judgment on the ground that plaintiffs' claims were preempted by 21 U.S.C., §360k(a). On appeal, the United States Court of Appeals for the Eleventh Circuit, reversing in part and affirming in part, ruled that the claims based on negligent design were not preempted but that the claims based

on negligent manufacture and failure to warn were preempted. *Held*, reversed insofar as the Court of Appeals judgment held that any of the claims were preempted and affirmed insofar as the judgment rejected defendant's preemption defense. The lead opinion was joined by five justices.

(a) *General preemptive effect.* 21 U.S.C., §360k(a) expressly preempts state law, but the extent of the preemption must be determined. A state's police powers cannot be superseded by a federal act unless that is Congress' clear and manifest purpose. The language and legislative history of the Medical Device Amendments indicate that they are intended to preempt specific, conflicting state statutes and regulations, rather than general duties imposed by common law actions. (116 S.Ct. 2250, 135 L.Ed.2d 716.)

(b) *Negligent design claim.* The claims alleging negligent design are not preempted. The FDA's "substantially equivalent" determination did not amount to a specific, federally enforceable "requirement" that would be preemptive under 21 U.S.C., §360k(a). The process undertaken by defendant here focuses on the device's equivalence to another device already on the market, not on its safety. The device has never been formally reviewed under the Medical Device Amendments for safety or effectiveness. The process accordingly provides little protection to the public, and is designed merely to maintain the status quo with respect to existing medical devices and their substantial equivalents. (116 S.Ct. 2254, 135 L.Ed.2d 720.)

(c) *Negligent manufacturing and labeling claims.*

(1) The remaining claims, those alleging negligent manufacture and failure to warn, are clearly not preempted to the extent that the claims rest on allegations that defendant negligently failed to comply with duties equal to, or substantially identical to, requirements imposed by the Medical Device Amendments. That the state requirements may be narrower than the federal rules does not make them "different" under 21 U.S.C., §360k(a). Moreover, nothing in the statute denies the state the right to provide a traditional damages remedy for violations of common law duties when those duties parallel federal requirements. The presence of a damages remedy does not amount to the additional or different "requirement" preempted under the statute; instead, it merely provides another reason for manufacturers to comply with identical existing requirements under federal law. (116 S.Ct. 2255, 135 L.Ed.2d 721.)

(2) The preemption defense against the manufacturing and labeling claims should have been rejected in full. State requirements are preempted only where the FDA has established "other specific requirements applicable to a particular device." (116 S.Ct. 2257, 135 L.Ed.2d 723.) The FDA has promulgated only general labeling and manufacturing regulations for medical devices. Accordingly, claims that allege noncompliance with other duties under state common law are not preempted. Preemption occurs only when a specific state requirement threatens to interfere with a specific federal requirement. Here, the federal requirements applicable to the device are entirely generic, and the state common law duties that plaintiffs seek to enforce are not specific to the particular device. (116 S.Ct. 2257, 135 L.Ed.2d 724.)

One justice, concurring in part and concurring in the judgment, expressed the view that ordinarily 21 U.S.C., §360k(a) preempted a requirement similar to a federal requirement even though it took the form of a standard of care imposed by a state law tort action, but that the statute did not preempt the tort claims here. Four other justices, concurring in part and dissenting in part, took the position that the negligent manufacture and failure to warn claims were preempted. (See *Buckman Co. v. Plaintiffs' Legal Committee* (2001) 531 U.S. 341, 121 S.Ct. 1012, 1017, 148 L.Ed.2d 854, 861 [state law fraud-on-FDA claims are impliedly preempted by federal law; federal statutory scheme amply empowers FDA to punish and deter fraud against FDA, and this authority is used by FDA to achieve delicate balance of statutory objectives, a balance that can be skewed by allowing fraud-on-FDA claims under state tort law]; *Armstrong v. Optical Radiation Corp.* (1996) 50 C.A.4th 580, 586, 57 C.R.2d 763 [preemption under Medical Device Amendments requires both device specific federal regulations and similar, conflicting state regulations that impose specific requirements; following *Medtronic*]; *Steele v. Collagen Corp.* (1997) 54 C.A.4th 1474, 1478, 63 C.R.2d 879 [state standards of care are preempted if they are different from or in addition to federal requirements arising from full premarket approval process (rather than merely approval under market equivalence test); however, manufacturer must show both premarket approval and compliance with federal standards]; 98 A.L.R. Fed 124 [federal preemption of state

common law products liability claims pertaining to drugs, medical devices, and other health-related items].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Riegel v. Medtronic* (2008) 552 U.S. ___, 128 S.Ct. 999, 1007, 169 L.Ed.2d 892, 902 [patient's common law claims of negligence, strict liability, and implied warranty against manufacturer of balloon catheter were preempted by Medical Device Amendments to federal Food, Drug, and Cosmetic Act; Food and Drug Administration premarket approval process for catheter established federal safety and effectiveness requirements for catheter, and safety and effectiveness were subjects of patient's claims]; *Blanco v. Baxter Healthcare Corp.* (2008) 158 C.A.4th 1039, 1056, 70 C.R.3d 566 [Medical Device Amendments preempted strict products liability claim against manufacturer of bileaflet mitral heart valve that fractured and failed, because claim would impose state manufacturing requirement concerning elimination of microporosity from valve different from Food and Drug Administration requirements imposed in premarket approval order, which did not impose specific requirements concerning microporosity]; *Jessen v. Mentor Corp.* (2008) 158 C.A.4th 1480, 1492, 71 C.R.3d 714 [Medical Device Amendments preempted patient's state law claim based on failure of manufacturer of testicular prosthesis to include in outer packaging warning that prosthesis subject to the Amendments had to be filled with saline solution prior to implantation; prosthesis complied with Food and Drug Administration labeling requirements imposed through premarket approval process, and manufacturer was not required to satisfy labeling requirement imposed more than 8 months after patient's surgery].



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f. Doctrine of Comparative Fault.

1. Former Law: Assumption of Risk.

6 *Witkin Sum. Cal. Law Torts* § 1541

[§ 1541] Former Law: Assumption of Risk.

Ordinary contributory negligence, such as negligent failure to discover a danger or defect, or to take precautions against the possibility of its existence, has not been treated as a defense in actions based on ultrahazardous activity. (See *supra*, §1417.) It has also been rejected as a defense in strict products liability actions. (See *Barth v. B. F. Goodrich Tire Co.* (1968) 265 C.A.2d 228, 243, 71 C.R. 306; *Ruiz v. Minnesota Mining & Mfg. Co.* (1971) 15 C.A.3d 462, 470, 93 C.R. 270; *Rest.3d, Torts: Products Liability* §17, Comment a; 4 Harper, James & Gray 2d §22.7; 63A *Am.Jur.2d* (1997 ed.), *Products Liability* §1350 et seq.; 18 *Hastings L. J.* 48; 38 *So. Cal. L. Rev.* 53; 13 *A.L.R.3d* 1057, 1100 [products liability: strict liability in Torts]; 46 *A.L.R.3d* 240 [contributory negligence or assumption of risk as defense under doctrine of strict liability]; 75 *A.L.R.4th* 538 [contributory negligence or assumption of risk as defense in case involving failure to provide safety device].)

A different rule was applied where the plaintiff voluntarily and unreasonably subjected himself or herself to a known danger, e.g., by continuing to operate or use a product after discovery of its defective condition. This kind of contributory fault, sometimes called assumption of risk (see *supra*, §1336), was a defense even to strict liability. (See *Luque v. McLean* (1972) 8 C.3d 136, 145, 104 C.R. 443, 501 P.2d 1163, *supra*, §1465; *Romig v. Goodyear Tire & Rubber Co.* (1969) 271 C.A.2d 420, 422, 76 C.R. 479, citing the text; *Carmichael v. Reitz* (1971) 17 C.A.3d 958, 991, 95 C.R. 381; *Baker v. Chrysler Corp.* (1976) 55 C.A.3d 710, 718, 127 C.R. 745 [pedestrian attempted to cross street directly in front of approaching automobile]; *Rest.3d, Torts: Products Liability* §17, Comment a; 63A *Am.Jur.2d* (1997 ed.), *Products Liability* §1350 et seq.; 95 *Harv. L. Rev.* 872 [Assumption of Risk and Strict Products Liability]; 18 *Hastings L. J.* 49.)

It was necessary to show that the plaintiff had knowledge of the particular risk. In *Smith v. DHY-Dynamic Co.* (1973) 31 C.A.3d 852, 107 C.R. 907, plaintiff laborer, working on a ditch-digging project, was injured when an earth-moving machine operated by another employee fell into the ditch. In this action against the manufacturer of the machine, the trial judge gave a brief instruction on assumption of risk. *Held*, reversible error, for the evidence did not show that plaintiff had knowledge of the particular risk, appreciated the magnitude of it, and voluntarily assumed it (see *supra*, §§1237, 1238). The evidence showed that the machine had an inadequate braking system on the rear axle only, and plaintiff, though working in the ditch within the proximity of the machine, did not assume the risk of this

mechanical defect unknown to him.

Li v. Yellow Cab Co. (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, supra, §1329, adopting the doctrine of comparative negligence, abolished the defenses of contributory negligence and the kind of assumption of risk that is actually a variant of contributory negligence. The *Li* case, however, dealt with negligence, and in a strict liability case, there is no negligence to compare. Although the dissenters in *Horn v. General Motors Corp.* (1976) 17 C.3d 359, 131 C.R. 78, 551 P.2d 398, urged an extension of the *Li* holding to include "comparative fault" in strict liability cases, the majority expressed no opinion on the point. But in *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 144 C.R. 380, 575 P.2d 1162, infra, §1542, the doctrine of comparative fault was adopted.

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SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §22.7.



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C. Strict Products Liability.
 6. Defenses.
 f. Doctrine of Comparative Fault.
 2. Adoption of Doctrine.

6 *Witkin Sum. Cal. Law Torts* § 1542

[§ 1542] Adoption of Doctrine.

In *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 144 C.R. 380, 575 P.2d 1162, decedent, driving an Opel on a freeway at high speed, struck a divider fence. The impact caused the car to spin, the driver's door was thrown open, and decedent was forcibly ejected, sustaining fatal injuries. It was undisputed that had he remained in the car his injuries would probably have been minor. In this wrongful death action against the manufacturer and others in the distribution chain, the sole theory of the complaint was strict liability for damages allegedly caused by an improperly designed door latch activated by the impact. "Thus, the case involves a so-called 'second collision' in which the 'defect' did not contribute to the original impact, but only to the 'enhancement' of the injury." (20 C.3d 730.) The expert witnesses were conflicting on whether the impact would have caused the door to open even if the car had been equipped with latches of the alternative designs suggested by plaintiffs.

Over objections, defendants introduced evidence that the car had a safety belt and door lock, that the owner's manual warned that belts should be worn and doors locked when the car was in motion, and that decedent did not use the belt or the lock; also that decedent was intoxicated at the time of the collision (this for the limited purpose of determining whether he had used the safety equipment). Thus, defendants contended that the decedent's own conduct contributed to his death, and this raised the principal issue, whether comparative negligence principles applied. The verdict was for defendants and plaintiffs appealed. *Held*, reversed.

(a) *Development of law of strict liability.* Tort law evolved from a legal obligation initially imposed without "fault" to recovery that generally was based on blameworthiness. Liability without fault continued in a restricted area (e.g., keepers of wild animals, those who handled dangerous substances, or those who engaged in ultrahazardous activities). Simultaneously, persons injured in the use of personal property were allowed to recover on a contract theory if they were buyers or in privity. Subsequently, liability was imposed in negligence on the manufacturer, and protection of the consumer was extended beyond negligence to express or implied warranty. But warranty liability was limited by the requirement of notice of breach and the defense of adequate disclaimer. And general dissatisfaction with the conceptual limitations of traditional tort and contract doctrines led to strict liability in tort. (20 C.3d 732.) This was never *absolute* liability; the manufacturer does not become an insurer of the safety of the product's user. The plaintiff's injury must have been caused by a "defect" in the product; and the plaintiff's negligence is a defense when it is either assumption of

risk or an unforeseeable product use. (20 C.3d 733.)

(b) *First argument against applying comparative negligence principles: conceptual and semantic difficulties.* Some authorities take the position that the two concepts cannot be merged because contributory negligence was only a defense to negligence, and strict liability is not founded on negligence or fault. This argument is unconvincing. (1) It is based on a precise definitional treatment of legal concepts that have developed much overlapping; e.g., contributory negligence and assumption of risk. (20 C.3d 735.) As Prosser points out, the term "contributory negligence" may be a misnomer, for negligence requires a duty to another, and the plaintiff guilty of contributory negligence is not violating a duty; "contributory fault" would be more descriptive. (20 C.3d 735.) Hence, the problem calls for avoidance of linguistic labels incapable of exact definition, and adoption of a flexible judicial posture; thus, in the present situation, "equitable apportionment or allocation of loss" may be more descriptive than "comparative fault." (20 C.3d 736.) "If a more just result follows from the expansion of comparative principles, we have no hesitancy in seeking it, mindful always that the fundamental and underlying purpose of *Li* was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault." (20 C.3d 737; on *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, see supra, §1329.)

(c) *Second argument: that manufacturer's incentive to produce safe products will be reduced.* There is little substance in this argument. (1) The liability is only lessened, not avoided, by the plaintiff's contributing conduct. (2) The manufacturer cannot assume that the user will be blameworthy. (3) The currently recognized defense of assumption of risk is a complete defense, inverting the incentives; i.e., a manufacturer might argue that his or her product was so defective that the user had to be aware of its patent defects. (20 C.3d 737, 738.) One important result of applying comparative principles to strict products liability is the elimination of the bizarre anomaly: In negligence actions, contributory negligence only diminishes recovery; in strict liability actions assumption of risk or product misuse completely bars recovery. Application of comparative principles to strict liability actions treats these defenses in the same manner as in negligence actions; i.e., the defense, if established, will reduce but not bar the plaintiff's claim. (20 C.3d 738.)

(d) *Third argument: that jurors cannot compare plaintiff's negligence with defendant's strict liability.* Experience of federal courts with the maritime doctrine of "unseaworthiness"--a form of strict liability--refutes this argument; no serious practical difficulties in jury trials have appeared. (20 C.3d 738, 739.)

(e) *Fourth argument: that merger of the two principles will adversely affect liability of such intermediate entities as retailers and bailors.* This is untenable. "Regardless of the identity of a particular defendant or of his position in the commercial chain the basis for his liability remains that he has marketed or distributed a defective product." And jurors capable of assessing the legal responsibility of a manufacturer can do likewise with subsequent distributors. (20 C.3d 739.)

(f) *Authorities supporting extension of comparative principles to strict products liability.* The majority of the states that have comparative negligence statutes, and the two states that, like California, adopted the doctrine judicially, apply the doctrine to strict liability actions. (20 C.3d 739, 740.) The majority of commentators urge its adoption. (20 C.3d 740, citing a long list.) The proposed Uniform Comparative Fault Act does likewise. It is revealing in its clear application of comparative principles to strict tort liability, and in its use of the broad generic term "fault" as including both negligence and strict liability. (20 C.3d 741, 742.)

(g) *Conclusion: the rule adopted.* "[W]e conclude that a system of comparative fault should be and it is hereby extended to actions founded on strict products liability. In such cases the separate defense of 'assumption of risk,' to the extent that it is a form of contributory negligence, is abolished. While, as we have suggested, on the particular facts before us, the term 'equitable apportionment of loss' is more accurately descriptive of the process, nonetheless, the term 'comparative fault' has gained such wide acceptance by courts and in the literature that we adopt its use." (20 C.3d 742.)

(h) *Policy reasons for adoption of rule.* The same considerations of policy that led to the *Li* decision call for

extension of similar principles to the strict products liability area. "We reiterate that our reason for extending a full system of comparative fault to strict products liability is because it is fair to do so. The law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation. We are convinced that in merging the two principles what may be lost in symmetry is more than gained in fundamental fairness." (20 C.3d 742.)

(i) *Suggested implementation of rule.* As in *Li*, practice problems are to be resolved at the trial level by exercise of broad discretion of the trial judge. But *F.R. Civ. P., Rule 49(a)*, giving a form of special verdict for maritime cases involving the doctrine of unseaworthiness, is illustrative of one technique that may be used: (1) The jury is first required to answer "yes" or "no" to questions on possible bases for a finding of unseaworthiness as a proximate cause of the plaintiff's injuries. (2) If the jury so finds, it moves to a second group of similar questions on whether and in what particulars the plaintiff's own negligence was a contributing factor. (3) If the answers so find, the jury states the percentage of contribution. (4) The jury then finds the amount of the plaintiff's damages without reference to his or her own negligence. (5) The judge then reduces the damage award by the percentage figure. (20 C.3d 743.)

(j) *Limited retroactivity of decision.* (1) Although it is arguable that retroactivity should extend to the finality of *Li*, this would be manifestly unfair, particularly because *Horn v. General Motors Corp.* (1976) 17 C.3d 359, 131 C.R. 78, 551 P.2d 398, supra, §1541, decided after *Li*, retained the separate system of defenses applicable to strict products liability. (20 C.3d 744.) (2) The new rule applies to all cases in which trial was not begun before the date of finality of this opinion, and to all cases in which the judgment is reversed on appeal for other reasons and retrial is commenced before the date of finality. (20 C.3d 743, 744.) (3) The new rule cannot be applied retroactively to the instant appeal to justify admission of the intoxication and "nonuse" evidence, for the issue was not raised in the trial court and no jury instructions on the issue were given. But, in the event of retrial, the principles will of course apply. (20 C.3d 744.)

(k) *Reversible error in admission of evidence of intoxication and nonuse of safety devices.* (1) The trial judge admitted the evidence on the theory that it was relevant to the defense of product misuse. But *Horn* points out that to accept a "nonuse" of safety equipment as a complete defense (as assumption of risk or product misuse) to a products liability action would subvert the rule that contributory negligence does not prevent recovery. (20 C.3d 745.) (2) The issues of intoxication and nonuse were emphasized in the trial, and the jury could well have concluded that decedent's failure, induced by intoxication, to use the belts and locks, was negligent conduct that completely barred recovery. (20 C.3d 745.) Thus, under the probability test of reversible error, reversal is required. (20 C.3d 746.)

Three justices dissented. (See 4 Harper, James & Gray 2d §22.7; 67 Cal. L. Rev. 936; 99 Harv. L. Rev. 809 [plaintiff's conduct as defense in cigarette products liability action]; 9 Pacific L. J. 775; 6 Pepperdine L. Rev. 485; 19 Santa Clara L. Rev. 355; 9 A.L.R.4th 633 [applicability of comparative negligence doctrine to actions based on strict liability]; 69 A.L.R.5th 625 [driver's comparative negligence as defense to enhanced injury, crashworthiness, or second collision claim]; BAJI, No. 9.03 [comparative fault in combined negligence and products liability case]; BAJI, No. 9.04 [reduction of damages because of comparative fault]; No. 16.10 [special verdict form; comparative fault]; BAJI, No. 16.11 [special verdict form; comparative fault in combined products liability and negligence case]; BAJI, No. 16.12 [special verdict form; comparative fault and comparative implied indemnity between defendants]; CACI, Nos. 1207, VF-1200.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §22.7.



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6 *Witkin Sum. Cal. Law Torts* § 1543

[§ 1543] Restatement Rule.

Recovery of damages for harm caused by a product defect "may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care." The manner and extent of the reduction and the apportionment of plaintiff's recovery among multiple defendants are "governed by generally applicable rules apportioning responsibility." (*Rest.3d, Torts: Products Liability* §17.)

Daly v. General Motors Corp. (1978) 20 C.3d 725, 144 C.R. 380, 575 P.2d 1162, *supra*, §1542, is among the authorities cited for the proposition that a majority of courts utilize comparative fault to reduce the recoveries of products liability plaintiffs. (See *Rest.3d, Torts: Products Liability* §17, Reporter's Note.)

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g. Contractual Exculpation.

6 Witkin Sum. Cal. Law Torts § 1544

[§ 1544] Contractual Exculpation.

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, whether oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons. (*Rest.3d, Torts: Products Liability* §18.)

This rule applies to cases in which commercial product sellers attempt unfairly to disclaim or otherwise limit their liability "to the majority of users and consumers who are presumed to lack information and bargaining power adequate to protect their interests." It "does not address whether consumers, especially when represented by informed and economically powerful consumer groups or intermediaries, with full information and sufficient bargaining power, may contract with product sellers to accept curtailment of liability in exchange for concomitant benefits, or whether such consumers might be allowed to agree to substitute alternative dispute resolution mechanisms in place of traditional adjudication." (*Rest.3d, Torts: Products Liability* §18, Comment d.) The rule is limited to new products; the effectiveness of disclaimers in connection with the commercial sale of used products "has considerable judicial support." (*Rest.3d, Torts: Products Liability* §18, Reporter's Note [citing, among other authorities, *LaRosa v. Superior Court* (1981) 122 C.A.3d 741, 746, 176 C.R. 224, supra, §1496, and *Wilkinson v. Hicks* (1981) 126 C.A.3d 515, 519, 179 C.R. 5, supra, §1496].)

Rest.3d, Torts: Apportionment of Liability §2 (see supra, §1293) authorizes contractual limitations on liability in tort actions, but only when permitted by "substantive law governing the claim." Such substantive law rules include the invalidation of disclaimers for personal injury in products liability cases under *Rest.3d, Torts: Products Liability* §18. (*Rest.3d, Torts: Apportionment of Liability* §2, Comment h; see 37 *San Diego L. Rev.* 293 [products liability waivers].)

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A. Nominal Damages.
1. Right to Nominal Damages.

6 *Witkin Sum. Cal. Law Torts* § 1545

[§ 1545] Right to Nominal Damages.

Although the principal object of damages is compensation for injury suffered (see *infra*, §1548), in some situations nominal damages, a trivial sum, may be recovered where a cause of action is proved but no substantial damage is shown. (See C.C. 3360; *Scofield v. Critical Air Medicine* (1996) 45 C.A.4th 990, 1007, 52 C.R.2d 915, *supra*, §428; *Rest.2d, Torts* §907; 22 *Am.Jur.2d* (2003 ed.), *Damages* §8 et seq.; 4 Harper, James & Gray 2d §25.1; 61 *Harv. L. Rev.* 118.) The advantages of a nominal damages award, other than psychological, are two: (a) The plaintiff is entitled to costs (see 7 *Cal. Proc.* (4th), *Judgment*, §89); (b) the plaintiff may be entitled to punitive damages (see *infra*, §1610).

It is a fundamental principle that a negligent act does not give rise to liability without damage; hence, where no actual injury has occurred, nominal damages are not recoverable. (*Fields v. Napa Milling Co.* (1958) 164 C.A.2d 442, 448, 330 P.2d 459.) Moreover, the failure to award nominal damages is not a ground for new trial or reversal unless the judgment for the plaintiff would have been of some benefit to him or her, as where it would protect a property right, or vindicate the plaintiff's reputation. (See *Gray v. Southern Pac. Co.* (1937) 21 C.A.2d 240, 247, 68 P.2d 1011 [assuming that plaintiff had right to recover certain bodily organs of deceased after lawful autopsy, this would not benefit her, and failure to award nominal damages was not reversible error]; *Staples v. Hoefke* (1987) 189 C.A.3d 1397, 1406, 235 C.R. 165.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §25.1. *Entitlement to costs:*

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §88.



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2. Where Award Is Proper.

6 *Witkin Sum. Cal. Law Torts* § 1546

[§ 1546] Where Award Is Proper.

Nominal damages are usually awarded where there is an invasion of a legally protected interest that does not result in actual damage. The invasion is "injury without damage," and an award of damages is not the object of the action, which is brought to vindicate the right or interest. The interest is recognized and protected by the award of nominal damages, together with costs. (C.C. 3360; *Siminoff v. James H. Goodman & Co. Bank* (1912) 18 C.A. 5, 15, 121 P. 939; see 22 *Am.Jur.2d* (2003 ed.), *Damages* §18 et seq.) (See *Carey v. Phipus* (1978) 435 U.S. 247, 98 S.Ct. 1042, 1053, 55 L.Ed.2d 252, 267 [suspension of students without procedural due process]; *Davidson v. Devine* (1886) 70 C. 519, 520, 11 P. 664 [nominal damages award will not be set aside for uncertainty]; *Maher v. Wilson* (1903) 139 C. 514, 520, 73 P. 418 [false imprisonment; plaintiff wrongfully detained, but compensated for time worked and loss of employment]; *Salo v. Smith* (1914) 25 C.A. 295, 302, 143 P. 322 [false imprisonment; keeping arrestee in jail without filing formal charge]; *Lady v. Palen* (1936) 12 C.A.2d 1, 54 P.2d 1133 [libel]; *Costerisan v. Melendy* (1967) 255 C.A.2d 57, 60, 62 C.R. 800 [trespass]; *Capell Associates v. Central Valley Sec. Co.* (1968) 260 C.A.2d 773, 780, 67 C.R. 463 [escrow holder failed to carry out directions for subordination agreement, but no showing of causal connection between omission and injury]; *Allen v. McMillion* (1978) 82 C.A.3d 211, 219, 147 C.R. 77 [possessor's action for trespass to land by forcible entry]; *Rest.2d, Torts* §§163, 907, Comment b, 620 [defamation]; 69 *A.L.R.2d* 628 [wrongful death action].)

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3. Amount Must Be Trivial.

6 *Witkin Sum. Cal. Law Torts* § 1547

[§ 1547] Amount Must Be Trivial.

Nominal damages must be distinguished from *compensatory damages in small amounts*. A plaintiff who suffers actual loss amounting to \$ 10 or \$ 100 recovers these amounts as compensatory damages. But where only nominal damages are awarded, the amount must be *trivial*, e.g., 1 cent or \$ 1; it is error to give such a sum as \$ 100 for nominal damages. (*Maher v. Wilson* (1903) 139 C. 514, 520, 73 P. 418; *Broads v. Mead & Cook* (1911) 159 C. 765, 769, 116 P. 46; *Price v. McComish* (1937) 22 C.A.2d 92, 100, 70 P.2d 978; see 22 *Am.Jur.2d* (2003 ed.), *Damages* §10 et seq.; 61 *Harv. L. Rev.* 119.)

This distinction is occasionally blurred: "The term 'nominal damages' describes two types of award--a trifling or token allowance for mere technical invasion of a right, without actual damage; and the very different allowance made when actual damages are substantial, but their extent and amount are difficult of precise proof." (*Kluge v. O'Gara* (1964) 227 C.A.2d 207, 209, 38 C.R. 607, *infra*, §1607.)

Nevertheless, a substantial award cannot be made where no substantial damages are suffered. In *Avina v. Spurlock* (1972) 28 C.A.3d 1086, 105 C.R. 198, the trial judge found that defendant landlords had been guilty of wrongful eviction of plaintiff tenants and unlawful detention of their personal property; but he further found that no evidence of monetary damages had been offered, and that "nominal damages should be awarded ... in the sum of \$ 501.00." *Held*, judgment modified to substitute an award of \$ 1. An unbroken line of cases limits such an award to a few cents or a dollar. An award of damages must rest upon substantial legal evidence. "[T]o permit the award of significant damages in the absence of such evidence would authorize capricious damage awards and the proliferation of litigation for small, technical legal wrongs where no actual damages are suffered." (28 C.A.3d 1089.)

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B. Compensatory Damages.
1. In General.
a. Theory and Distinctions.

6 *Witkin Sum. Cal. Law Torts* § 1548

[§ 1548] Theory and Distinctions.

In tort actions, damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring the plaintiff as nearly as possible to his or her former position, or giving some pecuniary equivalent. (See C.C. 3333, *infra*, §1553; *Rest.2d, Torts* §§901, 902, 903, 905, 906, 911; Dobbs, *The Law of Torts* §377 et seq.; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§24, 25, 29, 119 et seq.; Cal. Civil Practice, 2 Procedure, Demands for Relief, §8:7 et seq.; Cal. Civil Practice, 1 Torts, Compensatory Damages, Chap. 5; 54 *Cal. L. Rev.* 1559; 19 *Hastings L. J.* 1071; 40 *San Diego L. Rev.* 1091 [symposium on theory of compensatory damages]; BAJI, Nos. 14.00, 14.01, 14.02; CACI, Nos. 3900, 3901.)

This differs from the rule applicable to actions for breach of contract, under which the plaintiff is usually entitled to be compensated for the benefits he or she would have received from full performance. (*Rest.2d, Contracts* §347, Comment a; see 1 *Summary* (10th), *Contracts*, §§869, 879.) It also differs from the rule governing quasi-contractual recovery, under which the benefit to the defendant rather than the detriment to the plaintiff is the governing consideration. (*Rest., Restitution* §150 et seq.; see *Abramowitz v. Bank of America* (1955) 131 *C.A.2d Supp.* 892, 896, 281 *P.2d* 380; 1 *Summary* (10th), *Contracts*, §§1013, 1018.)

In *Dandoy v. Oswald Bros. Paving Co.* (1931) 113 *C.A.* 570, 298 *P.* 1030, defendant wrongfully dumped excavated earth on plaintiff's farm land during the latter's absence, and the trial judge found on sufficient evidence that the value of the land had not been impaired. The court held that this was more than mere technical trespass justifying only nominal damages, and that compensatory damages, in the amount of the cost of removal of the material, should be allowed. To hold otherwise "would be to decide that by the wrongful act of another, an owner of land may be compelled to accept a change in the physical condition of his property, or else perform the work of restoration at his own expense." (113 *C.A.* 572.)

On the other hand, the plaintiff is not entitled to be placed in a better position than he or she would have been in had the wrong not been done. In *Valdez v. Taylor Auto. Co.* (1954) 129 *C.A.2d* 810, 278 *P.2d* 91, defendant's agent represented that plaintiff would have full insurance coverage for the car he bought (the then minimum \$ 5,000 and \$ 10,000 personal injury and \$ 5,000 property damage). The judgment by a person injured in the collision was \$ 18,465, and the jury awarded this to plaintiff against defendant. *Held*, the actual detriment suffered was merely what the policy

(loss or damage coverage only) would have been worth if as represented--merely the stated minimums. The judgment was accordingly reduced to \$ 8,465. (129 C.A.2d 822.)

Damages cannot be awarded for a loss occurring as a result of *violation of the law*. (Page v. Bakersfield Uniform & Towel Supply Co. (1966) 239 C.A.2d 762, 773, 49 C.R. 46.)

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SUPPLEMENT: [This section is current through the latest supplement]

See 38 *Loyola L.A. L. Rev.* 1435 [Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss].



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1. In General.
b. General and Special Damages.

6 *Witkin Sum. Cal. Law Torts* § 1549

[§ 1549] General and Special Damages.

The distinction between general and special damages forms the basis of an important principle of pleading, i.e., the defendant is entitled to notice of what damages are to be claimed at the trial, and should be given this notice in the complaint. General damages are those that necessarily or usually result from particular wrongful acts, and the mere statement of the cause of action for the injury sufficiently implies that these damages resulted. Special damages are those that are not considered to be so necessary or usual a result, and specific notice is required when they are claimed. Hence, the rule is that general damages need not be alleged in the complaint, but special damages must be alleged in order to be proved. (See *Rest.2d, Torts* §904; 5 *Cal. Proc.* (4th), *Pleading*, §887 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]
Special damages must be alleged:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §933 et seq.



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CHAPTER IX - Torts

Witkin Summary of California Law
XVII. DAMAGES: IN GENERAL
B. Compensatory Damages.
1. In General.
c. No Double Recovery.

6 *Witkin Sum. Cal. Law Torts* § 1550

[§ 1550] No Double Recovery.

The general theory of compensatory damages bars double recovery for the same wrong. The principal situation is where joint or concurrent tortfeasors are jointly and severally liable for the same wrong. Only one complete satisfaction is permissible, and if partial satisfaction is received from one, the liability of others will be correspondingly reduced. (See *Ash v. Mortensen* (1944) 24 C.2d 654, 658, 660, 150 P.2d 876; *Laurenzi v. Vranizan* (1945) 25 C.2d 806, 813, 155 P.2d 633; *Spaulding v. Cameron* (1952) 38 C.2d 265, 269, 239 P.2d 625, *infra*, §1737; *Dodds v. Bucknum* (1963) 214 C.A.2d 206, 212, 29 C.R. 393, *infra*, §1629; *Krusi v. Bear, Stearns & Co.* (1983) 144 C.A.3d 664, 673, 192 C.R. 793; *Piedra v. Dugan* (2004) 123 C.A.4th 1483, 1492, 21 C.R.3d 36; 65 *Harv. L. Rev.* 1456; BAJI, No. 14.64; CACI, No. 3926.)

In an action for damages for negligent injury to property, (1) if the cost of restoration of the property to its original condition amounts to less than the diminution in value, the cost is the proper measure; (2) if the cost of restoration exceeds the diminution in value, diminution is the proper measure; and (3) it is reversible error to allow both. (*Mozzetti v. Brisbane* (1977) 67 C.A.3d 565, 576, 136 C.R. 751; see *infra*, §1727.)

However, an award of both compensatory and punitive damages for intentional infliction of emotional distress is not subject to challenge as double recovery. In *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 C.A.3d 5, 130 C.R. 416, *supra*, §459, the court pointed out that C.C. 3294 (*infra*, §1559) controls: "Compensatory damages and punitive damages are two different things with two different purposes. Compensatory damages are awarded to compensate an injured party for his injury; punitive damages are awarded to punish a wrongdoer and make an example of him. When both compensatory and punitive damages are awarded, there is no double punishment. There may be double recovery, but, unless and until the Legislature sees fit to alter *Civil Code section 3294*, it is a permissible double recovery." (59 C.A.3d 20.)

SUPPLEMENT: [This section is current through the latest supplement]



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XVII. DAMAGES: IN GENERAL
B. Compensatory Damages.
1. In General.
d. Certainty.

6 *Witkin Sum. Cal. Law Torts* § 1551

[§ 1551] Certainty.

The requirement that damages be "certain" and not "speculative" or "conjectural" is more important in contract than in tort actions, but it does apply to the latter as well. (See *Engle v. Oroville* (1965) 238 C.A.2d 266, 273, 47 C.R. 630 [no recovery for speculative lost profits based on "the fond dreams of the adventurer"]; *Kuffel v. Seaside Oil Co.* (1970) 11 C.A.3d 354, 366, 90 C.R. 209 [same]; *Piscitelli v. Friedenberg* (2001) 87 C.A.4th 953, 988, 105 C.R.2d 88, *infra*, §1555 [claim for lost future commissions on money management accounts was both speculative and nonspeculative as matter of law, depending on which assumption was relied on]; *Scognamillo v. Herrick* (2003) 106 C.A.4th 1139, 1150, 131 C.R.2d 393 [damages for second back surgery were too speculative, where evidence indicated that this surgery might never occur]; *Rest.2d, Torts* §912; 22 *Am.Jur.2d* (2003 ed.), *Damages* §328 et seq.; 61 *Harv. L. Rev.* 121; 7 *Stanf. L. Rev.* 110; BAJI, No. 14.60; CACI, No. 3900.)

However, though the *fact* of damage must be clearly established, the *amount* need not be proved with the same degree of certainty, but may be left to reasonable approximation or inference. Any other rule would mean that sometimes a plaintiff who had suffered substantial damage would be wholly denied recovery because the particular items could not, for some reason, be precisely determined. (See *Fishbaugh v. Fishbaugh* (1940) 15 C.2d 445, 453, 101 P.2d 1084; *Hanlon Drydock & Shipbuilding Co. v. Southern Pac. Co.* (1928) 92 C.A. 230, 235, 268 P. 385; *Katenkamp v. Union Realty Co.* (1940) 36 C.A.2d 602, 618, 98 P.2d 239; *Elsbach v. Mulligan* (1943) 58 C.A.2d 354, 366, 136 P.2d 651; *Hutcherson v. Alexander* (1968) 264 C.A.2d 126, 135, 70 C.R. 366; *Rest.2d, Torts* §912, Comment a; 22 *Am.Jur.2d* (2003 ed.), *Damages* §332 et seq.; 27 *Cal. L. Rev.* 350.)

In *Clemente v. California* (1985) 40 C.3d 202, 219 C.R. 445, 707 P.2d 818, an action against the state and a highway patrol officer for negligently investigating an accident in which plaintiff was struck by a motorcycle (see *supra*, §290), defendants sought an instruction that plaintiff must show that, but for the negligence of the officer, the lawsuit would have resulted in a collectible judgment in plaintiff's favor. *Held*, the requested instruction was properly denied.

(a) *Rest.2d, Torts* §912 states that the injured party must establish the extent of the harm and the amount representing adequate compensation "with as much certainty as the nature of the tort and the circumstances permit." And Comment a adds: "There is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm

should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered." (40 C.3d 219.)

(b) *Campbell v. Magana* (1960) 184 C.A.2d 751, 8 C.R. 32, 1 Cal. Proc. (4th), Attorneys, §334, relied on by defendants, is distinguishable. In that legal malpractice action, the court did say that plaintiff must prove that careful management of the lawsuit would have resulted in a favorable judgment and its collection. But in the malpractice action, identity of the tortfeasors is known and their financial resources are ascertainable; hence, there is no unfairness in limiting plaintiff's recovery to what he would have obtained in the absence of the attorney's negligence. Here, the situation is different: Nothing is known about the motorcyclist who struck plaintiff, e.g., whether he was employed by a business with a great deal of insurance, whether he was penniless, or whether he had average insurance and many assets. "Obviously, plaintiff's inability to prove whether a judgment against the motorcyclist would be collectible is due to defendant's negligence." (40 C.3d 220.)

In *Thrifty-Tel v. Bezenek* (1996) 46 C.A.4th 1559, 54 C.R.2d 468, supra, §720, an action against the parents of teenage boys who employed computer technology to crack plaintiff phone company's system and make long-distance phone calls without paying, the trial court erred in awarding damages based on plaintiff's unauthorized-use tariff, instead of requiring plaintiff to prove actual damages. Although the Public Utilities Commission is constitutionally authorized under Cal. Const., Art. XII, §§4, 6, to establish the rates that utilities may charge for their services, it is debatable whether the Commission may liquidate a utility's tort damages against third parties. Indeed, in an amicus brief, the Commission indicated that there was no intention that the tariff apply to tort claims against third parties. Whether plaintiff's tariff is a valid liquidated damages provision for a breach of contract claim is not before the court. Moreover, the trial court ruled against plaintiff in its quasi-contract cause of action, and plaintiff did not pursue a protective appeal. (46 C.A.4th 1569.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Service Employees Int. Union, Local 250 v. Colcord* (2008) 160 C.A.4th 362, 372, 72 C.R.3d 763 [determination that employer labor union could have avoided costs of decertification election instigated by former employees were it not for employees' tortious conduct was speculative; decertification could have been successful regardless of whether employees had properly resigned prior to decertification efforts]. *Campbell case:*

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §313.



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XVII. DAMAGES: IN GENERAL

B. Compensatory Damages.

1. In General.

e. Prospective Damages.

6 Witkin Sum. Cal. Law Torts § 1552

[§ 1552] Prospective Damages.

The plaintiff can establish liability only on a cause of action that accrued before the filing of the complaint. But once that liability is established, recovery may be had not only for loss already suffered, but also for (1) loss suffered after commencement of the action and before trial, and (2) loss reasonably certain to occur in the future. This is known as *prospective damage*. (See C.C. 3283; *Melone v. Sierra Ry. Co. of Calif.* (1907) 151 C. 113, 117, 91 P. 522; *Zerbo v. Electrical Products Corp.* (1931) 212 C. 733, 736, 300 P. 825 [instruction referring to damages plaintiff "will suffer" was sufficient; statutory language "certain to result" was not required]; *Ryan v. Oakland Gas, Light & Heat Co.* (1913) 21 C.A. 14, 23, 130 P. 693 [instructions referring to pain "to be necessarily suffered" was proper]; *Neumann v. Bishop* (1976) 59 C.A.3d 451, 462, 130 C.R. 786, citing the text; *Sommer v. Gabor* (1995) 40 C.A.4th 1455, 1472, 48 C.R.2d 235 [instructions that essentially limited recovery to damages that necessarily result from publication of defamatory matter was sufficient to comply with C.C. 3283 despite failure to give BAJI, No. 14.60]; *Camenisch v. Superior Court* (1996) 44 C.A.4th 1689, 1698, 52 C.R.2d 450 [trial judge is not required to strike damages that, at time of motion to strike, are too speculative for recovery but may become recoverable if tax liability matures before trial]; *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 C.A.4th 502, 532, 53 C.R.2d 887 [gas company's future costs in remediating contamination caused by PCBs, although not fixed, were, based on past experience, certain enough to be recoverable damages]; *Rest.2d, Torts §910*; 22 *Am.Jur.2d* (2003 ed.), *Damages §481* et seq.; BAJI, No. 14.60; CACI, No. 3900; cf. *Richman v. San Francisco, Napa & Calistoga Ry.* (1919) 180 C. 454, 458, 181 P. 769 [use of words "reasonably probable" was error]; *S. C. Anderson v. Bank of America* (1994) 24 C.A.4th 529, 536, 537, 30 C.R.2d 286 [motion for nonsuit was properly granted as to contractor's claim for lost prospective profits caused by reduction in bonding capacity; even if plaintiff had been awarded project, it offered no evidence enabling jury to conclude that it was reasonably probable that profit would have been earned]; *Westside Center Associates v. Safeway Stores* 23 (1996) 42 C.A.4th 507, 529, 49 C.R.2d 793 [evidence was insufficient to establish either fact or amount of damages]; *Kids' Universe v. In2Labs* (2002) 95 C.A.4th 870, 882, 116 C.R.2d 158 [profits allegedly lost as result of defendant's negligence in preventing plaintiffs from opening on-line toy business were not recoverable; plaintiffs failed to raise factual question whether business would have realized net profits].)

The most frequent illustrations of prospective damage are future disability or suffering in personal injury actions (see *Oliveira v. Warren* (1938) 24 C.A.2d 712, 76 P.2d 113; *infra*, §1667) and future damage resulting from a

continuing trespass or nuisance (see *infra*, §1737).

The requirement of certainty (*supra*, §1551) cannot be strictly applied where prospective damages are sought, because probabilities are really the basis for the award. (See *Bauman v. San Francisco* (1940) 42 C.A.2d 144, 163, 108 P.2d 989; *Ostertag v. Bethlehem Shipbuilding Corp.* (1944) 65 C.A.2d 795, 806, 151 P.2d 647.) But where the uncertainty is too great, recovery will be denied. (See *Bellman v. San Francisco High School Dist.* (1938) 11 C.2d 576, 588, 81 P.2d 894; *Silvester v. Scanlan* (1933) 136 C.A. 107, 111, 28 P.2d 97.)

An award for future pecuniary loss must be for the present cash value of the loss, i.e., the amount that, if invested at the highest reasonably secure rate of return, will cover the award. (See *Wilson v. Gilbert* (1972) 25 C.A.3d 607, 613, 102 C.R. 31 [present cash value instruction was improper where there was neither evidence concerning such factors as compounding and discounting nor judicial notice of present cash value tables]; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§792, 793; 8 *Proof of Facts* 2d 1 [appropriate discount rate for determining present value].)

West's Key Number Digest, Damages k.25 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 C.A.4th 1161, 1179, 36 C.R.3d 663 [lost profits, rather than value of defendants' new business, was correct measure of compensatory damages in action by limited liability company against its former vice presidents based on allegations that defendants, while claiming to start new business, actually converted company assets and misled customers into thinking that new business was company under another name]; *Parlour Enterprises v. Kirin Group* (2007) 152 C.A.4th 281, 287, 61 C.R.3d 243 [subfranchisor's projections outlined in offering circular given to potential investors could not be used to calculate lost profits of subfranchisor, subfranchisee, and investor from loss of business opportunities after franchisor cancelled area development agreement for ice cream parlors; projections were based on subfranchisor's assumptions, not actual operations, and were not based on facts substantially similar to lost business opportunity]; *Garcia v. Duro Dyne Corp.* (2007) 156 C.A.4th 92, 97, 67 C.R.3d 100 [evidence that worker's mesothelioma was reasonably certain to recur supported verdict awarding future economic damages in products liability action involving asbestos to which worker was exposed, despite fact that worker was in remission at time of trial; although no expert could state precise future date of recurrence or precise amount of future damages, evidence was sufficient for approximation of future recurrence and future expenses]; *Green Wood Industrial Co. v. Forceman Int. Dev. Group* (2007) 156 C.A.4th 766, 776, 67 C.R.3d 601, quoting the text [buyer fraudulently induced to pay for scrap metal that never existed failed to prove to reasonable certainty that it would pay claim against it by foreign resale buyer for failure to deliver goods, and thus buyer could not recover amount of claim as damages; although there was evidence that buyer had agreed to pay third-party claim, it presented no evidence that such agreement would be enforceable in foreign country or that claim would otherwise be paid].



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XVII. DAMAGES: IN GENERAL

B. Compensatory Damages.

2. Causation.

a. Nature of Requirement.

6 *Witkin Sum. Cal. Law Torts* § 1553

[§ 1553] Nature of Requirement.

The necessary causal connection between the tortious conduct and the injury must be shown, and in general the rules of legal or proximate cause that determine liability also determine whether the defendant shall be liable for particular items of injury or loss. (See *Hawthorne v. Siegel* (1891) 88 C. 159, 163, 25 P. 1114; *Burkett v. Griffith* (1891) 90 C. 532, 542, 27 P. 527; *Finnegan v. Royal Realty Co.* (1950) 35 C.2d 409, 433, 218 P.2d 17; *Kenyon v. Hartford Acc. & Indem. Co.* (1927) 86 C.A. 269, 273, 260 P. 952; *Brewer v. Teano* (1995) 40 C.A.4th 1024, 1036, 47 C.R. 2d 348, supra, §1218, quoting the text; *Rest.2d, Torts* §917; 22 *Am.Jur.2d* (2003 ed.), *Damages* §300; 38 *Cal. L. Rev.* 383; 25 *A.L.R.3d* 1386 [injury or disability resulting from medical treatment for accident as proximately caused by original accident within coverage of accident or disability insurance]; *BAJI*, No. 14.00; *CACI*, No. 3900.)

C.C. 3333 states the rule as follows: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." This differs from the rule governing breach of contract, under which the damages are limited to those reasonably contemplated by the parties. (See *Hunt Bros. Co. v. San Lorenzo Water Co.* (1906) 150 C. 51, 56, 87 P. 1093; *Abramowitz v. Bank of America* (1955) 131 C.A.2d Supp. 892, 896, 281 P.2d 380; *Rest.2d, Torts* §917, Comment d; 1 *Summary* (10th), *Contracts*, §871.)

In *Gill v. Epstein* (1965) 62 C.2d 611, 44 C.R. 45, 401 P.2d 397, plaintiff school janitor was arrested on suspicion of theft of the school's cash box. He was given several lie-detector tests and interrogations, and was charged, arraigned, and jailed for about 8 days. At his preliminary hearing, the case was dismissed on motion of the district attorney. In this action for false arrest and false imprisonment and unreasonable delay in taking him before a magistrate, the judge found no probable cause, but instructed the jury that damages for emotional distress and physical suffering during imprisonment following the arraignment and commitment were not legally compensable because they were not proximately caused by the wrongful arrest. *Held*, this was error. The arrest was a cause in fact, and the imprisonment, both before and after the arraignment, was a foreseeable consequence. (62 C.2d 618.)

West's Key Number Digest, *Damages* k.17 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See *Bailey v. Outdoor Media Group* (2007) 155 C.A.4th 778, 789, 66 C.R.3d 322 [proceeds that trespassing billboard advertising company received from sale of billboards were not causally related to company's wrongful occupation of leasehold property so as to permit lessee to recover proceeds as "benefits obtained," even though billboards were located on leasehold; company obtained sale proceeds as result of misrepresentation that it had valid sublease, not by reason of wrongful occupation]; *Sumpter v. Matteson* (2008) 158 C.A.4th 928, 933, 70 C.R.3d 495 [substantial evidence supported jury award of \$ 13,317 rather than claimed medical bills of \$ 131,282 in economic damages to driver injured in collision; plaintiff had suffered previous and subsequent injuries to her back, knee, and shoulder, and medical testimony did not link her injuries to this collision].



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B. Compensatory Damages.

2. Causation.

b. Burden of Proof Where Causation Is Uncertain.

6 *Witkin Sum. Cal. Law Torts* § 1554

[§ 1554] Burden of Proof Where Causation Is Uncertain.

In *Bertero v. National General Corp.* (1974) 13 C.3d 43, 118 C.R. 184, 529 P.2d 608, supra, §491, plaintiff recovered damages for malicious prosecution of a civil action. The prior action was one brought by plaintiff for breach of contract, and the theory of the present action was that defendant's cross-complaint in the prior action was maliciously filed without probable cause. (See supra, §506 et seq.) Defendant contended that the allegations in the cross-complaint of lack of consideration and undue influence were the same as the affirmative defenses in the answer; and that, because the answer was absolutely privileged (see supra, §561 et seq.), no recovery could be proper, because it was impossible to separate the damages caused by the actionable cross-complaint from those suffered by reason of the nonactionable answer. *Held*, the argument was untenable.

(a) *Analogy of negligence cases involving several tortfeasors.* It has been held that the burden of absolving himself or herself from liability or showing that damages should be apportioned may be placed on the particular tortfeasor defendant who raises the issue. (See supra, §67.) "Similarly in the instant case the defendants must shoulder the burden of apportioning proven damages if, in fact, some of such damages is the result of an aggressive defense which could be asserted with immunity and some is the result of a cross-action maliciously prosecuted." (13 C.3d 60.)

(b) *Defense of action is not inhibited.* "Defendants contend that to so hold inhibits the ability of a party involuntarily haled into court as a defendant to present a vigorous defense. On the contrary, our holding does not strip a defendant of his right to his day in court. It is simply a recognition that as between two conflicting interests--a defendant's election to risk injury to a plaintiff by an aggressive defense and a plaintiff's right to be free from groundless and maliciously prosecuted cross-actions--plaintiff's interest is paramount. By electing to prosecute a malicious cross-action in conjunction with an aggressive defense which may itself cause injury to a plaintiff, the defendant must bear the burden of establishing the apportionment of the overall damages proved by the plaintiff. Here, defendants did not attempt to differentiate between those damages caused plaintiff by the filing and assertion of their answer and the filing and prosecution of the cross-complaint. [Plaintiff] established that damages had flowed from the filings and proceedings thereon and thus no apportionment need be made." (13 C.3d 60, footnote 8.)

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B. Compensatory Damages.

3. Compensatory Damages in Particular Circumstances.

a. Anticipated Punitive Damages in Malpractice Action.

6 *Witkin Sum. Cal. Law Torts* § 1555

[§ 1555] Anticipated Punitive Damages in Malpractice Action.

In *Merenda v. Superior Court* (1992) 3 C.A.4th 1, 4 C.R.2d 87, plaintiff sued defendant attorneys for legal malpractice. In a motion by defendants for summary adjudication, the following issue was presented: whether compensatory damages could be awarded in the amount of the punitive damages that plaintiff would have obtained but for the attorneys' negligence causing the discharge in bankruptcy of her claim against Brown, her former employer. The trial judge, ruling against plaintiff, granted defendants' motion. Held, mandamus issued, directing the trial judge to deny the motion.

(a) In legal malpractice actions, the measure of damages is the difference between the amount of the actual judgment obtained and the judgment that should have been recovered. (3 C.A.4th 12.) Applying this rule, plaintiff should be entitled to recover from defendants as compensatory damages the amount of punitive damages she proves she would have obtained in the underlying action. (3 C.A.4th 12.) Although this is a case of first impression in California, commentators and out-of-state cases support this view. (3 C.A.4th 13.)

(b) "The recovery as compensatory damages in the malpractice action of the amount of unrecovered punitive damages is no more speculative than would be the direct recovery of punitive damages in the underlying action against Brown. In the malpractice action plaintiff must still prove her 'case within the case,' i.e., her entitlement to punitive damages against Brown. That is, to recover punitive damages as compensatory damages from defendants herein, plaintiff must prove Brown's conduct was oppressive, fraudulent or malicious." (3 C.A.4th 12.)

*Piscitelli v. Friedenber*g (2001) 87 C.A.4th 953, 105 C.R.2d 88, disagreed with *Merenda*, and made the following points:

(a) In a legal malpractice action in which the attorney's alleged negligence lies in the attorney's failure to press a meritorious claim, the measure of compensatory damages is the value of the claim lost. Punitive damages, on the other hand, are not compensation for loss. In short, in the underlying action, an award of punitive damages has nothing to do with the "detriment" suffered by a legal malpractice plaintiff, as that word is used in C.C. 3282 (loss or harm of person or property). (87 C.A.4th 980.)

(b) As a matter of public policy, imposing an award intended to punish a wrongful actor upon a defendant who did not act oppressively, maliciously, or fraudulently cannot be justified simply by relabelling the award as "compensatory." This result would punish an innocent person for another's wrongdoing and thus would be inconsistent with the goal of punishment. (87 C.A.4th 981.)

(c) Plaintiff argued that recharacterizing an award intended to punish as one intended to compensate can be justified under the theory that the legal malpractice defendant "proximately caused" the loss of plaintiff's punitive damages claim in the underlying action. This contention is without merit. It confuses the concepts of proximate causation and cause in fact. Here, although defendant's conduct might have been the cause in fact of plaintiff's lost claim, rules of legal cause, i.e., proximate causation, operate to relieve the defendant whose conduct is a cause in fact of the injury where it would be unjust to hold him or her legally responsible. (87 C.A.4th 982.)

The conflict was resolved in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 C.4th 1037, 1044, 135 C.R.2d 46, 69 P.3d 965, 1 Cal. Proc. (4th), Attorneys, Supp., §338, in which the court held that, for public policy reasons, legal malpractice plaintiffs may not recover lost punitive damages as compensatory damages. Accordingly, the court approved *Piscitelli* and disapproved *Merenda*.

SUPPLEMENT: [This section is current through the latest supplement]

See *Expansion Pointe Properties Ltd. Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP* (2007) 152 C.A.4th 42, 53, 61 C.R.3d 166 [for first time on appeal, client could not raise claim that rule of *Ferguson v. Lieff Cabraser, Heimann & Bernstein* (2003) 30 C.4th 1037, 135 C.R.2d 46, 69 P.3d 965, text, p. 1031, did not apply retroactively to client, which had entered into retainer agreement before announcement in *Ferguson* of new rule of law]. *Ferguson* case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §320.



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3. Compensatory Damages in Particular Circumstances.
b. Postresignation Damages in Employment Action.

6 Witkin Sum. Cal. Law Torts § 1556

[§ 1556] Postresignation Damages in Employment Action.

In proper circumstances, an employee who resigned because of being discriminatorily denied promotion is entitled to the pay differential both from the date of discrimination to the date of resignation and from the latter date to the date of judgment. The general rationale for denying postresignation damages, i.e., encouraging an employee to stay on the job and resolve the discrimination problem, is inapplicable where resolution of the discrimination problem within the working environment is not a viable option. Thus, postresignation damages are recoverable where there can be no successful placement into the position wrongfully denied. (*Cloud v. Casey* (1999) 76 C.A.4th 895, 905, 90 C.R.2d 757.)

West's Key Number Digest, Damages k.15

SUPPLEMENT: [This section is current through the latest supplement]



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XVII. DAMAGES: IN GENERAL

B. Compensatory Damages.

4. Tax Treatment of Tort Recovery.

a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1557

[§ 1557] In General.

(1) *Compensatory Damages*. Compensatory tort damages are ordinarily included in gross income. (See C.E.B., Attorney's Guide to Damages 2d, §7.1 et seq.; 4 *U.C.L.A. L. Rev.* 451.) However, gross income does not include "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of *personal injuries or sickness*." (26 *U.S.C.*, §104(a)(2); Rev.C. 17131 [exclusions from gross income are determined in accordance with Internal Revenue Code unless otherwise provided in Rev.C. 17131 et seq.].) (See *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 *C.3d* 1, 12, footnote 18, 84 *C.R.* 173, 465 *P.2d* 61, *infra*, §1632 [discussing exclusion of personal injury damages]; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§129, 745; 61 *Cal. L. Rev.* 1237 [tax treatment of post-termination personal injury settlements]; 4 *U.C.L.A. L. Rev.* 448; 30 *U.S.F. L. Rev.* 313 [interpretation of 26 *U.S.C.*, §104(a)(2)].)

The exclusion encompasses (a) compensatory damages for pain and suffering, loss of earning capacity, loss of consortium, and medical expenses, and (b) compensatory damages arising from injury to a taxpayer's personal rights, e.g., libel and slander and invasion of privacy. (See C.E.B., Attorney's Guide to Damages 2d, §7.13.)

(2) *Jury Instruction Is Improper*. The jury should not be instructed on the taxability of tort damages. (*Henninger v. Southern Pac. Co.* (1967) 250 *C.A.2d* 872, 878, 59 *C.R.* 76; see *Rest.2d, Torts* §914A [award of tort damages is neither augmented nor diminished because award is or is not taxable income]; 22 *Am.Jur.2d* (2003 ed.), *Damages* §86; 16 *A.L.R.4th* 589 [propriety of taking income tax into consideration in fixing damages in personal injury or death action].)

In *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 *C.A.3d* 626, 151 *C.R.* 399, defendants contended that they were entitled to inform the jury that plaintiff's net future earnings after income taxes constituted his actual loss. *Held*, the trial judge properly ruled that the issue could not be injected into the trial.

(a) *Contexts in which issue might be raised*. (1) The fact that the jury award is not subject to income taxation has been viewed by most courts as irrelevant to the obligation of the defendant to pay damages; the fact of nontaxability is a matter involving only the plaintiff and the government. (2) Other courts have taken the "modern," "reasonable," and "realistic" view that, in view of income taxes, the loss of future earnings should be measured by the net earnings after taxes, not the gross. (3) Defendants in the instant case also sought to show that plaintiff, by investment in tax-free

bonds, could obtain a larger ultimate award. (87 C.A.3d 666, 667.)

(b) *Reasons for rejection of evidence.* (1) Allowing the evidence in personal injury and wrongful death actions would open the door to intense speculation by the jury, which is highly undesirable. (2) To permit the jury to determine the plaintiff's net loss would require that they be informed of the customary obligation of the plaintiff to pay attorneys' fees from the award. (87 C.A.3d 667, 668.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

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4. Tax Treatment of Tort Recovery.
b. Punitive Damages.

6 Witkin Sum. Cal. Law Torts § 1558

[§ 1558] Punitive Damages.

Punitive damages are normally included in gross income. (*Commissioner of Internal Revenue v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 75 S.Ct. 473, 99 L.Ed. 483.) Whether punitive damages awarded in an action for *personal injuries* are excluded from gross income under 26 U.S.C., §104(a)(2) (supra, §1557) was once uncertain. (See C.E.B., Attorney's Guide to Damages 2d, §7.26; 31 *Hastings L. J.* 909; 25 Southwestern U. L. Rev. 461 [tax status of punitive damages awarded in personal injury actions].) The issue has now been decided: Punitive damages awarded in this type of action are *not* excluded. (*O'Gilvie v. United States* (1996) 519 U.S. 79, 117 S.Ct. 452, 136 L.Ed.2d 454.)

In *O'Gilvie v. United States*, K sued the maker of a product the use of which had resulted in his wife's death from toxic shock syndrome. He and his two children recovered \$ 1,535,000 in compensatory damages and \$ 10 million in punitive damages. K paid income tax on the punitive damages portion of the judgment, as did his two children. In the present action, plaintiff sought a refund, and, because the government had earlier given the children a refund, it sought to recover these refunds as erroneously made. The two cases were consolidated for trial. The district court ruled in favor of plaintiffs, but the Court of Appeals reversed. *Held*, judgment of the Court of Appeals affirmed; the punitive damages were taxable even though awarded in a personal injury action.

(a) 26 U.S.C., §104(a)(2) excludes from gross income any damages received on account of personal injuries or sickness. The issue here is whether the damages were received "on account of" injury or sickness. Plaintiffs contend that this phrase requires no more than a "but for" connection between the punitive damages and a suit for personal injuries. The government argues that the provision is applicable only to those personal injury damages awarded because of the personal injuries. In other words, the government would make the section inapplicable to punitive damages that are not compensation for injury, but instead are private fines levied to punish and deter reprehensible conduct. The government's interpretation is correct. (117 S.Ct. 454, 136 L.Ed.2d 459, citing *International Brotherhood of Electrical Workers v. Foust* (1979) 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698, 2 *Summary* (10th), *Agency and Employment*, §543.)

(b) The government's position is more consistent with *Commissioner of Internal Revenue v. Schleier* (1995) 515 U.S. 323, 115 S.Ct. 2159, 132 L.Ed.2d 294, 8 *Summary* (10th), *Constitutional Law*, §873, in which this Court, although not directly dealing with the issue, held that punitive damages awarded under the Age Discrimination in Employment

Act were taxable as having been awarded to punish, rather than to compensate. (117 S.Ct. 455, 136 L.Ed.2d 460.)

(c) The government's reading of the statute is also more faithful to the statute's history. Several decisions had held that the restoration of capital (for the purpose of replacing nontaxable, lost human ability with capital) was not taxable as ordinary income. In accordance with this principle, it was decided that money, such as the proceeds of an accident policy or the amount received "on account of" a personal injury suit, was likewise nontaxable. It was from this background that the statute emerged. (117 S.Ct. 455, 136 L.Ed.2d 461.)

(d) The statute not only excludes from taxation the nontaxable damages received as a replacement for the victim's physical or personal well-being, but also excludes the damages that substitute for lost wages that the victim would have earned and that would have been taxable had the injury taken place. "The statute's failure to separate those compensatory elements of damages (or accident insurance proceeds) one from the other does not change its original focus upon damages that restore a loss, that seek to make a victim whole, with a tax-equality objective providing an important part of, even if not the entirety of, the statute's rationale. All this is to say that the Government's interpretation of the current provision (the wording of which has not changed significantly from the original) is more consistent than is petitioners' with the statute's original focus." (117 S.Ct. 456, 136 L.Ed.2d 462.)

(e) There is no reason why Congress would have wanted to exempt punitive damages from ordinary income. The fact that the statute applies to both noncompensatory damages and compensatory damages does not support plaintiffs' position, because the coverage of some compensatory features of damages has support in both the language and history of the statute. Moreover, the exclusion of those damages meant to replace taxable lost wages is already somewhat of an anomaly, and that circumstance does not justify the extension of the anomaly or the creation of another. (117 S.Ct. 456, 136 L.Ed.2d 462.)

(f) Plaintiffs emphasize that the statute refers to "any" damages and omits any requirement that the damages be received "as compensation," thereby indicating that Congress intended to exclude from taxation all punitive damages regardless of the purpose for which they were received. Finally, they refer to a Treasury Regulation stating that "damages received" means an amount obtained through a suit based on tort or tort type rights, as evidence that the words "on account of personal injuries" refers to the type of lawsuit, rather than the type of damages. However, all of these arguments only show that one can reasonably interpret the statute several ways. They do not change the interpretation in *Schleier*, nor do they change the statute's history. (117 S.Ct. 457, 136 L.Ed.2d 463.)

(g) Plaintiffs also argued that the reasoning that led Congress to exclude lost wages from ordinary income would also have led it to exclude punitive damages received in personal injury cases, because such an exclusion was both generous to victims and would avoid administrative problems such as separating the punitive from the compensatory portions of a global settlement. This contention is without merit. Tax generosity presumably has its limits, and the administrative problem of distinguishing the punitive from the compensatory elements is likely to be less serious than that of distinguishing among the compensatory elements of a settlement. And the problem of identifying the elements of an ostensibly punitive award does not exist where the relevant state law provides that the damages at issue are entirely punitive. (117 S.Ct. 457, 136 L.Ed.2d 463.)

(h) Finally, plaintiffs rely on an amendment stating that the personal injury exclusion from gross income does not apply to any punitive damages received in connection with a case not involving personal injury. Plaintiffs contend that this amendment would not have been enacted unless Congress believed that, in the amendment's absence, punitive damages fell within the provision's coverage. However, Congress might have been merely attempting to clarify the situation with respect to punitive damages received for nonphysical injuries, while leaving the law untouched with respect to physical injuries. Also, the amendment grew out of the Senate's refusal to accept a House bill making all damages received for nonphysical injuries taxable. Thus, this amendment reveals the Senate's willingness to tax only the punitive damages received in these actions. In any event, the view of a later Congress cannot control the interpretation of an earlier enacted statute. (117 S.Ct. 457, 136 L.Ed.2d 464.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Punitive or Exemplary Damages.
1. In General.
a. Nature and Purpose of Award.

6 *Witkin Sum. Cal. Law Torts* § 1559

[§ 1559] Nature and Purpose of Award.

(1) *Punishment and Deterrence.* Although the basic principle of damages is compensation, additional damages may be given in tort actions where the defendant's conduct has been outrageous, for the purpose of punishing and deterring him or her and others from outrageous conduct in the future. (See generally *Acadia, Calif., Ltd. v. Herbert* (1960) 54 C.2d 328, 337, 5 C.R. 686, 353 P.2d 294, 3 Cal. Proc. (4th), *Actions*, §140; *Ferraro v. Pacific Finance Corp.* (1970) 8 C.A.3d 339, 351, 87 C.R. 226, *infra*, §1589; *Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 C.A.3d 376, 89 C.R. 78, *supra*, §459; *Tate v. Saratoga Savings & Loan Assn.* (1989) 216 C.A.3d 843, 854, 265 C.R. 440 [authority of arbitrator to award punitive damages]; *Rest.2d, Torts* §908; 4 Harper, James & Gray 2d §25.5A; Dobbs, *The Law of Torts* §381 et seq.; 22 *Am.Jur.2d* (2003 ed.), *Damages* §539 et seq.; C.E.B., *Tort Damages* 2d, §14.1 et seq.; Cal. Civil Practice, 2 Procedure, Demands for Relief, §8:11 et seq.; Cal. Civil Practice, 1 Torts, Punitive Damages, Chap. 7.)

(2) *Statutory Authorization.* C.C. 3294(a) states the general rule as follows: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

The following terms are defined:

(a) " 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (C.C. 3294(c)(1).)

(b) " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (C.C. 3294(c)(2).)

(c) " 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (C.C. 3294(c)(3).)

BAJI, Nos. 14.71 and 14.72.1 incorporate the definitions and also define "despicable conduct," i.e., "conduct which is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people." (See CACI, Nos. 3940 et seq. and 3945 et seq.; *SKF Farms v. Superior Court* (1984) 153 C.A.3d 902, 907, 200 C.R. 497; *Weisman v. Blue Shield of Calif.* (1984) 163 C.A.3d 61, 65, 209 C.R. 169; *Mock v. Michigan Millers Mut. Ins. Co.* (1992) 4 C.A.4th 306, 330, 5 C.R.2d 594 [instruction on malice that omitted requirement, imposed by C.C. 3294, that defendant's conduct be "despicable," was prejudicial error]; *Angie M. v. Superior Court* (1995) 37 C.A.4th 1217, 1227, 44 C.R.2d 197 [allegations that 48-year-old physician had sexual relations with his minor patient, and with fellow employee, knowing of patient's dysfunctional background that made her particularly susceptible to emotional distress, were sufficient to allege despicable conduct with wilful and conscious disregard of rights of others].)

(3) *Amount Claimed Cannot Be Stated*. "No claim for exemplary damages shall state an amount or amounts." (C.C. 3295(e); see 19 *Pacific L. J.* 689.) Where the defendant does not answer and a default is taken, the complaint does not give the defendant notice of any amount of punitive damages claimed, and a claim for punitive damages is void unless notice of the claim is given to the defendant in some other manner. (See C.C.P. 425.115 [form of notice]; *Wiley v. Rhodes* (1990) 223 C.A.3d 1470, 1473, 1474, footnote 4, 273 C.R. 279, 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §134.)

(4) *Litigation Tactics*. A party's litigation conduct cannot be the basis for punitive damages. Other sanctions and disciplinary procedures have been adopted to address this conduct. (*De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 C.A.4th 890, 917, 114 C.R.2d 708 [involving appeal and motions and requests for stays in alleged bad faith].)

(5) *Commentary*. Commentary on punitive damages is extensive. (See 56 *Cal. L. Rev.* 1 et seq. [symposium]; 60 *Cal. L. Rev.* 191 [under federal statutes]; 78 *Cal. L. Rev.* 1 [An Ordinary Economic Rationale for Extraordinary Legal Sanctions]; 17 *California Lawyer* 64 (January 1997) [A Primer on Punitive Damages]; 61 *Harv. L. Rev.* 119; 69 *Harv. L. Rev.* 938; 70 *Harv. L. Rev.* 517; 75 *Harv. L. Rev.* 418; 110 *Harv. L. Rev.* 1513 [jury determination of punitive damages]; 111 *Harv. L. Rev.* 869 [deterrence theory of punitive damages]; 19 *Loyola L.A. L. Rev.* 94 [use as bargaining tool]; 20 *Loyola L.A. L. Rev.* 455 [recovery in international arbitration]; 36 *Loyola L.A. L. Rev.* 869 [Civilizing Punitive Damages: Lessons From Restitution]; 21 *Pepperdine L. Rev.* 85 [allocation of punitive damages to someone other than plaintiff]; 26 *San Diego L. Rev.* 357 [deductibility of punitive damages as business expense]; 29 *San Diego L. Rev.* 335 [recovery of punitive damages from international air carrier under Warsaw Convention]; 40 *San Diego L. Rev.* 1649 [judicial redistribution of punitive damages awards]; 16 *U.C. Davis L. Rev.* 232 [recovery under no-fault compensation legislation]; 6 *U.C.L.A. L. Rev.* 427; 17 *U.C.L.A. L. Rev.* 1280 [under federal securities laws]; 48 *U.C.L.A. L. Rev.* 1017 [nontortfeasor liability for exemplary damages]; 20 *A.L.R.3d* 666 [apportionment among joint tortfeasors].)

(6) *Related Coverage*. Various aspects of punitive damages are given particular treatment in other sections of this chapter and other works.

(a) *Pleading*. (See 5 *Cal. Proc.* (4th), *Pleading*, §§871, 872.)

(b) *Survivability of punitive damages claim*. (See 3 *Cal. Proc.* (4th), *Actions*, §68.)

(c) *Recovery under arbitration agreement for medical malpractice*. (See *supra*, §952.)

(d) *Recovery in contractual arbitration proceeding*. (See 13 *Summary* (10th), *Equity*, §36.)

(e) *Taxability and deductibility*. (See *supra*, §1557.)

West's Key Number Digest, Damages k.87(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Punishment and Deterrence.* See 4 Harper, James & Gray 3d §25.5A.

Acadia case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §145.(2) *Statutory Authorization.* See *Lackner v. North* (2006) 135 C.A.4th 1188, 1210, 37 C.R.3d 863 [conduct of snowboarder in striking skier while she was standing in flat rest area was not "despicable" so as to support punitive damages claim; even if snowboarder was reckless in traveling at high speed in rest area, he did not hit skier intentionally, and he was not out of control until he saw skier and attempted to avoid her].

(*New*) *Statutory allowance of punitive damages is not ex post facto law:* Punitive damages in tort claims are not sufficiently penal to trigger the protection of the Ex Post Facto Clause. (See *21st Century Ins. Co. v. Superior Court* (2005) 127 C.A.4th 1351, 1357, 26 C.R.3d 476 [under statute reviving time-barred claims following Northridge earthquake, insureds' action against insurer that sought punitive damages incident to bad faith cause of action did not violate Ex Post Facto Clause]; *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 C.A.4th 1155, 1161, 28 C.R.3d 355 [in action against priest and bishop filed under statute reviving statute of limitations for certain lapsed child sex abuse actions, plaintiff's punitive damages claim did not violate Ex Post Facto Clause].)

(3) *Amount Claimed Cannot Be Stated.* *Wiley case:*

Cross-Reference: 6 Cal. Proc. (5th), Proceedings Without Trial, §158.

(3a) (*New*) *Jury's Prerogative.* Even after establishing a case where punitive damages are permissible, a plaintiff is never entitled to them as a matter of right. Granting or withholding an award of punitive damages is wholly within the control of the jury. (See *Sumpter v. Matteson* (2008) 158 C.A.4th 928, 936, 70 C.R.3d 495 [jury could find that driver acted without malice, and consequently that injured plaintiff was not entitled to punitive damages, notwithstanding abundant evidence that driver acted with conscious disregard for safety of others when he drove under influence of methamphetamines and intentionally failed to hit brakes when approaching red light; plaintiff's contention that evidence mandated that punitive damages be assessed as matter of law was without merit].)

(5) *Commentary.* See 41 *San Diego L. Rev.* 1429 [punitive damages as compensating society]; 8 *A.L.R.6th* 439 [construction of state statutory caps on punitive damages in cases not involving medical malpractice].

(6) *Related Coverage.*

(a) *Pleading:*

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §§917, 918.

(b) *Survivability of punitive damages claim:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §16.



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1. In General.
b. Restatement 2d.

6 Witkin Sum. Cal. Law Torts § 1560

[§ 1560] Restatement 2d.

Rest.2d, Torts §908 reads as follows:

"(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."

"(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant."

Comment a points out that although the purposes are the same, the effect of a civil judgment for punitive damages is not the same as that of a fine imposed after conviction of a crime, because the successful plaintiff and not the state is entitled to the money. And an award of punitive damages is not prevented by a prior criminal conviction for the same act; nor does the granting of punitive damages prevent a subsequent criminal conviction.

Comment c states that punitive damages may be awarded even though there is no substantial pecuniary or physical harm; i.e., a tort cause of action must be shown, but an award of nominal damages is enough to support a further award of punitive damages where the tort is committed for an outrageous purpose.

Comment e states that in determining the amount of damages, the trier of fact may consider not merely the act itself but all the circumstances, including the motive of the wrongdoer, the relations between the parties, and the provocation or want of provocation for the act; also the fact that the plaintiff has been put to trouble and expense in protecting his or her interests, and the wealth of the defendant. "Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future, with greater weight being given to the prior awards. In a class action involving all claims, full assessment of the punitive damages can be made." (See *infra*, §1563.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.
c. Model Punitive Damages Act.

6 Witkin Sum. Cal. Law Torts § 1561

[§ 1561] Model Punitive Damages Act.

(1) *Adoption.* The National Conference of Commissioners on Uniform State Laws approved the Model Punitive Damages Act in 1996. The Act applies only if punitive damages are awardable in the state by common law or other authority; it does not define the types of cases in which an award may be made. Nor does the Act place limits on punitive damages that do not already exist in the enacting state. The Act is designed instead to improve the "procedure, burden of proof, judicial review, and similar matters so that arbitrary monetary limitations may not be necessary." The Act was adopted as a model act, rather than a uniform law, because it is intended as "more of an experimental effort to assist States in developing effective new approaches," than a measure that state lawmakers are expected to enact unchanged. (See Prefatory Note to Uniform Law Commissioner's Model Punitive Damages Act, 14 U.L.A. (Master Ed.), Supplement.)

(2) *Requirements.* The Model Act spells out three prerequisites to liability for punitive damages (as well as the plaintiff's concomitant burden of proof):

(a) The defendant must have been "found liable for a legally recognized injury which supports an award of punitive damages" under the law of the state. (Model Punitive Damages Act, §5(a)(1), 14 U.L.A. (Master Ed.), Supplement.)

(b) The plaintiff must have "established by clear and convincing evidence that the defendant maliciously intended to cause the injury or consciously and flagrantly disregarded the rights or interests of others in causing the injury." (Model Punitive Damages Act, §5(a)(2), 14 U.L.A. (Master Ed.), Supplement.)

(c) An award must be "necessary to punish the defendant for the conduct or to deter the defendant from similar conduct in like circumstances." (Model Punitive Damages Act, §5(a)(3), 14 U.L.A. (Master Ed.), Supplement.)

(3) *Factors in Determining Amount.* The amount awarded is limited to a "fair and reasonable amount." (Model Punitive Damages Act, §7(a), 14 U.L.A. (Master Ed.), Supplement.) The court must instruct the jury to consider, in calculating the amount, any evidence that has been admitted regarding the following factors:

(a) The nature of defendant's wrongful conduct and its effect on the claimant and others. (Model Punitive Damages

Act, §7(a)(1), 14 U.L.A. (Master Ed.), Supplement.)

(b) The amount of compensatory damages. (Model Punitive Damages Act, §7(a)(2), 14 U.L.A. (Master Ed.), Supplement.)

(c) Any fines, penalties, damages, or restitution paid or to be paid by defendant arising from the wrongful conduct. (Model Punitive Damages Act, §7(a)(3), 14 U.L.A. (Master Ed.), Supplement.)

(d) Defendant's present and future financial condition and the effect of an award on each condition. (Model Punitive Damages Act, §7(a)(4), 14 U.L.A. (Master Ed.), Supplement.)

(e) Any profit or gain obtained by defendant through the wrongful conduct in excess of that likely to be divested by actions against defendant for compensatory damages or restitution. (Model Punitive Damages Act, §7(a)(5), 14 U.L.A. (Master Ed.), Supplement.)

(f) Any adverse effect of the award on innocent persons. (Model Punitive Damages Act, §7(a)(6), 14 U.L.A. (Master Ed.), Supplement.)

(g) Remedial measures taken or not taken by defendant since the wrongful conduct. (Model Punitive Damages Act, §7(a)(7), 14 U.L.A. (Master Ed.), Supplement.)

(h) Compliance or noncompliance with applicable agency or other standard. (Model Punitive Damages Act, §7(a)(8), 14 U.L.A. (Master Ed.), Supplement.)

(4) *Vicarious Liability*. For an employer or principal to be vicariously liable for punitive damages, the following conditions must be met:

(a) The employee or agent must be found liable for punitive damages. (Model Punitive Damages Act, §6, 14 U.L.A. (Master Ed.), Supplement.)

(b) The trier of fact must find by clear and convincing evidence that the employee's wrongful conduct occurred within the scope of the employment or agency and that the employer or principal, "with knowledge of its wrongful nature, directed, authorized, participated in, consented to, acquiesced in, or ratified the conduct." (Model Punitive Damages Act, §6, 14 U.L.A. (Master Ed.), Supplement.)

(c) The trier of fact must find that the award "is necessary to punish the employer or principal for the employer's or principal's conduct or to deter the employer or principal from similar conduct in like circumstances." (Model Punitive Damages Act, §6, 14 U.L.A. (Master Ed.), Supplement.)

(5) *Review*. The Act provides for review of liability for, and the amount of, punitive damages, both in the trial court and on appeal. (See Model Punitive Damages Act, §§8, 9, 14 U.L.A. (Master Ed.), Supplement.) A party may not seek appellate review of the award without having earlier filed a motion for review by the trial court. (Model Punitive Damages Act, §9(a), 14 U.L.A. (Master Ed.), Supplement.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Instructions.

6 Witkin Sum. Cal. Law Torts § 1562

[§ 1562] Instructions.

BAJI provides the following instructions governing punitive damages awards:

No. 14.71 [Punitive Damages--Recovery and Measure; Trial Not Bifurcated]; see supra, §1540.

No. 14.72.1 [Punitive Damages--Recovery Of--(Bifurcated Trial--First Phase)].

No. 14.72.2 [Punitive Damages--Measure Of--(Bifurcated Trial--Second Phase)].

No. 14.73 [Punitive Damages Against Principal for Acts of Agent--When Permitted (Non-Bifurcated Trial)]; see infra, §§1582, 1583.

No. 14.73.1 [Punitive Damages Against Principal For Acts Of Agent--When Permitted (Bifurcated Trial--First Phase)].

No. 14.74 [Managing Agent--Defined]; see infra, §1583.

No. 14.75 [Driving When Intoxicated--Actual Malice--Punitive Damages].

CACI provides the following punitive damages instructions:

No. 3940 [Punitive Damages--Individual Defendant Trial Not Bifurcated].

No. 3941 [Punitive Damages--Individual Defendant Trial Bifurcated Trial (First Phase)].

No. 3942 [Punitive Damages--Individual Defendant Trial Bifurcated Trial (Second Phase)].

No. 3943 [Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated].

No. 3944 [Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or

Employee--Bifurcated Trial (First Phase)].

No. 3945 [Punitive Damages--Entity Defendant--Trial Not Bifurcated].

No. 3946 [Punitive Damages--Entity Defendant--Bifurcated Trial (First Phase)].

No. 3947 [Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated].

No. 3948 [Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (First Phase)].

No. 3949 [Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (Second Phase)].

SUPPLEMENT: [This section is current through the latest supplement]

CACI instructions: The titles of the following CACI instructions have been changed:

No. 3940 [Punitive Damages--Individual Defendant--Trial Not Bifurcated].

No. 3941 [Punitive Damages--Individual Defendant--Bifurcated Trial (First Phase)].

No. 3942 [Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)].

No. 3949 [Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial]. *Correction:* Page 1041, fourth line of section, the cross-reference to §1540 should be to §1559.



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e. Awards in Multiple Litigation.

6 *Witkin Sum. Cal. Law Torts* § 1563

[§ 1563] Awards in Multiple Litigation.

Despite the criticisms of commentators (see 30 *Hastings L. J.* 1797), the objection of "double jeopardy" has been uniformly rejected; i.e., granting punitive damages to one plaintiff will not bar the later granting of punitive damages to another plaintiff for the same act of the defendant. (*Lemer v. Boise Cascade* (1980) 107 C.A.3d 1, 7, 165 C.R. 555; see 16 U.S.F. L. Rev. 1 [arguing that where classwide claims for punitive damages have been settled or adjudicated, opt-out plaintiffs cannot assert such claims]; 11 A.L.R.4th 1261 [propriety of awarding punitive damages to separate plaintiffs bringing successive actions arising out of common incident or circumstances against common defendant or defendants].)

However, the fact of multiple litigation may be considered in determining the *amount* of the award. (See *Delos v. Farmers Group* (1979) 93 C.A.3d 642, 667, 155 C.R. 843 [trial judge's reduction of award was proper where, because other similar actions were pending, there was likelihood of several awards against same defendant]; *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 C.A.4th 1645, 1660, 57 C.R.2d 525 [although jury can rely on punitive damages imposed in previous case in fixing punitive damages in current case, evidence of previous award must have been presented to jury; it is not sufficient for trial judge to take judicial notice of previous award]; *Rest.2d, Torts* §908, Comment e, *supra*, §1560.)

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f. No Insurance Against Award.

6 *Witkin Sum. Cal. Law Torts* § 1564

[§ 1564] No Insurance Against Award.

Other jurisdictions have reached conflicting conclusions on whether an insurance policy may validly cover liability for punitive damages. The analysis has centered either on construction of the particular provision involved or public policy considerations. (See 44 *Am.Jur.2d* (2003 ed.), *Insurance* §1529; 28 *Hastings L. J.* 431; 12 *U.S.F. L. Rev.* 743; 416 *A.L.R.4th* 11 [liability insurance as extending to liability for punitive damages].) In California, however, the question is settled by statute. "An insurer is not liable for a loss caused by the *wilful act* of the insured." (*Ins.C.* 533.) (See 2 *Summary* (10th), *Insurance*, §100 et seq.)

In *City Products Corp. v. Globe Indem. Co.* (1979) 88 *C.A.3d* 31, 151 *C.R.* 494, the court relied on this statute, as well as public policy, in holding that an insurer was not liable for its insured's punitive damages. City Products, doing business as Barker Bros. in Los Angeles, sued H on a claim and lost. H then sued City Products for malicious prosecution of a civil action, and received a judgment for \$ 2,725 as compensatory damages and \$ 10,000 as punitive damages. City Products paid the amount of the compensatory damage award, but challenged the punitive damage award on appeal, contending that no malice had been proved. The appellate court affirmed the judgment, pointing out that the determination to sue H had been made by the regional collection manager of City Products, an executive officer with authority to bind the corporation by a wrongful act without probable cause and with inferred malice. City Products then demanded payment from Globe Indemnity, under its policy covering damages sustained by malicious prosecution. Globe paid the compensatory damage award but refused to pay the award of punitive damages. In this action by City Products against Globe, the trial court gave judgment on demurrer for defendant insurer. *Held*, affirmed.

(a) The prior decision on appeal determined that the wrongdoing employee had power to bind the corporation and that his malice was properly imputed to it. (88 *C.A.3d* 36; see *infra*, §1583.)

(b) A promise to insure against a wilful and malicious act is prohibited by *Ins.C.* 533, and is also contrary to public policy. The objective of the award of punitive damages is to impose them "in an amount which will appropriately punish the defendant in view of 'the actual damages sustained,' 'the magnitude and flagrancy of the offense, the importance of the policy violated, and the wealth of the defendant.' Consideration of the wealth of the defendant would of course be pointless if such damages could be covered by insurance. The onus of the award would depend entirely upon the amount of insurance coverage and not upon the legally relevant factors." (88 *C.A.3d* 36.) (See *Ford Motor Co.*

v. Home Ins. Co. (1981) 116 C.A.3d 374, 172 C.R. 59 [no indemnity for punitive damages awarded in products liability case]; *Grimshaw v. Ford Motor Co. (1981) 119 C.A.3d 757, 174 C.R. 348*, *infra*, §1593; on liability of insurer breaching duty to settle for punitive damages assessed against insured, see 2 *Summary* (10th), *Insurance*, §113.)

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g. Is Award Disfavored?

6 *Witkin Sum. Cal. Law Torts* § 1565

[§ 1565] Is Award Disfavored?

Early cases sometimes referred to punitive damages as "disfavored," and the same disparaging comment may be found in a few later cases. (See *Gombos v. Ashe* (1958) 158 C.A.2d 517, 526, 322 P.2d 933, *infra*, §1574; *Henderson v. Security Nat. Bank* (1977) 72 C.A.3d 764, 771, 140 C.R. 388 ["Such damages are never awarded as a matter of right ... ; they are not favored by the law and they should be granted with the greatest of caution ... ; they will be allowed only in the clearest of cases"]; *Rosener v. Sears, Roebuck & Co.* (1980) 110 C.A.3d 740, 750, 168 C.R. 237, *infra*, §1621 ["Such damages constitute a windfall, which, though supported by law in proper cases ... , creates the anomaly of excessive compensation which makes the remedy an unappealing one"].)

Other cases take a different view of the award. (See *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 C.3d 809, 820, 169 C.R. 691, 620 P.2d 141 ["we cannot usurp the Legislature's determination that such damages should be recoverable in cases in which the statutory prerequisites are fulfilled"]; *Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 807, 174 C.R. 348, *infra*, §1593 ["The concept of punitive damages is rooted in the English common law and is a settled principle of the common law of this country"].)

The court in *Grimshaw v. Ford Motor Co.* added the following: "In the traditional noncommercial intentional tort, compensatory damages alone may serve as an effective deterrent against future wrongful conduct but in commerce related torts, the manufacturer may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than to remedy the defect. ... Governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. ... Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and not otherwise recoverable." (119 C.A.3d 810.)

Nevertheless, courts and writers have produced a considerable volume of adverse comment on the expanded scope and increasing amounts of punitive damage awards. (See *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789, 811, *supra*, §613; *Woolstrum v. Mailloux* (1983) 141 C.A.3d Supp. 1, 10, 13, 190 C.R. 729 [listing principal objections to punitive damages, and urging that trial and appellate courts carefully review jury awards]; *Krusi v. Bear, Stearns & Co.* (1983) 144 C.A.3d 664, 682, 192 C.R. 793 [concurring and dissenting opinion];

Rest.2d, Torts §908, Comment f; *105 Harv. L. Rev. 1900* [An Economic Analysis of the Plaintiff's Windfall From Punitive Damage Litigation]; *106 Harv. L. Rev. 1691* [validity of statute allowing state to claim portion of any punitive damages awarded]; *30 Hastings L. J. 1797* [Mass Liability and Punitive Damages Overkill]; *31 Hastings L. J. 639* [Punitive Damages: Toward a Principled Approach]; *66 So. Cal. L. Rev. 841* [argument that punitive damages should be paid to state, instead of plaintiff]; *20 Southwestern U. L. Rev. 103* [The Need for Federal Legislative Reform of Punitive Damages]; *40 U.C.L.A. L. Rev. 752* [Toward Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform]; *16 A.L.R.5th 129* [validity of statute allowing state to claim portion of any punitive damages awarded].)

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2. Constitutionality of Awards.
a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1566

[§ 1566] In General.

Browning-Ferris Industries of Vermont v. Kelco Disposal (1989) 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219, addressed an Eighth Amendment challenge to an award of punitive damages.

(a) "We face here the questions whether the Excessive Fines Clause of the Eighth Amendment applies to a civil-jury award of punitive or exemplary damages, and, if so, whether an award of \$ 6 million was excessive in this particular case. This Court has never held, or even intimated, that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case. Rather, our concerns in applying the Eighth Amendment have been with criminal process, and with direct actions initiated by government to inflict punishment. Awards of punitive damages do not implicate these concerns. We therefore hold, on the basis of the history and purpose of the Eighth Amendment, that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties." (109 S.Ct. 2912, 106 L.Ed.2d 228.)

(b) "Petitioners also ask us to review the punitive damages award to determine whether it is excessive under the Due Process Clause of the Fourteenth Amendment. The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness. But petitioners make no claim that the proceedings themselves were unfair or that the jury was biased or blinded by emotion or prejudice. Instead, they seek further due process protections, addressed directly to the size of the damages award. There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme ... but we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. ... That inquiry must await another day." (109 S.Ct. 2921, 106 L.Ed.2d 239.)

Two justices concurred in the opinion "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." (109 S.Ct. 2923, 106 L.Ed.2d 241.) Two other justices dissented in part, arguing that the "skyrocketing" awards have a detrimental effect on the research and development of new products. (109 S.Ct. 2924, 106 L.Ed.2d 242.)

Neither the Double Jeopardy Clause of the Fifth Amendment nor the Excessive Fines Clause of the Eighth Amendment precludes, as a second punishment for a single course of conduct, an award of punitive damages in a civil action, even though the defendant was convicted and sentenced to prison as a result of the same conduct on which the civil action was based. (*Shore v. Gurnett* (2004) 122 C.A.4th 166, 171, 172, 18 C.R.3d 583 [plaintiff in wrongful death action was entitled to recover punitive damages even though defendant was jailed for same conduct that caused decedent's death].) (See *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1, *infra*, §1567; *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366, *infra*, §1567; *BMW of North America v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, *infra*, §1568; *Cooper Industries v. Leatherman Tool Group* (2001) 532 U.S. 424, 121 S.Ct. 1678, 1685, 149 L.Ed.2d 674 [Courts of Appeals should apply de novo standard of review, not abuse of discretion standard, when passing on district courts' determinations of constitutionality of punitive damages awards]; *Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 C.A.3d 376, 89 C.R. 78, *supra*, §459 [statutory words "oppression" and "fraud" are not fatally uncertain]; *Wetherbee v. United Ins. Co. of America* (1971) 18 C.A.3d 266, 270, 95 C.R. 678, *infra*, §1620 [award is not a "fine"]; *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 C.A.3d 793, 802, 804, 274 C.R. 139 [discussing and rejecting due process challenge]; 75 Cal. L. Rev. 1433 [Punitive Damages and the Eighth Amendment]; 115 Harv. L. Rev. 356 [*Cooper Industries*]; 17 Hastings Const. L. Q. 439 ["Experimenting" with State Constitutional Limits on Punitive Damages in California: Application of the California Excessive Fines Clause]; 31 Pepperdine L. Rev. 477 [validity of one state's award of punitive damages for nationwide conduct]; 36 U.S.F. L. Rev. 411 [*Cooper Industries*].)

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See 94 Cal. L. Rev. 793 [constitutionality of punitive damages awards]; 38 Loyola L.A. L. Rev. 1297 [constitutional limitations on punitive damages]; 41 San Diego L. Rev. 1409 [same]; 41 San Diego L. Rev. 1443 [comparison to criminal sanctions in constitutional review of punitive damages]; 79 So. Cal. L. Rev. 1085 [Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence]; 81 So. Cal. L. Rev. 263 [punitive damages, retribution, and due process]; 1 A.L.R. Fed 2d 529 [constitutional issues concerning punitive damages--Supreme Court cases].



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b. No Due Process Violation.

6 *Witkin Sum. Cal. Law Torts* § 1567

[§ 1567] No Due Process Violation.

The issue left open in *Browning-Ferris Industries of Vermont v. Kelco Disposal* (1989) 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219, supra, §1566, was reached in *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1. Plaintiff H purchased a health insurance policy with defendant Pacific Mutual through its agent R. R misappropriated premium payments, and the insurer sent notice of cancellation to plaintiff in care of R, but plaintiff never received it and did not know that the policy had been cancelled. Plaintiff later incurred heavy hospital and physician's charges; and on nonpayment, her physician placed her account with a collection agency, which obtained a judgment that adversely affected her credit. She filed this action against R and the insurer for damages for fraud of its agent on the theory of respondeat superior. The trial judge instructed the jury on its discretion to award punitive damages if it determined that there was liability for fraud. The jury brought in a general verdict of \$ 1,040,000, of which amount the punitive damages component was not less than \$ 840,000. Pacific Mutual petitioned for certiorari, challenging the award as violative of due process. *Held*, judgment affirmed.

(a) *Traditional Common Law Rule*. Under the common law rule, the amount of the punitive award is initially determined by a jury under proper instructions; and "every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process." (111 S.Ct. 1043, 113 L.Ed.2d 19.) But neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through centuries insulates it from constitutional attack. (111 S.Ct. 1043, 113 L.Ed.2d 20.) Unlimited jury or judicial discretion in fixing of punitive damages "may invite extreme results that jar one's constitutional sensibilities." (111 S.Ct. 1043, 113 L.Ed.2d 20.) "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." (111 S.Ct. 1043, 113 L.Ed.2d 20.)

(b) *Award Does Not Violate Due Process*. The jury was properly instructed, and the post-trial review procedures were adequate to ensure that awards "are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." (111 S.Ct. 1045, 113 L.Ed.2d 22.) "We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent ... , and, of course, is much in excess of the fine that could be imposed for

insurance fraud. ... Imprisonment, however, could also be required of an individual in the criminal context. While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety." (111 S.Ct. 1046, 113 L.Ed.2d 23.)

In *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366, the Supreme Court granted certiorari to review a decision of the Supreme Court of Appeals of West Virginia, affirming a judgment for \$ 19,000 in compensatory damages and \$ 10 million in punitive damages. The Supreme Court held that the award was not so "grossly excessive" as to violate due process, and that the procedure followed by the trial court did not violate due process. TXO commenced the litigation by filing a complaint for a declaratory judgment on its interest in oil and gas development rights. Alliance filed a counterclaim for slander of title. In addition to evidence that TXO knew that Alliance had good title and that TXO advanced a claim on a worthless quitclaim deed in an effort to renegotiate its royalty arrangement, Alliance introduced evidence showing that TXO, a large company, had engaged in similar nefarious activities in its business dealings in other parts of the country. *Held*, judgment for Alliance affirmed.

(a) *Argument that punitive damages award 526 times greater than actual damages award is so excessive as to be deemed an arbitrary deprivation of property without due process of law.*

(1) Alliance contends that the standard of review should be the same standard of rational basis scrutiny that is appropriate for reviewing state economic legislation. TXO argues that the awards should be scrutinized more strictly than legislative penalties because they are typically assessed without any legislative guidance. (113 S.Ct. 2719, 125 L.Ed.2d 377.) Neither formulation is satisfactory. "Under respondents' rational basis standard, apparently *any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, would be acceptable. On the other hand, we reject the premise underlying TXO's invocation of heightened scrutiny. The review of a jury's award for arbitrariness and the review of legislation surely are significantly different." (113 S.Ct. 2719, 125 L.Ed.2d 378.)

(2) The comparative approach urged by petitioner is also an unsatisfactory test. It is a relatively straightforward task to draw intrajurisdictional and interjurisdictional comparisons on such matters as the definition of first-degree murder or the penalty imposed on nonviolent repeat offenders; but jury awards of punitive damages are the product of numerous and sometimes intangible factors, and no two cases are truly identical. "Thus, while we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations, we are not prepared to enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages awards." (113 S.Ct. 2720, 125 L.Ed.2d 379.)

(3) TXO places its primary emphasis on the fact that the award is 526 times as large as the actual damages award; and state courts have long held that punitive damages should bear some proportion to the real damage sustained. (113 S.Ct. 2721, 125 L.Ed.2d 380.) But both state Supreme Courts and this Court "have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." (113 S.Ct. 2721, 125 L.Ed.2d 381.) "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims if similar future behavior were not deterred." (113 S.Ct. 2722, 125 L.Ed.2d 381.)

(4) "In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow." (113 S.Ct. 2722, 125 L.Ed.2d 382.)

(b) *Argument that the punitive damages award was a result of a fundamentally unfair procedure.*

(1) The trial judge, in his review of the award, did not articulate his reasons for upholding it; but he did give counsel an adequate hearing on TXO's postverdict motions. "While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient dispatch of their duties, we certainly are not prepared to characterize the trial judge's failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation." (113 S.Ct. 2724, 125 L.Ed.2d 383.)

(2) The argument that the procedure was "unconstitutionally vague" because petitioner had no notice of the possibility that the award of punitive damages might be divorced from an award of compensatory damages is likewise without merit. "[T]he notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." (113 S.Ct. 2724, 125 L.Ed.2d 384.)

Three additional opinions were filed, all stressing the fact that the lead opinion was a plurality opinion in which only three justices joined: (a) Opinion of one justice, concurring in part of the plurality opinion and concurring in the judgment. (113 S.Ct. 2724, 125 L.Ed.2d 384.) (b) Opinion of two justices, concurring in the judgment. (113 S.Ct. 2726, 125 L.Ed.2d 387.) (c) An elaborate opinion of two justices with a third justice joining in parts, dissenting. (113 S.Ct. 2728, 125 L.Ed.2d 389.) (See *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 C.A.4th 1645, 1655, 57 C.R.2d 525 [due process does not require that trial judge state reasons for upholding punitive damages award; citing *TKO Production Corp.*]; *Romo v. Ford Motor Co.* (2002) 99 C.A.4th 1115, 1151, 122 C.R.2d 139 [upholding award of \$ 290 million against large vehicle manufacturer]; *Shore v. Gurnett* (2004) 122 C.A.4th 166, 175, 18 C.R.3d 583 [Due Process Clause did not preclude award of punitive damages in wrongful death action, even though defendant was convicted for same conduct that killed plaintiff's husband; statute expressly allowed recovery of civil punitive damages by survivors of homicide victims, and contrary rule would preclude subsequent prosecution of wrongdoer who had been subjected to civil punitive damages]; 30 Cal. Western L. Rev. 313 [TXO Production Corp.]; 107 Harv. L. Rev. 185 [same]; 21 Pepperdine L. Rev. 909 [same]; 68 So. Cal. L. Rev. 203 [same].)

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See *Boeken v. Philip Morris* (2005) 127 C.A.4th 1640, 1701, 26 C.R.3d 638 [punitive damages award against tobacco company of \$ 50 million, using multiplier of 9 times compensatory damages, did not violate due process in view of defendant's wealth and extreme reprehensibility of its conduct, i.e., defendant increased addictiveness by manipulating additives, gained smokers by fraud, and, knowing death could result, marketed cigarette that was more dangerous than ordinary consumers would expect]; *Century Surety Co. v. Polisso* (2006) 139 C.A.4th 922, 966, 43 C.R.3d 468 [ratio of 31/2 to 1 did not violate due process; punitive damages were not improperly duplicative of compensatory damages]; *Walker v. Farmers Ins. Exchange* (2007) 153 C.A.4th 965, 972, 63 C.R.3d 507 [ratio of 1 to 1 was proper for condominium insurer's bad faith in denial of defense in underlying personal injury action, where insureds recovered all economic damages and attorneys' fees, punitive element was present in compensatory damages award, trial judge's reduction in original punitive damages award did not eliminate its punitive function, insurer's conduct caused no physical harm, and insurer's conduct was result of isolated mistake]; *Wysinger v. Automobile Club of Southern Calif.* (2007) 157 C.A.4th 413, 428, 69 C.R.3d 1 [punitive damages award of \$ 1 million in employee's discrimination action under Fair Employment and Housing Act was not excessive; punitive damages award was less than four times compensatory damages, and single-digit multipliers are more likely to comport with due process].



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6 *Witkin Sum. Cal. Law Torts* § 1568

[§ 1568] Due Process Violation.

In *Honda Motor Co., Ltd. v. Oberg* (1994) 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336, Oregon's lack of true post-trial review rendered an award invalid on constitutional grounds. In a personal injury action against the manufacturer of a three-wheeled all-terrain vehicle, plaintiff recovered \$ 735,512.31 in compensatory damages and \$ 5 million in punitive damages. Although the Oregon Constitution prohibits judicial review of the amount of punitive damages unless the court can affirmatively say there is no evidence to support the verdict, the Oregon appellate courts upheld the award against defendant's due process challenge, finding no violation of the requirement of *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1, supra, §1567, that there be meaningful judicial scrutiny of punitive damages awards. *Held*, reversed.

(a) Oregon's procedure is unique. "An Oregon trial judge, or an Oregon Appellate Court, may order a new trial if the jury was not properly instructed, if error occurred during the trial, or if there is no evidence to support any punitive damages at all. But if the defendant's only basis for relief is the *amount* of punitive damages the jury awarded, Oregon provides no procedure for reducing or setting aside that award." (114 S.Ct. 2338, 129 L.Ed.2d 346.)

(b) Oregon case law interpreting the state Constitution has held that Oregon courts lack the power to examine an award to determine whether the jury was influenced by passion and prejudice, and for more than 50 years no Oregon court has inferred passion and prejudice from the size of an award. The review actually provided only ensures that there is evidence to support *some* punitive damages; it does not ensure that the evidence supports the amount actually awarded. (114 S.Ct. 2339, 129 L.Ed.2d 347, 348.)

(c) Oregon's abrogation of the traditional common law protections raises a presumption of unconstitutionality under the Due Process Clause, and the state has not provided any adequate substitute procedure or shown that the danger of arbitrary awards has subsided over time. None of the protections the state continues to provide (limitation of the amount of punitive damages to that specified in the complaint, the clear and convincing standard of proof, preverdict determination of maximum allowable punitive damages, and detailed jury instructions) justifies a lack of judicial review. (114 S.Ct. 2341, 2342, 129 L.Ed.2d 348, 350.)

Two dissenting justices argued that the state's procedures were sufficient to guide the jury in determining the

plaintiff's qualifications for, and the amount of, punitive damages, and that the amount actually awarded did not appear so grossly excessive as to violate due process protections. (114 S.Ct. 2350, 129 L.Ed.2d 361.) (See 108 Harv. L. Rev. 211 [Honda].)

In *State Farm Mut.Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585, plaintiffs, passing many cars on a two-lane highway, caused O to collide with S. In the ensuing action, defendant, plaintiffs' insurer, refused a settlement offer for the policy limits, even though investigators and witnesses concluded that plaintiff driver was the cause of the accident. The jury returned a verdict far in excess of the policy limits, and plaintiffs, who had obtained independent counsel, appealed. During the pendency of the appeal, O and S agreed not to seek satisfaction of their claims against plaintiffs in return for 90% of any recovery by plaintiffs against defendant. After plaintiffs lost on appeal, defendant paid the entire judgment, including the amount in excess of the policy limits. Nevertheless, plaintiffs, under their agreement with O and S, instituted the present bad faith action against defendant. On remand, after summary judgment for defendant was reversed, the case was bifurcated. In the first phase, the jury determined that defendant's decision not to settle was unreasonable. In the second phase, defendant moved unsuccessfully to exclude evidence of dissimilar out-of-state conduct. Based primarily on this type of evidence, the jury awarded plaintiffs \$ 2.6 million compensatory damages and \$ 145 million punitive damages. After the trial court reduced the damages to \$ 1 million and \$ 25 million respectively, both parties appealed, and the Supreme Court of Utah, relying on *BMW of North America v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589, 1604, 134 L.Ed.2d 809, 832, reinstated the \$ 145 million punitive damages award. The U.S. Supreme Court granted certiorari. *Held*, reversed and remanded.

(a) *Constitutional limitations.* While states possess discretion over the imposition of punitive damages, the Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. To the extent that an award is grossly excessive, it constitutes a deprivation of property and furthers no legitimate state purpose. Concern over the imprecision involved in punitive damage awards is heightened by the fact that civil defendants are not accorded the protections applicable in criminal proceedings. (123 S.Ct. 1519, 1520, 155 L.Ed.2d 600, 601, citing *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1, *supra*, §1567, and *Cooper Industries v. Leatherman Tool Group* (2001) 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674, *supra*, §1566.) To satisfy the Constitution, *Gore* requires courts reviewing punitive damages to consider the following three factors: (1) the degree of *reprehensibility* of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. (123 S.Ct. 1520, 155 L.Ed.2d 601.)

(b) *Reprehensibility of defendant's misconduct.*

(1) Defendant's handling of the claims against plaintiffs merits no praise, because defendant (a) altered its records to make plaintiff driver appear less culpable; (b) disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded; and (c) amplified the harm by first assuring plaintiffs that their assets would be safe from any verdict and by later telling them, postjudgment, to put a "for sale" sign on their house. "While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." (123 S.Ct. 1521, 155 L.Ed.2d 602.)

(2) Instead, this case was used as a platform to expose and punish the perceived deficiencies of defendant's operation throughout the nation, allegedly a scheme to meet corporate fiscal goals by capping payouts on claims. Plaintiffs contended that defendant had only itself to blame for the reliance on dissimilar and out-of-state conduct evidence, but the record shows that plaintiffs, from the onset, framed this case as a chance to rebuke defendant for its nationwide activities. (123 S.Ct. 1521, 1522, 155 L.Ed.2d 602, 603.)

(3) "A State cannot punish a defendant for conduct that may have been lawful where it occurred. ... Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful

acts committed outside of the State's jurisdiction." (123 S.Ct. 1522, 155 L.Ed.2d 603.) Plaintiffs, conceding that much of the out-of-state conduct was lawful where it occurred, contended that this evidence was nevertheless relevant because it demonstrated defendant's motive against its insured. This argument is without merit. "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a *nexus* to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (123 S.Ct. 1522, 1523, 155 L.Ed.2d 603, 604.)

(4) The more fundamental error committed by the Utah courts was that they awarded punitive damages to punish conduct that bore no relation to plaintiff's harm. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here." Awarding punitive damages on this basis creates the possibility of multiple awards, because nonparties are not generally bound by the judgment that some other plaintiff obtains. (123 S.Ct. 1523, 155 L.Ed.2d 604.)

(5) Because plaintiffs have identified scant evidence of repeated misconduct of the sort that injured them (and there was no indication that defendant was punished only for its actions against plaintiffs), the Utah decision cannot be justified on the ground that defendant was a *recidivist*. Although "other acts" evidence need not be identical to have relevance in calculating punitive damages, the Utah court erred because evidence pertaining to claims that had nothing to do with a *third-party* lawsuit was introduced at length. Because plaintiffs "have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis." (123 S.Ct. 1523, 1524, 155 L.Ed.2d 605.)

(c) *Ratio between harm to plaintiff and punitive damages award.*

(1) "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. ... We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." (123 S.Ct. 1524, 155 L.Ed.2d 605.) However, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. Nevertheless, a higher ratio might comport with due process where a particularly egregious harm has resulted in only a small amount of economic damages. And when the compensatory damages are substantial, a lesser ratio, perhaps equal to the amount of the compensatory damages, might be all that due process will allow. (123 S.Ct. 1524, 155 L.Ed.2d 605, 606.)

(2) Here, there is a presumption against an award that has a 145-to-1 ratio. The compensatory award was substantial. (The plaintiffs were awarded \$ 1 million for a year and a half of emotional distress, and this was complete compensation.) The harm arose from a transaction in the economic realm, not from some physical assault or trauma. (Plaintiffs suffered no physical injuries.) Defendant paid the excess verdict before the bad faith complaint was filed, so plaintiffs suffered only minor economic injuries for the 18-month period in which defendant refused to resolve the claim against them. Moreover, the compensatory damages for the injury suffered here likely were based on a component that was duplicated in the punitive damages award. (In many cases, compensatory damages include an amount for emotional distress.) (123 S.Ct. 1524, 1525, 155 L.Ed.2d 606.)

(3) The Utah Supreme Court sought to justify the massive punitive damages award by pointing out that, as a matter of statistical probability, defendant will be punished in only one out of 50,000 cases, and that defendant has great wealth. However, both facts have little to do with actual harm suffered by plaintiffs. Furthermore, the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. (123 S.Ct. 1525, 155 L.Ed.2d 607.)

(d) *Disparity between punitive damages and civil penalties.* Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of criminal trial. The most relevant civil sanction under Utah state law for the wrong done to plaintiffs appears to be a \$ 10,000 fine for an act of fraud, an amount dwarfed by the \$ 145 million punitive damages award. The Supreme Court of Utah relied on a broad

fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct, but, as the foregoing demonstrates, this analysis is insufficient to justify the award. (123 S.Ct. 1526, 155 L.Ed.2d 608.)

Three justices dissented, two on the ground that the Constitution provides no protections against excessive punitive damages awards, and the third arguing that the issue of excessiveness of these awards should be left to the states. (123 S.Ct. 1526, 1527, 155 L.Ed.2d 608, 609.)

In *Romo v. Ford Motor Co.* (2003) 113 C.A.4th 738, 6 C.R.3d 793, three members of a family were killed and three were injured when the vehicle in which they were riding rolled over as the driver was trying to avoid a vehicle that had swerved in front of him. In a products liability action against defendant car manufacturer brought by the survivors individually and on behalf of the decedents, the jury awarded compensatory damages of nearly \$5 million and punitive damages of \$290 million. The award was affirmed on appeal, and after the California Supreme Court denied a petition for review, the United States Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in view of *State Farm Mut. Auto. Ins. Co. v. Campbell*. *Held*, punitive damages reduced to \$23,723,387. (If plaintiffs decline the remittitur, the judgment is reversed, and the case remanded for a new trial on the amount of punitive damages.) The court made the following comments concerning the application of *Campbell* generally and as applied to this case.

(a) The idea of awarding punitive damages based purely on a conception of torts as *private*, as opposed to public, wrongs lost favor in the era of products liability litigation. (113 C.A.4th 745, citing *Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 174 C.R. 348, *infra*, §1593.) In cases of mass-produced consumer goods or company-wide practices of large insurers, outrageous or malicious wrongdoing was no longer simply an affront to the dignity of a single victim. Instead, the affront was to all affected by the goods or services or, given the reach of the misconduct, the affront was viewed as one to society as a whole. In this view, because the "wrong" was directed beyond the immediate plaintiff, punitive damages awards needed to be based on the overall scope of the wrong in order to punish and deter the mass torts. This broad view of punitive damages fully supports the \$290 million punitive damages award in the present case. (113 C.A.4th 745.)

(b) *Campbell* impliedly disapproved this broad view. Under its reasoning, the legitimate state goal that punitive damages may seek to achieve is the condemnation of such conduct as has resulted in outrage and humiliation *to the plaintiff before the court*; it is not a permissible goal to punish a defendant for everything else that it may have done wrong. (113 C.A.4th 749.) In other words, deterrence, under *Campbell*, arises as a natural result of imposing damages over and above traditional compensatory damages, not from the imposition of sanctions that are actually disabling to the defendant. (113 C.A.4th 750.)

(c) In the present case, the jury was instructed on the amount of punitive damages that would have a deterrent effect on defendant in view of its financial condition. Under the principles enunciated in *Campbell*, this was error. It was also error to instruct that the jury must find malice, without also restricting the amount of the award. (113 C.A.4th 753.)

(d) Applying the three factors first enunciated in *Gore, supra*, i.e., (1) reprehensibility, (2) the relationship between compensatory and punitive damages, and (3) comparable civil and criminal punishments, the first factor clearly justifies a substantial punitive damages award, while the third factor requires neither a higher or lower ratio between compensatory and punitive damages. With respect to the second factor, this was, in part, a wrongful death action, but there was no award reflecting the "outrage" done to the deceased family members. Thus, in death cases, the proportionality inquiry must focus on the relationship of punitive damages to the harm to the deceased victim, not merely to the compensatory damages awarded. "We do not perceive that due process considerations of proportionality between compensatory and punitive damages require a state to establish a system that inadequately punishes and deters malicious conduct that, with reasonable foreseeability, may cause death; we hold that death actions present an example of the type of extraordinary case contemplated by *State Farm* ... in which a single-digit multiplier does not necessarily form an appropriate limitation upon a punitive damages award." (113 C.A.4th 761.)

(e) Here, a punitive damages award of triple the compensatory damages is proper. In addition, an award of \$ 10 million is awarded to the administrator of the estates to ensure that killing is not made more profitable than injuring. The total award of \$ 23,723,287 is not more than a properly instructed jury would have awarded and is not unconstitutionally unreasonable. Although a single-digit multiplier is not required in this case, the punitive damages award is, nevertheless, approximately five times the compensatory damages. (113 C.A.4th 673.) (See *BMW of North America v. Gore*, *supra* [\$ 2 million punitive damages award against automobile manufacturer for failing to tell new car purchaser that parts of his vehicle had been repainted after predelivery damage violated due process]; *Diamond Woodworks v. Argonaut Ins. Co.* (2003) 109 C.A.4th 1020, 1051, 135 C.R.2d 736 [to comport with *Campbell*, ratio of punitive to compensatory damages cannot be greater than four to one]; *Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 C.A.4th 1253, 1289, 11 C.R.3d 317 [sanctions of \$ 20 million for tobacco company's improper advertising in California could not properly be based on company's nationwide financial figures without violating its due process rights]; *Bardis v. Oates* (2004) 119 C.A.4th 1, 21, 24, 14 C.R.3d 89 [in case involving breach of fiduciary, ratio of 42 to 1 was denial of due process; under facts presented, ratio of 9 to 1 was justifiable]; *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 C.A.4th 1061, 1081, 13 C.R.3d 586 [punitive damages award of \$ 1.7 million was excessive and therefore violated due process in loss payee's action against insurer for bad faith and fraud]; 23 California Lawyer 37 (August 2003) [punitive damages after *Campbell*]; 117 Harv. L. Rev. 317 [*Campbell*]; 31 Pepperdine L. Rev. 477 [same]; 31 Western State L. Rev. 27 [same].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Simon v. San Paolo U.S. Holding Co.* (2005) 35 C.4th 1159, 1179, 29 C.R.3d 379, 113 P.3d 63, Supp., *infra*, §1623A [total damage award of \$ 5,000 compensatory and \$ 1.7 million punitive; under three guideposts for determining constitutionality, punitive damages award reduced to \$ 50,000]; *Johnson v. Ford Motor Co.* (2005) 135 C.A.4th 137, 144, 37 C.R.3d 283 [compensatory damages of \$ 17,800 and punitive damages of \$ 10 million violated due process; defendant's conduct, i.e., concealing automobile's history of transmission repairs and replacements when reselling, justified only single multiplier]; *Gober v. Ralphs Grocery Co.* (2006) 137 C.A.4th 204, 222, 40 C.R.3d 92 [ratio between punitive and compensatory damages of at least 25 to 1 could not be justified in sexual harassment lawsuit against employer, because employer did not act with extreme reprehensibility and damages were not unusually small, hard to detect, or hard to measure; under facts, maximum allowable ratio was 6 to 1]; *Buell-Wilson v. Ford Motor Co.* (2006) 141 C.A.4th 525, 566, 46 C.R.3d 147 [in case involving SUV rollover, reduced compensatory damages of approximately \$ 27.6 million did not justify punitive damages of \$ 245 million; punitive damages reduced to \$ 55 million]; *Grassilli v. Barr* (2006) 142 C.A.4th 1260, 1287, 48 C.R.3d 715 [in civil rights action based on plaintiff motorist's harassment for complaining about officer's conduct, punitive damages violated due process; although conduct was reprehensible, motorist was not assaulted or imprisoned, ratio of 8 to 1 between punitive and compensatory damages was excessive in light of motorist being fully compensated, and statutes allowed three times damages as civil penalties for civil rights violations]; *Holdgrafer v. Unocal Corp.* (2008) 160 C.A.4th 907, 927, 73 C.R.3d 216 [oil company's conduct of concealing oil spills and leaks from public and government, denying responsibility, and misrepresenting magnitude of damage to environment was not similar to its conduct toward landowners whose property was contaminated with oil spilled from pipeline, and thus punitive damages award to landowners based on evidence of company's concealment of other incidents violated due process; following *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585, text, p. 1051]; 57 Hastings L. J. 827 [continuing to punish and deter despite *State Farm Mut. Auto. Ins. Co. v. Campbell*]; 41 San Diego L. Rev. 1465 [continued viability of multiple punitive damages after *Campbell*]; 32 Western State L. Rev. 1 [law of punitive damages after *Campbell*]; 33 Western State L. Rev. 90 [questions that *Campbell* did not answer].

Where substantial compensatory damages have been awarded, and the defendant's conduct involves only economic damage to a single plaintiff who is not particularly vulnerable, a punitive damages award that exceeds the compensatory damages awarded is not consistent with due process. (*Jet Source Charter v. Doherty* (2007) 148 C.A.4th 1, 5, 8, 55 C.R.3d 176 [charterer of private aircraft sued aircraft dealers for fraud in negotiating purchase of aircraft and received compensatory damages of \$ 6.5 million; punitive damages could not exceed that amount].) *Correction:* Page 1057, line 10, "*Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh*" should be "*Textron Financial Corp. v.*

National Union Fire Ins. Co. of Pittsburgh".



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CHAPTER IX - Torts

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2. Constitutionality of Awards.
d. (New) Disgorgement of Profits.

6 *Witkin Sum. Cal. Law Torts* § 1568A

[§ 1568A] (New) Disgorgement of Profits.

In *Johnson v. Ford Motor Co.* (2005) 35 C.4th 1191, 29 C.3d 401, 113 P.3d 82, plaintiffs purchased a used car from defendant dealership, which was acting as an agent for defendant car manufacturer. Plaintiffs were told that the automobile had a clean repair record when, in fact, the previous owners had experienced transmission problems so significant that they had requested that defendant repurchase the car as a "lemon," as required by the Song-Beverly Consumer Warranty Act (the Lemon Law; C.C. 1750 et seq.; see 4 *Summary* (10th), *Sales*, §314 et seq.). However, defendant construed that law so narrowly that the automobile did not qualify as a lemon. Instead, defendant approved issuance of an "owner appreciation certificate (OAC)," worth up to \$ 5,000 on any trade-in. The previous owners accepted an OAC and traded the car in, which is how it became available to be purchased by plaintiffs. Only after plaintiffs experienced similar transmission problems did they learn of the vehicle's previous repair record. Plaintiffs then sued for intentional and negligent misrepresentation and violation of the Lemon Law. At trial, it was shown that defendant's policy throughout California was to issue OACs for vehicles that were arguably lemons, a procedure that cost defendant significantly less than repurchase under the Lemon Law and that avoided the title branding and additional notice requirements involved in reselling a lemon (see C.C. 1793.23(c)). Defendant's managers also testified that defendant regarded OACs as assistance to the customer, not the dealership, thereby avoiding the requirement of California law to notify future buyers of defects that led to a vehicle's reacquisition by the manufacturer in response to a request by the buyer that the vehicle be either replaced or accepted for restitution for not conforming to express warranties, a requirement that applies even if the vehicle is not reacquired as a lemon (C.C. 1793.23(d)). Plaintiffs' counsel estimated defendant's savings in California from the practice of issuing OACs for vehicles that should have been reacquired as lemons and of failing to provide warranty buyback notices on all vehicles traded in with OACs, thus concealing the vehicles' defects from subsequent buyers, to be \$ 6 million to \$ 10 million per year, and urged that the punitive damages be high enough, in effect, to take those wrongful profits from defendant. Accepting this argument, the trial court awarded plaintiffs \$ 17,811.60 in compensatory damages and \$ 10 million in punitive damages. The Court of Appeal affirmed the decision to award punitive damages, but, holding that defendant could constitutionally be punished only for its fraud on plaintiffs and not for its overall course of conduct, reduced the punitive damages award to \$ 53,435, approximately three times the compensatory damages. *Held*, reversed and remanded.

(a) While both *BMW of North America v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, text, p.

1052, and *State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, were cases in which the evidence of conduct toward others was impermissibly broad, the United States Supreme Court's analysis in each case makes clear that due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff. "We therefore join the numerous courts holding that a civil defendant's recidivism remains pertinent to an assessment of culpability." (35 C.4th 1204.)

(b) A state may use punitive damages as a tool to protect the consuming public, not merely to punish a private wrong. In effecting that goal, the scale and profitability of a course of wrongful conduct by the defendant cannot justify an award that is grossly excessive in relation to the harm done or threatened, but scale and profitability remain relevant to reprehensibility and the size of award warranted, under the *BMW* and *Campbell* guideposts, to meet the state's interest in deterrence. "Nothing the high court has said about due process review requires that California juries and courts ignore evidence of corporate policies and practices and evaluate the defendant's harm to the plaintiff in isolation. California law has long endorsed the use of punitive damages to deter continuation or imitation of a corporation's course of wrongful conduct, and hence allowed consideration of that conduct's scale and profitability in determining the size of award that will vindicate the state's legitimate interests." (35 C.4th 1207.)

(c) To recognize that recidivism remains relevant is not to approve plaintiffs' aggregate disgorgement theory of punitive damages. The aggregate disgorgement theory should be distinguished from the simple return of ill-gotten gains earned from an individual plaintiff. Removal of any profits the defendant has earned by a wrongful act is a logical step toward deterring its repetition or imitation. But calculating punitive damages in an individual tort case by the profits made through similar torts against hundreds or thousands of other individuals creates possibilities for unfairness (to the defendant and other possible claimants), which may be of constitutional dimension. (35 C.4th 1208.)

(d) An award punishing the defendant for dissimilar hypothetical claims of others creates the possibility of multiple punitive damages awards for the same conduct because in the usual case nonparties are not bound by the judgment some other plaintiff obtains. Plaintiffs argued that overpunishment may be avoided by permitting a defendant to present evidence of past punitive damages awards for the same conduct. However, the exact basis for a prior punitive damages award will not always be clear, and even where it is proven that the defendant has already been punished severely for a course of conduct that included harm to the current plaintiff, there is no guarantee the jury or court will agree to deny the plaintiff before them recovery of punitive damages simply because another plaintiff, in another court, has already recovered. (35 C.4th 1209.)

(e) An aggregate disgorgement theory does not fit easily within the *BMW/Campbell* guideposts. Although the scale and profitability of a corporate practice is related to its reprehensibility, gains made over some period of time and the harm or potential harm to an individual plaintiff are not necessarily related. An award of disgorgement of all profits from a group of transactions similar to that which harmed the plaintiff (but not defined through the procedural limits of a class action) is therefore likely to be disproportionate to the individual plaintiff's compensatory award. (35 C.4th 1210.)

(f) Here, plaintiffs claimed to have justified the punitive damages award by proving that in 2000 and 2001, defendant issued about 1,300 OACs per year in California, that each OAC transaction represented a potentially dangerous vehicle that is resold to an unsuspecting consumer without disclosure of material facts, and that by issuing OACs instead of replacing or repurchasing these vehicles, defendant saved \$ 6,000 to \$ 10,000 per vehicle. Plaintiffs' proof, however, suffers from several major deficiencies.

(1) Plaintiffs nowhere explain the pertinence of the 2-year period they used to estimate profits. In 1997, defendant issued an OAC to the former owners for the vehicle, and plaintiffs bought that vehicle in 1998. Plaintiffs apparently assumed, without referring to any evidence, that defendant's OAC and reacquired vehicle policies and practices were uniform in nature and number from 1997 to 2001. Nor do plaintiffs explain why defendant's profits should be estimated over a 2-year period. (35 C.4th 1211.)

(2) Plaintiffs offered no proof that all OAC transactions--in any period--involved defective vehicles subject to the Lemon Law, much less that all such vehicles were dangerous or unrepaired. To the contrary, defendant introduced evidence that OACs were used to address a variety of customer dissatisfactions other than those involving defects. Even a vehicle with a defect is not necessarily a lemon. A nonconformity requiring a refund or replacement must substantially impair the use, value, or safety of the vehicle, but not every customer complaint rises to that level. Moreover, customers and manufacturers frequently disagree about whether a defect has been repaired or a reasonable number of attempts have been made. (35 C.4th 1211.)

(3) A vehicle that is not a lemon but that is reacquired in response to customer warranty complaints must carry a warranty buyback notice, but its reacquisition under the Lemon Law is not required. Thus, plaintiffs' \$ 6,000 to \$ 10,000 savings estimate, which is derived from comparison of lemon buyback costs with OAC face values, is inapplicable to such a vehicle. Plaintiffs introduced no evidence about how many unrepaired, defective OAC trade-ins fell into this category. (35 C.4th 1212.)

(4) It cannot be assumed that, in every other case in which a vehicle traded in with an OAC was resold, the new buyer was kept entirely in the dark regarding previous repairs and repair attempts. In plaintiffs' case, defendant failed to provide the required historical notices and also concealed, and affirmatively misrepresented, the vehicle's repair history. However, plaintiffs did not show that defendant's California dealers always, or generally, conceal and lie about the repair history of used cars they resell. (35 C.4th 1212.)

(g) "We agree with the Court of Appeal that the \$ 10 million punitive damages award may not ... constitutionally be justified on the basis of disgorgement of profits earned by [defendant] through its entire course of wrongful conduct toward other consumers. In reducing the punitives to a small multiple of the relatively modest compensatory damages award, however, the Court of Appeal apparently failed to adequately consider that [defendant's] fraud was more reprehensible because it was part of a repeated corporate practice rather than an isolated incident." Thus, the Court of Appeal's judgment is remanded for that court to conduct again the independent due process review required by *BMW* and *Campbell*. (35 C.4th 1196.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER IX - Torts

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6 Witkin Sum. Cal. Law Torts § 1568B

[§ 1568B] (New) Harm to Nonparties.

In *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940, plaintiff widow, as the representative of her husband's estate, sued defendant tobacco company, alleging that smoking had caused her husband's death. Finding that defendant had engaged in deceit, the jury awarded plaintiff compensatory damages of \$ 821,000 and punitive damages of \$ 79.5 million. The trial court ruled that the punitive damages award was constitutionally excessive and reduced it to \$ 32 million, but the Oregon Court of Appeals reinstated the original award. In affirming the award, the Supreme Court of Oregon held that it was unnecessary to instruct that defendant could not be punished for harm suffered by persons not before the court. *Held*, on certiorari review, vacated and remanded for further proceedings.

(a) Punishing a defendant for harm caused to nonparties presents several problems that raise constitutional issues. (1) The Due Process Clause prohibits a state from punishing an individual without first providing the individual with an opportunity to present every available defense, in a case such as this, that the nonparty victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary (see *Lindsey v. Normet* (1972) 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36). (2) To permit punishment for injuring nonparty victims would add a dimension without standards to the punitive damages equation, because the jury would be left to speculate on such questions as the number of nonparty victims, the seriousness of their injuries, and the exact circumstances of their injuries. (3) Fundamental due process concerns, i.e., risks of arbitrariness, uncertainty, and lack of notice, will be magnified. (127 S.Ct. 1063, 166 L.Ed.2d 948.) "[S]uch an award would amount to a taking of 'property' from the defendant without due process." (127 S.Ct. 1060, 166 L.Ed.2d 946.)

(b) There is no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming nonparties. Although *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585, text, §1568, said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm that the defendant's conduct could have caused, the same decision made it clear that the potential harm at issue was potential harm to the plaintiff. (127 S.Ct. 1063, 166 L.Ed.2d 949.)

(c) Plaintiff argued that she was free to show harm to other victims, because that harm is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. Defendant does not contest this proposition. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a

substantial risk of harm to the general public, and so was particularly reprehensible. However, a jury may not go further by using a punitive damages verdict to punish a defendant directly for harms that it is alleged to have visited on nonparties. "Given the risks of unfairness ... , it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (e.g., banning cigarettes) upon other States ... , it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. ... [T]he Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." (127 S.Ct. 1064, 166 L.Ed.2d 950.)

(d) The Oregon Supreme Court made three statements indicating a failure to clarify that it was using nonparty harm only with respect to reprehensibility. (127 S.Ct. 1064, 166 L.Ed.2d 950.) (1) *State Farm* held only that a jury could not base its punitive damages award on dissimilar acts of a defendant. This statement is correct. "We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now." (127 S.Ct. 1065, 166 L.Ed.2d 951.) (2) If a jury cannot punish a defendant for the harm that it caused to nonparties, it is difficult to see why the jury can consider this harm at all. This statement is incorrect, because it fails to recognize the distinction between using nonparty harm directly to punish a defendant and using it to show increased reprehensibility. (3) It is unclear how a jury could consider harm to others, yet withhold that consideration from the punishment calculus. This statement raises a practical problem, i.e., how to determine whether a jury, in taking account of harm caused to others under the rubric of reprehensibility, is not also seeking to punish the defendant for having caused injury to others. "[S]tate courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. ... [W]here the risk of that misunderstanding is a significant one--because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury--a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases." (127 S.Ct. 1065, 166 L.Ed.2d 951.)

A dissenting justice failed to see the distinction between taking third-party harm into account in order to assess reprehensibility (permitted) from doing so in order to punish the defendant directly (forbidden). "This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant--directly--for third-party harm." (127 S.Ct. 1067, 166 L.Ed.2d 953.) Another dissenting justice, with whom two justices concurred, argued that the Oregon courts correctly applied the distinction. (127 S.Ct. 1068, 166 L.Ed.2d 954.)

In *Bullock v. Philip Morris USA* (2008) 159 C.A.4th 655, 71 C.R.3d 775, plaintiff smoker, who was diagnosed with lung cancer, filed an action against defendant cigarette manufacturer, seeking damages based on products liability, fraud, and other theories. With respect to punitive damages, the trial court refused to give the following instruction that had been requested by defendant: "You are not to impose punishment for harms suffered by persons other than the plaintiff before you." *Held*, the refusal was error.

(a) The proposed instruction expressed the rule of law, confirmed in *Philip Morris USA v. Williams*, that the jury could not award punitive damages for the purpose of punishing defendant for harming nonparties to the litigation. However, *Williams* added the qualification that evidence of harm caused to others could be considered to determine the reprehensibility of the conduct that harmed plaintiff. (159 C.A.4th 693.)

(b) The fact that the proposed instruction did not include this qualification did not render it incomplete or misleading. Defendant had no duty to qualify its proposed instruction in order to encompass a rule of law favorable to plaintiff. Each party in a civil case has a duty only to propose instructions that accurately state the law supporting its own theory of the case. Accordingly, the proposed instruction was not improper, and the trial court erred by refusing to give it. (159 C.A.4th 693.)

(c) Evidence was presented at trial of defendant's nationwide publicity campaign designed to mislead the public about the adverse health effects of smoking. Moreover, in closing argument, plaintiff's counsel argued that, for each lawsuit against defendant for smoking-related illnesses, 28,000 Californians had died from smoking in the past 40 years. In view of this record, the error in refusing to give the proposed instruction was prejudicial. (159 C.A.4th 694.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Statutory Penalties Distinguished.
a. Nature and Validity of Penalties.

6 *Witkin Sum. Cal. Law Torts* § 1569

[§ 1569] Nature and Validity of Penalties.

Sometimes a statute imposes a penalty in an arbitrary sum irrespective of actual damage suffered. (See, e.g., *B. & P.C. 17206* [unfair competition]; *B. & P.C. 17536* [false and misleading advertising; "not to exceed" \$ 2,500 for each violation]; *C.C. 789.3* [\$ 100 per day for violation of statute prohibiting landlord's interferences with tenant's possession]; *C.C. 1794(c)* [wilful breach of consumer warranty; "two times the amount of actual damages"]; *P.C. 490.5(c)* [shoplifting from merchant or library, liable for rental value of merchandise or fair market value of library materials, and also not less than \$ 50 nor more than \$ 500]; *P.C. 825* [\$ 500 penalty recoverable by arrested person from officer who wilfully refuses or neglects to allow attorney to visit person on his or her request]; see *People v. Superior Court (Jayhill Corp.)* (1973) 9 *C.3d* 283, 107 *C.R. 192*, 507 *P.2d* 1400; *Kinney v. Vaccari* (1980) 27 *C.3d* 348, 165 *C.R. 787*, 612 *P.2d* 877, 12 *Summary* (10th), *Real Property*, §614; *Beltram v. Appellate Dept.* (1977) 66 *C.A.3d* 711, 716, 136 *C.R. 211*; *Rich v. Schwab* (1998) 63 *C.A.4th* 803, 814, 75 *C.R.2d* 170 [when Legislature has set range of penalty for each violation, consideration of defendant's financial condition is not proper; defendant may present evidence of financial condition to establish that court should award less than statutory maximum]; and see 51 *Harv. L. Rev.* 1092; 71 *A.L.R.2d* 986 [cumulative statutory penalties].)

In a case under the unfair competition law, civil penalties differ from punitive damages in the following ways: (1) they do not require evidence of defendant's wealth; (2) they are mandatory; (3) they only require proof by a preponderance of the evidence; (4) their amount is capped; and (5) they do not require a jury trial and are thus not subject to juror passion. (*People v. First Fed. Credit Corp.* (2002) 104 *C.A.4th* 721, 731, 128 *C.R.2d* 542.)

In *Ribas v. Clark* (1985) 38 *C.3d* 355, 212 *C.R. 143*, 696 *P.2d* 637, *supra*, §14, defendant eavesdropped on a telephone conversation between plaintiff and his former wife. In an arbitration hearing held in connection with the former wife's action to set aside a final judgment of dissolution, defendant testified about what she had overheard. Plaintiff then brought this action under *P.C. 637.2*, providing for a recovery of the greater of \$ 3,000 (now \$ 5,000) or three times the actual damages for violations of the Invasion of Privacy Act (*P.C. 631 et seq.*). Defendant argued that the action was barred by the judicial privilege of *C.C. 47* (*supra*, §562 *et seq.*). *Held*, the privilege was inapplicable to plaintiff's cause of action.

(a) *P.C. 637.2* authorizes recovery without proof of actual damages, and this right accrues at the moment of the

violation. (38 C.3d 365.)

(b) The alleged violation took place during a conversation prior to, and not in the context of, any judicial proceeding. P.C. 637.2 thus permits plaintiff to pursue the statutory remedy of a civil action "even though the judicial privilege bars his recovery for the only actual damage he claims to have suffered." (38 C.3d 365.)

Statutory penalties must be consistent with due process. In *Hale v. Morgan* (1978) 22 C.3d 388, 149 C.R. 375, 584 P.2d 512, 12 Summary (10th), *Real Property*, §614, C.C. 789.3, which at the time imposed a \$ 100-per-day fine on landlords who interfered with their tenants' occupancy, was held unconstitutional, because the penalty was mandatory in amount and unlimited in duration. (22 C.3d 397.) (Cf. *Marshall v. Brown* (1983) 141 C.A.3d 408, 417, 190 C.R. 392 [upholding *Lab.C. 1054*, imposing treble damages for violation of *Lab.C. 1050* et seq., 3 Summary (10th), *Agency and Employment*, §354; although statute directs mandatory, mechanical award, it is not "potentially limitless" and capable of serious abuse condemned in *Hale*]; *People v. Fremont Life Ins. Co.* (2002) 104 C.A.4th 508, 520, 128 C.R.2d 463 [on violation of unfair competition law by insurer with notice, civil penalty of \$ 2 million was not abuse of discretion; guidelines of *BMW of North America v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, supra, §1565, are not applicable to civil penalties].)

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3. Statutory Penalties Distinguished.
b. Treble Damages.

6 Witkin Sum. Cal. Law Torts § 1570

[§ 1570] Treble Damages.

Another type of statute allows treble damages, i.e., on proof of actual damage, an award of three times the amount may be given. Examples include the following:

B. & P.C. 17537.4 [use of improper incentives in advertising].

C.C. 52 [discrimination against person on account of sex, color, race, religion, ancestry, or national origin].

C.C. 1710.1 [removal or alteration of serial number].

C.C. 1719 [writing check without sufficient funds].

C.C. 1721 [intentional and malicious destruction of real or personal property at site where substantial improvements are under construction].

C.C. 1882 et seq. [unauthorized taking or diversion of electricity, gas, or water].

C.C. 3333.7 [recovery from commercial vehicle driver's employer where driver was under influence of alcohol or controlled substance at time of injury and employer wilfully failed to comply with specified alcohol and controlled substance requirements].

C.C. 3346, C.C.P. 732 [waste].

C.C.P. 733 [removing timber].

C.C.P. 1029.8 [injury or damage by specified unlicensed person].

C.C.P. 735, 1174 [forcible entry and detainer].

Corp.C. 14400 [wilful and malicious injury to property of cable television corporation].

Govt.C. 12651 [submitting false claim to state or local entity].

P.C. 637.2 [violation of Invasion of Privacy Act].

P.C. 496 [receiving stolen property].

Food & Ag.C. 21855 [taking or killing cattle; four times value of cattle, plus exemplary damages in "proper case"].

C.C.P. 733 authorizes treble damages for harming or removing trees or timber. A provision that treble damages "may be assessed," has been construed to mean that they should not be allowed except in cases where the defendant's acts are wilful and malicious, thus establishing the same test as for punitive damages (*infra*, §1572). (See *Swall v. Anderson* (1943) 60 C.A.2d 825, 141 P.2d 912; *Fick v. Nilson* (1950) 98 C.A.2d 683, 685, 220 P.2d 752; *Crofoot Lumber v. Ford* (1961) 191 C.A.2d 238, 245, 12 C.R. 639.)

C.C.P. 1029.8 imposes treble damages for injury or damage by various unlicensed persons. The statute applies to licenses required by *B. & P.C. 500* et seq. (healing arts), *B. & P.C. 50000* et seq. (professions and vocations generally), *B. & P.C. 18600* (boxing and wrestling), and *B. & P.C. 19000* et seq. (Home Furnishings Act). (*C.C.P. 1029.8(a)*.)

It does not apply to an action under *B. & P.C. 17000* (Unfair Practices Act) brought by a person licensed to engage in the activities performed by the unlicensed person or closely related activities. (*C.C.P. 1029.8(e)*.) And the term "unlicensed person" does not cover a person or entity (a) who has provided goods or services within the proper scope of the license under the good faith belief that he or she is properly licensed; (b) whose license has expired for nonpayment of a renewal fee, but who is eligible to renew without qualifying for an original license; and (c) who is licensed under *B. & P.C. 2700* et seq. (Nursing Practice Act) or *B. & P.C. 2840* (Vocational Nursing Practice Act), if the action arises from a claim that the licensee exceeded the scope of the practice authorized by the license. (*C.C.P. 1029.8(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 1060, first line on page, "B. & P.C. 50000 et seq." should be "B. & P.C. 5000 et seq."



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c. Recovery of Both Penalty and Punitive Damages.

6 *Witkin Sum. Cal. Law Torts* § 1571

[§ 1571] Recovery of Both Penalty and Punitive Damages.

(1) *Dual Remedies Permitted*. The fact that a statutory penalty or even criminal liability is imposed for a particular wrongful act does not preclude recovery of punitive damages in a tort action where the necessary malice or oppression is shown, and it is possible that the defendant may be punished criminally and forced to respond in punitive damages for the same act. (See *Greenberg v. Western Turf Assn.* (1903) 140 C. 357, 363, 73 P. 1050; *Perrine v. Paulos* (1950) 100 C.A.2d 655, 224 P.2d 41 [eviction by innkeeper]; *Gombos v. Ashe* (1958) 158 C.A.2d 517, 528, 322 P.2d 933, *infra*, §1574 [dictum]; see *Rest.2d, Torts* §908, Comment a; 2 A.L.R.5th 449 [right to punitive or multiple damages when cause of action renders both available].)

(2) *Election and Waiver*. If the purpose of the penalty is the same as that of punitive damages, the plaintiff cannot obtain double recovery. Hence, a plaintiff who seeks both in a single action must elect to have judgment entered in an amount that reflects either the statutory trebling or the compensatory and punitive damages. (*Marshall v. Brown* (1983) 141 C.A.3d 408, 419, 190 C.R. 392; *Turnbull & Turnbull v. ARA Trans.* (1990) 219 C.A.3d 811, 826, 268 C.R. 856, citing the text; *Clauson v. Superior Court* (1998) 67 C.A.4th 1253, 1256, 79 C.R.2d 747, citing the text [at pleading stage, plaintiff may seek to recover both punitive damages under C.C. 3294 for common law invasion of privacy and statutory penalties under P.C. 637.2(a) for wiretapping and eavesdropping; should plaintiff prevail, election must be made between punitive damages and statutory penalties]; *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 C.A.4th 890, 905, 114 C.R.2d 708 [because punitive damages are based on tort liability, plaintiff may not recover punitive damages based solely on statutory violation, where statute specifically provides for penalty that is punitive in nature; violation of C.C. 798.41].)

In *Troensegaard v. Silvercrest Industries* (1985) 175 C.A.3d 218, 220 C.R. 712, defendant manufactured and sold to plaintiff a mobilehome that exuded formaldehyde fumes in excess of a safe level, causing physical and emotional injuries and other expense. Plaintiff's complaint was based on breach of warranty under C.C. 1797 et seq. (4 *Summary* (10th), *Sales*, §65) and products liability. The jury verdict against defendant was for \$ 90,000 compensatory damages, \$ 55,000 punitive damages, and \$ 90,000 as a "civil penalty" under C.C. 1794(c), which limits the penalty to no more than two times the amount of actual damages. *Held*, the award of punitive damages was improper.

C.C. 3294 permits punitive damages and C.C. 1794 permits a civil penalty. Had the Legislature "intended a double

recovery of punitive and penal damages for the same willful, oppressive, malicious, and oppressive acts, it would in some appropriate manner have said so." Hence, in seeking the civil penalty together with attorneys' fees and expenses allowed by C.C. 1794, plaintiff waived punitive damages under C.C. 3294. (175 C.A.3d 228.) (See dissenting opinion, arguing that penalty was based on breach of warranty in failing to repair or replace defective mobilehome, while punitive damage award was based on distinct act of fraudulent concealment of unfavorable report on test ordered by defendant.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Election and Waiver.* See *Fassberg Const. Co. v. Housing Authority of Los Angeles* (2007) 152 C.A.4th 720, 60 C.R.3d 375 [city housing authority was precluded from recovering punitive damages against general contractor in action arising from housing authority's construction project, where aggregate punitive portion of treble damages award and civil penalty under state False Claims Act was sufficiently large that any additional award of punitive damages would be duplicative].



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4. Malice.

a. Requirement of Actual Malice.

6 *Witkin Sum. Cal. Law Torts* § 1572

[§ 1572] Requirement of Actual Malice.

Although the language of C.C. 3294 (*supra*, §1559) might seem to be satisfied with "fictional" or "implied" malice, the general rule, which is followed in California, requires a showing of *malice in fact* or *actual malice*, either by direct evidence of bad motive, or evidence furnished by the nature of the act done. (*Davis v. Hearst* (1911) 160 C. 143, 162, 116 P. 530; *Livesey v. Stock* (1929) 208 C. 315, 321, 281 P. 70 [malice shown; defendant twice deliberately fired shotgun at plaintiff]; *Ross v. Sweeters* (1932) 119 C.A. 716, 724, 7 P.2d 334; *Bergevin v. Morger* (1955) 130 C.A.2d 590, 593, 279 P.2d 136 [malice shown; defendant wantonly and without provocation kicked plaintiffs, causing serious injuries]; *Sturges v. Charles L. Harney* (1958) 165 C.A.2d 306, 321, 331 P.2d 1072 [malice shown from declarations of defendant]; *Leavy v. Cooney* (1963) 214 C.A.2d 496, 503, 29 C.R. 580; *Walton v. Anderson* (1970) 6 C.A.3d 1003, 1009, 86 C.R. 345, citing the text; *Ebaugh v. Rabkin* (1972) 22 C.A.3d 891, 895, 99 C.R. 706 [no basis for award against surgeon who negligently operated on wrong person, even though act may have been technical battery]; *Travelers Ins. Co. v. Leshner* (1986) 187 C.A.3d 169, 200, 231 C.R. 791; *Stewart v. Truck Ins. Exchange* (1993) 17 C.A.4th 468, 483, 21 C.R.2d 338 [no malice shown; despite evidence of insurer's bad faith, there was no evidence of either intent to harm or despicable conduct]; *American Airlines v. Sheppard, Mullin, Richter & Hampton* (2002) 96 C.A.4th 1017, 1045, 117 C.R.2d 685 [while representing one plaintiff, attorney was deponent in second case against same defendant and also gave advice to second-case plaintiff in responding to documents request; while this conduct had potential for conflict of interest, malice necessary for imposition of punitive damages was lacking]; see 22 *Am.Jur.2d* (2003 ed.), *Damages* §556 et seq.; 61 *A.L.R.3d* 984 [wrongful attachment or garnishment]; 93 *A.L.R.3d* 1109 [false arrest or imprisonment]; BAJI, No. 14.75 [driving while intoxicated--actual malice--punitive damages.].) (For statutory definition, see *supra*, §1559; on malice in products liability cases, see *infra*, §1593.)

The requirement is sometimes applied quite strictly. In *Wolfsen v. Hathaway* (1948) 32 C.2d 632, 198 P.2d 1, the court first quoted from *Davis v. Hearst*, *supra*, as follows: "Whatever may be the mode of proving the existence of malice in fact, it is only upon some showing regarded by the law as adequate to establish the presence of malice in fact, that is the motive and willingness to vex, harass, annoy, or injure, that punitive damages have ever been awarded." (32 C.2d 647.) The Court then held that the record showed only tortious acts under a mistaken claim of right after advice of counsel, which could not support that part of the verdict awarding exemplary damages. (32 C.2d 648.) It would seem, however, that the defendant's wrongful motive could have been inferred as a fact from the circumstances. (See *infra*,

§1573.)

West's Key Number Digest, Damages k.91(1)

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b. Inference From Circumstances.

6 *Witkin Sum. Cal. Law Torts* § 1573

[§ 1573] Inference From Circumstances.

Malice in fact may be proved by circumstantial evidence. (See *Bertero v. National General Corp.* (1974) 13 C.3d 43, 66, 118 C.R. 184, 529 P.2d 608, supra, §1554; *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 923, 148 C.R. 389, 582 P.2d 980, infra, §1620; *Coyne v. Nelson* (1951) 107 C.A.2d 469, 475, 237 P.2d 45 [false imprisonment by police officer, evidence of acceptance of money from codefendant, delayed and partly untrue police report]; *Roth v. Shell Oil Co.* (1960) 185 C.A.2d 676, 683, 8 C.R. 514; *Toole v. Richardson-Merrell* (1967) 251 C.A.2d 689, 713, 719, 60 C.R. 398, supra, §1177 [acts done in reckless disregard of injurious consequences]; *Black v. Shearson, Hammill & Co.* (1968) 266 C.A.2d 362, 369, 72 C.R. 157, supra, §795 [same]; *Harris v. Dixon Cadillac Co.* (1982) 132 C.A.3d 485, 494, 183 C.R. 299 [unlawful detention of plaintiff's car by defendant repair shop, in violation of Automotive Repair Act requirement of authorization for repairs]; *Krusi v. Bear, Stearns & Co.* (1983) 144 C.A.3d 664, 679, 192 C.R. 793; *Burnett v. National Enquirer* (1983) 144 C.A.3d 991, 1008, 193 C.R. 206 [preponderance of evidence was sufficient]; *The Nippon Credit Bank, Ltd., Los Angeles Agency v. 1333 North Calif. Boulevard* (2001) 86 C.A.4th 486, 501, 103 C.R.2d 421 [inference that trustor deliberately withheld paying tax on property securing loan in order to punish lender for failing to make interest rate concessions supported finding of malice]; 22 *Am.Jur.2d* (2003 ed.), *Damages* §556 et seq.; BAJI, No. 14.71; CACI, Nos. 3940, 3945, 3947.)

In *Parrott v. Bank of America* (1950) 97 C.A.2d 14, 217 P.2d 89, plaintiff, a teller in defendant bank, was accused by a customer and bank officials of appropriating a customer's deposit. She was interrogated at length, warned that she had better sign a confession or the matter would be turned over to the F.B.I. and prosecution would result, but that if she signed the confession and made restitution the matter would probably be dropped. After agreeing to sign, she consulted her fiancée and refused. She was threatened again, discharged, her account was debited, and the F.B.I. was informed of her probable defalcation. Then the customer came in and admitted having misplaced the deposit. But plaintiff was not restored to her position, the F.B.I. was not sufficiently informed of the facts, and an unfavorable answer was given to a prospective employer's inquiry. She suffered great ill health and a mental and physical breakdown and was awarded \$ 30,000; for loss of health and loss of employment, plaintiff was entitled to compensatory damages; the remainder of the \$ 30,000 was punitive damages. *Held*, the punitive damages award was supported by the following evidence from which the jury could infer malice: (1) The bank refused to reinstate plaintiff when her innocence was demonstrated; (2) the bank's report to federal authorities was not fair and truthful; (3) the bank's later letter to federal authorities was not

an unequivocal retraction; (4) the letter to a prospective employer did not give the real (groundless) reason for her discharge. (97 C.A.2d 24.)

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4. Malice.

c. Conscious Disregard of Rights or Safety.

1. Nature of Problem and Earlier Cases.

6 *Witkin Sum. Cal. Law Torts* § 1574

[§ 1574] Nature of Problem and Earlier Cases.

"Malice implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy, or injure. Mere spite or ill will is not sufficient. Mere negligence, even gross negligence, is not sufficient to justify such an award." (*Gombos v. Ashe* (1958) 158 C.A.2d 517, 527, 322 P.2d 933.) In *Gombos*, plaintiff alleged injuries resulting from defendant's wilful and reckless driving while intoxicated. *Held*, punitive damages could not be recovered. "If, by allegations similar to those here involved, a plaintiff can put into issue his right to punitive damages, it means that contributory negligence cannot be urged as a defense to the punitive damage charge, and, because punitive damages are based on the defendant's ability to pay, it also means that the plaintiffs can offer evidence of the financial status of the defendant. This would convert personal injury cases where intoxication or wilful misconduct are involved from the trial of a negligence case into a field day in which the financial standing of the defendant would become a major issue." (158 C.A.2d 528.) (See 33 A.L.R.5th 303 [automobile driver's intoxication as basis for punitive damages]; on disapproval of *Gombos*, see *infra*, §1575.)

In *G.D. Searle & Co. v. Superior Court* (1975) 49 C.A.3d 22, 122 C.R. 218, plaintiff brought an action against defendant, a pharmaceutical manufacturer, alleging that she used its oral contraceptives and suffered physical and emotional trauma. Defendant demurred, the lower court overruled the demurrer, and the Court of Appeal issued mandamus to compel sustaining the demurer with leave to amend. The court held that the complaint did not sufficiently plead malice as a ground for an award of punitive damages, but it also explored at length the confusing accumulation of case law on this subject.

(a) *Davis v. Hearst* (1911) 160 C. 143, 162, 116 P. 530, *supra*, §1572, the basic case on which most of the California decisions rest, makes evil motive the central element; and this causes no trouble where the plaintiff charges a deliberate tort. (49 C.A.3d 30.)

(b) Where the charge is of a nondeliberate injury, *wanton and reckless misconduct* has been described as synonymous with malice. "[S]imilar pronouncements utilize *recklessness* as a descriptive term, but only in combination with other pejorative descriptions, such as wantonness, willfulness, intent and conscious disregard of danger." (49 C.A.3d 30.)

(c) A third group of cases "utilize[s] *reckless misconduct* and *reckless disregard* as terms with the independent capacity to sustain exemplary damage awards." (49 C.A.3d 30.)

(d) A fourth group "distinctly reject[s] recklessness as an independent basis for a finding of malice." (49 C.A.3d 31.)

(e) C.C. 3294 (supra, §1559) "views evil motive as the central, essential factor in the malice which justifies an exemplary award." And this calls upon the jury to assess the defendant's actual state of mind; "it is not satisfied by characterizing his conduct as unreasonable, negligent, grossly negligent or reckless." (49 C.A.3d 31.)

(f) The shifting decisional definitions may indicate "judicial restlessness with the *Davis v. Hearst* formula" as applied to products liability suits against manufacturers of dangerous products. "In a personal injury action the notion of conscious disregard of the *safety* of others logically may be substituted for that of disregard of the *rights* of others. We suggest *conscious disregard of safety* as an appropriate description of the *animus malus* which may justify an exemplary damage award when nondeliberate injury is alleged." (49 C.A.3d 32.)

In *Seimon v. Southern Pac. Trans. Co.* (1977) 67 C.A.3d 600, 607, 136 C.R. 787, the court followed the *Searle* analysis and applied its test of "conscious disregard of safety" to defendant's conduct in knowingly allowing a dangerous crossing to remain without taking corrective action. "[T]he jury could have gleaned from this evidence that defendant had displayed a conscious and callous indifference to, or disregard of, probable harm to motorists." Hence, the trial judge erred in granting a nonsuit on the cause of action for wilful misconduct, and the judgment was reversed for a retrial on the issue of punitive damages. (67 C.A.3d 609.) (See *Schreefel v. Okuly* (1983) 143 C.A.3d 818, 828, 192 C.R. 402 [distinguishing *Seimon*; evidence was insufficient to justify punitive damages instruction].)

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c. Conscious Disregard of Rights or Safety.

2. Rule That Conscious Disregard of Safety Is Sufficient.

6 *Witkin Sum. Cal. Law Torts* § 1575

[§ 1575] Rule That Conscious Disregard of Safety Is Sufficient.

In *Taylor v. Superior Court* (1979) 24 C.3d 890, 157 C.R. 693, 598 P.2d 854, plaintiff sued to recover compensatory and punitive damages for injuries sustained in an automobile collision with a car driven by S. The complaint alleged that (a) S was a longtime alcoholic, aware of his practice of driving while intoxicated and of the dangers of this conduct; (b) he had a long record of arrests and convictions for drunken driving, and was currently on probation and also facing an additional drunk driving charge; (c) he nevertheless continued in employment requiring that he call on commercial establishments where liquor was sold, to deliver or transport liquor in his car; and (d) at the time of the accident, he was transporting liquor and simultaneously consuming an alcoholic beverage and was "under the influence of intoxicants." On the basis of these factual allegations, plaintiff stated that S "acted with a conscious disregard of Plaintiff's safety." *Held*, a cause of action was stated.

(a) Malice does not require actual intent to harm; conscious disregard of safety is enough to support a demand for punitive damages. Prosser states that there must be a fraudulent or evil motive on the defendant's part, "or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton." (24 C.3d 894.)

(b) California cases have expressed the same view; e.g., *Seimon v. Southern Pac. Trans. Co.* (1977) 67 C.A.3d 600, 607, 136 C.R. 787, *supra*, §1574, and *G.D. Searle & Co. v. Superior Court* (1975) 49 C.A.3d 22, 122 C.R. 218, *supra*, §1574. In *Searle*, the court made this distinction: Mere reckless disregard or misconduct is insufficient, but "conscious disregard of safety" is an appropriate description of malice when nondeliberate injury is alleged. "We concur with the *Searle* observation. ... In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences." (24 C.3d 895.)

(c) *Gombos v. Ashe* (1958) 158 C.A.2d 517, 527, 322 P.2d 933, *supra*, §1574, involved a complaint that alleged driving while drunk despite knowledge of the safety hazards. The present complaint's additional allegations of alcoholism and prior arrests and convictions merely confirm defendant's awareness of his inability to drive safely while drunk; the essence of the two complaints is the same. *Gombos*, holding the complaint insufficient, was decided at a time

when it was unclear whether conscious disregard of the safety of others could be the basis of an award of punitive damages. Today, this is the generally accepted view (24 C.3d 896), and, to the extent inconsistent, *Gombos* is disapproved (24 C.3d 900).

(d) The punitive damage award in cases involving conscious disregard of safety also carries out the policy of deterrence, under the view of a substantial majority of the courts that have considered the matter; and "it also represents the better reasoned view." (24 C.3d 897.)

(e) The legislative response to *Coulter v. Superior Court* (1978) 21 C.3d 144, 145 C.R. 534, 577 P.2d 669, supra, §1069, does not call for a different result; punitive damages are awarded against the intoxicated driver, not the supplier of the liquor. "We discern no valid reason whatever for immunizing the driver himself from the exposure to punitive damages given the demonstrable and almost inevitable risk visited upon the innocent public by his voluntary conduct." (24 C.3d 897.)

(f) Finally, defendant contended that many instances of simple negligent conduct could be alleged to involve a conscious disregard of the safety of others; e.g., wilful disobedience of traffic signals or speed limit laws. "That case is not before us and we express no opinion on it, holding only that one who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle demonstrates, in the words of Dean Prosser, 'such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.' ... Although the circumstances in a particular case may disclose similar wilful or wanton behavior in other forms, ordinarily, routine negligent or even reckless disobedience of traffic laws would not justify an award of punitive damages." (24 C.3d 899.)

Two justices, concurring and dissenting, make these points: (a) *Gombos* correctly holds that driving while drunk is reckless but not malicious; (b) persons who drive while drunk are not always conscious of the high risk of harm to others; (c) the present complaint contains allegations of repeated drunk driving and complete awareness of the possible consequences, so that a jury may conclude that defendant acted with a conscious disregard of the safety of others. But to go any further would open a Pandora's Box: The majority opinion allows the claim of punitive damages to be based on the mere allegation that "the driver had taken enough wine at dinner to be classified as legally under the influence of alcohol and knew that he would have to drive home." (24 C.3d 900.) Another justice dissented at length, claiming in part that *Gombos v. Ashe* was correctly decided. (24 C.3d 901.)

Nolin v. National Convenience Stores (1979) 95 C.A.3d 279, 157 C.R. 32, decided before *Taylor*, reached the same conclusion in a different factual setting. Plaintiff sued for damages sustained from a slip-and-fall accident in the self-service gasoline pump area of defendant's market. The jury awarded compensatory damages of \$ 68,101 (reduced by 10% for comparative fault), and punitive damages of \$ 50,000. *Held*, affirmed.

(a) Plaintiff made a sufficient showing of malice by the following evidence: (1) Defendant's store manager was aware of a defective pump nozzle that spilled gasoline, and of prior incidents of slip-and-fall, and reported these matters to defendant's district representative, but no attempt was made to repair the equipment. (2) The store also sold motor oil by the can, without providing methods of opening cans or pouring the oil into the engine; and customers, borrowing ordinary can openers and fashioning makeshift funnels, frequently spilled oil. (3) Defendant had no adequate cleanup procedure and no warning signs advising patrons of the hazards. (95 C.A.3d 288.)

(b) "Defendant's established inattention to the danger showed a complete lack of concern regarding the harmful potential--the probability and likelihood of injury. The entire nature of defendant's operation, as it was presented to the jury, reflected defendant's overriding concern for a minimum-expense operation, regardless of the peril involved. This concern was evidenced by the method of deployment of clerks, the absence of maintenance personnel, and the absence of necessary equipment for handling oil sold to customers. The evidence also established that the employees who observed the danger daily communicated it upward to supervisory personnel, but to no avail." (95 C.A.3d 288.) (See *Bell v. Sharp Cabrillo Hosp.* (1989) 212 C.A.3d 1034, 1043, 260 C.R. 886 [under either subjective or objective test,

hospital did not consciously disregard safety of others in failing to conduct complete review of competence of longtime staff physician].)

The impact of *Taylor* was the subject of considerable comment. (See 68 *Cal. L. Rev.* 911; 31 *Hastings L. J.* 307; 36 *Hastings L. J.* 793; 8 *Pepperdine L. Rev.* 117; 8 *San Fernando Valley L. Rev.* 219; 20 *Santa Clara L. Rev.* 1013.) (On conscious disregard of safety in products liability cases, see *infra*, §1593; for statutory definition incorporating conscious disregard of safety, see *supra*, §1559.)

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3. Rule Is Retroactive.

6 *Witkin Sum. Cal. Law Torts* § 1576

[§ 1576] Rule Is Retroactive.

Mau v. Superior Court (1980) 101 C.A.3d 875, 161 C.R. 895, held that *Taylor v. Superior Court* (1979) 24 C.3d 890, 157 C.R. 693, 598 P.2d 854, supra, §1575, should not be applied retroactively because (a) there can be no retroactive deterrence of intoxicated drivers, and (b) insurance companies relied on the earlier law in figuring rates. *Busboom v. Superior Court* (1980) 113 C.A.3d 550, 169 C.R. 886, disagreed: "It is unlikely drunk drivers are deterred by the threat of punitives over and above already existing risks of drunk driving (e.g., loss of license, jail sentence, death or injury, cancellation of insurance, loss of status in some communities). As for insurance companies, they fix their rates with reference to many factors and their policies do not cover punitive damages." (113 C.A.3d 553.) The *Busboom* court saw no great burden in retroactive application in view of the short statute of limitations (1 year). (113 C.A.3d 554.)

In *Dawes v. Superior Court* (1980) 111 C.A.3d 82, 168 C.R. 319, decided after *Mau* but before *Busboom*, the court found a way to apply the conscious disregard of safety doctrine to an accident case arising before *Taylor* without reliance on *Taylor*. The trial judge struck out the allegations supporting the claim for punitive damages on the grounds that at the time of the accident, *Gombos v. Ashe* (1958) 158 C.A.2d 517, 527, 322 P.2d 933, supra, §1574, was controlling, and that under *Mau*, *Taylor* should be given only prospective effect. *Held*, mandamus granted to compel restoration of the pleading.

(a) Since 1974, the term "malice" in C.C. 3294 has been interpreted as including a conscious disregard of safety. *Taylor* did not change the law in this regard; it merely held that contrary to *Gombos v. Ashe*, driving a vehicle while intoxicated may in appropriate circumstances evidence a conscious disregard of safety. (111 C.A.3d 88.)

(b) The pleading in the instant case set forth much more than drunken driving: It was alleged that defendant ran a stop sign, zigzagged in and out of traffic at excessive speed when many pedestrians and bicyclists were in the immediate vicinity, and that he and his passenger falsely reported to the police that the passenger was driving. (111 C.A.3d 88.)

(c) The fact that no California decision before *Taylor* had approved recovery of punitive damages in an action arising out of a vehicle accident caused by a drunken driver is not a bar to that recovery. "There is not and there never

was one rule of law for intoxicated driving cases and another rule of law for other types of cases." (111 C.A.3d 90.)

Accordingly, the court did not reach the question whether *Mau* correctly held that *Taylor* should be given only prospective effect. (111 C.A.3d 87.) The issue was resolved in *Peterson v. Superior Court* (1982) 31 C.3d 147, 150, 164, 181 C.R. 784, 642 P.2d 1305, disapproving *Mau* and holding that the *Taylor* rule should be applied retroactively.

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d. Ignorance of Injured Party's Identity.

6 Witkin Sum. Cal. Law Torts § 1577

[§ 1577] Ignorance of Injured Party's Identity.

The contention that a punitive damages award is improper where the tortfeasor is ignorant of the identity of the injured party at the time the tort is committed was rejected in *Ramona Manor Convalescent Hosp. v. Care Enterprises* (1986) 177 C.A.3d 1120, 1141, 225 C.R. 120, a case involving intentional interference with prospective economic advantage (see supra, §853 et seq.). "There are many California decisions imposing punitive damages irrespective of the defendant's knowledge of the victim's specific identity. *Taylor v. Superior Court* ... and its progeny approve punitive recoveries against drunk drivers. ... Obviously a drunk driver does not know the specific identity of his victim. Products liability cases imposing punitive damages on manufacturers of pharmaceuticals and medical supplies are also inconsistent with [defendant's] contention; these cases require a conscious disregard of the probable dangerous consequences in marketing the manufacturer's product, not that the manufacturer know the identity of the specific persons who will suffer injury. ... Judicial approval of punitive damage claims in class action disputes is also irreconcilable with [defendant's] 'knowledge of identity' argument." (177 C.A.3d 1142.) (On *Taylor v. Superior Court* (1979) 24 C.3d 890, 157 C.R. 693, 598 P.2d 854, see supra, §1574.)

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5. Proper and Improper Plaintiffs.
a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1578

[§ 1578] In General.

(1) *Basic Rule*. In the absence of statute, only the person immediately injured is entitled to punitive damages. (*People v. Superior Court (Jayhill Corp.)* (1973) 9 C.3d 283, 287, 107 C.R. 192, 507 P.2d 1400.) Hence, an assignee of the cause of action may not recover punitive damages. (*French v. Orange County Inv. Corp.* (1932) 125 C.A. 587, 591, 13 P.2d 1046.)

(2) *Heirs in Wrongful Death Action*. There can be no award of punitive damages to heirs in wrongful death actions; they can recover only for pecuniary loss to themselves. (*Lange v. Schoettler* (1896) 115 C. 388, 390, 47 P. 139; *Doak v. Superior Court* (1968) 257 C.A.2d 825, 838, 65 C.R. 193; *Pease v. Beech Aircraft Corp.* (1974) 38 C.A.3d 450, 461, 113 C.R. 416; *Stencel Aero Engineering Corp. v. Superior Court* (1976) 56 C.A.3d 978, 985, 128 C.R. 691; *Georgie Boy Mfg. v. Superior Court* (1981) 115 C.A.3d 217, 222, 171 C.R. 382 [rejecting equal protection challenge]; *Ford Motor Co. v. Superior Court* (1981) 120 C.A.3d 748, 751, 175 C.R. 39 [same].) (For arguments in favor of allowing punitive damages, see 15 Santa Clara Lawyer 507; 8 U.S.F. L. Rev. 585; for statutory exception where death results from homicide for which defendant has been convicted of felony, see C.C. 3294(d), *infra*, §1586.)

Grimshaw v. Ford Motor Co. (1981) 119 C.A.3d 757, 174 C.R. 348, offered this explanation: "Given that the primary purposes of punitive damages are punishment and deterrence of like conduct by the wrongdoer and others, a rational justification exists for the legislative denial of the right to seek punitive damages to the class of persons who are heirs of a decedent whose claim for such damages survived and was enforceable by the personal representative. Where such claim survives and is recoverable in an action by the personal representative of the decedent ... , to grant the heirs an additional, separate and independent right to recover punitive damages in a wrongful death action would permit double punishment for the same tortious conduct and could also lead to double recovery of punitive damages by the heirs. The purpose of punishment and deterrence will have been served by the enforcement of the punitive damage claim that survived the decedent. There is a likelihood that the heirs would share in the personal representative's recovery of such damages." (119 C.A.3d 835.)

In *Vander Lind v. Superior Court* (1983) 146 C.A.3d 358, 194 C.R. 209, plaintiffs' minor daughter was killed by defendant Amtrak's speeding train, and plaintiffs sued for wrongful death, seeking punitive damages under *Pub.Util.C.* 2106 (see 8 *Summary* (10th), *Constitutional Law*, §§1089, 1090). This section authorizes an action against a public

utility based on an unlawful act or omission, and permits an award of punitive damages if the court finds that the act or omission was wilful. *Held*, no punitive damages were recoverable.

(a) Except under the statute allowing punitive damages where death results from a homicide (see *infra*, §1586), the damages recoverable in wrongful death cases are strictly limited. (146 C.A.3d 364.) And in the absence of statute, punitive damages are allowed only to those directly injured by intentional tortious acts or omissions. (146 C.A.3d 365.)

(b) Neither the language nor legislative history of *Pub.Util.C. 2106* supports the theory that this section was intended to change that rule. (146 C.A.3d 367.) Although *Pub.Util.C. 2106* loosely authorizes exemplary damages to persons "affected," the Legislature intended those damages to be recovered (if at all) only by persons (or their personal representatives) who are themselves the direct victims of a utility's wilful act or omission. A contrary conclusion and a literal application of the statute would expand the class of plaintiffs newly enfranchised to recover exemplary damages (upon proof of actual damages) beyond precedent and reason. Employers, parents of stillborn children and others remotely "affected" might obtain compensatory and exemplary awards against utilities on facts that have previously precluded recovery. (146 C.A.3d 367.)

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5. Proper and Improper Plaintiffs.
b. Recovery by Public Entities.

6 Witkin Sum. Cal. Law Torts § 1579

[§ 1579] Recovery by Public Entities.

Sanger v. Superior Court (1992) 8 C.A.4th 444, 10 C.R. 436, holds that a municipality may recover punitive damages in an action against private parties. The city of Sanger sued defendant chemical companies on causes of action for negligence, nuisance, trespass, and product defect, asserting that the city's water system was contaminated by DBCP manufactured, distributed, sold, used, or transported by defendants. The complaint alleged that defendants' acts caused damages in excess of \$ 500,000. Punitive damages were sought on the ground that defendants acted with knowledge of, or in callous, conscious, or reckless disregard of, the toxic and dangerous character of DBCP to humans, and that the chemical would contaminate or destroy the city's property. The trial court, relying on *Los Angeles v. Shpegel-Dimsey* (1988) 198 C.A.3d 1009, 1025, 244 C.R. 507, granted defendants' motion for judgment on the pleadings. *Held*, mandamus issued, directing the court to vacate its order and to issue a new order denying the motion.

(a) The *Los Angeles* case stated two reasons for its conclusion: *First*, a municipality has police power, and by ordinance may impose fines or other penal remedies; hence, it is proper to refuse to permit recovery of punitive damages in the absence of express statutory authority. *Second*, *Govt.C. 818* bars an award of punitive damages *against* a public entity; consequently, to permit a public entity to seek punitive damages would raise "serious questions of equal protection." (8 C.A.4th 448.) "We do not agree with the *City of Los Angeles* in either its statutory interpretation or its constitutional concerns." (8 C.A.4th 448.)

(b) The language of C.C. 3294 is clear and unambiguous; it allows all plaintiffs, both public and private, to recover punitive damages. (8 C.A.4th 448, 449.) And the purposes of punitive damages are advanced by this construction even if the party against whom the punishment is imposed could have been, or actually already had been, punished through the exercise of municipal police power. (8 C.A.4th 449.)

(c) The equal protection concerns of *Los Angeles* are not well founded; there is a rational basis for holding that public entities may recover punitive damages but are not liable for those damages. "Requiring the public entity to pay punitive damages would punish the very group imposition of punitive damages was intended to benefit." (8 C.A.4th 450, citing *McAllister v. South Coast Air Quality Dist.* (1986) 183 C.A.3d 653, 228 C.R. 351, *supra*, §230.) The fact that public entities may punish and deter wrongdoers through their police power "could, of course, persuade the Legislature to amend its statutory scheme to prohibit public entities from recovering punitive damages." (8 C.A.4th 450.) But it does

not render unconstitutional the statutory scheme actually devised by the *Legislature*. (8 C.A.4th 450.) (See *Glendale v. Superior Court* (2002) 95 C.A.4th 1266, 1269, 116 C.R.2d 16 [following *Sanger*].)

However, because only those immediately injured are entitled to punitive damages (*supra*, §1578), the Attorney General is not entitled to punitive damages in an action to recover civil penalties for false advertising or unfair competition. (*People v. Superior Court (Jayhill Corp.)* (1973) 9 C.3d 283, 287, 107 C.R. 192, 507 P.2d 1400.)

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Correction: Page 1071, first line of section, citation for *Sanger v. Superior Court* should be 10 C.R.2d 436.



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a. In General.

6 Witkin Sum. Cal. Law Torts § 1580

[§ 1580] In General.

Punitive damages can be given only against a wrongdoer. The following rules apply:

(1) *Wrongdoer's Estate*. An award cannot be given after the wrongdoer's death, against his or her estate. (*C.C.P.* 377.42; *Evans v. Gibson* (1934) 220 C. 476, 489, 31 P.2d 389; see *Leavitt v. Gibson* (1935) 3 C.2d 90, 108, 43 P.2d 1091 [award permitted by nunc pro tunc judgment; criticized in 24 Cal. L. Rev. 479]; *Roddenberry v. Roddenberry* (1996) 44 C.A.4th 634, 666, 51 C.R.2d 907 [former Prob.C. 573 (now C.C.P. 377.42) was not applicable to fraud by decedent's loan-out corporation, which was continuing entity]; *Whelan v. Rallo* (1997) 52 C.A.4th 989, 991, 60 C.R.2d 876, 14 Summary (10th), *Wills and Probate*, §520 [punitive damages awarded in judgment are recoverable even though defendant dies while appeal is pending]; *Rest.2d, Torts* §926; 30 A.L.R.4th 707 [punitive damages claim as surviving death of tortfeasor or person wronged].)

(2) *Minors and Incompetents*. A minor or person of unsound mind is not liable for punitive damages unless at the time of the act he or she was capable of knowing that it was wrongful. (C.C. 41; *Family C.* 6600.)

(3) *Surety*. No award can be made against a surety on an attachment bond. (*Carter v. Agricultural Ins. Co.* (1968) 266 C.A.2d 805, 806, 72 C.R. 462; see 2 A.L.R.4th 1254 [liability of surety on private bond for punitive damages].)

(4) *Vicarious Liability Under Vehicle Code*. There can be no award against a parent or other person with custody, based on the signing of a minor's driving license (*Veh.C.* 17709(b), *supra*, §1258), or against an owner of an automobile driven with permission (*Veh.C.* 17151(b), *supra*, §1261). (See 22 Am.Jur.2d (2003 ed.), *Damages* §§588, 596, 599.)

(5) *Public Entity*. A public entity is not liable for punitive damages. (*Govt.C.* 818; see *supra*, §230; 1 A.L.R.4th 448 [municipal corporation]; on right of municipality to recover punitive damages, see *supra*, §1579.) However, a public entity *other than the state* is authorized to pay that part of a judgment that is for punitive damages upon finding: (a) the judgment was based on an act or omission of an employee or former employee acting within the course and scope of his or her employment; (b) the act or omission was done in good faith, without actual malice and in the apparent best interests of the public entity; (c) payment of the claim or judgment would be in the entity's best interests. An entity of the *state government* is also authorized to pay punitive damages, provided the payment is approved by the Legislature

and recommended by the appointing authority of the employee or former employee whose act or omission was the basis for the judgment. The Legislature and the appointing authority must find that the aforementioned three conditions exist. (*Govt.C. 825(b)*; see *17 Pacific L. J. 794*.)

Govt.C. 825 neither affects the prohibition against punitive damages specified in *Govt.C. 818* nor constitutes a waiver of an entity's immunity from these damages under *42 U.S.C.*, §§1981, 1983, or 1985. (*Govt.C. 825(e)*; see *Newport v. Fact Concerts (1981)* 453 U.S. 247, 101 S.Ct. 2748, 2758, 69 L.Ed.2d 616, 630, 8 Summary (10th), *Constitutional Law*, §840 [no punitive damages may be awarded against city in civil rights action under *42 U.S.C.*, §1983].)

The immunity established by *Govt.C. 818* does not apply to public employees. (*Runyon v. Superior Court (1986)* 187 C.A.3d 878, 882, 232 C.R. 101, supra, §347.)

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 b. Employer.
 1. General Rule of Nonliability.

6 *Witkin Sum. Cal. Law Torts* § 1581

[§ 1581] General Rule of Nonliability.

An employer may be held liable for an employee's tort under the doctrine of respondeat superior, but ordinarily the employer cannot be made to pay punitive damages where he or she neither authorized nor ratified the act. (C.C. 3294(b), *infra*, §1585; *Warner v. Southern Pac. Co.* (1896) 113 C. 105, 111, 45 P. 187; *Lightner Mining Co. v. Lane* (1911) 161 C. 689, 705, 120 P. 771; *McInerney v. United R. of San Francisco* (1920) 50 C.A. 538, 549, 195 P. 958; *O'Donnell v. Excelsior Amusement Co.* (1930) 110 C.A. 685, 690, 294 P. 737; *Alterauge v. Los Angeles Turf Club* (1950) 97 C.A.2d 735, 740, 218 P.2d 802; *Sullivan v. Matt* (1955) 130 C.A.2d 134, 144, 278 P.2d 499; *Ebaugh v. Rabkin* (1972) 22 C.A.3d 891, 895, 99 C.R. 706, citing the text; *Henderson v. Security Nat. Bank* (1977) 72 C.A.3d 764, 773, 140 C.R. 388; *Tri-Delta Engineering v. Insurance Co. of North America* (1978) 80 C.A.3d 752, 759, 146 C.R. 14, citing the text; *Mathieu v. Norrell Corp.* (2004) 115 C.A.4th 1174, 1190, 10 C.R.3d 52; *Rest.2d, Torts* §909; 70 *Harv. L. Rev.* 526; 22 *Am.Jur.2d* (2003 ed.), *Damages* §590 et seq.)

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See *Flores v. AutoZone West* (2008) 161 C.A.4th 373, 386, 74 C.R.3d 178 [customer who was assaulted by employee could not recover punitive damages from employer, as evidence did not support finding that employer had advance notice that employee was unfit, that employer employed him with conscious disregard of rights or safety of others, or that employer ratified or condoned employee's violent treatment of customers].



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6 *Witkin Sum. Cal. Law Torts* § 1582

[§ 1582] Act Authorized or Ratified.

An award may be made against an individual employer who directed or ratified the act, or a corporation whose superior officials directed or ratified the acts of other employees. (See C.C. 3294(b), *infra*, §1585; *McChristian v. Popkin* (1946) 75 C.A.2d 249, 256, 171 P.2d 85 [employer failed to discharge employee guilty of wanton battery]; *Farvour v. Geltis* (1949) 91 C.A.2d 603, 605, 205 P.2d 424 [landlord, whose actual or purported agent removed windows from tenant's apartment, ignored subsequent Health Department notice to replace them]; *Sandoval v. Southern Calif. Enterprises* (1950) 98 C.A.2d 240, 250, 219 P.2d 928 [employees who attacked plaintiff were neither reprimanded nor discharged]; *Schanafelt v. Seaboard Finance Co.* (1951) 108 C.A.2d 420, 423, 239 P.2d 42 [oppressive collection methods; testimony of agent that this was authorized and usual practice of corporation and that it was informed of facts]; *Coats v. Construction & General Laborers Local No. 185* (1971) 15 C.A.3d 908, 915, 93 C.R. 639 [defendant union, with knowledge of outrageous conduct of its business agents, retained them in employment]; *Davis v. Local Union No. 11 Int. Brotherhood of Electrical Workers, AFL-CIO* (1971) 16 C.A.3d 686, 697, 94 C.R. 562 [union business agent given unrestricted authority to act and retained in employment]; *Hale v. Farmers Ins. Exchange* (1974) 42 C.A.3d 681, 691, 117 C.R. 146; *Allard v. Church of Scientology* (1976) 58 C.A.3d 439, 452, 129 C.R. 797; *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 C.A.3d 5, 18, 130 C.R. 416 [disapproving instruction that punitive damages could be awarded against employer under the doctrine of respondeat superior; see *supra*, §1581]; *Hartman v. Shell Oil Co.* (1977) 68 C.A.3d 240, 249, 250, 137 C.R. 244 [circumstantial evidence of ratification was sufficient]; *Spahn v. Guild Industries Corp.* (1979) 94 C.A.3d 143, 156, 156 C.R. 375; *Kiseskey v. Carpenters' Trust for Southern Calif.* (1983) 144 C.A.3d 222, 234, 235, 192 C.R. 492 [allegation that defendant agents of defendant labor union were "acting within the course and scope of such agency and the permission and consent of their co-defendants" was sufficient pleading to support award against principal]; *Siva v. General Tire & Rubber Co.* (1983) 146 C.A.3d 152, 159, 194 C.R. 51; *Greenfield v. Spectrum Inv. Corp.* (1985) 174 C.A.3d 111, 118, 219 C.R. 805; *Pusateri v. E.F. Hutton & Co.* (1986) 180 C.A.3d 247, 253, 225 C.R. 526; *Herrick v. Quality Hotels, Inns & Resorts* (1993) 19 C.A.4th 1608, 1618, 24 C.R.2d 203 [action by hotel guard who was threatened with gun by hotel director of security; hotel manager knew director possessed guns in violation of employer's policy, he was present on prior occasion when director was arrested for assault, and he later promoted director]; *Romo v. Ford Motor Co.* (2002) 99 C.A.4th 1115, 1140, 122 C.R.2d 139 [corporate liability did not require that ratifying act be performed by person occupying managerial position]; 19 Proof

of Facts 3d 437 [punitive damages against employer for complicity in employee's driving misconduct]; 6 *U.C.L.A. L. Rev.* 425 [unfair labor practices]; 19 *U.S.F. L. Rev.* 311 [nonprofit corporation]; 93 *A.L.R.3d* 826 [principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee]; BAJI, Nos. 14.73, 14.73.1; CACI, Nos. 3943, 3944.)

The implication from some of the cases, that retention of an employee with knowledge of the facts necessarily leads to an inference of ratification, was challenged in *Sullivan v. Matt* (1955) 130 *C.A.2d* 134, 278 *P.2d* 499. Defendant Matt was the superintendent of defendant railroad's terminal and defendant Miller was the terminal yardmaster. *Held*, failure to discharge them did not justify an award of exemplary damages against the railroad. "It would be unfair to both the employer and employee to hold that the mere retention of an employee in service, *whose special skill and experience were necessary*, is a ratification of his malicious acts committed within the course of his employment." (130 *C.A.2d* 144.)

In *Weeks v. Baker & McKenzie* (1998) 63 *C.A.4th* 1128, 74 *C.R.2d* 510, plaintiff sued a partner in her former law firm and the firm itself, under *Govt.C. 12940(h)(1)* of the Fair Employment and Housing Act. Plaintiff was awarded punitive damages of \$ 225,000 against the partner and \$ 3.5 million against the firm, based on evidence of numerous instances of sexual harassment. In affirming the punitive damages award against the firm, the court rejected the following arguments:

(a) That no award can be assessed against the employer without a showing that it itself was guilty of malice, oppression, or fraud. All that is necessary to justify a punitive damages award against the employer is to show that it engaged in the conduct defined by *C.C. 3294(b)* (*supra*, §1585). (63 *C.A.4th* 1153.)

(b) That because the employer's liability is merely vicarious, the punitive damages assessed against it can be no greater than those assessed against the individual employee. *C.C. 3294(b)* authorizes an award against the employer based on the employer's own wrongful conduct, not on the basis of its vicarious liability, and there is nothing in the statute limiting the amount of punitive damages against the employer to the amount awarded against the individual employee. Liability under *C.C. 3294(b)* is only vicarious to the extent that the employer is liable for the actions of its officer, director, or managing agent in hiring or controlling the offending employee. (63 *C.A.4th* 1154.)

(c) That *C.C. 3294(b)* requires that an employer have failed to terminate the offending employee before punitive damages can be awarded against it. The statute does not impose a duty on an employer to terminate a harassing employee but, instead, imposes a duty to take reasonable measures to prevent a known harasser from committing future acts of harassment. (63 *C.A.4th* 1156.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Liability in Other Situations.

6 *Witkin Sum. Cal. Law Torts* § 1583

[§ 1583] Liability in Other Situations.

The Restatement follows the view of some courts that hold the employer liable in two other situations:

(1) Where the employer knowingly or recklessly employs an unfit employee, e.g., one of vicious character.
(*Rest.2d, Torts* §909(b).)

(2) Where the employer (usually a corporation) employs an agent in a managerial capacity. This rule is based on the theory that the corporate employer will thereby be deterred from engaging unfit persons for important managerial positions. (*Rest.2d, Torts* §909(c); see *Lowe v. Yolo County Consol. Water Co.* (1910) 157 C. 503, 511, 108 P.297; *California Grape Control Bd. v. Boothe Fruit Co.* (1934) 220 C. 279, 282, 29 P.2d 857; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 C.3d 809, 822, 169 C.R. 691, 620 P.2d 141, 2 *Summary* (10th), *Insurance*, §242; *Agarwal v. Johnson* (1979) 25 C.3d 932, 947, 160 C.R. 141, 603 P.2d 58; *Toole v. Richardson-Merrell* (1967) 251 C.A.2d 689, 712, 60 C.R. 398; *Allard v. Church of Scientology* (1976) 58 C.A.3d 439, 452, 129 C.R. 797, citing the text; *Spahn v. Guild Industries Corp.* (1979) 94 C.A.3d 143, 156, 157, 156 C.R. 375; *Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 813, 174 C.R. 348, *infra*, §1593; 13 *So. Cal. L. Rev.* 140; 30 *Western State L. Rev.* 31 [employer's liability for punitive damages]; BAJI, No. 14.73 [nonbifurcated trial], BAJI, No. 14.73.1 [bifurcated trial], BAJI, No. 14.74 [agent employed in managerial capacity]; CACI, No. 3943 [nonbifurcated trial], CACI, No. 3944 [bifurcated trial].)

In *Kuchta v. Allied Builders Corp.* (1971) 21 C.A.3d 541, 98 C.R. 588, 3 *Summary* (10th), *Agency and Employment*, §24, the rule was extended to apply to the relationship of *franchisor and franchisee*. The franchise agreement provided for extensive control by A over W, particularly the right to terminate the franchise by reason of W's insolvency, failure to maintain sufficient gross sales, and failure to comply with the contractual obligations or with building codes; and the franchise royalty was based entirely on gross receipts. Thus, A received a financial benefit from fraudulently induced contracts, and the agency relationship was equivalent to that of a managerial official. (21 C.A.3d 550.)

SUPPLEMENT: [This section is current through the latest supplement]

The title of CACI, No. 3943 has been changed to [Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated].



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4. Award Only Against Employer.

6 *Witkin Sum. Cal. Law Torts* § 1584

[§ 1584] Award Only Against Employer.

In *Browand v. Scott Lumber Co.* (1954) 125 C.A.2d 68, 269 P.2d 891, the verdict for assault awarded damages as follows: \$ 2,000 compensatory against M, the employee; \$ 2,000 compensatory and \$ 11,000 punitive against S Co., the employer, and B, its general manager. *Held*, affirmed. The verdict did not exonerate the employee so as to negate malice; it was merely silent on punitive damages as to him, and a juror's question indicated that the jury took into consideration M's criminal conviction for the assault. "[S]ince evidence of a defendant's wealth is admissible to enable the jury to determine what amount of punishment should be imposed by compelling him to pay a fine, ... it would appear equally proper to consider, as obviously the jury here did, what other punishment the defendant [M] had received for the same act, and in the exercise of its discretion to conclude that his conviction and fine in the justice's court was sufficient punishment for him. In other words, the jury might well have determined that [M] had been punished but that [B] and the lumber company had not, and by its verdict sought to make the 'example as well as the punishment fit the offense.' " (125 C.A.2d 74.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Codification of Rules.

6 *Witkin Sum. Cal. Law Torts* § 1585

[§ 1585] Codification of Rules.

(1) *In General.* C.C. 3294(b), added in 1980, codifies the rule of nonliability (see *supra*, §1581) and its exceptions (see *supra*, §1582 et seq.). The employer is not liable unless one of the following conditions applies:

(a) The employer "had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others."

(b) The employer "authorized or ratified the wrongful conduct for which the damages are awarded."

(c) The employer "was personally guilty of oppression, fraud or malice."

With respect to a corporate employer, "the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (See C.C. 3294(b).)

Evidence of the employer's ratification and any other finding under C.C. 3294(b) must be by clear and convincing evidence, just as is specifically required by C.C. 3294(a) (*supra*, §1559). (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 C.A.4th 1640, 1642, 3 C.R.3d 258 [whether insurance company ratified agent's fraud].)

(2) *Definition of Managing Agent.* In *White v. Ultramar* (1999) 21 C.4th 563, 88 C.R.2d 19, 981 P.2d 944, plaintiff was dismissed by defendant corporation, which operated a chain of convenience stores, after testifying for another employee at an unemployment compensation hearing. The supervisor who fired plaintiff was a zone manager for defendant, responsible for managing 8 stores with at least 65 employees. The individual store managers reported to the zone manager. The zone manager, in turn, reported to department heads in defendant's retail management department, but they delegated most of the responsibility for running the stores to her. Plaintiff sued defendant for wrongful termination and received a substantial award of punitive damages, in addition to compensatory relief. The Court of Appeal affirmed, upholding the punitive damages award on the ground that the zone manager was a "managing agent" under C.C. 3294(b) because she was the supervisor who fired plaintiff. The Supreme Court granted review to resolve a

conflict in the Courts of Appeal over how to define the statutory term "managing agent." Some courts (see, e.g., *Stephens v. Coldwell Banker Commercial Group* (1988) 199 C.A.3d 1394, 1404, 245 C.R. 606), including the Court of Appeal in this case, broadly defined the term to include supervisory employees who, although their decisionmaking authority may be limited, possess the ability to hire and fire company employees. Others (see, e.g., *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 C.A.4th 397, 421, 27 C.R.2d 457) restricted the term's application to those employees who exercise substantial discretion in their decisionmaking so that their decisions ultimately determine corporate policy. *Held*, judgment awarding punitive damages affirmed, but adopting the restricted definition of "managing agent."

(a) Before its 1980 amendment, the punitive damages statute, C.C. 3294, simply provided for the recovery of punitive damages, in an action for breach of an obligation not arising from contract, against a defendant who was guilty of oppression, fraud, or malice, for the sake of example and by way of punishing the defendant. C.C. 3294(b) was added in 1980 and amended in 1982. The drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages. Thus, for corporate punitive damages liability, the wrongful act giving rise to the exemplary damages must be committed by an "officer, director, or managing agent." (21 C.4th 571.)

(b) Under the principle of *ejusdem generis*, general statutory terms following a listing of specific classes of persons or things must be construed as applying to persons or things of the same general nature or class as those listed. Applying the doctrine to interpret "managing agent," it must be noted that the Legislature placed that term next to the terms "officer" and "director," intending that a managing agent be more than a mere supervisory employee. The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy. (21 C.4th 573.)

(c) The Court of Appeal's overly broad interpretation of the term "managing agent" in this case effectively abrogates the statute's "officer, director, or managing agent" requirement. A rule defining managing agent as any supervisor who can hire or fire employees, regardless of whether he or she possesses substantial authority over decisions that ultimately determine corporate policy, effectively allows punitive damages liability without proof of anything more than simple tort liability. Equating mere supervisory status with managing agent status would create a rule where corporate employers are liable for punitive damages in most employment cases. This rule would defeat the Legislature's intent to discourage corporate acts of oppression, fraud, or malice under C.C. 3294(b), and compromise the limited role and deterrent purpose of punitive damages awards to punish wrongdoers and thereby deter the commission of wrongful acts. It might also discourage employers from making good faith efforts to enforce policies that forbid discrimination or retaliation. (21 C.4th 575.)

(d) The Legislature, in amending C.C. 3294(b), intended that principal liability for punitive damages not depend on employees' managerial levels, but on the extent to which they exercise substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, supervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation are managing agents. Conversely, supervisors who have no discretionary authority over decisions that ultimately determine corporate policy are not managing agents, even though they have the ability to hire or fire other employees. In order to demonstrate that an employee is a true managing agent under the statute, a plaintiff seeking punitive damages must show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business. (21 C.4th 576.)

(e) The scope of a corporate employee's discretion and authority is a question of fact for decision on a case-by-case basis. Under the definition established here, and viewing all facts in favor of the trial court's judgment, the zone manager was a managing agent. The supervision of 8 retail stores and 65 employees is a significant aspect of defendant's business. The zone manager exercised substantial discretionary authority over vital aspects of defendant's business that included managing numerous stores on a daily basis and making significant decisions affecting both store and company policy. In firing plaintiff for testifying at an unemployment compensation hearing, she exercised substantial discretionary authority over decisions that ultimately determined corporate policy in a most crucial aspect of defendant's business. (21 C.4th 577.) (See *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 C.A.4th

1061, 1079, 13 C.R.3d 586 [insurance solicitor as insurer's managing agent; relying on *White v. Ultramar*]; 30 Western State L. Rev. 31 [*White v. Ultramar*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Corporate employer: C.C. 3294(b) does not state that punitive damages cannot be awarded against a corporation for the conduct of an employee, unless the employee is a corporate officer, director, or managing agent. To the contrary, the statute says that punitive damages cannot be awarded against a corporation for conduct of an employee, unless a corporate officer, director, or managing agent has the requisite knowledge, authorized or ratified the employee's wrongful conduct, or personally committed the act of oppression. (*Myers v. Trendwest Resorts* (2007) 148 C.A.4th 1403, 1435, 56 C.R.3d 501 [although supervisor who allegedly harassed employee was not corporate officer, director, or managing agent, critical inquiry was degree of discretion supervisor possessed in making decisions that would determine corporate policy, and triable issue of fact remained whether upper management had sufficient knowledge of supervisor's unfitness to provide basis for punitive damages].)

(2) *Definition of Managing Agent.* See *Gelfo v. Lockheed Martin Corp.* (2006) 140 C.A.4th 34, 63, 43 C.R.3d 874 [terminated employee claiming disability discrimination based on failure to rehire him after layoff did not establish that vice president was employer's "managing agent" for purposes of punitive damages award against employer; employee presented no evidence that vice president exercised substantial discretionary authority over decisions that ultimately determined corporate policy]; *Virtanen v. O'Connell* (2006) 140 C.A.4th 688, 715, 44 C.R.3d 702 [attorney violated duty as escrow holder in stock sales transaction and was liable to prospective seller, along with firm, for value of converted stock; absent firm's advance knowledge or ratification of attorney's actions and absent evidence that attorney exercised substantial discretionary authority over significant aspects of firm's business, imposition of punitive damages against firm was barred as matter of law]; *Wysinger v. Automobile Club of Southern Calif.* (2007) 157 C.A.4th 413, 428, 69 C.R.3d 1 [employee's supervisor was managing agent, and thus his retaliatory conduct towards employee warranted punitive damages award in action against employer under Fair Employment and Housing Act; supervisor was vice president of district office operations, regional managers and regional vice president reported directly to him, he was responsible for day-to-day operations and strategy, and he had authority to move district managers to different offices].



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a. Tort Actions.
1. Personal Torts.

6 *Witkin Sum. Cal. Law Torts* § 1586

[§ 1586] Personal Torts.

Any tort that involves sufficiently reprehensible conduct presents a proper case for punitive damages. The typical examples are intentional torts to the person, such as the following:

(1) *Assault and Battery*. (See *Livesey v. Stock* (1929) 208 C. 315, 321, 281 P. 70 [assault with deadly weapon]; *Ingram v. Higgins* (1951) 103 C.A.2d 287, 290, 229 P.2d 385 [assault by motorist on police officer, striking him with bottle and running car against him]; *Sheward v. Magit* (1951) 106 C.A.2d 163, 167, 234 P.2d 708 [wilful battery with fists, \$ 3,525 compensatory, \$ 1,000 exemplary]; *Sullivan v. Matt* (1955) 130 C.A.2d 134, 143, 278 P.2d 499 [vicious attack with fists and pick handle]; *Bergevin v. Morger* (1955) 130 C.A.2d 590, 593, 279 P.2d 136 [unprovoked attack, kicking plaintiffs]; 6 *Am.Jur.2d* (1999 ed.), *Assault and Battery* §151 et seq.; 98 *A.L.R.3d* 870 [criminal liability as barring or mitigating recovery of punitive damages]; BAJI, No. 14.62; CACI, No. 3925.)

(2) *False Imprisonment*. (See *Coyne v. Nelson* (1951) 107 C.A.2d 469, 475, 237 P.2d 45; 32 *Am.Jur.2d* (1995 ed.), *False Imprisonment* §149 et seq.)

(3) *Intentional Infliction of Emotional Distress*. (See *Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 C.A.3d 376, 404, 89 C.R. 78, supra, §459 [rejecting contention that compensatory and punitive damages for emotional distress constitute improper double recovery].)

(4) *Nuisance Intentionally Maintained*. (See *Stoiber v. Honeychuck* (1980) 101 C.A.3d 903, 920, 162 C.R. 194, 3 *Cal. Proc.* (4th), *Actions*, §146 [breach of warranty of habitability].)

(5) *Wrongful Death Resulting From Homicide*. C.C. 3294(d) creates a right of action under C.C.P. 377.10 et seq. (see supra, §23) based on death resulting "from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time." The C.C.P. 377.62 procedures for joinder and consolidation apply to prevent multiple recoveries of punitive damages based on the same wrongful act. (C.C. 3294(d).) (See 15 *Pacific L. J.* 693.)

(6) *Stalking*. (See *supra*, §662.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Assault and Battery*. See 6 *Am.Jur.2d* (2008 ed.), *Assault and Battery* §142 et seq.

(2) *False Imprisonment*. See 32 *Am.Jur.2d* (2007 ed.), *False Imprisonment* §146 et seq.

(4) *Nuisance Intentionally Maintained*.

Stoiber case:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §150.



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2. Fraud.

6 Witkin Sum. Cal. Law Torts § 1587

[§ 1587] Fraud.

Fraud cases in which punitive damage awards were sustained are numerous. (See *BMW of North America v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589, 1595, 134 L.Ed.2d 809, 822, supra, §1568 [reversing grossly excessive punitive damages award for automobile sales fraud as denial of due process]; *Eatwell v. Beck* (1953) 41 C.2d 128, 134, 257 P.2d 643; *Ward v. Taggart* (1959) 51 C.2d 736, 743, 336 P.2d 534, infra, §1713; *Schroeder v. Auto Driveaway Co.* (1974) 11 C.3d 908, 922, 114 C.R. 622, 523 P.2d 662; *Wyatt v. Union Mortg. Co.* (1979) 24 C.3d 773, 790, 157 C.R. 392, 598 P.2d 45; *Nevada Nat. Leasing Co. v. Hereford* (1984) 36 C.3d 146, 153, 203 C.R. 118, 680 P.2d 1077 [fraudulent bid at auction, pursuant to conspiracy to raise prices by secret fictitious bids]; *Taylor v. Wright* (1945) 69 C.A.2d 371, 384, 159 P.2d 980; *Lawson v. Town & Country Shops* (1958) 159 C.A.2d 196, 204, 323 P.2d 843; *Wright v. Rogers* (1959) 172 C.A.2d 349, 368, 342 P.2d 447; *Southern Calif. Disinfecting Co. v. Lomkin* (1960) 183 C.A.2d 431, 451, 7 C.R. 43 [fraudulent appropriation of employer's customer lists]; *Sharp v. Automobile Club of Southern Calif.* (1964) 225 C.A.2d 648, 653, 37 C.R. 585; *Spencer v. Harmon Enterprises* (1965) 234 C.A.2d 614, 626, 44 C.R. 683; *Toole v. Richardson-Merrell* (1967) 251 C.A.2d 689, 713, 719, 60 C.R. 398, supra, §1177; *Barth v. B. F. Goodrich Tire Co.* (1968) 265 C.A.2d 228, 240, 71 C.R. 306 [dictum: no punitive damages awarded]; *Wetherbee v. United Ins. Co. of America* (1968) 265 C.A.2d 921, 927, 71 C.R. 764; *Black v. Shearson, Hammill & Co.* (1968) 266 C.A.2d 362, 369, 72 C.R. 157, supra, §795; *Oakes v. McCarthy Co.* (1968) 267 C.A.2d 231, 262, 73 C.R. 127; *Mahon v. Berg* (1968) 267 C.A.2d 588, 592, 73 C.R. 356; *Esparza v. Specht* (1976) 55 C.A.3d 1, 8, 127 C.R. 493, infra, §1607; *Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 C.A.3d 101, 135, 135 C.R. 802 [false promise inducing plaintiff to make contract for improvement loan]; *O'Hara v. Western Seven Trees Corp.* (1977) 75 C.A.3d 798, 806, 142 C.R. 487, supra, §817 [defendant landlord intentionally misled plaintiff tenant about serious potential danger]; *Walker v. Signal Cos.* (1978) 84 C.A.3d 982, 996, 149 C.R. 119, supra, §787 [punitive damages were awarded where complaint in separate counts alleged both breach of contract and fraud]; *Rosener v. Sears, Roebuck & Co.* (1980) 110 C.A.3d 740, 748, 168 C.R. 237; *Notrica v. State Comp. Ins. Fund* (1999) 70 C.A.4th 911, 945, 83 C.R.2d 89 [evidence of State Compensation Insurance Fund's concealment of change in method of estimating reasonable claim reserve level, resulting in higher premiums and lower dividends, supported punitive damages award]; 37 Am.Jur.2d (2001 ed.), *Fraud and Deceit* §414; 19 A.L.R.4th 801 [actions by purchasers of real property].)

In *Walton v. Anderson* (1970) 6 C.A.3d 1003, 86 C.R. 345, defendants agreed to sell 270 shares of stock in a corporation almost wholly owned by defendant A, for \$ 40,500, which sum was received and used by the corporation. No permit had been sought or could have been issued. In this action, plaintiff was awarded compensatory damages of \$ 40,500, with \$ 5,000 punitive damages against defendant A and \$ 1,000 punitive damages against defendant W. *Held*, affirmed. Punitive damages were particularly appropriate in this case; compensatory damages--restitution--would have little deterrent effect, for the wrongdoer would run no risk beyond returning what was wrongfully obtained. (6 C.A.3d 1010.) Punitive damages may not be awarded for negligent misrepresentation. (See *Reid v. Moskovitz* (1989) 208 C.A.3d 29, 32, 255 C.R. 910.)

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3. Trespass or Injury to Real Property.

6 *Witkin Sum. Cal. Law Torts* § 1588

[§ 1588] Trespass or Injury to Real Property.

Wilful trespass or intentional injury to real property are occasionally grounds for an award of punitive damages. (See *Brenner v. Haley* (1960) 185 C.A.2d 183, 188, 8 C.R. 224 [plaintiff had lease on fence on which he painted advertisements; defendant wrongfully painted out signs; compensatory \$ 1,500, exemplary \$ 2,000]; *Roth v. Shell Oil Co.* (1960) 185 C.A.2d 676, 681, 8 C.R. 514 [defendant company, without terminating its dealer sales contract, removed its poles and painted out its signs, etc., on plaintiff's property; compensatory \$ 540, exemplary \$ 2,000]; *Donnell v. Bisso Bros.* (1970) 10 C.A.3d 38, 44, 88 C.R. 645, 12 Summary (10th), *Real Property*, §400 [roadbed was bulldozed after action was filed; self-help was improper, because defendant had no title to property destroyed; \$ 5,000 punitive]; *Zimmer v. Dykstra* (1974) 39 C.A.3d 422, 437, 114 C.R. 380 [servient owner's malicious interference with prescriptive easement of access to garage; "somewhat analogous to the 'spite' fence or nuisance cases"]; *Goshgarian v. George* (1984) 161 C.A.3d 1214, 1224, 208 C.R. 321.)

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XVII. DAMAGES: IN GENERAL

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7. Types of Cases.

a. Tort Actions.

4. Wrongful Taking of Personal Property.

6 *Witkin Sum. Cal. Law Torts* § 1589

[§ 1589] Wrongful Taking of Personal Property.

Conversion is a tort that often justifies an award of punitive damages. (See *Haigler v. Donnelly* (1941) 18 C.2d 674, 681, 117 P.2d 331 [money]; *Schroeder v. Auto Driveaway Co.* (1974) 11 C.3d 908, 922, 114 C.R. 622, 523 P.2d 662; *Zhadan v. Downtown L.A. Motors* (1976) 66 C.A.3d 481, 136 C.R. 132, *infra*, §1622; *Krusi v. Bear, Stearns & Co.* (1983) 144 C.A.3d 664, 678, 192 C.R. 793; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §125; 54 *A.L.R.2d* 1361 [punitive damages for conversion of personalty by one other than chattel mortgagee or conditional seller]; 35 *A.L.R.3d* 1016 [wrongful seizure of chattel by one claiming security interest].)

In *Ferraro v. Pacific Finance Corp.* (1970) 8 C.A.3d 339, 87 C.R. 226, B bought a used Cadillac from defendant S, a used car dealer. The car was financed by defendant Pacific, but by a mistake of S's employee, a negotiable certificate of full ownership was given to B. B sold the car to plaintiff, a bona fide purchaser, who, under the law, received full title. When B defaulted in payments, defendants discovered plaintiff's possession, and Pacific, without inquiry about plaintiff's ownership, had the car repossessed at 3 a.m. In response to an inquiry from plaintiff's attorney, Pacific made several statements denying its actions and its interest in the car; and S subsequently obtained a new certificate of ownership by falsely representing to the Department of Motor Vehicles that the original had been lost. Later, S sold the car to a third party. In this action for damages for conversion, plaintiff received a verdict and judgment for \$ 2,812 compensatory damages, and punitive damages of \$ 25,000 against Pacific and \$ 8,000 against S. *Held*, affirmed.

The responsible officers of Pacific--operations manager, district manager, and house counsel--participated in the acts recited, "a high-handed, tortious, and perhaps felonious, taking" of plaintiff's property. (8 C.A.3d 348.) This "whole sorry spectacle of corporate arrogance" had its genesis in a corporate policy: "Whenever in the course of its business some person, rightfully (as here) or otherwise, adversely claimed ownership or a right to possession of a vehicle, the policy required that the car be seized by stealth or by force after which the company would 'ask questions.' It becomes obvious to any reasonable mind that such a policy must be very profitable. With its alert staff of counsel, repossessioners, and other policy enforcers, hundreds, perhaps thousands, of adverse claims which must be made annually are, right or wrong, speedily resolved in Pacific's favor. It is just as obvious that many victims of the policy must be financially unable, or for other reasons reluctant, to cope with Pacific's economic resources and are obliged to relinquish just claims. Such a policy is malicious and oppressive; it is in the public interest that it be curbed." (8 C.A.3d 353.)

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aa. Former Law: Bad Faith Rule.

6 *Witkin Sum. Cal. Law Torts* § 1590

[§ 1590] Former Law: Bad Faith Rule.

In *Seaman's Direct Buying Service v. Standard Oil Co.* (1984) 36 C.3d 752, 769, 206 C.R. 354, 686 P.2d 1158, the court held that the implied covenant of good faith and fair dealing is breached, and a tort action for compensatory or punitive damages lies, where a party attempts to avoid liability by denying, in bad faith and without probable cause, that the contract exists. (For full discussion of case, see 3 *Cal. Proc.* (4th), *Actions*, §165.)

(a) "While the proposition that the law implies a covenant of good faith and fair dealing in all contracts is well established, the proposition advanced by *Seaman's*--that breach of the covenant always gives rise to an action in tort--is not so clear. In holding that a tort action is available for breach of the covenant in an insurance contract, we have emphasized the 'special relationship' between insurer and insured, characterized by elements of public interest, adhesion, and fiduciary responsibility. ... No doubt there are other relationships with similar characteristics and deserving of similar legal treatment." (36 C.3d 768.)

(b) "When we move from such special relationships to consideration of the tort remedy in the context of the ordinary commercial contract, we move into largely uncharted and potentially dangerous waters. Here, parties of roughly equal bargaining power are free to shape the contours of their agreement and to include provisions for attorney fees and liquidated damages in the event of breach. They may not be permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured. In such contracts, it may be difficult to distinguish between breach of the covenant and breach of contract, and there is the risk that interjecting tort remedies will intrude upon the expectations of the parties. This is not to say that tort remedies have no place in such a commercial context, but that it is wise to proceed with caution in determining their scope and application." (36 C.3d 769.)

In accordance with this caution, later cases generally refused to extend the *Seaman's* tort to wrongful termination of employment and to breaches of various types of commercial contracts. (See *Foley v. Interactive Data Corp.* (1988) 47 C.3d 654, 254 C.R. 211, 765 P.2d 373, 3 *Summary* (10th), *Agency and Employment*, §271 [repudiating rule of *Tameny v. Atlantic Richfield Co.* (1980) 27 C.3d 167, 164 C.R. 839, 610 P.2d 1330, that employee can sue in tort for wrongful

discharge]; *Wallis v. Superior Court* (1984) 160 C.A.3d 1109, 1119, 207 C.R. 123, 3 Summary (10th), *Agency and Employment*, §271; *Rulon-Miller v. International Business Machines Corp.* (1984) 162 C.A.3d 241, 253, 208 C.R. 524; *Quigley v. Pet* (1984) 162 C.A.3d 877, 890, 891, 208 C.R. 394 [following instruction was reversible error: "If a contracting party fails to deal fairly and in good faith it is subject to liability for all damages proximately resulting from such conduct"]; *Koehrer v. Superior Court* (1986) 181 C.A.3d 1155, 1167, 226 C.R. 820; *Multiplex Ins. Agency v. California Life Ins. Co.* (1987) 189 C.A.3d 925, 930, 235 C.R. 12 [analysis of *Seaman's* and subsequent cases and suggesting that *Seaman's* rule might apply not only where defendant denied existence of contract, but also where defendant admitted existence of contract but denied liability under it]; *Rogoff v. Grabowski* (1988) 200 C.A.3d 624, 630, 246 C.R. 185 [no allegation that lessor of limousine who left plaintiffs stranded at party denied contract's existence]; *Kruse v. Bank of America* (1988) 202 C.A.3d 38, 58, 248 C.R. 217 [no proof of existence of underlying contract]; *Mitsui Mfrs. Bank v. Superior Court* (1989) 212 C.A.3d 726, 731, 260 C.R. 793; *Kittredge Sports Co. v. Superior Court* (1989) 213 C.A.3d 1045, 1047, 1048, 261 C.R. 857; *Lynch & Freytag v. Cooper* (1990) 218 C.A.3d 603, 611, 267 C.R. 189, 12 Summary (10th), *Real Property*, §734 [no *Seaman's* tort committed by answer to complaint]; *Trustees of the Capital Wholesale Elec. Co. Profit Sharing & Trust Fund v. Shearson Lehman Bros.* (1990) 221 C.A.3d 617, 623, 270 C.R. 566 [insufficient allegations of special relationship between investors and brokerage house to justify tort damages for latter's breach of covenant of good faith]; *Careau & Co. v. Security Pac. Business Credit* (1990) 222 C.A.3d 1371, 1396, 272 C.R. 387 [whether tort damages might be allowed for breach of implied covenant in noninsurance cases appears to be increasingly "problematic"]; *DuBarry Int. v. Southwest Forest Industries* (1991) 231 C.A.3d 552, 571, 282 C.R. 181 [tort recognized by *Seaman's* "is limited to the bad faith denial of the existence of the contract and cannot be extended to the assertion of other defenses to liability"]; *Peterson Dev. Co. v. Torrey Pines Bank* (1991) 233 C.A.3d 103, 119, 284 C.R. 367 [mere fact that lender presented borrower with "escrow statement" did not create special relationship removing transaction from ordinary commercial context]; *Harris v. Atlantic Richfield Co.* (1993) 14 C.A.4th 70, 74, 17 C.R.2d 649; *Stoll v. Shuff* (1994) 22 C.A.4th 22, 28, 27 C.R.2d 249 [no requirement that denial of existence of contract be expressly stated or be made directly to plaintiff]; *Bionghi v. Metropolitan Water Dist. of Southern Calif.* (1999) 70 C.A.4th 1358, 1370, 83 C.R.2d 388 [plaintiff had no cause of action for breach of covenant of good faith and fair dealing where plaintiff relied on same acts and sought same damages as in plaintiff's breach of contract claim and no special relationship was alleged].)

The *Seaman's* decision generated extensive commentary. (See, e.g., 60 *So. Cal. L. Rev.* 509 [discussion of majority and dissenting opinions in *Seaman's* case]; 39 *Stanf. L. Rev.* 161 [economic analysis of damages for bad faith breach]; 21 *U.S.F. L. Rev.* 419, 445, 452, 470 [*Seaman's* and its progeny]; 44 *A.L.R.4th* 1131 [damages recoverable for wrongful discharge of at-will employee].)

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Full discussion of Seaman's case:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §169.



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6 Witkin Sum. Cal. Law Torts § 1591

[§ 1591] Bad Faith Rule Limited to Insurance Cases.

The reasoning in *Seaman's Direct Buying Service v. Standard Oil Co.* (1984) 36 C.3d 752, 769, 206 C.R. 354, 686 P.2d 1158, supra, §1590, was abrogated and the opinion was overruled as "wrongfully decided" in *Freeman & Mills v. Belcher Oil Co.* (1995) 11 C.4th 85, 44 C.R.2d 420, 900 P.2d 669, 3 Cal. Proc. (4th), Actions, §166, involving defendant's promise to pay a law firm for its expenses expended on defendant's behalf. "[T]he *Seaman's* decision has generated uniform confusion and uncertainty regarding its scope and application, and widespread doubt about the necessity or desirability of its holding. These doubts and criticisms, express or implied, in decisions from this state and from other state and federal courts, echoed by the generally adverse scholarly comment ... , convince us that *Seaman's* should be overruled in favor of a general rule precluding tort recovery for noninsurance contract breach, at least in the absence of violation of 'an independent duty arising from principles of tort law' ... other than the bad faith denial of the existence of, or liability under, the breached contract." (See *Norager v. Nakamura* (1996) 42 C.A.4th 1817, 1820, 50 C.R.2d 481 [*Freeman & Mills* applied retroactive to appeals pending on date it was decided]; *Brown v. California Pension Administrators & Consultants* (1996) 45 C.A.4th 333, 346, 52 C.R.2d 788 [following *Freeman & Mills*].) (On insurance cases involving breach of covenant of good faith, see 2 *Summary* (10th), Insurance, §240 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Freeman & Mills case:

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cc. Breach by Surety.

6 *Witkin Sum. Cal. Law Torts* § 1592

[§ 1592] Breach by Surety.

In *Cates Const. v. Talbot Partners* (1999) 21 C.4th 28, 86 C.R.2d 855, 980 P.2d 407, a commercial surety issued a bond in favor of a real estate developer and the bank that provided financing for a construction project as coobligees guaranteeing the contract performance of the general contractor on the project. In a subsequent action by the contractor and the surety against the developer and the bank, the developer and the bank cross-complained against the surety for breach of the implied covenant of good faith and fair dealing in the performance bond. The trial court determined that the surety had breached the covenant and awarded tort damages, including punitive damages. *Held*, reversed.

(a) The coobligees cannot, as a matter of law, recover in tort for the surety's alleged breach of the covenant of good faith and fair dealing implied in the performance bond. Because the covenant of good faith and fair dealing essentially is a contract term that aims to effectuate the contractual intentions of the parties, compensation for its breach is limited to contract rather than tort remedies, other than in the insurance context. (21 C.4th 43.)

(b) The insurance policy cases represent a major departure from traditional principles of contract law that should not be extended to other contract settings. (21 C.4th 46, citing *Freeman & Mills v. Belcher Oil Co.* (1995) 11 C.4th 85, 94, 44 C.R.2d 420, 900 P.2d 669, 3 Cal. Proc. (4th), Actions, §166.) A construction performance bond is neither an insurance policy nor a contract otherwise marked by elements of adhesion, public interest, or fiduciary responsibility, such that an extracontractual remedy is necessitated in the interests of social policy. Obligees have ample power to protect their interests through negotiation, and sureties, for the most part, are deterred from acting unreasonably by the threat of strong statutory and administrative sanctions and penalties, including license suspension and revocation. Contract remedies provide adequate compensation for breach of a construction bond. (21 C.4th 47.)

(c) Because the coobligees cannot, as a matter of law, recover in tort for the surety's alleged breach of the covenant, they also cannot recover punitive damages. Under C.C. 3294(a), punitive damages, which are designed to punish and deter statutorily defined types of wrongful conduct, are available only in actions for breach of an obligation not arising from contract. In the absence of an independent tort, punitive damages may not be awarded for breach of contract even when the defendant's conduct in breaching the contract is wilful, fraudulent, or malicious. (21 C.4th 61.)

SUPPLEMENT: [This section is current through the latest supplement]
Freeman & Mills case:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §170.



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aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1593

[§ 1593] In General.

The issue whether punitive damages may properly be awarded in a products liability case was elaborately considered in *Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 174 C.R. 348. G was fatally injured and her passenger son was permanently injured when their 1972 Ford Pinto, stalled on a freeway, was struck from the rear by another car and burst into flames. The action was brought for wrongful death and personal injuries against Ford Motor Co. on the theory of strict liability for design defects in the car's gas tank. The evidence showed that the 1972 Pinto was conceived as a low-priced subcompact automobile; that the gas tank was placed behind the rear axle leaving insufficient crush space, and also lacked reinforcing members; that crash tests by the company's engineers disclosed the inability of the car to withstand rear-end crashes; that essential changes in the design could have been made at a moderate cost, but the highest level of management nevertheless decided to market the car with its known defects. The jury verdicts were: for the injured son, \$ 2,516,000 compensatory damages and \$ 125,000,000 punitive damages; for the heirs, \$ 559,680 compensatory damages. On defendant's motion for a new trial, the son was required to remit all but \$ 3,500,000 in punitive damages. *Held*, judgment on the verdict affirmed.

(a) *Conscious disregard of safety by manufacturer.* Defendant contended that the "malice" requirement of C.C. 3294 (see *supra*, §1572) is incompatible with the unintentional tort of marketing a defectively designed product. The decisional law is to the contrary. Many cases have interpreted the term to cover "a conscious disregard of the probability that the actor's conduct will result in injury to others." (119 C.A.3d 808, citing *Taylor v. Superior Court* (1979) 24 C.3d 890, 157 C.R. 693, 598 P.2d 854, *supra*, §1575, and *Dawes v. Superior Court* (1980) 111 C.A.3d 82, 168 C.R. 319, *supra*, §1576.) This interpretation "to encompass conduct evincing callous and conscious disregard of public safety by those who manufacture and market mass produced articles is consonant with and furthers the objectives of punitive damages." (119 C.A.3d 810; see *supra*, §1559.) And there is no constitutional infirmity in applying C.C. 3294 to an unintentional tort. (119 C.A.3d 811.)

(b) *Sufficiency of evidence of conscious disregard of safety.* "Through the results of the crash tests Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided

to defer correction of the shortcoming by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted 'conscious disregard' of the probability of injury to members of the consuming public." (119 C.A.3d 813.)

(c) *Corporate responsibility for act of managerial agent.* The evidence brought the case within the tests of *Rest.2d, Torts §909(c)(d)* (see supra, §1583): The results of the crash tests were forwarded up the chain of command, making management aware of the design defects. (119 C.A.3d 813, 814.)

(d) *Amount of punitive damage award.* Defendant contended that the amount, even as reduced by the trial judge, was excessive in that it was many times over the highest previously upheld in California, and exceeded maximum civil penalties that could be imposed under federal or state statutes. This contention is not persuasive:

(1) The amount awarded in other cases is not a valid consideration, and the fact that an award may set a precedent does not render it suspect. (119 C.A.3d 819.)

(2) Applying the criteria of *Neal v. Farmers Ins. Exchange (1978) 21 C.3d 910, 148 C.R. 389, 582 P.2d 980*, infra, §1620: (a) The conduct of Ford's management "was reprehensible in the extreme," and "endangered the lives of thousands of Pinto purchasers." (b) Taking into account defendant's wealth, the punitive award was .005% of Ford's net worth and .03% of its 1976 net income; considering the amount of compensatory damages, the ratio of punitive to compensatory was 1.4 to 1. (c) As to deterrent effect, "[a]n award which affects the company's pricing of its product and thereby affects its competitive advantage would serve as a deterrent." (119 C.A.3d 819, 820.)

(3) The disparity between the maximum fines and monetary penalties and the punitive damage award is not a valid objection. "It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of mass produced defective products that punitive damages must be of sufficient amount to discourage such practices. Instead of showing that the punitive damage award was excessive, the comparison between the award and the maximum penalties under state and federal statutes and regulations governing automotive safety demonstrates the propriety of the amount of punitive damages awarded." (119 C.A.3d 820.)

In *Vossler v. Richards Mfg. Co. (1983) 143 C.A.3d 952, 192 C.R. 219*, proof was offered that defendant manufacturer discovered an engineering error in developing a properly designed prosthetic device, but concealed the error from the medical profession, its own sales personnel, and the orthopedic surgeon who had designed the device. Plaintiff was injured as a result of implanting the defective device in her knee joint. The jury awarded compensatory damages of \$ 25,000 and punitive damages of \$ 500,000. *Held*, judgment affirmed.

(a) *Relation of punitive to compensatory damages.* The award represented a ratio of 20:1, and defendant contended that in California no ratio in a products liability case had exceeded 2:1 (or 7:1 in any jurisdiction). Products liability design cases are distinguishable in that to characterize a cost-benefit decision as conscious disregard of safety of others may sometimes operate unfairly and may tend to discourage product development. But the present case does not involve a design decision; defendant deliberately chose to market a defective product for business reasons. (143 C.A.3d 968.) Its conduct "was marginally less monstrously inhumane than the conduct of defendant in *Grimshaw*, since concealment of Richards' manufacturing error for the sole purpose of protecting its profits merely threatened excruciating pain and crippling immobility to thousands of arthritic patients and anguish to their physicians and their families, not the fiery death that the auto manufacturer visited upon its customers. However, insofar as reprehensibility of conduct was concerned, the jury's award of punitive damages was fully justified." (143 C.A.3d 966.)

(b) *Possibility of multiple awards.* The contention that a high ratio is improper in products liability cases, because of the risk of punishing a manufacturer several times for the same conduct, is answered in *Grimshaw* and *Rest.2d, Torts §908*, Comment e. In any subsequent case, the court may take into consideration punitive damages that have been

awarded in prior suits and that may be awarded in the future. (143 C.A.3d 969.)

Other decisions and commentators have addressed punitive damages in products liability cases. (See *Siva v. General Tire & Rubber Co.* (1983) 146 C.A.3d 152, 158, 194 C.R. 51; *Hilliard v. A.H. Robins Co.* (1983) 148 C.A.3d 374, 395, 397, 196 C.R. 117 [intrauterine birth control device]; *West v. Johnson & Johnson Products* (1985) 174 C.A.3d 831, 867, 220 C.R. 437 [vaginal tampon]; *Gawara v. United States Brass Corp.* (1998) 63 C.A.4th 1341, 1360, 74 C.R.2d 663 [in strict liability case, award of punitive damages requires something more than mere commission of tort]; *Romo v. Ford Motor Co.* (2002) 99 C.A.4th 1115, 1144, 122 C.R.2d 139 [to get vehicle to market quickly, policymakers decided to forgo testing that had previously established that better design and crush resistance was needed; this evidence showed wilful and conscious disregard of safety of others]; 30 Proof of Facts 3d 351 [proving punitive damages in products liability actions]; 54 Am.Jur. Trials 443 [Punitive Damages in Products Liability Litigation]; 4 *Loyola L.A. L. Rev.* 405 [Punitive Damages in Mass-Marketed Product Litigation]; 6 *Pepperdine L. Rev.* 139; 16 *Santa Clara L. Rev.* 895; 52 *Stanf. L. Rev.* 1809 [punitive damages as deterrent to economic efficiency]; 52 *Stanf. L. Rev.* 1821 [corporate benefit-cost analysis respecting risk of punitive damages liability]; 13 *A.L.R.4th* 52 [allowance of punitive damages in products liability case]; 108 *A.L.R.5th* 343 [liability of cigarette manufacturers for punitive damages].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Karlsson v. Ford Motor Co.* (2006) 140 C.A.4th 1202, 1230, 45 C.R.3d 265 [award of punitive damages was proper where passenger was provided only with lap belt, rather than three-point harness]; 24 *A.L.R.6th* 497 [recovery of punitive damages for exposure to asbestos].



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6. Products Liability Action.

bb. Market Share Cases.

6 *Witkin Sum. Cal. Law Torts* § 1594

[§ 1594] Market Share Cases.

In *Magallanes v. Superior Court* (1985) 167 C.A.3d 878, 213 C.R. 547, the court held that in an action based on the market share theory of liability for injuries sustained by ingestion of DES (*Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, *supra*, §1486), punitive damages cannot be awarded.

(a) The *Sindell* opinion deals solely with compensatory damages, and furnishes no authority for a punitive damages award. (167 C.A.3d 884.) A 1983 federal district court decision (*Morris*), applying what it thought to be the California law, held that a punitive damages award may be made. (167 C.A.3d 881, 885.) The *Morris* opinion relied in part on the analogy of punitive damage awards against an employer, but "we view the employer-employee-victim connection" to be substantially different from "the manufacturer-unidentifiable drug-victim connection." (167 C.A.3d 886.)

(b) Public policy considerations call for rejection of punitive damage awards in market share liability cases:

(1) There is a potential for "overkill," when early claimants obtain large awards that may exhaust the economic resources of the alleged wrongdoers and preclude satisfaction of awards of compensatory damages to future claimants. (167 C.A.3d 886.)

(2) The *Sindell* formula provides a logical and reasonable basis for awarding and apportioning compensatory damages, but it is inappropriate for an award of punitive damages. (a) The award is an individualized punishment and deterrent imposed on a particular and identified wrongdoer for acting with malice or oppression. (b) The measure of that malice or oppression requires the determination of the state of mind of the particular defendant. (167 C.A.3d 887, 888.)

(3) One factor in the imposition of punitive damages is the wealth of the defendant; and in each case, there would probably be a lessening of a defendant's net worth that would affect the amount of punitive damages that could be assessed in subsequent cases. (167 C.A.3d 886.)

(4) In a market share case, some suppliers not named as defendants will fortuitously escape liability, while others,

whose conduct was no more culpable and who may not have caused the plaintiff any harm will, by reason of their joinder as defendants, remain subject to the burden of punitive damages. (167 C.A.3d 889.)

(c) "We conclude that the foregoing public policy considerations, i.e., preservation of the rights of future claimants to compensatory damages, the potential for overkill, the punitive effect of numerous and substantial compensatory awards to present and future claimants, the attenuated deterrent effect of long belated awards, and the inherent unfairness of punitive damages in the market share scheme, preclude such damages in market share liability cases." (167 C.A.3d 889.) (See *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 C.A.4th 1645, 1669, 57 C.R.2d 525 [refusing to extend reasoning of *Magallanes v. Superior Court* to asbestos litigation, where each plaintiff must prove individual injury and causation]; 23 *Santa Clara L. Rev.* 185.)

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7. Civil Rights Action.

6 *Witkin Sum. Cal. Law Torts* § 1595

[§ 1595] Civil Rights Action.

Smith v. Wade (1983) 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632, upholding an award of punitive damages in an action under 42 U.S.C., §1983 (8 Summary (10th), *Constitutional Law*, §816 et seq.), made a positive pronouncement on their availability, noting that the precise issue had never before been squarely presented (103 S.Ct. 1629, 75 L.Ed.2d 638, 639.) The action was brought by Wade, a youthful offender in a Missouri Reformatory, against Smith, a guard, alleging that Smith, with knowledge that an assault against him was likely, placed him in a cell with other inmates who beat and sexually assaulted him.

(a) *Standard for award: actual intent is not essential.* In the early common law, a majority of jurisdictions followed the rule that punitive damages could be awarded without a showing of actual ill will or intent to injure. In other words, they permitted punitive damage awards on variously stated standards of negligence, recklessness, or other culpable conduct. (103 S.Ct. 1632, 1634, 75 L.Ed.2d 642, 644.) The same rule applies today, under state cases and *Rest.2d, Torts* §908(2) and Comment b: "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." (103 S.Ct. 1635, 75 L.Ed.2d 646.)

(b) *Standard under §1983 is the same.* There is no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action; "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages." (103 S.Ct. 1637, 75 L.Ed.2d 648.)

(c) *Same threshold for compensatory and punitive damages.* The contention that the deterrent purposes of punitive damages are served only if the threshold is higher than the underlying standard for liability is unsound. There has never been any such common law rule; and both the First and Second Torts Restatements have pointed out that "in torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages." Thus, many courts have held that "punitive damages are available on the same showing of fault as is required by the underlying tort in, for example, intentional infliction of emotional distress, defamation of a public official or public figure, and defamation covered by a

common-law qualified immunity." (103 S.Ct. 1638, 1639, 75 L.Ed.2d 649, 650.)

Four justices dissented, arguing in the main that a wrongful intent is essential to a punitive damage award in actions under 42 U.S.C., §1983.

West's Key Number Digest, Civil Rights k.275, 404

SUPPLEMENT: [This section is current through the latest supplement]



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a. Tort Actions.

8. Job Discrimination Action.

6 *Witkin Sum. Cal. Law Torts* § 1596

[§ 1596] Job Discrimination Action.

(1) *In General.* The California Fair Employment and Housing Act (FEHA; *Govt.C. 12900* et seq.) declares job discrimination to be against public policy and an unlawful employment practice. If a complaint is not resolved by conference or conciliation, an accusation may issue to be heard by the Fair Employment and Housing Commission; if no accusation issues within a specified period after the filing of the complaint and the matter is not otherwise resolved, the Department of Fair Employment and Housing must give the complainant a right-to-sue letter, after which he or she may sue in the superior court. (See 8 *Summary* (10th), *Constitutional Law*, §948 et seq.)

In *Commodore Home Systems v. Superior Court* (1982) 32 C.3d 211, 185 C.R. 270, 649 P.2d 912, two black employees of defendant Commodore alleged that each was discharged under defendant's policy of denying supervisory and management positions to blacks. The prayer sought compensatory and punitive damages. Defendant moved to strike the punitive damages part of the prayer, and, on denial of the motion, sought mandamus. *Held*, writ denied; punitive damages may be recovered in this type of action.

(a) The provision giving the right to sue (*Govt.C. 12970(a)*) does not mention punitive damages, but the statute's silence is not a bar. When a statute recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including punitive damages under C.C. 3294(a), are available unless a contrary legislative intent appears. (32 C.3d 215.)

(b) No legislative intent to preclude punitive damages appears from an analysis of the statutory provisions and the legislative history; and decisions denying punitive damages under federal statutes deal with distinguishable statutory provisions. (32 C.3d 216, 217, 218, 219.)

(c) "Even if the Legislature did limit the remedies available in the administrative setting (a question we need not decide), it has not spoken similarly about the judicial forum. Distinctions between the two kinds of proceedings suggest that restrictions on the agency do not by implication extend to a court." (32 C.3d 220.)

Two justices dissented, arguing that the legislative history does not show an intent to permit recovery of punitive

damages. (32 C.3d 222.)

The Commission, while empowered to award actual damages and to assess administrative fines and civil penalties, lacks authority to grant punitive damages. (*Govt.C. 12970(d)*), codifying holding of *Dyna-Med v. Fair Emp. & Housing Com.* (1987) 43 C.3d 1379, 241 C.R. 67, 743 P.2d 1323.)

(2) *Sexual Discrimination and Harassment.* *Commodore Home Systems* was followed in *Monge v. Superior Court* (1986) 176 C.A.3d 503, 509, 222 C.R. 64, involving a charge of sexual job discrimination and harassment under *Govt.C. 12940*.

(3) *Age Discrimination.* *Commodore Home Systems* was followed in *Stephens v. Coldwell Banker Commercial Group* (1988) 199 C.A.3d 1394, 1404, 245 C.R. 606, upholding an award of punitive damages against a corporation based on age discrimination under *Govt.C. 12940*.

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9. Other Torts.

6 *Witkin Sum. Cal. Law Torts* § 1597

[§ 1597] Other Torts.

Punitive damages have been awarded in other tort actions in which the necessary elements have been shown. The following are examples:

(1) *Defamation*. (See *Roemer v. Retail Credit Co.* (1975) 44 C.A.3d 926, 937, 119 C.R. 82; *Bindrim v. Mitchell* (1979) 92 C.A.3d 61, 74, 155 C.R. 29; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§569, 570; 98 *Harv. L. Rev.* 847; 16 *Loyola L.A. L. Rev.* 99 [defamation in fiction]; BAJI, Nos. 7.12, 7.12.1, 7.12.2; CACI, No. 1700 et seq.; supra, §529 et seq.)

(2) *Malicious prosecution*. (See *MacDonald v. Joslyn* (1969) 275 C.A.2d 282, 293, 79 C.R. 707, supra, §488 [malicious institution of will contest]; 22 *Am.Jur.2d* (2003 ed.), *Damages* §570; 94 A.L.R.3d 791 [defendant's state of mind necessary or sufficient to warrant award of punitive damages in malicious prosecution action]; supra, §469 et seq.)

(3) *Abuse of process*. (See 22 *Am.Jur.2d* (2003 ed.), *Damages* §570; 61 A.L.R.3d 984 [wrongful attachment]; supra, §517 et seq.)

(4) *Slander of title or disparagement of property*. (See *Seeley v. Seymour* (1987) 190 C.A.3d 844, 866, 237 C.R. 282; 7 A.L.R.4th 1219 [slander of title or disparagement of property]; supra, §640 et seq.)

(5) *Interference with contract or prospective economic advantage*. (See *Ramona Manor Convalescent Hosp. v. Care Enterprises* (1986) 177 C.A.3d 1120, 1142, 225 C.R. 120; 22 *Am.Jur.2d* (2003 ed.), *Damages* §570; 44 A.L.R.4th 1078 [interference with contract or business relationship]; supra, §759 et seq.)

(6) *Wrongful eviction*. (See *Tooke v. Allen* (1948) 85 C.A.2d 230, 239, 192 P.2d 804 [court took notice of other decisions dealing with oppression of tenants by same defendant].)

(7) *Unlawful detainer*. (See *Sasson v. Katash* (1983) 146 C.A.3d 119, 121, 126, 194 C.R. 46 [commercial lessee, with knowledge that he had no legal claim and that lessor had made new lease, occupied premises for 5 months and 9 days after lease's expiration]; *Roth v. Morton's Chefs Services* (1985) 173 C.A.3d 380, 388, 218 C.R. 684 [commercial lessee fraudulently breached provision against subletting without lessor's consent and retained possession after 3-day

notice to quit].)

(8) *Trustee's breach of fiduciary duty.* (See *Werschull v. United Calif. Bank* (1978) 85 C.A.3d 981, 1001, 149 C.R. 829, *infra*, §1610; *Vale v. Union Bank* (1979) 88 C.A.3d 330, 339, 151 C.R. 784; cf. *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1986) 185 C.A.3d 1149, 1154, 230 C.R. 276 [breach of fiduciary duty is insufficient basis by itself for punitive damages].)

(9) *Admiralty suit under Jones Act.* (See *Baptiste v. Superior Court* (1980) 106 C.A.3d 87, 94, 164 C.R. 789, 2 Summary (10th), *Workers' Compensation*, §131.)

(10) *Employee's action against employer.* (See *McDonald v. Superior Court* (1986) 180 C.A.3d 297, 302, 225 C.R. 394, 2 Summary (10th), *Workers' Compensation*, §44 [injury aggravated by employer's fraudulent concealment of existence of injury and its connection with employment (*Lab.C. 3602(b)(2)*]).)

(11) *Claim and delivery (replevin).* (See *Knox v. Wolfe* (1946) 73 C.A.2d 494, 504, 167 P.2d 3 [defendants acquired rented property and, upon refusal of their demand for half interest in business, terminated lease and forcibly prevented removal of lessee's fixtures and personal property; \$ 500 award upheld].)

(12) *Medical malpractice.* (See *Baker v. Sadick* (1984) 162 C.A.3d 618, 626, 208 C.R. 676 [action based on fraud and wilful neglect, rather than on simple negligence]; 27 A.L.R.3d 1274 [medical malpractice].)

(13) *Vehicle accident litigation.* (See 17 Proof of Facts 3d 311 [punitive damages in motor vehicle accident litigation]; 18 Proof of Facts 3d 1 [intoxicated driver].)

(14) *Actions involving transport, handling, and storage of toxic or hazardous substances.* (See 39 A.L.R.5th 763 [toxic and hazardous substances].)

SUPPLEMENT: [This section is current through the latest supplement]



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6 *Witkin Sum. Cal. Law Torts* § 1598

[§ 1598] Equity Actions.

In *Rivero v. Thomas* (1948) 86 C.A.2d 225, 239, 194 P.2d 533, an action to establish a constructive trust in real property wrongfully acquired by a fiduciary, the trial judge awarded a money judgment of \$ 5,468.40 plus \$ 500 punitive damages, and imposed a lien on the property to secure payment. *Held*: (a) Although ordinarily punitive damages are not awarded in equity actions, they may be awarded where there is evidence of fraud; but (b) because the purpose of punitive damages is distinct from that for which the trust was imposed, the *lien* can only be made to cover the award of compensatory damages, and the punitive damages must be collected in the ordinary manner. (See 58 A.L.R.4th 844 [power of equity court to award].)

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6 *Witkin Sum. Cal. Law Torts* § 1599

[§ 1599] Alternative Contract or Tort Actions.

The general rule excludes punitive damages in actions based on contract. (See C.C. 3294; *Rest.2d, Contracts* §355; 70 *Harv. L. Rev.* 531; 1 *Summary* (10th), *Contracts*, §876.) However, if the plaintiff has an election of either a contract action or tort action, and sues on the tort theory, punitive damages may be awarded. (See *Jones v. Kelly* (1929) 208 C. 251, 254, 280 P. 942; *Haigler v. Donnelly* (1941) 18 C.2d 674, 680, 117 P.2d 331; *Schroeder v. Auto Driveaway Co.* (1974) 11 C.3d 908, 922, 114 C.R. 622, 523 P.2d 662 [one contract count, two tort counts]; *Foster v. Keating* (1953) 120 C.A.2d 435, 454, 261 P.2d 529; *Wetherbee v. United Ins. Co. of America* (1968) 265 C.A.2d 921, 927, 71 C.R. 764; *Horn v. Guaranty Chevrolet Motors* (1969) 270 C.A.2d 477, 484, 75 C.R. 871 [rescission for fraud]; *Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 C.A.3d 376, 400, 89 C.R. 78, supra, §459; *Kuchta v. Allied Builders Corp.* (1971) 21 C.A.3d 541, 549, 98 C.R. 588 [count for fraudulently inducing plaintiff to enter into contract]; *Rest.2d, Torts* §908, Comment b; 74 *Cal. L. Rev.* 2033 [standards for awards in borderland of contract and tort]; 7 *Cal. Western L. Rev.* 496 [*Fletcher*]; 70 *Harv. L. Rev.* 531; 47 *A.L.R.3d* 314 [*Fletcher*]; supra, §1590.) (For discussion of alternative contract and tort actions, see 3 *Cal. Proc.* (4th), *Actions*, §139 et seq.; on quasi-contract actions, see *infra*, §1713.)

Where the action is a hybrid, i.e., based on both contract and tort theories, and election of the contract theory is essential to maintenance of the action, punitive damages are not recoverable. In *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 C.A.3d 90, 214 C.R. 883, an action against an insurer for bad faith failure to pay a claim, the election to sue in contract was necessary to avoid the tort statute of limitations. Plaintiff nevertheless sought punitive damages on the tort theory. The court, relying on the strict language of C.C. 3294 (supra, §1559), declared that punitive damages can be allowed only for breach of an obligation "not arising from contract." Hence: "When the action proceeds under alternate tort theories in addition to a contract action, then punitive damages may be awarded under the alternative tort theory. ... But if the tort cause of action is time-barred ... , plaintiff must proceed solely on her contract theory; and she may not also proceed on the time-barred tort theory to obtain punitive damages." (169 C.A.3d 107.)

SUPPLEMENT: [This section is current through the latest supplement]
Full discussion of alternative actions:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §144 et seq.



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1. In General.

6 Witkin Sum. Cal. Law Torts § 1600

[§ 1600] In General.

In an action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages may be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages. The court may allow the amended pleading (1) on a motion by the party seeking the pleading and (2) on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to C.C. 3294. The court must deny the motion if it is not filed within 2 years after the complaint or initial pleading is filed or not less than 9 months before the date the matter is first set for trial, whichever is earlier. (*C.C.P.* 425.13(a); see *Johnson v. Superior Court* (2002) 101 C.A.4th 869, 879, 883, 124 C.R.2d 650 [sperm bank was "health care provider" within meaning of C.C.P. 425.13; physicians who screened donors were also "health care providers" because negligence occurred in rendering services for which physicians were licensed]; *Palmer v. Superior Court* (2002) 103 C.A.4th 953, 962, 127 C.R.2d 252 [medical group composed of licensed physicians who provided direct medical service to patients was "health care provider," even though it was not itself licensed]; *Cryolife v. Superior Court* (2003) 110 C.A.4th 1145, 1157, 2 C.R.3d 396 [tissue bank (health dispensary that dispenses human tissue for transplantation and provides tissue-related services that are identified with human health) is health care provider; following *Johnson, supra*, and *Coe v. Superior Court* (1990) 220 C.A.3d 48, 269 C.R. 368, *supra*, §942]; 35 A.L.R.5th 145 [Allowance of Punitive Damages in Medical Malpractice Action]; 109 A.L.R.5th 397 [punitive damages for pharmacist's wrongful conduct in preparing or dispensing prescription--other than under Consumer Product Safety Act (15 U.S.C., §2072)]; on definition of "health care provider," see *C.C.P.* 425.13(b).)

The test of whether an act arose out of professional negligence is whether the act occurred in rendering services for which the health care provider was licensed, not whether the act involved a high or low degree of skill. (*Williams v. Superior Court* (1994) 30 C.A.4th 318, 322, 36 C.R.2d 112 [health care provider was professionally negligent when it failed to warn nurse, who was invited to administer shot and was wounded while it was being given, that patient was known to have violent propensities, especially towards female nurses].)

C.C.P. 425.13 is not jurisdictional, and its protection can be waived, because the statute is procedural in that affects only a remedy, rather than a substantive right. (*Vallbona v. Springer* (1996) 43 C.A.4th 1525, 1535, 51 C.R.2d 311 [by

answering plaintiff's complaint and litigating case for nearly a year before raising issue, defendants waived rights that they might have had under statute].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Vazquez de Mercado v. Superior Court* (2007) 148 C.A.4th 711, 714, 55 C.R.3d 889 [C.C.P. 425.13 did not apply to plaintiffs who sued veterinarian for allegedly failing to advise them of horse's physical problems before they purchased it; other statutes define "professional negligence" as limited to personal injury, and plaintiffs' economic injuries were not "personal" to them]; 34 Southwestern U. L. Rev. 67 [limiting punitive damages in health care field].



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2. Arising Out of Professional Negligence.

6 Witkin Sum. Cal. Law Torts § 1601

[§ 1601] Arising Out of Professional Negligence.

In *Covenant Care v. Superior Court* (2004) 32 C.4th 771, 11 C.R.3d 222, 86 P.3d 290, plaintiffs alleged that (a) decedent elder, who was suffering from Parkinson's Disease, spent time in defendants' skilled nursing facility; (b) defendants, knowing of decedent's condition, failed to provide him with proper care, nutrition, hydration, and medication; (c) decedent was left in his own excrement for long periods, developed infected body sores exposing muscle and bone, and became severely dehydrated; (d) when transferred, decedent was not sent to an acute care facility, as his condition required, but to a 24-hour care facility, where he soon died; and (e) defendants acted with malice and oppression, deliberately failed to report decedent's condition to public authorities, and misrepresented decedent's condition both to himself and to plaintiffs. Plaintiffs filed a motion for leave to amend to claim punitive damages, and defendants opposed on the ground that the motion violated the requirement of *C.C.P. 425.13(a)* that the motions be filed within 2 years after the complaint. The trial court granted the motion to amend, and the Court of Appeal denied writ relief. The question is whether plaintiff's elder abuse claim is one arising out of the professional negligence of a health care provider, when the provider is acting as a custodian for the elderly.

(a) Welf.C. 15657, which deals with recoveries under the Elder Abuse Act (Welf.C. 15600 et seq.), provides that a plaintiff who proves by clear and convincing evidence that a defendant is liable for physical abuse, neglect, or financial abuse, and that the defendant is guilty of recklessness, oppression, etc., is entitled to heightened remedies, in addition to those otherwise provided, such as recovery of attorney fees and costs. Under *C.C.P. 425.13(a)*, in an action for damages "arising out of the professional negligence of a health care provider," no claim for punitive damages may be included unless the plaintiff files a timely motion demonstrating a substantial probability that he or she will prevail on the claim. (32 C.4th 779.)

(b) Plaintiffs relied on *Delaney v. Baker* (1999) 20 C.4th 23, 26, 82 C.R.2d 610, 971 P.2d 986, *infra*, §1687, which held that a cause of action seeking the heightened remedies of the Elder Abuse Act for reckless or oppressive elder abuse is not one based on professional negligence within the meaning of Welf.C. 15657.2, a section of the Elder Abuse Act that excludes causes of action based on professional negligence. Plaintiffs contended that the same result should apply with respect to the use of "professional negligence" in *C.C.P. 425.13(a)*. Although it is clear that "professional negligence," i.e., failure to exercise ordinary knowledge, care, and skill, is not the same as the egregious elder abuse

alleged by plaintiffs, this fact is not dispositive in view of *Central Pathology Service Med. Clinic v. Superior Court* (1992) 3 C.4th 181, 10 C.R.2d 208, 832 P.2d 924, *infra*, §1604, which held that the phrase "arising out of professional negligence" in C.C.P. 425.13(a) applied to proposed additional intentional tort causes of action, as well as to the ordinary negligence causes of action already in the complaint. Defendants contended that *Delaney* and *Central Pathology*, taken together, do not preclude health care providers from being subject to liability under the Elder Abuse Act and also from being protected by the restrictions on pleading punitive damages contained in C.C.P. 425.13. Based more on legislative intent, rather than on a reconciliation of these two cases, this position is rejected. The limitations of C.C.P. 425.13 on actions for damages arising out of professional negligence "were not meant to burden those who pursue the cause of abused elderly persons ... under the Elder Abuse Act." (32 C.4th 781, 783.)

(c) Nothing in the text of C.C.P. 425.13(a) or the Elder Abuse Act suggests that the Legislature meant to link the two statutes. Although statutory elder abuse includes neglect, which in turn includes negligent failure of an elder custodian to provide medical care, "neglect," as used in the Elder Abuse Act, covers an area of conduct distinct from professional negligence, i.e., it refers to failure to provide for an elderly person's basic needs, rather than the substandard performance of medical services. "Thus, the statutory definition of neglect speaks not to the undertaking of medical services, but of the failure to provide medical care." (32 C.4th 783.)

(d) The legislative history of Welf.C. 15657, allowing heightened remedies for egregious elder abuse, reveals that it was intended to shift the Act's focus from reporting abuse and using law enforcement to combat it to making private, civil enforcement profitable. On the other hand, C.C.P. 425.13(a) was enacted to prevent frivolous claims of punitive damages whenever a health care provider was sued for professional negligence. The legislative history of that statute shows that the intent was to protect health care providers only in their capacity as providers and that there was no intent to protect them when acting in any other capacity, such as elder custodians. "Provider" and "custodian" are quite different. The former refers to a person or facility certified pursuant to certain licensing provisions, while an elder custodian is charged with attending to the basic needs of the elderly. (32 C.4th 784.)

(e) The legislative history of the Elder Abuse Act reveals that the term "professional negligence," as used in Welf.C. 15657.2, was mutually exclusive of the abuse and neglect made actionable by the Act. The Legislature apparently concluded that the requirement of Welf.C. 15657 that there be clear and convincing evidence of liability and recklessness, oppression, etc., was sufficient to protect health care providers from liability under the statute for acts of simple or even gross negligence. (32 C.4th 785.)

(f) The Elder Abuse Act was enacted to protect a particularly vulnerable segment of society, and the Legislature added heightened civil remedies for egregious misconduct to enable interested persons to engage attorneys to take up the cause of elderly abused persons. To burden such causes with the procedural requirements of C.C.P. 425.13(a) when claims are made for punitive damages would undermine this legislative intent. (32 C.4th 787.)

(g) C.C.P. 425.13(a) was enacted amid concern over routine inclusion of sham punitive damages claims in medical malpractice actions, and it sought to address this problem by requiring clear and convincing evidence of recklessness, oppression, etc., and by establishing a pretrial mechanism to allow the court to determine whether a claim for punitive damages can proceed. Applying C.C.P. 425.13(a) to an elder abuse cause of action would not substantially reduce sham punitive damages claims in such cases, because a plaintiff claiming heightened remedies under the Elder Abuse Act is already required to prove recklessness, oppression, etc. Nor would that application afford health care providers significant additional protection against unsubstantiated claims for punitive damages. (32 C.4th 788.)

(h) C.C.P. 425.13(a) requires that the motion to be allowed to include a claim for punitive damages be filed within 2 years of the complaint. The purpose of this requirement is to provide a health care provider with notice of a punitive damage claim, as well as to prevent "last minute" insertion of these claims. However, in any elder abuse action, issues of egregious misconduct are, by definition, always present, so that a defendant has the necessary notice from the outset. (32 C.4th 789.)

(i) Defendants failed to acknowledge the factual aspects of *Central Pathology* that qualify its holding, i.e., that the case addressed common law causes of action for fraud and intentional infliction of emotional distress that arose in the medical malpractice context. While *Central Pathology* thus speaks to situations in which claims for punitive damages are, as a factual matter, predicated on mere negligence or a conscious disregard of the rights or safety of others in which intentional torts are nevertheless alleged, its rationale does not extend to situations, as here, in which a claim for punitive damages accompanies allegations of a statutory violation, proof of which will require clear and convincing evidence that the defendant has been guilty of recklessness, oppression, etc., in the commission of physical, neglectful, or financial elder abuse. (32 C.4th 790.)

(j) C.C.P. 425.13(a) does not apply. Nothing in the text, legislative history, or purposes of either C.C.P. 425.13(a) or the Elder Abuse Act suggests that the Legislature intended "to afford health care providers that act as elder custodians, and that egregiously abuse the elders in their custody, the special protections against exemplary damages they enjoy when accused of negligence in providing health care." (32 C.4th 776.) (See *Country Villa Claremont Healthcare Center v. Superior Court* (2004) 120 C.A.4th 426, 434, 15 C.R.3d 315 [elder abuse; following *Covenant Care*].)

In *Palmer v. Superior Court* (2002) 103 C.A.4th 953, 127 C.R.2d 252, supra, §1601, Dr. R, a member of the medical group that was plaintiff's primary care provider, received a request from plaintiff's prosthetist recommending newly-available prostheses. According to a contract between defendant medical group and plaintiff's HMO requiring defendant to make decisions about whether requested equipment was "medically necessary" (utilization review), defendant's medical director determined that the requested prostheses were not a medical necessity. When plaintiff instituted his HMO's appeal process, Dr. R informed him that a letter could be sent to plaintiff's disability insurer questioning whether he was actually disabled (because the level of activity required to justify plaintiff's need for the new prostheses could mean that he was not disabled). Plaintiff sued defendant for intentional and negligent infliction of emotional distress, based on the determination that the equipment was not medically necessary and the threat by Dr. R, and included allegations for punitive damages. In response to defendant's motion, the trial court ordered that the punitive damages allegations be stricken for failure to comply with C.C.P. 425.13, and plaintiff petitioned for mandamus to overturn this order. *Held*, denied; the services provided by defendant on behalf of plaintiff's HMO were ones "arising out of professional negligence" within the meaning of C.C.P. 425.13.

(a) The allegedly injurious utilization review, conducted by defendant's medical director, amounted to a medical clinical judgment such as would arguably arise out of professional negligence. Plaintiff's contention that this was a purely administrative or economic role played by defendant is rejected. Rather, the statutes require that utilization review be conducted by medical professionals, and they must carry out these functions by exercising medical judgment and applying clinical standards. (103 C.A.4th 972.)

(b) With respect to the warning, defendant, as Dr. R's principal, could not be held vicariously liable, because an innocent principal cannot be liable if the agent is not liable (see 2 *Summary* (10th), *Agency and Employment*, §167), and Dr. R. had earlier been dismissed from the action. However, to the extent that Dr. R allegedly acted against plaintiff's interests, by going outside his normal health care provider role, there is still an underlying assumption that he had loyalty or patient advocacy responsibilities toward plaintiff that he was neglecting or misusing, due to his status as a primary health care provider. Accordingly, these intentional infliction of emotional distress allegations against defendant, dealing with pressure and warnings, still fall within the context of professional medical negligence and they therefore qualify as allegations that trigger the procedural protections of C.C.P. 425.13. (103 C.A.4th 972.) (See *Scripps Clinic v. Superior Court* (2003) 108 C.A.4th 917, 942, 134 C.R.2d 101 [decision to withdraw from treatment of patient is medical decision, within context of medical negligence, not administrative decision, because it is decision that occurs during medical treatment; citing *Palmer*].)

SUPPLEMENT: [This section is current through the latest supplement]
See 39 U.C. Davis L. Rev. 699 [*Covenant Care*].



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3. Substantial Probability That Plaintiff Will Prevail.

6 Witkin Sum. Cal. Law Torts § 1602

[§ 1602] Substantial Probability That Plaintiff Will Prevail.

In order to avoid the conclusion that *C.C.P. 425.13* unconstitutionally invades the right to a jury trial, the requirement that a "substantial probability" of success be established imposes only a burden to demonstrate the existence of a prima facie case. However, under *C.C. 3294(a)* the plaintiff's ultimate burden at trial will be to satisfy the jury by "clear and convincing evidence" that the defendant was guilty of malice, oppression, or fraud. Thus, any prima facie case under *C.C.P. 425.13* must necessarily meet that standard. (*Looney v. Superior Court* (1993) 16 *C.A.4th* 521, 537, 539, 20 *C.R.2d* 182; see *Aquino v. Superior Court* (1993) 21 *C.A.4th* 847, 854, 860, 26 *C.R.2d* 477 [in action against three doctors for negligent and intentional infliction of emotional distress, plaintiffs failed to establish prima facie case of entitlement to punitive damages, as they were unlikely to be able to show malice, oppression, or fraud by clear and convincing evidence; citing *Looney*].)

The test required by the statute was formulated somewhat differently in *College Hosp. v. Superior Court* (1994) 8 *C.4th* 704, 34 *C.R.2d* 898, 882 *P.2d* 894, although the court acknowledged that there is little substantive difference between the "sufficient prima facie showing" approach, stated in *Looney*, and its own "triable issue" approach: "[T]he gravamen of section 425.13(a) is that the plaintiff may not amend the complaint to include a punitive damages claim unless he both states and substantiates a legally sufficient claim. In other words, the court must deny the section 425.13(a) motion where the facts asserted in the proposed amended complaint are legally insufficient to support a punitive damages claim. ... The court also must deny the motion where the evidence provided in the 'supporting and opposing affidavits' either negates or fails to reveal the actual existence of a triable claim. ... The section 425.13(a) motion may be granted only where the plaintiff demonstrates that both requirements are met." (8 *C.4th* 719.) Here, the trial judge erred in allowing plaintiff's complaint to be amended to add a punitive damages claim against the hospital, because the conduct at issue was engaged in by a hospital employee acting in his personal capacity and plaintiff would therefore be unable to prove that the hospital authorized or ratified his acts. (8 *C.4th* 723, 724.) Neither should the judge have allowed an amendment to add a punitive damages claim against the hospital administrator, because plaintiff could not show that the administrator had acted maliciously against plaintiff. (8 *C.4th* 725.) (See 23 *Pepperdine L. Rev.* 711 [*College Hosp.*].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Time Limits.

6 *Witkin Sum. Cal. Law Torts* § 1603

[§ 1603] Time Limits.

In *Brown v. Superior Court* (1990) 224 C.A.3d 989, 274 C.R. 442, the motion was made only 4 months before trial (rather than the required 9 months; see *supra*, §1600) and nearly 2 months after learning the date of trial. Plaintiff contended that the time limit cannot apply to "fast-track" cases under *Govt.C. 68600* et seq. (2 *Cal. Proc.* (4th), *Courts*, §438) because of impossibility. *Held*, the trial court erred in allowing plaintiff's untimely amendment. While it may be possible to begin trial less than 9 months after filing of the complaint, thus rendering compliance with C.C.P. 452.13 impossible, "the court has the flexibility at trial setting to accommodate a party in such a predicament." (224 C.A.3d 994.)

In *Looney v. Superior Court* (1993) 16 C.A.4th 521, 537, 539, 20 C.R.2d 182, plaintiffs filed an action in December 1991 against a medical center and two doctors for negligence and various intentional torts, and sought punitive damages. Because plaintiffs had failed to comply with C.C.P. 425.13, defendants moved to strike the punitive damages allegations. The trial judge, relying on the holding in *Bommarreddy v. Superior Court* (1990) 222 C.A.3d 1017, 272 C.R. 246, that the statute was inapplicable to intentional torts, denied the motion. Plaintiffs then moved for trial preference under C.C.P. 36 and obtained a trial date of August 10, 1992. Relying on *Central Pathology Service Med. Clinic v. Superior Court* (1992) 3 C.4th 181, 10 C.R.2d 208, 832 P.2d 924, *infra*, §1604, which was decided on July 31, 1992, and which overruled *Bommarreddy*, defendants successfully sought mandamus requiring the trial judge to strike the punitive damages allegations. On December 23, 1992, plaintiffs filed a C.C.P. 425.13 motion, but it was denied because it was not filed more than 9 months prior to the date initially set for trial. *Held*, this was error.

(a) With less than 2 weeks until the first assigned trial date, the rules were changed by the *Central Pathology* decision and plaintiffs were required to comply with C.C.P. 425.13. However, to require them to also comply with the 9-month time limit, when it was clearly impossible to do so, would result in an application of C.C.P. 36 and 425.13 that would produce an absurd and clearly anomalous result. This must be avoided. (16 C.A.4th 535.)

(b) "We therefore imply an exception to section 425.13 which permits the granting of a motion brought less than nine months prior to the first assigned trial date where it is *necessary* to protect a plaintiff's right to a preferential trial date *and* the defendant receives or has had a reasonable opportunity to conduct discovery regarding the punitive damage

claim. In the peculiar circumstances of a case such as this one, we can accommodate the fundamental and salutary purposes of these two statutes in no other way." (16 C.A.4th 536.)

(c) Here, in order to receive the trial preference to which the trial judge found them entitled, plaintiffs would be required to abandon a major part of their claim if C.C.P. 425.13 were applied literally. This result could not be an intended consequence of C.C.P. 36, and would defeat its very purpose. On the other hand, because defendants had substantial notice of the punitive damage claim and an ample opportunity to conduct discovery with respect to it, the purpose behind C.C.P. 425.13 has, in fact, been served. Hence, it is appropriate in these circumstances to imply an exception to this otherwise mandatory statute. (16 C.A.4th 537.)

In *Goodstein v. Superior Court* (1996) 42 C.A.4th 1635, 50 C.R.2d 459, plaintiff contended that (a) due to local rules, she did not receive a full 9-month notice of the trial date, because the trial judge, on August 25, set a trial date of May 10 of the following year, 15 days less than the 9-month period of C.C.P. 425.13; and (b) because of delays in taking defendant's deposition, she lacked sufficient evidence to support the allegation of punitive damages until February, approximately 3 months before the trial date. The trial judge, under C.C.P. 425.13, granted plaintiff's motion to amend the complaint to allege claims for punitive damages against defendant health care provider. *Held*, mandamus issued directing the trial judge to vacate the order and to conduct further proceedings.

(a) *Looney v. Superior Court*, *supra*, established that the trial judge has discretion to grant an exception to the 9-month requirement of C.C.P. 425.13, where (1) it is necessary to protect a plaintiff's right to a preferential trial date, and (2) the defendant receives, or has had reasonable opportunity to conduct, discovery regarding the claim for punitive damages. (42 C.A.4th 1643.)

(b) Here, plaintiff, to be entitled to relief from the 9-month requirement, must be able to show that "(1) she was unaware of the facts or evidence necessary to make a proper motion under section 425.13 more than nine months prior to the first assigned trial date, (2) she made diligent, reasonable and good faith efforts to discover the necessary facts or evidence to support such a motion more than nine months prior to the first assigned trial date, (3) after assignment of the trial date she made reasonable, diligent and good faith efforts to complete the necessary discovery, (4) she filed her motion under section 425.13 as soon as reasonably practicable after completing such discovery (but in no event more than two years after the filing of her initial complaint) and (5) [defendant] will suffer no surprise or prejudice by reason of any shortened time period and will be given every reasonable opportunity to complete all necessary discovery in order to prepare to meet [plaintiff's] punitive damage allegations." (42 C.A.4th 1645.)

(c) "Relief from the time limits specified in section 425.13 should be granted only in those situations where a plaintiff has moved with reasonable dispatch and diligence and, through no fault of his or her own, has been placed in a position where compliance with the nine-month time mandate is impossible or reasonably impracticable. Upon remand, the trial court will have to examine the court file in this case and the declarations and other evidence submitted by the parties and make specific findings on each of the five criteria specified above." Only in the event that plaintiff can satisfy all of them by a preponderance of the evidence will it be proper for the court to grant her motion to amend. (42 C.A.4th 1646.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Freedman v. Superior Court* (2008) 166 C.A.4th 198, 206, 82 C.R.3d 563 [in action against surgeon for leaving surgical towel in plaintiff's abdomen, 9-month deadline of C.C.P. 425.13(a) was applicable, even if depositions conducted after deadline indicated that surgeon made omissions from operative report and used surgical towel that could not be seen on x-ray in violation of hospital policy, where plaintiff knew most of facts offered in support of motion to add punitive damages claim before he filed complaint].

Fast-Track cases:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §257. *Correction:* Page 1105, ninth line in first paragraph of section,

"C.C.P. 452.13" should be "*C.C.P. 425.13*".



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6 *Witkin Sum. Cal. Law Torts* § 1604

[§ 1604] Action Based on Intentional Tort or Crime.

In *Central Pathology Service Med. Clinic v. Superior Court* (1992) 3 C.4th 181, 10 C.R.2d 208, 832 P.2d 924, plaintiffs C and M filed a complaint for damages against defendant medical providers, asserting causes of action for medical negligence and loss of consortium based on defendants' failure to care for and treat C. Two months before the scheduled date of trial, plaintiffs moved for leave to file an amended complaint adding causes of action for fraud and intentional infliction of emotional distress, and seeking punitive damages. The new causes alleged that defendants performed a pap smear that showed abnormal cells, but failed to notify C that she was developing cancer, and intentionally failed to notify her that she should be retested. The cause of action for intentional infliction of emotional distress alleged that defendants acted in an outrageous manner with the intent to cause severe emotional distress. The trial court, relying on *Bommarreddy v. Superior Court* (1990) 222 C.A.3d 1017, 272 C.R. 246, which held that C.C.P. 425.13 did not apply to intentional torts, granted the motion to amend, and the Court of Appeal summarily denied defendants' petition for mandamus. *Held*, matter remanded to Court of Appeal with directions to issue mandamus directing the trial court to vacate its order allowing plaintiffs to amend.

(a) The issue involved requires construction of the words "professional negligence," and "arising out of," as used in C.C.P. 425.13(a). (3 C.4th 187.) Although intentional tort causes of action can "arise out of" contractual relationships, "whether intentional tort causes of action can 'arise out of' professional negligence has not been addressed. ... [I]t is unclear whether the intentional tort causes of action may be said to originate, grow, or flow from 'professional negligence.'" (3 C.4th 188.)

(b) The legislative history undermines the *Bommarreddy* conclusion that the statute is limited to causes of action alleging professional negligence. (3 C.4th 188 et seq.) "Based on the language of the statute and its legislative history, we conclude that an action for damages arises out of the professional negligence of a health care provider if the injury for which damages are sought is directly related to the professional services provided by the health care provider." (3 C.4th 191.)

(c) There are few situations in which claims for punitive damages are predicated on mere negligence or a conscious disregard of the rights or safety of others and in which no intentional torts are alleged; hence, the *Bommarreddy*

interpretation "would render the statute virtually meaningless." (3 C.4th 191.) Under that interpretation, injured patients could readily assert that their providers committed an intentional tort and that punitive damages are sought only in connection with the intentional tort. By including such a cause of action in a negligence action, plaintiffs would annul the procedural requirements the Legislature sought to impose on them. (3 C.4th 191.)

(d) *Bommarreddy* is disapproved. (3 C.4th 191.) "We hold that when an injured party seeks punitive damages for an injury that is directly related to the professional services provided by a health care provider acting in its capacity as such, then the action is one 'arising out of the professional negligence of a health care provider,' and the party must comply" with C.C.P. 425.13(a). (3 C.4th 191.)

(e) "The allegations that identify the nature and cause of a plaintiff's injury must be examined to determine whether each is directly related to the manner in which professional services were provided. ... The clear intent of the Legislature is that any claim for punitive damages in an action against a health care provider be subject to the statute if the injury that is the basis for the claim was caused by conduct that was directly related to the rendition of professional services." (3 C.4th 192.)

(f) "Plaintiffs' cause of action for fraud in this case is directly related to the manner in which defendants provided professional services. The claim emanates from the manner in which defendants performed and communicated the results of medical tests, a matter that is an ordinary and usual part of medical professional services. It is therefore governed by section 425.13(a). Plaintiffs' cause of action for intentional infliction of emotional distress is predicated on the same alleged acts as the fraud claim. Therefore, it too is directly related to defendants' performance of professional services and is governed by section 425.13(a)." (3 C.4th 192.)

One justice, concurring in the result, strongly disagreed with the conclusion that the statute applies to an action for battery predicated on treatment exceeding or different from that to which a plaintiff consented. A common law battery gives rise to an action for compensatory and possible punitive damages, and the plaintiff should not be required to seek a court's permission merely because the battery arises out of medical services neither sought nor desired. (3 C.4th 193.)

In *Davis v. Superior Court* (1994) 27 C.A.4th 623, 33 C.R.2d 6, the rationale of *Central Pathology Service Med. Clinic* was applied in a medical malpractice action in which plaintiff sought punitive damages based on defendant's alleged involvement in a fraudulent scheme to deprive him of his workers' compensation benefits. Although defendant's conduct was allegedly criminal, the fact remained that plaintiff was seeking damages for an injury that was directly related to the professional services rendered by defendant acting in his capacity as a health care provider. The statute was therefore applicable, and the trial judge should have granted defendant's motion to strike based on plaintiff's lack of compliance. Creating an exception applicable to plaintiffs who are workers' compensation claimants is a matter for the Legislature, not the courts. (27 C.A.4th 629, 630.)

A dictum in *Central Pathology*, to the effect that sexual battery "usually" does not "arise out" of the health care provider's professional negligence and that it is thus not covered by C.C.P. 425.13, is inapplicable where the sexual battery occurs during an examination by a doctor rendering gynecological services, i.e., where the opportunity to perform the battery is directly related to the manner in which services are rendered. (*Cooper v. Superior Court* (1997) 56 C.A.4th 744, 750, 65 C.R.2d 674.) (See *United Western Med. Centers v. Superior Court* (1996) 42 C.A.4th 500, 502, 49 C.R.2d 682 [C.C.P. 425.13(a) applied to action alleging that two hospital employees committed sexual assault on plaintiff; citing *Central Pathology Service Med. Clinic*]; 30 Cal. Western L. Rev. 221 [*Central Pathology Service Med. Clinic*]; 20 *Pepperdine L. Rev.* 872 [same]; 20 *San Diego L. Rev.* 621 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



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6 *Witkin Sum. Cal. Law Torts* § 1605

[§ 1605] Action Against Religious Corporation.

C.C.P. 425.14 sets forth requirements for obtaining punitive damages in actions against religious corporations that are similar to those imposed by *C.C.P. 425.13* for health care providers (see *supra*, §1600 et seq.).

(a) "No claim for punitive or exemplary damages against a religious corporation or religious corporation sole shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive or exemplary damages to be filed."

(b) The plaintiff must make a motion supported by affidavits, and the court may allow the filing if, on the basis of supporting and opposing affidavits, it finds that "the plaintiff has established evidence which substantiates that plaintiff will meet the clear and convincing standard of proof" of *C.C. 3294* (see *supra*, §1559).

(c) Nothing in the statute is intended to affect a plaintiff's right to discover evidence on the issue of punitive damages.

Unlike *C.C.P. 425.13*, *C.C.P. 425.14* does not specify a time period for filing the motion.

Rowe v. Superior Court (1993) 15 *C.A.4th* 1711, 19 *C.R.2d* 625, rejected the contention that *C.C.P. 425.14* requires that, before a claim for punitive damages may be pleaded, the trial judge must first determine, from a review and weighing of supporting and opposing affidavits, that the plaintiff will win on the issue of punitive damages. This construction would invade plaintiffs' right to a jury trial. "We therefore must read the statute to require only that a plaintiff demonstrate the existence of sufficient evidence to establish a *prima facie* case for punitive damages, having in mind the higher clear and convincing standard of proof. ... In making this judgment, the trial court's consideration of the defendant's opposing affidavits does not permit a weighing of them against the plaintiff's supporting evidence, but only a determination that they do not, as a matter of law, defeat that evidence." (15 *C.A.4th* 1723.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Little Co. of Mary Hosp. v. Superior Court* (2008) 162 *C.A.4th* 261, 75 *C.R.3d* 519, the issue was whether the analysis of *Covenant Care v. Superior Court* (2004) 32 *C.4th* 771, 11 *C.R.3d* 222, 86 *P.3d* 290, text, §1601, applies in

the related context of *C.C.P. 425.14*. Although a plaintiff seeking punitive damages against a health care corporation for elder abuse is not subject to *C.C.P. 425.13*, must the plaintiff nonetheless satisfy the nearly identical requirement in *C.C.P. 425.14* of proving a substantial probability of prevailing on the punitive damages claim when the defendant health care provider qualifies as a religious corporation?

Plaintiff filed an action for elder abuse and wrongful death after his mother died while in the care and custody of defendant religious corporation. The complaint sought punitive damages in connection with the claim for elder abuse, and defendant moved to strike that claim. Ruling that the rationale articulated in *Covenant Care* to exclude elder abuse punitive damages claims from the requirements of *C.C.P. 425.13* applied equally to exclude claims against religious organizations from the requirements of *C.C.P. 425.14*, the trial court denied the motion to strike. Defendant then petitioned for mandamus to compel the trial court to vacate its order denying the motion to strike. *Held*, mandamus issued.

(a) *C.C.P. 425.13* expressly applies only to actions "arising out of the professional negligence of a health care provider." It is limited both by the identity of the defendant and the nature of the plaintiff's claim. In contrast, nothing in the language of *C.C.P. 425.14* makes its applicability dependent on the conduct of the religious organization. In other words, the requirements of *C.C.P. 425.14* must be satisfied whenever the defendant is a religious organization, regardless of the nature of the conduct giving rise to the plaintiff's claim. (162 C.A.4th 269.)

(b) The bill adding *C.C.P. 425.14* was approved by the Legislature on the same day that the Legislature adopted the amendment limiting the scope of *C.C.P. 425.13* to conduct arising from a health care provider's professional negligence. These simultaneous actions strongly suggest that the omission of limiting language in *C.C.P. 425.14* was intentional. (162 C.A.4th 269.)

(c) In *Covenant Care*, the Supreme Court held that *C.C.P. 425.13* did not encompass elder abuse claims, which were rooted in conduct far more egregious than the professional negligence covered by that statute. That conclusion, while based in part on the salutary policy of the Elder Abuse Act, focused particularly on the limiting language in *C.C.P. 425.13* and on the legislative history of the amendment that added this restrictive text to the statute. "The *Covenant Care* Court's analysis is simply inapplicable to an interpretation of the broader statutory language contained in" *C.C.P. 425.14*. (162 C.A.4th 270.)

(d) Plaintiff argued that subjecting elder abuse plaintiffs to the procedural requirements of *C.C.P. 425.14* would undermine the legislative intent to foster these actions by providing litigants and attorneys with incentives to bring them. Furthermore, plaintiff contended that doing so is unnecessary, because the Elder Abuse Act imposes its own protections against meritless punitive damage claims. However, contrary to plaintiff's arguments, the statute's threshold pleading requirement neither restricts the heightened penalties authorized by the Elder Abuse Act nor increases the plaintiff's burden of proof. It simply mandates a prima facie showing of merit-supporting allegations of recklessness, oppression, or fraud earlier in the proceedings rather than later. Nothing in the application of *C.C.P. 425.14* to religious health care providers in elder abuse actions dilutes the purpose of providing heightened civil penalties to litigants and their attorneys prosecuting legitimate elder abuse claims. (162 C.A.4th 271.)

(e) "We recognize our holding necessarily means a religious health care provider has greater protection from unsubstantiated punitive damage claims than afforded secular health care providers. Whatever the merits of that differentiation between religious not-for-profit entities and their secular counterparts, that is precisely what the Legislature intended." (162 C.A.4th 271.)



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6 *Witkin Sum. Cal. Law Torts* § 1606

[§ 1606] Felon's Action Against Victim.

C.C.P. 128.5(d) permits the trial judge to assess punitive damages against a plaintiff who is found guilty of fraud, oppression, or malice in maintaining an action against the victim of a felony for which the plaintiff was convicted (or against the victim's heirs, relatives, estate, or personal representative). The victim may recover punitive damages for injuries arising from the acts for which the plaintiff was convicted.

The enacting legislation requires trial judges to screen these cases carefully to ensure that the suit was not filed for a vexatious, fraudulent, malicious, or oppressive purpose. (Stats. 1990, Chap. 887, §2.) The applicability of *C.C.P. 128.5* was limited by 1994 legislation adding *C.C.P. 128.6* and *128.7*. (See 7 *Cal. Proc.* (4th), *Trial*, §§239, 250.)

SUPPLEMENT: [This section is current through the latest supplement]
Applicability of C.C.P. 128.5:

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §§226, 237.



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a. Nature of Requirement.

6 *Witkin Sum. Cal. Law Torts* § 1607

[§ 1607] Nature of Requirement.

Although there is a considerable body of authority to the contrary, including the Restatement (*Rest.2d, Torts* §908, Comment c; *supra*, §1560), it is settled in California that punitive damages cannot be awarded unless *actual* damages were suffered, the theory being that they are in addition to compensatory damages. (*Mother Cobb's Chicken Turnovers v. Fox* (1937) 10 C.2d 203, 205, 73 P.2d 1185 [rule applied even where plaintiff received consent decree of injunction against defendant's unauthorized use of trade name]; *Haydel v. Morton* (1935) 8 C.A.2d 730, 736, 48 P.2d 709; *Warfield v. Krueger* (1929) 96 C.A. 671, 673, 274 P. 764; *Oppenheimer v. Deutchman* (1951) 104 C.A.2d 165, 166, 230 P.2d 873; *Sasser v. Miles & Sons Trucking Service* (1953) 119 C.A.2d 239, 241, 259 P.2d 488; *Foster v. Keating* (1953) 120 C.A.2d 435, 454, 261 P.2d 529; *Continental Ins. Co. v. Superior Court* (1995) 37 C.A.4th 69, 85, 43 C.R.2d 374 [punitive damages were not available in insurance bad faith action without showing of economic loss].) (See 4 Harper, James & Gray 2d §25.5A; 22 *Am.Jur.2d* (2003 ed.), *Damages* §551 et seq.; 70 *Harv. L. Rev.* 528; 3 *Stanf. L. Rev.* 341; 97 *A.L.R.2d* 1145 [appellate court's power to remit portion of actual damages while sustaining award of punitive damages]; 40 *A.L.R.4th* 11 [sufficiency of showing of actual damages].)

In *Kluge v. O'Gara* (1964) 227 C.A.2d 207, 38 C.R. 607, plaintiffs successively employed eight attorneys to sue on claims, and lost by dismissal for lack of prosecution. They sued their last attorney for malpractice, and received judgment for the full amount of the prayer for actual damages, \$ 20,000; this was satisfied. In the present action, they sued all eight for conspiracy to defeat the malpractice action, seeking \$ 50,000 actual and \$ 100,000 punitive damages. *Held*, affirming judgment on demurrer, plaintiffs' recovery of the full amount sought in that action necessarily showed that any wrongful acts of defendants caused them no actual damage, and punitive damages could not be recovered. (227 C.A.2d 210.)

Esparza v. Specht (1976) 55 C.A.3d 1, 127 C.R. 493, presented this issue on unusual facts. Plaintiff sued defendant on a promissory note in the principal amount of \$ 445.50, admittedly due with interest of \$ 27.84. Defendant cross-complained, alleging fraud and seeking compensatory damages of \$ 307.40 and punitive damages. At the trial, plaintiff waived his claim for all amounts due except those in excess of \$ 307.40. The trial judge allowed defendant an offset for the compensatory damage claim of \$ 307.40, and then denied punitive damages on the ground that there were no actual damages. *Held*, reversed; whether defendant's recovery was in the form of an award of damages or an offset was not controlling.

(a) To establish his demand against plaintiff, defendant was required to plead and prove every element of the fraud including damages. After defendant presented considerable evidence, plaintiff waived his claim for all amounts due except those in excess of \$ 307.40. "This may have been done to expedite the trial time for the case but we can only view it as conceding [defendant] had a proper claim for that amount. ... There is no justice in allowing the perpetrator of a fraud to avoid the related consequences of punitive charges attendant with his fraudulent acts simply by paying the actual damages claimed by the defrauded after a bitter lawsuit and before the jury returns what appears to be a certain verdict." (55 C.A.3d 9.)

(b) "[F]or purposes of finding actual damages to justify recovery of punitive damages it is sufficient that the defrauded party show *a damage*, and not that he must show *bottomline damages*, i.e., damages over and above all the cross-claims of the perpetrator of the fraud." (55 C.A.3d 9.)

In *Cheung v. Daley* (1995) 35 C.A.4th 1673, 42 C.R.2d 164, the court reexamined the rule in *Mother Cobb's Chicken Turnovers v. Fox*, *supra*, and found that it was still valid. The case was the latest episode in a bitter dispute concerning a rundown parcel of residential property. Plaintiffs claimed that defendant had violated the Fraudulent Transfer Act (C.C. 3439 et seq.) by conveying the parcel and another property to his mother in order to evade a nuisance judgment about to be obtained by plaintiffs. Plaintiffs tried to recover compensatory damages of \$ 40,000, consisting of costs and unbilled attorneys' fees, but the jury returned a special verdict that found the total damages to be "0.00." The jury also found that, in making the transfers, defendant was guilty of fraud, oppression, or malice, and awarded plaintiffs \$ 92,000, which was reduced to \$ 62,000. Judgment for this amount was entered for plaintiffs. *Held*, reversed.

(a) As the court said in *Mother Cobb's Chicken Turnovers*: "Evil thoughts or acts, barren of result, are not the subject of exemplary damages." (35 C.A.4th 1677.) This position was approved by the *California Supreme Court*. (35 C.A.4th 1676, citing *Potter v. Firestone Tire & Rubber Co.* (1993) 6 C.4th 965, 25 C.R.2d 550, 863 P.2d 795, *supra*, §1036.) It finds support in C.C. 3294(a), which authorizes punitive damages "in addition to the actual damages " where the defendant acted with oppression, fraud, or malice. And C.C. 3281 defines damages as compensation in money. (35 C.A.4th 1676.) Thus, the *Mother Cobb's Chicken Turnovers* rule is still valid, and Court of Appeal opinions to the contrary will not be followed. (35 C.A.4th 1676, 1677, disapproving *James v. Public Finance Corp.* (1975) 47 C.A.3d 995, 121 C.R. 670.)

(b) Plaintiff asserts that punitive damages may be awarded, because the award includes an element of compensation. This construction may be feasible in some cases, but not where, as here, the jury has specifically found that there were no such damages. (35 C.A.4th 1677.)

In *Jackson v. Johnson* (1992) 5 C.A.4th 1350, 1351, 7 C.R.2d 482, the complaint alleged simple negligence, but the jury, under erroneous instructions by the trial judge, brought in a verdict awarding \$ 20,000 as punitive damages. *Held*, judgment on the verdict reversed.

(a) Simple negligence cannot support an award of punitive damages (5 C.A.4th 1354); and actual loss or damage is an essential element of the tort of legal malpractice (5 C.A.4th 1355).

(b) *Clark v. McClurg* (1932) 215 C. 279, 9 P.2d 505, *infra*, §1609, is distinguishable. "Unlike *Clark*, the instant jury did not leave blank the actual damages assessment. Nor, as in *Clark* which concerned libel per se, may actual damages be presumed." (5 C.A.4th 1358.) These two distinctions were held dispositive in *Mother Cobb's Chicken Turnovers*. (5 C.A.4th 1358.)

(c) *James v. Public Finance Corp.* upheld an award by "liberal construction." But the *James* opinion simply nullified the jury's finding; it failed to consider *Mother Cobb's Chicken Turnovers*, and was wrongly decided. (5 C.A.4th 1358, 1359.)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Harper, James & Gray 3d §25.5A.



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6 *Witkin Sum. Cal. Law Torts* § 1608

[§ 1608] No Need for Prayer.

Although actual damages cannot be awarded in the absence of a *prayer for compensatory damages* (see 5 *Cal. Proc.* (4th), *Pleading*, §887), punitive damages[<] may be awarded on allegation and proof of actual damages, despite the absence of a prayer for compensatory damages. (>*Weiss v. Blumencranc* (1976) 61 *C.A.3d* 536, 542, 544, 131 *C.R.* 298 [failure to expressly mention punitive damages in prayer of complaint does not preclude award where body of complaint sets forth facts on which award of punitive damages may be predicated].)

SUPPLEMENT: [This section is current through the latest supplement]
Absence of prayer for compensatory damages:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §933.



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c. Separate Award Is Not Essential.

6 *Witkin Sum. Cal. Law Torts* § 1609

[§ 1609] Separate Award Is Not Essential.

If actual damages are alleged and proved, a separate award of compensatory damages is not a necessary foundation for an award of punitive damages. In *Clark v. McClurg* (1932) 215 C. 279, 9 P.2d 505, the jury brought in a verdict against defendant for publication of matter libelous per se, but assessed the damages as "\$... dollars" actual damages, and \$ 5,000 punitive damages. *Held*, the proof of a libel per se entitled the plaintiff to actual or compensatory damages, and the jury's inadvertence in assessing the entire amount as punitive damages was a mere error of form. (215 C. 285.) (See *Contento v. Mitchell* (1972) 28 C.A.3d 356, 358, 104 C.R. 591 [following *Clark*; slander per se, judge awarded \$ 3,000, with conclusion of law characterizing entire amount as punitive damages]; 7 *Cal. Proc.* (4th), *Trial*, §372.)

Similarly, a general verdict in a single sum for compensatory and punitive damages will be sustained in the absence of a request for segregation of the amounts. (*McChristian v. Popkin* (1946) 75 C.A.2d 249, 262, 171 P.2d 85; *Rogers v. Kabakoff* (1947) 81 C.A.2d 487, 491, 184 P.2d 312.) (See 7 *Cal. Proc.* (4th), *Trial*, §375 et seq.)

In *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 148 C.R. 389, 582 P.2d 980, *infra*, §1620, the court disapproved of the undifferentiated verdict form (single space for damages and no means of segregation). Such a verdict makes review of the issue of excessive damages "next to impossible" for the trial judge on motion for new trial and for the appellate court on appeal. (21 C.3d 927.) However, under the facts, review was not difficult: Plaintiff husband was precluded by statute from recovering damages for emotional distress suffered by decedent wife, and the economic damages were no more than \$ 10,000; hence, the amount of punitive damages awarded by the reduced verdict was about \$ 740,000. (21 C.3d 927.)

SUPPLEMENT: [This section is current through the latest supplement]
Separate award as foundation:

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §363. *General verdict in single sum:*

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §366 et seq.



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d. Award of Nominal Damages.

6 *Witkin Sum. Cal. Law Torts* § 1610

[§ 1610] Award of Nominal Damages.

May an award of only nominal damages support an additional award of punitive damages? In *Sterling Drug v. Benatar* (1950) 99 C.A.2d 393, 221 P.2d 965, the court, carefully distinguishing between the two bases for nominal damages (*supra*, §1547), gave an affirmative answer as follows: Where *actual damage* has been suffered, but nominal damages only are awarded because the plaintiff is unable to establish the amount with certainty, the nominal damage award is a sufficient foundation for the award of punitive damages. In this case, defendant was enjoined from selling plaintiff's products at below fair trade prices (before the Fair Trade Act was repealed). As a reason for equitable relief, the complaint properly alleged irreparable damage and the difficulty of ascertaining the amount, and the evidence established a considerable volume of cut-rate sales. Thus, actual damage was clear, and the lower court's award of \$ 1 nominal and \$ 200 punitive damages was "an expedient and just way of overcoming the difficulty of finding the exact extent of the actual damage in a case where exemplary damages are recoverable." (99 C.A.2d 402.) (See Rest.2d, Torts §848A, Comment c; 22 *Am.Jur.2d* (2003 ed.), *Damages* §554; 70 *Harv. L. Rev.* 529; 3 *Stanf. L. Rev.* 341; and see *Civic Western Corp. v. Zila Industries* (1977) 66 C.A.3d 1, 19, 135 C.R. 915.)

Moreover, under the holdings in *Clark v. McClurg* (1932) 215 C. 279, 285, 9 P.2d 505, and *Contento v. Mitchell* (1972) 28 C.A.3d 356, 358, 104 C.R. 591, *supra*, §1609, the absence of an express award of nominal damages is a technical error of form, and not a ground for reversal. "[T]he only function of nominal damages is to indicate that the finder of fact has determined that the plaintiff has suffered an invasion of a legal right. If plaintiff's legal right has been invaded, an award of nominal damages is an idle formalism." (*Contento v. Mitchell, supra*, 28 C.A.3d 359.)

In *Werschull v. United Calif. Bank* (1978) 85 C.A.3d 981, 149 C.R. 829, the evidence showed that defendant Bank, as trustee of a pension fund, had unlawfully diverted funds, but there was no way of knowing just how or to what extent plaintiff beneficiaries were injured; i.e., the amount of actual damage could be fixed only by speculation. The judge awarded actual damages of \$ 1, and punitive damages of \$ 550,000. *Held*, affirmed. (a) In breach of fiduciary duty cases, the requirement of proof of actual damage "is greatly deemphasized." (85 C.A.3d 1004.) (b) Punitive damages have been awarded in cases in which the actual damage award was nominal--\$ 1; and here the evidence supported the jury's finding that plaintiffs suffered actual damages in some unspecified amount. (85 C.A.3d 1004.)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Discretion of Jury.

6 *Witkin Sum. Cal. Law Torts* § 1611

[§ 1611] Discretion of Jury.

There is no fixed standard by which punitive damages can be determined, and both the award and the amount are left to the discretion of the jury, on a consideration of all of the circumstances, subject to the usual rule that the award will be rejected if it is without support in the evidence. (See *Lewis v. Hayes* (1913) 165 C. 527, 533, 132 P. 1022; *Scott v. Times-Mirror Co.* (1919) 181 C. 345, 367, 184 P. 672; *Thomson v. Catalina* (1928) 205 C. 402, 404, 271 P. 198; *Pickwick Stages, Northern Div. v. The Board of Trustees* (1921) 54 C.A. 730, 731, 215 P. 558; *Ferraro v. Pacific Finance Corp.* (1970) 8 C.A.3d 339, 351, 87 C.R. 226, supra, §1589; *Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 C.A.3d 376, 408, 89 C.R. 78, supra, §459; *Wetherbee v. United Ins. Co. of America* (1971) 18 C.A.3d 266, 271, 95 C.R. 678, infra, §1620; *Rest.2d, Torts* §908, Comment e, supra, §1560 [elements that may be considered]; 70 *Harv. L. Rev.* 530; 17 *U.S.F. L. Rev.* 147 [Punitive Damages in California: The Integrity of Jury Verdicts]; 36 *U.S.F. L. Rev.* 411 [constitutional role of jury in assessing punitive damages]; 35 *A.L.R.4th* 441 [personal injury or death cases]; 35 *A.L.R.4th* 538 [nonpersonal injury or death cases]; 14 *A.L.R.5th* 242 [excessiveness or inadequacy of punitive damages in nonpersonal injury or death cases]; 27 *A.L.R.4th* 318 [effect of plaintiff's comparative negligence]; BAJI, Nos. 14.71, 14.72.2; CACI, No. 3940 et seq.; on federal constitutional requirement of judicial review as limit on jury's discretion to award punitive damages, see *Honda Motor Co., Ltd. v. Oberg* (1994) 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336, supra, §1568.)

The almost complete freedom of the jury both in the *award* and the *amount* is emphasized in *Brewer v. Second Baptist Church of Los Angeles* (1948) 32 C.2d 791, 197 P.2d 713. An award of compensatory damages for libel was held proper. However, an instruction that if the jury should find that the publication was done wantonly, etc., "then the plaintiffs are entitled to recover exemplary ... damages," was held reversible error. The plaintiff is never "entitled" to punitive damages as a matter of right; the granting "is wholly within the control of the jury, and may not legally be influenced by any direction of the court." (32 C.2d 801.) The judgment was reversed for a retrial on the issue of exemplary damages alone; the court observed that the new jury could maintain a reasonable relation between the prior award of compensatory damages and the new award of punitive damages, notwithstanding the fact that it would not determine the compensatory damages. (32 C.2d 802.) (See *Farvour v. Geltis* (1949) 91 C.A.2d 603, 606, 205 P.2d 424 [landlord wantonly removed windows from tenant's apartment, causing physical and mental suffering; \$ 500 actual and \$ 2,000 punitive damages upheld]; *Haines v. Parra* (1987) 193 C.A.3d 1553, 1560, 239 C.R. 178 [quoting *Brewer* and

citing the text; error for trial judge to make award on plaintiff's motion for summary judgment[.]

It is proper to instruct the jury that acts of provocation by the plaintiff may be considered in *mitigation* of punitive damages. (See *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 721, 39 C.R. 64; *Rest.2d, Torts* §921.) But they should not be instructed to consider attorneys' fees or other litigation expenses as *elements* in measuring the recovery. (*Howell v. Scoggins* (1874) 48 C. 355, 357; see 30 A.L.R.3d 1443 [attorney's fees or other expenses of litigation as element in measuring punitive damages].)

West's Key Number Digest, Damages k.94

SUPPLEMENT: [This section is current through the latest supplement]



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6 *Witkin Sum. Cal. Law Torts* § 1612

[§ 1612] Relation to Actual Damages.

(1) *In General.* A general limitation has been imposed by the rule that ordinarily the punitive damages must be in some reasonable proportion to the actual damages suffered. In practice, this means that the trial judge may grant a new trial for excessive damages or the appellate court may reverse the judgment unless the punitive damages are scaled down. (See *Schroeder v. Auto Driveaway Co.* (1974) 11 C.3d 908, 922, 114 C.R. 622, 523 P.2d 662, supra, §808 [punitive damages less than one-half actual damages were not excessive]; *Plotnik v. Rosenberg* (1921) 55 C.A. 408, 410, 203 P. 438 [trespass; actual damage \$ 15, award of \$ 1,500 punitive damages reduced to \$ 300]; *Wilkinson v. Singh* (1928) 93 C.A. 337, 344, 269 P. 705 [eviction; \$ 70 actual, \$ 1500 punitive, reduced to \$ 300]; *Dreyer v. Cyriacks* (1931) 112 C.A. 279, 284, 297 P. 35 [excessive award for death of dog used in motion pictures]; *Booth v. The Peoples Finance & Thrift Co. of Modesto* (1932) 124 C.A. 131, 144, 12 P.2d 50 [conversion]; *Ferraro v. Pacific Finance Corp.* (1970) 8 C.A.3d 339, 351, 87 C.R. 226, supra, §1589; *Wetherbee v. United Ins. Co. of America* (1971) 18 C.A.3d 266, 271, 95 C.R. 678, infra, §1620; *Forte v. Nolfi* (1972) 25 C.A.3d 656, 688, 102 C.R. 455; *Allard v. Church of Scientology* (1976) 58 C.A.3d 439, 453, 129 C.R. 797 [malicious prosecution, \$ 50,000 compensatory, \$ 250,000 punitive; punitive reduced to \$ 50,000]; *Zhadan v. Downtown L.A. Motors* (1976) 66 C.A.3d 481, 496, 136 C.R. 132, infra, §1622; *Vossler v. Richards Mfg. Co.* (1983) 143 C.A.3d 952, 968, 192 C.R. 219, infra, §1619 [products liability]; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§610, 611; 70 *Harv. L. Rev.* 530; 9 *Pacific L. J.* 823; 13 *U.S.F. L. Rev.* 613; 12 *A.L.R.5th* 195 [punitive damages in personal injury cases].)

In *BMW of North America v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589, 1601, 134 L.Ed.2d 809, 829, supra, §1568, the United States Supreme Court held that there is no mathematical "bright line" formula comparing punitive and compensatory damages in determining what is constitutionally acceptable.

In *Livesey v. Stock* (1929) 208 C. 315, 281 P. 70, defendant deliberately fired a shotgun at plaintiff, many small shot taking effect; the jury awarded \$ 5,000 actual and \$ 50,000 punitive damages. *Held*, although the record disclosed no prejudicial error, the very size of the verdict suggested passion and prejudice, and it was reduced to \$ 750 and \$ 10,000. (208 C. 322.)

This rule does not, however, preclude a large award of punitive damages based upon substantial actual damages, even though, because of the difficulty of ascertaining the extent of the actual damage, the basic award is only a *nominal*

sum. (See *Sterling Drug v. Benatar* (1950) 99 C.A.2d 393, 402, 221 P.2d 965, supra, §1610; 3 *Stanf. L. Rev.* 345; cf. *Finney v. Lockhart* (1950) 35 C.2d 161, 163, 217 P.2d 19; 70 *Harv. L. Rev.* 530.)

In *Wyatt v. Union Mortg. Co.* (1979) 24 C.3d 773, 157 C.R. 392, 598 P.2d 45, a case involving gross fraud by eight corporate and individual defendants, the jury awarded \$ 25,000 compensatory damages (reduced by the trial judge to \$ 1,000), and \$ 200,000 punitive damages. *Held*, affirmed: the \$ 200,000 award was much less than the income directly generated by false charges to borrowers. (24 C.3d 790.)

(2) *Instructions*. In *Gagnon v. Continental Cas. Co.* (1989) 211 C.A.3d 1598, 260 C.R. 305, an action against a disability insurer that resulted in a punitive damages award of \$ 2.5 million, the trial judge refused to instruct that the punitive damages must bear a "reasonable relation to the actual damages," as then stated in BAJI, No. 14.71. The judge was apparently concerned that, because plaintiff, as the executor of the insured's estate, was not entitled to compensatory damages, the "reasonable relation" language might compel the jury to keep punitive damages low. To allay this concern, defendant suggested modifying the BAJI language to state that the reasonable relation must be to the "actual harm or injury," rather than to the "actual damages." *Held*, it was prejudicial error to reject this modification.

(a) "[T]o meaningfully apply the 'reasonable relation' rule, the trier of fact (and reviewing court) should not focus on some bottom-line amount of an award of compensatory damages but on the nature and degree of the actual harm suffered by the plaintiff (and perhaps others). ... This focus most directly promotes the purpose of the rule, which the Supreme Court explained as follows: '[E]ven an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small.' ... With the focus on the plaintiff's injury rather than the amount of compensatory damages, the rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (211 C.A.3d 1604, quoting *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 148 C.R. 389, 582 P.2d 980, *infra*, §1620.)

(b) Hence, "even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damages actually suffered by the plaintiff and proved at trial." (211 C.A.3d 1605.) (See *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 C.A.4th 1132, 1165, 29 C.R.2d 559 [questioning how plaintiff in *Gagnon*, in her representative capacity, could prove actual harm, as she was not entitled to compensatory damages for disability benefits or emotional distress].)

BAJI, No. 14.71 was revised in 1989 to require a reasonable relation to the "injury, harm, or damages actually suffered by the plaintiff." (See BAJI, Nos. 14.71, 14.72.2; CACI, Nos. 3940 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Walker v. Farmers Ins. Exchange* (2007) 153 C.A.4th 965, 973, 63 C.R.3d 507 [most important indication of reasonableness of punitive damages award is degree of reprehensibility of defendant's conduct; \$ 1.5 million compensatory, \$ 8.3 million punitive; punitive reduced to \$ 1.5 million]; *McGee v. Tucoemas Federal Credit Union* (2007) 153 C.A.4th 1351, 1361, 63 C.R.3d 808 [trial court did not abuse discretion in remitting \$ 2 million compensatory damages award by \$ 750,000 but refusing to remit \$ 1.2 million punitive damages award].



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 aa. In General.

6 Witkin Sum. Cal. Law Torts § 1613

[§ 1613] In General.

"[T]he wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 C.3d 43, 65, 118 C.R. 184, 529 P.2d 608, supra, §§491, 1554.) The defendant's wealth is a factor in determining the amount of the award, and evidence of it is admissible. (See *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 928, 148 C.R. 389, 582 P.2d 980, infra, §1620; *Adams v. Murakami* (1991) 54 C.3d 105, 284 C.R. 318, 813 P.2d 1348, infra, §1619; *Sandoval v. Southern Calif. Enterprises* (1950) 98 C.A.2d 240, 250, 219 P.2d 928; *MacDonald v. Joslyn* (1969) 275 C.A.2d 282, 293, 79 C.R. 707, supra, §488; *Ferraro v. Pacific Finance Corp.* (1970) 8 C.A.3d 339, 349, 87 C.R. 226, supra, §1589; *Wetherbee v. United Ins. Co. of America* (1971) 18 C.A.3d 266, 270, 95 C.R. 678, infra, §1620; *Roemer v. Retail Credit Co.* (1975) 44 C.A.3d 926, 937, 119 C.R. 82; *Walker v. Signal Cos.* (1978) 84 C.A.3d 982, 997, 149 C.R. 119; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 C.A.3d 1220, 1243, 1 C.R.2d 301; *Cummings Med. Corp. v. Occupational Med. Corp.* (1992) 10 C.A.4th 1291, 1298, 13 C.R.2d 585; *Romo v. Ford Motor Co.* (2002) 99 C.A.4th 1115, 1152, 122 C.R.2d 139 [although wealth of defendant can be considered, ability to pay punitive damages award cannot justify otherwise excessive award]; *StreetScenes v. ITC Entertainment Group* (2002) 103 C.A.4th 233, 126 C.R.2d 754 [when properly ordered to produce evidence of its wealth, defendant stated that it would produce most recent consolidated report at proper time; this was all authentication needed, and report was admissible against defendant, even though it was unaudited]; 70 Harv. L. Rev. 528; 24 So. Cal. L. Rev. 367; 13 U.S.F. L. Rev. 613; 9 A.L.R.3d 692 [wealth of one or more of several joint defendants]; 87 A.L.R.4th 141 [relationship to defendant's wealth as factor in determining propriety of award].) (On discovery of wealth, see infra, §1618; on bifurcation of trial on issue of defendant's wealth, see infra, §1615 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
 See 37 Loyola L.A. L. Rev. 1739 [wealth-calibrated punitive damages].

In *Simon v. San Paolo U.S. Holding Co.* (2005) 35 C.4th 1159, 29 C.R.3d 379, 113 P.3d 63, Supp., infra, §1623A, the California Supreme Court observed: "Because a court reviewing the jury's award for due process compliance may

consider what level of punishment is necessary to vindicate the state's legitimate interests in deterring conduct harmful to state residents, the defendant's financial condition remains a legitimate consideration in setting punitive damages" after the decisions evaluating the constitutionality of a punitive damages award (see text, §1566 et seq.). (35 C.4th 1185.) In some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. In other cases, especially those involving substantial compensatory awards, the level of deterrence may be limited to that provided as a natural result of imposing damages over and above traditional compensatory damages. (35 C.4th 1186.)



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1. Evidence Admissible.
bb. Net Worth.

6 *Witkin Sum. Cal. Law Torts* § 1614

[§ 1614] Net Worth.

In *Kenly v. Ukegawa* (1993) 16 C.A.4th 49, 19 C.R.2d 771, *infra*, §1716, the trial judge awarded plaintiff \$ 200,000 in punitive damages based on evidence that, because of fraudulent conduct that saved certain property from foreclosure, defendant stood to gain over \$ 2 million from a later resale of the property. *Held*, the failure to consider defendant's net worth was error.

(a) Although net worth has been the traditional criterion against which an award of punitive damages was measured to decide whether the award was excessive, *Cummings Med. Corp. v. Occupational Med. Corp.* (1992) 10 C.A.4th 1291, 1298, 13 C.R.2d 585, *held* that a punitive damage award could be based solely on the amount of profit that the defendant received from the fraud without regard to his or her net worth. (16 C.A.4th 56.) And *Adams v. Murakami* (1991) 54 C.3d 105, 284 C.R. 318, 813 P.2d 1348, *infra*, §1619, although laced with language suggesting that net worth is the touchstone for punitive damage awards, declined to prescribe any rigid standard for measuring a defendant's ability to pay. (16 C.A.4th 57, footnote 6.)

(b) "We are convinced that in most cases there must be evidence of the defendant's net worth in order to support the punitive damage award. An award based solely on the alleged 'profit' gained by the defendant, in the absence of evidence of net worth, raises the potential of its crippling or destroying the defendant, focusing as it does solely on the assets side of the balance sheet without examining the liabilities side of the balance sheet. Without evidence of the entire financial picture, an award based on 'profit' could leave a defendant devoid of assets with which to pay his other liabilities. It is here that we believe the *Cummings* court strayed when it concluded that an award based on the profit reaped from the fraud is proper and can never be excessive." (16 C.A.4th 57.)

(c) "We do not hold that an award of punitive damages can *never* be justified solely on the profits of the fraudulent transaction (without evidence of net worth), because there may well be cases where the evidence compels the conclusion the defendant will not be crippled by the award. For example, a \$ 10,000 punitive damage award (based on profits) against a Fortune 500 company might well be proper without a lengthy presentation of the company's net worth. However, the facts presented here cannot assure us that the award will not have a crippling effect, and therefore

evidence is required on that issue." (16 C.A.4th 57, footnote 7.) (See *Vossler v. Richards Mfg. Co.* (1983) 143 C.A.3d 952, 967, 968, 192 C.R. 219 [although net income is best yardstick, figures on gross sales, gross income, or gross wealth are relevant]; *Lara v. Cadag* (1993) 13 C.A.4th 1061, 1064, 16 C.R.2d 811 [evidence of defendant's earnings is not, by itself, meaningful evidence of financial condition]; *Robert L. Cloud & Associates v. Mikesell* (1999) 69 C.A.4th 1141, 1151, 82 C.R.2d 143 [under *Lara* and *Kenly*, neither annual income nor illegal profits is adequate evidence of the defendant's net worth; what is required is evidence of the defendant's ability to pay].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Century Surety Co. v. Polisso* (2006) 139 C.A.4th 922, 960, 43 C.R.3d 468 [rules for determining whether punitive damage award violated due process (see text, §1566 et seq.) did not render consideration of net worth improper].



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 aa. In General.

6 *Witkin Sum. Cal. Law Torts* § 1615

[§ 1615] In General.

C.C. 3295 authorizes a bifurcated trial on the issue of defendant's wealth.

(1) "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud" under C.C. 3294. (C.C. 3295(d).)

(2) This evidence is admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. (C.C. 3295(d).)

(3) The evidence must be presented to "the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud." (C.C. 3295(d).) (See *Westrec Marina Management v. Jardine Ins. Brokers Orange County* (2000) 85 C.A.4th 1042, 1049, 102 C.R.2d 673 [before punitive damages may be awarded, plaintiff must prove oppression, malice, or fraud by clear and convincing evidence, and this proof must be made in first phase of bifurcated trial; if this is not done, court is later justified in refusing trial on punitive damages issue]; BAJI, Nos. 14.72.1, 14.72.2, 14.73.1; CACI, Nos. 3941, 3942, 3944, 3946, 3948, 3949.)

SUPPLEMENT: [This section is current through the latest supplement]



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bb. Same Trier of Fact.

6 *Witkin Sum. Cal. Law Torts* § 1616

[§ 1616] Same Trier of Fact.

In *Medo v. Superior Court* (1988) 205 C.A.3d 64, 251 C.R. 924, a wrongful death action, the trial judge announced that the issue of punitive damages would be bifurcated and tried to a separate jury. Defendant's counsel made no objection. The jury returned a \$ 163,000 verdict for plaintiffs and was discharged. Defendant then moved to dismiss on the ground that, the jury having been discharged, it was impossible to comply with the "one jury" requirement of C.C. 3295(d) (*supra*, §1615). The trial judge denied the motion, but ordered that at the second phase of the trial, plaintiffs' liability must be retried before evidence on punitive damages could be presented. *Held*, this was error; although C.C. 3295(d) required a single jury, it was waived by the failure of defendant's counsel to object.

(a) Plaintiffs argued that C.C. 3295(d) requires only that the jury hearing evidence of a defendant's malice must hear evidence of that defendant's financial condition. However, had the Legislature intended to allow different juries to make the liability and punitive damage decisions, it could have done so. The phrase "found for the plaintiff and" shows that profit and financial condition evidence must be presented to the same trier of fact that has already made the findings of liability and malice, oppression, or fraud. (205 C.A.3d 68.)

(b) This interpretation is reasonable, because punitive damages must be tied to oppression, fraud, or malice in the conduct giving rise to liability in the case. Hence, to evaluate oppression, etc., the jury must be allowed to consider the conduct giving rise to the liability. (205 C.A.3d 68.)

(c) However, the trial judge specifically stated that he would make the order for bifurcation unless there was strong objection from counsel. The testimony of counsel for defendant that she recalled making objection to bifurcation, but could not say whether it was made on or off the record, is insufficient to support a finding that an objection was made within a reasonable time after the bifurcation order. Hence, the requirement that compensatory and punitive damages be determined by the same jury was waived. (205 C.A.3d 69.) Had counsel objected, and especially had he informed the trial judge of the recent enactment of C.C. 3295(d), it is quite possible that separate juries would not have been ordered. (205 C.A.3d 70.)

(d) Although plaintiffs should not be deprived of the first jury's finding of liability, evidence of the conduct upon which liability rested could be heard by the second jury in determining the amount of punitive damages. (205 C.A.3d 70.)

In *El Monte v. Superior Court* (1994) 29 C.A.4th 272, 276, 34 C.R.2d 490, plaintiffs sued two police officers and the city of El Monte for compensatory and punitive damages. Prior to trial, the trial judge granted defendants' application, under C.C. 3295(d), to preclude the admission of evidence. The jury returned a verdict for one plaintiff against one police officer and the city, awarded compensatory damages, and found that the officer had acted with malice, oppression, or fraud, so that punitive damages could be awarded. After the verdict, the trial judge asked if there was anything else and, receiving no response from either counsel concerning punitive damages, discharged the jury. Realizing his mistake as the jury was leaving, plaintiffs' counsel told defendants' counsel, in the hallway, that the jury should not have been discharged before it heard evidence of defendants' wealth. Defense counsel said nothing. Plaintiffs' counsel then filed a motion for a directed verdict for specified punitive damages, but because no evidence had been presented on the subject, the trial judge decided to reconvene a new jury to hear evidence on the matter. Defendants objected to this procedure by way of mandamus. *Held*, granted.

(a) C.C. 3295(d) explicitly provides that the *same* jury that found for the plaintiff must hear the evidence of the defendant's wealth. The statute leaves no room for the exercise of discretion, unless the defendant expressly or tacitly agrees otherwise. Therefore, it was an abuse of discretion for the trial judge to reconvene a new jury, even though he did so to correct an obvious mistake. (29 C.A.4th 276.)

(b) *Medo* is distinguishable. In that case, the court announced at the onset of trial that the issue of punitive damages would be tried to a separate jury unless counsel objected. Neither counsel said anything until a verdict had been rendered and the jury discharged, at which time defense counsel objected, claiming that there was no way to comply with C.C. 3295. The court held that defendant had waived his right to have the same jury determine his wealth, because he had been informed that a different jury would hear that issue, but had said nothing. In the present case, there was no evidence that the trial judge planned to employ two juries. And defense counsel had no obligation to point out evidence that had been omitted. (29 C.A.4th 277.)

(c) *People v. Saunders* (1993) 5 C.4th 580, 20 C.R.2d 638, 853 P.2d 1093, 1 Cal. Crim. Law (3d), *Defenses*, §122, dealing with the right under P.C. 1025, 1164 to have the same jury hear evidence of prior convictions, is instructive. In that case, the trial judge discharged the jury after it had reached a verdict on the substantive charges, and defendant had waived his right to a jury trial on the priors. After a court trial on the priors, defendant changed his mind, withdrew his waiver, and raised the issue of once in jeopardy on the priors. The trial judge and appellate court held that a defendant may not "sandbag" the court by failing to object and then later asserting his right to have the same jury hear the evidence of priors. Defense counsel had a duty to inform the court of his rights, including the right of having the same jury hear evidence of priors. By failing to object, he waived this right. Applying this aspect of *Saunders* to the present action, it follows that had the trial judge announced his intention to discharge the jury, continued the case to the next day, and then impaneled a second jury, defendant would have waived his C.C. 3295 right to have the same jury hear the evidence on the issue of punitive damages, by saying nothing. (29 C.A.4th 277.)

(d) "*Medo* served as a warning to *defendants*, that the right to have the liability and punitive damages phases of the trial tried by one jury may be waived where the defendant knows up front that two juries will be employed, and fails to object when the first is discharged after the liability phase. This case should serve as a warning to *plaintiffs* that in the absence of a clear understanding that two juries will be employed, plaintiffs must put on their entire case, including evidence relevant to the amount of punitive damages, before the jury is discharged. Failure to do so results in a forfeiture of the right to punitive damages." (29 C.A.4th 280.)

In *Rivera v. Sassoon* (1995) 39 C.A.4th 1045, 46 C.R.2d 144, plaintiffs brought an action against their former landlord for breach of the warranty of habitability. The jury awarded damages to plaintiffs, and found that defendant had acted with malice. However, prior to the second phase of the trial on punitive damages, two of the jurors who had

decided the liability issue, claiming financial hardship, were replaced by alternate jurors. *Held*, this procedure did not violate C.C. 3295(d).

(a) Under *El Monte v. Superior Court*, a new jury cannot hear the evidence of punitive damages. (39 C.A.4th 1048.) However, alternate jurors, while not personally deciding the question of liability, are members of the jury that did hear, while under oath, all of the evidence presented. They are thus in as good a position to evaluate the evidence of malice giving rise to liability as are the jurors that they replaced. (39 C.A.4th 1049.)

(b) Accepting defendant's interpretation of the statute "would mean that in every case involving punitive damages if a juror had to be excused due to illness, family emergency, or other good cause after the liability phase of the trial the court would have to grant the defendant's motion for a mistrial. As a matter of public policy and sound judicial administration, replacing the excused juror with an alternate is preferable to giving the defendant a second bite of the apple at plaintiff's expense due to circumstances beyond plaintiff's control." (39 C.A.4th 1049.)

In *Torres v. Automobile Club of Southern Calif.* (1997) 15 C.4th 771, 63 C.R.2d 859, 937 P.2d 290, 9 Cal. Proc. (4th), *Appeal*, Supp., §779, the Court of Appeal set aside as excessive a \$ 1.7 million punitive damages award rendered against defendant insurer for bad faith refusal to pay a \$ 38,000 automobile accident claim, but remanded the entire cause for a complete retrial. The court concluded that a retrial was mandated by the requirement of C.C. 3295(d) that evidence of profit and financial condition must be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud. *Held*, reversed and remanded for a new trial on punitive damages only. The legislative history of this provision indicates that the "same trier of fact" language was meant to apply only to bifurcation, and that it was not designed to change the long-standing rule that, on remand, a retrial can be limited to the issue of punitive damages only. (15 C.4th 776.) (See *Barmas v. Superior Court* (2001) 92 C.A.4th 372, 375, 112 C.R.2d 71 ["same trier of fact" provision of C.C. 3295(d) applies to bifurcated trials only and thus does not preclude partial retrial before different jury of issues of malice and, if necessary, punitive damages in nonbifurcated case].)

SUPPLEMENT: [This section is current through the latest supplement]
Torres case:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §891.



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 cc. Time of Application.

6 *Witkin Sum. Cal. Law Torts* § 1617

[§ 1617] Time of Application.

Las Palmas Associates v. Las Palmas Center Associates (1991) 235 C.A.3d 1220, 1 C.R.2d 301, involved a contract under which defendant shopping center sellers had promised to guarantee certain leases. Defendants filed a declaratory relief action, and plaintiff buyers filed a cross-complaint based on breach of contract and fraud in connection with the execution of the guaranties. During opening argument, counsel for plaintiffs told the jury that defendant H was a billion-dollar company, and later cross-examined a witness on the subject of H's wealth. In response to defendants' unwillingness to voluntarily produce their records, plaintiffs had an out-of-town H executive standing by to testify as its initial witness (defendants had presented their case first). At this point, which came after months of pretrial proceedings and 5 days of testimony, defendants filed a motion under C.C. 3295(d) for a protective order excluding evidence of their wealth. The trial judge denied the motion. *Held*, this was not an abuse of discretion.

(a) Defendants argued that the only deadline imposed by C.C. 3295(d) is that the motion be made before the trier of fact delivers a verdict finding the defendant liable for acts meriting the assessment of punitive damages. This is incorrect. A request under C.C. 3295(d) is essentially a motion in limine that should ordinarily be made before trial. (235 C.A.3d 1241.) Making the motion may be delayed until a later date, but in this event the trial judge, despite the mandatory language of the statute, has the discretion to deny it if the delay is unexcused and would cause harm to the plaintiff. (235 C.A.3d 1242.)

(b) Here, defendants had early warning that plaintiffs intended to introduce evidence concerning H's wealth; hence, they had no excuse for their delay in filing a motion to exclude the evidence. Moreover, granting the motion in the midst of trial would have been prejudicial to plaintiffs because, at the time the motion was made, they had an out-of-town witness waiting to discuss defendants' finances. (235 C.A.3d 1242.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Discovery of Financial Condition.

6 *Witkin Sum. Cal. Law Torts* § 1618

[§ 1618] Discovery of Financial Condition.

(1) *Revocation of Protective Order as Sanction.* In *Richards v. Superior Court* (1978) 86 C.A.3d 265, 150 C.R. 77, plaintiffs sued five members of a law firm for malicious prosecution, intentional interference with business relations, and intentional infliction of emotional harm. Plaintiffs served interrogatories seeking financial information and stating that in lieu of detailed answers a current financial statement would be sufficient. The trial judge issued a protective order stating that the answers would be kept sealed, not to be opened except by the judge conducting the mandatory settlement conference. Four defendants filed statements; the fifth did not, and the trial judge made an order that the protective order would be dissolved if he did not comply. In the settlement conference, the judge found that the financial statement of the fifth defendant was inadequate and dissolved the protective order as to all defendants. *Held*, this was an abuse of discretion, and mandamus granted to compel issuance of a new protective order. "In effect, the trial court held four of the petitioners hostage to force compliance by the fifth, and then imposed its sanction order when the fifth did not perform in a manner deemed adequate by the judge." (86 C.A.3d 270.) This was an abuse of discretion as to the fifth; the court could not revoke its protective order even if the response was inadequate.

(a) The rule that a plaintiff alleging a cause of action that supports a claim for punitive damages may by discovery obtain information concerning his or her adversary's financial status was established by *Coy v. Superior Court* (1959) 51 C.2d 471, 473, 334 P.2d 569, 2 Cal. Evidence (4th), Witnesses, §318, in the "flush of optimism" that the "game element" would be removed from the litigation process. (86 C.A.3d 270, quoting *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 376, 15 C.R. 90, 364 P.2d 266, 2 Cal. Evidence (4th), Discovery, §1.)

(b) Experience has shown that civil discovery "has in far too many instances become its own means of substituting a battle of attrition for a search for truth. It has become a method by which the volume or nature of information sought and not the probability of success of a claim or defense pressures settlement." (86 C.A.3d 270, 271.)

(c) Discovery seeking financial information in punitive damages cases "is one classic instance of the manner in which civil discovery is used to achieve a litigation advantage never contemplated when the methodology was introduced into pretrial procedure. Causes of action for punitive damages have become very easy to allege. ... Response to discovery seeking financial information places a severe burden on the responder. At a minimum, there is the time and

expense necessary to the compilation of a complex mass of information unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damages which may never be awarded. In addition, there is usually the potential that untoward disclosure of the information obtained may in some way or other react adversely against the disclosing party for reasons totally unrelated to the lawsuit. The possibilities run all the way from greater exposure to the not so gentle solicitations of some charitable organizations to the possibility of damage to the discloser in the competitive business arena." (86 C.A.3d 271.)

(d) "Given the presently broad test of discoverable matter, the burden incident to the compilation of information that may never be of value to anyone seems built into the process. The potential of untoward disclosure of the financial information obtained in the discovery process is not. It seems a rare instance indeed that the potential of disclosure for purposes unrelated to the lawsuit or to persons other than counsel and their representatives serves any purpose except to give a tactical edge to the party who has obtained discovery of the information by allowing that party the benefit of pressure in settlement negotiations by threat or implication of disclosure." (86 C.A.3d 272.)

(e) "[W]here a party is compelled in civil discovery to reveal financial information because the information is relevant to the subject matter of a claim for punitive damages, that party is, upon his motion, presumptively entitled to a protective order that the information need be revealed only to counsel for the discovering party or to counsel's representative, and that once so revealed, the information may be used only for the purposes of the lawsuit. The burden is upon the opposing party to establish a substantial reason why the order should be denied. That reason must be related to the lawsuit." (86 C.A.3d 272.)

(2) *Statutory Authorization of Protective Orders.* Protective orders are now authorized by statute. "The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages" pursuant to C.C. 3294, prior to the introduction of evidence of the defendant's profits or financial condition. (C.C. 3295(a); see *11 Pacific L. J.* 352.) No pretrial discovery of financial condition may be had unless the court, on noticed motion, finds that "there is a substantial probability that the plaintiff will prevail on the claim." (C.C. 3295(c); see *Cobb v. Superior Court* (1979) 99 C.A.3d 543, 550, 551, 160 C.R. 561, 2 Cal. Evidence (4th), *Discovery*, §17; *Jabro v. Superior Court* (2002) 95 C.A.4th 754, 756, 115 C.R.2d 843 [in granting C.C. 3295(c) motion for disclosure of defendants' assets, trial judge improperly failed to weigh evidence presented by both sides; rather, he held that all plaintiff had to do was make prima facie showing sufficient to avoid summary judgment on his punitive damages claim]; 54 A.L.R.4th 998 [discovery of defendant's sales, earnings, or profits on issue of punitive damages].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Authorization of Protective Orders.* See *Hilton K. v. Greenbaum* (2006) 144 C.A.4th 1406, 1412, 51 C.R.3d 295 [in consolidated actions, judge's financial condition discovery rulings, which implicitly found that there was "substantial probability" that other plaintiffs would prevail in their molestation-based claims against school, did not raise issue of material fact that precluded summary judgment for school in another molestation action by other parents].



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6 *Witkin Sum. Cal. Law Torts* § 1619

[§ 1619] Introduction of Evidence Is Essential.

At one time, evidence of wealth, though discoverable and admissible (see *supra*, §1613 et seq.), was held not essential to an award. (*Hanley v. Lund* (1963) 218 C.A.2d 633, 645, 32 C.R. 733; *Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 C.A.3d 376, 404, 89 C.R. 78, *supra*, §459; *Vossler v. Richards Mfg. Co.* (1983) 143 C.A.3d 952, 964, 192 C.R. 219; *Fenlon v. Brock* (1989) 216 C.A.3d 1174, 1182, 265 C.R. 324.)

Dumas v. Stocker (1989) 213 C.A.3d 1262, 262 C.R. 311, and *Storage Services v. Oosterbaan* (1989) 214 C.A.3d 498, 516, 262 C.R. 689, rejected this line of cases. The California Supreme Court resolved the conflict in *Adams v. Murakami* (1991) 54 C.3d 105, 284 C.R. 318, 813 P.2d 1348, by holding that evidence of the defendant's financial condition is a prerequisite to an award of punitive damages, and that the burden of introducing this evidence is on the plaintiff.

Plaintiff, a chronic schizophrenic of low intelligence, brought an action for medical malpractice, battery, and intentional infliction of emotional distress, against defendant Dr. M and defendant hospital. The complaint alleged that as a result of their wrongful acts and omissions plaintiff became pregnant by another patient and gave birth to a son who was mentally retarded and autistic. The jury returned a verdict for plaintiff that, after adjustments by the trial court, amounted to \$ 1,024,266, including \$ 750,000 in punitive damages. The hospital settled, but Dr. M appealed, contending that the punitive damages award was improper because plaintiff had not introduced evidence of Dr. M's financial condition. *Held*, judgment reversed.

(a) *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 148 C.R. 389, 582 P.2d 980, *infra*, §1620, set forth three criteria for determining whether an award of punitive damages is excessive (i.e., exceeds the level necessary to properly punish and deter). One of these is the defendant's financial condition, and a reviewing court cannot make a fully informed determination unless the record contains evidence of that condition. (54 C.3d 110, 111.) In *Burnett v. National Enquirer* (1983) 144 C.A.3d 991, 193 C.R. 206, *infra*, §1621, the court, reiterating the *Neal* factors, concluded that, although the defendant's misconduct was "reprehensible," the award had to be reduced solely because it constituted too great a portion of defendant's net worth and income. (54 C.3d 111.)

(b) Although the determination whether an award is excessive is an unscientific process (54 C.3d 112, quoting *Devlin v. Kearny Mesa AMC/Jeep/Renault* (1984) 155 C.A.3d 381, 202 C.R. 204, infra, §1620), when provided with evidence of the defendant's financial condition the reviewing court can at least reach a reasonably informed decision. "Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive. Plaintiff offers no justification for imposing such a burden on reviewing courts or for encouraging ill-informed decision." (54 C.3d 112.)

(c) The better reasoned line of Court of Appeal decisions requires evidence of the defendant's financial condition. *Dumas*, on a full consideration of the *Neal* decision, points out that compensatory damages cannot be based on speculation, and that there is no reason for a different standard for punitive damages. (54 C.3d 114.) *Dumas* states the correct rule. (54 C.3d 114, 115.) The opposing rule, set forth in *Vossler* is not persuasive. It was based on *Hanley v. Lund*, supra, a poorly reasoned case decided before *Neal*. (54 C.3d 115.) "We affirm the rule stated in *Dumas*, ... and disapprove of *Hanley* ... and its progeny." (54 C.3d 115.)

(d) The issue has recently acquired a federal constitutional dimension, in *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1, supra, §1567. (54 C.3d 116, 117.) "We need not decide, and do not decide, whether evidence of a defendant's financial condition is a constitutional prerequisite under *Haslip*. ... At a minimum, however, the high court has made clear a constitutional mandate for meaningful judicial scrutiny of punitive damages awards. This requirement weighs heavily in favor of evidence of a defendant's financial condition. Absent such evidence, a reviewing court cannot make an informed decision whether the amount of punitive damages is excessive as a matter of law. That commonsense concern is itself sufficient to require such evidence as a matter of state law. Moreover, in light of *Haslip*, the absence of such evidence raises doubt as to the constitutionality of a punitive damages award." (54 C.3d 118.)

(e) The final problem is how to allocate the burden of producing the evidence.

(1) Under *Ev.C. 500* (1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §6), fundamental fairness is the lodestar; and the bedrock concerns of policy and fairness support placing the burden on the plaintiff. "It is not too much to ask of a plaintiff seeking such a windfall to require that he or she introduce evidence that will allow a jury and a reviewing court to determine whether the amount of the award is appropriate, and in particular, whether it is excessive in light of the central goal of deterrence." (54 C.3d 120.)

(2) The potential unfairness of imposing the burden on the defendant becomes even more clear when considered in the light of trial practice reality. "It is inherently prejudicial to require a defendant to introduce evidence of personal finances. Doing so places a defendant in the position of bidding against himself. A defendant in that position is forced to tell the jury in effect that: 'My conduct doesn't warrant punitive damages. But, by the way, if you disagree, please be gentle, I'm worth only the following amount.' ... Requiring a defendant to prove his or her own financial condition may improperly taint the jury's decision whether to impose punitive damages in the first instance. The defendant's only alternative is to remain silent as to personal finances and run the risk of being annihilated financially." (54 C.3d 120.)

(3) Consideration of the question from the plaintiff's perspective leads to the same conclusion. As one practice guide explains: "Plaintiff's counsel has everything to gain and nothing to lose by utilizing the rule that permits (and if the verdict is high) compels introduction of the defendant's wealth." (54 C.3d 122.) "Perhaps a plaintiff might want to keep from a jury the evidence of a defendant's financial resources if they were meager and thus might lead to a small punitive damages award. In this circumstance, however, the plaintiff would be deliberately seeking an award disproportionate (or at least unrelated) to the defendant's ability to pay. That result, of course, is contrary to the public purpose of punitive damages." (54 C.3d 122.)

Two justices dissented. (See *Washington v. Farlice* (1991) 1 C.A.4th 766, 777, 2 C.R.2d 607 [inadequate evidence of defendant's financial condition to determine if award of \$ 50,000 was justified]; *Tomaselli v. Transamerica Ins. Co.* (1994) 25 C.A.4th 1269, 1282, 1285, 31 C.R.2d 433, citing the text [punitive damages award was defective; only

evidence of defendant's financial condition was annual report of defendant's corporate parent, and there was no showing that it would be unjust to plaintiffs to limit award to percentage of defendant's value rather than that of parent]; *Chavez v. Keat* (1995) 34 C.A.4th 1406, 1410, 41 C.R.2d 72 [rule that plaintiff bears burden of proving defendant's wealth is not constitutionally required; it is California rule of substantive law, not applicable to federal cause of action in California court]; 25 *Loyola L.A. L. Rev.* 1441 [Adams]; 19 *Pepperdine L. Rev.* 842 [same]; on full retroactivity of *Adams*, see *Douglas v. Ostermeier* (1991) 1 C.A.4th 729, 740, 2 C.R.2d 594, 9 Cal. Proc. (4th), Appeal, §980; on inapplicability of *Adams* rule where substantive law being applied is federal, see *Barber v. Rancho Mortg. & Inv. Corp.* (1994) 26 C.A.4th 1819, 1842, footnote 26, 32 C.R.2d 906.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Caira v. Offner* (2005) 126 C.A.4th 12, 37, 24 C.R.3d 233 [to comply with rule that there must be evidence of defendant's financial condition, court may order defendant to produce financial statement, and if defendant fails to obey order, it cannot claim on appeal that evidence of financial worth was lacking]; *Kelly v. Haag* (2006) 145 C.A.4th 910, 916, 52 C.R.3d 126 [evidence was insufficient to support \$ 75,000 punitive damages award against contractor causing water damage to condominium, where there was no evidence that, at time of trial, contractor still owned certain properties, and even if he did own those properties, there was no evidence of any encumbrances on properties at time of trial, or of other liabilities contractor may have had]; *Baxter v. Peterson* (2007) 150 C.A.4th 673, 679, 58 C.R.3d 686 [in fraud case, plaintiff lessee failed to introduce sufficient evidence of defendant lessor's financial condition to support \$ 75,000 punitive damages award, where, although record showed that lessor owned several rental houses, there was no evidence regarding their value, amount of income they generated, extent to which they were encumbered, or whether properties' operation was profitable]. *Douglas case*:

Cross-Reference: 9 Cal. Proc. (5th), Appeal, §544.



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6 *Witkin Sum. Cal. Law Torts* § 1620

[§ 1620] Awards Upheld.

In *Wetherbee v. United Ins. Co. of America* (1971) 18 C.A.3d 266, 95 C.R. 678, defendant insurer was found to have committed a fraud on plaintiff beneficiary of a health policy, who was awarded stipulated compensatory damages of \$ 1,050 and punitive damages as prayed, \$ 500,000. On appeal, the judgment was reversed for a retrial of the issue of punitive damages. (265 C.A.2d 921.) On the retrial, the jury awarded \$ 200,000 and the judge denied a new trial. *Held*, affirmed. The object of punitive damages "is to make the example as well as the punishment fit the offense." Defendant's report to stockholders showed \$ 300 million in gross assets, \$ 60 million in net assets, and a monthly net income after taxes of \$ 1 million. The \$ 200,000 was less than a week's after-tax income. "Thus, the jury could reasonably conclude that an award equal to one week's earnings was required to effect the necessary punishment of defendant and to serve as an example for other insurers." (18 C.A.3d 271.)

In *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 148 C.R. 389, 582 P.2d 980, the court declared that, in determining whether the recovery is so grossly disproportionate as to raise a presumption of passion or prejudice (see *supra*, §1612 et seq.), it is guided by the following principles:

(a) The particular nature of the defendant's acts: "[T]he more reprehensible the act, the greater the appropriate punishment." (21 C.3d 928.)

(b) The amount of compensatory damages awarded: "[E]ven an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small." (21 C.3d 928.)

(c) The wealth of the defendant: "[O]bviously, the function of deterrence ... , will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." (21 C.3d 928, citing the text.) "By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (21 C.3d 928.)

Applying these principles to the instant case:

(1) The jury and judge could properly have concluded that the conduct of defendant was "highly reprehensible," involving "a calculated attempt" to take advantage of the tragedies afflicting Mrs. N and her family "in order to effect a settlement at a bargain price." (21 C.3d 929.)

(2) If Mrs. N had not died, it is likely that a substantial additional amount of compensatory damages would have been awarded for emotional distress; under these circumstances "the apparent disproportion" cannot nullify the award. (21 C.3d 929.)

(3) The reduced verdict represents less than 1/10 of 1% of defendant's gross assets and less than 1 week's net income; hence, as in *Wetherbee*, *supra*, the award "was required to effect the necessary punishment of defendant and to serve as an example for other insurers." (21 C.3d 929.)

In *Zaxis Wireless Communications v. Motor Sound Corp.* (2001) 89 C.A.4th 577, 107 C.R.2d 308, a punitive damages award of \$ 300,000 was held not to be excessive as a matter of law despite the fact that defendant company had a negative net worth. Although many items may be "losses" for accounting purposes, they do not affect a defendant's ability to pay a damages award. This was especially true in this case where the evidence showed that defendant had a net profit of \$ 7.5 million, a credit line of \$ 50 million, and cash on hand and a checking balance of over \$ 19 million. Net worth is too easily manipulated to be the sole standard of measuring a defendant's ability to pay. (89 C.A.4th 581.)

Many additional decisions are illustrative. (See *MacDonald v. Joslyn* (1969) 275 C.A.2d 282, 293, 79 C.R. 707, *supra*, §488; *Ferraro v. Pacific Finance Corp.* (1970) 8 C.A.3d 339, 353, 87 C.R. 226, *supra*, §1589 [award against corporate defendant much larger than against individual defendant; award upheld]; *Roemer v. Retail Credit Co.* (1975) 44 C.A.3d 926, 937, 119 C.R. 82; *Walker v. Signal Cos.* (1978) 84 C.A.3d 982, 149 C.R. 119; *Pistorius v. Prudential Ins. Co.* (1981) 123 C.A.3d 541, 554, 176 C.R. 660 [award of \$ 1 million was .00002% of defendant's gross assets and 1/20 of 1% of its net worth; upheld]; *Betts v. Allstate Ins. Co.* (1984) 154 C.A.3d 688, 711, 201 C.R. 528; *Downey Savings & Loan Assn. v. Ohio Cas. Ins. Co.* (1987) 189 C.A.3d 1072, 1097, 234 C.R. 835 [compensatory damages of \$ 152,983.43, punitive damages of \$ 5 million--ratio of 32.7 to 1--upheld]; *Douglas v. Ostermeier* (1991) 1 C.A.4th 729, 750, 2 C.R.2d 594, 9 Cal. Proc. (4th), *Appeal*, §980 [award of \$ 187,000 was justified by evidence of defendant's wealth and nature of his possibly criminal acts in selling used car to plaintiff]; *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 C.A.4th 1645, 1659, 57 C.R.2d 525 [fact that punitive damages exceeded profits made on item that caused harm did not automatically make them excessive]; *Rufo v. Simpson* (2001) 86 C.A.4th 573, 616, 103 C.R.2d 492 [in upholding punitive damage award of \$ 25 million against famous ex-football player, court properly considered evidence of defendant's ability to earn future income, taking into account damaging effects of present trial; fact that punitive damages exceeded defendant's net worth did not prove excessiveness in light of exempt nature of much of defendant's income].)

In *Devlin v. Kearny Mesa AMC/Jeep/Renault* (1984) 155 C.A.3d 381, 202 C.R. 204, the court examined the opinions dealing with the claim of excessive punitive damages awards, analyzed the relevant factors considered on review, and, in an Appendix, listed the cases awarding damages, noting amounts and relationship to wealth. (For a full discussion of *Devlin*, see 9 Cal. Proc. (4th), *Appeal*, §369; and see *Goshgarian v. George* (1984) 161 C.A.3d 1214, 1227, 1228, 208 C.R. 321 [commenting on *Devlin* opinion and Appendix].)

SUPPLEMENT: [This section is current through the latest supplement]

See *San Bernardino v. Walsh* (2007) 158 C.A.4th 533, 541, 69 C.R.3d 848 [evidence did not support claim by defendants that punitive damages awards of \$ 1 million and \$ 500,000 respectively would financially ruin them; both defendants manipulated and concealed wrongfully obtained profits and evidence of net worth, one defendant manipulated net worth of \$ 3.7 million to ensure he would obtain comfortable lifestyle despite award, and other defendant owned more than \$ 2 million in assets, as well as equity in real property]. *Douglas case*:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §544. *Full discussion of Devlin case:*

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §375.



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6 Witkin Sum. Cal. Law Torts § 1621

[§ 1621] In General.

In *Little v. Stuyvesant Life Ins. Co.* (1977) 67 C.A.3d 451, 136 C.R. 653, supra, §214, the verdict against an insurer for wrongful termination of disability payments was \$ 172,325 compensatory damages and \$ 2.5 million punitive damages. *Held*, the compensatory damage award, while "somewhat generous," was not excessive. (67 C.A.3d 466.) The punitive damage award was, in the light of the evidence, excessive. It amounted to more than 15% of defendant's entire net worth, and bore no reasonable relationship to the compensatory damages. (67 C.A.3d 469, citing the text.) Hence, the judgment was affirmed as modified to permit plaintiff to agree to a reduction to \$ 250,000; otherwise the issue of the amount of punitive damages was to be retried. (67 C.A.3d 470.)

In *Rosener v. Sears, Roebuck & Co.* (1980) 110 C.A.3d 740, 168 C.R. 237, plaintiff homeowners entered into home improvement contracts with a contractor licensed by defendant. The work was badly done, the contractor defaulted, and defendant violated its promises to assure satisfactory performance. Plaintiffs suffered physical and emotional distress, invasions of privacy, property damage, and financial loss. The verdict was for \$ 158,000 compensatory damages and \$ 10 million punitive damages. *Held*, reversed for a new trial on punitive damages unless plaintiffs consent to a reduction of the punitive damage award to \$ 2.5 million. The punitive damage award was not reasonably related to either the compensatory damages or the nature of defendant's conduct, and was clearly excessive.

(a) *Relation to compensatory damages.* If defendant's *wealth* were the only guiding factor (see supra, §1613), the award, representing less than 1/4 of 1% of defendant's net assets and only 31/2 days of net income, might be justified. (110 C.A.3d 750.) But the reasonable relation test (see supra, §1612) must also be applied, and the award did not meet the test; the ratio here was 63 to 1. (110 C.A.3d 752, 753, citing *Little v. Stuyvesant Life Ins. Co.*, supra, and *Allard v. Church of Scientology* (1976) 58 C.A.3d 439, 453, 129 C.R. 797, supra, §1612.)

(b) *Nature of defendant's act.* As pointed out in *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 148 C.R. 389, 582 P.2d 980, supra, §1620, the reprehensibility of the defendant's act is an important factor. Some of the problems of defendant's contractor and the recalcitrance of his bonding company could not easily have been anticipated; some of defendant's actions were based on advice of counsel; and defendant made some attempts to rectify the situation. (110

C.A.3d 753, 754.)

In *Burnett v. National Enquirer* (1983) 144 C.A.3d 991, 193 C.R. 206, supra, §637, compensatory damages were properly awarded, in the amount of \$ 50,000, on a showing of false statements injuring plaintiff's professional standing, in a publication read by 16 million persons. (144 C.A.3d 1016.) But the punitive damage award was excessive. The jury verdict was for \$ 1.3 million, which the trial judge reduced to \$ 750,000. The reduced amount, however, was 35% of the defendant's net worth and nearly half of its net income for the period under consideration. Accordingly, the appellate court ordered that it be further reduced to \$ 150,000 or that defendant be granted a new trial on the issue. (144 C.A.3d 1012.)

A number of additional decisions are illustrative. (See *BMW of North America v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589, 1601, 134 L.Ed.2d 809, 829, supra, §1568 [punitive damages award 500 times actual damages was denial of due process]; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 C.3d 809, 824, 157 C.R. 482, 598 P.2d 452, 2 Summary (10th), *Insurance*, §242 [award 40 times larger than substantial compensatory damage award, representing 21/2 months of defendant's entire net income for 1973 and more than 7 months of this income in 1974 was excessive as matter of law]; *Goshgarian v. George* (1984) 161 C.A.3d 1214, 1227, 1228, 1229, 208 C.R. 321 [reducing award from \$ 15,000 to \$ 7,500]; *Sprague v. Equifax* (1985) 166 C.A.3d 1012, 1052, 1054, 213 C.R. 69 [trial judge properly applied factors set forth in *Neal and Little*]; *Seeley v. Seymour* (1987) 190 C.A.3d 844, 866, 237 C.R. 282; *Storage Services v. Oosterbaan* (1989) 214 C.A.3d 498, 515, 262 C.R. 689 [award representing 44% of defendant's net worth, and exceeding his gross income in year of trial]; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 C.A.3d 1220, 1255, 1 C.R.2d 301 [\$ 10 million award reduced to \$ 2 million]; *Michelson v. Hamada* (1994) 29 C.A.4th 1566, 1592, 36 C.R.2d 343 [\$ 1.25 million award; defendant's net worth valued at \$ 4.4 million]; *George F. Hillenbrand v. Insurance Co. of North America* (2002) 104 C.A.4th 784, 820, 128 C.R.2d 586 [\$ 14 million award in malicious prosecution action reduced to \$ 3 million; reduction was justified where underlying action was prosecuted at lawyer's behest, and there was no evidence of personal ill will towards plaintiff]; 17 U.S.F. L. Rev. 147 [criticizing California appellate decisions reducing awards]; 12 A.L.R.5th 195 [excessiveness or inadequacy of punitive damages awarded in personal injury or death case]; 103 A.L.R.5th 379 [validity of state statutory cap on punitive damages].)

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6 *Witkin Sum. Cal. Law Torts* § 1622

[§ 1622] Defendant Not Wealthy.

In *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 C.A.3d 5, 18, 130 C.R. 416, the court, after quoting the general rule of *Bertero v. National General Corp.* (1974) 13 C.3d 43, 65, 118 C.R. 184, 529 P.2d 608, supra, §1554, that the wealthier the defendant the larger the award of punitive damages needs to be, said: "It also follows that the poorer the wrongdoing defendant the smaller the award of punitive damages need be in order to accomplish the statutory objective." Plaintiff's home was lost through foreclosure after defendant insurer unjustifiably refused to continue payments on a mortgage insurance policy (see supra, §459), and the jury awarded plaintiff compensatory damages of \$ 267,294.52 and punitive damages of \$ 500,000. The compensatory damage award, almost all of which was for emotional distress, was held excessive in light of the suffering shown (see infra, §1746), and the punitive damage award was held excessive in light of the net worth of defendant--\$ 1,607,721.01. (59 C.A.3d 18.) (See 79 A.L.R.3d 1138 [admissibility of evidence of defendant's lack of financial resources as matter in mitigation of punitive damages].)

This issue, and the ratio of actual to punitive damages, were explored in *Zhadan v. Downtown L.A. Motors* (1976) 66 C.A.3d 481, 136 C.R. 132. Plaintiff's car broke down, and she called defendant's service manager, asking him to pick it up and find out what was wrong with it. B. & P.C. 9884.9 provides that the repairer must give a written estimate, that no work may be done before authorization to proceed, and that no charge may be made in excess of the estimate without the consent of the customer. (See 4 *Summary* (10th), Sales, §332.) Defendant performed work without an estimate, and presented her with a bill for \$ 1,952.52 for repairs, for a car valued at about \$ 1,500. Plaintiff refused to pay, and managed to obtain possession of the car; but defendant later repossessed it, and plaintiff was forced to rent a car for business use. In this action for damages for conversion, plaintiff offered evidence that some of the work charged for had not been done, and that other work was poorly done, requiring an expenditure of \$ 87 for corrective work. The jury verdict was for \$ 5,342 compensatory and \$ 175,000 punitive damages. The trial judge made a conditional new trial order for reduction of the punitive damages to \$ 50,000, but this was defective for failure to state reasons (C.C.P. 657). *Held*, the punitive damage award was excessive, and judgment was reversed for a new trial on all issues (see infra, §1739).

(a) *Matters involved in determination of issue.* (1) The award must bear a reasonable relation to actual damages. (2)

The poorer the wrongdoer the smaller the award need be. (3) The public policy embodied in the statute violated, and the magnitude of defendant's violation by the defendant, are also to be considered. (66 C.A.3d 496.)

(b) *Policy embodied in statute.* Defendant was guilty of a flagrant violation of a statute enacted for the protection of consumers, and this supported imposition of punitive damages "in a very substantial amount." Hence, if the judge had made an adequate statement of reasons for his conditional new trial order, the reduced amount of \$ 50,000 might well have been justified. (66 C.A.3d 497.)

(c) *Relation to actual damages.* The amount awarded by the jury was about 40 times the compensatory damages. Some older cases have held such a ratio too high; more recent cases have approved higher amounts, and, as pointed out in *Wetherbee v. United Ins. Co. of America* (1971) 18 C.A.3d 266, 95 C.R. 678, supra, §1620, there is no fixed ratio. (66 C.A.3d 498.) In other words, excessiveness must be tested by "the importance of the policy violated by defendant's conduct, the degree and extent, both qualitatively and quantitatively, of the violation, and the financial circumstances of the defendant." (66 C.A.3d 499.)

(d) *Defendant's net worth.* Unlike the wealthy defendant in *Wetherbee*, defendant had only \$ 532,000 in net assets, and the award, more than one-third of that amount, "could only be justified on the assumption that it is necessary to put defendant out of business in order to deter future conduct of a like nature." This would require "clear evidence of a continuing course of conduct involving large-scale flagrant violations," which was not shown here. (66 C.A.3d 500.)

In the retrial in *Zhadan*, supra, the punitive damage award of \$ 90,000 was upheld, on a showing that defendant's net worth had increased to \$ 1,314,000; i.e., the former award was 33% of the net worth and the present less than 7% of the net worth. (*Zhadan v. Downtown Los Angeles Motors Distributors* (1979) 100 C.A.3d 821, 834, 161 C.R. 225.)

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d. Prejudicial Matter in Trial.

6 *Witkin Sum. Cal. Law Torts* § 1623

[§ 1623] Prejudicial Matter in Trial.

In *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 148 C.R. 389, 582 P.2d 980, supra, §1620, plaintiff's counsel used the "third party argument," i.e., by questions and argument urged the jury to judge defendant's conduct not in the context of its policy limits but in the context of the total "value" of the injuries suffered by N in the accident, about \$ 500,000. This was improper: (a) In the actual third-party situation, where the insurer refuses to settle an injured person's claim against its insured, the insurer can be held liable for the full amount of any judgment regardless of policy limits. (21 C.3d 925, citing *Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 58 C.R. 13, 426 P.2d 173, 2 Summary (10th), *Insurance*, §264.) (b) This principle has no application to the present first-party situation, for plaintiff's injuries (in the accident) were sustained prior to defendant's breach, and could not be a proximate result of the breach. (21 C.3d 925.) Thus, counsel's conduct should be condemned; but, because the extent and severity of N's injuries were relevant to the punitive damages, and because the judge instructed the jury that the "value" of those injuries was not to be considered as an element of compensatory damages, it cannot be said that the jury was misled, and the error was therefore not prejudicial. (21 C.3d 925.)

Counsel also, from opening statement to closing argument, placed before the jury the details of N's condition following the accident, her subsequent death from cancer, and her son's death from the same disease. "Counsel's zeal in this respect in some instances led him into excesses," and he was reproved by the judge. However, the facts behind this tactic were relevant: "[T]he jury was clearly entitled to consider evidence of the situation of the insured at the time of the proffered settlement insofar as that situation was known to the insurer and might be considered to have motivated its actions." Hence, it cannot be said that the verdict as reduced resulted from passion and prejudice. (21 C.3d 926.)

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e. (New) Uncompensated or Potential Harm as Affecting Amount.

6 Witkin Sum. Cal. Law Torts § 1623A

[§ 1623A] (New) Uncompensated or Potential Harm as Affecting Amount.

In *Simon v. San Paolo U.S. Holding Co.* (2005) 35 C.4th 1159, 29 C.R.3d 379, 113 P.3d 63, plaintiff attempted to purchase a building from defendant. The parties entered into a tentative agreement in which plaintiff, in exchange for defendant's acceptance of a \$ 1.1 million sales price, agreed to deposit \$ 50,000 to open escrow and to complete all inspections by a specified date, at which time the deposit would become nonrefundable. At the same time, plaintiff secured an attorney, paying a nonrefundable \$ 5,000 retainer. When defendant sought to have the inspections completed by an earlier date, the parties could not agree, and the negotiations terminated. Plaintiff then sued for breach of contract and promissory fraud. Finding that there was no contract, but that defendant had made a false promise about a material matter upon which plaintiff had relied to his detriment, the jury awarded him compensatory damages equal to the \$ 5,000 retainer. Finding further that defendant had acted with malice and oppression, the jury fixed punitive damages at \$ 1.7 million. In attempting to justify the award, plaintiff argued that the \$ 1.7 million punitive award should not be measured against the \$ 5,000 compensatory award, but against the alleged actual harm that he had sustained, i.e., the \$ 400,000 difference between the sales price and what plaintiff's expert testified the building was worth. *Held*, \$ 5,000 was the extent of plaintiff's damage.

(a) *Appropriate basis for comparison.* United States Supreme Court precedents appear to contemplate that, in some circumstances, the use of measures of harm beyond the compensatory damages is appropriate. These include *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366, text, §1567; *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585, text, §1568; and *BMW of North America v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, 832, text, §1568. However, "the \$ 400,000 in profit that plaintiff might have gained by purchasing the building is not a proper consideration." (35 C.4th 1174.)

(b) *Uncompensated harm.*

(1) The jury did not specify the false promise made by defendant. Thus, the finding could have referred to defendant's express promise to proceed to escrow and attempt to complete a transaction on the agreed terms, to its express promise to exclusively negotiate, to its implied promise to seek approval from the New York office for a sale on the agreed terms, or to any combination of these promises. However, had defendant made none of these promises,

plaintiff would still not have obtained the property, because, as the jury found, he had no contractual right to buy the property. Consequently, defendant's promissory fraud did not deprive plaintiff of property that he would have obtained but for the fraud; it merely led him to spend \$ 5,000 to retain an attorney in anticipation of opening escrow. (35 C.4th 1175.)

(2) Plaintiff contended that he was precluded from recovering the \$ 400,000 in lost profits only by operation of C.C. 3343(a)(1), which sets damages for a defrauded attempted purchaser of property at the "[a]mounts actually and reasonably expended in reliance upon the fraud." This contention is without merit. Fraudulent promises to negotiate exclusively and proceed to escrow may cause the attempted buyer to expend money in reliance, but they do not themselves cause the losses occasioned by the attempted buyer's failure to actually obtain the property. That injury is instead caused by the seller's breach of an enforceable contractual obligation to sell the property, where one exists. Hence, if plaintiff had prevailed on his breach of contract cause of action, he would have been entitled to recover the benefit of his bargain, here allegedly \$ 400,000, because defendant's refusal to sell to him would have caused that injury. But defendant in fact had no contractual obligation to sell plaintiff the property. It had an obligation imposed by law not to fraudulently promise to sell plaintiff the property, but had defendant complied with that obligation, plaintiff still would not have obtained the property. (35 C.4th 1175.)

(c) *Potential harm.*

(1) Plaintiff also contended that defendant's fraud was intended to cause him, or risked causing him, potential losses, including the \$ 50,000 deposit that was to become nonrefundable upon completion of the inspections. Plaintiff further contended that his potential losses included an unquantified financial impact; i.e., had he given up his leased business premises after signing the letter of intent, he would then have "found himself on the street" when defendant pulled out of the sale. However, "these asserted potential injuries, like the uncompensated harm ... , may not be considered in assessing the ratio of punitive damages to harm." (35 C.4th 1177.)

(2) The potential harm that is properly included in this analysis is harm that is foreseeable from the defendant's conduct. However, the \$ 400,000 in profit plaintiff claimed that he would have earned by acquiring the property cannot be considered potential harm resulting from defendant's promissory fraud, because, in the absence of any contractual obligation to sell plaintiff the property, defendant's tortious conduct could not have had the foreseeable effect of depriving plaintiff of an entitlement to purchase it. Similarly, plaintiff's potential loss of his \$ 50,000 deposit was simply not shown to be a likely result of defendant's fraud. To obtain the \$ 50,000, defendant would first have had to open escrow, which required entering into a binding contract of sale, something defendant did not do. The same may be said of plaintiff's possible cancellation of his then current leasing arrangement, i.e., that he might do so without first entering into a binding purchase contract was not foreseeable, and had he done so after executing such a contract, he would not have been "out on the street," because he could have enforced the contract. (35 C.4th 1177.)

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D. Mitigation of Damages.

1. Avoidable Consequences.

a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1624

[§ 1624] In General.

Where damage to person or property is threatened or inflicted by either breach of contract or tort, the injured party has the active duty to use reasonable care and diligence to protect himself or herself and minimize the loss. And if, by the injured party's own neglect, the damages are unnecessarily enhanced, the injured party cannot recover the excess. (See *Pretzer v. California Transit Co.* (1930) 211 C. 202, 208, 294 P. 382; *Withrow v. Becker* (1935) 6 C.A.2d 723, 729, 45 P.2d 235; *Shaffer v. Debbas* (1993) 17 C.A.4th 33, 41, 21 C.R.2d 110 [award of \$ 130,000 based on cost of repair of house had to be reduced to \$ 97,500, where jury found that 25% of property damage to house could have been avoided]; Cal. Civil Practice, 1 Torts, Mitigation of Damages, Chap. 6; 6 Am.Jur. Trials 501 [Minimizing Personal Injury Damages]; BAJI, Nos. 14.67, 14.68; CACI, Nos. 3930, 3931.)

Though frequently expressed in terms of a duty of the injured party, it is perhaps more accurate to say that the wrongdoer is not required to compensate for damages avoidable by reasonable effort. Hence, the rule is sometimes referred to as the "doctrine of avoidable consequences." (See *Rest.2d, Torts* §918; 4 Harper, James & Gray 2d §25.4; 22 *Am.Jur.2d* (2003 ed.), *Damages* §340 et seq.; 61 *Harv. L. Rev.* 131; 55 *A.L.R.2d* 936 [duty of one suing for damage to vehicle to minimize damages]; 66 *A.L.R.2d* 1131 [duty to minimize damages for wrongful injunction].) The doctrine applies to wilful as well as negligent torts. (*Green v. Smith* (1968) 261 C.A.2d 392, 67 C.R. 796, *infra*, §1626.)

In *Thrifty-Tel v. Bezenek* (1996) 46 C.A.4th 1559, 54 C.R.2d 468, *supra*, §720, plaintiff, a telephone long-distance carrier, sued defendants, the parents of teenage boys who used the family computer to crack plaintiff's system and make long-distance phone calls without paying. In November, defendants' sons first used the family home computer and modem to enter plaintiff's system. Plaintiff became aware of the computer hacking through its internal security system almost immediately and had identified its source by late November, but made no attempt to contact defendants. Three months later, in February, the sons again tried to find an authorization code, this time using computer software to perform rapid-fire random number searches, generating over 1,300 calls and overburdening plaintiff's system. Plaintiff again did not contact defendants, but subsequently filed this action, seeking damages for conversion, fraud, and the reasonable value of services. Plaintiff offered no explanation for its failure to complain to defendants after the November hacking episode, and did not rebut defendant father's testimony that he would have stopped the hacking immediately had he been informed. The trial court found for plaintiff, and awarded \$ 33,720 in damages and nearly \$ 14,000 in attorneys' fees and costs. *Held*, judgment reversed as to damages. (On liability aspects of case, see *supra*,

§§720, 773, 821, 822, 1229, 1230.) Plaintiff had a duty to mitigate its damages and may not recover for losses that it could have avoided. Under the uncontradicted evidence, had plaintiff informed defendants of their sons' activities, defendants would have prevented them from engaging in the second, more serious computer hacking episode in February. Accordingly, plaintiff is not entitled to recover for the February event. Because the judgment presumably included damages attributable to the February incident, the judgment must be reversed and the matter remanded for a new trial on damages. (46 C.A.4th 1568.)

Personal injury cases furnish a familiar illustration. A plaintiff who fails or refuses to submit to necessary treatment by a doctor cannot recover for additional harm resulting from failing to do so. (See 4 Harper, James & Gray 2d §25.4; 22 Am.Jur.2d (2003 ed.), *Damages* §366 et seq.; 62 A.L.R.3d 70 [duty of injured person to submit to nonsurgical medical treatment to minimize damages]; BAJI, No. 6.28; CACI, No. 517; *infra*, §1626.) And if the plaintiff does act with reasonable care in seeking medical aid, the right to recover damages will not be diminished by reason of the fact that the plaintiff might have obtained better treatment. (*Boa v. San Francisco-Oakland Terminal Rys.* (1920) 182 C. 93, 102, 187 P. 2; *Garrison v. Booth* (1935) 10 C.A.2d 738, 742, 52 P.2d 535 [plaintiff treated slight abrasion himself for 4 days, then went to doctor as soon as fever developed]; *Christiansen v. Hollings* (1941) 44 C.A.2d 332, 345, 112 P.2d 723; see *McKinney v. Red Top Cab Co.* (1931) 113 C.A. 637, 641, 299 P. 113 [plaintiff imprudently took train trip after accident, without getting prompt medical care; but no showing that injuries were aggravated by doing so].)

The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. (*Royal Thrift & Loan Co. v. County Escrow* (2004) 123 C.A.4th 24, 41, 20 C.R.3d 37 [lender's conduct of foreclosure sale was reasonable, although better procedure was available].)

West's Key Number Digest, Damages k.62(1) et seq.

SUPPLEMENT: [This section is current through the latest supplement]

Doctrine of avoidable consequences: See 4 Harper, James & Gray 3d §25.4. *Failure to seek medical care:* See 4 Harper, James & Gray 3d §25.4.



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1. Avoidable Consequences.

b. Recovery of Cost of Efforts.

6 *Witkin Sum. Cal. Law Torts* § 1625

[§ 1625] Recovery of Cost of Efforts.

A party who fulfills his or her duty to mitigate damages may recover the reasonable cost of doing so, provided that it does not exceed the damages prevented or reasonably anticipated. (*Kleinclaus v. Marin Realty Co.* (1949) 94 C.A.2d 733, 739, 211 P.2d 582; *Hartong v. Partake* (1968) 266 C.A.2d 942, 968, 72 C.R. 722; *Rest.2d, Torts* §919; 61 *Harv. L. Rev.* 133; 33 *A.L.R.3d* 1262 [recovery of cost of insured's efforts from property insurer].)

In *Pacific Tel. & Tel. Co. v. Granite Const. Co.* (1964) 225 C.A.2d 765, 37 C.R. 727, plaintiff installed an underground communications cable to the site of Winter Olympic Games tryouts. Defendant, contractor for an access road, damaged it by trespass and negligence. *Held*, plaintiff was entitled to recover not only the cost of repair, but the cost of relocating 780 feet of cable to avoid future injuries. (225 C.A.2d 769.)

In *Zander v. Texaco* (1968) 259 C.A.2d 793, 66 C.R. 561, plaintiff settled with insured tortfeasors and gave them a covenant not to execute. Then plaintiff sued their insurer on his statutory cause of action under *Ins.C. 11580(b)(2)* (see 2 *Summary* (10th), *Insurance*, §301 et seq.). *Held*, the covenant did not bar this action; i.e., plaintiff should not be penalized for this attempt to minimize his damages. Hence, he could recover from the insurer the amount of his judgment against the tortfeasors, less the amount of the settlement. (259 C.A.2d 803.)

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1. Avoidable Consequences.

c. Exceptions to Requirement.

1. Unreasonable Efforts.

6 *Witkin Sum. Cal. Law Torts* § 1626

[§ 1626] Unreasonable Efforts.

The doctrine of avoidable consequences does not apply where the measures necessary to avoid or lessen the damage would involve an unreasonably great effort, risk, or expense, or would be impractical. (*Joerger v. Pacific Gas & Elec. Co.* (1929) 207 C. 8, 28, 276 P. 1017; *Valencia v. Shell Oil Co.* (1944) 23 C.2d 840, 846, 147 P.2d 558, *infra*, §1627; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§344, 347 et seq.)

In *Green v. Smith* (1968) 261 C.A.2d 392, 67 C.R. 796, plaintiff had a large crop of nursery stock on leased land. Defendant bought the land, and, in clearing it for future subdivision, demolished the pipeline supplying water. Plaintiff attempted to convey the water by constructing a ditch, but was only partially successful. Damage to trees was found to be \$ 17,000, but the trial judge awarded only \$ 600, the cost of a substitute means of conveying water--by portable irrigation equipment using other water. *Held*, reversed. The injured party need not make unreasonable efforts; and reasonableness is determined by the situation confronting the plaintiff when loss is threatened, not by judgment of hindsight. (261 C.A.2d 396, citing the text.) Here, the probative findings were that plaintiff did attempt to irrigate by constructing one ditch, then a bigger one, and that he was able to salvage part of the crop. These findings were inconsistent with the conclusion that he failed to take reasonable measures. "The fact that in retrospect a reasonable alternative course of action is shown to have been feasible is not proof of the fact that the course actually pursued by plaintiff was unreasonable." (261 C.A.2d 398.)

In *Seaboard Music Co. v. Germano* (1972) 24 C.A.3d 618, 101 C.R. 255, plaintiff leased coin-operated amusement equipment to a bar owner for 3 years. The agreement contained a provision that any sale of the business should require the purchaser to assume the equipment contract. Defendant business opportunity brokers induced the lessee to sell without this provision, and plaintiff sued for inducement of breach of contract. Damages were awarded on the basis of lost profits of \$ 51 per week for the remaining weeks of the lease. Defendants contended that plaintiff should have attempted to minimize damages by re-leasing the equipment to another. *Held*, judgment affirmed. The duty to minimize would apply if a single house or single piece of equipment were involved. Here, plaintiff was in the business of leasing the equipment; it had a warehouse full of similar machines; to apply the minimizing doctrine would deprive it of the profit realized on another contract, which it would have made irrespective of the breach. (24 C.A.3d 623.)

In personal injury cases, the plaintiff need accept only the level of medical treatment that appears reasonably necessary, and may properly refuse to consent to a serious operation with the attendant risk of failure. (*Boa v. San Francisco-Oakland Terminal Rys.* (1920) 182 C. 93, 101, 187 P. 2; *Karberg v. Southern Pac. Co.* (1935) 10 C.A.2d 234, 251, 52 P.2d 285; *Dodds v. Stellar* (1946) 77 C.A.2d 411, 423, 175 P.2d 607; see 61 *Harv. L. Rev.* 132; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§367, 368.)

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2. Reliance on Defendant's Promise.

6 *Witkin Sum. Cal. Law Torts* § 1627

[§ 1627] Reliance on Defendant's Promise.

Another exception to the doctrine has been recognized where the plaintiff remains inactive in reliance upon a promise of the defendant to pay for the repair of damaged property. In *Valencia v. Shell Oil Co. (1944) 23 C.2d 840, 147 P.2d 558*, defendant's employee negligently damaged plaintiff's truck, and defendant ordered repairs made, but its insurance carrier refused to pay the bill (\$ 222) unless plaintiff would sign a release of all claims. *Held*, plaintiff was entitled to recover not only for the cost of repairs, but \$ 4,416 for loss of use of the truck for 17 months. Although plaintiff would ordinarily have been bound to minimize damages by paying for repairs, this duty was first excused by defendant's undertaking until the insurance company's repudiation, and subsequently excused where it appeared that plaintiff was unable to meet the expense. (*23 C.2d 846.*)

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3. Lender's Failure To Insure Collateral.

6 *Witkin Sum. Cal. Law Torts* § 1628

[§ 1628] Lender's Failure To Insure Collateral.

In *Valle de Oro Bank v. Gamboa* (1994) 26 C.A.4th 1686, 32 C.R.2d 329, a bank brought an action for the balance due on a promissory note secured by a motor home. The motor home had been destroyed by fire, and the unpaid balance exceeded the insurance coverage obtained by defendant. The trial judge allowed the jury to consider and ultimately apply the doctrine of mitigation of damages by virtue of the fact that the bank, which had a contractual option to procure comprehensive insurance on the motor home, had declined to do so. *Held*, this was improper. When a lender agrees to maintain insurance for a financed vehicle, an action for breach of the agreement can be maintained for fire damage if in fact no insurance coverage was provided. (26 C.A.4th 1693.) In the present case, however, plaintiff had no such obligation. It fully performed under the contract when it disbursed the loan proceeds to defendant, and the obligation to procure insurance was defendant's. "When [defendant] allowed his insurance coverage to lapse and when he thereafter arranged for renewal of coverage for less than the amount of the loan balance, no damage producing event had yet occurred. The vehicle which collateralized the loan still existed and [defendant] continued to make scheduled loan payments. Simply put, there was no damage for the Bank to mitigate, and it was still the Bank's contractual *option*, not *obligation*, to secure its own insurance coverage." (26 C.A.4th 1694.)

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2. Benefits Conferred by Defendant.

6 *Witkin Sum. Cal. Law Torts* § 1629

[§ 1629] Benefits Conferred by Defendant.

If the defendant's tort causes injury to the plaintiff, but also confers a special benefit on the plaintiff, the value of the benefit may sometimes be considered and the plaintiff's recovery limited to the net loss. (*Maben v. Rankin* (1961) 55 C.2d 139, 144, 10 C.R. 353, 358 P.2d 681 ["In determining the damages suffered as a result of a tortious act, consideration may be given, where equitable, to the value of any special benefit conferred by that act to the interest which was harmed"]; *Rest.2d, Torts* §920; see *Dakota Gardens Apartment Investors "B" v. Pudwill* (1977) 75 C.A.3d 346, 352, 354, 142 C.R. 126, citing the text [defendant cannot diminish amount of damages by paying debt of plaintiff without plaintiff's consent; mitigation will be denied where it is inequitable]; 22 *Am.Jur.2d* (2003 ed.), *Damages* §383 et seq.; 13 *Summary* (10th), *Personal Property*, §121 [accession]; 12 *Summary* (10th), *Real Property*, §462 [innocent improver of realty].)

The same is true where the defendant pays the plaintiff's medical expense. In *Dodds v. Bucknum* (1963) 214 C.A.2d 206, 29 C.R. 393, a personal injury action, plaintiff's medical and hospital expenses of \$ 955.05 were paid by defendant's insurance carrier under the provisions of defendant's automobile policy. *Held*, plaintiff was not entitled to inclusion of this amount in the judgment. Starting with the fundamental policy against double recovery, the court stated the distinction between benefits conferred by third persons and by the defendant.

(a) If the plaintiff carries insurance that covers his or her medical expenses, the fact of payment from this collateral source cannot be claimed as a windfall deduction by the defendant wrongdoer, who in no way contributed to the compensation. (214 C.A.2d 213.) (See *infra*, §1631.)

(b) But if the defendant personally pays the plaintiff's medical bill, the plaintiff cannot recover again for the amount (*Rest.2d, Torts* §923, *Illus.* 3); "It can make no difference either in principle or in justice that defendant did not pay these bills out of his own pocket but that the source of such payments was insurance purchased by defendant with his own funds for such an eventuality." (214 C.A.2d 213.)

In *Heckert v. MacDonald* (1989) 208 C.A.3d 832, 256 C.R. 369, the Heckerts purchased a 31-unit apartment building from MacDonald and others in 1978, for \$ 900,000. MacDonald, a real estate broker, represented both the sellers and the purchasers. He had acted as managing agent of the property for the previous owners and continued to act for the Heckerts. In 1983, the Heckerts sold the building to M & S for \$ 1,720,000, in a transaction negotiated by

MacDonald and Frankel, broker for M & S. Shortly thereafter, M & S found extensive structural deficiencies and dry rot resulting from failure to repair leaks. They brought this action against the Heckerts and MacDonald, for fraud and negligent nondisclosure, and the Heckerts cross-complained against MacDonald for indemnity. The jury brought in a verdict of \$ 200,000 to M & S, and the judge entered judgment for the Heckerts for complete indemnity on their cross-complaint against MacDonald. The Heckerts then moved for attorneys' fees of \$ 46,172.50 from MacDonald, incurred in defending the action that had been brought against them solely because of his tortious conduct as broker. The trial judge denied the motion. *Held*, affirmed.

(a) The Heckerts were entitled to attorneys' fees under the "tort of another" or "third party tort" exception to the general rule that each party bears the cost of his or her attorneys' fees. (208 C.A.3d 836, citing *Prentice v. North Amer. Title Guaranty Corp., Alameda Div.* (1963) 59 C.2d 618, 30 C.R. 821, 381 P.2d 645, *infra*, §1656.)

(b) However, the theory of the "third party tort" exception is that the attorneys' fees are recoverable not as such but as damages. (208 C.A.3d 838.) Here, the Heckerts came within the "special benefit" doctrine. (208 C.A.3d 839, citing the text.) The profit on the sale of their property resulting from the broker's tortious conduct was far in excess of the attorneys' fees; i.e., in view of the jury's award of \$ 200,000 to M & S, the Heckerts received \$ 200,000 more from M & S than they would have received had M & S known the true value and structural condition at the time of sale. (208 C.A.3d 839.)

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3. Other Mitigating Factors.

6 *Witkin Sum. Cal. Law Torts* § 1630

[§ 1630] Other Mitigating Factors.

(1) *Return of Property Wrongfully Taken*. In an action for conversion, the damages are mitigated by the defendant's return of the property, or by its recovery by the plaintiff. (See *George v. Pierce* (1898) 123 C. 172, 176, 55 P. 775, 56 P. 53; *Blewett v. Miller* (1900) 131 C. 149, 151, 63 P. 157; *Ross v. Sweeters* (1932) 119 C.A. 716, 721, 7 P.2d 334; *Krusi v. Bear, Stearns & Co.* (1983) 144 C.A.3d 664, 673, 192 C.R. 793, citing the text; *Rest.2d*, Torts §922; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §137; 75 *A.L.R.2d* 473 [pleading matter in mitigation in tort action other than defamation].)

(2) *Defamation Cases*. Evidence in mitigation of damages is frequently offered in actions for libel or slander. (See *C.C.P.* 461; 75 *Harv. L. Rev.* 1228; 12 *So. Cal. L. Rev.* 225, 251.) Thus, the area of circulation or dissemination of the defamatory statement may be considered, as in *Bonner v. Los Angeles Examiner* (1936) 17 C.A.2d 458, 462, 62 P.2d 427, where derogatory charges concerning plaintiff were made in a Los Angeles newspaper, but plaintiff resided elsewhere, and there was no showing that the newspaper circulated in the place of his residence.

Due care of the defendant in investigating the matter, or in taking the information from reliable sources, is likewise a basis for mitigating damages. But reliance upon mere rumors, without investigation, will not support a plea in mitigation. (*Edwards v. San Jose Printing & Publishing Soc.* (1893) 99 C. 431, 438, 34 P. 128.) (On retraction or correction, see *supra*, §629.)

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4. Collateral Source Rule.

a. Nature of Rule.

6 *Witkin Sum. Cal. Law Torts* § 1631

[§ 1631] Nature of Rule.

The "collateral source rule" has been stated as follows: "Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer." (*Anheuser-Busch v. Starley* (1946) 28 C.2d 347, 349, 170 P.2d 448; see *De Cruz v. Reid* (1968) 69 C.2d 217, 226, 70 C.R. 550, 444 P.2d 342, citing the text; *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 6, 84 C.R. 173, 465 P.2d 61, *infra*, §1632; *Hrnjak v. Graymar* (1971) 4 C.3d 725, 729, 94 C.R. 623, 484 P.2d 599; *Lee v. State Farm Mut. Ins. Co.* (1976) 57 C.A.3d 458, 464, 129 C.R. 271; *Krusi v. Bear, Stearns & Co.* (1983) 144 C.A.3d 664, 674, 192 C.R. 793; *Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 C.A.3d 159, 166, 167, 169, 222 C.R. 800, *infra*, §1635; *Rest.2d, Torts* §920A; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§392, 395; 59 *Cal. L. Rev.* 258; 68 *Harv. L. Rev.* 366; 52 *A.L.R.2d* 1451 [receipt of compensation from assumption of accumulated employment leave, vacation time, sick leave allowance, or the like, as affecting recovery against tortfeasor]; 47 *A.L.R.3d* 234 [*Hrnjak*]; 49 *A.L.R.5th* 685 [valuing damages for gratuitously rendered nursing and medical care]; 104 *A.L.R. Fed* 492 [applicability of collateral source rule to actions under Federal Tort Claims Act].)

The doctrine has been severely criticized by commentators. (See 54 *Cal. L. Rev.* 1478; 59 *Cal. L. Rev.* 258; 77 *Harv. L. Rev.* 741.) But it is firmly established as the California rule. (See *infra*, §1632.)

The Medical Injury Compensation Reform Act abrogates the rule in actions for professional negligence against health care providers. The defendant may introduce evidence of Social Security payments, state or federal disability or compensation payments, health or income disability payments, and benefits received under group health plans. (C.C. 3333.1(a); see *supra*, §956.) A public entity, in a post-trial hearing, may obtain a reduction of the judgment where the plaintiff has already received partial pretrial compensation. (*Govt.C.* 985, *infra*, §1637 *et seq.*)

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4. Collateral Source Rule.

b. Supporting Theories and Policies.

6 *Witkin Sum. Cal. Law Torts* § 1632

[§ 1632] Supporting Theories and Policies.

In *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 84 C.R. 173, 465 P.2d 61, the court undertook an elaborate review of the nature, purpose, and scope of the rule, and answered the principal criticisms leveled at it by commentators (see *supra*, §1631).

(a) Policy considerations support the rule. An insured invests money in insurance premiums to assure his or her medical care, and the insured, not the tortfeasor, should receive the benefits of that thrift. "The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities. Courts consider insurance a form of investment, the benefits of which become payable without respect to any other possible source of funds. If we were to permit a tortfeasor to mitigate damages with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit. Defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance." (2 C.3d 10.)

(b) The rule does not give the plaintiff an unjustifiable double recovery.

(1) Insurance policies increasingly provide for either subrogation or refund of benefits after a tort recovery by the insured. In these cases, "the collateral source rule simply serves as a means of by-passing the antiquated doctrine of nonassignment of tortious actions and permits a proper transfer of risk from the plaintiff's insurer to the tortfeasor by way of the victim's tort recovery. The double shift from the tortfeasor to the victim and then from the victim to his insurance carrier can normally occur with little cost in that the insurance carrier is often intimately involved in the initial litigation and quite automatically receives its part of the tort settlement or verdict." (2 C.3d 11.)

(2) Even where the law precludes subrogation or refund of benefits, or where the collateral source waives subrogation or refund, "the rule performs entirely necessary functions in the computation of damages." (2 C.3d 11.) One function is to prevent confusing the jury in its assessment of general damages. To permit the defendant to disclose compensation by a collateral source for plaintiff's medical costs "might irretrievably upset the complex, delicate, and somewhat indefinable calculations which result in the normal jury verdict." (2 C.3d 11.) The other function is to

overcome the disadvantage to the plaintiff resulting from the usual attorney's contingent fee contract. The jury is not informed of the fact that a large portion of the recovery goes to the attorney, and that the plaintiff therefore rarely receives the compensation for his or her injuries as computed by the jury. Thus: "The collateral source rule partially serves to compensate for the attorney's share. ... Indeed, many jurisdictions that have abolished or limited the collateral source rule have also established a means for assessing the plaintiff's costs for counsel directly against the defendant rather than imposing the contingent fee system." (2 *C.3d* 12.)

(c) Repudiation of the rule without other fundamental changes would be undesirable. "If we consider the collateral source rule as applied here in the context of the entire American approach to the law of torts and damages, we find that the rule presently performs a number of legitimate and even indispensable functions. Without a thorough revolution in the American approach to torts and the consequent damages, the rule at least with respect to medical insurance benefits has become so integrated within our present system that its precipitous judicial nullification would work hardship. In this case the collateral source rule lies between two systems for the compensation of accident victims: the traditional tort recovery based on fault and the increasingly prevalent coverage based on non-fault insurance. Neither system possesses such universality of coverage or completeness of compensation that we can easily dispense with the collateral source rule's approach to meshing the two systems. ... The reforms which many academicians propose cannot easily be achieved through piecemeal common law development; the proposed changes, if desirable, would be more effectively accomplished through legislative reform. In any case, we cannot believe that the judicial repeal of the collateral source rule, as applied in the present case, would be the place to begin the needed changes." (2 *C.3d* 13.) (See 59 *Cal. L. Rev.* 258; 77 *A.L.R.3d* 415 [*Helfend*].)

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4. Collateral Source Rule.

c. Scope and Application of Rule.

1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1633

[§ 1633] In General.

(1) *Source Must Be Independent.* The collateral source rule was restated and reaffirmed in *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 13, 84 C.R. 173, 465 P.2d 61, supra, §1632, as applicable "in tort cases in which the plaintiff has been compensated by an independent collateral source--such as insurance, pension, continued wages, or disability payments--for which he has actually or constructively ... paid or in cases in which the collateral source would be recompensed from the tort recovery through subrogation, refund of benefits, or some other arrangement." As indicated, the collateral source from which the injured person receives compensation must be a source wholly independent of the tortfeasor. Thus, collateral recovery is not allowed where a joint tortfeasor is involved, because the source of recovery is not "wholly independent." (*Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 C.A.3d 479, 485, 255 C.R. 40 [plaintiff's insurer could be sued as independent source for bad faith denial of claim; insurer's fraud was so distinct from defendant driver's negligence that it could not be considered joint tortfeasor]; see *infra*, §1640.)

(2) *Rule Applies in Legal Malpractice Action.* In *Norton v. Superior Court* (1994) 24 C.A.4th 1750, 30 C.R.2d 217, an attorney being sued by his clients for his handling of their property damage claim sought discovery of the terms and conditions of plaintiffs' recovery from their insurer for the property damage. The trial judge denied defendant's motion to compel production of documents. *Held*, writ of mandamus issued, even though the collateral source rule applies to legal malpractice actions. "[D]ue to the unique nature of a legal malpractice action, being the trial of a 'suit within a suit,' the defendant attorney stands in the shoes of the underlying tortfeasor insofar as the collateral source rule is concerned. Thus, the collateral source rule applies indirectly in a way which makes evidence of payments from a collateral source irrelevant on the question of damages." (24 C.A.4th 1758.) Nevertheless, the documents sought could be admissible for a purpose other than mitigating damages; they could, for example, be used to show plaintiffs' motive in bringing the malpractice action. Therefore, on remand the trial judge should inspect the documents in camera in order to determine whether they should be produced, and if so, what conditions or restrictions should apply. (24 C.A.4th 1761, 1762.)

(3) *Triple Recovery.* In *Rotolo Chevrolet v. Superior Court* (2003) 105 C.A.4th 242, 129 C.R.2d 283, plaintiff was injured in a vehicle accident, forced to retire, and received a disability pension, evidence of which he was able to exclude under the collateral source rule. *Held*, this was error. If plaintiff planned to claim only lost earnings damages,

the collateral source rule would preclude evidence of his disability pension, but he also intended to seek to recover the amount of regular retirement benefits that he lost due to his forced early retirement. Although plaintiff's employer is a "source wholly independent of the tortfeasor," the fact that the employer provides two potential types of pension benefits does not make one type "collateral" to the other, which is already "collateral" to plaintiff's lost earnings. Otherwise, plaintiff would receive triple compensation: lost earnings damages, damages based on his lost regular retirements benefits, and his actual disability retirement benefits. (105 C.A.4th 245.)

(4) *Instructions*. The question whether to tell the jury about collateral compensation is analytically distinct from the collateral source rule, but because the two issues are so closely related courts often draw no distinction between the two. Usually, the jury instruction issue arises when the plaintiff *can* recover collateral benefits, but the issue may also arise when the plaintiff *cannot* recover a collateral benefit. In either situation, the jury should not be given that information. (*Lund v. San Joaquin Valley R.* (2003) 31 C.4th 1, 8, 1 C.R.3d 412, 71 P.3d 770.)

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(5) *(New) Applicability in Breach of Contract Cases*. The collateral source rule has not been generally applied in cases founded upon breach of contract. It does apply, however, where the plaintiff sues for breach of contract and the underlying conduct involves a tort. And it also applies in a construction defect case based on combined tort and contract claims. (*El Escorial Owners' Assn. v. DLC Plastering* (2007) 154 C.A.4th 1337, 1359, 65 C.R.3d 524 [collateral source rule applied to builder's express indemnity causes of action against subcontractors, which builder had assigned to condominium owners association in connection with construction defects action, because underlying claims against subcontractors were based on their negligence and causation, which association had to prove to prevail].)



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2. Gratuitous Payment.

6 *Witkin Sum. Cal. Law Torts* § 1634

[§ 1634] Gratuitous Payment.

In *Arambula v. Wells* (1999) 72 C.A.4th 1006, 85 C.R.2d 584, plaintiff was injured in a car collision. His claim for damages included loss of earnings. Plaintiff worked for a family-owned company in which his brother was the major shareholder, and the brother continued to pay plaintiff's weekly salary during his absence from work due to his injuries. Although there was evidence that the brother "wished" to be reimbursed, plaintiff presented no documentation establishing that the continued payment of his salary was required or that his brother had the right to be reimbursed. The trial judge thus instructed the jury not to award damages for lost earnings. *Held*, cause remanded for a limited new trial on the issue of lost wages.

(a) The collateral source rule clearly allows the plaintiff to recover damages despite having received compensation from some additional source, where the plaintiff has paid for the additional compensation or where the collateral source would be compensated. Relying on footnote 5 of *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 84 C.R. 173, 465 P.2d 61, *supra*, §1632, defendant argued that the collateral source rule did not apply to *gratuitous* payments. This argument is without merit. The *Helfend* case had nothing to do with the issue at hand. (72 C.A.4th 1009.)

(b) There are numerous other reasons for holding that *Helfend* is not authority for the proposition that the collateral source rule does not apply to gratuitous payments. The law existing at the time of the *Helfend* decision made no special distinction for purely gratuitous benefits. (72 C.A.4th 1011, citing *Fifield Manor v. Finston* (1960) 54 C.2d 632, 7 C.R. 377, 354 P.2d 1073, *supra*, §751, and *Tremeroli v. Austin Trailer Equipment Co.* (1951) 102 C.A.2d 464, 227 P.2d 923, 7 Cal. Proc. (4th), Trial, §447.) No subsequent appellate opinion has construed *Helfend* in the manner suggested by defendant. (72 C.A.4th 1011, citing *Rodriquez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 151 C.R. 399, and *Hanif v. Housing Authority* (1988) 200 C.A.3d 635, 246 C.R. 192, *infra*, §1670.)

(c) Public policy concerns weigh heavily in favor of applying the collateral source rule to gratuitous payments: (1) Applying the rule in this manner favors private charitable assistance; (2) to the extent that private generosity operates, the impact on the state is lightened; (3) applying the rule to gratuitous payments precludes tortfeasors from gaining a windfall; (4) the plaintiff may be motivated to repay the donor, thus avoiding even the semblance of a double recovery;

and (5) the injured victim may not have been made whole by the damages recovered, because generally his or her attorney will receive a large portion of this amount. (72 C.A.4th 1012.)

(d) Where a tortfeasor's friends or family pay the victim's bills, not primarily to benefit him or her, but because of a sense of moral obligation or atonement, the tortfeasor may well be entitled to an offset to effectuate the donor's intent and to avoid a double recovery. (72 C.A.4th 1015.)

(e) The rule of evidence aspect of the collateral source rule precludes the introduction of the plaintiff's having been additionally compensated for the purpose of reducing damages. However, this evidence may be introduced for other purposes, such as to impeach the plaintiff's claimed inability to work. Whether these purposes exist here must be resolved by the trial judge on remand. (72 C.A.4th 1015.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Smock v. California* (2006) 138 C.A.4th 883, 886, 41 C.R.3d 857 [collateral source rule was properly applied in traffic accident victim's personal injury action in order to exclude from jury's consideration certain gratuitous payments that victim received from his employer during his convalescence]. *Tremeroli case*:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §437. *Correction:* Page 1149, line 9 of paragraph (b), "*Rodriquez v. McDonnell Douglas Corp.*" should be "*Rodriguez v. McDonnell Douglas Corp.*"



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3. Illustrations.

6 *Witkin Sum. Cal. Law Torts* § 1635

[§ 1635] Illustrations.

In *Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 C.A.3d 159, 222 C.R. 800, plaintiff bought an apartment complex from defendant, on representations that the roof was sound. Leaks developed, plaintiff incurred significant repair bills, and he was forced to credit tenants' rentals for damage caused by the leakage. He brought this action for damages for fraud, seeking recovery for "out-of-pocket" losses under C.C. 3343. Defendant, pointing out that the apartment was financed by the FHA and was subject to an FHA mortgage, attempted to introduce evidence that FHA regulations authorized an increase in rentals to recoup the expenses incurred, and that plaintiff's application for this increase had been approved by the FHA. The trial judge excluded the evidence. *Held*, the order was proper.

(a) The evidence was relevant. Evidence of a defrauded purchaser's receipt of reimbursement through a regulatory agency's authorization to increase rentals is probative on the issue of whether the defrauded purchaser actually sustained any damages. (177 C.A.3d 165.)

(b) The evidence was nevertheless excludable under the collateral source rule. The restrictive and regulative FHA insured mortgage was equivalent to a constructive payment or investment by the plaintiff mortgagor in a program with potential collateral benefits (favorable interest rate and compensation for increased operating costs). (177 C.A.3d 169.) Most jurisdictions, including California, have balanced two conflicting principles--compensating the plaintiff only for losses actually sustained, and avoiding a windfall to the defendant--in favor of excluding evidence of benefits received from a source wholly independent of the tortfeasor. (177 C.A.3d 170.)

(c) Defendant contended that the absence of a right of subrogation or refund in the third party providing benefits precluded application of the collateral source rule. (177 C.A.3d 165, 167, 170.) "However, the real issue is not whether a windfall is to be conferred upon either party, but rather which party shall receive the benefit of a windfall which presumably already exists. As between the insured plaintiff and the tortfeasor, it would seem that justice compels the conclusion the former's claim is the better. ... In any event, it is clear the possibility of a double recovery in favor of respondent will not impose a double burden on appellant; appellant, as tortfeasor, bears responsibility only for the single burden of his wrong." (177 C.A.3d 170.)

The cases and annotations furnish many illustrations. (See *De Cruz v. Reid* (1968) 69 C.2d 217, 226, 70 C.R. 550, 444 P.2d 342, citing the text; *Loggie v. Interstate Transit Co.* (1930) 108 C.A. 165, 169, 291 P. 618 [collision insurance paid for damage to automobile]; *Inglewood Park Mausoleum Co. v. Ferguson* (1935) 9 C.A.2d 217, 218, 49 P.2d 305 [notary was liable for acknowledging forged deed, though title company paid plaintiff full amount of policy]; *Gersick v. Shilling* (1950) 97 C.A.2d 641, 650, 218 P.2d 583 [payment of hospital bills by Blue Cross, and disability payments by U.S. Employment Service]; *Hume v. Lacey* (1952) 112 C.A.2d 147, 152, 245 P.2d 672 [pension payments were not deducted from recovery for loss of earning capacity]; *Patent Scaffolding Co. v. William Simpson Const. Co.* (1967) 256 C.A.2d 506, 510, 64 C.R. 187, 13 Summary (10th), Equity, §189; *McQuillan v. Southern Pac. Co.* (1974) 40 C.A.3d 802, 807, 115 C.R. 418 [amount received from Public Employees' Retirement System, analogous to pension and insurance payments]; *Maggio v. United Farm Workers* (1991) 227 C.A.3d 847, 877, 278 C.R. 250 [money received from fund created to reimburse lettuce growers for losses suffered during strike was not deducted]; *Shaffer v. Debbas* (1993) 17 C.A.4th 33, 40, 21 C.R.2d 110 [rejecting contention that rule should be limited to personal injury cases]; *Miller v. Ellis* (2002) 103 C.A.4th 373, 382, 126 C.R.2d 667 [in malpractice suit against two attorneys, collateral source rule was unavailable to permit first attorney to recover from second attorney, despite payment by first attorney's insurer of his liability to injured party; first attorney was not in any way an "injured party"]; 75 A.L.R.2d 885 [receipt of public or private pension]; 4 A.L.R.3d 535 [receipt of disability unemployment benefits]; 7 A.L.R.3d 516 [compensation paid by employer, notwithstanding disability]; 11 A.L.R.3d 1115 [insurer's payment of medical or funeral expenses under liability policy]; 77 A.L.R.3d 366 [public relief or gratuity]; 77 A.L.R.3d 415 [hospitalization or medical insurance]; 41 A.L.R.5th 771 [admissibility on damages issue of evidence of availability of free public special education].)

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6 *Witkin Sum. Cal. Law Torts* § 1636

[§ 1636] In General.

In *Salinas v. Souza & McCue Const. Co.* (1967) 66 C.2d 217, 227, 57 C.R. 337, 424 P.2d 921, the court characterized the rule as punitive in nature, and therefore inapplicable in actions against public entities, which cannot be held liable for punitive damages (see *supra*, §1580). (See 9 Santa Clara Lawyer 227.)

The *Souza* case was overruled on this point in *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 14, 84 C.R. 173, 465 P.2d 61, *supra*, §1632. Plaintiff was injured in an automobile collision with a bus negligently driven by defendant M for defendant District, a public entity. Plaintiff claimed about \$ 2,700 in special damages, including bills for doctor, hospital, and medicines. Defendant sought to show that 80% of the hospital bill was paid by plaintiff's Blue Cross insurance carrier, and that some of his other medical expenses may have been paid by other insurance. The evidence was excluded, and judgment was rendered for plaintiff on a jury verdict for \$ 16,400. *Held*, affirmed. The collateral source rule "applies to governmental entities as well as to all other tortfeasors."

(a) The *Souza* characterization of the rule as punitive is unsound. If it were punitive, it could only apply in cases of oppression, fraud, or malice, and would be inapplicable to most tort cases and almost all negligence cases. (2 C.3d 13.)

(b) To preclude application of the doctrine in actions against public entities would give rise to a dilemma. If the entity were immune but the employee liable, he or she would have to pay the extra damages equivalent to the collateral source increment, but would be entitled to indemnity from the entity. The result would be that the entity's immunity would be bypassed when the plaintiff sued both, or an unjustifiable result would occur if the employee sued only the entity. (2 C.3d 15.) (See *Acosta v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 19, 25, 84 C.R. 184, 465 P.2d 72 [applying *Helfend* rule in action only against public entity, not joining employee]; 59 Cal. L. Rev. 258.)

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6 *Witkin Sum. Cal. Law Torts* § 1637

[§ 1637] Nature of Statute.

Govt.C. 985 establishes a special procedure by post-trial motion for the reduction of a judgment against a state or local public entity in an action for personal injuries or wrongful death. (For procedure, see *infra*, §§1638, 1639.)

Govt.C. 985(b) restates the general collateral source rule: "Any collateral source payment paid or owed to or on behalf of a plaintiff shall be inadmissible in any action for personal injuries or wrongful death where a public entity is a defendant."

In all actions affected by *Govt.C. 985*, the court must instruct the jury with the following language: "You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard." (*Govt.C. 985(j)*.) (See BAJI, No. 14.60.5; CACI, No. 3923.)

If the defendant public entity or defendant public employee is also a health care provider as defined in C.C. 3333.1 (*supra*, §956), that section controls as to that defendant. (*Govt.C. 985(l)*.)

The statute does not apply to lien or subrogation rights provided in *Lab.C. 3850 et seq.* (see 2 *Summary* (10th), *Workers' Compensation*, §72 et seq.). (*Govt.C. 985(m)*.)

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bb. Motion, Discovery, and Settlement Conference.

6 *Witkin Sum. Cal. Law Torts* § 1638

[§ 1638] Motion, Discovery, and Settlement Conference.

(1) *Basis of Motion.* The motion may be made after a verdict has been returned that includes damages "for which payment from a collateral source" has already been paid or is obligated to be paid for services or benefits provided prior to the commencement of trial, and the total of collateral source payments is over \$ 5,000 (the amount to be increased 5% compounded on January 1, 1989, and each January 1 thereafter; thus, as of January 1, 2005, the amount was \$ 10,914). (*Govt.C. 985(b).*)

(2) *Motion.* The defendant public entity may, by noticed motion within the time set in *C.C.P. 659* (see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §49), "request a posttrial hearing for a reduction of the judgment" for the collateral source payments. (*Govt.C. 985(b).*) The hearing may be noticed with any motions pursuant to *Govt.C. 962* and *984* (see *supra*, §§234, 235) or *C.C.P. 659*; but "the hearing shall not occur until after the determination of any motions for a new trial, for judgment notwithstanding the verdict, for remittitur, for additur, and after any mandatory settlement conference" under *Govt.C. 962*. (*Govt.C. 985(b).*)

(3) *Discovery of Names of Providers and Amounts.* *Govt.C. 985* allows discovery as follows:

(a) A defendant public entity may, by interrogatory or in writing at the trial-setting conference, "request from the plaintiff a list of the names and addresses of any provider of a collateral source payment affected by this section that has provided collateral source payments directly to or on behalf of the plaintiff and the amount provided to the plaintiff from each collateral source." (*Govt.C. 985(c).*)

(b) The plaintiff must produce the requested list within 30 days of the request, and has a continuing duty to disclose any additional names and addresses of providers who pay or owe collateral source payments between the time of the response and the commencement of trial. (*Govt.C. 985(c).*)

(c) If the plaintiff fails or refuses to supply the required information, the defendant public entity, upon discovery of the identity of the provider of a collateral source payment, within 5 years of the date of entry of judgment, may request a

reduction of the judgment for those payments. (*Govt.C. 985(d)*.) The failure also "shall subject plaintiff or plaintiff's attorney to sanctions." (*Govt.C. 985(d)*.)

(4) *Settlement Conference*. The following procedural provisions govern settlement conferences:

(a) The public entity must give written notice to each listed or identified provider of the date set for any pretrial settlement conference. (*Govt.C. 985(c)*.)

(b) The provider is not required to attend a pretrial conference unless requested to do so by the court; but the court may request it to attend or give written information, to be available by telephone, or to otherwise participate in the conference; and it waives its rights to reimbursement unless it attends or otherwise complies with the request. (*Govt.C. 985(c)*.)

(c) The public entity must also give 20 days' notice to the provider of any post-trial settlement conference. (*Govt.C. 985(e)*.)

(d) Proof of service of any notice must be filed with the court and a copy served on all parties to the action. (*Govt.C. 985(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Motion*.

C.C.P. 659:

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §48.



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cc. Hearing and Determination.

6 *Witkin Sum. Cal. Law Torts* § 1639

[§ 1639] Hearing and Determination.

(1) *Authority and Discretion of Court.* At the hearing, the trial court "shall, in its discretion and on terms as may be just," make the following determinations:

(a) Final determination as to any pending lien and subrogation rights. (*Govt.C. 985(f).*)

(b) Determination of what portion of collateral source payments should be reimbursed from the judgment to the provider, deducted from the verdict, or accrue to the benefit of the plaintiff. (*Govt.C. 985(f).*)

"No provider of collateral source payments pursuant to this section shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a public entity defendant other than in the amount so determined by the court." (*Govt.C. 985(f).*)

(2) *Reimbursements and Adjustments.* The following rules govern reimbursements and adjustments:

(a) If the court has determined that the verdict included money damages for which the plaintiff has already received payment or had expenses paid by Medi-Cal, county health care, Aid to Families with Dependent Children, Victims of Crime, "or other nonfederal publicly funded source of benefit with statutory lien rights," the court "*shall order reimbursement*" from the judgment of those amounts to the provider "on terms as may be just." (*Govt.C. 985(f)(1).*) (See *Joyce v. Simi Valley Unified School Dist. (2003) 110 C.A.4th 292, 307, 1 C.R.3d 712* [judgment against school district was not reduced by amount attributable to medical services provided to injured student under insurance policy that her mother had as employee of district; district purchased insurance as employer and did not contribute to student's care as public entity tortfeasor].)

(b) If the court has determined that the verdict includes money damages for which the plaintiff has already received payment or had expenses paid by private medical programs, health maintenance organizations, state disability, unemployment insurance, private disability insurance, "or other sources of compensation similar to those listed," the

court "after considering the totality of all circumstances and on terms as may be just," may determine what portion of the collateral source benefits will be (1) reimbursed from the judgment to the provider, (2) used to reduce the verdict, or (3) accrue to the benefit of the plaintiff. "However, nothing in this section shall create subrogation or lien rights that do not already exist." (*Govt.C. 985(f)(2)*; see *Garcia v. Sacramento* (2002) 103 C.A.4th 67, 77, 126 C.R.2d 465 [under *Govt.C. 985(f)(1)* and (f)(2), court had discretion to deny reimbursement of Medi-Cal lien; plaintiff quadriplegic recovered judgment against county for far less than his future medical costs]; *Joyce v. Simi Valley Unified School Dist.*, *supra* [school district's request for discretionary deduction under *Govt.C. 985(f)(2)* for medical services that had been paid by insurance that district provided to injured student's mother was properly denied, where district failed to identify all collateral providers and medical liens].)

(c) In determining the amount to be reimbursed, or the amount by which the judgment will be reduced, the court must make the following adjustments:

(1) "Where plaintiff has been found partially at fault, the reimbursement or reduction shall be decreased by the same percentage as the entire judgment is reduced to take into account the plaintiff's comparative fault." (*Govt.C. 985(f)(3)(A)*.)

(2) "The court shall deduct from the reimbursement or reduction the amount of premiums the court determines were paid by or on behalf of the plaintiff to the provider of a collateral source payment." (*Govt.C. 985(f)(3)(B)*.)

(3) After making the adjustments described in *Govt.C. 985(f)(3)(A)* and (f)(3)(B), "the court shall reduce that amount by a percentage equal to the percentage of the entire judgment that the plaintiff paid or owes for his or her attorney fees and costs and reasonable expenses incurred." (*Govt.C. 985(f)(3)*.)

(3) *Limitations on Amount Deducted or Reimbursed.* "In no event shall the total dollar amount deducted from the verdict, paid to lienholders or reimbursed to all collateral source providers, exceed one-half of the plaintiff's net recovery for all damages after deducting for attorneys' fees, medical services paid by the plaintiff, and litigation costs; however, the court may order no reimbursement or verdict reduction if the reimbursement or reduction would result in undue financial hardship upon the person who suffered the injury." (*Govt.C. 985(g)*.)

(4) *Time and Manner of Payment.* Unless otherwise ordered by the court, 50% of any amount reimbursed "shall be due immediately." The court may order the remaining 50% to be paid in installments over a period of time to be determined by the court pursuant to *Govt.C. 984* (see *supra*, §235) not to exceed 10 years. (*Govt.C. 985(h)*.)

(5) *Cases Involving Multiple Defendants.* In a case involving multiple defendants, the reduction must be proportional to the percentage of the judgment actually paid by the public entity and must satisfy the judgment as to the portion of the judgment reduced so that no other judgment debtor will be jointly liable for the portion of the judgment reduced. After a hearing and determination, if the public entity judgment debtor is required to satisfy a portion of a joint and several judgment beyond that public entity judgment debtor's several portion due to the uncollectability of a joint tortfeasor's portion, the public entity may move to reduce the additional portion in a proportional amount. (*Govt.C. 985(i)*.)

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e. Distinctions.

1. Payment by Tortfeasor's Insurer.

6 *Witkin Sum. Cal. Law Torts* § 1640

[§ 1640] Payment by Tortfeasor's Insurer.

The collateral source rule applies where the plaintiff gets compensation from his or her own insurer or some other source wholly independent of the defendant tortfeasor. (See *supra*, §1636.) However, if the tortfeasor's insurer pays the plaintiff (e.g., under an insured tortfeasor's automobile policy no-fault medical payment clause), a credit must be given. (See *Dodds v. Bucknum* (1963) 214 C.A.2d 206, 213, 29 C.R. 393, *supra*, §1629.)

In *Jones v. California Cas. Indem. Exchange* (1970) 13 C.A.3d Supp. 1, 91 C.R. 726, Y's dog bit J. J sued Y and recovered judgment for \$ 3,750, which sum included an award for her medical expenses of \$ 1,257.21. Y's insurance company, C, defended the suit and satisfied the judgment. Then J sued C for medical expenses. Y's homeowner's policy had two distinct provisions: (a) the liability clause, requiring the insurer to defend a lawsuit and satisfy a judgment--a fault provision; and (b) the no-fault medical payment clause, requiring payment of medical expenses of a person injured by the insured regardless of fault. *Held*, C was entitled to the credit. The fact that it did not pay J until after judgment (the first time a demand was made on it) was immaterial. There is no reason for a different result when judgment is obtained and the claim is made thereafter. (13 C.A.3d Supp. 5.)

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2. Uninsured Motorist Proceeds.

6 *Witkin Sum. Cal. Law Torts* § 1641

[§ 1641] Uninsured Motorist Proceeds.

In *Waite v. Godfrey* (1980) 106 C.A.3d 760, 163 C.R. 881, plaintiff sustained personal injuries and damage to her automobile in a collision involving defendant's car and the car of an unidentified hit-and-run driver who fled from the scene. Plaintiff received \$ 12,000 from her insurer under her uninsured motorist coverage, and obtained a verdict for \$ 20,000 against defendant. The trial judge, treating the uninsured motorist proceeds as coming from a collateral source, refused to allow defendant a setoff. *Held*, the setoff should have been allowed, and judgment should be reduced to \$ 8,000. The following considerations make the collateral source rule inapplicable:

(a) The duty to pay the uninsured motorist claim depends on establishing the culpability of the uninsured driver; it does not allow the defendant to "garner the benefits" of the plaintiff's providence. (106 C.A.3d 771, 772, citing *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 13, 84 C.R. 173, 465 P.2d 61, *supra*, §1632.) In the absence of a setoff, plaintiff would receive \$ 32,000 for a \$ 20,000 loss, and defendant would be denied the equitable treatment required by C.C.P. 877 (*supra*, §§71, 73). (106 C.A.3d 772, 773.)

(b) In the cases in which the collateral source rule has been applied, the payments, if recovered in a tort action, would have been characterized as special damages. "[W]e have not been able to find a single case in which the collateral source rule has been applied where the proceeds so defined had been received as compensation for pain and suffering, i.e., as and for *general* damages, damages which uninsured motorist proceeds clearly contemplate." (106 C.A.3d 774.)

(c) Because the insurer paying an uninsured motorist claim is subrogated to the rights of the insured against the person causing the injury, there is a possibility that, if setoff were denied, plaintiff would receive two payments of \$ 12,000 from defendant: one directly in satisfaction of the judgment, and the other indirectly through the uninsured motorist carrier. (106 C.A.3d 774, 775.) (See 37 *Hastings L. J.* 667; 3 A.L.R.5th 746 [insured's recovery of uninsured motorist claim against insurer as affecting subsequent recovery against tortfeasors causing injury]; 40 A.L.R.5th 603 [provision for reduction of uninsured or underinsured motorist coverage by amount recovered from tortfeasor].)

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3. Use of Rule To Reduce Damages.

6 *Witkin Sum. Cal. Law Torts* § 1642

[§ 1642] Use of Rule To Reduce Damages.

In *McKinney v. California Portland Cement Co.* (2002) 96 C.A.4th 1214, 117 C.R.2d 849, decedent worked as a plasterer and was exposed to asbestos-containing products during his 35-year career. For reasons unrelated to the asbestos exposure, decedent retired in 1989. In 1994, at age 62, he elected to begin receiving Social Security benefits. Two years later, he died of lung cancer, and plaintiff widow, believing that his death was partly caused by asbestos exposure (as well as cigarette smoking), commenced a wrongful death action against defendant, the maker of a cement that contained asbestos. The damages sought included a claim of past and future loss of decedent's union and Social Security benefits. Arguing that because plaintiff, after decedent's death, began receiving both pension and Social Security survivor's benefits calculated on the basis of decedent's income, she suffered no actual loss of income, defendant moved for an order that the collateral source rule be used to preclude plaintiff from introducing evidence regarding any financial loss based on decedent's Social Security and pension payments. Seeking to apply the collateral source rule *affirmatively*, defendant argued that if the rule prevented it from obtaining an offset of damages in the amount of the pension, the rule should also apply to preclude plaintiff from referring to decedent's pension in her affirmative showing of lost financial contributions to the household. The trial court rejected defendant's motion. *Held*, affirmed; defendant's attempted use of the collateral source rule in reverse as a weapon to diminish damages conflicts with the underlying, long-standing principle of the rule.

(a) Claiming that the collateral source rule only applies to benefits when they are paid to replace something that was lost because of death, defendant argued that plaintiff's pension benefits and Social Security survivor's benefits were not paid in connection with decedent's death and that, therefore, they could be offset against plaintiff's damages. This argument is unpersuasive. Plaintiff's benefits were paid as a direct result of decedent's death. The loss sustained was the loss of decedent's contributions to the household from his income had he lived. The benefits paid to plaintiff were a replacement for the lost contributions from a source unrelated to defendant. (96 C.A.4th 1222.)

(b) The fact that plaintiff received postdeath benefits from the same source as decedent's earnings makes no difference in the application of the collateral source rule. It is an integral part of the rule that a plaintiff will be compensated for his or her loss in some fashion from an outside source. And whether the compensation comes from a pension benefit rather than an insurance policy makes no difference. (96 C.A.4th 1224, citing *Hume v. Lacey* (1952) 112

C.A.2d 147, 245 P.2d 672, supra, §1635.)

(c) The nature of the sources of income at issue supports the conclusion that they were properly considered as damages for the wrongful death of decedent. The Social Security benefits paid to decedent during his life were based on his earnings and paid to him. He apparently applied a portion of those benefits to support his household. The only evidence available in the record on appeal indicates that plaintiff did not directly receive her husband's Social Security payments while he was alive. As a result of his death, she became entitled to Social Security death benefits in her own name, based on her husband's earnings. In fact, Social Security publications instruct survivors like plaintiff to apply promptly for widow's benefits, which indicates that the benefits paid to the deceased spouse do not automatically continue in an unchanged form. This benefit did not exist before decedent's death, but is a new benefit flowing to plaintiff as a direct result of the death. Thus, it is a classic collateral source, and defendant has produced no reason to ignore the rule. *(96 C.A.4th 1226.)*

(d) The issue regarding the pension is not quite as clear, but defendant did not place any evidence in the record to indicate that the union pension was a joint payment to plaintiff and decedent that merely continued unchanged after his death. Because defendant was the proponent of the motion, if this were a joint continuing payment, it was defendant's burden to produce supporting evidence. *(96 C.A.4th 1226.)*

(e) Plaintiff's offer of proof was that, like many pensions, the plasterers union pension offered reduced lifetime benefits in exchange for death benefits to a surviving spouse. This feature of a pension, which is, in essence, a constructive payment for the survivor benefit, makes it look much like an insurance policy. The contributions to the pension plan resulted in a collateral source benefit wholly independent from the tortfeasor. *(96 C.A.4th 1227.)*

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E. Interest.

1. Actions Other Than for Personal Injury.

a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1643

[§ 1643] In General.

Interest awarded as damages differs from interest provided for by agreement (see 1 *Summary* (10th), *Contracts*, §888). It is allowed to compensate for the delay in recovery of the damages to which the plaintiff is entitled. (See *Bullis v. Security Pac. Nat. Bank* (1978) 21 C.3d 801, 815, 148 C.R. 22, 582 P.2d 109; *Harsany v. Cessna Aircraft Co.* (1983) 148 C.A.3d 1139, 1143, 196 C.R. 374; *Rest.2d, Torts* §913; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§462, 473 et seq.; 15 *Stanf. L. Rev.* 107 [pecuniary loss under Death on the High Seas Act]; 96 *A.L.R.2d* 1104 [wrongful death actions].)

(1) *Money or Property Capable of Ascertainment.* Where the tort consists in wrongfully obtaining money or property that has a value capable of ascertainment, e.g., conversion, interest will be given. (C.C. 3336; see *New York Cloak & Suit House of Los Angeles v. Coston* (1928) 94 C.A. 94, 96, 270 P. 695; *Moreno v. Greenwood Auto Center* (2001) 91 C.A.4th 201, 209, 110 C.R.2d 177 [in case involving lease of new truck and trade-in of old truck, plaintiff recovered conversion damages for loss of use of old truck, but not for value of that truck at time of conversion; nevertheless, plaintiff was entitled to prejudgment interest]; *Rest.2d, Torts* §913; 22 *Am.Jur.2d* (2003 ed.), *Damages* §477 et seq.; 36 *A.L.R.2d* 337 [interest on damages for period before judgment for injury to, or detention, loss, or destruction of, property].)

Where the tort is one involving property damages that are readily ascertainable, interest is recoverable. (C.C. 3287(a); *Levy-Zentner Co. v. Southern Pac. Trans. Co.* (1977) 74 C.A.3d 762, 795, 142 C.R. 1 [fire in defendant's warehouse destroyed contents and portion of adjacent building]; *Marine Terminals Corp. v. Paceco* (1983) 145 C.A.3d 991, 995, 193 C.R. 687 [faulty repair of machine].)

(2) *Oppression, Fraud, or Malice.* "[I]n every case of oppression, fraud, or malice, interest may be given in the discretion of the jury." (C.C. 3288; see *Isaacs v. Frank Meline Co.* (1934) 2 C.A.2d 341, 346, 37 P.2d 1045; *McNulty v. Copp* (1954) 125 C.A.2d 697, 712, 271 P.2d 90; *Nathanson v. Murphy* (1957) 147 C.A.2d 462, 467, 305 P.2d 710; *Vogelsang v. Wolpert* (1964) 227 C.A.2d 102, 125, 38 C.R. 440; *Michelson v. Hamada* (1994) 29 C.A.4th 1566, 1585, 36 C.R.2d 343 [in fraud cause of action, 7% was proper rate of interest; jury, as well as trial judge, may assess interest from time plaintiff parted with money or property]; 61 *Harv. L. Rev.* 136; 5 *U.C.L.A. L. Rev.* 262.)

(3) *Actions Other Than Contract.* In an action for breach of an obligation not arising from contract, interest may be

given in the discretion of the jury. (C.C. 3288; see *infra*, §1644.)

In *Bullis v. Security Pac. Nat. Bank*, *supra*, the court discussed the relationship between the two provisions of C.C. 3288 and the necessity for liquidated damages under C.C. 3287: Under C.C. 3288, the trier of fact may award prejudgment interest for the breach of an obligation not arising from contract, and in cases of oppression, fraud, or malice. "It is clear from this language that a party does not have to prove both a breach of a noncontractual obligation and oppression, fraud, or malice. ... Even if plaintiff's damages are not liquidated, prejudgment interest may be awarded." (21 C.3d 814.) (See *Harsany v. Cessna Aircraft Co.*, *supra*, 148 C.A.3d 1143 [where evidence concerning value of plaintiff's destroyed airplane was conflicting, trial judge correctly applied C.C. 3288, rather than C.C. 3287(a)].)

(4) *Effect of Comparative Negligence*. In *Wisper Corp. v. California Commerce Bank* (1996) 49 C.A.4th 948, 57 C.R.2d 141, an embezzlement case, 75% of the negligence was attributed to plaintiff corporation, W, and 25% to defendant bank, CCB. Holding that the damages were not "certain, or capable of being made certain by calculation" within the meaning of C.C. 3287(a), the court said: "[I]t is clear the amount of damages owed by CCB to Wisper was not subject to calculation until *after* the completion of a trial. Although the universe of Wisper's damage was calculable--that is, the number of checks, totaling in excess of \$ 1.4 million--the question of whether and to what extent CCB had any liability for Wisper's loss was hotly debated. At the end of the battle, Wisper emerged with a mere 25 percent of its claimed damages. Thus, there is a significant disparity between that which was sought and that which was ultimately found appropriate. Only one element of the claim was certain until the jury made its findings." (49 C.A.4th 957.)

(5) *Damages in Personal Injury Action*. Prejudgment interest on damages awarded in a personal injury action is permissible under specified statutory conditions. (C.C. 3291; see *infra*, §1646.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Money or Property Capable of Ascertainment*. See *Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan* (2005) 129 C.A.4th 692, 702, 28 C.R.3d 815 [consignor of jewelry, who prevailed in conversion action against lender to whom consignee had wrongfully pledged consigned goods, was entitled to prejudgment interest until date competing claims to ownership were resolved, even though consignor had earlier obtained goods pursuant to bonded writs of possession; under writs, consignor was effectively deprived of goods until his right to them was actually determined].



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- b. Obligation Not Arising From Contract.

6 *Witkin Sum. Cal. Law Torts* § 1644

[§ 1644] Obligation Not Arising From Contract.

"In an action for the breach of an obligation not arising from contract," interest may be given in the jury's discretion. (C.C. 3288; see *Redke v. Silvertrust* (1971) 6 C.3d 94, 106, 98 C.R. 293, 490 P.2d 805 [breach of agreement to make will, by violation of confidential relationship, constituting constructive fraud and unjust enrichment]; *Bullis v. Security Pac. Nat. Bank* (1978) 21 C.3d 801, 814, 148 C.R. 22, 582 P.2d 109, supra, §1643, citing the text [bank breached duty of due care by allowing one coexecutor to withdraw funds from estate's account without other coexecutor's signature].)

Newby v. Vroman (1992) 11 C.A.4th 283, 14 C.R.2d 44, raised the following issue of first impression: "How should prejudgment interest under section 3288 be calculated and imposed when, prior to judgment against a nonsettling tortfeasor, a joint tortfeasor settles with plaintiff in good faith, thereby mandatorily reducing pro tanto the amount of that judgment?" Plaintiffs sued NCI and V for property damage, and settled with NCI for \$ 30,000. Subsequently, the trial judge entered judgment for plaintiffs for \$ 43,440, and, pursuant to plaintiffs' motion, awarded prejudgment interest under C.C. 3288 in the amount of \$ 28,507.50.

In calculating the prejudgment interest, the trial judge (a) calculated the total prejudgment interest based upon the entire judgment of \$ 43,440; (b) allowed plaintiffs all such interest from the date of their loss to the date NCI paid \$ 30,000 in settlement; and (c) computed plaintiffs' prejudgment interest after that date based on \$ 13,440, i.e., the total judgment of \$ 43,440 reduced by the \$ 30,000 paid in settlement. V argued that the prejudgment interest should have been calculated only on the amount of judgment after NCI's settlement was deducted, i.e., on the sum of \$ 13,440. *Held*, the method used by the trial judge was correct.

(a) The method used is consistent with the policy of maximizing a plaintiff's recovery to the extent that the negligence or fault of others has contributed to it. In other words, to compensate plaintiffs fully for their loss, prejudgment interest, which is awarded as *damages*, must first be calculated on the entire judgment from the date of the tortious act proximately causing their damages. If the method favored by V were adopted, plaintiffs simply would not be fully compensated for their loss. (11 C.A.4th 289.)

(b) The method used is also consistent with the policy favoring settlements. "If prejudgment interest against a nonsettling joint tortfeasor is calculated only on the balance of the judgment after settlements paid by others are

deducted, plaintiffs would be discouraged from settling with one of multiple defendants because they would be unable to be fully compensated for their loss." (11 C.A.4th 290.)

(c) "While ... a plaintiff is entitled to receive prejudgment interest on the full amount of the judgment, that interest must be awarded against the nonsettling defendants on the full amount of judgment *only* up to the date when the settling tortfeasor makes payment to plaintiff, who then has that money to use or invest. Thereafter, the plaintiff is entitled to further prejudgment interest from the nonsettling defendants only on the remaining principal balance of the judgment after its reduction by such settlement amount. Were the rule otherwise, plaintiffs would clearly be doubly compensated by first receiving the use and benefit of a partial settlement sum, and thereafter obtaining the additional compensation of continuing prejudgment interest thereon from a nonsettling defendant." (11 C.A.4th 290.)

West's Key Number Digest, Damages k.66.1, 67, 69

SUPPLEMENT: [This section is current through the latest supplement]



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 - a. General Rule Against Interest.

6 *Witkin Sum. Cal. Law Torts* § 1645

[§ 1645] General Rule Against Interest.

Although C.C. 3288 has been construed as permitting discretionary prejudgment interest for unliquidated tort claims (see *supra*, §1643), this interest is not allowed on damages awarded for bodily harm, pain, and suffering in personal injury actions. (See *Greater Westchester Homeowners Assn. v. Los Angeles* (1979) 26 C.3d 86, 102, 160 C.R. 733, 603 P.2d 1329; *Rest.2d, Torts* §913(2); 22 *Am.Jur.2d* (2003 ed.), *Damages* §§475, 476.)

This rule was explained in *Greater Westchester*, as follows: "[D]amages for the intangible, noneconomic aspects of mental and emotional injury are of a different nature. They are inherently nonpecuniary, unliquidated and not readily subject to precise calculation. The amount of such damages is necessarily left to the subjective discretion of the trier of fact. Retroactive interest on such damages adds uncertain conjecture to speculation." (26 C.3d 103.) "Furthermore, a fact finder in assessing a claim of general damages for physical, mental and emotional suffering, possesses full authority to consider the duration of the alleged suffering. Accordingly, the disallowance of any interest on such a claim does not deprive the claimant of compensation for an element of actual damage. To the contrary, its allowance, in fact, may in a given case create a double recovery." (26 C.3d 103.)

However, in special circumstances, personal injury damages may be sufficiently certain to merit prejudgment interest. (See *E.L. White v. Huntington Beach* (1982) 138 C.A.3d 366, 377, 187 C.R. 879 [defendants who satisfied personal injury judgment and sought indemnification were entitled to prejudgment interest from date of satisfaction].)

In a wrongful death action, prejudgment interest cannot be awarded on the inherently nonpecuniary damages for mental and emotional injury, or on damages for loss of future earnings after the date of verdict; but to the extent that the award is for earnings lost in the period from the date of the accident to the date of the verdict, an award is proper. (*Canavin v. Pacific Southwest Airlines* (1983) 148 C.A.3d 512, 526, 527, 196 C.R. 82.)

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 1. Nature and Scope of Statute.

6 *Witkin Sum. Cal. Law Torts* § 1646

[§ 1646] Nature and Scope of Statute.

(1) *Rule of General Applicability.* C.C. 3291 begins with a general rule allowing prejudgment interest in personal injury actions: "In any action brought to recover damages for personal injury sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or by wilful intent of the other person, corporation, association, or partnership, and whether the injury was fatal or otherwise, it is lawful for the plaintiff in the complaint to claim interest on the damages alleged as provided in this section."

(2) *Rejection of Offer To Compromise.* C.C. 3291 then states a special rule regarding offers to compromise: "If the plaintiff makes an offer pursuant to *Section 998 of the Code of Civil Procedure* which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to *Section 998 of the Code of Civil Procedure* which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment." (See *Gutierrez v. State Ranch Services* (1983) 150 C.A.3d 83, 85, 198 C.R. 16; *Wilson v. Wal-Mart Stores* (1999) 72 C.A.4th 382, 387, 85 C.R.2d 4 [where judgment was lower than second rejected compromise offer, but was higher than first rejected offer, no prejudgment interest was recoverable]; *Deocampo v. Ahn* (2002) 101 C.A.4th 758, 775, 125 C.R.2d 79, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §81 [in calculating prejudgment interest in C.C.P. 998 case, entire judgment is used, except that future damages are reduced to present value]; 14 *Pacific L. J.* 465; 16 *U.S.F. L. Rev.* 325 [proposing enactment of statute]; 40 *A.L.R.4th* 147 [validity and construction of statute or rule allowing or changing rate of prejudgment interest in tort actions].)

The right to prejudgment interest after obtaining a judgment more favorable than a pretrial offer is not extinguished by an earlier adverse judgment followed by a new trial. The new trial nullifies the adverse judgment, so that only the more favorable judgment remains. (*Saakyan v. Modern Auto* (2002) 103 C.A.4th 383, 389, 126 C.R.2d 674, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §91.)

(3) *Rule Is Inapplicable to Public Entities and Employees.* C.C. 3291 concludes with the following limitation: "This section shall not apply to a public entity, or to a public employee for an act or omission within the scope of employment, and neither the public entity nor the public employee shall be liable, directly or indirectly, to any person

for any interest imposed by this section." (C.C. 3291.)

(4) *Statute Is Mandatory*. In *Morin v. ABA Recovery Service* (1987) 195 C.A.3d 200, 240 C.R. 509, *infra*, §1648, the court, construing the statutory language in the light of its purpose, held that where the statutory conditions are met, C.C. 3291 "mandates an award of prejudgment interest." (195 C.A.3d 207.) But the court called attention to a problem that arises where, after the defendant rejects the plaintiff's offer, the defendant makes an offer that the plaintiff rejects: "We acknowledge concern the mandatory interest award required by *Civil Code* section 3291 may work unfairly where the plaintiff has rejected the defendant's written offer to settle for a sum ultimately exceeding the jury verdict. Treating the statute as requiring an interest award in any case where the judgment exceeds the plaintiff's rejected offer will result in inequity to a defendant making a timely good faith offer to settle for an amount in fact exceeding the later jury award. We nonetheless believe the Legislature rejected this concern. The Legislature intended different treatment of personal injury actions because of the manifest greater prejudice of delay in recovering personal injury damages as compared to contractual or business-tort losses given the probability personal injury plaintiffs are likely to be physically as well as monetarily impaired. We leave to the Legislature any change in the statute." (195 C.A.3d 206, footnote 1.)

(5) *Federal Preemption*. C.C. 3291 is preempted by a federal decision not to allow prejudgment interest in Federal Employers' Liability Act actions. (*Lund v. San Joaquin Valley R.* (2003) 31 C.4th 1, 13, 1 C.R.3d 412, 71 P.3d 770.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Rejection of Offer To Compromise*. See *Ray v. Goodman* (2006) 142 C.A.4th 83, 87, 47 C.R.3d 659 [plaintiff who made two rejected statutory settlement offers and who obtained judgment exceeding both offers was entitled to prejudgment interest from date of first offer rather than date of second offer, even though it superseded first offer].

Deocampo case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §89. *Saakyan case:*

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §111.



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2. Interest on Award of Punitive Damages.

6 *Witkin Sum. Cal. Law Torts* § 1647

[§ 1647] Interest on Award of Punitive Damages.

In *Greenfield v. Spectrum Inv. Corp.* (1985) 174 C.A.3d 111, 219 C.R. 805, a judgment for compensatory and punitive damages was entered pursuant to C.C. 3291, but the trial court denied prejudgment interest as to the punitive damages, which had been awarded against defendant employer on the ground of ratification of the employee's conduct. (174 C.A.3d 118, 125.) *Held*, plaintiff was entitled to interest on both compensatory and punitive damages. The statute states that "the judgment" shall bear interest, and there is only one judgment, which covers both kinds of damages. The statute refers to a "tort" by "wilful intent" which in this case was the intentional assault on plaintiff by the employee, for which defendant employer was responsible. (174 C.A.3d 125.)

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3. Verdict for Personal Injury and Other Damages.

6 *Witkin Sum. Cal. Law Torts* § 1648

[§ 1648] Verdict for Personal Injury and Other Damages.

(1) *In General.* In *Morin v. ABA Recovery Service* (1987) 195 C.A.3d 200, 240 C.R. 509, plaintiff's complaint sought personal injury damages for emotional distress, and damages for wrongful repossession and detention of personal property (including loss of use and enjoyment, expenses for alternative living quarters, replacement items of personal property and lost wages). The jury brought in a general verdict for \$ 27,500 general damages and \$ 40,000 punitive damages. Opposing plaintiff's request for prejudgment interest, defendant argued that none could be allowed because the verdict did not indicate how much was awarded for personal injury. The trial judge, mistakenly assuming that the award was discretionary rather than mandatory (see *supra*, §1646), entered an order denying prejudgment interest without reaching the issue of apportionment. *Held*, order reversed with directions to the trial court "to determine the portion, if any, of the verdict attributable to personal injury claims and award prejudgment interest accordingly," or, if unable to make this determination, to deny the award. (195 C.A.3d 212.)

(a) The jury may have based its verdict on claims other than personal injury damages, and on the record, it is impossible to determine whether any portion reflects personal injury damages. (195 C.A.3d 208.) Under similar circumstances, where a cause of action based on a contract providing for attorneys' fees is joined with other causes of action, the prevailing party may recover attorneys' fees under C.C. 1717 only as they relate to the contract cause, and cannot recover at all if it is impossible to determine what part of the jury award relates to contract. (195 C.A.3d 208, discussing *McKenzie v. Kaiser-Aetna* (1976) 55 C.A.3d 84, 88, 127 C.R. 275.)

(b) The burden of proof of entitlement to prejudgment interest under C.C. 3291 follows the requirement of pleading, and is on the plaintiff. (195 C.A.3d 209, 210.) The rule of appellate review--that a general verdict imports findings in the winning party's favor on all averments of his or her pleading that are material to the recovery--is distinguishable, and the rule governing attorneys' fees declared in *McKenzie* is persuasive. (195 C.A.3d 210.)

(c) Like the plaintiff in *McKenzie*, plaintiff here did not request special jury findings about the theories of recovery underlying the award; but the failure to do so does not bar his claim. "While special jury findings would have been the most direct and effective means of establishing the fact and amount of personal injury recovery, such findings are not necessarily the sole means to determine whether the jury awarded plaintiff damages for personal injuries and, if such

damages were awarded, their amount. Facts and circumstances peculiar to this case, possibly including such considerations as the parties' theories of the case, uncontroverted evidence or jury instructions, may permit determination of the fact and amount of personal injury recovery." (195 C.A.3d 211.)

(2) *Distinction: Verdict Based on Single Cause of Action.* In *Bihun v. AT&T Information Systems* (1993) 13 C.A.4th 976, 16 C.R.2d 787, plaintiff, a victim of sexual harassment, was awarded compensatory damages of \$ 1.5 million and \$ 500,000 in punitive damages. The compensatory damages included \$ 686,000 for loss of future earnings and \$ 662,000 for emotional distress. Relying on *Morin*, defendant contended that prejudgment interest was applicable only to the damages for emotional distress because those were the only damages related to plaintiff's personal injury. *Held*, plaintiff was entitled to interest on the entire award. In *Morin*, it was possible that some or even all of the damages awarded were attributable to the cause of action for possession of personal property. Here, however, the claims for lost wages and punitive damages were based on a single cause of action under the Fair Employment and Housing Act for sexual harassment, which is an action involving a personal injury (see *infra*, §1646). (13 C.A.4th 1006.)

(3) *Burden of Proof.* Consistent with the general rule of *Ev.C. 500* (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §6), the plaintiff has the burden of proving what portion of the award represents damages for personal injury eligible for prejudgment interest under C.C. 3291. (See *Lakin v. Watkins Associated Industries* (1993) 6 C.4th 644, 659, 25 C.R.2d 109, 863 P.2d 179 [following *Morin*].)

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4. Service Must Be on Party.

6 *Witkin Sum. Cal. Law Torts* § 1649

[§ 1649] Service Must Be on Party.

In *Moffett v. Barclay* (1995) 32 C.A.4th 980, 38 C.R.2d 546, plaintiff served an offer of compromise on defendant's insurer *before* the complaint had been served on defendant. The offer of compromise was addressed "to defendants and their attorneys of record." The trial judge awarded prejudgment interest to plaintiff following defendant's failure to accept the compromise offer and the entry of judgment in plaintiff's favor. *Held*, reversed. C.C.P. 998 requires that compromise offers be served on a "party." Here, defendant had not been served with the complaint at the time of the offer, and thus, was not a party, and the insurer had not been designated as defendant's agent for any purpose. (32 C.A.4th 983, citing *Ward v. Superior Court* (1973) 35 C.A.3d 67, 110 C.R. 501, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §83.)

SUPPLEMENT: [This section is current through the latest supplement]
Ward case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §92.



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5. Prejudgment Interest Is Not Element of Damages.

6 *Witkin Sum. Cal. Law Torts* § 1650

[§ 1650] Prejudgment Interest Is Not Element of Damages.

Prejudgment interest awarded under C.C. 3291 is not an element of damages. In *Steinfeld v. Foote-Goldman Proctologic Med. Group* (1997) 60 C.A.4th 13, 70 C.R.2d 41, a medical malpractice action, the issue was whether the prejudgment interest under C.C. 3291 for the period between plaintiff's offer under C.C.P. 998 and entry of the judgment was an element of damages included in the judgment, so as to entitle plaintiff to postjudgment interest on the sum of the verdict and prejudgment interest, under C.C.P. 685.010(a) (see 7 Cal. Proc. (4th), *Judgment*, §§272, 273). *Held*, prejudgment interest under C.C. 3291 is not an element of damages. Eligibility for interest under C.C. 3291 is predicated on a simple comparison between the judgment, including all the damages, and the offer to compromise under C.C.P. 998. Hence, prejudgment interest under C.C. 3291 is not itself an element of damages. The legislative history of C.C. 3291 corroborates this conclusion. C.C. 3291 was enacted to encourage settlements, not to compensate plaintiffs for the loss of use of calculable settlement funds. (60 C.A.4th 17.) (See *Hess v. Ford Motor Co.* (2002) 27 C.4th 516, 530, 117 C.R.2d 220, 41 P.3d 46 [prejudgment interest accrued under C.C. 3291 is not part of judgment, and plaintiff may not obtain interest on this prejudgment interest, i.e., no compound interest]; on characterization of prejudgment interest as damages in calculating postjudgment interest generally, see 7 Cal. Proc. (4th), *Judgment*, §278.)

SUPPLEMENT: [This section is current through the latest supplement]
C.C.P. 685.010(a):

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §§326, 327.

Characterization of prejudgment interest:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §332.



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 6. Scope of Personal Injury.

6 *Witkin Sum. Cal. Law Torts* § 1651

[§ 1651] Scope of Personal Injury.

(1) *Defamation*. *O'Hara v. Storer Communications* (1991) 231 C.A.3d 1101, 282 C.R. 712, *infra*, §1702, held that defamation was a personal injury within the meaning of C.C. 3291, even though plaintiff, by her failure to request a retraction under C.C. 48a (*supra*, §633), was restricted to recovering special damages. (231 C.A.3d 1119.)

(2) *Sexual Harassment*. *Bihun v. AT&T Information Systems* (1993) 13 C.A.4th 976, 16 C.R.2d 787, held that sexual harassment in the workplace is a personal injury within the meaning of C.C. 3291, regardless of whether the harassment is "quid pro quo" or "environmental."

(3) *Wrongful Death*. In *McKinney v. California Portland Cement Co.* (2002) 96 C.A.4th 1214, 117 C.R.2d 849, *supra*, §1642, decedent's wife and children brought a wrongful death action against manufacturers of asbestos products. *Held*, the trial court properly granted the wife's request for prejudgment interest under C.C. 3291, even though the statute expressly refers to personal injury and not to wrongful death. "The background of the statute indicates a concern with differentiating broadly between property damage and personal injury. The most useful approach ... is not to rely on the formal label placed on the complaint, such as negligence, defamation or wrongful death. The appropriate query is whether the damages may be characterized as compensation for a personal injury. ... [I]t is clear that damages awarded to a spouse and children as a result of the wrongful death of a husband and father are personal injury damages." (96 C.A.4th 1231.)

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7. Actions Excluded.

6 *Witkin Sum. Cal. Law Torts* § 1652

[§ 1652] Actions Excluded.

(1) *First-Party Insurance Bad Faith*. In *Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 C.3d 121, 3 C.R.2d 666, 822 P.2d 374, the court held that C.C. 3291 does not apply to a first-party bad faith action by an insured against the insurer. Plaintiff was a passenger in an automobile that was struck by an uninsured drunk driver. Plaintiff was not wearing a seat belt, and suffered a fractured shoulder. She made a claim under the uninsured motorist coverage of her policy with defendant, retained counsel, and demanded arbitration. Acting on expert advice that plaintiff would have suffered only minor injuries if she had been wearing a seat belt, defendant offered to settle for \$ 20,000. Plaintiff demanded the policy limit of \$ 100,000. In the arbitration proceedings, plaintiff reduced her demand to \$ 60,000, and defendant responded with a counteroffer of \$ 25,000. The arbitrator concluded that plaintiff was not negligent in failing to wear a seat belt, and awarded her \$ 88,000, which defendant promptly paid.

Plaintiff then sued defendant for breach of the implied covenant of good faith and fair dealing and violation of *Ins.C. 790.03*, asserting that as a consequence of defendant's failure to provide adequate benefits under the policy, she suffered emotional distress. Plaintiff also filed a *C.C.P. 998* offer to compromise in the amount of \$ 249,099, which defendant rejected. At trial, the jury returned a general verdict in favor of plaintiff for \$ 15,765 in actual damages, and \$ 1,576,500 in punitive damages. The trial judge refused to reduce the punitive damages, and also awarded \$ 300,000 in prejudgment interest on the total amount of the verdict. The Court of Appeal affirmed, reasoning that because the primary focus of the bad faith action was to vindicate personal interest, it became a "personal injury" action within the meaning of C.C. 3291. *Held*, judgment of Court of Appeal reversed.

(a) Plaintiff argued that because breach of the implied covenant gives rise to a tort action under *Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 58 C.R. 13, 426 P.2d 173, 2 *Summary* (10th), *Insurance*, §258, and *Gruenberg v. Aetna Ins. Co.* (1973) 9 C.3d 566, 108 C.R. 480, 510 P.2d 1032, 2 *Summary* (10th), *Insurance*, §247, the nature of the harm suffered is personal injury. But both *Crisci* and *Gruenberg* emphasize that an insurance bad faith action seeks recovery of a property right. (53 C.3d 127, 128.) And *Richardson v. Allstate Ins. Co.* (1981) 117 C.A.3d 8, 172 C.R. 423, 3 *Cal. Proc.* (4th), *Actions*, §575, dealing with the statute of limitations, holds that an action for breach of the implied covenant is based on infringement of property rights. (53 C.3d 128.) The *Richardson* court reasoned that this is so because breach of that covenant causes financial loss to the insured, and it is the financial loss or risk of

financial loss that defines the cause of action; mental distress is compensable as an aggravation of financial damages, not as a separate cause of action. (53 C.3d 129.)

(b) The same principles apply here: "Breach of the implied covenant is actionable in the insurance context because such conduct causes financial loss to the insured, and it is that loss which defines the cause of action. Had the Legislature intended to apply section 3291 to such an action for interference with property rights, including a breach of the implied covenant of good faith and fair dealing, it could have expressly so provided. Indeed, the language of the statute reveals that the Legislature was seeking to restrict prejudgment interest in a particular type of award, ostensibly to encourage early settlement and to compensate injured plaintiffs for the unfair withholding of insurance proceeds. We cannot agree with either the present Court of Appeal or plaintiff that all actions for breach of the implied covenant of good faith and fair dealing involving a claim for emotional distress damages, no matter how incidental to the cause of action or how small the amount, are entitled to the special prejudgment interest award accorded by the statute. The absence of any language indicating section 3291 was intended to be applicable to incidental damages flowing from such a breach, including emotional distress damages, convinces us the Legislature did not intend to include such damages within the ambit of the statute." (53 C.3d 129.)

Two justices dissented. (53 C.3d 137.) (See *Lakin v. Watkins Associated Industries* (1993) 6 C.4th 644, 657, 25 C.R.2d 109, 863 P.2d 179 [distinguishing *Gourley* on ground that in *Lakin* plaintiff's claims of emotional distress were at heart of her case, rather than merely incidental to invasion of property interests].)

(2) *Wrongful Termination*. *Holmes v. General Dynamics Corp.* (1993) 17 C.A.4th 1418, 22 C.R.2d 172, held that plaintiff's action for wrongful termination in violation of public policy was not within the scope of C.C. 3291, even though the termination caused plaintiff to suffer extensive personal damages. As *Gourley v. State Farm Mut. Auto. Ins. Co.*, *supra*, makes clear, the applicability of C.C. 3291 depends on the nature of the tort, instead of on the type or extent of the damages. And the tort of wrongful termination primarily involves infringement of property rights, not personal injury. Moreover, the essence of a wrongful termination action is vindication of the public interest, not vindication of the plaintiff's personal interest. (17 C.A.4th 1436.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *First-Party Insurance Bad Faith*. *Richardson case*:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §649.(3) (New) *Breach of Insurance Contract*. An action against an insurance company to recover policy benefits is not an action to recover "damages for personal injury," but rather an action to recover damages for breach of contract, even if that contract is to provide compensation for personal injury. (*Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 C.4th 133, 146, 45 C.R.3d 760, 137 P.3d 939 [action involving uninsured motorist provision of injured party's insurance coverage; relying on *Gourley*].)



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b. Statutory Authorization.

8. Insurer's Settlement Offer as Abrogating Obligation To Pay Prejudgment Interest.

6 *Witkin Sum. Cal. Law Torts* § 1653

[§ 1653] Insurer's Settlement Offer as Abrogating Obligation To Pay Prejudgment Interest.

In *State Farm Mut. Auto. Ins. Co. v. Crane* (1990) 217 C.A.3d 1127, 266 C.R. 422, plaintiff was rendered paraplegic in an accident while riding as a passenger in a vehicle owned by W. W had an insurance policy with State Farm, limiting liability to \$ 25,000 for each person injured. Before suit was filed, State Farm offered to pay plaintiff the policy limit of \$ 25,000 "in full settlement" of the claim. The offer was rejected. Suit was filed, and plaintiff made his offer to settle for \$ 499,999.99, which was rejected by defendant insureds. State Farm then filed this action for declaratory relief, seeking a ruling that it would not owe prejudgment interest on any judgment against its insureds, and offered to deposit its policy limits with the court pursuant to C.C.P. 572. The trial court granted summary judgment for State Farm. *Held*, affirmed.

(a) The policy provided that the insurer would pay, in addition to the limits, "any costs." C.C. 3291, providing for prejudgment interest, is part of an Article titled "Interest as Damages," and the courts have construed the term "interest" in other sections in that Article as an item of damages, not a cost apart from damages. (217 C.A.3d 1133.) However, this legal interpretation is not controlling if a person reading the policy would come to a different conclusion. (217 C.A.3d 1133.)

(b) The policy defined "costs" as including "[i]nterest on all damages owed by an insured as the result of a judgment until we pay, offer or deposit in court the amount due under this coverage." Reading the policy as a whole, it is likely that a layperson would expect C.C. 3291 interest to be covered by this provision. "After all, section 3291 interest meets the literal criteria of this policy language. The interest is calculated 'on damages owed by an insured as the result of a judgment.' ... This language is the policy's only explicit reference to the payment of interest. ... We therefore conclude section 3291 interest is a 'cost' within the meaning of the policy language obligating respondent for payment in addition to its policy limits for bodily injury." (217 C.A.3d 1133.)

(c) The remaining question is whether State Farm's offer was valid, i.e., reasonable and in good faith, so as to stop C.C. 3291 interest from running. The appellant asserted that, considering all the circumstances, there had to be a reasonable possibility that the settlement offer would be accepted, and that the offer must be shown to be reasonable and made in good faith. "We cannot agree that State Farm had to evaluate the likelihood of success of its settlement offer."

(217 C.A.3d 1135.) An offer conditioned on full settlement is the only kind of offer the insurer can make. An unconditional payment would have the effect of bankrolling the plaintiff's case. "We therefore conclude State Farm did not have to show its policy limits settlement offer stood a reasonable possibility of acceptance. Rather, the offer cut off State Farm's obligation to pay prejudgment interest." (217 C.A.3d 1138.)

SUPPLEMENT: [This section is current through the latest supplement]



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6 Witkin Sum. Cal. Law Torts § 1654

[§ 1654] Arbitration Proceedings.

In *Wagy v. Brown* (1994) 24 C.A.4th 1, 29 C.R.2d 48, plaintiffs brought a personal injury action against defendants arising from an automobile accident. Plaintiffs made an offer to settle for \$ 50,000, under C.C.P. 998. However, the offer was not timely accepted, and the case proceeded to arbitration. The arbitrator awarded plaintiffs \$ 50,000, and ordered each party to bear costs. Following entry of judgment, plaintiffs moved to tax costs, including prejudgment interest under C.C.P. 998 and C.C. 3291. The memorandum of costs was ordered stricken, and plaintiffs appealed. *Held*, prejudgment interest could not be awarded.

(a) Prejudgment interest is an item of costs under C.C.P. 1033.5(a)(13). Plaintiffs argue that, under C.C.P. 998, the right to claim costs did not vest until judgment was entered, and the court's determination was the only appealable ruling on the issue. Defendants contend that C.C.P. 998 and C.C. 3291 do not apply to arbitration proceedings. Plaintiffs are correct. While *Woodard v. Southern Calif. Permanente Med. Group* (1985) 171 C.A.3d 656, 217 C.R. 514, held that those statutes are not applicable to arbitration proceedings, that case concerned *contractual* arbitration. *Joyce v. Black* (1990) 217 C.A.3d 318, 266 C.R. 8, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §77, correctly recognized that *judicial* arbitration is part of the judicial process, to which C.C.P. 998 and C.C. 3291 are applicable. (24 C.A.4th 8.)

(b) Entitlement to prejudgment interest is dependent on the *judgment* being greater than the settlement offer, not the same. Thus, even if the arbitrator's award exceeded the settlement offer, the statutes would not apply, because the award is not final in any sense. This also means that the arbitrator's award, which denied costs, could not have included prejudgment interest, which does not come into play until there is a judgment. (24 C.A.4th 10.)

C.C.P. 998 applies to settlement offers made in disputes to be resolved by arbitration under C.C.P. 1281 (contractual arbitration) and C.C.P. 1295 (arbitration respecting medical malpractice). (C.C.P. 998(b).) Specified labor arbitrations are excepted from the statute. (C.C.P. 998(i).)

SUPPLEMENT: [This section is current through the latest supplement]
Joyce case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §83.



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1. General Rule: Fees Are Not Recoverable.

6 *Witkin Sum. Cal. Law Torts* § 1655

[§ 1655] General Rule: Fees Are Not Recoverable.

The successful plaintiff in a tort action is entitled to *costs*, but not to attorneys' fees unless express statutory provision is made for them. (*C.C.P. 1021*; see *Viner v. Untrecht* (1945) 26 *C.2d* 261, 272, 158 *P.2d* 3; *Pederson v. Kennedy* (1982) 128 *C.A.3d* 976, 979, 180 *C.R. 740* [although *C.C. 3333*, on damages for breach of obligation other than contract (see *supra*, §§1548, 1553), could arguably support award of attorneys' fees to make wronged party whole, *C.C.P. 1021* precludes that award]; *Rest.2d, Torts* §914(1); 7 *Cal. Proc.* (4th), *Judgment*, §145 et seq.)

West's Key Number Digest, Damages k.70.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

Costs: See *El Escorial Owners' Assn. v. DLC Plastering* (2007) 154 *C.A.4th* 1361, 1359, 65 *C.R.3d* 524 [condominium owners association that prevailed in construction defect action was entitled to expert witness fees as damages, even if experts were hired only to assist in litigation and not to assist in planning or making repairs].

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §149 et seq.



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2. Expense of Previous Litigation.

6 Witkin Sum. Cal. Law Torts § 1656

[§ 1656] Expense of Previous Litigation.

The expense of previous litigation, including attorneys' fees, may be recovered. (See *Lareau v. Southern Pac. Trans. Co.* (1975) 44 C.A.3d 783, 798, footnote 15, 118 C.R. 837, supra, §78; *Brousseau v. Jarrett* (1977) 73 C.A.3d 864, 871, 141 C.R. 200, citing the text; *Howard v. Schaniel* (1980) 113 C.A.3d 256, 266, 267, 169 C.R. 678 [this exception to general rule denying attorneys' fees is applied on case-by-case basis where "exceptional circumstances" are present]; *Saunders v. Cariss* (1990) 224 C.A.3d 905, 910, 274 C.R. 186; 66 Cal. L. Rev. 94; 61 Harv. L. Rev. 135; 45 A.L.R.2d 1183 [attorneys' fees incurred in earlier litigation with third person because of involvement therein through tortious act of present adversary]; 65 A.L.R.2d 1426 [attorneys' fees for wrongful attachment].)

Thus, a plaintiff wrongfully subjected to false imprisonment or malicious prosecution may sue the guilty party and in this latter action may recover attorneys' fees spent in defending the prior proceeding. (See *Rest.2d, Torts* §§671, 681, 914; infra, §§1698, 1699.) And one who is required through another's tort to protect his or her own interest by bringing or defending an action against a third person may recover attorneys' fees incurred. (See *Moe v. Transamerica Title Ins. Co.* (1971) 21 C.A.3d 289, 303, 98 C.R. 547 [award against title company for omission of pending bankruptcy proceeding in title examination].)

The "previous" litigation may be actually concurrent. In *Prentice v. North Amer. Title Guaranty Corp., Alameda Div.* (1963) 59 C.2d 618, 30 C.R. 821, 381 P.2d 645, defendant escrow holder, through negligence in closing a transaction, made it necessary for plaintiff vendor to bring a quiet title action against the purchaser and holder of the first deed of trust. He joined the escrow holder in the action. *Held*, in addition to the judgment quieting title against the purchaser and lienholder, he was entitled to damages against the escrow holder in the amount of the attorney's fee paid. (59 C.2d 621.) (See *Ruth v. Lytton Savings & Loan Assn. of Northern Calif.* (1968) 266 C.A.2d 831, 844, 72 C.R. 521 [following *Prentice*].)

In *Sooy v. Peter* (1990) 220 C.A.3d 1305, 270 C.R. 151, 1 Cal. Proc. (4th), Attorneys, §326, the court made this observation: "[T]he so-called 'third party tort exception' to the rule that parties bear their own attorney fees is not really an 'exception' at all but an application of the usual measure of tort damages. The theory of recovery is that the attorney fees are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action. In these cases there is no recovery of attorney fees qua attorney fees. ... [N]early all of the cases which have applied the doctrine involve a clear violation of a traditional tort duty between the tortfeasor who is required

to pay the attorney fees and the person seeking compensation for those fees." (220 C.A.3d 1310.)

In *Vacco Industries v. Van Den Berg* (1992) 5 C.A.4th 34, 6 C.R.2d 602, the trial court awarded plaintiffs attorneys' fees against defendant Van Den Berg alone under the third-party tortfeasor doctrine of *Prentice*. On appeal, this part of the judgment was held procedurally and substantively erroneous.

(a) Procedurally, the award under this doctrine necessarily involved a damage issue that should have been submitted to the jury; instead the trial judge treated the award of *Prentice* fees as though they were costs. (5 C.A.4th 56.)

(b) Substantively also, the award was incorrect, for it was made to a successful party in what was essentially a "two party" lawsuit: "Van Den Berg and Eastlack, working together with their newly acquired corporate vehicle, jointly committed the tortious acts of which Vacco complained. There is nothing about their relations or their conduct that justifies singling out Van Den Berg as the one whose conduct caused Vacco to have to prosecute a legal action against the other two. Yet, this is the justification which Vacco offers for the imposition of *Prentice* fees against Van Den Berg. The rule of *Prentice* was not intended to apply to one of several joint tortfeasors in order to justify additional attorney fee damages. If that were the rule there is no reason why it could not be applied in every multiple tortfeasor case with the plaintiff simply choosing the one with the deepest pocket as the '*Prentice* target.' Such a result would be a total emasculation of *Code of Civil Procedure* section 1021 in tort cases." (5 C.A.4th 57.)

SUPPLEMENT: [This section is current through the latest supplement]
Sooy case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §302.



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G. Proposition 213: Limitation on Recovery of Damages.
1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1657

[§ 1657] In General.

(1) *Nature of Statute*. On November 6, 1996, the electorate adopted Proposition 213, an initiative measure entitled "The Personal Responsibility Act of 1996." (Prop. 213, §1; see *Yoshioka v. Superior Court* (1997) 58 C.A.4th 972, 981, 68 C.R.2d 553 [Prop. 213 is constitutional]; *Quackenbush v. Superior Court* (1997) 60 C.A.4th 454, 463, 70 C.R.2d 271 [same].) The purpose of the measure is "to restore balance to our justice system by limiting the right to sue of criminals, drunk drivers, and uninsured motorists." (Prop. 213, §2(c).) Its provisions apply to all actions in which the initial trial did not commence prior to January 1, 1997. (Prop. 213, §4; see *Yoshioka v. Superior Court*, *supra*, 58 C.A.4th 979 [Prop. 213 applies retroactively]; *Savnik v. Hall* (1999) 74 C.A.4th 733, 738, 88 C.R.2d 417 [same].)

(2) *Felons*. A plaintiff may not recover any damages in a negligence action if the plaintiff's injuries were in any way proximately caused by his or her commission of a felony, or immediate flight from the felony, and plaintiff is convicted of the felony. (C.C. 3333.3.)

In *Jenkins v. Los Angeles* (1999) 74 C.A.4th 524, 88 C.R.2d 149, plaintiff stole an automobile. About 4 hours later, a security guard became suspicious and alerted the police, who found plaintiff parked in the lot of a nearby mall. Plaintiff then put his car in reverse, and one of the officers, thinking that another officer was in danger of being struck by plaintiff's vehicle, fired four shots, one of which hit and wounded plaintiff. After being convicted of taking a vehicle without the owner's consent, plaintiff sued the county, its sheriff's department, and two individual officers for negligence and various intentional torts based on the use of excessive force. Defendants moved for summary judgment on the ground that the action was barred by C.C. 3333.3. *Held*, summary judgment for defendants reversed.

(a) Although C.C. 3333.3 plainly states that, under the specified circumstances, the plaintiff cannot recover any damages in a "negligence" action, defendants argued that because the claimed intentional torts were grounded on the use of excessive force, they were, in effect, claims "based on negligence" (because, by their nature, the threshold issue in each case was whether the force used was reasonable). This argument is without merit. C.C. 3333.3 is part of Proposition 213, and the ballot pamphlet for that proposition stated that while it prevented felons from recovering for *accidental* injuries, they were still able to recover for some injuries, such as those resulting from the excessive use of force. Moreover, the language of C.C. 3333.3 is clearly contrary to defendants' position. (74 C.A.4th 530.)

(b) C.C. 847 is similar in that it renders landowners immune for injuries sustained by felons in the commission of

specified felonies. This statute has been held to apply to justifiable, but not unjustifiable, use of force. C.C. 847 is not specifically limited to actions based on negligence. A landowner remains liable for wilful, wanton, or criminal conduct. Hence, if the Legislature, in enacting C.C. 3333.3 had wanted to include some intentional conduct, it could have employed a similar approach, rather than specifying that it applied to "actions based on negligence." (74 C.A.4th 532, citing *Calvillo-Silva v. Home Grocery* (1998) 19 C.4th 714, 80 C.R.2d 506, 968 P.2d 65.)

(c) Although C.C. 3333.3 applies to negligence actions, summary judgment was erroneous, because plaintiff raised a triable issue of material fact whether his injuries were sustained during "immediate flight" from the felony for which he was convicted. Here, plaintiff took the car at midnight, but the confrontation in the parking lot, the incident that caused his injury, did not occur until 4 hours later. Moreover, there was nothing in the record that established that, as a matter of law, plaintiff's injury occurred in the commission of or immediate flight from the crime for which he was convicted. (74 C.A.4th 534.)

(3) *Drivers Under the Influence of Alcohol or Drugs*. In an action to recover damages arising out of the operation or use of a motor vehicle, a person may not recover noneconomic damages to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if at the time of the accident he or she was operating the vehicle in violation of Veh.C. 23152 or 23153 and was convicted of that offense. (C.C. 3333.4(a)(1).) Also, a liability or uninsured motorist insurer is not liable, directly or indirectly, to indemnify for these noneconomic losses. (C.C. 3333.4(b).)

(4) *Uninsured Motorists*. (See *infra*, §1658 et seq.)

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2. Uninsured Motorists.
a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1658

[§ 1658] In General.

Generally, in an action to recover damages arising out of the operation or use of a motor vehicle, an injured person may not recover noneconomic damages if he or she was the owner of a vehicle involved in the accident and the vehicle was not insured, or was the operator of an involved vehicle and cannot establish his or her financial responsibility, as required by the financial responsibility laws. (C.C. 3333.4(a)(2), (a)(3).) Also, a liability or uninsured motorist insurer is not obligated to indemnify for these noneconomic losses. (C.C. 3333.4(b).) An uninsured *owner* may nevertheless recover for these losses where the owner was injured by a motorist operating his or her vehicle under the influence of alcohol or drugs and subsequently convicted of that offense. (C.C. 3333.4(c).) (See *Cabral v. Los Angeles County Metropolitan Trans. Authority* (1998) 66 C.A.4th 907, 911, 78 C.R.2d 385 [uninsured vehicle owner injured when opening door of parked vehicle could not recover noneconomic damages; "operation" is broader than "driving," and "use" is broader still]; *Honsickle v. Superior Court* (1999) 69 C.A.4th 756, 765, 82 C.R.2d 36 [there is no exception in C.C. 3333.4 for driver or owner who unsuccessfully attempts to purchase insurance]; *Montes v. Gibbens* (1999) 71 C.A.4th 982, 985, 84 C.R.2d 324 [C.C. 3333.4(a)(3) does not apply to uninsured employee driving employer's vehicle in scope of employment]; *Savnik v. Hall* (1999) 74 C.A.4th 733, 739, 88 C.R.2d 417 [person listed on car registration as "registered owner" did not possess all incidents of ownership, and thus was not "owner" for purposes of C.C. 3333.4].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Garcia v. Superior Court* (2006) 137 C.A.4th 342, 348, 39 C.R.3d 902 [owner of self-propelled piece of machinery who was injured when machinery fell off truck while being loaded to be transported as freight was not precluded by C.C. 3333.4 from recovering noneconomic damages against truck owner; although truck was parked on street and uninsured owner was driving machinery onto truck, statute did not apply to machinery once it was removed from road and placed as freight for transportation]; *Jeremia v. Hilmar Unified School Dist.* (2008) 166 C.A.4th 324, 329, 332, 82 C.R.3d 658 [wife of vehicle owner was not also "owner" under C.C. 3333.4(a)(2), even though vehicle was purchased with community property funds, where wife was unaware that husband had bought vehicle rather than merely borrowed it from employer; her community property interest did not make her owner, where she had no other connection with vehicle].



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b. Products Liability.

6 *Witkin Sum. Cal. Law Torts* § 1659

[§ 1659] Products Liability.

The C.C. 3333.4 limitation on recovery of noneconomic damages by uninsured motorists is not applicable in products liability actions. In *Hodges v. Superior Court* (1999) 21 C.4th 109, 86 C.R.2d 884, 980 P.2d 433, an uninsured motorist sued an automobile manufacturer, alleging a design defect and seeking both compensatory and punitive damages for injuries suffered when his car's gas tank ruptured when struck from the rear, causing an explosion. The trial court granted defendant's motion for summary adjudication with regard to plaintiff's claim for punitive damages, citing C.C. 3333.4. *Held*, reversed.

(a) The scope of C.C. 3333.4, precluding recovery of noneconomic damages by uninsured motorists "in any action arising out of the operation or use of a motor vehicle," is unclear. (21 C.4th 113.) It is therefore necessary to look beyond the statutory language to the electorate's purpose in enacting Proposition 213, of which C.C. 3333.4 is a part. (21 C.4th 114.)

(b) The primary purpose behind Proposition 213 was to limit automobile insurance claims by uninsured motorists. The electorate wanted to insure that uninsured motorists, who contribute nothing to the insurance pool, would be restricted in what they receive from it. The initiative was designed to provide fairness for those who obey the financial responsibility laws, not to provide a windfall to manufacturers whose design and manufacturing processes are not subject to those laws. (21 C.4th 115.) Nothing in the legislative history of the initiative suggests that the voters intended to limit recovery of damages against manufacturers of dangerous vehicles. Indeed, such a windfall is inconsistent with the long-standing public policy of requiring manufacturers to bear the costs of injury from defective products. (21 C.4th 117.)

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c. Punitive Damages.

6 *Witkin Sum. Cal. Law Torts* § 1660

[§ 1660] Punitive Damages.

The C.C. 3333.4 limitation does not apply to punitive damages. In *Nakamura v. Superior Court* (2000) 83 C.A.4th 825, 100 C.R.2d 97, plaintiffs, the owner and the operator of a vehicle, neither of whom had the requisite insurance or proof of financial responsibility, brought a personal injury action against the driver of a vehicle that collided with plaintiffs' vehicle, as well as against the driver's employer. Earlier, the driver had been charged with various offenses, including two counts relating to drug or alcohol use under *Veh.C. 23152* and one count for reckless driving under *Veh.C. 23103*. In return for pleading nolo contendere to reckless driving, the other charges were dismissed. In the present action, plaintiffs amended their complaint to ask for punitive damages. *Held*, C.C. 3333.4 does not bar plaintiffs from pursuing their claim for punitive damages.

(a) As an exception to the limitation prohibiting the recovery of noneconomic damages, C.C. 3333.4(c) allows an uninsured operator to recover those damages if the injury was caused by a defendant who operated a vehicle in violation of *Veh.C. 23152* and was *convicted* of that offense. Here, this exception does not apply, because the driver was charged, but not convicted, i.e., the *Veh.C. 23152* counts were dismissed. (83 C.A.4th 832.)

(b) C.C. 3333.4(a) prohibits the uninsured from recovering "non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages." However, punitive damages, whose sole purposes are to punish and deter, do not compensate for loss, and thus do not fit neatly within any of the specific noneconomic losses enumerated in the statute. Furthermore, under the principle of ejusdem generis, the phrase "other nonpecuniary damages" is confined to the kind of damages specified, i.e., pain, suffering, physical impairment, and disfigurement. Each of the enumerated items reflects a consequence of the plaintiff's personal and physical injury and a subjective loss for which money could compensate the victim. However, imposition of punitive damages is triggered by the conduct and state of mind of the wrongdoer, not by the nature of the loss suffered by the plaintiff. Although punitive damages, like the enumerated items, are not "objectively verifiable monetary losses," they differ in kind from these items in that they serve to punish and deter, rather than to compensate. (83 C.A.4th 833.)

(c) A related statute, C.C. 3333.2 (supra, §958 et seq.), sets a limit on the amount of noneconomic damages recoverable, and it has been held that this cap does not apply to punitive damages. (83 C.A.4th 836, citing *Baker v. Sadick* (1984) 162 C.A.3d 618, 208 C.R. 676, supra, §952.) Similarly, with respect to C.C. 3333.3 (supra, §1657), a

companion statute to C.C. 3333.4, *Jenkins v. Los Angeles* (1999) 74 C.A.4th 524, 535, 88 C.R.2d 149, supra, §1657, concluded that the statute did not limit recovery for damages caused by intentional torts, because the applicable ballot pamphlet made no mention of these torts, but instead indicated that the measure was designed to bar tort recovery of damages by fleeing felons based on negligence. So also the ballot pamphlet for C.C. 3333.4 made no mention of whether punitive damages should or should not be covered by the statute. Distilled to its essence, the pamphlet reflected a primary aim to limit automobile insurance claims by uninsured motorists, who contribute nothing to the insurance pool, and thereby to reduce insurance rates. Thus, *Hodges v. Superior Court* (1999) 21 C.4th 109, 86 C.R.2d 884, 980 P.2d 433, supra, §1659, did not limit an uninsured motorist's claim against a car manufacturer in strict liability, because recovery of these damages against car manufacturers, like an uninsured motorist's recovery of punitive damages, was unlikely to have a noticeable effect on the insurance pool. (83 C.A.4th 836.)

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2. Uninsured Motorists.
d. Wrongful Death.

6 *Witkin Sum. Cal. Law Torts* § 1661

[§ 1661] Wrongful Death.

The limitation of C.C. 3333.4 does not apply to wrongful death plaintiffs, even though their decedent was an uninsured owner or operator of the vehicle involved in the accident. This is so because the plaintiffs themselves do not fall within the provisions of the statute. In *Horwich v. Superior Court* (1999) 21 C.4th 272, 87 C.R.2d 222, 980 P.2d 927, the parents of an uninsured driver who died in an automobile accident brought a wrongful death action against the other driver. Defendant alleged as an affirmative defense that, because the decedent was uninsured at the time of the accident, C.C. 3333.4 barred plaintiffs from recovery of damages for the nonpecuniary value of her care, comfort, and society. The trial judge disagreed, granting plaintiffs' motion for judgment on the pleadings. *Held*, affirmed.

(a) The grammatical structure and logic of the statutory language taken as a whole indicate that plaintiffs in an action are barred from recovery only when they are themselves uninsured. This interpretation is in accord with the electorate's intent in adopting Proposition 213. The statute is aimed at those individuals who have failed to take personal responsibility for their actions, including drivers without obligatory liability insurance. A wrongful death plaintiff who is not the uninsured owner or operator of a vehicle involved in the accident cannot be one who has failed to take personal responsibility, because the law imposes no obligation on that person. (21 C.4th 275.)

(b) No absolute rule allows a wrongful death defendant to assert any defense that would have been available against the decedent. Unlike some jurisdictions in which wrongful death actions are derivative, C.C.P. 377.60 (supra, §1378) creates a new cause of action in favor of the heirs as beneficiaries, based on their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained had he or she survived. In the case of a statutory defense, the court must consider the language and intent of the enactment as well as the original and distinct nature of a wrongful death action. The more reasonable interpretation of C.C. 3333.4, in light of the electorate's objective, precludes its application under the circumstances of this case. Thus, defendant had no basis to invoke C.C. 3333.4 as a defense, even if he could have asserted it against the decedent. (21 C.4th 283.)

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6 *Witkin Sum. Cal. Law Torts* § 1662

[§ 1662] Action Against Public Entity.

The C.C. 3333.4 limitation extends to actions against public entities based on the condition of public property, such as actions for nuisance or dangerous condition of property. In *Day v. Fontana* (2001) 25 C.4th 268, 105 C.R.2d 457, 19 P.3d 1196, an uninsured motorcycle driver was injured when struck by an automobile in an intersection. The motorcyclist sued not only the other driver but also the county and city, alleging causes of action for dangerous condition of public property and nuisance, based on overgrown vegetation that surrounded the intersection. The trial court granted the public entities' motion to preclude noneconomic damages pursuant to C.C. 3333.4. Plaintiff was subsequently awarded economic damages only, which were allocated among all three defendants. *Held*, affirmed.

(a) This action falls squarely within the terms of C.C. 3333.4, because plaintiff was the owner of an uninsured motorcycle and there was a necessary and causal relationship between his operation of the motorcycle and the accident for which he claims the public entities were responsible. Because C.C. 3333.4 contains no exception for suits against public entities, plaintiff is statutorily barred from recovering noneconomic damages from defendants. (25 C.4th 273.)

(b) The legislative history of Proposition 213, of which C.C. 3333.4 is a part, reinforces this conclusion. Public entities are among those directly affected by motorists who violate the financial responsibility laws, and Proposition 213 seeks to ensure that those who fail to comply with those laws will not be rewarded. When an uninsured driver causes damage to roadways or to other public property on or adjacent to the roadways, including traffic signs, directional signs, traffic signals, street lights, median strips, and landscaping, the public entity suffers a direct harm and public safety may sometimes be placed at risk until repairs are made. In these situations, the public entity generally is left to bear the entire cost of the repairs necessitated by the uninsured tortfeasor's acts and financial irresponsibility. (25 C.4th 274.) Violators of the financial responsibility law also detrimentally affect the interests of public entities in a more indirect way. When the negligence of an uninsured driver and the dangerous condition of public property combine to jointly cause injury to an insured driver, both tortfeasors are jointly and severally liable for all economic damages awarded to the insured driver. Typically, however, the public entity's right of contribution from the uninsured tortfeasor is meaningless because the tortfeasor is judgment proof. In these circumstances, the public entity ends up paying all of the insured driver's economic damages while the uninsured driver pays nothing. Hence, construing C.C. 3333.4 to apply to actions against public entities promotes the general purpose of the statute. Public entities, while remaining legally responsible to pay for an uninsured driver's economic losses, are at least relieved of liability for noneconomic losses. (25 C.4th 275.)

(c) *Hodges v. Superior Court* (1999) 21 C.4th 109, 86 C.R.2d 884, 980 P.2d 433, supra, §1659, is distinguishable. The right to recover fully for an injury caused by an automobile design defect, even by an uninsured motorist, has no bearing on any principle of fairness having to do with the financial responsibility laws. (25 C.4th 279.) (See *Allen v. Sully-Miller Contracting Co.* (2002) 28 C.4th 222, 226, 120 C.R.2d 795, 47 P.3d 639 [Proposition 213 applied in negligence and premises liability action by uninsured motorcyclist against construction company that maintained road; *Day v. Fontana* extended to *private* entities].)

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f. Causal Connection.

6 *Witkin Sum. Cal. Law Torts* § 1663

[§ 1663] Causal Connection.

The C.C. 3333.4 limitation does not apply when there is no causal relation between the operation of the vehicle and the accident giving rise to the injury. In *Anaya v. Superior Court* (2002) 96 C.A.4th 136, 116 C.R.2d 660, a girl was injured when a car owned by her parents, who were uninsured, collided with a city sanitation truck. In the course of transporting her to a hospital, a city helicopter crashed and the girl died. In her parents' action against the city for wrongful death, the trial court granted the city's motion for summary adjudication. *Held*, reversed. The city, in its capacity as owner and operator of the helicopter, was not entitled to the benefit of C.C. 3333.4. The statute is intended to prevent unfairness when an accident occurs between an insured and an uninsured motorist, not to operate as a windfall to a person or entity that is not part of the automobile insurance system. (96 C.A.4th 141.) The statute has been applied where an uninsured motorist seeks recovery against a government entity on theories of nuisance and dangerous condition of public property, but only where there is a necessary and causal relationship between the motorist's vehicle operation and the accident. (96 C.A.4th 143; citing and distinguishing *Day v. Fontana* (2001) 25 C.4th 268, 105 C.R.2d 457, 19 P.3d 1196, *supra*, §1662.) Here, there was no such connection. (96 C.A.4th 144.)

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g. Insured Vehicle.

6 *Witkin Sum. Cal. Law Torts* § 1664

[§ 1664] Insured Vehicle.

In *Goodson v. Perfect Fit Enterprises* (1998) 67 C.A.4th 508, 79 C.R.2d 102, a van owned by plaintiff, who was uninsured, collided with defendant's truck, resulting in injuries. At the time of the accident, the van was being driven by a third party, who was insured under a qualifying automobile policy. Plaintiff sought to recover both economic and noneconomic damages, but at the commencement of trial, defendant successfully moved, under C.C. 3333.4(a)(1), to preclude the noneconomic damages. Judgment was then entered consisting only of plaintiff's economic damages, and plaintiff appealed insofar as the judgment excluded noneconomic damages. *Held*, reversed as to the denial of noneconomic damages, but otherwise affirmed.

(a) C.C. 3333.4(a)(2) precludes the recovery of noneconomic damages in vehicle accident cases if "[t]he injured person was the owner of a vehicle involved in the accident *and* the vehicle was not insured as required by the financial responsibility laws of this state." Because plaintiff was indisputably owner of a vehicle involved in the accident, the primary issue is whether the vehicle was insured as required by the financial responsibility laws. *It was*. (67 C.A.4th 512.)

(b) *Veh.C. 16000.7* defines "uninsured vehicle" as one for which the financial responsibility of *Veh.C. 16021* was not in effect at the time of the accident, and *Veh.C. 16021* provides that financial responsibility of the driver or owner of a vehicle involved in the accident is established if either is an insured under a policy complying with the financial responsibility requirements and covering the driver for the vehicle involved in the accident. "The plain meaning of these provisions ... is that financial responsibility for the vehicle is established, and the vehicle is insured as required by the financial responsibility laws, if the owner or the driver has insurance that covers the driver for his or her operation of the vehicle involved in an accident. Although the vehicle owner generally will satisfy these requirements by personally maintaining insurance for the vehicle, section 16021 provides that financial responsibility is established so long as the driver is covered, under either the owner's automobile policy or the driver's own." This conclusion is confirmed by *Veh.C. 16054*, which permits either the owner or driver to submit evidence of financial responsibility. (67 C.A.4th 513.)

(c) Defendant argued that plaintiff failed to comply with *Veh.C. 16020*, which requires both the driver and owner to carry evidence of financial responsibility. This contention is without merit. *Veh.C. 16020* imposes two separate requirements: establishing financial responsibility, and carrying proof of it. The bar in C.C. 3333.4 against recovering

noneconomic damages applies only to the first requirement. Thus, even assuming that plaintiff did not satisfy the proof requirement, he did meet the only requirement that was relevant to this case, the requirement of financial responsibility. (67 C.A.4th 514.)

(d) *Veh.C. 17150* and *17151* provide for liability of vehicle owners for injury or property damage occasioned by use of the vehicle with the owners' permission, and defendant argued that public policy requires that the *owners* have sufficient funds to cover this liability. However, this argument is irrelevant to the present case, because those statutes are not part of the Financial Responsibility Law, and thus the fact that the owners might have insurance sufficient to cope with the liability established thereunder is not specifically required to render a vehicle insured under C.C. 3333.4(a)(2). (67 C.A.4th 514.) Also irrelevant is the fact that the legislation enacting the Financial Responsibility Law stated that financial capability is to be deemed "a concurrent responsibility of such motor vehicle ownership or operation." Rather than referring to a concurrent responsibility of the owner and driver to carry insurance, the quoted language means that financial responsibility is a responsibility concurrent with vehicle ownership or operation. (67 C.A.4th 515.)

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A. Injuries to Person.
1. In General.

6 *Witkin Sum. Cal. Law Torts* § 1665

[§ 1665] In General.

Full compensation to an injured person for "all the detriment proximately caused" by the injury (C.C. 3333, *supra*, §1558) may include various types of recovery. (See generally 22 *Am.Jur.2d* (2003 *ed.*), *Damages* §122 et seq.; *Rest.2d, Torts* §924; C.E.B., *Tort Damages* 2d, §1.1 et seq.; 34 *Proof of Facts* 3d 1 [personality change from closed head trauma]; 59 *Proof of Facts* 3d 203 [failed back syndrome]; 53 *Am.Jur. Trials* 1 [evaluation and settlement of personal injury cases]; 59 *Am.Jur. Trials* 395 [proving damages in personal injury cases]; BAJI, No. 14.69 [life expectancy]; CACI, No. 3932 [same].)

The following are the principal types:

- (1) Impairment of earning capacity. (See *infra*, §1666 et seq.)
- (2) Medical care and other expenses. (See *infra*, §1670.)
- (3) Physical pain and mental suffering. (See *infra*, §1671 et seq.)
- (4) Aggravation of a prior condition. (See *infra*, §1676.)
- (5) Susceptibility to subsequent disease or injury. (See *infra*, §1677.)
- (6) Loss of consortium. (See *infra*, §1679 et seq.)

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As long as the record supports the total amount of economic damages, regardless of whether the evidence relates to medical expenses or lost wages, that part of the award must be affirmed. (See *Stone v. Center Trust Retail Properties* (2008) 163 *C.A.4th* 608, 615, 77 *C.R.3d* 556 [award of economic damages based on lost wages or medical expenses could stand, even if plaintiff presented no evidence of medical expenses].)



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2. Loss of Past Earnings or Value of Time.

6 Witkin Sum. Cal. Law Torts § 1666

[§ 1666] Loss of Past Earnings or Value of Time.

If the plaintiff was disabled, whether temporarily or permanently, partially or totally, one of the elements of damages is the value of the time already lost up to the date of trial. (See *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 656, 151 C.R. 399; *Rest.2d, Torts* §924(b).) This may be proved in several ways:

(1) *Earnings*. The plaintiff may show actual earnings from wages or commissions prior to the injury. (See *Bonneau v. North Shore R. Co.* (1907) 152 C. 406, 413, 93 P. 106; *Perry v. McLaughlin* (1931) 212 C. 1, 12, 297 P. 554; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§149, 152 et seq.; 3 *Proof of Facts* 491 [damages]; 61 *Harv. L. Rev.* 163; 81 *A.L.R.2d* 733 [admissibility, as against objection of remoteness, of evidence of past earnings, on issue of amount of damages in action for personal injury or death]; 82 *A.L.R.2d* 679 [admissibility of evidence of plaintiff's or decedent's drawings from partnership or business as evidence of earning capacity, in action for personal injury or death]; *BAJI*, No. 14.11; *CACI*, No. 3903C.)

(2) *Earning Power*. Because the recovery is for loss of time or earning power, and loss of earnings is only a means of determining its value, the plaintiff may recover even where he or she was not working and earned nothing. (*Storrs v. Los Angeles Traction Co.* (1901) 134 C. 91, 93, 66 P. 72; *Kline v. Santa Barbara Consol. Ry. Co.* (1907) 150 C. 741, 748, 90 P. 125; *Holmes v. California Crushed Fruit Co.* (1924) 69 C.A. 779, 780, 232 P. 178; *Gotsch v. Market Street Ry. Co.* (1928) 89 C.A. 477, 483, 265 P. 268; *Wilcox v. Sway* (1945) 69 C.A.2d 560, 572, 160 P.2d 154; *Tornell v. Munson* (1947) 80 C.A.2d 123, 125, 181 P.2d 112; see 22 *Am.Jur.2d* (2003 ed.), *Damages* §136 et seq.; 61 *Harv. L. Rev.* 165; *BAJI*, No. 14.11.)

(3) *Self Employment*. Where the plaintiff was not employed by another, but conducted his or her own business, the value of loss of time can be proved by evidence of past profits, provided that the plaintiff's personal efforts were the predominating factor in making them. (*Maus v. Scavenger Protective Assn.* (1934) 2 C.A.2d 624, 631, 39 P.2d 209; *Rest.2d, Torts* §924, Comment c; see 22 *Am.Jur.2d* (2003 ed.), *Damages* §§156, 739; 7 *Stanf. L. Rev.* 97; 45 *A.L.R.3d* 345 [profits of business as factor in determining loss of earnings or earning capacity in action for personal injury or death].) But the loss of profits cannot be shown where others were employed in the plaintiff's business; in this case, the reasonable value of the plaintiff's services to the business must be proved. (*Lombardi v. California Street Ry. Co.* (1899) 124 C. 311, 319, 57 P. 66; *Pretzer v. California Transit Co.* (1930) 211 C. 202, 207, 294 P. 382; see 7 *Stanf. L. Rev.* 107; 12 *A.L.R.2d* 288 [loss of profits of business in which plaintiff is interested as factor in determining damages in

personal injury action]; 37 A.L.R.2d 364 [cost of hiring substitute].)

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a. In General.

6 Witkin Sum. Cal. Law Torts § 1667

[§ 1667] In General.

The plaintiff may recover damages for the impairment of his or her earning capacity, based upon the present value of the earnings for the probable period of disability, which may be the plaintiff's life expectancy if the disability is permanent. (See *Bonneau v. North Shore R. Co.* (1907) 152 C. 406, 413, 93 P. 106; *Shaw v. Southern Pac. R. Co.* (1910) 157 C. 240, 242, 107 P. 108; *Zibbell v. Southern Pac. Co.* (1911) 160 C. 237, 254, 116 P. 513; *Kircher v. Atchison, Topeka & Santa Fe Ry. Co.* (1948) 32 C.2d 176, 186, 195 P.2d 427 [air cadet, age 23, left hand nearly severed; jury could consider youth, university education, training as physical instructor, military future]; *Connolly v. Pre-Mixed Concrete Co.* (1957) 49 C.2d 483, 488, 319 P.2d 343 [20-year-old champion tennis player, \$ 95,000 for injured leg, on evidence of probable earnings from tours]; *Ostertag v. Bethlehem Shipbuilding Corp.* (1944) 65 C.A.2d 795, 807, 151 P.2d 647; *McChristian v. Popkin* (1946) 75 C.A.2d 249, 262, 171 P.2d 85 [assault and battery]; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 656, 151 C.R. 399; *Heiner v. Kmart Corp.* (2000) 84 C.A.4th 335, 344, 100 C.R.2d 854 [evidence was admissible regarding plaintiff dentist's lost profits as result of injury, despite his noncompliance with certain licensing requirements, where plaintiff's expert testified that plaintiff could easily have brought his practice into compliance had he been able to continue as dentist]; *Rest.2d, Torts* §924, Comment d; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§144, 146, 148, 712; 29 *Proof of Facts* 3d 259 [lost earning capacity]; C.E.B., *Tort Damages* 2d, §1.41 et seq.; 12 *U.C. Davis L. Rev.* 797 [criticism of inadequate awards to children]; 15 *A.L.R.2d* 418 [earning capacity of student or trainee, or its loss]; 18 *A.L.R.3d* 88 [impairment of earning capacity and instructions]; 23 *A.L.R.3d* 1189 [intent to change occupation]; BAJI, No. 14.12.)

"Loss of earning power is an element of general damages that may be inferred from the nature of the injury, with or without proof of actual earnings or income either before or after the injury." The test is not what the plaintiff would have earned in the future but what he or she could have earned; and the plaintiff may recover even where he or she was not working and earned nothing. (*Hilliard v. A.H. Robins Co.* (1983) 148 C.A.3d 374, 412, 196 C.R. 117; see *Gargir v. B'Nei Akiva* (1998) 66 C.A.4th 1269, 1280, 78 C.R.2d 557 [proper to give BAJI, No. 14.12 on loss of earning power, where nature of injury justified conclusion that plaintiff's earning ability had been impaired; plaintiff could present expert testimony about amount she would have earned but she was not required to do so]; CACI, No. 3903D.)

In determining the life expectancy, it is the customary practice to offer in evidence the standard mortality tables, compiled by life insurance companies from their experience, showing the probable life expectancy of a normally

healthy person (a life insurance risk) of a particular age. (See *Murphy v. National Ice Cream Co.* (1931) 114 C.A. 482, 486, 300 P. 91; 3 Proof of Facts 491 [damages]; 50 A.L.R.2d 419 [mortality tables as dependent upon showing of permanency of injury]; 79 A.L.R.2d 275 [testimony of actuary or mathematician]; 1 Cal. Evidence (4th), Hearsay, §294.)

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See 7 A.L.R.6th 1 [admissibility and sufficiency of evidence of future earning capacity in position or field for which person has not fulfilled education, training, or like eligibility requirement; superseding 15 A.L.R.2d 418, text, p. 1186].



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b. Plaintiff's Lost Years.

6 *Witkin Sum. Cal. Law Torts* § 1668

[§ 1668] Plaintiff's Lost Years.

In *Fein v. Permanente Med. Group* (1985) 38 C.3d 137, 211 C.R. 368, 695 P.2d 665, plaintiff recovered judgment against defendants for failure to make a timely diagnosis of an impending heart attack. Defendant contended that the trial judge erred in instructing the jury that damages could be awarded for loss of earnings attributable to plaintiff's "lost years"--the period of time by which his life expectancy was diminished as a result of defendant's negligence. *Held*, recovery of these damages is consistent with the general rule permitting an award based on loss of future earnings "because of inability to work for as long a period of time in the future as he could have done had he not sustained the accident." (38 C.3d 153, quoting *Robison v. Atchison, Topeka & Santa Fe Ry. Co.* (1962) 211 C.A.2d 280, 288, 27 C.R. 260, and citing *Sea-Land Services v. Gaudet* (1974) 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, 2 Summary (10th), *Workers' Compensation*, §145.) (See *Overly v. Ingalls Shipbuilding* (1999) 74 C.A.4th 164, 171, 87 C.R.2d 626 [*Fein* reasoning applied where lost years' damages were in form of pension, Social Security, and "household services" benefits; these damages are not reduced to account for plaintiff's personal consumption during lost years]; *Rest.2d, Torts* §924, Comments d, e; 50 *Cal. L. Rev.* 598.)

Recovery for lost years will not subject the defendant to double payment in the event the plaintiff's heirs sue for wrongful death; in a wrongful death action, the jury will be instructed that it should consider the amount the decedent had obtained from the defendant in an earlier judgment as compensation for impairment of his or her future earning capacity. (*Fein v. Permanente Med. Group*, *supra*, 38 C.3d 153, 154, citing *Blackwell v. American Film Co.* (1922) 189 C. 689, 700, 209 P. 999.)

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c. Illegal Alien Subject to Deportation.

6 *Witkin Sum. Cal. Law Torts* § 1669

[§ 1669] Illegal Alien Subject to Deportation.

In *Rodriguez v. Kline* (1986) 186 C.A.3d 1145, 232 C.R. 157, the court, in a case of first impression, laid down guidelines for determining the applicable law on the future earning capacity of an illegal alien who could be subject to deportation. Plaintiff, a citizen of Mexico, claimed to have worked in this country for nearly 20 years, and therefore that he might have been successful in suspending deportation or obtaining amnesty. The trial judge allowed evidence to be introduced as to his projected earnings in this country as well as in Mexico, and merely instructed the jury that defendant had the burden of proof on the issue of plaintiff's illegal status and the possibility and probability of his deportation. *Held*, judgment for plaintiff reversed.

To avoid the prejudicial effect of evidence on alien status and liability to deportation, the issue should be treated as one of law to be decided by the trial judge in a hearing outside the presence of the jury. (186 C.A.3d 1148.) At the hearing: (a) The defendant will have the initial burden of proving that the plaintiff is an alien subject to deportation. (b) If the defendant is successful, the burden will shift to the plaintiff to show that he or she has taken steps that will correct the deportable condition. (c) If the judge's decision is in the plaintiff's favor, evidence relating to alienage should be excluded, and the plaintiff's projected earning capacity may be computed on the basis of past and future income in the United States. (d) On the other hand, if the judge decides in favor of the defendant, the evidence must be limited to earnings that could be anticipated in the country of lawful citizenship; but because the plaintiff's status would ordinarily not be relevant to a determination of liability, he or she would be entitled to a limiting instruction to that effect. (186 C.A.3d 1149.)

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XVIII. DAMAGES: KINDS OF INJURY
A. Injuries to Person.
4. Medical Care and Related Expense.

6 Witkin Sum. Cal. Law Torts § 1670

[§ 1670] Medical Care and Related Expense.

The plaintiff is entitled to recover the reasonable cost of necessary medical and hospital services, including prospective expense of this kind. (See *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 409, 115 C.R. 765, 525 P.2d 669, *infra*, §1679 [injured husband is entitled to recover reasonable value of nursing services; hence, wife, suing for damages for loss of consortium, cannot recover for this item]; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 C.4th 965, 1009, 25 C.R.2d 550, 863 P.2d 795 [enumerating factors relevant to determination that monitoring is reasonable and necessary]; *Reichle v. Hazie* (1937) 22 C.A.2d 543, 547, 71 P.2d 849 [plaintiff may recover even though treated at county hospital; if plaintiff is able to pay charges, county officials must collect from him or her]; *Gastine v. Ewing* (1944) 65 C.A.2d 131, 143, 150 P.2d 266 [money paid for necessary services was recoverable, even though doctor was unlicensed]; *Wilcox v. Sway* (1945) 69 C.A.2d 560, 570, 160 P.2d 154 [future expense]; *Miranda v. Shell Oil Co.* (1993) 17 C.A.4th 1651, 1655, 26 C.R.2d 655 [plaintiffs were exposed to pesticide through contaminated ground water; costs of future medical monitoring were recoverable]; *Gutierrez v. Cassiar Mining Corp.* (1998) 64 C.A.4th 148, 156, 75 C.R.2d 132 [even if defendant asbestos supplier exposed plaintiff with preexisting lung condition to toxins significantly increasing risk of cancer, defendant was not liable for medical monitoring costs unless monitoring called for tests in addition to that which plaintiff required apart from toxic exposure]; *Rest.2d, Torts* §924(c); 22 *Am.Jur.2d* (2003 ed.), *Damages* §§165, 173, 175 et seq.; C.E.B., *Tort Damages* 2d, §1.20 et seq.; 68 *Harv. L. Rev.* 366; 12 *U.C. Davis L. Rev.* 797 [criticism of inadequate awards to children]; BAJI, Nos. 14.10, 14.10.1; CACI, Nos. 3903A, 3903B.)

Practice works dealing with problems of proof are numerous. (See 3 Proof of Facts 491 [damages]; 4 Proof of Facts 3d 645 [future medical needs of injured child]; 9 Proof of Facts 3d 1 [rehabilitation and life care needs after traumatic brain injury]; 23 Proof of Facts 3d 243 [establishing foundation for proof of medical expenses]; 25 Proof of Facts 3d 313 [medical monitoring damages resulting from exposure to toxic substances]; 43 *Hastings L. J.* 661 [payment of future medical surveillance expenses in toxic exposure litigation]; 69 *A.L.R.2d* 1261 [proof required for recovery for future medical expenses]; 90 *A.L.R.2d* 1323 [value of care and nursing gratuitously rendered]; 12 *A.L.R.3d* 1347 [evidence of reasonableness of amount]; 89 *A.L.R.3d* 87 [evidence to prove future medical expenses as a result of injury to head or brain]; 46 *A.L.R.4th* 1151 [cost of diagnostic examinations absent proof of actual bodily injury]; 17 *A.L.R.5th* 327 [expense of medical monitoring to detect or prevent future disease or condition]; 26 *A.L.R.5th* 401 [proof of future medical expenses resulting from injury to back, neck, or spine]; 49 *A.L.R.5th* 685 [valuing damages for gratuitously rendered nursing and medical care].)

In *Laughner v. Bryne* (1993) 18 C.A.4th 904, 22 C.R.2d 671, plaintiff filed a complaint for personal injuries on behalf of her minor child, who had been struck by defendants' car. The first cause of action sought an award of damages on the child's behalf for medical expenses, future medical expenses, loss of earnings, and general damages. The second cause of action sought damages on plaintiff's own behalf for future medical expenses for the care of the child and damages for the cost of supporting the child beyond the age of majority due to his permanent disability. After plaintiff settled the first cause of action on behalf of the child, the trial judge sustained defendants' demurrer to the second cause of action. *Held*, affirmed. Both causes of actions sought to recover damages for the same future medical expenses and future cost of support. Hence, by settling the cause of action on behalf of the child, plaintiff waived her right to seek the same damages for herself. (18 C.A.4th 911.)

In *Hanif v. Housing Authority* (1988) 200 C.A.3d 635, 246 C.R. 192, an action by a child who was hit by a car, the damages award included (a) the reasonable value of medical care and services, even though the amount exceeded the Medi-Cal payments made on plaintiff's behalf as payment in full, and (b) the reasonable value of the 24-hour attendant care provided by plaintiff's parents. *Held*, the former amount was error; the latter was correct.

(a) "[W]hen the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate." (200 C.A.3d 641.)

(b) When attendant care is rendered by the plaintiff's family, the defendant is liable in the amount for which reasonably competent care by others could have been obtained, even though the plaintiff may have a legal right to care from his family. (200 C.A.3d 644.) Hence, the fact that plaintiff's parents were relatively unskilled in professional home nursing is irrelevant. (200 C.A.3d 645.)

Johnston v. Long (1947) 30 C.2d 54, 181 P.2d 645, held that plastic surgery may be a proper item of medical expense, repudiating a contrary view declared in the early case of *Karr v. Parks* (1872) 44 C. 46. "Any expressions in the *Karr* case to the effect that an injured party is not entitled to damages in the form of expenses incurred for restorative surgery made necessary by the negligence of defendant must be disapproved. (See Rest., Torts, §924(c).) Present day standards no longer regard plastic surgery as a strange or foreign art. Indeed, there may be occasions when an injured person would be required to undergo plastic surgery to mitigate damages." (30 C.2d 77.) (See 88 A.L.R.3d 117 [cost of future cosmetic plastic surgery as element of damages].)

Where the obligation is incurred but not yet paid, the plaintiff may recover, but he or she must offer some other evidence of the reasonable value of the services. (See *Fisk v. Poplin* (1920) 46 C.A. 587, 591, 189 P. 722 [pleading was insufficient]; *Latky v. Wolfe* (1927) 85 C.A. 332, 346, 259 P. 470; *Caulfield v. Market Street Ry. Co.* (1937) 20 C.A.2d 220, 221, 66 P.2d 752.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Greer v. Buzgheia* (2006) 141 C.A.4th 1150, 1157, 46 C.R.3d 780 [trial court did not abuse discretion in allowing evidence of reasonable cost of plaintiff's medical care, while reserving until after verdict propriety of reduction of recovery for that care, under *Hanif v. Housing Authority* (1988) 200 C.A.3d 635, 246 C.R. 192, text, p. 1190, to amount paid or incurred; evidence of reasonable cost of care gives jury more complete picture of extent of plaintiff's injuries]; *Katiuzhinsky v. Perry* (2007) 152 C.A.4th 1288, 1296, 62 C.R.3d 309 [personal injury plaintiffs' recovery of medical expenses incurred was not limited to discounted amounts collection company paid to plaintiffs' health care providers to purchase their bills, where, unlike situation in *Hanif*, plaintiffs were still fully liable for amount of providers' charges, even though tortfeasor was answerable only to discounted amount paid by purchaser of liens].

In *Olsen v. Reid* (2008) 164 C.A.4th 200, 79 C.R.3d 255, plaintiff filed a lawsuit against defendant for negligence, and defendant stipulated to liability. Before trial, plaintiff moved to admit evidence of the full amount that her medical providers billed her for treatment. The trial court granted this motion. Defendant, on the other hand, moved to admit evidence of the amount plaintiff actually paid for her treatment after deducting the amount that plaintiff's insurers had

paid. The trial court denied this motion, stating that any reduction in the amount of medical expenses would be handled after trial. The jury's verdict included the amount that plaintiff was actually billed for her medical treatment. Under *Nishihama v. San Francisco* (2001) 93 C.A.4th 298, 112 C.R.2d 861, and *Hanif v. Housing Authority*, *supra*, defendant claimed that she was entitled to a reduction in the verdict, because plaintiff's providers had "written off" a portion of her bills, and defendant filed a posttrial motion to reduce the jury's verdict by that amount. The trial court granted the motion as a partial judgment notwithstanding the verdict and reduced the judgment by the requested amount. Both parties appealed. Plaintiff argued that the trial court improperly reduced the judgment. On cross-appeal, defendant argued that the trial court should have granted her motion in limine, thereby precluding the jury from hearing evidence of the actual amounts billed by plaintiff's medical providers. *Held*, reversed; the trial court was instructed to reinstate the full amount of the jury's verdict.

(a) *Plaintiff's appeal.* *Hanif* and *Nishihama* held that, when a plaintiff has medical insurance, damages are limited to the amount actually paid or incurred, not any greater amount billed, even if that amount is reasonable. Plaintiff and amici curiae asked that the holdings in these cases be reconsidered, but "[w]e need not go that far ... in order to decide this case." (164 C.A.4th 203.) In support of her motion to reduce the amount of the verdict, defendant submitted a 22-page bill from a medical center, page 20 of which included the following line item: "ADJ--MHIPA CAP ADJ" and, in the amount column, "46,270.05-." The next line item read: "ADJ--MHIPA CAP W/O" and "8,024.15-." The "Total payments & adjustments" was listed as "55,094.20-." From this evidence, "we find it far from clear as to what was paid, what, if anything, was 'written off,' and to what extent [plaintiff] remained liable for any further charges. The cryptic notations the court relied upon may reflect payments, or writedowns or writeoffs; we cannot know, and if any evidence revealed the actual facts, they are not present in the record." Therefore, the trial court erred in reducing the amount of the jury verdict. (164 C.A.4th 202, 203.)

(b) *Defendant's cross-appeal.* Defendant argued that it was error for the trial court to permit the jury to hear evidence of the full measure of plaintiff's medical damages. "We squarely reject this argument." Even the cases holding that a plaintiff is entitled to the lesser amount of damages, those incurred rather than billed, have approved of the jury hearing evidence of the full amount of plaintiff's damages. There is no reason to assume that the usual rates charged provide a less accurate indicator of the extent of the plaintiff's injuries than did the specially negotiated rates obtained by his or her insurer. Indeed, the opposite is more likely to be true. Therefore, there was no abuse of discretion in the trial court's denial of the motion. (164 C.A.4th 204.)



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XVIII. DAMAGES: KINDS OF INJURY

A. Injuries to Person.

5. Physical Pain and Mental Suffering.

a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1671

[§ 1671] In General.

(1) *Right To Recover.* The plaintiff is entitled to damages for physical pain and for mental suffering that result from or accompany the physical injury. (*Sloane v. Southern Calif. Ry. Co.* (1896) 111 C. 668, 678, 44 P. 320; *Merrill v. Los Angeles Gas & Elec. Co.* (1910) 158 C. 499, 507, 111 P. 534; *Easton v. United Trade School Contracting Co.* (1916) 173 C. 199, 202, 159 P. 597; *Deevy v. Tassi* (1942) 21 C.2d 109, 120, 130 P.2d 389; *Capelouto v. Kaiser Foundation Hosp.* (1972) 7 C.3d 889, 893, 103 C.R. 856, 500 P.2d 880 [mental suffering "frequently constitutes the principal element of tort damages," and awards that fail to compensate for it have been held inadequate as a matter of law]; *Sullivan v. Delta Air Lines* (1997) 15 C.4th 288, 297, 63 C.R.2d 74, 935 P.2d 781, 14 Summary (10th), *Wills and Probate*, §519 [pain and suffering award survives plaintiff's death pending appeal]; *Graham v. Yellow Cab Co. of Los Angeles* (1932) 125 C.A. 141, 146, 13 P.2d 773; *McChristian v. Popkin* (1946) 75 C.A.2d 249, 262, 171 P.2d 85 [assault and battery]; *Hilliard v. A.H. Robins Co.* (1983) 148 C.A.3d 374, 413, 196 C.R. 117 [absence of medical bills or medical testimony will not foreclose recovery; jury may infer pain from common experience]; *Macy's Calif. v. Superior Court* (1995) 41 C.A.4th 744, 752, 48 C.R.2d 496 [routine needle stick is not physical injury and does not justify parasitic damages for fear of contracting HIV/AIDS, in absence of proof of detrimental change to body]; *Loth v. Truck-A-Way Corp.* (1998) 60 C.A.4th 757, 764, 70 C.R.2d 571, *infra*, §1673 [recovery for pain and suffering must be based on evidence specific to plaintiff, as opposed to statistical data concerning public at large]; *Rest.2d, Torts* §§905, 924(a); 22 *Am.Jur.2d* (2003 ed.), *Damages* §200 et seq.; Cal. Civil Practice, 1 Torts, Emotional Distress, Chap. 11; C.E.B., *Tort Damages* 2d, §1.70 et seq.; 3 *Proof of Facts* 491 [damages]; 5 *Proof of Facts* 3d 323 [intangible damages for injury to elderly person]; 9 *Proof of Facts* 3d 207 [phantom pain and stump pain after amputation]; 25 *Proof of Facts* 3d 187 [traumatic incident resulting in loss or alteration of physical functioning that has psychological basis]; 61 *Harv. L. Rev.* 138; 108 *Harv. L. Rev.* 1787 [pain and suffering damages]; 18 *A.L.R.3d* 170 [permanence of injuries]; 3 *A.L.R.4th* 940 [per diem or similar mathematical basis for fixing damages for pain and suffering]; 52 *A.L.R.4th* 1 [damages for injuries causing mental or psychological harm]; 55 *A.L.R.4th* 186 [validity of verdict awarding medical expenses but failing to award damages for pain and suffering]; 61 *A.L.R.4th* 413 [parents' recovery of damages for noneconomic loss caused by injury or death of child]; *BAJI*, No. 14.13.) (On exception where injured party dies before judgment, see *C.C.P.* 377.20(b), 377.34, *supra*, §23.)

(2) *Unitary Concept.* "In general, courts have not attempted to draw distinctions between the elements of 'pain' on

the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal ... Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. ... But the detriment, nevertheless, is a genuine one that requires compensation." (*Capelouto v. Kaiser Foundation Hosp.*, *supra*, 7 C.3d 892.)

(3) *Future Pain*. Pain "reasonably certain" to occur in the future is also a proper element. (*Mella v. Hooper* (1927) 200 C. 628, 631, 254 P. 256; *Ryan v. Oakland Gas, Light & Heat Co.* (1913) 21 C.A. 14, 23, 130 P. 693; *Oliveira v. Warren* (1938) 24 C.A.2d 712, 714, 76 P.2d 113; see 22 Am.Jur.2d (2003 ed.), *Damages* §201 et seq.; 17 *Hastings L. J.* 263; 18 A.L.R.3d 10 [sufficiency of evidence to prove future pain and suffering and to warrant instructions]; 50 A.L.R.4th 13 [anxiety as to future disease or condition as element of damages]; 20 A.L.R.5th 1 [necessity of expert testimony on permanence of injury and future pain and suffering].)

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A. Injuries to Person.

5. Physical Pain and Mental Suffering.

b. Nature of Mental Suffering.

6 *Witkin Sum. Cal. Law Torts* § 1672

[§ 1672] Nature of Mental Suffering.

Mental suffering may consist of any of the following:

(1) *Fright or shock at time of injury.* (See *Easton v. United Trade School Contracting Co.* (1916) 173 C. 199, 202, 159 P. 597; *Herrick v. Quality Hotels, Inns & Resorts* (1993) 19 C.A.4th 1608, 1618, 24 C.R.2d 203 [\$ 40,000 awarded to hotel guard who was threatened by hotel director of security with gun; guard "thought he was going to be killed"]; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§49, 211.)

(2) *Subsequent nervousness or hysteria.* (See *Kimic v. San Jose-Los Gatos Interurban Ry. Co.* (1909) 156 C. 273, 278, 104 P. 312; *Johnson v. Pearson* (1929) 100 C.A. 503, 506, 280 P. 394; 28 *Proof of Facts* 1 [sleep loss as element of damages]; 24 *Proof of Facts* 3d 273 [emotional distress caused by fear of future disease]; 26 *Proof of Facts* 3d 1 [major depressive disorder]; 27 *Proof of Facts* 3d 1 [generalized anxiety disorders].)

(3) *Anxiety over inability to make a living.* (See *May v. Farrell* (1928) 94 C.A. 703, 714, 271 P. 789; *Rest.2d, Torts* §905, Comment e.)

(4) *Humiliation and embarrassment resulting from scars, disfigurement, or disability.* (See *Huggans v. Southern Pac. Co.* (1949) 92 C.A.2d 599, 616, 207 P.2d 864 [injuries to 12-year-old boy; "we suggest only one element of shame and humiliation: the boy now goes swimming but he crawls between the dressing room and the pool"]; *Rest.2d, Torts* §905, Comment d; 9 *Proof of Facts* 3d 307 [psychological effects of physical disfigurement]; 61 *Harv. L. Rev.* 165; cf. *Kalleg v. Fassio* (1932) 125 C.A. 96, 99, 13 P.2d 763 [husband cannot recover for grief, etc., at disfigurement of wife and children, because this is part of their distinct causes of action].)

In *Sandoval v. Southern Calif. Enterprises* (1950) 98 C.A.2d 240, 219 P.2d 928, plaintiff, a singer and orchestra leader, was wrongfully beaten by dance hall guards and wrongfully prosecuted (see *supra*, §§469, 475, 476). *Held*, on the battery count, a \$ 25,000 compensatory damages award (plus punitive damages) was proper. The evidence showed multiple bruises and lacerations, teeth broken, a permanent scar on his face, months of pain, nervousness, and emotional upset disabling him from singing. "[W]hen a person of a sensitive nature is brutally beaten the wrong is a shock to the moral sensibilities and tends to vex, disgrace and humiliate the injured party and he experiences extreme fear and

emotional disturbance." (98 C.A.2d 255.)

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A. Injuries to Person.
5. Physical Pain and Mental Suffering.
c. Loss of Enjoyment.

6 *Witkin Sum. Cal. Law Torts* § 1673

[§ 1673] Loss of Enjoyment.

(1) *In General.* There has been much discussion of the possible element of "loss of enjoyment," i.e., impairment of the plaintiff's capacity to engage in recreational or other pleasurable activities of a normal person. The principal objections have been uncertainty of the damage suffered, and the danger of double recovery where the jury considers this element indirectly in awarding damages for physical pain and mental suffering. (See 22 *Am.Jur.2d* (2003 ed.), *Damages* §§231, 233; 49 *Proof of Facts* 3d 339 [damages for loss of enjoyment of life]; 27 *Cal. L. Rev.* 350; 61 *Harv. L. Rev.* 143; 103 *Harv. L. Rev.* 811 [denial of loss-of-enjoyment damages to comatose plaintiffs]; 13 *So. Cal. L. Rev.* 152; 34 *A.L.R.4th* 293 [loss of enjoyment as distinct element in awarding damages for bodily injury].)

This concept was explored in *Huff v. Tracy* (1976) 57 *C.A.3d* 939, 129 *C.R.* 551, where plaintiff's injury was a laceration of the tongue that permanently impaired his sense of taste. On his request, the trial judge instructed both on pain and suffering (BAJI, No. 14.13) and injury to "enjoyment of life." *Held*, this was error, though harmless in view of the moderate award of damages. (a) A majority of American jurisdictions recognize the compensability of loss of enjoyment of life, some as a component of the pain and suffering award, others as a distinct item. (57 *C.A.3d* 943.) (b) The standard BAJI pain-and-suffering instruction describes a unitary concept of recovery (see *supra*, §1671) that includes the component of physical impairment limiting the capacity to share in the amenities of life. A separate enjoyment-of-life instruction repeats the other and opens up the possibility of double recovery. (57 *C.A.3d* 943, citing the text.) (See 12 *Pacific L. J.* 965.)

(2) *Loss of Enjoyment Is Not Subject of Expert Evidence.* In *Loth v. Truck-A-Way Corp.* (1998) 60 *C.A.4th* 757, 70 *C.R.2d* 571, a vehicular accident case, plaintiff's resulting disabilities decreased her ability to pursue her former social and recreational activities. Plaintiff introduced an expert economist's testimony, over defense objection, on "hedonic" damages (damages for loss of enjoyment of life). The expert testified that he had computed the basic economic value of life (apart from earnings from employment) from (a) the amount society is willing to pay per capita on protective devices such as seat belts, smoke detectors, etc., (b) the risk premiums employers pay to induce workers to perform hazardous jobs, and (c) the cost/benefit analyses of federally mandated safety projects and programs. Based on these studies, he had calculated the value of an average person's remaining 44-year life expectancy at \$ 2.3 million, which he described as a baseline figure. The expert adjusted the baseline figure to account for plaintiff's longer-than-average remaining life expectancy of 53 years, and then multiplied the adjusted baseline figure by various percentages reflecting

plaintiff's possible degrees of disability to calculate various possible hedonic damage awards. The jury awarded plaintiff substantial general damages. *Held*, admission of the testimony was prejudicial error.

(a) *Pain and suffering damages must be based on evidence specific to plaintiff.* The jury must impartially determine pain and suffering damages based on evidence specific to the plaintiff, as opposed to statistical data concerning the public at large. Here, plaintiff asked the jury to accept \$ 2.3 million as the baseline value of life and to give her a percentage of that figure (adjusted for her age) as hedonic damages. The baseline figure, however, is not based on an analysis of any particular individual's life, but rather on benchmark figures such as the amount society spends per capita on selected safety devices, or the amount employers pay to induce workers to perform high risk jobs. No meaningful relationship can be perceived between those arbitrarily selected benchmark spending figures and the value of the plaintiff's life. In *Beagle v. Vasold* (1966) 65 C.2d 166, 172, 53 C.R. 129, 417 P.2d 673, *infra*, §1675, the Supreme Court rejected the notion that pain and suffering damages may be computed by some mathematical formula. The expert's hedonic damages formula, however, purports to do just that. (60 C.A.4th 764.)

(b) *Loss of enjoyment is compensable only as component of pain and suffering damages.* The expert testimony improperly encouraged the jury to calculate plaintiff's hedonic damages separately from her remaining damages for pain and suffering, creating a risk of double recovery. While a general pain and suffering award may include compensation for the plaintiff's loss of enjoyment of life, loss of enjoyment is only one component of pain and suffering and is not calculated as a separate award. Separate instructions on pain and suffering and loss of enjoyment of life are prohibited because they may mislead a jury to award double damages for the same injury. For the same reason, the testimony offered here is inadmissible as a matter of law. (60 C.A.4th 765.)

(c) *Expert testimony is inadmissible to show loss of enjoyment.* Under *Ev.C. 801(a)* (see 1 *Cal. Evidence* (4th), *Opinion Evidence*, §29), a plaintiff's loss of enjoyment of life is not "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (60 C.A.4th 767.) No amount of expert testimony on the value of life could possibly help a jury decide this difficult question. California's present system of requiring the jury to determine, without the benefit of a mathematical formula, the amount of a general damages award is not without its faults. But unless and until the Legislature devises a method for computing pain and suffering damages, a plaintiff may not supply, through expert testimony or otherwise, her own formula for computing these damages. Just as no judge may give the jury a standard for determining pain and suffering, no expert may supply a formula for computing the value of life and, by extrapolation, the value of the loss of enjoyment of life. (60 C.A.4th 767.)

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5. Physical Pain and Mental Suffering.

d. Injury to Baby.

6 *Witkin Sum. Cal. Law Torts* § 1674

[§ 1674] Injury to Baby.

In *Babb v. Murray* (1938) 26 C.A.2d 153, 79 P.2d 159, plaintiff suffered fractures of both femurs at the age of 31/2 months, with the possibility of shortened legs, and during a long healing process was strapped in a crib. *Held*, damages of \$ 7,500 were excessive, and should be reduced to \$ 4,000. The items of physical suffering, pain, and mental anguish were incapable of proof because of the age of the child. "There was neither medical nor scientific testimony offered to show whether the child suffered any pain at all, or over any appreciable period. Manifestly, she did not know what happened to her and, not knowing, was without fear or mental anguish." (26 C.A.2d 155.)

Babb was disapproved in *Capelouto v. Kaiser Foundation Hosp.* (1972) 7 C.3d 889, 103 C.R. 856, 500 P.2d 880. Plaintiff child, born in defendant's hospital, contracted salmonella in the nursery shortly after her birth. During the first year of her life, she suffered from severe vomiting, diarrhea, dehydration, cramps, and shock; she was hospitalized six times, and at times was fed intravenously. Ultimately she recovered with no permanent disability. In this action for malpractice, the judge gave an instruction under the *Babb* holding, precluding any award for physical pain and mental suffering. The jury gave plaintiff \$ 1,510.24, the precise amount of medical expenses. *Held*, judgment reversed for new trial on issue of damages.

(a) The *Babb* court confused capacity to suffer with ability to discover the cause of the pain. (7 C.3d 894.) "Once we recognize this fallacy, little remains to support the *Babb* rule; human experience tells us that infants can feel pain and discomfort even if they do not know the source of it." (7 C.3d 894.)

(b) Expert medical testimony is not needed; suffering, of an adult or a child, can be proved by lay witnesses relating observations of involuntary declarations and expressions of pain. (7 C.3d 895.) And even in the absence of explicit testimony of this kind, "the jury may infer such pain, if the injury is such that the jury in its common experience knows it is normally accompanied by pain." (7 C.3d 896.) (See 1 *Pepperdine L. Rev.* 102.)

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A. Injuries to Person.

5. Physical Pain and Mental Suffering.

e. Permissible Argument.

6 *Witkin Sum. Cal. Law Torts* § 1675

[§ 1675] Permissible Argument.

Several typical methods of influencing the jury to return large verdicts for pain and suffering have been the subject of much debate, with California taking the following positions:

(1) *Reading the prayer*. The plaintiff's counsel may inform the jury of the total amount of the demand. (See *Beagle v. Vasold* (1966) 65 C.2d 166, 172, 53 C.R. 129, 417 P.2d 673; 14 A.L.R.3d 541 [reference by plaintiff's counsel to amount of damages claimed or expected by his or her client].)

(2) *The Golden Rule argument*. May the jurors be asked to place themselves in the plaintiff's shoes and award such damages as they would "charge" to undergo equivalent pain and suffering? Although this has not been judicially condemned in California, the court in *Beagle v. Vasold* observed that "we do not imply that we also approve the so-called 'golden rule' argument." (65 C.2d 182.) (See *Neumann v. Bishop* (1976) 59 C.A.3d 451, 483, 130 C.R. 786 [disapproving "golden rule" argument, but finding no prejudicial error].)

(3) *The "per diem" argument*. This is a strategic device, conceived by plaintiffs' lawyers, which suggests to the jury that a stated sum be awarded for each day or other chosen period of suffering undergone by the plaintiff. Its object is to overcome the inherent uncertainty in this element of damages by giving the jury something that appears more certain--a mathematical formula. (See *Beagle v. Vasold*, *supra*, 65 C.2d 172; 13 *Hastings L. J.* 502; 18 *Hastings L. J.* 684; 33 *So. Cal. L. Rev.* 214; 3 A.L.R.4th 940 [per diem or similar mathematical basis for fixing damages for pain and suffering].)

The use of this argument has been criticized by some courts and writers, mainly on the following grounds: The statement of counsel is not based on any evidence in the case; the mathematical formula produces a misleading illusion of certainty; shrewd manipulation of the unit of time may grossly magnify the total award; and fixing damages for pain and suffering calls not for calculation but for human judgment. As the dissenting justice puts it in *Beagle v. Vasold*: "It is therefore unrealistic to seek an appropriate award for pain and suffering by the use of any so-called per diem formula. Only after counsel has determined how much damages for pain and suffering he is going to ask for can he select a per diem ratio to support his request. He could arrive at any amount he wished by adjusting either the period of time to be taken as a measure or the amount surmised for the pain and suffering for that period." (65 C.2d 184.) "It is no answer that the question-begging in his reasoning may be exposed by counterargument or challenged by an equally fictive

formula leading to a different result. Truth is not served by sophistic arguments or clashes between them." (65 C.2d 184.)

These attacks were rejected and the argument was approved in *Beagle v. Vasold*. Plaintiff, with serious injuries, received a small award after the trial judge prevented counsel from using the argument. *Held*, reversed. The opinion elaborately examines the authorities, finds that a majority of courts and law writers favor it (65 C.2d 173), and answers the critics as follows:

(a) If the total demand may be revealed to the jury there is no reason to prohibit its presentation in segmented form. One involves no more speculation than the other, and the jury could do the reverse calculation from the demand, the life expectancy of the plaintiff, and the evidence of future detriment. (65 C.2d 177.)

(b) There are safeguards to prevent the jury from being misled: Counsel may tax their credulity to the point of discrediting his or her entire argument (the risk of "overpersuasion"), and the judge may instruct that the amount claimed is not evidence and that they are not bound by any particular method of calculation. (65 C.2d 177, 181.) Moreover, the verdict must meet the test of reasonableness or it will be reduced by the trial judge or appellate court. (65 C.2d 179.)

(c) Although the argument is not evidence, it can have a foundation in evidence. "Indeed it is necessarily inferred from observation of the plaintiff in the courtroom and from expert testimony regarding the nature of his injuries and their consequences. If the jury must infer from what it sees and hears at the trial that a certain amount of money is warranted as compensation for the plaintiff's pain and suffering, there is no justification for prohibiting counsel from making a similar deduction in argument. ... It would be paradoxical to hold that damages in totality are inferable from the evidence but that when this sum is divided into segments representing days, months or years, the inference vanishes." (65 C.2d 176.)

(d) An award by the jury of the full amount of the per diem calculation is not necessarily excessive. "The circumstances may indicate the prescience of the attorney or his accurate evaluation of the case." (65 C.2d 179.)

(e) Defense counsel may also effectively use the argument. By dividing a large total demand into segments, counsel may expose the plaintiff's claims as grossly exaggerated. (65 C.2d 181.)

(f) The argument actually helps the jury to perform the difficult task of placing a money value on this element. They are not aided by advice to be guided by their observation, experience, and sense of fairness. "These homilies provide little assistance to the jury. Under some circumstances, the concept of pain and suffering may become more meaningful when it is measured in short periods of time than over a span of many years, perhaps into infinity. The 'worth' of pain over a period of decades is often more difficult to grasp as a concept of reality than is the same experience limited to a day, a week or a month." (65 C.2d 181.)

(g) The view that the argument should be allowed or denied in the judge's discretion is rejected, as likely to produce confusion and abuse (e.g., peremptory challenges of judges, appeals seeking review of exercise of discretion). Hence, prohibiting the argument is error, and it may be freely used by either counsel, subject to instructions on the jury's function in determining damages. (65 C.2d 182.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Injuries to Person.
6. Aggravation of Plaintiff's Prior Condition.

6 Witkin Sum. Cal. Law Torts § 1676

[§ 1676] Aggravation of Plaintiff's Prior Condition.

If the plaintiff suffers unusual injury by reason of the defendant's act and other contributing causes, the general tendency is to hold the defendant liable for the entire injury. Thus, the plaintiff, by reason of prior injury or disease, may have been unusually susceptible, and have suffered a more serious injury than was foreseeable. (*Deibler v. Wright* (1931) 119 C.A. 277, 284, 6 P.2d 344; *Smith v. Schumacker* (1938) 30 C.A.2d 251, 263, 85 P.2d 967; see *Taylor v. Pole* (1940) 16 C.2d 668, 672, 107 P.2d 614; *Maxwell v. Powers* (1994) 22 C.A.4th 1596, 1606, 28 C.R.2d 62 [in action alleging successive medical malpractice, plaintiff was entitled to instruction regarding original tortfeasor's liability for aggravation of injury due to subsequent negligent medical care]; *Rest.2d, Torts* §461; 22 *Am.Jur.2d* (2003 ed.), *Damages* §242 et seq.; 2 *Proof of Facts* 3d 323 [preexisting mental disorder]; 15 *Loyola L.A. L. Rev.* 409 ["thin skull" plaintiff concept]; 31 *A.L.R.3d* 1000 [liability of tortfeasor for injured person's subsequent injury or reinjury]; *BAJI*, Nos. 14.65, 14.66; *CACI*, No. 3927 et seq.)

In *Hagy v. Allied Chemical & Dye Corp.* (1953) 122 C.A.2d 361, 265 P.2d 86, plaintiffs drove through a smog bank created around defendant's plant by sulphur fumes. Plaintiff wife had a coughing spell and, during treatment, a preexisting throat cancer was discovered and her larynx was removed. Judgments for the wife for aggravation of the cancer (\$ 25,000) and for the husband for aggravation of a heart condition (\$ 5,000) were affirmed.

The medical treatment after the injury may increase the injury and, even if this is due to the doctor's negligence, the defendant is liable, provided the plaintiff selected the doctor with due care. (*Boa v. San Francisco-Oakland Terminal Rys.* (1920) 182 C. 93, 99, 187 P. 2; *Blackwell v. American Film Co.* (1922) 189 C. 689, 694, 209 P. 999; *Dewhirst v. Leopold* (1924) 194 C. 424, 433, 229 P. 30; *Rest.2d, Torts* §457; see *Ash v. Mortensen* (1944) 24 C.2d 654, 657, 150 P.2d 876; 22 *Am.Jur.2d* (2003 ed.), *Damages* §246; 18 *So. Cal. L. Rev.* 165; 6 *U.C.L.A. L. Rev.* 490; 100 *A.L.R.2d* 808 [liability of tortfeasor for consequences of negligence, mistake, or lack of skill of physician or surgeon].)

This liability is not restricted to negligently caused additional harm. The defendant tortfeasor is liable for harm resulting from the normal efforts of third persons rendering aid in a proper manner; e.g., death resulting from a risk inherent in the medical treatment reasonably required to treat the injuries caused by the accident. (*Hastie v. Handeland* (1969) 274 C.A.2d 599, 605, 79 C.R. 268; see *Rest.2d, Torts* §457.)

When the evidence justifies an instruction on aggravation of a preexisting condition or disease, the plaintiff is

entitled to such an instruction; a general instruction on proximate cause is wholly insufficient. (*Ng v. Hudson* (1977) 75 C.A.3d 250, 255, 142 C.R. 69.) (See BAJI, No. 14.65.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Henry v. Superior Court* (2008) 160 C.A.4th 440, 455, 72 C.R.3d 808 [homeowners alleged to be original tortfeasors in premises liability case were permitted, pursuant to statutory rule eliminating joint liability for noneconomic damages in personal injury actions, to present evidence showing that medical malpractice by doctors aggravated plaintiff's injuries, so as to limit their liability for noneconomic damages to their proportionate share of fault, where homeowners' fault could be evaluated, measured, and compared to doctors' fault].



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A. Injuries to Person.
7. Susceptibility to Subsequent Disease or Injury.

6 *Witkin Sum. Cal. Law Torts* § 1677

[§ 1677] Susceptibility to Subsequent Disease or Injury.

The plaintiff may recover from the original defendant tortfeasor where, as a result of a weakened condition after the injury, he or she becomes more susceptible to and suffers a subsequent disease or injury. (*Ensign v. Southern Pac. Co.* (1924) 193 C. 311, 318, 223 P. 953; *Brown v. Beck* (1923) 63 C.A. 686, 690, 220 P. 14; *Rest.2d, Torts* §§458, 460; 35 *U.C. Davis L. Rev.* 965 [recovery for fear of disease]; 50 *A.L.R.4th* 13 [future disease or condition, or anxiety relating to it, as element of recovery]; BAJI, No. 14.66; CACI, No. 3929.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Injuries to Person.

8. Loss of Consortium.

a. Former Rule Denying Recovery.

6 *Witkin Sum. Cal. Law Torts* § 1678

[§ 1678] Former Rule Denying Recovery.

For some time, the California courts followed the common law rule allowing a *husband* to recover for loss of his wife's society, companionship, and services. (See *Edminster v. Thorp* (1951) 101 C.A.2d 756, 757, 226 P.2d 373; *Gist v. French* (1955) 136 C.A.2d 247, 255, 288 P.2d 1003; 61 *Harv. L. Rev.* 145; 3 *U.C.L.A. L. Rev.* 163.) The common law gave the *wife* no comparable right. This discriminatory rule was repudiated by the District of Columbia Court of Appeals in the *Hitaffer* case in 1950, and the challenge was received with enthusiasm by many writers and some courts. (See 40 *Cal. L. Rev.* 464; 64 *Harv. L. Rev.* 672; 7 *Hastings L. J.* 326; 25 *So. Cal. L. Rev.* 144; 1 *U.C.L.A. L. Rev.* 223; 3 *U.C.L.A. L. Rev.* 402; 36 *A.L.R.3d* 900 [wife's right of action for loss of consortium].) But California's response was to deny recovery to both husband and wife.

(1) *Action by wife.* In *Deshotel v. Atchison, Topeka & Santa Fe Ry. Co.* (1958) 50 C.2d 664, 328 P.2d 449, the husband, severely injured in a collision, recovered judgment for \$ 290,000 in a prior action. During its pendency, plaintiff wife brought the present action against the same defendants for loss of consortium. *Held*, on demurrer, a wife has no action for loss of consortium. Any recognition of such a right should come from the Legislature, with appropriate definition of the extent of liability, procedural rules, and safeguards against double recovery. (50 C.2d 667.) (See 10 *Hastings L. J.* 214, 237; 6 *U.C.L.A. L. Rev.* 161.)

(2) *Action by husband.* The rule allowing the husband recovery for loss of consortium was abrogated in *West v. San Diego* (1960) 54 C.2d 469, 6 C.R. 289, 353 P.2d 929. Plaintiff's wife was injured in an accident. Plaintiff, suing for himself and as her guardian ad litem, received verdicts of \$ 57,828.89 for his wife and \$ 5,000 for his loss of services and consortium, based on evidence that her brain injury had reduced her mentality to that of a 4- or 5-year-old child. *Held*, the award to the husband could have included, under the instructions, damages for loss of consortium, and these cannot be recovered; hence, the judgment was reversed as to the husband's verdict for retrial of that issue. The husband's right was recognized at common law, but the *Deshotel* case holding that the wife had no similar right, removed any basis in principle or policy for the rule. (54 C.2d 475.)

A single dissenting justice wrote a powerful argument for retention of the rule: (a) A large part of California family law protects spouses against *intentional* interference with rights of sexual intercourse, fatherhood, and society of the wife. (b) The overwhelming weight of authority in this country supports the husband's cause of action, as do legal

writers and the British House of Lords. (c) The failure of the Legislature to provide for this right is immaterial; the common law should be followed under C.C. 22.2. (d) If symmetry is desired, it should be secured by giving the wife the right as well. (6) The wrongful death statute allows compensation for loss of society. "Thus, if one spouse is deprived of his consortium rights by reason of the tortious act of defendant that results in the death of the other spouse, recovery may be had for the loss of such consortium. But, according to the majority, if one spouse is not killed but is injured in such a way that the other is permanently deprived of such rights, then he cannot recover for this loss! Such a distinction is artificial, absurd and unsound." (54 C.2d 487.) (See 48 Cal. L. Rev. 882 [criticizing decision]; 8 U.C.L.A. L. Rev. 985 [supporting decision]; 34 So. Cal. L. Rev. 334.)

Recovery is now allowed in an action by a spouse. (See *infra*, §1679 et seq.) This is also the Restatement rule. (See *Rest.2d, Torts* §693.)

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 - b. Recovery by Spouse.
 - 1. In General.

6 Witkin Sum. Cal. Law Torts § 1679

[§ 1679] In General.

In *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669, the Supreme Court overruled *Deshotel v. Atchison, Topeka & Santa Fe Ry. Co.* (1958) 50 C.2d 664, 328 P.2d 449, supra, §1678, and *West v. San Diego* (1960) 54 C.2d 469, 6 C.R. 289, 353 P.2d 929, supra, §1678, and declared the right of either spouse to recover for loss of consortium. (12 C.3d 408.) Richard, 22 years old, was injured in an accident that left him almost totally paralyzed. Plaintiff, his wife, 20 years old at the time, sued for damages including loss of consortium (defined by the court as "loss of conjugal fellowship and sexual relations"). Her declaration, filed in support of the pleading, stated that the parties had been deeply in love, and wanted a family; and that, by reason of the accident, her husband's life "has been ruined" and "[a]s his partner, my life has been ruined too." The trial judge, agreeing with the plaintiff's theory, nevertheless sustained a demurrer on the authority of *Deshotel*. The Court of Appeal, likewise disagreeing with *Deshotel*, left it to the Supreme Court to consider whether its later cases "can be read as undermining the rationale of those holdings." Held: "This is a perceptive and accurate reading of our decisions" (12 C.3d 388); "the reasons for this rule have ceased" and the cause of action should be recognized (12 C.3d 385).

(a) *First argument of Deshotel: Weight of authority against recovery.* At the time of *Deshotel* (1958), only five states supported the wife's right; in the ensuing 16 years, 31 states allowed recovery; and the change in trend has been recognized by the tentative draft of the Second Torts Restatement, changing the earlier rule. Thus, "the precedential foundation" has been destroyed, and "a new common law rule has arisen." (12 C.3d 392.)

(b) *Second argument of Deshotel: Legislative problem.* The contention that a departure from a settled rule should be left to the Legislature has been rejected in many recent decisions of this state and other states, which emphasize the judicial responsibility for upkeep of the common law, and its inherent capacity for growth and change. (12 C.3d 393, 394; see 9 Cal. Proc. (4th), Appeal, §966 et seq.)

(c) *Third argument of Deshotel: A rule allowing recovery would have undesirable consequences.* Four reasons for rejecting the rule on the merits, set forth in *Deshotel*, are unconvincing:

- (1) That the injury is "too indirect." This contention is refuted by fundamental principles of negligence and by the

opinion in *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, supra, §1008, stating the test of foreseeability: Under this approach, "one who negligently causes a severely disabling injury to an adult may reasonably expect that the injured person is married and that his or her spouse will be adversely affected by that injury." (12 C.3d 400.)

(2) That the measurement of damages would involve conjecture. Though valuation of the loss is difficult, this is no reason for denying recovery altogether. Loss of consortium is mainly a form of mental suffering, for which the jury may properly award compensation. "Money is a poor substitute for the loss of an only child or the pain resulting from serious injuries. Likewise, it cannot truly compensate a wife for the destruction of her marriage, but it is the only known means to compensate for the loss suffered and to symbolize society's recognition that a culpable wrong--even if unintentional--has been done." (12 C.3d 402.)

(3) That if the wife's cause of action is recognized, others with close relationship to the injured person would assert similar claims, and the courts would be faced with the perplexing task of drawing the line. This objection was also answered in *Dillon v. Legg*, and in other cases allowing recovery for emotional distress: The courts can fix proper guidelines; "That the law might be urged to move too far ... , is an unacceptable excuse for not moving at all." (12 C.3d 404.)

(4) That, because the husband's judgment might include compensation for his inability to participate in normal married life, separate redress to the wife for loss of consortium would involve the danger of double recovery. The argument is based on a misconception: The wife cannot recover for loss of the husband's financial support because he recovers for loss of earnings and earning power--the source of her right to such support; but consortium includes other elements: "love, companionship, affection, society, sexual relations, solace and more." (12 C.3d 405.) When the husband's physical injury precludes copulation and procreation, the wife's loss is just as real as it is distinct from his. (12 C.3d 405.) Avoidance of double recovery presents only a procedural problem. (a) Each element of damages must be kept separate, by careful identification at the trial, by appropriate rulings and jury instructions, and by reduction of the wife's verdict if any damages for which the husband is compensated are included. (12 C.3d 406.) (b) The wife should normally join her cause of action with that of the husband; if she files a separate action the defendant would ordinarily be entitled to consolidation. (12 C.3d 407.)

(d) *Retroactivity*. The new rule will (1) operate in the usual retroactive manner where no settlement has been made and the statute of limitations has not run; but (2) where a settlement or judgment has been obtained by one spouse before the effective date of this decision (August 21, 1974), the other spouse will not be permitted to recover for loss of consortium; i.e., as to these cases, the decision is prospective. (12 C.3d 408.) (See *Pesce v. Summa Corp.* (1975) 54 C.A.3d 86, 88, 126 C.R. 451, 2 Summary (10th), *Workers' Compensation*, §138 [right of wife of harbor worker to recover under federal maritime law]; *Meighan v. Shore* (1995) 34 C.A.4th 1025, 1034, 40 C.R.2d 744; C.E.B., Tort Damages 2d, §2.2; Cal. Civil Practice, 1 Torts, Loss of Consortium, Chap. 10; 10 Proof of Facts 3d 97 [wife's recovery for loss of consortium]; 63 Cal. L. Rev. 323; 15 Santa Clara Lawyer 495; 2 Western State L. Rev. 193; 7 West L.A. L. Rev. 240; 4 A.L.R.3d 805 [measure and elements of damages in wife's action]; 29 A.L.R.4th 1200 [injured party's release as barring spouse's action]; 60 A.L.R.4th 1174 [whether loss of consortium claim must be joined with underlying claim].)

SUPPLEMENT: [This section is current through the latest supplement]
Departure from settled rule:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §530 et seq.



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- 2. Effect of Insurance Policy "One Person" Limit.

6 Witkin Sum. Cal. Law Torts § 1680

[§ 1680] Effect of Insurance Policy "One Person" Limit.

The nature of the cause of action for loss of consortium was examined in *United Services Auto. Assn. v. Warner* (1976) 64 C.A.3d 957, 135 C.R. 34. Insurance policies commonly provide a limit for bodily injuries sustained by "one person," and a higher limit for bodily injury sustained by "two or more persons as the result of any one occurrence." The court declared that the cause of action does not arise out of a bodily injury to the plaintiff spouse, but out of the bodily injury to the injured spouse; hence, where only one person is injured or killed in the accident, the "one person" limit applies, no matter how many persons suffer loss of services or loss of consortium as a result. (64 C.A.3d 962, 963, 964.)

The opposite result was reached in *Abellon v. Hartford Ins. Co.* (1985) 167 C.A.3d 21, 212 C.R. 852. C, severely injured in an automobile accident, sued for damages for his injuries, and his wife J sued for loss of consortium. A stipulated judgment for \$ 750,000 to C and \$ 250,000 to J was entered against the insured. Defendant insurer paid \$ 250,000, the policy limit on C's claim, but refused to pay anything on J's claim on the ground that the policy limit applied to "bodily injury to any one person caused by any one accident." Plaintiffs contended that the claim for the wife's loss of consortium was distinct from the husband's claim for physical injury, and came within the "each occurrence" policy limit of \$ 500,000. The trial court granted summary judgment for defendant. *Held*, reversed.

(a) Under *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669, and *Lantis v. Condon* (1979) 95 C.A.3d 152, 157 C.R. 22, the wife's cause of action is not "derivative" but is personal to her; and the injury to her emotional state should be treated in the same way as a bodily injury. (167 C.A.3d 25, 26, 27.) Hence, J was a second person injured by the accident, and recovery was subject only to the "each occurrence" limit. (167 C.A.3d 26.)

(b) *United Services Auto Assn.* is distinguishable in that the policy limit there was for "all damages, including damages for and loss of services." Defendant's "per person" limitation did not contain this qualifying phrase. (167 C.A.3d 31.) Hence, construing the policy against the insurer, J's independent injury was covered by the "per occurrence" limitation, but the injury she sustained is separate from that of her husband. Therefore, the language of the "per person" limitation cannot be strained so as to merge her injury with her husband's. If defendant wants to limit liability in accidents where loss of consortium damages are sought, "it should expressly provide that such damages are subject to the 'per person' limitation." (167 C.A.3d 33.) (See *Mid-Century Ins. Co. v. Bash* (1989) 211 C.A.3d 431, 436, 437, 259

C.R. 382 [following *United Services Auto Assn.* in interpreting similar policy language].)

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- 3. No Recovery for Premarital Injury.

6 *Witkin Sum. Cal. Law Torts* § 1681

[§ 1681] No Recovery for Premarital Injury.

In *Zwicker v. Altamont Emergency Room Physicians Med. Group* (2002) 98 C.A.4th 26, 118 C.R.2d 912, prior to his marriage, plaintiff husband had emergency surgery to remove his left testicle, after being told the day before that there was no evidence of testicular torsion and that he should follow up with his own physician. Over the next 11 months, three semen tests indicated that he was infertile, although it was not then known if the infertility was permanent. Shortly thereafter, plaintiffs were married, and 2 weeks later, they instituted a malpractice action, alleging that defendant physicians' negligent diagnosis had resulted in plaintiff husband's infertility. Plaintiff wife filed a claim for loss of consortium, claiming that as a result of defendants' negligence, plaintiff husband was incapable of impregnating her. Specifically, she argued that a cause of action for loss of consortium did not accrue until she knew or should have known that her husband's infertility was permanent, a fact that did not occur until after the marriage. Defendants, on the other hand, contended that plaintiff wife had no cause of action for consortium, because she knew about her future husband's fertility problems before their marriage, even though she did not then know that those problems were permanent. *Held*, summary judgment for defendants affirmed; the timing and extent of plaintiff wife's knowledge of the infertility are irrelevant.

(a) In California, the right to recover for loss of consortium is founded on the relationship of marriage, and absent this relationship the right does not exist. (98 C.A.4th 30, citing *Elden v. Sheldon* (1988) 46 C.3d 267, 250 C.R. 254, 758 P.2d 582, *supra*, §1020.) "A premarital injury does not give rise to a cause of action for loss of consortium at the time it occurs, and the postmarital discovery of the premarital injury cannot create a cause of action for loss of consortium where one did not exist in the first place." (98 C.A.4th 30.)

(b) Although most courts in the United States have denied recovery for loss of consortium based on injuries that predated the marriage, some courts, under the "delayed discovery rule," have recognized an exception to this bar when the injuries were unknown until after the marriage, and in California, there is authority to support the proposition that the delayed discovery rule applies to loss of consortium claims. (98 C.A.4th 34, citing *Uram v. Abex Corp.* (1990) 217 C.A.3d 1425, 266 C.R. 695, 3 Cal. Proc. (4th), *Actions*, §527.) However, this is of no help to plaintiff wife. "We are unaware of any other area in tort law in which the existence of a cause of action depends on the date the injury is discovered. The delayed discovery rule 'originated as a means of preserving negligence claims' from *the strict*

application of the statute of limitations, which might otherwise be deemed to have run even before the plaintiff knew he or she had a claim. ... To our knowledge, the delayed discovery rule has never been invoked in California to justify the *very existence of a cause of action*. There is no basis for making an exception for loss of consortium." (98 C.A.4th 35, citing *Israelsky v. Title Ins. Co.* (1989) 212 C.A.3d 611, 261 C.R. 72, 3 Cal. Proc. (4th), Actions, §488.)

SUPPLEMENT: [This section is current through the latest supplement]

Uram case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §570. *Israelsky case:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §523.



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- 4. Scope of Recovery.

6 *Witkin Sum. Cal. Law Torts* § 1682

[§ 1682] Scope of Recovery.

(1) *No Reduction for Husband's Negligence.* To reduce the wife's recovery because of her husband's contributory negligence would in effect apply the abolished rule of imputed negligence (see *supra*, §725); hence, it is improper to do so. (*Lantis v. Condon* (1979) 95 C.A.3d 152, 156, 157 C.R. 22.) (See 25 A.L.R.4th 118 [negligence of spouse or child as barring or reducing recovery for loss of consortium by other spouse or parent].)

Under *Rest.3d, Torts: Apportionment of Liability* §6(a) (*supra*, §1006), an injured party's negligence is imputed to a plaintiff asserting a consortium claim. (*Rest.3d, Torts: Apportionment of Liability* §6, Comment b.)

(2) *Recovery Where No Physical Injury Is Suffered.* In *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, *supra*, §1022, the court noted that in *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669, *supra*, §1679, the husband suffered extensive disabling physical injuries, but held that this fact was not vital to the decision: "[A] marital relationship can be grievously injured when one spouse suffers a traumatically induced neurosis, psychosis, chronic depression, or phobia." (27 C.3d 933.) Where the injury is emotional rather than physical, the plaintiff may have a more difficult task in proving negligence, causation, and the requisite degree of harm, but these are jury questions. (27 C.3d 933.) (See *Anderson v. Northrop Corp.* (1988) 203 C.A.3d 772, 780, 250 C.R. 189, *supra*, §1034 [allegation that plaintiff's spouse was "mentally upset, distressed, and aggravated" was insufficient to support action for loss of consortium]; 69 Cal. L. Rev. 1142; 16 A.L.R.4th 537 [*Molien*].)

(3) *No "Partial" Loss of Consortium.* A complaint alleging that the wife suffered emotional distress and "a partial loss of consortium" by reason of the husband's "disfiguring scars" is insufficient. "We think that loss of consortium ... means a complete loss of consortium for a definite period of time or a nondeterminable length of time and is not to be confused with the inevitable physical, mental, and emotional damage normally or usually suffered by one spouse when the other has been wrongfully injured." (*Park v. Standard Chem Way Co.* (1976) 60 C.A.3d 47, 50, 131 C.R. 338.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Recovery Where Spouse's Appeal Is Dismissed.* In *Hahn v. Mirda* (2007) 147 C.A.4th 740, 54 C.R.3d 527, plaintiffs' complaint alleged two causes of action: (a) that defendant doctors performed a radical mastectomy on plaintiff

wife and did not tell her that the surgery was unnecessary when a postoperative report showed that she had originally been improperly diagnosed; (b) that plaintiff husband suffered loss of consortium as a result. A demurrer without leave to amend was sustained, and both parties appealed. *Held*, the complaint sufficiently pleaded an independent cause of action for loss of consortium; although defendants owed no duty of care and disclosure to plaintiff husband, plaintiff wife adequately pleaded tortious injury from which plaintiff husband's claim was derived. (147 C.A.4th 745.)



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XVIII. DAMAGES: KINDS OF INJURY

- A. Injuries to Person.
- 8. Loss of Consortium.
- c. No Recovery by Child.

6 *Witkin Sum. Cal. Law Torts* § 1683

[§ 1683] No Recovery by Child.

In *Suter v. Leonard* (1975) 45 C.A.3d 744, 120 C.R. 110, the court refused to extend *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669, supra, §1679, to a child's action, with a strong hint that the question was still open. S, divorced and with custody of plaintiff daughter, a minor, was injured in an automobile accident. The mother and daughter both sued, the mother seeking \$ 2 million and the child \$ 150,000 for loss of her mother's consortium. The child's cause of action alleged that the accident had left her mother disabled and unable to care for her. *Held*, judgment for defendant on demurrer to the child's cause of action affirmed.

(a) Under *Rodriguez*, the case has "both logical and sympathetic appeal." "Certain aspects of the spousal relationship are similar to those of the parent-child relationship, and there can be little question of the reality of the loss suffered by a child deprived of the society and care of its parent." (45 C.A.3d 746.)

(b) However, other considerations must be taken into account. "Ideally, each loss should be paid in full in undepreciated currency. Practically, not every loss can be made compensable in money damages, and legal causation must terminate somewhere. In delineating the extent of a tortfeasor's responsibility for damages under the general rule of tort liability (*Civ. Code*, §1714), the courts must locate the line between liability and non-liability at some point, a decision which is essentially political." (45 C.A.3d 746.)

(c) Other jurisdictions uniformly deny recovery. "The interest of the child in proper parental care ... has run into a stone wall where there is merely negligent injury to the parent." (45 C.A.3d 747.)

(d) The *Rodriguez* opinion, in distinguishing spousal and parent-child relationships, "gave implied support to these concerns" (absence of enforceable claim to parent's services, indirect nature of injury, uncertainty of damages, possibility of double recovery, multiplication of tort litigation, splitting cause of action, abrogation of the statute of limitations, increase in insurance costs). "In the absence of a specific ruling to the contrary from our Supreme Court, we follow the unanimous rulings of other jurisdictions and classify plaintiff's loss as non-actionable." (45 C.A.3d 747.)

(e) This holding does not deny equal protection. The Legislature could rationally conclude that the parent will recover for any loss of ability to properly care for his or her children, and that only on the parent's death should

intangible losses to the child become actionable. (45 C.A.3d 748.) (See *Garza v. Kantor* (1976) 54 C.A.3d 1025, 1027, 127 C.R. 164 [following *Suter* and authorities in other jurisdictions denying recovery].)

In *Borer v. American Airlines* (1977) 19 C.3d 441, 138 C.R. 302, 563 P.2d 858, the court noted that Court of Appeal opinions had reached different conclusions on the right of a parent or a child to sue (see *Hair v. Monterey* (1975) 45 C.A.3d 538, 119 C.R. 639, *infra*, §1684), and resolved the conflict by holding that no cause of action exists for loss of consortium in a parent-child relationship. B was injured when a lighting fixture fell on her at defendant's airline terminal. The complaint was filed by nine children, who alleged that she had been rendered unable to carry on her usual duties as a mother. Each sought damages of \$ 100,000. *Held*, judgment for defendant on demurrer affirmed.

(a) *Question is one of policy.* The *Rodriguez* opinion rejected the argument that the decision would logically require recognition of an analogous cause of action in other relationships. (19 C.3d 445.) That case, therefore, "does not compel the conclusion that foreseeable injury to a legally recognized relationship necessarily postulates a cause of action; instead it clearly warns that social policy must at some point intervene to delimit liability." (19 C.3d 446.) B foreseeably has not only a husband with a cause of action, but children, parents, brothers and sisters, cousins, in-laws, friends, colleagues, "and other acquaintances who will be deprived of her companionship." (19 C.3d 446.) The line must be drawn somewhere, and the question is one of policy. (19 C.3d 446, quoting *Suter v. Leonard*.)

(b) *Policy reasons against extension of liability to parent-child relationship.* Strong policy reasons compel rejection of plaintiffs' claim:

(1) The loss is intangible and nonpecuniary. "[M]onetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women. To say that plaintiffs have been 'compensated' for their loss is superficial; in reality they have suffered a loss for which they can never be compensated; they have obtained, instead, a future benefit essentially unrelated to that loss." (19 C.3d 447.) The social burden of an award cannot be ignored merely because the payment is made initially by the "negligent" defendant or his insurer. "Realistically the burden of payment of awards for loss of consortium must be borne by the public generally in increased insurance premiums or, otherwise, in the enhanced danger that accrues from the greater number of people who may choose to go without any insurance." (19 C.3d 447.) And the cost of administration--the expense of settling or litigating claims--would be sizable. (19 C.3d 447.)

(2) Because of its intangible character, the damages for loss of parental consortium would be difficult to measure. And the risk of double recovery would be great. "[T]o ask the jury, even under carefully drafted instructions, to distinguish the loss to the mother from her inability to care for her children from the loss to the children from the mother's inability to care for them may be asking too much." (19 C.3d 448.)

(c) *Spousal action distinguished.* *Rodriguez*, in upholding the wife's action, rejected similar policy arguments directed against the action by a spouse; but this does not call for a similar rejection of the arguments against the action for loss of parental consortium. (1) The major element of impairment of sexual life is not involved in the child's action. (19 C.3d 448.) (2) Actions by children create serious problems of multiplication of actions and damages, as the instant case illustrates (nine independent causes of action). (19 C.3d 449.) (3) Over 30 states now permit a spousal suit, but no state permits a child's action, and 18 have expressly rejected the claim. (19 C.3d 449, footnote 2.)

(d) *Foreseeability decisions distinguished.* The opinions in *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, *supra*, §1086, and *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *supra*, §1050, stressing the consideration of foreseeability in imposing tort liability, did not involve the creation of a new cause of action for solely intangible damages, attended with problems of multiplication of claims and liability. (19 C.3d 450.) *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, *supra*, §1008, emphasizing the factor of close relationship of the plaintiff and victim, limited its holding to cases of physical injury to the plaintiff. And *Krouse v. Graham* (1977) 19 C.3d 59, 137 C.R. 863, 562 P.2d 1022, *supra*, §1012, refused to extend the *Dillon* rule to a situation

in which the plaintiff did not suffer a physical injury. (19 C.3d 450.)

(e) *Wrongful death actions distinguished.* Under former C.C.P. 377 (now C.C.P. 377.60 et seq.), a child may sue for wrongful death of a parent and recover the value of the decedent's affection and society; and plaintiffs contended that the statute, in permitting this recovery by children of a deceased parent while refusing it to children of a seriously disabled parent, denies equal protection of the law. But the distinction rests on a rational basis:

(1) The statutory wrongful death action was created to plug a loophole in the common law, and the recovery for loss of affection and society fulfills a social belief that a tortfeasor who negligently kills should not escape liability, "no matter how unproductive his victim." (19 C.3d 452.) The case of a disabled parent is wholly different: because the immediate victim of the tort has a cause of action, the tortfeasor cannot escape liability. (19 C.3d 452.)

(2) The wrongful death action is the only means by which the family unit can recover compensation for the loss of parental care and services; but while the parent lives, the tangible aspects of the child's loss can be compensated in the parent's own cause of action. (19 C.3d 452.)

A lengthy dissenting opinion by the author of the *Rodriguez* decision took issue with the majority on every point, and concluded that the letter and spirit of *Rodriguez* called for recognition of the child's cause of action. (19 C.3d 453.) (See C.E.B., Tort Damages 2d, §2.5; 66 Cal. L. Rev. 430; 18 Pacific L. J. 233 [criticism of decision]; 5 San Fernando L. Rev. 449; 18 Santa Clara L. Rev. 263.)

Borer was followed in *Nix v. Preformed Line Products Co.* (1985) 170 C.A.3d 975, 216 C.R. 581. But the Court of Appeal, bound by the Supreme Court decision, called for a reexamination of the rule in the light of later decisions in other jurisdictions and strong criticism of the *Borer* result. (170 C.A.3d 986.) The opinion reviews recent cases from Massachusetts, Michigan, Iowa, Wisconsin, and Washington upholding the child's right to recover for loss of parental consortium. (170 C.A.3d 981 et seq.) (See 11 A.L.R.4th 529 [child's right of action for loss of support, training, parental attention, or the like, against a third person negligently injuring parent].)

SUPPLEMENT: [This section is current through the latest supplement]
See 12 A.L.R.6th 241 [adult child's right of action for loss of parental consortium].



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A. Injuries to Person.

8. Loss of Consortium.

d. No Recovery by Parent.

6 Witkin Sum. Cal. Law Torts § 1684

[§ 1684] No Recovery by Parent.

(1) *Dictum Supporting Recovery.* In *Hair v. Monterey* (1975) 45 C.A.3d 538, 119 C.R. 639, a case tried before *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669, supra, §1679, the court denied recovery for loss of consortium of a child, but in a strong dictum declared that this recovery would be allowed if the *Rodriguez* rule were applicable. Plaintiffs' 9-year-old son sustained serious permanent injuries as a result of oral surgery performed by defendant physician in defendant county's hospital. He was blind, a quadriplegic, suffered brain damage, and had seizures. In a prior action, he recovered damages for the reasonable value of medical, nursing, and related care. In the present action by his parents, recovery was sought by them for the extraordinary care and affection required for a child so injured, for emotional distress suffered by witnessing his injuries, and for loss of consortium. *Held*, judgment for defendants on demurrer affirmed.

(a) *Rodriguez* expressly reserved the question of applicability of its holding to the parent-child relationship (see supra, §1679), and traditionally recovery for loss of consortium has been disallowed; i.e., the parent's recovery is strictly for pecuniary loss (see supra, §726). (45 C.3d 544.)

(b) *Rodriguez*, however, furnishes support for a new rule; there is no meaningful distinction between a spouse's loss of comfort and society and a parent's loss. "Our analysis of that case leads us to the conclusion that, logically, there is no objection to an extension of the rule laid down therein so as to permit recovery by parents for lost pleasure, society, comfort and companionship sustained by reason of injuries inflicted upon their child. However, the law is as much a creature of public policy as of logic. Logic serves the function of directing analysis while public policy prescribes the boundaries of decision making. Whereas this court may constitute a proper forum for dealing with the former, we feel that, in most situations, the latter is more properly left to determination by the Legislature or by a higher echelon of the judiciary. In this instance, however, we observe that no reasonable distinction can be drawn between the right of parents, in appropriate circumstances, to seek recovery for lost comfort, society and companionship of an injured and totally helpless child and the right of a spouse, in similar circumstances, to seek recovery for loss of consortium as authorized by *Rodriguez*." (45 C.A.3d 545.)

(2) *Holding Denying Recovery.* *Baxter v. Superior Court* (1977) 19 C.3d 461, 138 C.R. 315, 563 P.2d 871, follows *Borer v. American Airlines* (1977) 19 C.3d 441, 138 C.R. 302, 563 P.2d 858, supra, §1683. The child, aged 16, suffered

mental impairment, blindness, and partial paralysis as a result of alleged medical malpractice. In addition to his cause of action, his mother and father set forth claims for loss of his society, etc. *Held*, the same considerations that led to denial of the child's action in *Borer* compelled a similar result here.

(a) The risk of multiple claims and disproportionate awards is less, because an injured child has only two parents; but this difference between the cases is not significant. (19 C.3d 464.)

(b) The jurisdictions are divided on the parent's right of action. Some, citing the common law right of a parent to recover for loss of a child's services, treat affection and companionship as "services." But in California, the cases on the parents' statutory right to a child's earnings and services (see 10 *Summary* (10th), *Parent and Child*, §296) permit recovery only for loss of earnings or services of economic value. (19 C.3d 465.) To expand the recovery to include damages for loss of affection and society would be contrary to the reasoning of *Borer*. (19 C.3d 466.)

(c) Contrary language in *Mobaldi v. Regents of Univ. of Calif.* (1976) 55 C.A.3d 573, 127 C.R. 720 §1019, and *Hair v. Monterey* is disapproved. (19 C.3d 466, footnote 4.) (See *Zavala v. Arce* (1997) 58 C.A.4th 915, 936, 68 C.R.2d 571, supra, §1029 [recovery for loss of filial consortium denied in action by mother of dead child for negligent infliction of emotional distress; following *Baxter*]; C.E.B., Tort Damages 2d, §2.4; 66 Cal. L. Rev. 430; 54 A.L.R.4th 112 [parent's right to recover for loss of consortium for injury to child].)

The court in both *Borer* and *Baxter* took pains to point out that the cause of action of a parent for intentional interference with the parent-child relationship is still recognized (see *Rosefield v. Rosefield* (1963) 221 C.A.2d 431, 34 C.R. 479, supra, §729); the tort presents no danger of multiplication of claims or damages, and may serve to deter child stealing and similar antisocial conduct. (*Borer*, supra, 19 C.3d 451, footnote 3; *Baxter*, supra, 19 C.3d 466, footnote 3.)

In re Marriage of Segel (1986) 179 C.A.3d 602, 224 C.R. 591, relied on the policy bases of *Borer* and *Baxter* in denying recovery on unusual facts. Plaintiff, after dissolution of her marriage and an award of child custody to the husband, brought an action against him, alleging that he maliciously prohibited her from seeing the child and sought to alienate the child against her. In affirming judgment for defendant on demurrer, the court declared that the primary right involved was that of visitation; that "judicial recognition of a cause of action for loss of filial consortium would undermine the purposes of the Family Law Act"; and that disputes over visitation should be speedily decided by the family law court and not "used as a vehicle for claiming monetary damages." (179 C.A.3d 608, 609.)

SUPPLEMENT: [This section is current through the latest supplement]



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8. Loss of Consortium.
e. No Recovery by Nonmarital Cohabitant.

6 *Witkin Sum. Cal. Law Torts* § 1685

[§ 1685] No Recovery by Nonmarital Cohabitant.

In *Butcher v. Superior Court* (1983) 139 C.A.3d 58, 71, 188 C.R. 503, the Court of Appeal held that "an unmarried cohabitant may state a cause of action for loss of consortium by showing that the nonmarital relationship is both stable and significant." (139 C.A.3d 71.) After listing factors showing stability and significance, the court said: "While the particular items of evidence will vary from case to case, and some of these suggested criteria may be absent, and other different ones present, the plaintiff will bear the burden of demonstrating both that the relationship is stable and that it has those characteristics of significance which one may expect to find in what is essentially a de facto marriage." (139 C.A.3d 70.)

However, emphasizing the lack of supporting authority, the state's interest in promoting marriage, and the difficulty in determining whether the relationship of nonmarital cohabitants is equivalent to a marriage, the California Supreme Court disapproved *Butcher* in *Elden v. Sheldon* (1988) 46 C.3d 267, 250 C.R. 254, 758 P.2d 582, supra, §1020. (See 58 So. Cal. L. Rev. 1467, 1478, 1486; 40 A.L.R.4th 553 [action for loss of consortium based on nonmarital cohabitation].)

In *Tong v. Jocson* (1977) 76 C.A.3d 603, 142 C.R. 726, the court reiterated the caution in *Borer v. American Airlines* (1977) 19 C.3d 441, 138 C.R. 302, 563 P.2d 858, supra, §1683, that a line must be drawn at some point in determining the relationships that give rise to liability for loss of consortium. Plaintiff was engaged to G and the two began living together in 1973. In February 1974, both were injured in an automobile accident. In March 1974, plaintiff and G were married, and some months afterwards, he filed an action seeking damages for his personal injuries and for loss of consortium arising from G's injuries. *Held*, summary judgment for defendant affirmed; the parties were not married at the time of the accident. (See 14 U.S.F. L. Rev. 133; 5 A.L.R.4th 300 [loss of consortium for injury occurring prior to marriage].)

In *Lieding v. Commercial Diving Center* (1983) 143 C.A.3d 72, 191 C.R. 559, the parties were engaged March 9 and selected May 31 as a wedding date, but the husband was injured on April 14. The court followed *Tong* and out-of-state authority in holding that no cause of action for loss of consortium could be maintained where the spouse's injuries were sustained before the marriage. (143 C.A.3d 76.)

In *Grant v. Avis Rent-a-Car System* (1984) 158 C.A.3d 813, 204 C.R. 869, J, married to H, began living with S in

August 1982, at which time H commenced dissolution proceedings (and eventually obtained judgment in July 1983). In September 1982, 1 month and 2 days after she had been living with J, S was injured in an automobile accident. In this action by S and J, J sought damages for loss of consortium, alleging that at the time of the accident, plaintiffs were "unmarried cohabitants possessing every characteristic of the spousal relationship except formalization." *Held*, summary judgment for defendant affirmed. The fact that J was married to another woman during the entire period he lived with S before the accident prevented their relationship from being either stable or significant. (158 C.A.3d 818.)

In *Ledger v. Tippitt* (1985) 164 C.A.3d 625, 210 C.R. 814, supra, §1020, the court pointed out that the right of an unmarried cohabitant (who is not a putative spouse) has been denied in the United States with only two exceptions; and that cases denying recovery include those in which the accident occurred after announcement of a wedding date or on the day parties were to be married, and those in which the parties had children. (164 C.A.3d 634, 635.) Under the reasoning of these cases (164 C.A.3d 636, 637), the holdings in cases allowing recovery are wrong:

(a) There is no strong policy favoring maintenance of nonmarital relationships. Also, it is difficult to accept the idea that a friend of an injured party can "marry into a cause of action" despite his or her promise to take the spouse for better or for worse. (164 C.A.3d 637.)

(b) The test of exclusivity of sexual relationship would invade the claimant's right of privacy by requiring disclosure of intimate aspects of personal life, and no public policy would be served by requiring a nonmarital partner to relinquish the right of privacy as a condition of recovering damages for loss of consortium. (164 C.A.3d 637.)

SUPPLEMENT: [This section is current through the latest supplement]

See 39 U.S.F. L. Rev. 201 [recovery for loss of consortium by unmarried cohabitant].



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A. Injuries to Person.
9. Abuse of Elderly or Dependent Adult.
a. Statutory Remedies.

6 *Witkin Sum. Cal. Law Torts* § 1686

[§ 1686] Statutory Remedies.

(1) *In General.* The 1991 Legislature enacted Welf.C. 15657 et seq., entitled "Civil Actions for Abuse of Elderly or Dependent Adults," which govern the damages, fees, and costs recoverable in actions involving the abuse of elderly or dependent adults. (Welf.C. 15657.) This legislation has been referred to as the Elder Abuse and Dependent Adult Civil Protection Act or, more concisely, the Elder Abuse Act. (See *Delaney v. Baker* (1999) 20 C.4th 23, 26, 33, 82 C.R.2d 610, 971 P.2d 986.) (On reports of abuse of elderly or dependent adults, see *supra*, §147 et seq.)

(2) *Cause of Action.* After the death of the elder or dependent adult, the right to maintain an action is transferred to the personal representative of the decedent, or if none, to the person or persons entitled to succeed to the decedent's estate. (Welf.C. 15657.3(d); see *Estate of Lowrie* (2004) 118 C.A.4th 220, 224, 12 C.R.3d 828 [under Welf.C. 15657.3(d), granddaughter had standing to bring elder abuse action where she would inherit if defendant uncle were disqualified].)

(3) *Recklessness, Oppression, Fraud, or Malice.* Where it is proven by clear and convincing evidence that the defendant was guilty of recklessness, oppression, fraud, or malice in the commission of physical abuse, neglect, or financial abuse against an elderly or dependent adult, the following rules apply:

(a) The court must award to the plaintiff reasonable attorneys' fees and costs, including reasonable fees for the services of a conservator, if any, devoted to the litigation of the action. (Welf.C. 15657(a).) (See *ARA Living Centers - Pac. v. Superior Court* (1993) 18 C.A.4th 1556, 1562, 23 C.R.2d 224 [Welf.C. 15657(a) applies retroactively, i.e., to abuse occurring before January 1, 1992]; *Intrieri v. Superior Court* (2004) 117 C.A.4th 72, 76, 12 C.R.3d 97 [factual question whether nursing home's conduct constituted requisite "reckless neglect"].)

(b) The award of attorneys' fees must be based on all factors relevant to the value of the services rendered; the value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained; and whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability. (Welf.C. 15657.1.) (See *Conservatorship of Levitt* (2001) 93 C.A.4th 544, 548, 113 C.R.2d 294 [even though attorney representing conservator in efforts to protect modest estates of two elders was recognized leader in field of elder abuse, it was not abuse of discretion for trial court to reduce his request for attorneys' fees by 15% based on size of estates].)

(c) The limitations imposed by *C.C.P. 377.34* (supra, §23), i.e., no recovery for pain, suffering, or disfigurement where the person with the cause of action dies before judgment, are not applicable. However, the damages recovered are subject to the limitation imposed by *C.C. 3333.2(b)* (supra, §958), i.e., \$ 250,000 for noneconomic losses. (Welf.C. 15657(b).) (See *ARA Living Centers - Pac. v. Superior Court*, supra, 18 C.A.4th 1563 [Welf.C. 15657(b) does not apply retroactively, i.e., to abuse occurring before January 1, 1992]; 39 *San Diego L. Rev.* 599 [need to reexamine damage caps in Elder Abuse Act].)

(d) The standards set forth in *C.C. 3294(b)* regarding the imposition of punitive damages on an employer for the acts of an employee, i.e., advance knowledge of the employee's unfitness and a conscious disregard of the rights of others or authorization or ratification of the wrongful conduct, must be satisfied before damages or attorneys' fees may be imposed against an employer. (Welf.C. 15657(c).) (See *Marron v. Superior Court* (2003) 108 C.A.4th 1049, 1067, 134 C.R.2d 358, supra, §230 [complaint was sufficient under Welf.C. 15657(c) to withstand motion for summary adjudication].) (For similar statute on financial abuse as defined in Welf.C. 15610.30, see Welf.C. 15657.5.)

(4) *Abduction*. Where it is proven by clear and convincing evidence that an individual is liable for abduction of an elderly or dependent adult, the defendant is liable for (a) costs of representing the abductee and his or her family in any state in any action related to the abduction and returning of the abductee to this state, and (b) travel expenses for the abductee's return. (Welf.C. 15657.05.) (See Welf.C. 15610.06 ["abduction" defined].)

(5) *Punitive Damages*. Punitive damages claims in elder abuse cases are not subject to the procedural limitations of *C.C.P. 425.13(a)* (supra, §1600) for filing similar claims in medical malpractice cases. (*Covenant Care v. Superior Court* (2004) 32 C.4th 771, 11 C.R.3d 222, 86 P.3d 290, supra, §1601.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Quiroz v. Seventh Avenue Center* (2006) 140 C.A.4th 1256, 1282, 45 C.R.3d 222 [heir of resident who died at skilled nursing facility was not entitled to heightened remedies afforded by Elder Abuse and Dependent Adult Civil Protection Act in her wrongful death action against facility; Act is intended to protect elders and dependent adults who are victims of abuse, not their heirs].

When a conservator has been appointed, the probate court has jurisdiction over claims made under the Elder Abuse and Dependent Adult Civil Protection Act, but if the probate court decides that the case should be determined in a civil action, it must transfer the case to the general civil calendar of the superior court. (*Conservatorship of Kayle* (2005) 134 C.A.4th 1, 6, 35 C.R.3d 671 [matter should have been transferred, not dismissed].)

(2) *Cause of Action*. Welf.C. 15657.3(d) was subdivided in 2007. After the death of the elder or dependent adult, the decedent's personal representative has the right to commence and maintain an action. If there is no personal representative, the right to commence or maintain an action passes to an intestate heir whose interest is affected by the action, the decedent's successor in interest, or an interested party. (Welf.C. 15657.3(d)(1).) These persons may also commence or maintain an action if the personal representative refuses to do so or if the personal representative's family or an affiliate is alleged to have committed abuse of the elder or dependent adult. (Welf.C. 15657.3(d)(2).) If two or more of these persons or a personal representative has standing to commence or maintain an action, the court may "make any order concerning the parties that is appropriate to ensure the proper administration of justice in the case." (Welf.C. 15657.3(e).)

(3) *Recklessness, Oppression, Fraud, or Malice*. See *Sababin v. Superior Court* (2006) 144 C.A.4th 81, 89, 50 C.R.3d 266 [triable issues precluded summary adjudication whether rehabilitation center's employees were guilty of reckless, oppressive, or malicious neglect, rather than ordinary negligence, where it was reasonably deducible that center's employees neglected to follow patient's care plan by failing to check patient's skin condition on daily basis and failing to notify physician of need for treatment order]. *Attorneys' fees*: See *Perlin v. Fountain View Management* (2008) 163 C.A.4th 657, 77 C.R.3d 743 [violation of Elder Abuse Act is independent cause of action, and failure of plaintiffs to obtain verdict establishing causation by clear and convincing evidence precluded award of attorneys' fees; jury found

causation under preponderance of evidence standard and found recklessness by clear and convincing evidence, but failed to find "oppression, fraud, or malice" by clear and convincing evidence]; *Wood v. Jamison* (2008) 167 C.A.4th 156, 164, 83 C.R.3d 877 [finding that attorney acted knowingly in assisting one client in taking proceeds of loan to another, elderly client, an act of financial elder abuse, was supported by substantial evidence, including evidence that attorney knew that loan proceeds were to be used to invest in nightclub, and justified award of attorneys' fees].

Services of conservator: An award under Welf.C. 15657.5(a) for the services of a conservator does not include the services of a trustee. (*Sanders v. Lawson* (2008) 164 C.A.4th 434, 438, 78 C.R.3d 851.)

(New) Financial abuse: An elder or dependent adult is entitled to the remedies granted by Welf.C. 15657.5 against any person or entity who "takes, secretes, appropriates, obtains, or retains" the real or personal property of the elder or dependent adult when the elder or dependent adult lacks capacity or is of unsound mind, if that person or entity, on demand, fails to return the property. (Welf.C. 15657.6, added in 2008)



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XVIII. DAMAGES: KINDS OF INJURY

A. Injuries to Person.

9. Abuse of Elderly or Dependent Adult.

b. Exception for Professional Negligence by Health Care Provider.

6 *Witkin Sum. Cal. Law Torts* § 1687

[§ 1687] Exception for Professional Negligence by Health Care Provider.

An action against a health care provider, as defined in *C.C.P.* 340.5, based on the provider's alleged professional negligence, is governed by the laws specifically applicable to professional negligence causes of action. (*Welf.C.* 15657.2.)

Delaney v. Baker (1999) 20 *C.4th* 23, 26, 33, 82 *C.R.2d* 610, 971 *P.2d* 986, holding a health care provider subject to the enhanced remedies of the Elder Abuse Act (see *supra*, §1686), discussed the purpose and effect of *Welf.C.* 15657.2. Plaintiff's 88-year-old mother was sent to defendant nursing facility to recuperate from a fractured ankle. Less than 4 months later, she died while still a resident of that facility. At the time of death, plaintiff's mother had stage IV bedsores (tissue eaten away down to the bone), and there was evidence that she had frequently been left lying in her own urine and feces for extended periods of time. The neglect occurred despite plaintiff's frequent complaints and even though defendant nursing home had been cited for patient neglect by the Department of Health Services. In an action against the nursing home and two administrators, the jury awarded damages for pain and suffering, attorneys' fees, and costs. *Held*, affirmed.

(a) Ordinarily, damages recoverable by a decedent's personal representative may not include pain and suffering. However, *Welf.C.* 15657 provides that where the defendant is liable for neglect of the elderly *and* has been guilty of recklessness in committing that neglect, damages may be awarded for pain and suffering. Further, the court, in addition to all other remedies otherwise provided by law, must award attorneys' fees and costs. (20 *C.4th* 28.)

(b) *Welf.C.* 15657.2 provides that, notwithstanding the rest of the Elder Abuse Act, a cause of action against a health care provider that is based on the provider's professional negligence is governed by the laws that specifically apply to those professional negligence causes of action. Defendants argued that the phrase "based on professional negligence" in *Welf.C.* 15657.2 *includes* "reckless neglect" within the meaning of *Welf.C.* 15657, and that, therefore, the available remedies do not include the additional remedies allowed by *Welf.C.* 15657. To the contrary, the legislative history shows that those who enacted the Act believed that "professional negligence" and the neglect specified in *Welf.C.* 15657 are mutually exclusive. (20 *C.4th* 29.)

(c) Simple negligence is the failure to exercise the due care that an ordinary person would exercise under the

circumstances, and the professional negligence referred to in Welf.C. 15657.2 is similar, except that due care is measured by the standards of a professional. Under Welf.C. 15657, a plaintiff must demonstrate, by clear and convincing evidence, something extra, i.e., reckless, oppressive, fraudulent, or malicious conduct. The present case deals with "recklessness," which involves more than mere inadvertence or incompetence, but rises to the level of conscious choice of a course of action known to pose a serious danger to others. Welf.C. 15657.2 makes it clear that the conduct proscribed by Welf.C. 15657 does not include acts of simple negligence, but instead refers to forms of abuse or neglect performed with some degree of culpability greater than mere negligence. This interpretation does not render Welf.C. 15657.2 mere surplusage. The Legislature could have reasonably decided that an express statement excluding professional negligence from Welf.C. 15657 was needed. (20 C.4th 31.)

(d) The legislative history of Welf.C. 15657 shows that it only pertains to acts of egregious abuse, and that it thus protects health care providers from heightened liability for acts of simple negligence. If the Legislature had meant to go even further and completely exempt health care providers from Welf.C. 15657, it would not have used a phrase like "professional negligence," which is generally regarded as distinct from reckless or oppressive behavior. (20 C.4th 33.)

(e) The fact that some health care institutions both perform custodial functions and provide medical care means that a specific act, such as allowing the patient to suffer malnutrition, can be both "professional negligence" and "reckless conduct." If the conduct is accompanied by recklessness, oppression, fraud, or maliciousness, it is subject to the heightened remedies allowed by Welf.C. 15657; otherwise, it is governed by the laws applicable to simple negligence. (20 C.4th 34.)

(f) In the present case, there was substantial evidence that plaintiff's mother was subject to neglect. Defendants failed, over an extended period of time, to attend to her advanced bedsores, and otherwise neglected her in such a way as to contribute to her pain and suffering and eventual death. There was also substantial evidence that the conduct was reckless, given defendants' knowledge of the deteriorating condition of plaintiff's mother and plaintiff's repeated efforts to intervene in her behalf. That evidence supports the award of attorneys' fees and costs and damages for pain and suffering, as Welf.C. 15657 permits. (20 C.4th 41.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Injuries to Person.
9. Abuse of Elderly or Dependent Adult.
c. Forms and Instructions.

6 Witkin Sum. Cal. Law Torts § 1688

[§ 1688] Forms and Instructions.

(1) *Judicial Council Forms.* The Judicial Council has adopted the following forms in connection with the Elder Abuse Act:

Form No. EA-100 [Petition for Protective Orders (Elder or Dependent Adult Abuse) (CLETS)].

Form No. EA-110 [Response to Petition for Protective Orders (Elder or Dependent Adult Abuse) (CLETS)].

Form No. EA-120 [Order to Show Cause and Temporary Restraining Order (Elder or Dependent Adult Abuse) (CLETS)].

Form No. EA-130 [Restraining Order After Hearing (Elder or Dependent Adult Abuse) (CLETS)].

Form No. EA-140 [Proof of Service (Elder or Dependent Adult Abuse) (CLETS)] (personal service).

Form No. EA-141 [Proof of Service (Elder or Dependent Adult Abuse) (CLETS)] (service by mail).

Form No. EA-150 [Instructions on Petition for a Protective Order to Prevent Elder or Dependent Adult Abuse].

(2) *Instructions.* The following BAJI instructions relate to remedies under the Elder Abuse Act:

BAJI, No. 7.46 [additional remedies where recklessness, oppression, fraud, or malice].

BAJI, No. 7.47 [additional remedies--definitions].

BAJI, No. 7.48 [additional remedies against principal for acts of agent].

The following CACI instructions relate to remedies under the Act:

CACI, No. 3101 [financial abuse--essential factual elements--enhanced remedies sought--individual or individual and employer defendants (Welf.C. 15657, 15610.30)].

CACI, No. 3102 [financial abuse--essential factual elements--enhanced remedies sought--employer defendant (Welf.C. 15657, 15610.30)].

CACI, No. 3104 [neglect--essential factual elements--enhanced remedies sought--individual or individual and employer defendants (Welf.C. 15657, 15610.57)].

CACI, No. 3105 [neglect--essential factual elements--enhanced remedies sought--employer defendant (Welf.C. 15657, 15610.57)].

CACI, No. 3107 [physical abuse--essential factual elements--enhanced remedies sought--individual or individual and employer defendants (Welf.C. 15657, 15610.63)].

CACI, No. 3108 [physical abuse--essential factual elements--enhanced remedies sought--employer defendant (Welf.C. 15657, 15610.63)].

CACI, No. 3110 [abduction--essential factual elements--enhanced remedies sought--individual or individual and employer defendants (Welf.C. 15657.05, 15610.06)].

CACI, No. 3111 [abduction--essential factual elements--enhanced remedies sought--employer defendant (Welf.C. 15657.05, 15610.06)].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Judicial Council Forms.* The current Elder Abuse Act forms adopted by the Judicial Council are as follows:

Form No. EA-100 [Request for Orders to Stop Elder or Dependent Adult Abuse].

Form No. EA-102 [Confidential CLETS Information].

Form No. EA-110 [Response to Request for Orders to Stop Elder or Dependent Adult Abuse].

Form No. EA-120 [Notice of Hearing and Temporary Restraining Order (CLETS-TEA or TEF)].

Form No. EA-125 [Request and Order for Reissuance of Temporary Restraining Order (CLETS-TEA or TEF)].

Form No. EA-130 [Order After Hearing Restraining Elder or Dependent Adult Abuse (CLETS-EAR or EAF)].

Form No. EA-140 [Proof of Personal Service--CLETS].

Form No. EA-141 [Proof of Service by Mail--CLETS].

Form No. EA-142-INFO [What is "Proof of Service"?].

Form No. EA-145 [Proof of Firearms Turned in or Sold].

Form No. EA-150-INFO [Can a Restraining Order to Prevent Elder or Dependent Adult Abuse Help Me?] (*formerly EA-150*).

Form No. EA-151-INFO [How Can I Respond to a Request for Orders to Stop Elder or Dependent Adult Abuse?].

(2) *Instructions.* The following CACI instructions relate to remedies under the Elder Abuse Act:

CACI, No. 3101 [Financial Abuse--Decedent's Pain and Suffering (*Welf. & Inst. Code*, § 15657.5)].

CACI, No. 3102A [Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants (*Welf.*

& Inst. Code, §§ 15657, 15657.5, 15657.05; Civ. Code, § 3294(b))] (derived from former CACI, No. 3102).

CACI, No. 3102B [Employer Liability for Enhanced Remedies--Employer Defendant Only (*Welf. & Inst. Code, §§ 15657, 15657.5, 15657.05; Civ. Code, § 3294(b))*] (derived from former CACI, No. 3102).

CACI, No. 3104 [Neglect--Enhanced Remedies Sought (*Welf. & Inst. Code, § 15657*)].

CACI, No. 3107 [Physical Abuse--Enhanced Remedies Sought (*Welf. & Inst. Code, § 15657*)].

CACI, No. 3110 [Abduction--Enhanced Remedies Sought (*Welf. & Inst. Code, § 15657.05*)].

CACI, Nos. 3105, 3108, and 3111 were revoked in 2008.



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A. Injuries to Person.
10. Marketing of Illegal Drugs.

6 *Witkin Sum. Cal. Law Torts* § 1689

[§ 1689] Marketing of Illegal Drugs.

Plaintiffs in actions under the Drug Dealer Liability Act (*supra*, §464 et seq.) may ordinarily recover all of the following damages:

(1) Economic damages, including, but not limited to, the cost of treatment and rehabilitation, medical expenses, loss of economic or educational potential, loss of productivity, absenteeism, support expenses, accidents or injury, and any other pecuniary loss proximately caused by the use of an illegal controlled substance. (*Health & Saf.C. 11705(d)(1).*)

(2) Noneconomic damages, including, but not limited to, physical and emotional pain, suffering, physical impairment, emotional distress, medical anguish, disfigurement, loss of enjoyment, loss of companionship, services and consortium, and other nonpecuniary losses proximately caused by an individual's use of an illegal controlled substance. (*Health & Saf.C. 11705(d)(2).*)

(3) Exemplary damages. (*Health & Saf.C. 11705(d)(3).*)

(4) Reasonable attorneys' fees. (*Health & Saf.C. 11705(d)(4).*)

(5) Costs of suit, including, but not limited to, reasonable expenses for expert testimony. (*Health & Saf.C. 11705(d)(5).*)

An individual user plaintiff (see *supra*, §465) may recover only economic damages, attorneys' fees, and costs, and not noneconomic or exemplary damages. (*Health & Saf.C. 11706(c).*)

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B. Wrongful Death.

1. In General.

a. Recovery of Loss.

6 *Witkin Sum. Cal. Law Torts* § 1690

[§ 1690] Recovery of Loss.

(1) *Loss of Benefits*. The theory of California's wrongful death statutes (*C.C.P.* 377.60 et seq.; supra, §1378) is that the heirs of the decedent may recover for the pecuniary loss of present and probable future benefits of any kind. These include (a) the present value of future contributions; (b) the value of any personal service, advice, or training that would probably have been given; (c) the value of the decedent's society and companionship. (See *Bond v. United R. of San Francisco* (1911) 159 C. 270, 274, 113 P. 366; *Ure v. Maggio Bros. Co.* (1938) 24 C.A.2d 490, 491, 75 P.2d 534; *Vecchione v. Carlin* (1980) 111 C.A.3d 351, 357, 168 C.R. 571, citing the text; *Overly v. Ingalls Shipbuilding* (1999) 74 C.A.4th 164, 176, 87 C.R.2d 626 [loss of decedent's financial support is what decedent probably would have earned during remainder of his or her life minus personal maintenance expenses and the amount that would have been spent on other things]; *Rest.2d, Torts* §925; 22A *Am.Jur.2d* (2003 ed.), *Death* §186 et seq.; C.E.B., *Tort Damages* 2d, §3.21 et seq.; 25 *Proof of Facts* 3d 251 [damages in wrongful death or survival action]; 53 *Am.Jur. Trials* 1 [evaluation and settlement of wrongful death cases]; 25 *Cal. L. Rev.* 170, 174; 61 *Harv. L. Rev.* 166; 77 *A.L.R.3d* 1175 [proof of value of housewife's services in wrongful death action]; 42 *A.L.R.5th* 465 [wrongful death damages for loss of expectancy of inheritance]; *BAJI*, No. 14.51; *CACI*, No. 3921; *infra*, §1691 et seq.) (On pension, retirement income, or Social Security payments, etc., as affecting recovery, see 81 *A.L.R.2d* 949; 84 *A.L.R.2d* 764; on use of mortality tables to determine life expectancy, and annuity tables to arrive at present value of prospective pecuniary loss, see 1 *Cal. Evidence* (4th), *Hearsay*, §294.)

The jury has a broad discretion, subject to the usual control where the award is plainly excessive or inadequate, to give an amount "that, under all the circumstances of the case, may be just." (*C.C.P.* 377.61; see *Valente v. Sierra Ry. Co.* (1910) 158 C. 412, 419, 111 P. 95; *Amore v. Di Resta* (1932) 125 C.A. 410, 414, 13 P.2d 986.)

(2) *Funeral Expenses*. Funeral expenses are recoverable by the survivor legally obligated to pay for them. (*Adams v. Southern Pac. Co.* (1935) 4 C.2d 731, 743, 53 P.2d 121; *Wilson v. San Francisco* (1951) 106 C.A.2d 440, 445, 235 P.2d 81.)

(3) *Value of Household Services*. The survivor can recover for the lost household services that would have been provided by the decedent. (*McKinney v. California Portland Cement Co.* (2002) 96 C.A.4th 1214, 1227, 117 C.R.2d 849 [no need for surviving spouse to actually pay money to replace lost services].)

(4) *No Recovery for Medical Expenses.* Medical expenses for treatment of the decedent's injuries prior to death are not recoverable. (*Gallup v. Sparks-Mundo Engineering Co.* (1954) 43 C.2d 1, 10, 271 P.2d 34.)

(5) *No Recovery for Suffering or Grief.* There is no recovery for suffering or grief of the plaintiffs or of the decedent. (*Clough v. Steen* (1934) 3 C.A.2d 392, 394, 39 P.2d 889; *Canavin v. Pacific Southwest Airlines* (1983) 148 C.A.3d 512, 519, 196 C.R. 82, supra, §1380); *Nelson v. Los Angeles* (2003) 113 C.A.4th 783, 793, 6 C.R.3d 650; see *Rest.2d, Torts* §925, Comment e; 24 *San Diego L. Rev.* 1003 [*Canavin*].) (On recovery in some jurisdictions for grief or mental anguish resulting from death of child, see 45 *A.L.R.4th* 234; on effect of death of beneficiary, see 73 *A.L.R.4th* 441.)

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B. Wrongful Death.
1. In General.

b. Value of Society and Companionship.

6 *Witkin Sum. Cal. Law Torts* § 1691

[§ 1691] Value of Society and Companionship.

Recovery for the loss of society and companionship of the deceased is generally permitted to the extent that it has some pecuniary value. (*Valente v. Sierra Ry. Co.* (1910) 158 C. 412, 418, 111 P. 95; *Krouse v. Graham* (1977) 19 C.3d 59, 68, 137 C.R. 863, 562 P.2d 1022; *Griffey v. Pacific Elec. Ry. Co.* (1922) 58 C.A. 509, 519, 209 P. 45; *Williams v. McDowell* (1939) 32 C.A.2d 49, 53, 89 P.2d 155; *Duclos v. Tashjian* (1939) 32 C.A.2d 444, 453, 90 P.2d 140 [married daughters, supported by husbands, were each properly awarded damages for loss of society, etc., of father, at \$ 150 per year of his life expectancy]; *Benwell v. Dean* (1967) 249 C.A.2d 345, 349, 57 C.R. 394 [evidence of nature of personal relationship existing between decedent and heirs is admissible]; *Fagerquist v. Western Sun Aviation* (1987) 191 C.A.3d 709, 726, 236 C.R. 633, *infra*, §1694; *Rufo v. Simpson* (2001) 86 C.A.4th 573, 613, 103 C.R.2d 492 [as matter of law, it could not be said that \$ 8.5 million award was excessive, where deceased was close to his father, although not to his mother, and award was made in aggregate; fact that \$ 8.5 million was much larger than award ever given for loss and comfort from adult son living apart and independently does not prove passion or prejudice]; *Knowles v. Superior Court* (2004) 118 C.A.4th 1290, 1301, 13 C.R.3d 700 [mentally disabled son's belief that his father was still alive did not necessarily prevent him from establishing damages for loss of his father's companionship; citing *Krouse* and *Fagerquist*]; see *Rest.2d, Torts* §925, Comment b; C.E.B., *Tort Damages* 2d, §3.29 et seq.; 61 A.L.R.4th 309 [adequacy of damages awarded for noneconomic loss resulting from injury or death of spouse]; cf. *Carr v. Pacific Tel. Co.* (1972) 26 C.A.3d 537, 545, 103 C.R. 120 [evidence of early moral indiscretions was too remote].)

Evidence of grief and sorrow is not relevant. However, evidence of loss of love, companionship, comfort, affection, society, solace, and moral support is relevant. (*Hiser v. Bell Helicopter Textron* (2003) 111 C.A.4th 640, 658, 4 C.R.3d 249.)

In *Krouse v. Graham*, *supra*, the court recognized that loss of society and companionship is essentially a nonpecuniary loss, but nevertheless permitted recovery. In an automobile collision resulting from defendant's admitted negligence, Mrs. K was killed and Mr. K was injured. Plaintiffs, Mr. K and five K children, brought this action for wrongful death and personal injuries. On the wrongful death cause of action Mr. K and the children received \$ 300,000, to be divided by the trial judge. At the trial, plaintiffs introduced evidence showing that Mrs. K was a devoted mother and an active homemaker; also that, due to Mr. K's physical condition, she had the primary responsibility for maintaining the home and taking care of a dependent minor son. The jury was instructed that Mr. K could recover

reasonable compensation for loss of his wife's "love, companionship, comfort, affection, society, solace or moral support, any loss of enjoyment of sexual relations, or any loss of her physical assistance in the operation or maintenance of the home." On appeal, defendant contended that this instruction improperly allowed recovery for "nonpecuniary" losses. *Held*, the instruction was proper.

(a) *Development of California case law on "pecuniary" loss.* The statute (now C.C.P. 377.61), as amended in 1872, removed the words "pecuniary or exemplary," and referred only to damages that may be "just" under all of the circumstances. But the cases developed the theory that damages were recoverable only for the "pecuniary" losses suffered. (19 C.3d 67.)

(b) *Broad scope of "pecuniary" loss.* The cases have not restricted recovery to the elements having ascertainable economic value, such as loss of household services or earning capacity. They have held admissible evidence of the closeness of the family unit (*Griott v. Gamblin* (1961) 194 C.A.2d 577, 578, 15 C.R. 228), the warmth of feeling between family members (*Benwell v. Dean*, *supra*), and the character of the deceased as "kind and attentive" or "kind and loving" (*Cook v. Clay Street Hill R. Co.* (1882) 60 C. 604, 609). Adult children have received substantial awards for the wrongful death of retired, elderly parents (*Griott v. Gamblin*, *supra*), and parents have received damages for the death of young children (*Parsons v. Easton* (1921) 184 C. 764, 773, 195 P. 419; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 C.2d 655, 666, 313 P.2d 557). (19 C.3d 68.)

(c) *Improper elements and appropriate instruction.* The cases indicate that the "pecuniary value" limitation is intended to exclude compensation for grief and sorrow attendant on the death of a loved one. But it is both unnecessary and unwise to require a pecuniary loss instruction solely to eliminate these improper elements. "To direct the jury, on the one hand, to limit plaintiff's recovery to pecuniary losses alone while also compensating the plaintiff for loss of such nonpecuniary factors as the society, comfort, care and protection of a decedent is calculated to mislead and invite confusion. Instead, a simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (19 C.3d 69.)

(d) *Sea-Land Services case.* The United States Supreme Court decision in *Sea-Land Services v. Gaudet* (1974) 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, 2 Summary (10th) *Workers' Compensation*, §145, followed the weight of state court authority in recognizing the right to recover for loss of society in an admiralty case; and "[i]t is greatly persuasive with us that in doing so the Supreme Court interpreted the term 'society' as including 'a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." (19 C.3d 70.)

(e) *Analogy of personal injury case.* The elements of recovery sought by plaintiff would be available as "consortium" damages in a personal injury action for a wife's injuries (see *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669, *supra*, §1679). (19 C.3d 70.) (See 24 *San Diego L. Rev.* 1003, 1007 [Krouse]; BAJI, No. 14.50; CACI, No. 3921.)

West's Key Number Digest, Death k.88

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B. Wrongful Death.

2. Death of Spouse and Parent.

a. Earnings of Husband and Father.

6 *Witkin Sum. Cal. Law Torts* § 1692

[§ 1692] Earnings of Husband and Father.

(1) *Present Value of Future Earnings*. Where the decedent was a husband and father, the chief element is the present value of the earnings he would have contributed to the family during the period of his life expectancy. (*Gilmore v. Los Angeles Ry. Corp.* (1930) 211 C. 192, 197, 295 P. 41; *Shebley v. Peters* (1921) 53 C.A. 288, 291, 293, 200 P. 364; *Emery v. Southern Calif. Gas Co.* (1946) 72 C.A.2d 821, 165 P.2d 695; *Brown v. Boehm* (1947) 78 C.A.2d 595, 602, 178 P.2d 49 [husband leaving widow and five adult children]; *Gall v. Union Ice Co.* (1951) 108 C.A.2d 303, 320, 239 P.2d 48; 48 A.L.R.4th 229 [retired persons]; see BAJI, No. 14.50; CACI, No. 3921.)

In *Syah v. Johnson* (1966) 247 C.A.2d 534, 55 C.R. 741, decedent, a paroled convict and compulsive gambler, had abandoned his wife and children, and his wife worked almost all their married life. Nevertheless, a \$ 30,000 verdict was upheld on the following reasoning: He had been a good father and husband when not gambling; he had become reconciled with his wife on a promise to quit it; he had made substantial earnings during extended terms of employment before his imprisonment, and after his release he worked and gave the family substantial support; and his life expectancy was more than 30 years. (247 C.A.2d 547.)

In *Canavin v. Pacific Southwest Airlines* (1983) 148 C.A.3d 512, 196 C.R. 82, supra, §1380, plaintiff, 33, died in an airplane crash. In the wrongful death suit brought by his widow and three young children, the trial judge admitted evidence of decedent's after-tax earnings as a basis for assessment of damages for loss of future financial support. *Held*, this was error. (148 C.A.3d 539, citing *Henniger v. Southern Pac. Co.* (1967) 250 C.A.2d 872, 59 C.R. 76, and *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 151 C.R. 399, supra, §1679.)

(2) *Widow's Remarriage Irrelevant*. Where a widow sues for the death of her husband, the pecuniary loss, as in other death cases, is to be determined on the basis of conditions existing at the time of the decedent's death. The probability or even the fact of the widow's remarriage is not a basis for mitigation of her damages, for it is wholly a matter of speculation whether this would better her condition. Accordingly, evidence on the issue is irrelevant and should be excluded. (*Wood v. Alves Service Trans.* (1961) 191 C.A.2d 723, 728, 13 C.R. 114; *Benwell v. Dean* (1967) 249 C.A.2d 345, 356, 57 C.R. 394 [adding additional reason that defendant should not be allowed to profit by remarriage, just as he or she cannot profit by money coming to plaintiff from collateral source]; *Cherrigan v. San Francisco* (1968) 262 C.A.2d 643, 652, 69 C.R. 42 [holding also that trial judge properly denied motion to compel

plaintiff widow to use her new husband's surname, which would have brought remarriage to jury's attention]; see 87 A.L.R.2d 252 [remarriage of surviving spouse, or possibility thereof, as affecting action for wrongful death of deceased spouse]; 88 A.L.R.3d 926 [admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage or possibility thereof].)

In *Cavallaro v. Michelin Tire Corp.* (1979) 96 C.A.3d 95, 157 C.R. 602, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §162, the court rejected the contention that Ev.C. 351, abolishing limitations on the admissibility of relevant evidence, called for a change in the exclusionary rule. The court declared that the true basis of the rule was public policy, and that its principal justification is similar to that of the collateral source rule (see supra, §1632). "Other reasons for the rule are that the mitigating effect of remarriage upon a spouse's loss from the death of his or her spouse is speculative and might necessitate trial of innumerable differences and similarities between the deceased spouse and the new spouse." (96 C.A.3d 108.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 1224, line 6 of second full paragraph, "*Henniger v. Southern Pac. Co.*" should be "*Henninger v. Southern Pac. Co.*"



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B. Wrongful Death.

2. Death of Spouse and Parent.

b. Services of Wife and Mother.

6 *Witkin Sum. Cal. Law Torts* § 1693

[§ 1693] Services of Wife and Mother.

Where the deceased was a wife and mother, the important element is the value of her services in the home. (See *Johnson v. Southern Pac. R. Co.* (1908) 154 C. 285, 297, 97 P. 520; *Valente v. Sierra Ry. Co.* (1910) 158 C. 412, 418, 111 P. 95; *Lasater v. Oakland Scavenger Co.* (1945) 71 C.A.2d 217, 220, 162 P.2d 486 [wife, leaving husband and seven adult children]; *Martin v. Mansfeldt* (1950) 100 C.A.2d 327, 331, 223 P.2d 501 [wife leaving husband]; *Burke v. San Francisco* (1952) 111 C.A.2d 314, 322, 244 P.2d 708 [wife leaving husband, adult son, and daughter]; 47 A.L.R.4th 100 [death of homemaker]; 61 A.L.R.4th 309 [adequacy of damages awarded for noneconomic loss resulting from injury or death of spouse].)

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B. Wrongful Death.

2. Death of Spouse and Parent.

c. Child's Loss of Advice and Training.

6 *Witkin Sum. Cal. Law Torts* § 1694

[§ 1694] Child's Loss of Advice and Training.

The death of a mother or father also causes a special loss to the children, who may recover the value of advice and services in their training and education. (*Redfield v. Oakland Consol. Street Ry. Co.* (1895) 110 C. 277, 288, 42 P. 822, 1063 [mother]; *Johnson v. Southern Pac. R. Co.* (1908) 154 C. 285, 297, 97 P. 520 [mother]; *Valente v. Sierra Ry. Co.* (1910) 158 C. 412, 418, 111 P. 95 [mother]; *Tolley v. Engert* (1925) 71 C.A. 442, 444, 235 P. 652 [father]; *Sumrall v. Butler* (1951) 102 C.A.2d 515, 521, 524, 227 P.2d 881 [death of father and mother; action by minor children]; 61 A.L.R.4th 251 [adequacy of damages awarded for noneconomic loss resulting from injury or death of parent].)

However, an adult child cannot recover in the absence of evidence showing either dependency or reasonable grounds for expecting some pecuniary benefit from the continuance of the decedent's life. (*Parga v. Pacific Elec. Ry. Co.* (1951) 103 C.A.2d 840, 845, 230 P.2d 364 [action under Federal Employers' Liability Act for death of father]; cf. *Duclos v. Tashjian* (1939) 32 C.A.2d 444, 453, 90 P.2d 140 [married daughters, supported by husbands, were each properly awarded damages for loss of society, etc., of father, at \$ 150 per year of his life expectancy].)

In *Fagerquist v. Western Sun Aviation* (1987) 191 C.A.3d 709, 236 C.R. 633, plaintiff, a 10-year-old child born with severe brain damage, had a life expectancy of 69.7 years, the mental development of a 3-year-old child, and the communication skills of a 9-month-old child. The jury awarded her \$ 1.5 million for the death of her father in a plane crash, even though, as a divorced parent, his financial support to plaintiff would not have exceeded \$ 70,000 (\$ 150 per month child support over plaintiff's life expectancy). *Held*, affirmed.

(a) There was substantial evidence showing that plaintiff and decedent had a special relationship: Decedent was the best at understanding and using the sign language by which plaintiff communicated; and, despite her handicaps, plaintiff enjoyed decedent's love and attention, responded meaningfully to his affection, was extremely happy when they were together, and was unable to obtain the same positive opportunities and experiences from her mother. (191 C.A.3d 727.) It was within the jury's discretion to place a pecuniary value on plaintiff's loss of support, comfort, love, and guidance as a result of decedent's death, and its evaluation was not so excessive as to raise a presumption that it resulted from passion or prejudice. (191 C.A.3d 728.)

(b) Defendant airline argued that plaintiff's mental retardation prevented her from appreciating decedent's love and

companionship as fully as if she were normal, and hence necessitated the assignment of a lower value for her loss of society and companionship. However, it would not be unreasonable for the jury, which knew that plaintiff would remain "childlike" throughout her life, to have concluded that she would be *more* seriously damaged by the loss of her father than would a child who might compensate for such a loss by normal maturation. (191 C.A.3d 729.)

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B. Wrongful Death.

3. Death of Child.

a. Minor Child.

6 *Witkin Sum. Cal. Law Torts* § 1695

[§ 1695] Minor Child.

Where the deceased was a minor child, recovery is based on the present value of reasonably probable future services and contributions, deducting the probable cost of rearing the child. (See *Bond v. United R. of San Francisco* (1911) 159 C. 270, 276, 113 P. 366; *Fuentes v. Tucker* (1947) 31 C.2d 1, 9, 187 P.2d 752; *Peluso v. City Taxi Co.* (1919) 41 C.A. 297, 300, 182 P. 808; *Criss v. Angelus Hosp. Assn. of Los Angeles* (1936) 13 C.A.2d 412, 420, 56 P.2d 1274; *Hunton v. California Portland Cement Co.* (1944) 64 C.A.2d 876, 882, 149 P.2d 471; *Foerster v. Direito* (1946) 75 C.A.2d 323, 332, 170 P.2d 986; *Tyson v. Romey* (1948) 88 C.A.2d 752, 756, 199 P.2d 721; *Fields v. Riley* (1969) 1 C.A.3d 308, 315, 81 C.R. 671, citing the text [prospective cost of child's support and education offset any pecuniary loss suffered by divorced father who rarely saw child]; cf. *Zeller v. Reid* (1940) 38 C.A.2d 622, 624, 101 P.2d 730 [verdict was excessive where there was no showing of substantial contributions by child]; 22A *Am.Jur.2d* (2003 ed.), *Death* §241 et seq.; 49 *Proof of Facts* 2d 191 [damages for wrongful death of child]; 20 *Am.Jur. Trials* 513 [litigating damages for death or injury to child]; 25 *Cal. L. Rev.* 103; 49 *Cal. L. Rev.* 194; 14 *A.L.R.2d* 485 [damages for personal injury resulting in death of infant]; 49 *A.L.R.3d* 934 [death of minor]; 77 *A.L.R.4th* 411 [recovery for loss of consortium resulting from death of child]; 84 *A.L.R.5th* 687 [who, other than parent, may recover for loss of consortium on death of minor child]; BAJI, No. 14.52; CACI, No. 3922.)

In some jurisdictions, only the services during minority are considered, and this generally means that after deducting the expense of bringing up the child the recovery will be extremely small. Other jurisdictions, including California, include the probable contributions by the child after majority. (*Bond v. United R. of San Francisco*, supra.)

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B. Wrongful Death.

3. Death of Child.

b. Adult Child.

6 *Witkin Sum. Cal. Law Torts* § 1696

[§ 1696] Adult Child.

Where the deceased was an adult child, the award is for the present value of future services and contributions reasonably expected, considering the needs of the parents, the past conduct of the child, and the life expectancies of the parents. (See *Parsons v. Easton* (1921) 184 C. 764, 770, 195 P. 419; *Griffey v. Pacific Elec. Ry. Co.* (1922) 58 C.A. 509, 517, 209 P. 45; *Ure v. Maggio Bros. Co.* (1938) 24 C.A.2d 490, 492, 75 P.2d 534.)

In *Riley v. California Erectors* (1973) 36 C.A.3d 29, 32, 111 C.R. 459, decedent son had been living with his mother, a divorcee. At the time of his death, she was contemplating marriage with D, and married him 3 months later. Defendant sought to introduce evidence of the marriage in mitigation of damages. *Held*, the evidence was inadmissible. Although the precise question (marriage of a mother) was one of first impression, the principle followed in the analogous case of marriage of a spouse (see *supra*, §1692) was controlling. Damages are measured by the situation existing at the time of the act causing death, and are unaffected by events occurring thereafter. Hence, the defendant should no more profit by a subsequent marriage of the surviving spouse or mother than he or she should by money coming to the plaintiff from a collateral source (see *supra*, §1631). (36 C.A.3d 32.) (See 7 A.L.R.2d 1380 [effect of deceased child's marriage or its probability]; 69 A.L.R.3d 1038 [remarriage of surviving parent as affecting action for wrongful death of child]; 77 A.L.R.4th 411 [recovery for loss of consortium resulting from death of child].)

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B. Wrongful Death.
4. Death of Other Relative.

6 *Witkin Sum. Cal. Law Torts* § 1697

[§ 1697] Death of Other Relative.

Where the plaintiffs are merely collateral heirs, such as sisters or brothers, they are not, by reason of that fact alone, injured by the death of the decedent. Despite the fact that the statute gives them a right of action, they must prove an actual pecuniary loss of some kind or will be entitled to no more than nominal damages. (*Burk v. Arcata & Mad River R. Co.* (1899) 125 C. 364, 366, 57 P. 1065; see 42 A.L.R.5th 465 [wrongful death damages for loss of expectancy of inheritance from decedent].)

In *Wilson v. San Francisco* (1951) 106 C.A.2d 440, 235 P.2d 81, an action for death of a Catholic priest, his sister was awarded a \$ 2,000 verdict (deducting funeral expenses, only \$ 1,100 for pecuniary loss). In reversing the judgment for inadequacy, the court pointed out that the decedent had a 20-year and she an 18-year life expectancy; that she, as his sole beneficiary, would have received over \$ 20,000 if his normal savings continued through that period; and that she, as his housekeeper and hostess, enjoyed a social relationship now absent in her job as a domestic servant. (106 C.A.2d 444.)

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C. Other Torts to Person, Reputation, and Similar Interests.
1. False Imprisonment.

6 *Witkin Sum. Cal. Law Torts* § 1698

[§ 1698] False Imprisonment.

The plaintiff in an action for false imprisonment may recover as general damages the value of loss of time and any mental suffering or humiliation. (See *Washington v. Farlice* (1991) 1 C.A.4th 766, 774, 2 C.R.2d 607; *Scofield v. Critical Air Medicine* (1996) 45 C.A.4th 990, 1008, 52 C.R.2d 915, supra, §428; *Rest.2d, Torts* §924; 32 *Am.Jur.2d* (1995 ed.), *False Imprisonment* §140 et seq.; C.E.B., *Tort Damages* 2d, §12.1 et seq.; 13 *Proof of Facts* 3d 111 [compensatory damages]; 48 *A.L.R.4th* 165 [damages for false imprisonment or arrest; excessiveness or inadequacy].)

As special damages, the plaintiff may recover for such matters as discomfort, injury to health, injury to reputation, or loss of job or opportunity for employment. (See *Kenyon v. Hartford Acc. & Indem. Co.* (1927) 86 C.A. 269, 274, 260 P. 952 [publication of newspaper account of arrest was admissible to show damage]; cf. *Salo v. Smith* (1914) 25 C.A. 295, 299, 143 P. 322 [nominal damages only, where there was no showing of substantial damage].)

Another element of special damages is the reasonable expense (including counsel fees) of obtaining release from imprisonment. (*Nelson v. Kellogg* (1912) 162 C. 621, 623, 123 P. 1115; *Neves v. Costa* (1907) 5 C.A. 111, 121, 89 P. 860; see 21 *A.L.R.3d* 1068 [attorneys' fees as element of damages in action for false imprisonment or arrest, or for malicious prosecution].)

West's Key Number Digest, False Imprisonment k.32.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 32 *Am.Jur.2d* (2007 ed.), *False Imprisonment* §135 et seq.



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2. Malicious Prosecution.

6 Witkin Sum. Cal. Law Torts § 1699

[§ 1699] Malicious Prosecution.

(1) *Criminal Prosecution*. A criminal prosecution implies a defamatory accusation of crime, and therefore the usual elements of damages in a defamation action may be shown: harm to reputation, emotional distress, expense incurred in defense, and pecuniary loss legally caused by the proceeding. (*Rest.2d, Torts* §§670, 671; see *Sandoval v. Southern Calif. Enterprises* (1950) 98 C.A.2d 240, 254, 219 P.2d 928, supra, §476; *Allard v. Church of Scientology* (1976) 58 C.A.3d 439, 450, 129 C.R. 797 [damage to reputation can be presumed from a charge of theft resulting in arrest, followed by dismissal in interest of justice]; 52 *Am.Jur.2d* (2000 ed.), *Malicious Prosecution* §114 et seq.; C.E.B., *Tort Damages* 2d, §10.27 et seq.; 61 *Harv. L. Rev.* 171; 50 *A.L.R.4th* 843 [excessiveness or inadequacy of damages for malicious prosecution]; on defamation, see *infra*, §§1701, 1702.)

(2) *Malicious Institution of Civil Proceeding*. Where the tort is malicious institution of a civil proceeding, the harm resulting from interference with use of property, injury to reputation, emotional distress, and the expense of defense against the proceeding are elements of damages. (See *Stevens v. Chisholm* (1919) 179 C. 557, 563, 178 P. 128; *Edwards v. Container Kraft Carton & Paper Supply Co.* (1958) 161 C.A.2d 752, 758, 327 P.2d 622 [lost profits shown by sales records]; *MacDonald v. Joslyn* (1969) 275 C.A.2d 282, 293, 79 C.R. 707, supra, §488 [malicious institution of will contest, with false charges against plaintiff executor; damages properly included \$ 123,052.91 that would have been received as probate and trustee fees, \$ 10,000 general damages for injury to reputation and mental anguish, and \$ 50,000 punitive damages]; *Rest.2d, Torts* §681; C.E.B., *Tort Damages* 2d, §10.27 et seq.; 61 *Harv. L. Rev.* 172; 21 *A.L.R.3d* 1068 [attorneys' fees].)

In *Bertero v. National General Corp.* (1974) 13 C.3d 43, 118 C.R. 184, 529 P.2d 608, supra, §§491, 1554, the court upheld a large award of damages for malicious prosecution of a cross-complaint. The record showed that plaintiff paid substantial legal fees in defending against the cross-complaint; that the cross-action damaged his reputation in the business and entertainment industry; that he suffered trauma from the demand for recovery of past payments to him--which could have made him insolvent; that he was unemployed; and that his stock options and insurance benefits had been revoked. The jury could reasonably have inferred that the prosecution of the fabricated charges in the cross-complaint brought about substantial emotional distress. (13 C.3d 61, 62.)

West's Key Number Digest, Malicious Prosecution k.65.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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3. Abuse of Process.

6 *Witkin Sum. Cal. Law Torts* § 1700

[§ 1700] Abuse of Process.

The theory of damages for abuse of process is similar to that in malicious institution of a civil proceeding (*supra*, §1699), but the cases on this subject add little to the general principle of C.C. 3333 ("detriment proximately caused thereby"). (See *Breznikar v. T.J. Topper Co. (1941)* 46 C.A.2d 435, 438, 116 P.2d 176 [recovery of value of business, including good will, where business was destroyed]; *Owens v. McManus (1952)* 108 C.A.2d 557, 558, 239 P.2d 72 [malicious attachment; recovery of value of cancelled lease and punitive damages]; 1 *Am.Jur.2d (1994 ed.)*, *Abuse of Process* §28; C.E.B., *Tort Damages* 2d, §11.9 et seq.; 45 *A.L.R.2d* 1221 [value of use of property wrongfully attached]; 55 *A.L.R.3d* 911 [elements of damage resulting from wrongful execution against business property]; 83 *A.L.R.3d* 598 [mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution].)

West's Key Number Digest, Process k.171

SUPPLEMENT: [This section is current through the latest supplement]
See 1 *Am.Jur.2d. (2005 ed.)*, *Abuse of Process* §§27, 28.



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4. Defamation.
a. General Damages.

6 *Witkin Sum. Cal. Law Torts* § 1701

[§ 1701] General Damages.

Where a libel or slander is actionable per se (see *supra*, §542 et seq.), general damages are recoverable for the injury to the reputation of the plaintiff. It is not necessary to prove affirmatively that the reputation was good, for this is presumed; and it is not necessary to trace any particular effect on that reputation, for the presumption is that it was substantially harmed, and the jury may award compensatory damages. (See C.C. 48a(4)(a); *Scott v. Times-Mirror Co.* (1919) 181 C. 345, 365, 184 P. 672; *Behrendt v. Times-Mirror Co.* (1938) 30 C.A.2d 77, 90, 85 P.2d 949; *Rosenberg v. J.C. Penney Co.* (1939) 30 C.A.2d 609, 619, 86 P.2d 696 [business reputation of merchant]; *Weller v. American Broadcasting Cos.* (1991) 232 C.A.3d 991, 1014, 283 C.R. 644 [jury can award damages for both proved and presumed injury to reputation]; *Rest.2d, Torts* §620 et seq.; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §374 et seq.; C.E.B., *Tort Damages* 2d, §8.8; 61 *Harv. L. Rev.* 169; 69 *Harv. L. Rev.* 934; 26 *Pacific L. J.* 933 [evaluating damages from harm to reputation]; 12 *So. Cal. L. Rev.* 225; 24 *So. Cal. L. Rev.* 364; 20 *Stanf. L. Rev.* 504 [criticizing general damage award and proposing retraction-reply statute]; BAJI, Nos. 7.10, 7.10.1; CACI, No. 1700 et seq.)

Recovery is also allowed for humiliation and emotional distress. (C.C. 48a(4)(a); see *Behrendt v. Times-Mirror Co.*, *supra*; *Clay v. Lagiss* (1956) 143 C.A.2d 441, 449, 299 P.2d 1025; *Rest.2d, Torts* §623; 69 *Harv. L. Rev.* 937; 24 *So. Cal. L. Rev.* 365.)

Where the retraction statute applies, general damages are not recoverable unless the plaintiff makes a proper demand in compliance with the statute. (C.C. 48a, *supra*, §630.)

West's Key Number Digest, Damages k.5; Libel and Slander 116 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 50 *Am.Jur.2d* (2006 ed.), *Libel and Slander* §357 et seq.



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4. Defamation.
b. Special Damages.

6 *Witkin Sum. Cal. Law Torts* § 1702

[§ 1702] Special Damages.

"*'Special damages'*³⁵⁰ are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other." (C.C. 48a(4)(b).) The most important items are loss of a job or business opportunities. (See *Adams v. Cameron* (1915) 27 C.A. 625, 636, 150 P. 1005, 151 P. 286; *Rest.2d, Torts* §§575, 622, 622A; 50 *Am.Jur.2d* (1995 ed.), *Libel and Slander* §375; C.E.B., *Tort Damages* 2d, §8.9; 61 *Harv. L. Rev.* 170; 69 *Harv. L. Rev.* 937, 939; *BAJI*, No. 7.11; *CACI*, No. 1700 et seq.; cf. *Peabody v. Barham* (1942) 52 C.A.2d 581, 585, 126 P.2d 668 [no recovery where items were not specifically pleaded].)

In *O'Hara v. Storer Communications* (1991) 231 C.A.3d 1101, 282 C.R. 712, the question was whether special damages under C.C. 48a could be established by evidence that plaintiff was rendered incapable of working by defendant broadcaster's slanderous statement that she was an alleged prostitute. One witness testified that his observation of some of the effects of the defamation on plaintiff, i.e., the shaking of her hands and lack of confidence, was one reason why he did not hire her for a sales position. *Held*, special damages were established.

(a) Under the specific language of C.C. 48a, a person's loss of employment due to obvious emotional instability is loss to "property, business, trade, profession or occupation." Here, this loss was established by evidence that at least one potential employer had decided not to hire plaintiff as a direct result of the effects of the defamation, and this evidence was corroborated by the testimony of four other witnesses who described plaintiff's distressed mental condition following the defamation. (231 C.A.3d 1114.)

(b) Defendant contended that the corroborating testimony was inadmissible because it merely presented evidence of general damages by describing the effects of the defamation on plaintiff's emotional stability. However, any such defect was cured by an instruction that evidence of plaintiff's hurt feelings, depression, and emotional distress was admitted solely for the purpose of showing that plaintiff was limited in her ability to work or was rendered incapable of working. (231 C.A.3d 1114.)

(c) The definition of special damages in C.C. 48a also includes money expended by plaintiff as a result of the alleged libel. Hence, bills incurred for plaintiff's treatment by a psychiatrist for posttraumatic stress syndrome were

recoverable as special damages, even though they had not yet been paid. (231 C.A.3d 1116, footnote 6.)

West's Key Number Digest, Damages k.5; Libel and Slander 118

SUPPLEMENT: [This section is current through the latest supplement]
See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §358.



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5. Slander of Title and Trade Libel.

6 *Witkin Sum. Cal. Law Torts* § 1703

[§ 1703] Slander of Title and Trade Libel.

The distinction between defamation and disparagement of property (*supra*, §640) is that in actions for disparagement the liability is only for pecuniary loss, and the action cannot be used to vindicate reputation. (See *Burkett v. Griffith* (1891) 90 C. 532, 537, 27 P. 527; *Rest.2d, Torts* §633; 50 Am.Jur.2d (1995 ed.), Libel and Slander §548 et seq.; C.E.B., Tort Damages 2d, §8.44 et seq.; 4 A.L.R.4th 532 [what constitutes special damages in action for slander of title].) Hence, the elements of damage are:

(1) The loss or impairment of ability to sell, the measure being the difference between the normal price and the salable value or depressed sale price afterwards; or, where goods of the plaintiff have been generally disparaged, the amount of loss of business. (*Gudger v. Manton* (1943) 21 C.2d 537, 554, 134 P.2d 217 [real property]; *Davis v. Wood* (1943) 61 C.A.2d 788, 799, 143 P.2d 740; *Seeley v. Seymour* (1987) 190 C.A.3d 844, 864, 237 C.R. 282; *Rest.2d, Torts* §633(a).) It is not necessary to show that a particular pending deal was hampered or prevented; recovery may be had for the depreciation in market value of the property. (*Davis v. Wood, supra*; *Glass v. Gulf Oil Corp.* (1970) 12 C.A.3d 412, 424, 89 C.R. 514.)

(2) The expense of litigation to protect a title from the disparaging charge; e.g., a quiet title suit to remove a cloud. In other words, although attorneys' fees in the main action are not a proper item of damages, those previously incurred in clearing the slandered title are recoverable as special damages (just as the cost of defending against a criminal prosecution is recoverable in a tort action for malicious prosecution). (See *Wright v. Rogers* (1959) 172 C.A.2d 349, 366, 342 P.2d 447 [expense of legal proceedings and damages for inconvenience and loss of time]; *Contra Costa County Title Co. v. Waloff* (1960) 184 C.A.2d 59, 67, 7 C.R. 358; *Forte v. Nolfi* (1972) 25 C.A.3d 656, 686, 102 C.R. 455; *Rest.2d, Torts* §633(b).)

West's Key Number Digest, Libel and Slander k.139

SUPPLEMENT: [This section is current through the latest supplement]
See 50 Am.Jur.2d (2006 ed.), *Libel and Slander* §536 et seq.



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6. Invasion of Privacy.

6 *Witkin Sum. Cal. Law Torts* § 1704

[§ 1704] Invasion of Privacy.

The tort of invasion of privacy protects an interest similar to that protected by the law of defamation (see *supra*, §651). The elements are the harm to the interest in privacy, the mental distress suffered, and special damage caused by the invasion. (*Rest.2d, Torts* §652H.)

The principal element is general damages for injury to peace of mind and feelings. "That injury may be inferred by the trier of fact from the testimony with relation to the social status of the person libeled. This inference may be supplemented by the direct statement of the plaintiff to the effect that his feelings were injured." (*Fairfield v. American Photocopy Equipment Co.* (1955) 138 C.A.2d 82, 90, 291 P.2d 194; *Miller v. National Broadcasting Co.* (1986) 187 C.A.3d 1463, 1484, 1485, 1486, 232 C.R. 668, *supra*, §659; see 62A *Am.Jur.2d* (2005 ed.), *Privacy* §255 et seq.; C.E.B., *Tort Damages* 2d, §9.17 et seq.; 48 *Cal. L. Rev.* 409; 14 *A.L.R.2d* 750, 773 [right of privacy]; BAJI, No. 7.26 et seq.; CACI, No. 1820 et seq.)

West's Key Number Digest, Torts k.8.5

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Injury to peace of mind and feelings: See 62A *Am.Jur.2d* (2005 ed.), *Privacy* §256.



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7. Causing Emotional Distress.
a. Instruction.

6 Witkin Sum. Cal. Law Torts § 1705

[§ 1705] Instruction.

An approved instruction on pain and suffering and emotional distress informs the jury that the amount of the award must include reasonable compensation for pain, discomfort, fears, anxiety, and other emotional distress suffered by the plaintiff (and for similar suffering reasonably certain to be experienced in the future from the same cause). (See *Fletcher v. Western Nat. Life Ins. Co. (1970) 10 C.A.3d 376, 397, 398, 89 C.R. 78*, supra, §459; *Agarwal v. Johnson (1979) 25 C.3d 932, 953, 160 C.R. 141, 603 P.2d 58*, supra, §461; C.E.B., Tort Damages 2d, §6.40 et seq.; BAJI, No. 12.88; CACI, No. 2350.)

West's Key Number Digest, Damages k.48, 226

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b. Underlying Tort.
1. Negligence.

6 *Witkin Sum. Cal. Law Torts* § 1706

[§ 1706] Negligence.

In *Gonzales v. Personal Storage* (1997) 56 C.A.4th 464, 65 C.R.2d 473, plaintiff entered into a contract with defendant for the storage of valuable personal property. Plaintiff fell behind in her rent and, instead of sending her a preliminary lien notice and notice of lien sale, as required by law, defendant placed an advertisement for an auction in a local paper. Soon thereafter, an impostor, having been informed by the advertisement of plaintiff's name, her unit number, and a description of the stored property, appeared claiming to be plaintiff. The impostor paid the overdue rent and absconded with the property. Shortly thereafter, plaintiff brought her account up to date and, when inquiring about her payment, learned of the lost property. Plaintiff then sued on several causes of action and received judgment for negligence and conversion (see *infra*, §1707). The judgment included an award for pain and suffering, supported by evidence that loss of so many items of a personal nature caused plaintiff to suffer much emotional distress. *Held*, this part of the judgment was affirmed but not with respect to the negligence cause of action.

(a) In negligence cases of this type, one way that plaintiff, who did not suffer any personal injury and did not observe the injury of a loved one, could recover for pain and suffering was to show that defendant had assumed a duty to her in which her emotional condition was an object. However, defendant correctly pointed out that its landlord-tenant relationship with plaintiff did not give rise to any duty to protect plaintiff's emotional tranquility. Indeed, there was nothing in the conversations between the parties or in the lease itself indicating that defendant had assumed a duty to protect defendant from emotional distress. Moreover, this duty did not arise from defendant's duty to protect plaintiff's personal property. (56 C.A.4th 474.)

(b) Unless the defendant has assumed a duty to the plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. However, with rare exceptions, the breach must threaten physical harm, not simply damage to property or financial interests, as here. Thus, were plaintiff's claims solely for negligence, she could not recover damages for pain and suffering. (56 C.A.4th 474.)

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b. Underlying Tort.
2. Conversion.

6 *Witkin Sum. Cal. Law Torts* § 1707

[§ 1707] Conversion.

Emotional distress damages are permitted as part of a conversion claim, even though the harm suffered is only economic. (*Gonzales v. Personal Storage* (1997) 56 C.A.4th 464, 475, 65 C.R.2d 473, *supra*, §1706.) This is so because the converter has direct knowledge of the likely consequences of the interference with the plaintiff's dominion over the property. In other words, although the converter can contend that he or she acted without knowledge of rightful ownership, he or she cannot claim ignorance of the potential emotional harm that the interference would cause. In contrast, the negligent destroyer of personal property has considerably less knowledge of the emotional consequences of his or her actions. (*Gonzales v. Personal Storage*, *supra*, 56 C.A.4th 477.)

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b. Underlying Tort.
3. Insurance Bad Faith.

6 Witkin Sum. Cal. Law Torts § 1708

[§ 1708] Insurance Bad Faith.

(1) *Financial Loss Is Required.* To recover emotional distress damages in an insurance bad faith case, the insured must show *financial loss*. In *Waters v. United Services Auto. Assn.* (1996) 41 C.A.4th 1063, 1071, 1081, 48 C.R.2d 910, plaintiffs' house was damaged by fire. Defendant insurer, as required by its policy, paid the amount needed for restoration, but not until a long delay had occurred while the parties negotiated over the amount. Based on this delay, plaintiffs then sued defendant for bad faith. The parties agreed that in *third-party* bad faith cases, damages for emotional distress are recoverable only when the insured has suffered some financial loss. However, plaintiffs contended that, in *first-party* bad faith cases, such as this, evidence of delay in paying benefits was sufficient to sustain damages for emotional distress, and no evidence of actual financial loss was necessary. The trial judge agreed, awarding plaintiffs \$ 1.375 million for emotional distress. *Held*, reversed; evidence of financial loss is necessary in both first- and third-party cases.

(a) A statement in *Sprague v. Equifax* (1985) 166 C.A.3d 1012, 213 C.R. 69, relied on by plaintiffs, lends some support to the position that actual damages are not necessary. However, in that case, financial loss was present, and the statement is taken out of context. (41 C.A.4th 1071.)

(b) *Rest.2d, Torts §46*, which allows emotional distress damages for extreme and outrageous conduct that intentionally or recklessly causes this distress, deals only with the separate tort of intentional infliction of emotional distress (see *supra*, §449 et seq.). It is not applicable to cases such as this, where emotional distress is an element of damages resulting from the invasion of some other interest. (41 C.A.4th 1073.)

(c) *Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 C.3d 121, 3 C.R.2d 666, 822 P.2d 374, *supra*, §1652, contains a statement to the effect that the "risk" of financial loss is sufficient to justify emotional distress damages. In other words, just the possibility that defendant had not paid the full amount claimed for the dwelling restoration would be sufficient. However, this statement is based on authority that does not support it. It is therefore mere surplusage that is not to be followed. (41 C.A.4th 1077.)

(d) Plaintiffs claim that attorneys' fees were incurred and that one of the plaintiffs was hospitalized, both as a result

of the delay. However, the record contains no evidence to support either of these charges. Without this evidence, it is impossible to infer that they, in fact, existed. (41 C.A.4th 1081.)

(e) "We are not suggesting the Waters (or anyone else) must end up in the poorhouse before claiming emotional distress damages. Consistent with the existing cases, we are simply holding that some financial loss must be shown to reduce the risk of fictitious claims and those based simply on bad manners, and to avoid litigation over trivialities. Indeed, the ability to validate emotional distress damages is critical where, as here, the carrier's bad faith consists of delay in the form of continuing negotiations. While it is true that an insured bargains for prompt payment, not a right of action against the insurer, the insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance-seeking public because of the necessity to increase rates, and would finally drive the insurer out of business. Indeed, analysis of the leading first party cases demonstrates that a rule has never been applied which holds under any circumstances that an insurer which refuses to pay benefits claimed to be due under the policy did so at its own risk. Clearly, both logic and good policy dictate that no such rule ever be applied in first party cases.' " (41 C.A.4th 1080.) (See BAJI, Nos. 12.92, 12.95 [recovery may be had in cases involving an insurer's bad faith failure to pay or to settle "all damages resulting from such conduct"].) (See *Maxwell v. Fire Ins. Exchange* (1998) 60 C.A.4th 1446, 1449, 70 C.R.2d 866 [mere loss of use of money caused by delay in payment of judgment in underlying personal injury action did not constitute per se economic loss sufficient to allow recovery of emotional distress damages in third-party bad faith action].)

(2) *Scope of Recovery*. Once financial loss is shown, the insured may recover for all emotional distress proximately caused by the insurer's bad faith, regardless of whether the distress results from the financial loss. In *Clayton v. United Services Auto. Assn.* (1997) 54 C.A.4th 1158, 63 C.R.2d 419, the appeal arose out of a bad faith action brought by plaintiff against his insurer based on defendant's conduct in attempting to settle, for a fraction of the policy limits, plaintiff's underinsurance claim for the death of his child in an automobile accident. Plaintiff recovered judgment for nearly \$ 30,000 in compensatory damages, plus \$ 400,000 for emotional distress. *Held*, affirmed.

(a) Defendant contended that the trial judge erred in failing to instruct the jury that it could award emotional distress damages only if plaintiff's distress flowed from damages caused by defendant's conduct. Obviously, because plaintiff had recovered nearly \$ 30,000 in compensatory damages, he had no financial loss caused by defendant. However, there is nothing in *Waters v. United Services Auto. Assn.*, *supra*, requiring that actual damages be caused in this manner. Instead, the plaintiff in a bad faith case must prove some economic loss as a means of validating the seriousness of his or her emotional distress. Then, once economic loss is shown, the plaintiff is entitled to recover for all the emotional distress proximately caused by the insurer's bad faith without proving any causal link between the emotional distress and the financial loss. (54 C.A.4th 1160.)

(b) Here, even though plaintiff did not suffer financial hardship from nonpayment of his claim, his compensatory damages of nearly \$ 30,000 served to validate the seriousness of his claim, and he was then entitled to recover for the emotional distress resulting from defendant's conduct. (54 C.A.4th 1162.)

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D. Interference With Contract or Economic Advantage.

6 Witkin Sum. Cal. Law Torts § 1709

[§ 1709] Interference With Contract or Economic Advantage.

The elements of damage for interference with a contract or prospective contractual relation are "(a) the pecuniary loss of the benefits of the contract or the prospective relation; (b) consequential losses for which the interference is a legal cause; and (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference." (*Rest.2d, Torts* §774A(1).) (See *Ojala v. Bohlin* (1960) 178 C.A.2d 292, 302, 2 C.R. 919 [unfair competition--injury to reputation]; *Di Loreto v. Shumake* (1995) 38 C.A.4th 35, 38, 45 C.R.2d 22 [claim that another attorney interfered with plaintiff attorney's prospective economic advantage with client was insufficient basis for award of damages for emotional distress; to justify those damages, conduct must be extreme and outrageous]; 45 *Am.Jur.2d* (1999 ed.), *Interference* §58 et seq.; 19 *Hastings L. J.* 1119 [inducement of breach of contract]; 8 *Loyola L.A. L. Rev.* 302 [civil conspiracy and interference with contract]; 7 *Santa Clara Lawyer* 140 [interference with contractual relations]; 34 *So. Cal. L. Rev.* 283 [monetary awards for unfair competition]; BAJI, No. 7.89.)

If a wrongful act causes the loss of a business, its value may be determined by capitalizing the past profits. Thus, in *Elsbach v. Mulligan* (1943) 58 C.A.2d 354, 136 P.2d 651, defendant, by misrepresentations and threats, procured the cancellation of plaintiff's sales agencies and obtained them for himself. The court awarded damages consisting of plaintiff's average yearly profits (\$ 6,000), capitalized on the basis of a 5-year purchase, or a total of \$ 30,000. (58 C.A.2d 365.) (See *Foster v. Keating* (1953) 120 C.A.2d 435, 453, 261 P.2d 529 [following *Elsbach*]; 26 *Proof of Facts* 3d 119 [lost profits resulting from tortious injury to business].)

Where the plaintiff is unable to establish lost profits with certainty, recovery may be based on proof of the actual profits received by the defendant tortfeasor. (See *Ramona Manor Convalescent Hosp. v. Care Enterprises* (1986) 177 C.A.3d 1120, 1140, 225 C.R. 120; 5 *A.L.R.4th* 1276 [recovery based on tortfeasor's profits in action for procuring breach of contract].)

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E. Fraud and Deceit.

1. Development of Out-of-Pocket Loss Rule.
a. Nature of Rule.

6 *Witkin Sum. Cal. Law Torts* § 1710

[§ 1710] Nature of Rule.

(1) *Original Benefit of Bargain Rule*. Many jurisdictions give the defrauded party the "benefit of his bargain" by making the recovery the difference between the actual value of the property and the value it would have had if it had been as represented. This was formerly the California rule. (See *Hines v. Brode* (1914) 168 C. 507, 510, 143 P. 729; *George Cople Co. v. Hindes* (1917) 34 C.A. 576, 580, 170 P. 155; *Mitchell v. Tuttle* (1929) 102 C.A. 16, 20, 282 P. 534; *Roome v. Real Estate Inv. Co.* (1933) 131 C.A. 496, 497, 21 P.2d 599; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §416 et seq.; C.E.B., 1 *Real Property Remedies and Damages* 2d, §3.43 et seq.; 2 *Cal. L. Rev.* 333; 3 *Cal. L. Rev.* 152; 61 *Harv. L. Rev.* 173; 13 *So. Cal. L. Rev.* 168.)

(2) *Out-of-Pocket Loss Rule*. The other rule, followed by the Torts Restatement, allows the defrauded party only the difference between the value of what was given up and the value of that received; i.e., it makes up the plaintiff's "out-of-pocket loss," but does not award him or her the amount of anticipated profits from the bargain. (See *Rest.2d, Torts* §549.) This rule, with an additional provision for consequential damages, was established in California in 1935 by the enactment of C.C. 3343, which then read as follows: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." (See *Feckenscher v. Gamble* (1938) 12 C.2d 482, 499, 85 P.2d 885; *Bagdasarian v. Gagnon* (1948) 31 C.2d 744, 762, 192 P.2d 935; *Eatwell v. Beck* (1953) 41 C.2d 128, 131, 134, 257 P.2d 643; *Jacobs v. Levin* (1943) 58 C.A.2d Supp. 913, 916, 137 P.2d 500; *Oldenburg v. Brody* (1956) 139 C.A.2d 543, 556, 293 P.2d 844; *Clar v. Board of Trade of San Francisco* (1958) 164 C.A.2d 636, 645, 331 P.2d 89; *Peskin v. Phinney* (1960) 182 C.A.2d 632, 635, 6 C.R. 389; *McCauley v. Dennis* (1963) 220 C.A.2d 627, 631, 34 C.R. 90; *McCue v. Bruce Enterprises* (1964) 228 C.A.2d 21, 30, 39 C.R. 125; *Michelson v. Camp* (1999) 72 C.A.4th 955, 971, 85 C.R.2d 539; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §420 et seq.; 43 *Cal. L. Rev.* 356; 61 *Harv. L. Rev.* 173; 13 *A.L.R.3d* 875 [out of pocket or benefit of bargain as proper rule of damages for fraudulent representations inducing contract for transfer of property]; for revised statute, see *infra*, §1714.) (On damages for negligent misrepresentation, see *Rest.2d, Torts* §552B; on damages for innocent misrepresentation, see *Rest.2d, Torts* §552C.)

(3) *Effect of Subsequent Developments*. In *Garrett v. Perry* (1959) 53 C.2d 178, 346 P.2d 758, defendant vendor sold land to plaintiff on false representations of its fitness as a cattle ranch. The price was \$ 700,000--\$ 100,000 in cash

and \$ 600,000 in notes secured by deeds of trust. Plaintiff defaulted, the notes were foreclosed, and defendant vendor regained title. In this damage suit, the judge found that the market value at the time of sale was \$ 530,000, and gave judgment for \$ 170,000 (\$ 700,000 less \$ 530,000) plus consequential damages. *Held*, affirmed as modified to deduct \$ 11,000.

Applying C.C. 3343 in the normal manner, damages were assessed by the judge on the basis of circumstances at the time the contract was made. At that time, plaintiff was liable for the entire purchase price of \$ 700,000, and it appeared that he was defrauded to the extent of \$ 170,000. But when the foreclosure took place without a deficiency judgment, plaintiff had actually parted only with the \$ 100,000 downpayment and \$ 59,000 on the notes. He was therefore only defrauded in the amount of \$ 159,000, and the additional \$ 11,000 was a windfall to which he was not entitled. If he had only paid \$ 100,000, he would under the trial judge's theory receive a windfall of \$ 70,000; i.e., the earlier the default the bigger the windfall. Hence, values are to be considered as of the time of the fraudulent transaction, but subsequent circumstances other than value may be effective to increase or reduce the damages recoverable. (53 C.2d 186.) (See *Hahn v. Food Service Equipment Co.* (1963) 220 C.A.2d 412, 416, 33 C.R. 851; *Burkhous v. Phillips* (1971) 18 C.A.3d 661, 665, 96 C.R. 197; *Ford v. Cournale* (1973) 36 C.A.3d 172, 184, 111 C.R. 334; 14 Santa Clara Lawyer 325.)

(4) *No Offset for Rental Value.* In *Sixta v. Ochsner* (1960) 187 C.A.2d 485, 9 C.R. 617, plaintiff purchaser sued defendant vendor to rescind, and defendant cross-complained for damages for fraud against P, her vendor. Plaintiff was successful in rescinding, so defendant was left with the land; but defendant was also successful on her cross-complaint, being awarded the purchase price and consequential damages (infra, §1712). The difficult issue presented, however, was whether P, the original vendor, was entitled to an offset for the rental value of the property up to the time of suit. The court, reviewing the meager authority, concluded that if the cross-complainant had proceeded on the theory of rescission a court of equity could give the offset to avoid unjust enrichment; but that, in an action for damages, the legalistic view prevails that the defrauded purchaser is occupying the land as a matter of right and not as a tenant. (187 C.A.2d 491.)

(5) *Exception for Sales of Goods.* "Remedies for material misrepresentation or fraud include all remedies available under this division for nonfraudulent breach." (U.C.C. 2721.) The purpose of this provision is to give the defrauded buyer of goods the same remedies as those specified for breach of warranty, and therefore in a proper case to give him or her the benefit of the bargain. (See Official Comment; 4 *Summary* (10th), *Sales*, §§178, 203; *Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 C.A.3d 388, 431, 264 C.R. 779, quoting the text.)

West's Key Number Digest, Fraud k.59 et seq.

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b. Value of Property.

6 *Witkin Sum. Cal. Law Torts* § 1711

[§ 1711] Value of Property.

The principal factor in applying the measure of damages is the value of the property. (See *Zinn v. Ex-Cell-O Corp.* (1944) 24 C.2d 290, 297, 149 P.2d 177 [value of stock]; *Rest.2d, Torts* §549.) The "actual value" referred to in C.C. 3343 is given its ordinary meaning of market value. (*Bagdasarian v. Gragnon* (1948) 31 C.2d 744, 753, 192 P.2d 935.) But where goods are bought for resale, the actual value is the net amount received on the resale (sales price minus the expenses of the sale), and not the gross sales price. (*Clar v. Board of Trade of San Francisco* (1958) 164 C.A.2d 636, 650, 331 P.2d 89.)

In the case of a false promise inducing a contract, damages are not limited to the difference between market price and purchase price at the time of purchase; recovery may be measured by market value as of the date the promise was breached, because that is the date when the damage occurred. (*Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 C.A.3d 101, 146, 135 C.R. 802.)

The out-of-pocket loss rule (see *supra*, §1710) may not be circumvented by extending the principle of consequential damages. Thus, in *Gagne v. Bertran* (1954) 43 C.2d 481, 275 P.2d 15, *supra*, §820, plaintiffs bought land for a building in reliance on negligent misrepresentations of defendant about soil conditions, and were compelled to pay over \$ 3,000 more than anticipated for foundations. The court held, however, that if the lots were worth what they paid for them, they were not damaged even though they would not have bought if they had known the truth. The additional cost incurred was not caused by defendant's misinformation, but by the condition of the soil; they would have incurred the same costs if defendant had correctly reported the fill condition. And they did not prove that the extent of the fill made the lots unsuitable for the intended use or made the reasonable cost of the building exceed its value. (43 C.2d 491, 492.) (See *Overgaard v. Johnson* (1977) 68 C.A.3d 821, 827, 137 C.R. 412 [following *Gagne*]; 43 Cal. L. Rev. 356 [critical note].)

Under the out-of-pocket loss rule, it is possible for the plaintiff to establish the elements of fraud and yet recover nothing. In other words, the limited damage rule often nullifies the effect of the modern liberal rule as to the plaintiff's right to rely on the defendant's representations (see *supra*, §813). The plaintiff, e.g., may, after considerable effort, conclude an apparently profitable real estate investment. However, if it turns out that the plaintiff has simply exchanged money for property equivalent in value (as determined by the jury or found by the trial court), the plaintiff cannot get damages; the only remedy is to rescind and get back the money. In *Oliver v. Benton* (1949) 92 C.A.2d 853, 208 P.2d

375, plaintiff bought real property in reliance on representations that rentals of \$ 125 per month were being received; actually the rent was \$ 77.50 per month. The trial court found that the purchase price paid (\$ 19,500) did not exceed the actual value, and gave judgment for defendants. *Held*, this was proper. The difference in rent was not an element of damage to plaintiff. "The fact that he may anticipate more and be falsely led to expect it, or that he would have made a profit if the representation had been true, does not entitle him to recover for his disappointment in not receiving that which he was led to expect." (92 C.A.2d 856.)

In *Jacobs v. Levin* (1943) 58 C.A.2d Supp. 913, 137 P.2d 500, plaintiffs bought a home from defendants who fraudulently concealed a defective fireplace, which would cost \$ 470 to fix. In a suit based on affirmance of the contract, the trial court found that the fair market value of the home was \$ 550 more than plaintiffs paid. *Held*, they were not damaged and could recover nothing.

The rule also protects a builder who, either deliberately or without sufficient information, undervalues the cost of building a house on a cost plus basis. In *McCauley v. Dennis* (1963) 220 C.A.2d 627, 34 C.R. 90, plaintiff contractor agreed to build a home for defendant on a cost plus 10% fee basis, representing without sufficient information that the cost would be about \$ 30,000. The house actually cost about \$ 57,000, and its value was found to be about that amount. *Held*, plaintiff was entitled to recover his fee, but limited to 10% of the amount he had represented that the house would cost, plus agreed extra work. Defendant was denied damages for the fraud, because he failed to show that he had paid more than the house was worth. (220 C.A.2d 634, 636.)

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1. Development of Out-of-Pocket Loss Rule.
c. Consequential Damages.

6 *Witkin Sum. Cal. Law Torts* § 1712

[§ 1712] Consequential Damages.

The original statute allowed the plaintiff to recover "any additional damage," i.e., consequential damages proximately resulting from reliance on the defendant's fraud. The phrase "any additional damage" was broadly interpreted to mean any loss arising from the transaction. Hence, the defrauded party could recover for any reasonable expenditures rendered fruitless because of the deceit. (See *The Edward Barron Estate Co. v. Woodruff Co.* (1912) 163 C. 561, 577, 126 P. 351; *Campbell v. Birch* (1942) 19 C.2d 778, 793, 122 P.2d 902; *Hartong v. Partake* (1968) 266 C.A.2d 942, 969, 72 C.R. 722; 37 *Am.Jur.2d* (2001 ed.), *Fraud and Deceit* §413; 43 *Cal. L. Rev.* 358; for specification in revised statute of kinds of consequential damages recoverable, see *infra*, §1714.)

In *Williams v. Graham* (1948) 83 C.A.2d 649, 189 P.2d 324, defendant, who had agreed to sell land to plaintiff, falsely representing that he had title, failed to convey. Plaintiff was allowed to recover his deposit and the amount of rent paid for other premises necessary in his business for a 6-month period. (83 C.A.2d 653.)

In *Garrett v. Perry* (1959) 53 C.2d 178, 346 P.2d 758, plaintiff operated a cattle ranch at a loss and incurred expenses for operation, care, and improvement; the total amount, \$ 30,400, was properly awarded. (53 C.2d 186.)

In *Sixta v. Ochsner* (1960) 187 C.A.2d 485, 9 C.R. 617, where the location of land sold for \$ 4,000 was misrepresented, the purchaser was awarded over \$ 6,000 expended in improvements on the property. (187 C.A.2d 490.)

In *Buist v. C. Dudley DeVelbiss Corp.* (1960) 182 C.A.2d 325, 6 C.R. 259, plaintiff bought a house for \$ 14,000 and spent \$ 3,452.68 on improvements. The condition of the soil had been misrepresented, and the house was so damaged by subsequent settling that it had no value. Hence, plaintiff was allowed to recover the purchase price plus the cost of the improvements. (182 C.A.2d 334.) A concurring opinion suggests that this was in effect restitution, and that the court should have ordered a return of the property to defendant. (182 C.A.2d 335.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Green Wood Industrial Co. v. Forceman Int. Dev. Group* (2007) 156 C.A.4th 766, 774, 67 C.R.3d 601 [\$ 159,000 award of lost profits to buyer; middleman fraudulently induced by seller and others to pay for shipments of scrap metal that never existed; lost profits constituted consequential damages].



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CHAPTER IX - Torts

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XVIII. DAMAGES: KINDS OF INJURY
E. Fraud and Deceit.

1. Development of Out-of-Pocket Loss Rule.
 - d. Quasi-Contractual Recovery.

6 *Witkin Sum. Cal. Law Torts* § 1713

[§ 1713] Quasi-Contractual Recovery.

The courts developed an exception to the statutory out-of-pocket loss rule (*supra*, §1710) by treating the action as one in quasi-contract rather than tort. In *Savage v. Mayer* (1949) 33 C.2d 548, 203 P.2d 9, defendant, acting as the agent for plaintiff in the purchase of stock, bought shares privately at \$ 17, and delivered them to plaintiff for \$ 20, representing that he had procured them on the stock exchange at the higher price. In this action, defendant contended that plaintiff could recover nothing, because no showing was made as to the market value of the stock. *Held*, plaintiff was entitled to recover the difference between \$ 17 and \$ 20 on the shares purchased. Although defendant was guilty of fraud, the action was not for damages for deceit; it was a principal's action to recover secret profits made by an agent. The right of recovery is based upon duties incident to the agency relationship; a quasi-contractual obligation to pay the money to the principal exists, and the measure of damages set forth in C.C. 3343 for fraud with respect to property transactions is not a limitation. (33 C.2d 551.)

This theory was greatly extended in *Ward v. Taggart* (1959) 51 C.2d 736, 336 P.2d 534. Defendant T, a real estate broker, falsely represented to plaintiffs' agent that he was the exclusive agent for the sale of S's land, and that S would not sell for less than \$ 5,000 per acre. Plaintiffs offered this sum, whereupon defendant purchased it from S for \$ 4,000 per acre, using plaintiff's money to pay S, and concealing his secret profit by using an associate as the escrow holder. *Held*, judgment for recovery of the profit and exemplary damages affirmed.

(a) No damages could be recovered in tort under the out-of-pocket loss rule, for the evidence showed that the property was worth \$ 5,000 an acre--what plaintiff paid for it. But C.C. 3343 expressly recognizes "any legal or equitable remedies" to which the defrauded person may be entitled, and general principles of equity and quasi-contract call for a remedy to prevent defendant's unjust enrichment at the expense of plaintiffs. Hence, defendant was held a constructive trustee for plaintiffs of the secret profit. (51 C.2d 741.)

(b) As to exemplary damages, defendant contended that, on the abandonment of the tort theory to avoid the restrictive measure of damages for fraud, the case was not a proper one for these damages. But the simple tort-contract line of demarcation is rejected as a test for the interpretation of "an obligation not arising from contract" (C.C. 3294). "Contract" in the statute means agreement, not a quasi-contractual obligation; and the fraud is not really "waived" in this kind of quasi-contract suit, but is rather the foundation of the fictitious implied-in-law promise. Hence, defendant's

obligation "does not arise from contract but is imposed by law," and exemplary damages are not precluded by C.C. 3294. Moreover, these "damages are appropriate in cases like the present one, where restitution would have little or no deterrent effect, for wrongdoers would run no risk of liability to their victims beyond that of returning what they wrongfully obtained." (51 C.2d 743.) (For critical discussions of the holding and implications, see 48 Cal. L. Rev. 342; 11 Hastings L. J. 183; 12 Stanf. L. Rev. 270; 7 U.C.L.A. L. Rev. 147; 11 U.C.L.A. L. Rev. 879; and see *Walsh v. Hooker & Fay* (1963) 212 C.A.2d 450, 458, 28 C.R. 16 [C.C. 3343 was not applicable where fraudulent agent of defendant stockbrokers misrepresented value of stock in selling it to plaintiff; fiduciary relationship exception]; *Boyd v. Bevilacqua* (1966) 247 C.A.2d 272, 294, 55 C.R. 610 [joint venturers conspired to deprive one of interest in real property development; fiduciary relationship exception applied, and fair market value of interest in joint venture was recovered]; *Brockway v. Heilman* (1967) 250 C.A.2d 807, 812, 58 C.R. 772 [false promise to transfer liquor license in sale of cafe]; on fiduciary exception, see *infra*, §1717.)

In *Coleman v. Ladd Ford Co.* (1963) 215 C.A.2d 90, 29 C.R. 832, defendant car dealer's salesman, to induce the sale of a new car, falsely represented to plaintiff that he had a buyer for her used car who would take over the obligation to pay the balance due. Plaintiff, relying on the representation, bought the new car. Thereafter, the finance company repossessed her old one and obtained a judgment against her for the unpaid balance. *Held*, plaintiff was entitled to recover the amount of the judgment, together with attorneys' fees and court costs incurred in defense of the finance company's action. *Ward v. Taggart* relaxed the rule of *Bagdasarian v. Gagnon* (1948) 31 C.2d 744, 753, 192 P.2d 935, *supra*, §1711, to the extent of recognizing reasonable exceptions to the exclusive measure of damages set forth in C.C. 3343, and that recovery in the instant case is proper under the *Ward* theory. (215 C.A.2d 93.) (See 11 U.C.L.A. L. Rev. 876.)

SUPPLEMENT: [This section is current through the latest supplement]

See *San Bernardino v. Walsh* (2007) 158 C.A.4th 533, 541, 69 C.R.3d 848 [in county's action to recover damages resulting from bribery scheme, disgorgement of profits from scheme was appropriate remedy under theory of unjust enrichment, even though public funds were not used to pay bribes; following *Ward v. Taggart* (1959) 51 C.2d 736, 336 P.2d 534, text, p. 1243].



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2. Statutory Expansion.
a. Elements of Damage.

6 *Witkin Sum. Cal. Law Torts* § 1714

[§ 1714] Elements of Damage.

The 1971 Legislature revised C.C. 3343 to extend the recoverable damages.

(1) *Difference in Value*. C.C. 3343(a) carries over the original out-of-pocket loss provision (supra, §1710): "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received." (See *Housley v. Poway* (1993) 20 C.A.4th 801, 812, 813, 24 C.R.2d 554 [plaintiff was fraudulently induced to part with right-of-way and slope easement but received payment only for right-of-way; recoverable damages were out-of-pocket loss (value of land taken for slope), but not "all damages legally caused by misrepresentation," as instructed by trial judge]; *Saunders v. Taylor* (1996) 42 C.A.4th 1538, 1542, 50 C.R.2d 395 [use of term "actual damages" in C.C. 1102.13 (failure to disclose) means compensatory damages as measured by C.C. 3343(a); it was not attempt to reinstate benefit-of-the-bargain rule].)

(2) *Additional Damage*. The 1971 amendment adds to the general authorization of "any additional damage" a specific nonexclusive recital of certain kinds of consequential damages. (C.C. 3343(a).) (On background, purpose, and effect of amendment, see *Stout v. Turney* (1978) 22 C.3d 718, 725, 150 C.R. 637, 586 P.2d 1228, *infra*, §1716; *Channell v. Anthony* (1976) 58 C.A.3d 290, 309, 312, 129 C.R. 704; *Hartman v. Shell Oil Co.* (1977) 68 C.A.3d 240, 244, 247, 137 C.R. 244; *Cory v. Villa Properties* (1986) 180 C.A.3d 592, 598, 225 C.R. 628, *infra*, §1716; 30 *Hastings L. J.* 475; 14 *Santa Clara Lawyer* 347; for instructions, see *Pepper v. Underwood* (1975) 48 C.A.3d 698, 706, 122 C.R. 343; BAJI, No. 12.56; CACI, No. 1920 et seq.; for exception allowing recovery under "benefit of the bargain" rule where the fraudulent defendant stands in a fiduciary relationship, see *infra*, §1717.)

The defrauded person may recover any additional damage arising from the transaction, including the following:

(a) "Amounts actually and reasonably expended in reliance upon the fraud." (C.C. 3343(a)(1).)

(b) "An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud." (C.C. 3343(a)(2).) (See *Channell v. Anthony* (1976) 58 C.A.3d 290, 316, 319, 129 C.R. 704.)

(c) "Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it." (C.C. 3343(a)(3).) (See *Channell v. Anthony*, *supra*, 58 C.A.3d 309.)

(d) Fraud on the purchaser. (C.C. 3343(a)(4), *infra*, §§1715, 1716.)

(3) *Scope of Revision*. The revised statute makes it clear that the extension is only in the area of *consequential damages*, and that the benefit of the bargain rule (see *supra*, §1710) is not revived. Nothing in the statute permits "the defrauded person to recover any amount measured by the difference between the value of the property as represented and the actual value thereof." (C.C. 3343(b)(1).) However, nothing in the statute denies "to any person having a cause of action for fraud and deceit any legal or equitable remedies to which such person may be entitled." (C.C. 3343(b)(2).) Thus, quasi-contractual recovery under the theory of *Ward v. Taggart* (1959) 51 C.2d 736, 336 P.2d 534, *supra*, §1713, is unaffected, and the benefit of the bargain may be recovered in actions by the defrauded buyer of goods under the Commercial Code rule (*supra*, §1710). (See *Sprague v. Frank J. Sanders Lincoln Mercury* (1981) 120 C.A.3d 412, 417, 174 C.R. 608 [car dealer repeatedly falsely represented that defects had been repaired; governing statutes were C.C. 1709 and 3333, which allow damages for mental distress and suffering, rather than C.C. 3343]; *Croeni v. Goldstein* (1994) 21 C.A.4th 754, 759, 760, 26 C.R.2d 412 [plaintiffs, who sought to enforce sale of business and obtain sale price from buyers, could not recover lost profits from them, but could seek them from buyer's officer under fraud theory; under C.C. 3343(b)(2) he remained liable under "any other legal or equitable remedies"].)

However, the provisions referring to "additional damages" and to "any legal and equitable remedies" do not permit recovery beyond the ordinary consequential damages; hence, an award for pain and suffering is improper. (*O'Neil v. Spillane* (1975) 45 C.A.3d 147, 159, 119 C.R. 245, 1 Summary (10th), *Contracts*, §317.)

SUPPLEMENT: [This section is current through the latest supplement]



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 - 2. Statutory Expansion.
 - b. Fraud on Purchaser.

6 Witkin Sum. Cal. Law Torts § 1715

[§ 1715] Fraud on Purchaser.

A defrauded purchaser who has been induced by reason of fraud to purchase or otherwise acquire property is entitled to the following: "[A]n amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud." (C.C. 3343(a)(4); see *Storage Services v. Oosterbaan* (1989) 214 C.A.3d 498, 510, 262 C.R. 689 ["otherwise acquire," as used in C.C. 3343(a)(4), included acquisition of title that entitled purchaser to property's fair market value, but not to its possession].)

Loss of these profits, however, is recoverable only if (1) the defrauded party acquired the property for the purpose of use or resale at a profit; (2) he or she reasonably relied on the fraud in entering into the transaction; and (3) in anticipating profits from the subsequent use or sale, and the loss of profits was proximately caused by the fraud and reliance on it. (C.C. 3343(a)(4); see *Hartman v. Shell Oil Co.* (1977) 68 C.A.3d 240, 247, 137 C.R. 244 ["Clearly and specifically, lost profits proximately caused are recoverable"]; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 C.A.3d 1220, 1254, 1 C.R.2d 301 [in action based on sale of shopping center, buyers were entitled to recover lost profits resulting from defendant sellers' fraudulent promise to guarantee payment of certain leases].)

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2. Statutory Expansion.

c. Illustrations.

6 *Witkin Sum. Cal. Law Torts* § 1716

[§ 1716] Illustrations.

In *Stout v. Turney* (1978) 22 C.3d 718, 150 C.R. 637, 586 P.2d 1228, defendant and his partners were sued for damages for fraud in the sale of a mobilehome park to plaintiff. The other partners settled, and after trial judgment was entered against defendant on a verdict for plaintiff for \$ 92,200 damages, less \$ 30,000 received in the settlements. Defendant contended on appeal that the trial judge committed prejudicial error in his instruction, adapted from C.C. 3343, by omitting the parts that precluded use of the "benefit-of-the-bargain" measure of damages. *Held*, there was no error, and substantial evidence of loss of profits and other consequential damages supported the verdict.

(a) *Law prior to 1971 amendment of C.C. 3343.* From the initial enactment of C.C. 3343 in 1935, California followed the minority out-of-pocket loss rule of compensation for loss sustained, rather than the benefit-of-the-bargain rule of satisfaction of contractual expectations. (22 C.3d 725.) But the courts fashioned relief appropriate to particular circumstances in which application of the strict rule would lead to injustice; e.g., in cases involving fiduciaries, additional damages consisting of expenditures of time and money, proof of anticipated profit in determining value of property received, and quasi-contract recovery for unjust enrichment. (22 C.3d 725; see supra, §§1712, 1713.)

(b) *Amendment in 1971.* The Legislature was aware of logical inconsistencies in the judicial application of C.C. 3343 and other statutes dealing with damages for fraud; e.g., recovery of lost profits under the general tort statute (C.C. 3333) in cases not involving purchase of property and under the general contract statute (C.C. 3300) in breach of contract cases involving purchase of property; and U.C.C. 2721, permitting benefit-of-the-bargain recovery in cases subject to the *Commercial Code*. (22 C.3d 726.) The amendment was an expansion of the former section's treatment of consequential ("additional") damages: (1) Existing case law was stated to cover damage arising from lost time and money reasonably expended in reliance. (2) Recovery of lost profits was authorized as a component of "additional" damage. The amendment emphasized that this expansion was not an adoption of the "benefit-of-the-bargain" standards (which would be applicable regardless of whether the property was profit-producing). (22 C.3d 727.)

(c) *Application of amended statute.* The instruction was correct under *Hartman v. Shell Oil Co.* (1977) 68 C.A.3d 240, 137 C.R. 244, supra, §1715, i.e., it is proper to instruct only on the part of C.C. 3343 dealing with consequential damages, when, as here, the plaintiff does not seek recovery of an out-of-pocket loss. "The statute awards damage for traditional 'out-of-pocket' loss *together with* any additional damage arising from the particular transaction. ... If a

plaintiff shows no traditional 'out-of-pocket' loss, that component of the award is zero. If, however, he goes on to show consequential or 'additional' damage of the type prescribed by the statute, the amount which he so demonstrates is recoverable." (22 C.3d 729.) (See *Cory v. Villa Properties* (1986) 180 C.A.3d 592, 601, 225 C.R. 628 [following *Stout*]; *Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 C.A.3d 388, 430, 431, 264 C.R. 779 [discussing *Stout* and U.C.C. 2721].)

In *Kenly v. Ukegawa* (1993) 16 C.A.4th 49, 19 C.R.2d 771, defendant owned property encumbered by a note that was in default. To preclude a foreclosure that would harm his credit rating, defendant agreed to sell the property to plaintiff for the amount of the note. With borrowed funds, plaintiff purchased the note, but later learned that defendant was attempting to sell the property to another person. Plaintiff then instituted this action for fraud. Although defendant eventually paid plaintiff the full amount due on the note, the trial judge found that fraud had been committed, and awarded plaintiff damages of \$ 800,000, i.e., the lost profits that he would have obtained had defendant honored the agreement to sell the property to him. *Held*, this was error.

(a) Plaintiff cites no California authority holding that lost profits may be awarded to a defrauded party who never acquired the property to be resold. And the cases involving fraud where property was not acquired have limited damages to out-of-pocket losses. (16 C.A.4th 54, citing *Gray v. Don Miller & Associates* (1984) 35 C.3d 498, 198 C.R. 551, 674 P.2d 253, and *Christiansen v. Roddy* (1986) 186 C.A.3d 780, 231 C.R. 72, *supra*, §820.) These cases are consistent with the rule that a plaintiff in a tort action is not to be placed in a better position than he would have been had the wrong not been done. (16 C.A.4th 55.)

(b) C.C. 3343(a)(4) limits the recovery of lost profits to persons who have been fraudulently induced to "purchase or otherwise acquire the property in question." This language clearly contemplates that the person actually acquire the property from which profits were to be realized. Here, that property was the farm, which was never acquired by plaintiff. (16 C.A.4th 55, distinguishing *Hartman v. Shell Oil Co.*, *supra*, on the ground that the franchise in question was actually acquired by the defrauded party.)

(c) Plaintiff's argument that it was proper to award lost profits because the purchase of the note was the first step toward acquiring the farm is without merit. This theory requires that the multiple references to "property" in C.C. 3343(a)(4) be interpreted as referring to different properties. For example, in this case the property "acquired" would be the note, while the "profitable" property would be the farm. This does not accord with the limits specified in C.C. 3343(a)(4). (16 C.A.4th 55.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Breach of Fiduciary Duty.

6 *Witkin Sum. Cal. Law Torts* § 1717

[§ 1717] Breach of Fiduciary Duty.

Another exception to the statutory out-of-pocket loss rule (see *supra*, §1710) is recognized where the fraud is not by the vendor or purchaser but by a fiduciary; in this situation the general tort measure of C.C. 3333 (*supra*, §1548 et seq.) applies, and the defrauded party is entitled to compensation for the full amount of the loss caused by the breach of fiduciary duty.

In *Pepitone v. Russo* (1976) 64 C.A.3d 685, 688, 134 C.R. 709, plaintiff exchanged her real property for a motel owned by G. Defendant real estate broker drafted the exchange agreement and handled the transaction, without disclosing the fact that a second trust deed encumbering the motel had an acceleration clause. As a result, plaintiff lost the motel at a foreclosure sale, and sued defendant for damages for breach of fiduciary duty. The trial judge applied the out-of-pocket loss rule. *Held*, this was error.

(a) In cases of breach of fiduciary duty, the tort measure of damages under C.C. 3333 is similar to the contract measure under C.C. 3300 (see 1 *Summary* (10th), *Contracts*, §871); i.e., the injured party should be given the benefit of his or her bargain. (64 C.A.3d 689.)

(b) Applying this rule, plaintiff sustained a loss equal to the fair market value of the motel, plus the expenditures incurred in efforts to prevent the foreclosure. (64 C.A.3d 689.) (See *Overgaard v. Johnson* (1977) 68 C.A.3d 821, 824, 137 C.R. 412; *Walters v. Marler* (1978) 83 C.A.3d 1, 25, 147 C.R. 655; BAJI, No. 12.57; CACI, No. 1924.)

In *Salahutdin v. Valley of Calif.* (1994) 24 C.A.4th 555, 29 C.R.2d 463, plaintiffs informed their agent that they wished to buy property that could be subdivided. Their agent found a parcel that he assured them was more than an acre in size and could therefore be subdivided. In fact, the lot was less than an acre and almost certainly could not be subdivided. Plaintiffs brought the present action for negligent misrepresentation against the agent's employer. The trial judge found that the agent had breached his fiduciary duty to plaintiffs and committed constructive fraud. The judge determined damages under C.C. 3333 by comparing the value of the property plaintiffs received and the value of the property they would have received if the agent's representations had been accurate. *Held*, this was proper.

(a) In actions involving fiduciary fraud, some commentators have recognized a split of authority as to the proper measure of damages. One explanation for the split is that "benefit of the bargain" damages are awarded where the

principal sues the agent for fraud, and "out of pocket" damages are awarded where the theory is negligent misrepresentation. The result should not depend on mere pleading differences such as these, and the broader measure of damages is the fairer one. "This division has consistently applied the broader measure of damages for fiduciary fraud, refusing to limit damages to the 'out of pocket' measure." (24 C.A.4th 566, 567, citing *Ford v. Cournale* (1973) 36 C.A.3d 172, 111 C.R. 334, supra, §1710, *Pepitone v. Russo*, supra, and *Walsh v. Hooker & Fay* (1963) 212 C.A.2d 450, 458, 28 C.R. 16 supra, §1713.)

(b) The trial judge properly followed this approach, awarding plaintiffs the difference between the fair market value of comparable property that could be subdivided and the value of the subject property with only the remote possibility that a variance could be obtained in the future to allow subdivision. This compensated plaintiffs for any and all detriment proximately caused by the breach of fiduciary duty. (24 C.A.4th 561, 568.)

(c) The trial judge was also correct to use the *date of discovery* of the fraud to calculate "benefit of the bargain" damages. "Applying the difference as of the date of the transaction would defeat the goal of compensation for the entire loss where, as here, discovery of the fiduciary's constructive fraud did not occur until years after purchase of the property." (24 C.A.4th 568.) (For case holding that damages resulting from a fiduciary's *negligent misrepresentation* are measured by the out-of-pocket loss rule, see *Hensley v. McSweeney* (2001) 90 C.A.4th 1081, 1084, 109 C.R.2d 489 [following *Overgaard*, and disagreeing with *Salahutdin*, supra].)

Fragale v. Faulkner (2003) 110 C.A.4th 229, 1 C.R.3d 616, disagreed with *Hensley* and agreed with *Salahutdin*. Plaintiff buyers sued defendant seller and defendant broker for negligent and intentional misrepresentation in connection with the sale of a house, alleging that, contrary to what they had been told, serious defects existed with respect to additions to the house. At trial, the evidence showed that, while plaintiffs knew that the additions were constructed without permits, they were misled into believing that any defects were not serious. Defendant broker then moved for nonsuit on the ground that plaintiffs had not proved diminution of property caused by the defects, as required by the out-of-pocket-loss rule of C.C. 3343. The trial judge agreed, but nevertheless denied the motion and allowed the case to go to the jury on the cost of repairs. After the jury returned special verdicts against both defendants, finding them liable for negligent and intentional misrepresentation, the trial judge granted defendant broker's motion for judgment notwithstanding the verdict and entered judgment for defendants. *Held*, affirmed except with respect to the claim against defendant broker for intentional misrepresentation.

(a) In fraud cases involving the purchase of property, the out-of-pocket measure of damages stated in C.C. 3343 generally applies. However, in the case of fraud by a fiduciary, the broader measure provided by C.C. 3333 applies, i.e., all the detriment proximately caused by the tort. (110 C.A.4th 235, citing *Alliance Mortg. Co. v. Rothwell* (1995) 10 C.4th 1226, 44 C.R.2d 352, 900 P.2d 601, 4 Summary (10th), *Security Transactions in Real Property*, §176.) Here, defendant broker, as agent for both plaintiffs and defendant seller, was a fiduciary. However, because no fiduciary relationship existed between plaintiffs and defendant seller, plaintiffs' damages against this defendant were measured by C.C. 3343, and because plaintiffs produced no evidence of the actual value of the property they received, they failed to establish an essential element of their cause of action. (110 C.A.4th 235.)

(b) Under C.C. 3333, a plaintiff is only entitled to its actual or out-of-pocket losses suffered because of a fiduciary's *negligent* misrepresentation, and thus plaintiffs' claim against defendant broker for this tort suffered from the same defect as the claim against defendant seller. However, the California Supreme Court has not yet decided whether the measure of damages under C.C. 3333 might be greater for a fiduciary's *intentional* misrepresentation. Under the principles enunciated in C.C. 3333 (all the detriment proximately caused) and in C.C. 1709 (wilful deceiver is liable for any damage caused), the measure of damages in a case of intentional misrepresentation by a fiduciary is not limited to out-of-pocket losses. (110 C.A.4th 236.) Thus, the trial judge was not required to penalize plaintiffs for failing to establish the difference between the amount that they paid for the house and what it was worth in its non-code compliant condition. (110 C.A.4th 236.)

(c) Here, the jury's award of \$ 19,000 against defendant broker was presumably based on evidence about cost of

repair, and this award effectively enabled plaintiffs to place the property in the condition that they believed existed at the time of purchase. As such, it compensated plaintiffs for the detriment proximately caused, as permitted by C.C. 3333. Moreover, any significant difference between plaintiffs' out-of-pocket loss and the cost of repairs is unlikely in this case. Accordingly, the trial judge erred in entering judgment notwithstanding the verdict on the claim against defendant broker for intentional misrepresentation. (110 C.A.4th 239.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Strebel v. Brenlar Inv.* (2006) 135 C.A.4th 740, 745, 37 C.R.3d 699 [in prospective buyer's action against fiduciary for fraudulent concealment of information that prevented prospective purchase from being completed, out-of-pocket loss rule was inapplicable; instead, plaintiff was entitled to damages based on amount of appreciation of his existing house, which he sold prematurely].



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F. Trespass and Injury to Personal Property.
1. Injury.
a. Alternative Measures.

6 Witkin Sum. Cal. Law Torts § 1718

[§ 1718] Alternative Measures.

(1) *Depreciation and Loss of Use.* Where personal property is injured but not wholly destroyed, one rule is that the plaintiff may recover the depreciation in value (the measure being the difference between the value immediately before and after the injury), and compensation for the loss of use. (See *Crain v. Sumida* (1922) 59 C.A. 590, 597, 211 P. 479 [value of loss of use may be established by evidence of rental value of property]; *Hand Electronics v. Snowline Joint Unified School Dist.* (1994) 21 C.A.4th 862, 870, 26 C.R.2d 446, 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §103, quoting the text; *Rest.2d, Torts* §928; C.E.B., *Tort Damages* 2d, §13.1 et seq.; C.E.B., *California Attorney's Guide to Damages* 2d, §5.33; 61 *Harv. L. Rev.* 160; BAJI, Nos. 14.20, 14.22; CACI, Nos. 3903J, 3903M.) (On injury to livestock, see 79 *A.L.R.2d* 677; on injury to dog, see 61 *A.L.R.5th* 635; on injury to cat, see 8 *A.L.R.4th* 1287; on damage to motor vehicle, see 18 *Proof of Facts* 3d 239; on property damages generally, see 22 *Am.Jur.2d* (2003 ed.), *Damages* §§279, 282 et seq.; 3 *Proof of Facts* 491 [damages].)

(2) *Cost of Repairs and Loss of Use.* The plaintiff may also elect to repair the property, and recover the reasonable cost of repairs and the value of the loss of use while repairs are being made with due diligence. (See *Valencia v. Shell Oil Co.* (1944) 23 C.2d 840, 844, 147 P.2d 558; *Pfingsten v. Westenhaver* (1952) 39 C.2d 12, 23, 244 P.2d 395; *Rhodes v. Firestone Tire & Rubber Co.* (1921) 51 C.A. 569, 573, 197 P. 392; *Konda v. Frumpkin* (1928) 90 C.A. 384, 386, 265 P. 955; *Tremeroli v. Austin Trailer Equipment Co.* (1951) 102 C.A.2d 464, 480, 227 P.2d 923; *Johnson v. Central Aviation Corp.* (1951) 103 C.A.2d 102, 108, 229 P.2d 114; *Rest.2d, Torts* §928; 61 *Harv. L. Rev.* 160; cf. 64 *Harv. L. Rev.* 336 [no recovery for loss of use caused by plaintiff's inability to pay repair bill].)

Ordinarily, a plaintiff who elects to repair cannot recover both the cost of repairs and the depreciation in value; this is on the supposition that the repairs have restored the original value. But if this is not so, the requirement of election does not apply. Thus, in *Merchant Shippers Assn. v. Kellogg Express & Draying Co.* (1946) 28 C.2d 594, 170 P.2d 923, new precision machinery was damaged. The evidence showed that though repairs would put it in working order, it would be considered "secondhand" and would be difficult to sell in a limited market. *Held*, it was proper to award not only the cost of repairs, but the difference between its value before the injury and after the repairs were made. (28 C.2d 600.)

Although normally the period of loss of use is that reasonably required for making the repairs, a longer time is

sometimes allowed; e.g., where there was delay pending the arrival of new parts (*Lyle v. Seller* (1924) 70 C.A. 300, 302, 233 P. 345), and where the plaintiff was financially unable to make repairs (*Valencia v. Shell Oil Co.*, *supra*, 23 C.2d 846).

(3) *Special Damages*. Special damages may also be shown. (See *Lyle v. Seller* (1924) 70 C.A. 300, 302, 233 P. 345 [wages paid chauffeur, without benefit, while automobile was awaiting repairs].)

In *Johnson v. Central Aviation Corp.* (1951) 103 C.A.2d 102, 229 P.2d 114, plaintiffs' airplane was damaged by a student pilot. In addition to seeking the usual loss of use, they alleged that, prior to the collision, they had agreed to sell the plane, which cost them \$ 20,000, for \$ 27,500, and that they were damaged in the sum of \$ 7,500 lost profits. *Held*, it was error to strike out this allegation. "There is nothing necessarily inconsistent with a claim for damages for loss of use of the plane and a claim for loss of profits upon sale, since both elements of damage might, in a proper case, if the proof warranted, be allowable. Thus, the time for delivery of the plane under the sale might be far enough in the future to enable the owner to use the plane for his own purposes for a period of time before being obligated to deliver it to the buyer in accordance with his selling agreement." (103 C.A.2d 106.)

West's Key Number Digest, Damages k.5, 113

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Depreciation and Loss of Use*.

Hand Electronics case:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §94.



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1. Injury.
b. Where One Measure Is Larger.

6 *Witkin Sum. Cal. Law Torts* § 1719

[§ 1719] Where One Measure Is Larger.

A problem arises where one of the above mentioned alternative methods (*supra*, §1718) would result in a larger recovery than if the other rule were applied. It is apparently the California rule that, if the cost of repairs would amount to more than the depreciation in value, the plaintiff cannot obtain a greater sum than the amount of this depreciation. The burden is on the defendant, however, to show that the plaintiff's measure would result in the excess recovery. (See *Rhodes v. Firestone Tire & Rubber Co.* (1921) 51 C.A. 569, 574, 197 P. 392; *Konda v. Frumpkin* (1928) 90 C.A. 384, 385, 265 P. 955; cf. contrary statement in *Rest.2d, Torts* §928, Comment a.)

Similarly, it has been held that where the depreciation would be greater than the cost of repairs, the damages are limited to the reasonable cost of the repairs. (*Menefee v. Raisch Imp. Co.* (1926) 78 C.A. 785, 788, 248 P. 1031; *Olds & Stoller v. Seifert* (1927) 81 C.A. 423, 427, 254 P. 289; see *Byrne v. Western Pipe & Steel Co. of Calif.* (1927) 81 C.A. 270, 273, 253 P. 776.)

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2. Destruction.
a. Market Value.

6 *Witkin Sum. Cal. Law Torts* § 1720

[§ 1720] Market Value.

(1) *In General.* If the property is wholly destroyed, the usual measure of damages is its market value. (See *Murray v. Southern Pac. Co.* (1931) 112 C.A. 150, 155, 296 P. 667; *Tatone v. Bing* (1936) 12 C.A.2d 543, 544, 55 P.2d 933 [vegetables and fruit, testimony about cost admitted]; *Lane v. Spurgeon* (1950) 100 C.A.2d 460, 463, 223 P.2d 889; *Parks v. Atwood Crop Dusters* (1953) 118 C.A.2d 368, 373, 257 P.2d 653 [cotton crop]; *Hand Electronics v. Snowline Joint Unified School Dist.* (1994) 21 C.A.4th 862, 870, 26 C.R.2d 446, 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §103, quoting the text [market value was proper measure of damages where pantographs (used for making printed circuit boards) were rendered unrepairable in traffic accident; C.C. 1431.2 (supra, §§53, 61, 62) applies only to allocation of damages, and thus did not affect measure of damages]; *Rest.2d, Torts* §927; see 22 *Am.Jur.2d* (2003 ed.), *Damages* §282; 61 *Harv. L. Rev.* 125, 159; 32 *A.L.R.2d* 910 [perishable goods]; 9 *A.L.R.4th* 1245 [loss, destruction, or conversion of personal papers, photographs, or paintings]; BAJI, No. 14.21; CACI, No. 3903K; on destruction of livestock, see 79 *A.L.R.2d* 677; on killing of dog, see 1 *A.L.R.3d* 997.)

In *Pelletier v. Eisenberg* (1986) 177 C.A.3d 558, 223 C.R. 84, citing the text, plaintiff artist sued defendant art gallery owners for losses suffered by destruction of consigned paintings, and received a verdict for their fair market value. Defendants contended that the 40% commission payable under the consignment contract on sale of paintings should have been deducted. *Held*, plaintiff was entitled to the entire amount. The parties agreed to a commission if the paintings were sold, not if they were destroyed; and plaintiff would not be compensated for his loss if he had to pay for something he never acquired (benefits from the sale of his paintings), and which defendants never earned (a commission for sale of the paintings). (177 C.A.3d 567.)

(2) *Value to Owner.* Where the market value is relatively small as compared with its special value to the owner, the value to the owner may sometimes be recovered, and resort may be had to this evidence as the value of time spent in producing it. This exception is applied, e.g., to books and manuscripts. (See *Willard v. Valley Gas & Fuel Co.* (1915) 171 C. 9, 14, 151 P. 286; *Rest.2d, Torts* §911, Comment e; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§287, 291 et seq., 721; 3 *Proof of Facts* 3d 171 [damages]; 61 *Harv. L. Rev.* 126.)

West's Key Number Digest, Damages k.105, 113

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Hand Electronics case:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §94.



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2. Destruction.
b. Loss of Use.

6 *Witkin Sum. Cal. Law Torts* § 1721

[§ 1721] Loss of Use.

Where property is *injured*, recovery is allowed for loss of use during the time required for repairs (see *supra*, §1718). Where it is totally destroyed, there is authority denying recovery for loss of use, chiefly on the common law theory that destruction changes the plaintiff's right from one of ownership to a claim for the value. (See 33 *So. Cal. L. Rev.* 451.) However, in *Reynolds v. Bank of America* (1959) 53 *C.2d* 49, 345 *P.2d* 926, the court disapproved prior dicta and followed the Restatement in rejecting this limitation. Defendant's testator had negligently destroyed plaintiff's airplane. Recovery of its value, \$ 30,000, was allowed by the trial judge, but value of its use for the 4-month period required to find a replacement, and loss of business profits for this period, was denied. *Held*, reversed.

"There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable, and we have concluded that when the owner of a negligently destroyed commercial vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled, upon proper pleading and proof, to recover for loss of use in order to 'compensate for all the detriment proximately caused' by the wrongful destruction." (53 *C.2d* 50.) (See *Rest.2d, Torts* §927(2)(d); 22 *Am.Jur.2d* (2003 *ed.*), *Damages* §§296, 297; 33 *So. Cal. L. Rev.* 451 [pointing out that speculative recovery can be avoided by strict insistence on minimizing damages]; 12 *U.S.F. L. Rev.* 311 [admiralty collision cases]; 73 *A.L.R.2d* 719 [measure of damages for destruction or injury to airplane]; 18 *A.L.R.3d* 497 [recovery for loss of use of motor vehicle damaged or destroyed].)

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See *Metz v. Soares* (2006) 142 *C.A.4th* 1250, 1255, 48 *C.R.3d* 743 [classic car owner, whose car was rendered total loss when exposed to elements while at repair shop, was not entitled to loss of use damages in absence of proof that he used classic car; owner had not used car for 5 years before leaving car at shop, and he did not establish that he intended to use it during 4 years that it was at shop]; 32 *Western State L. Rev.* 141 [damages for loss of companion animal].



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3. Conversion.
a. Alternative Measures.

6 *Witkin Sum. Cal. Law Torts* § 1722

[§ 1722] Alternative Measures.

Where the property is taken, and the action is brought for conversion, the basic recovery is for the value of the property with interest. But the difficult question in conversion is the time as of which the value is to be determined. The plaintiff may recover either (1) the value of the property at the time of conversion, with interest from that time, or (2) "an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted." In addition to either of these, the plaintiff may also receive a fair compensation for the time and money properly expended in pursuit of the property. (C.C. 3336; see *Friedman v. Renz* (1939) 31 C.A.2d 71, 73, 87 P.2d 386 [shares of stock]; *Chatterton v. Boone* (1947) 81 C.A.2d 943, 947, 185 P.2d 610; *Stroman v. Lynch* (1949) 91 C.A.2d 406, 408, 205 P.2d 409; *Wong v. Paine, Webber, Jackson & Curtis* (1962) 208 C.A.2d 17, 20, 24 C.R. 821; *Krueger v. Bank of America* (1983) 145 C.A.3d 204, 215, 193 C.R. 322, quoting the text [proper measure is value where plaintiff fails to establish existence of special circumstances to invoke alternative]; *Lueter v. California* (2002) 94 C.A.4th 1285, 1301, 115 C.R.2d 68 [award of \$ 1.50 for conversion was approved where there was only remote possibility that destroyed evidence would have been usable in litigation; C.C. 3333 (supra, §1548) and C.C. 3336 were not applicable under these facts]; *Rest.2d, Torts* §927; 18 *Am.Jur.2d* (2004 ed.), *Conversion* §116 et seq.; 61 *Harv. L. Rev.* 127, 158.) (On conversion of secured note, see *infra*, §1723; on conversion of livestock, see 79 *A.L.R.2d* 677; on conversion of corporate stock, see 31 *A.L.R.3d* 1286; on conversion of wearing apparel or household goods, see 34 *A.L.R.3d* 816; on right of nonowner with special interest to recover full value of property converted, see *supra*, §706.)

Expenses incurred in preparation for litigation rather than in pursuit of property are not recoverable. (See *Haines v. Parra* (1987) 193 C.A.3d 1553, 1559, 239 C.R. 178.) However, C.C. 3336 extends to efforts related to, but having a purpose independent of, litigation, such as preparation of lists of property, inspection of inventories, and contacts with police. (*Gladstone v. Hillel* (1988) 203 C.A.3d 977, 992, 250 C.R. 372.)

Although the first and specific statutory alternative--the value with interest--is the typical measure, the other general alternative is sometimes applied. In *Wade v. Markwell & Co.* (1953) 118 C.A.2d 410, 258 P.2d 497, an action for conversion of a fur coat, the court considered the cost, extent of use, and depreciation formula (estimated life 8 years) in determining the award. (118 C.A.2d 432.) In *Ruiz v. Bank of America* (1955) 135 C.A.2d Supp. 860, 287 P.2d 409, plaintiff, the conditional buyer of a car, was induced by defendant seller to have repairs made, after which the

seller refused to return it. Because plaintiff was not the complete owner but had an interest in the car, its value could be repaid to him by applying the general alternative measure. (135 C.A.2d Supp. 864.) In *Myers v. Stephens* (1965) 233 C.A.2d 104, 43 C.R. 420, plaintiff was engaged in the business of buying houses to move, relocate, and resell. Defendant sold him an old house for a nominal sum (\$ 250) in order to get rid of it; then defendant resold to another. The first measure (value of the property) would have been wholly inadequate, for plaintiff had investigated locations and had agreed to buy a lot, and would have made an ascertainable profit had the deal gone through. Hence, he was entitled, under the alternative measure, to loss of profits--\$ 3,040. (233 C.A.2d 116.)

Where timber is taken, "damage should be determined on the basis of market value, less the reasonable and necessary cost of marketing, the same as with annual crops, i.e., the expense of harvesting, cutting, hauling and delivering the logs to the mill where they were sold." (*Crofoot Lumber v. Ford* (1961) 191 C.A.2d 238, 249, 12 C.R. 639.)

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Value of property at time of conversion: See *Virtanen v. O'Connell* (2006) 140 C.A.4th 688, 708, 44 C.R.3d 702 [substantial evidence supported award of compensatory damages to prospective seller of stock converted by attorney who was acting as escrow holder, where amount of award reflected testimony of investor, who had purchased same stock from seller, as to stock's value at time of conversion].



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b. Conversion of Secured Note.

6 *Witkin Sum. Cal. Law Torts* § 1723

[§ 1723] Conversion of Secured Note.

Knudsen v. Hill (1964) 227 C.A.2d 639, 38 C.R. 859, examines the question of value of a note secured by a purchase money mortgage or deed of trust. C gave plaintiff such a note for \$ 26,500. Plaintiff borrowed \$ 18,000 from defendants and pledged the C note as security. With a balance of \$ 11,800 owing, defendants wrongfully converted the note by selling it to an agent of C for \$ 16,052.26. Plaintiff was admittedly entitled to the statutory damages for conversion (value of property or compensation for loss), but what was the value of the note? The trial judge took the *sale price* as the value, thus awarding damages of \$ 16,052.26, less the balance owed. *Held*, reversed; plaintiff was entitled to the *face value* at the time of conversion, \$ 24,674.20, less the balance owed.

(a) The general American rule is that, where a note imposes personal liability on the maker, its face value is *prima facie* its true value, subject to contrary proof. But if, as here, it can be collected only from the security (purchase money mortgage, no deficiency judgment), the measure of damages is the *value of the security* at the time of conversion. (227 C.A.2d 642.)

(b) This latter rule may be applied here under the general language of C.C. 3356: "For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner." (227 C.A.2d 643.)

(c) The trial judge's measure--the sale price--was improper. (1) This was not an open sale but a secret and unfair transaction in which C bought a note for \$ 16,052.26 which was admittedly worth \$ 24,674.20 (because it wiped out a fully secured obligation in that amount). (2) Defendant sellers had no reason to bargain for a higher price because they had to turn over everything above \$ 11,800 to plaintiff. (227 C.A.2d 644.)

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4. Detention: Replevin.
a. In General.

6 *Witkin Sum. Cal. Law Torts* § 1724

[§ 1724] In General.

(1) *Where Property Is Recovered.* If the action is not brought for conversion, but instead the plaintiff either repossesses the property or sues for and obtains its specific recovery (replevin), he or she is entitled to damages for its detention. One measure is interest on the value of the property from the time of taking, which may be sought, e.g., where the property has no substantial use value. But if the property consists of machinery, automobiles, or something else with a readily provable use or rental value, the plaintiff may recover the value of the use from the time of taking to the time he or she regains possession. (*Dunlop v. Farmer* (1923) 64 C.A. 691, 693, 222 P. 640; *Ferris v. Cooper* (1932) 125 C.A. 234, 237, 13 P.2d 536; see *Rest.2d, Torts* §931; 66 *Am.Jur.2d* (2001 ed.), *Replevin* §93 et seq.) A plaintiff who rents a substitute may recover the reasonable cost. (*Rest.2d, Torts* §931.)

If the property has diminished in value from the time of taking, the depreciation is, of course, a necessary element to restore the plaintiff to his or her original position. (See *Berry v. Bank of Bakersfield* (1918) 177 C. 206, 210, 170 P. 415; *Anglo-Calif. Trust Co. v. Collins* (1923) 192 C. 315, 317, 219 P. 982; *Spencer Kennelly, Ltd. v. Bank of America* (1942) 19 C.2d 586, 589, 122 P.2d 552.) And special damages may be recoverable in a proper case. (See *Ruzanoff v. Retailers Credit Assn. of Sacramento* (1929) 97 C.A. 682, 686, 276 P. 156; *Rest.2d, Torts* §931.)

(2) *Where Property Is Not Recovered.* If the plaintiff sues for specific recovery, but the property is lost or destroyed, the action does not automatically become one for conversion, which would ordinarily limit damages to the value of the property and interest. Under C.C.P. 667, the plaintiff is entitled to the value and damages for the detention. The value is given as a substitute for the return of the property itself, and in addition, the plaintiff may recover as usual for the loss of use. (*Nahhas v. Browning* (1919) 181 C. 55, 57, 183 P. 442; *Drinkhouse v. Van Ness* (1927) 202 C. 359, 374, 379, 260 P. 869; *Guerin v. Kirst* (1949) 33 C.2d 402, 414, 202 P.2d 10; *Smith v. Pilgrim* (1931) 117 C.A. 244, 246, 3 P.2d 573.)

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4. Detention: Replevin.
b. Use Value in Excess of Value of Property.

6 *Witkin Sum. Cal. Law Torts* § 1725

[§ 1725] Use Value in Excess of Value of Property.

The use value is ordinarily the net rental value; and, under some circumstances, as where the period of deprivation is long, the sum recovered may be greater than the value of the property itself. It has been said that this is not necessarily improper; but the disparity may be so great, e.g., double the value, that the court may consider the damages excessive. (See *Tucker v. Hagerty* (1918) 37 C.A. 789, 791, 174 P. 908; *Booth v. The Peoples Finance & Thrift Co. of Modesto* (1932) 124 C.A. 131, 137, 12 P.2d 50.)

In *Mutch v. Long Beach Imp. Co.* (1920) 47 C.A. 267, 190 P. 638, plaintiffs' car, worth \$ 400, was detained for 20 months. Damages were awarded for the loss of use in about 3 times that amount. *Held*, the award was excessive; it is improper to grant an amount for the value of use out of all proportion to the value of the thing itself, because this would in effect be punitive damages, and would violate the rule of C.C. 3359 that damages must be reasonable. (47 C.A. 269.) (See *Bonestell v. Western Automotive Finance Corp.* (1924) 69 C.A. 719, 726, 232 P. 734.)

In *Fran-Well Heater Co. v. Robinson* (1960) 182 C.A.2d 125, 5 C.R. 900, two oil well heaters were wrongfully withheld. The trial court awarded reasonable monthly rental of \$ 200 from detention to trial, about 21/2 years, or a total of over \$ 5,000, although the property was worth only \$ 1,679.26. *Held*, grossly disproportionate, and judgment reversed. (182 C.A.2d 133.)

In *Harris v. Dixon Cadillac Co.* (1982) 132 C.A.3d 485, 183 C.R. 299, the court criticized the *Mutch* decision and quoted *Smith v. Pilgrim* (1931) 117 C.A. 244, 246, 3 P.2d 573, and *Reynolds v. Bank of America* (1959) 53 C.2d 49, 345 P.2d 926, *supra*, §1721, as indicative of the better view. In *Harris*, plaintiff's car was wrongfully detained for more than a year; she could not afford the \$ 10 to \$ 15 per day leasing cost for a rental automobile, and had to quit her job and move to her parents' home. The value of the car was \$ 2,500; the damage award was \$ 7,500, or less than \$ 5 per day for the period of detention. *Held*, the award was supported by the evidence and was not unreasonable. (132 C.A.3d 490, 491, 492.)

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G. Trespass and Injury to Real Property.
1. Wrongful Occupancy.

6 Witkin Sum. Cal. Law Torts § 1726

[§ 1726] Wrongful Occupancy.

A mere trespass, without injury or occupancy, will justify only nominal damages (see *supra*, §1546); but if the trespass is followed by occupancy, the plaintiff can recover for the value of the use during the period. (C.C. 3334(a) [period not exceeding 5 years before action]; see *Rest.2d, Torts* §931.) This is normally the fair rental value on the market when offered for rent under ordinary circumstances. (*Bourdieu v. Seaboard Oil Corp. (1944) 63 C.A.2d 201, 207, 146 P.2d 256.*) However, the statutory definition of "value of the use of the property" is broader: the phrase means the greater of reasonable rental value or the benefits obtained by the wrongful occupier, with the qualification that reasonable rental value must be used if the wrongful occupation was the result of the wrongful occupier's mistake of fact. (C.C. 3334(b); see *11382 Beach Partnership v. Libaw (1999) 70 C.A.4th 212, 218, 82 C.R.2d 533* [where there was evidence of rental value of commercial premises destroyed by fire, it was error to deny damages for lessee's delay in surrendering premises]; C.E.B., *Attorney's Guide to Damages* 2d, Chap. 5.)

The plaintiff may also obtain the reasonable cost of repair or restoration of the property to its original condition (see *infra*, §1728), and the costs, if any, of recovering the possession. (C.C. 3334(a).) (On compensation to innocent improver, see *12 Summary* (10th), *Real Property*, §462.)

The owner is entitled to recover damages under C.C. 3334 even though he or she does not presently intend to use the land; otherwise, the wrongful occupier could gain expense-free use of the property. In *Don v. Trojan Const. Co. (1960) 178 C.A.2d 135, 2 C.R. 626*, plaintiffs bought a commercially zoned lot, intending to build a supermarket, but delayed construction for financial reasons. Defendant contractor, building a subdivision nearby and needing a place to store dirt, used plaintiffs' lot on the alleged permission from its former owner and in the asserted belief that it was still owned by that owner. The trial judge found that the average rental value of the land during the time of use was \$ 550, or \$ 5,500 for the period. But, because plaintiffs would not have used or rented it, he concluded that they suffered no damages except the technical invasion of their possessory rights, for which he awarded \$ 200 as nominal damages. *Held*, reversed, with directions to enter judgment for \$ 5,500. (*178 C.A.2d 139.*)

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Benefit obtained: See *Watson Land Co. v. Shell Oil Co. (2005) 130 C.A.4th 69, 76, 29 C.R.3d 343* [oil company's

avoidance of remediation costs of leaking gasoline pipeline under landowner's property was not "benefit" to oil company that entitled landowner to recover benefit damages under C.C. 3334(b)(1), where oil company derived no financial advantage from leakage and resulting contamination]; *Bailey v. Outdoor Media Group* (2007) 155 C.A.4th 778, 787, 66 C.R.3d 322 [in calculating "benefits obtained" from wrongful occupation of land for operation of business, trial court may offset expenses incurred by trespassing defendant against gross income only when defendant presents credible evidence of expenses incurred, but, when defendant fails to do so, trial court may award damages based on gross revenue].



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CHAPTER IX - Torts

Witkin Summary of California Law
XVIII. DAMAGES: KINDS OF INJURY
G. Trespass and Injury to Real Property.
2. Injury to Land or Improvements by Completed Wrong.
a. Diminution in Value.

6 Witkin Sum. Cal. Law Torts § 1727

[§ 1727] Diminution in Value.

(1) *In General.* The different kinds of real property and varying types of injury make it unwise to establish a fixed rule governing damages, and consequently a number of alternative theories are applied. (See *Hancock v. George R. Curtis Paving Co.* (1931) 114 C.A. 624, 628, 300 P. 65; *Givens v. Markall* (1942) 51 C.A.2d 374, 379, 124 P.2d 839; *Cornell v. Sennes* (1971) 18 C.A.3d 126, 136, 95 C.R. 728, citing the text; *Mozzetti v. Brisbane* (1977) 67 C.A.3d 565, 576, 136 C.R. 751; *Heninger v. Dunn* (1980) 101 C.A.3d 858, 862, 162 C.R. 104, citing the text; *Armitage v. Decker* (1990) 218 C.A.3d 887, 904, 267 C.R. 399; *Cassinis v. Union Oil Co.* (1993) 14 C.A.4th 1770, 1788, 18 C.R.2d 574; *Rest.2d, Torts* §929; 22 *Am.Jur.2d* (2003 ed.), *Damages* §265 et seq.; 42 *Proof of Facts* 2d 247 [damages for injury to real property]; 33 *Proof of Facts* 3d 163 [proof of diminished property value due to environmental contamination]; 56 *Am.Jur. Trials* 369 [recovery of damages for property devaluation from off-site environmental hazards]; 25 *Cal. Western L. Rev.* 367 [Stigma Damages: The Case for Recovery in Condominium Construction Defect Litigation]; 61 *Harv. L. Rev.* 161; 82 *A.L.R.2d* 1106 [waste by tenant]; 1 *A.L.R.3d* 801 [wrongful removal of earth, sand, or gravel]; 31 *A.L.R.4th* 171 [measure and elements of damages for injury to bridge]; *infra*, §1728 et seq.; on statutory penalty for intentional or malicious destruction of property at building site, see *supra*, §1570.)

However, the basic and normal rule uses diminution in value as the measure; i.e., the difference between the market value of the land before and after the injury. (*Herzog v. Grosso* (1953) 41 C.2d 219, 226, 259 P.2d 429 [increase in grade of road to plaintiff's property]; *Hancock v. George R. Curtis Paving Co.*, *supra*; *Revis v. I.S. Chapman & Co.* (1933) 130 C.A. 109, 115, 19 P.2d 511; *Willoughby v. Southern Pac. Co.* (1948) 83 C.A.2d 414, 415, 188 P.2d 816 [residence damaged by surface waters]; *Basin Oil Co. v. Baash-Ross Tool Co.* (1954) 125 C.A.2d 578, 606, 271 P.2d 122; *Ferraro v. Southern Calif. Gas Co.* (1980) 102 C.A.3d 33, 50, 51, 162 C.R. 238; *Rest.2d, Torts* §§929(1)(a), 911.)

Where the injury is only temporary, the usual measure is the impairment of rental value during the period. (*Guttinger v. Calaveras Cement Co.* (1951) 105 C.A.2d 382, 387, 233 P.2d 914, *infra*, §1729; *Spaulding v. Cameron* (1954) 127 C.A.2d 698, 706, 274 P.2d 177.)

(2) *Loss of Value While Repairs Are Being Made.* In *Safeco Ins. Co. of America v. J & D Painting* (1993) 17 C.A.4th 1199, 21 C.R.2d 903, defendant's employees negligently caused a fire at plaintiff's home, and plaintiff's insurer paid him \$ 247,118 for repairs and \$ 19,500 for loss of use. During the 6 months that the repairs were being made, the

value of the home declined by \$ 300,000, owing to a general decline in market value for similar homes in that area. Plaintiff then instituted the present action to recover from defendant the loss in value during the repair period, as well as the extra mortgage interest he was required to pay during that period due to his inability to sell the house at its previous value. *Held*, summary judgment for defendant affirmed.

(a) Plaintiff is not seeking double damages, i.e., if his repaired house is worth \$ 300,000 less than it was prior to the fire, then a recovery of that amount above the cost of repair would be no more than restorative. And plaintiff might be able to show that, but for defendant's negligence, he would have been able to sell his house earlier for more than he can now obtain. However, C.C. 3333 (*supra*, §1553) mandates recovery not simply for all detriment caused by the defendant's negligence, but for all detriment proximately caused. (17 C.A.4th 1204.)

(b) A superseding cause that is utterly unrelated to the defendant's negligence breaks the chain of proximate cause and bars recovery. Here, the decline in market value was such a superseding cause, i.e., it bore no relation whatsoever to defendant's negligence, which was merely the condition or occasion for the market decline to affect plaintiff's house. Nor was the decline in market value foreseeable by defendant. Based on recent history, a delay in the sale of property in California would more likely increase the owner's return. (17 C.A.4th 1204.)

(c) This case differs from slander of title or wrongful attachment cases, in which plaintiffs have been awarded the difference in market value between the time a lien is imposed and the time it is lifted (see, e.g., *Gudger v. Manton* (1943) 21 C.2d 537, 134 P.2d 217, *supra*, §1703). In those cases, the defendant acted intentionally to adversely affect the marketability of property, thereby making the decline in market value a proximate cause of the tort. (17 C.A.4th 1205.)

(d) "Under a proximate cause analysis, there is a clear distinction between awarding cost of repair even when it exceeds the diminution in value (which is permissible) and awarding diminution in value even when it exceeds the cost of repair (which is impermissible). Destruction which the court allows to be repaired for personal reasons, at a cost exceeding the diminution in value, is clearly proximately caused by the defendant's negligence. There is no such causal connection here." (17 C.A.4th 1205.)

(e) Finally, there is no compelling public policy reason to allow plaintiff to recover when the time needed to repair negligently inflicted property damage coincides with a general decline in the market for these properties. That recovery would not deter negligence in any meaningful way. The opportunity to sell in a high market may present itself again. And those unlucky enough to sell in low markets are often able to buy in low markets. Defendant's negligence appears only to have deprived plaintiff of the fortuitous opportunity to sell in an inflated market. To the extent that plaintiff's desire to sell in that market may have been motivated by an astute analysis of the market, the less excusable was it for him to wait to sell until the repairs were finished. (17 C.A.4th 1205.)

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 b. Cost of Repairs.

6 Witkin Sum. Cal. Law Torts § 1728

[§ 1728] Cost of Repairs.

(1) *In General.* Another permissible measure is the reasonable cost of repair or restoration of the property to its original condition, together with the value of the lost use during the period of injury. (*Linforth v. San Francisco Gas & Elec. Co.* (1909) 156 C. 58, 62, 103 P. 320; *Higgins v. Los Angeles Gas & Elec. Co.* (1911) 159 C. 651, 662, 115 P. 313; *Erllich v. Menezes* (1999) 21 C.4th 543, 555, 87 C.R.2d 886, 981 P.2d 978, *supra*, §1037, citing the text; *Cox v. Odell* (1905) 1 C.A. 682, 685, 82 P. 1086; *Dandoy v. Oswald Bros. Paving Co.* (1931) 113 C.A. 570, 572, 298 P. 1030 [cost of removing materials dumped on land]; *Kell v. Jansen* (1942) 53 C.A.2d 498, 503, 127 P.2d 1033; *Plonley v. Reser* (1960) 178 C.A.2d Supp. 935, 937, 940, 3 C.R. 551; *Pacific Tel. & Tel. Co. v. Granite Const. Co.* (1964) 225 C.A.2d 765, 770, 37 C.R. 727, *supra*, §1625; *Raven's Cove Townhomes v. Knuppe Dev. Co.* (1981) 114 C.A.3d 783, 802, 171 C.R. 334, quoting the text; *Armitage v. Decker* (1990) 218 C.A.3d 887, 905, 267 C.R. 399; *Rest.2d, Torts* §929; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§263, 265; 42 *Proof of Facts* 2d 247 [damages for injury to real property].) Thus, where a lessor of an oil lease wrongfully caused the destruction of a prospect hole, the measure of damages was held to be the cost of redrilling to the place where the destruction occurred. (*Alphonzo E. Bell Corp. v. Lisle* (1946) 74 C.A.2d 638, 651, 169 P.2d 462.)

(2) *Personal Use Exception.* *Rest.2d, Torts* §929, Comment b considers the cost of repair an allowable measure of damages where the owner has a good personal reason for restoring the property, even though the cost would be greater than the diminution in value of the land. In California, however, the older cases have that the expense of repairs is not allowable where it would exceed the depreciation in value. (See *Salstrom v. Orleans Bar Gold Mining Co.* (1908) 153 C. 551, 558, 96 P. 292; *Kell v. Jansen*, *supra*; *Basin Oil Co. v. Baash-Ross Tool Co.* (1954) 125 C.A.2d 578, 606, 271 P.2d 122; 5 *So. Cal. L. Rev.* 249; cf. *Herzog v. Grosso* (1953) 41 C.2d 219, 226, 259 P.2d 429 [defendant, contending that cost of repairs was less than depreciation, failed to prove it].)

In *Heninger v. Dunn* (1980) 101 C.A.3d 858, 162 C.R. 104, citing the text, the court held that the personal reason exception may be invoked where shade or ornamental trees have been destroyed, and replacement can be made at a cost that is not unreasonable in relation to the damage inflicted and the value of the land. (101 C.A.3d 864, 865, 866.)

In *Orndorff v. Christiana Community Builders* (1990) 217 C.A.3d 683, 266 C.R. 193, the court adopted the exception with a limitation. Plaintiffs' home was built by defendants on defectively compacted soil, and settlement

occurred. In this action, the trial judge found on evidence presented by plaintiffs that it would cost \$ 243,539.95 to repair the defects and relocate the plaintiffs while the repairs were being completed. Their appraiser testified that after repair the home would be worth \$ 238,500. The judge awarded plaintiffs the repair and relocation expenses, but defendants contended that the award should have been only in the amount by which the defendants had diminished the value of the home. *Held*, judgment affirmed.

(a) *Heninger v. Dunn*, *supra*, approved the personal reason exception, and this supports the award. That exception does not require that the home be unique; it is enough that it is required for some personal use by the owners and that they have a bona fide desire to repair or restore. (217 C.A.3d 688, quoting *Heninger* and *Rest.2d, Torts* §929, Comment b.)

(b) Contrary to defendants' contention, the personal reason exception is not incompatible with the imposition of strict liability for defects in mass-produced residential housing. "Neither a consumer's reliance upon a builder's expertise nor the builder's ability to spread his risks over a large number of his products suggests that a home, once purchased, can be readily replaced. Indeed the record in this case suggests quite the contrary. The Orndorffs purchased a home which abuts an open-space easement and thus is free of neighbors on one side; they have also made substantial improvements to their home in the 11 years they have occupied it. Accordingly, we find no inconsistency in the Orndorffs' reliance on the doctrine of strict liability and their desire to repair their home rather than abandon it." (217 C.A.3d 689.)

(c) "By requiring that repair costs bear a reasonable relationship to value before harm and to the level of harm actually suffered, the *Heninger* case prevents the unusual or bizarre results the defendants in this case contend would occur should we stray in any manner from a diminution in value measure of damages. Contrary to the defendants' argument, application of the personal reason exception does not permit a plaintiff to insist on reconstruction of a unique product where the cost of repair will far exceed either the value of the product or the damage the defendant has caused. As we interpret *Heninger*, the owner of a unique home or automobile cannot insist on its reconstruction where the cost to do so far exceeds the value of the home or automobile. Nor are repair costs appropriate where only slight damage has occurred and the cost of repair is far in excess of the loss in value." (217 C.A.3d 690.)

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c. Lost Profits.

6 *Witkin Sum. Cal. Law Torts* § 1729

[§ 1729] Lost Profits.

In *Natural Soda Products Co. v. Los Angeles* (1943) 23 C.2d 193, 143 P.2d 12, plaintiff's business was the removal and processing of soda deposits from a dry lake bed. Defendant flooded the lake, damaging the minerals and making the plant inaccessible. *Held*, plaintiff could recover for lost profits, based on evidence of past earnings. (23 C.2d 199.) (See *Razzano v. Kent* (1947) 78 C.A.2d 254, 261, 177 P.2d 612, *infra*, §1737; *Lucky Auto Supply v. Turner* (1966) 244 C.A.2d 872, 881, 53 C.R. 628, 12 *Summary* (10th), *Real Property*, §430 [wrongful interference with license to use parking lot for business customers].)

On the other hand, in *Guttinger v. Calaveras Cement Co.* (1951) 105 C.A.2d 382, 233 P.2d 914, defendant's cement plant emitted dust and gases that were deposited over part of plaintiffs' cattle grazing lands. The injury was clearly temporary, the grazing acreage was greatly in excess of the area affected, and the tort therefore did not necessarily cause a loss of profits, for the production of cattle may have been the same. Hence, plaintiffs failed to show a basis for the loss of profits measure, and the rental value measure was properly applied. (105 C.A.2d 389.)

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d. Emotional Distress.

6 *Witkin Sum. Cal. Law Torts* § 1730

[§ 1730] Emotional Distress.

The occupant, regardless of physical injury, may recover damages for "the discomfort and annoyance of himself and the members of his family and for mental suffering occasioned by fear for the safety of himself and his family when such discomfort or suffering has been proximately caused by a trespass or a nuisance." (*Acadia, Calif., Ltd. v. Herbert* (1960) 54 C.2d 328, 337, 5 C.R. 686, 353 P.2d 294 [approving additional recovery for loss of wife's services in home]; see *Alonso v. Hills* (1950) 95 C.A.2d 778, 787, 214 P.2d 50; *Smith v. Los Angeles* (1989) 214 C.A.3d 266, 288, 262 C.R. 754, citing *Acadia, Calif., Ltd.* and *Alonso*; *Armitage v. Decker* (1990) 218 C.A.3d 887, 905, 267 C.R. 399, citing the text; *Rest.2d, Torts* §929(1)(c).)

In *Herzog v. Grosso* (1953) 41 C.2d 219, 259 P.2d 429, plaintiffs, husband and wife, were given damages for defendant's obstruction of the access road to their home. *Held*, it was proper to include an award of \$ 1,500 to each for "nervousness, worry, and mental distress for the safety of themselves and their daughter and others" who had to use the dangerous road. (41 C.2d 225.)

In *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 C.2d 265, 288 P.2d 507, defendant company, operating a cotton ginning and cottonseed processing plant, produced for about 6 months each year fumes, dust, lint, etc., covering the furniture, garden, and persons of plaintiffs. *Held*, verdict and judgment for \$ 9,541 affirmed. Even though the trespass was not of a type that would ordinarily cause fright or shock, the annoyance and discomfort was a natural consequence. (45 C.2d 272.)

In the *Acadia* case, *supra*, defendant cut off plaintiff's water supply. "Defendant's disruption of the water supply is closely analogous to a trespass or a nuisance in that it interfered with the use and enjoyment of the land by Burke and his wife, and such conduct warrants imposition of liability for mental distress of the occupants, at least where, as here, the tortious acts are wilful." And it "is immaterial whether defendant knew of Mrs. Burke's unstable mental condition," for "a tortfeasor must take his victim as he finds him." (54 C.2d 338.)

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3. Independent Unit or Fixture.

6 *Witkin Sum. Cal. Law Torts* § 1731

[§ 1731] Independent Unit or Fixture.

Where a portion of the land, such as a building, has been injured or destroyed, and can be treated as a separate unit for purposes of damages, the plaintiff may recover for its diminution in value if injured, or its value if destroyed. (*Williams v. Faria* (1931) 112 C.A. 455, 461, 297 P. 78; *Hancock v. George R. Curtis Paving Co.* (1931) 114 C.A. 624, 628, 300 P. 65; *Rest.2d, Torts* §929, Comment f; 22 *Am.Jur.2d* (2003 ed.), *Damages* §§269 et seq., 756, 757.)

Another election is allowed where the property is a *fixture*, which is taken from the land or destroyed. The proper measure is usually its value in place as part of the realty, and not the much smaller price it would sell for if removed. Hence, if it has no substantial value apart from the land, the plaintiff may use the ordinary measure of diminution in value of the land. (See *Wilmerton v. Morton* (1946) 74 C.A.2d 891, 897, 169 P.2d 992 [tenant's wrongful removal of central refrigeration plant from apartment house]; *Cornell v. Sennes* (1971) 18 C.A.3d 126, 135, 95 C.R. 728; 22 *Am.Jur.2d* (2003 ed.), *Damages* §275; 42 *Proof of Facts* 2d 247 [damages for injury to real property].)

But if the fixture does have a substantial independent value, the plaintiff may recover that. (See *Givens v. Markall* (1942) 51 C.A.2d 374, 378, 124 P.2d 839; *Menzies v. Geophysical Service* (1953) 116 C.A.2d 419, 423, 254 P.2d 51 [water well; "recovery may be the value of the thing thus destroyed or the cost of its repair"]; *Rest.2d, Torts* §929, Comment g.) *Givens* illustrates a still further election. Mining machinery was taken and later returned; plaintiff was awarded the sum of \$ 1,000, the cost of repairing the damage and reinstalling it in the mine.

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a. Ordinary Injury or Taking: Actual Damages.

6 *Witkin Sum. Cal. Law Torts* § 1732

[§ 1732] Ordinary Injury or Taking: Actual Damages.

For wrongful injury to or removal of timber, the ordinary measure is the value of the trees. (*Rest.2d, Torts* §929, Comment f.) Where fruit trees are injured or destroyed, the measure is the difference in the value of the orchard land before and after their loss. (*Hill v. Morrison* (1928) 88 C.A. 405, 408, 263 P. 573; *Rest.2d, Torts* §929, Comment f.) (See 22 *Am.Jur.2d* (2003 ed.), *Damages* §§276, 277; 61 *Harv. L. Rev.* 162; 69 *A.L.R.2d* 1335 [destruction of or injury to trees and shrubbery]; 90 *A.L.R.3d* 800 [fruit, nut, or other productive trees]; 95 *A.L.R.3d* 508 [injury to or destruction of shade or ornamental tree or shrub].)

The rule on recovery of actual damages only is restated in C.C. 3346 (*infra*, §§1733, 1734) for two situations:

(1) Trespass under authority; the provision for actual damages applies to wood taken by authority of highway officers for adjoining highways or bridges. (See *Drewry v. Welch* (1965) 236 C.A.2d 159, 181, 46 C.R. 65; 54 *Cal. L. Rev.* 1843.)

(2) Trespass in reliance on a mistaken boundary line fixed by a licensed surveyor, where the survey was procured by the defendant or his or her principal, lessor, or immediate predecessor in title. (See *Helm v. Bollman* (1959) 176 C.A.2d 838, 841, 1 C.R. 723; *Ghera v. Sugar Pine Lumber Co.* (1964) 224 C.A.2d 88, 90, 36 C.R. 305, 3 *Cal. Proc.* (4th), *Actions*, §431.)

A third situation arises under other statutes, where the damage to timber is caused by a fire negligently allowed to extend beyond the defendant's land. Earlier statutes allowed treble damages; now only actual damages are recoverable, but recovery is also allowed for the expenses of fighting the fire and of providing emergency medical services, and for the costs relating to investigating and accounting for the fire. (See *Health & Saf.C.* 13007, 13008, 13009, 13009.1; *Gould v. Madonna* (1970) 5 C.A.3d 404, 407, 85 C.R. 457; *Department of Forestry & Fire Protection v. LeBrock* (2002) 96 C.A.4th 1137, 117 C.R.2d 790.)

In *McKay v. California* (1992) 8 C.A.4th 937, 10 C.R.2d 771, plaintiffs' retail produce outlet business was destroyed when a controlled-burn fire set by defendant state on adjacent land spread to plaintiffs' property and destroyed six acres of fruit trees, plants, trellises, irrigation pipe, and other improvements. In addition to damages for loss of value

of the burned acreage, the trial judge awarded damages for the loss of profits from the business. *Held*, this was proper; *Health & Saf.C. 13007* permits recovery for "any damages to the property." "In view of the broad language of section 13007 and its history of liberal construction, we conclude the statute places no restrictions on the type of property damage that is compensable. Loss of profits from a business connected to property that is negligently damaged by a set fire is a form of property damage. Such damage is compensable under the general rule allowing recovery of lost profits for property damage caused by negligence." (8 C.A.4th 940, citing *J'Aire Corp. v. Gregory* (1979) 24 C.3d 799, 157 C.R. 407, 598 P.2d 60, supra, §751.) (See *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 C.A.4th 439, 446, 105 C.R.2d 856 [in computing damage to pistachio trees from contaminated irrigation, cost of replacing trees may be used, and in figuring cost, age of trees and lost profits may be considered, because age determines productivity].)

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Ghera case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §458.



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b. Trespass Under Mistake: Double Damages.

6 *Witkin Sum. Cal. Law Torts* § 1733

[§ 1733] Trespass Under Mistake: Double Damages.

C.C. 3346 provides for double damages in two situations: (1) Where the trespass by the defendant is under probable cause to believe that the land is defendant's own or her principal's; and (2) where the trespass is casual and involuntary.

In *Drewry v. Welch* (1965) 236 C.A.2d 159, 46 C.R. 65, defendant purchasers of unsevered timber, acting under the mistaken belief that their expired contract was still in force, continued to cut and remove trees. *Held*, double damages were mandatory and properly awarded. The court explained the theory behind this unusual award against a person acting without intent to commit any wrong: Just as in conversion, an award of compensatory damages merely restores the wrongdoer to his original position and may even leave him with a profit. (236 C.A.2d 176.) C.C. 3346, "providing in effect treble damages against the rogue and double damages against the blunderer is so framed to meet a special situation existing in the timber lands." (236 C.A.2d 177.) (See *Heninger v. Dunn* (1980) 101 C.A.3d 858, 868, 162 C.R. 104 [rejecting contention that double damages provisions of C.C. 3346 apply only to trees with value as timber]; *Baker v. Ramirez* (1987) 190 C.A.3d 1123, 1138, 235 C.R. 857; *Ostling v. Loring* (1994) 27 C.A.4th 1731, 1750, 33 C.R.2d 391 [after defendant defaulted in action for wrongful cutting down of trees, plaintiff could recover double, but not triple, damages; in absence of evidence of culpability, least culpable treatment under statute was warranted].)

Damages should not be doubled under C.C. 3346 if punitive damages are awarded. However, statutory damages and punitive damages arising out of the same cause of action are not mutually exclusive. (*Hassoldt v. Patrick Media Group* (2000) 84 C.A.4th 153, 169, 100 C.R.2d 662.)

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c. Wilful and Malicious Trespass: Treble Damages.

6 *Witkin Sum. Cal. Law Torts* § 1734

[§ 1734] Wilful and Malicious Trespass: Treble Damages.

If the taking is wilful and malicious, the statutes allow the court to award treble damages; i.e., three times the amount of actual detriment. (C.C. 3346; C.C.P. 733; see *Swall v. Anderson* (1943) 60 C.A.2d 825, 827, 141 P.2d 912; *Caldwell v. Walker* (1963) 211 C.A.2d 758, 762, 27 C.R. 675.)

In *Roche v. Casissa* (1957) 154 C.A.2d 785, 316 P.2d 776, defendants C employed defendant E to top trees, and he cut down plaintiffs' trees. Judgment was given (1) in favor of E, the innocent agent, for costs against C, his guilty principal, and (2) for plaintiff against C for \$ 2,400 (\$ 800 actual damages trebled). Here defendant "knew that the trees were not on his land, yet he disregarded the rights of the adjoining owner and cut the trees for the sole purpose of improving the view from his own house. This evidence supports the finding that his acts were wanton and wilful." (154 C.A.2d 789.)

The three kinds of statutory damages were summarized in *Drewry v. Welch* (1965) 236 C.A.2d 159, 46 C.R. 65, as follows: The effect of C.C. 3346 and C.C. 733 "is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court *may* impose treble damages but *must* impose double damages; (2) for casual and involuntary trespass, etc., the court *must* impose double damages; and (3) for trespass under authority actual damages." (236 C.A.2d 181.)

Damages should not be tripled under C.C. 3346 if punitive damages are awarded. However, statutory damages and punitive damages arising out of the same cause of action are not mutually exclusive. (*Hassoldt v. Patrick Media Group* (2000) 84 C.A.4th 153, 169, 100 C.R.2d 662.)

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5. Injury to Growing Crops.

6 Witkin Sum. Cal. Law Torts § 1735

[§ 1735] Injury to Growing Crops.

(1) *Market Value*. The ordinary rule governing injury to, or destruction of, a growing crop is its value at the time of destruction. Because the unmaturing crop has no market value, this is determined by taking the market value of the estimated product, but deducting the cost of producing and marketing it. (*Teller v. Bay & River Dredging Co.* (1907) 151 C. 209, 212, 90 P. 942; *Bagdasarian v. Gragnon* (1948) 31 C.2d 744, 755, 192 P.2d 935; *Dennis v. Crocker-Huffman Land & Water Co.* (1907) 6 C.A. 58, 66, 91 P. 425; *Dutra v. Cabral* (1947) 80 C.A.2d 114, 119, 181 P.2d 26 [action for breach of contract, but discussing measure of damages in tort cases]; *Rest.2d, Torts* §929, Comment f; 21A Am.Jur.2d (1998 ed.), Crops §§92 et seq., 74 et seq.; 3 Proof of Facts 491 [damages]; 20 Proof of Facts 2d 115 [damages: value of growing crop]; 61 Harv. L. Rev. 162.)

(2) *Crop Without Market Value*. If the crop has no market value as such, other theories must be invoked. Thus, for destruction of grass on grazing land, the measure is its rental value as pasture, and, where necessary, the cost of reseeded the field. (*Miller & Lux v. Pinelli* (1927) 84 C.A. 42, 51, 257 P. 573; *Murphy v. Nielsen* (1955) 132 C.A.2d 396, 399, 282 P.2d 126.) And where a crop is wholly experimental, other elements, such as expense and character of contemplated use, may be considered by the jury. (See *Zvolanek v. Bodger Seeds, Ltd.* (1935) 5 C.A.2d 106, 109, 42 P.2d 92.)

(3) *Perennial Crop*. A distinction has been drawn between destruction of an annual crop (e.g., vegetables, grain) and a perennial crop (e.g., alfalfa). In the latter case, it is said that the better measure may be the difference in rental value of the property with and without the crop, but it is nevertheless possible in a proper case to apply the ordinary measure of market value less the cost of production and marketing. (*Staub v. Muller* (1936) 7 C.2d 221, 228, 60 P.2d 283; see 21A Am.Jur.2d (1998 ed.), Crops §96.)

(4) *Field Crop Products Subject to Testing or Product Development Program*. A person who wilfully and knowingly damages or destroys a field crop known to be the subject of testing or product development conduct by prescribed public entities is liable for "twice the value of the crop damaged or destroyed." (*Food & Ag.C. 52100(a)*.) However, recovery is limited to "twice actual damages involving research, testing, and crop development costs directly related to the crop that has been damaged or destroyed." (*Food & Ag.C. 52100(b)*.)

West's Key Number Digest, Damages k.112

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Market Value*. See 21A Am.Jur.2d (2008 ed.), Crops §68 et seq.(3) *Perennial Crop*. See 21A Am.Jur.2d (2008 ed.), Crops §73.



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G. Trespass and Injury to Real Property.
6. Taking Minerals or Other Products.

6 Witkin Sum. Cal. Law Torts § 1736

[§ 1736] Taking Minerals or Other Products.

(1) *Innocent Taking*. Where the act consists not merely of injury to or destruction of a portion of the land, but the severance and appropriation of such things as minerals, a distinction is drawn between wilful and innocent taking.

If the taking is by inadvertence or honest mistake, the measure of damages is the value of the mineral less the cost of mining and milling. (See *Union Oil Co. of Calif. v. Mutual Oil Co.* (1937) 19 C.A.2d 409, 415, 65 P.2d 896 [plaintiffs recovered value of oil removed, defendants failed to raise question of credit for expense of removal]; 53A Am.Jur.2d (1996 ed.), Mines and Minerals §419 et seq.; 21 A.L.R.2d 380 [right of trespasser to credit for expenditures in producing, as against his or her liability for value of, oil or minerals]; 1 A.L.R.3d 801 [taking earth, sand, or gravel].)

The measure is the value "in situ," or, (1) if that cannot be proved, value at the mouth of the pit, less the expense of mining and transporting them to that point, or (2) value of the mineral extracted from the ore, less the cost of mining and milling. (See *Daly v. Smith* (1963) 220 C.A.2d 592, 598, 33 C.R. 920; *Whittaker v. Otto* (1967) 248 C.A.2d 666, 675, 56 C.R. 836.)

The element of good faith, essential to an inadvertent or mistaken taking, may be shown by reliance on the legal opinion of a competent attorney. (*Daly v. Smith*, *supra*, 220 C.A.2d 600 [rejecting contention that attorney was not sufficiently disinterested to give reliable advice]; *Whittaker v. Otto*, *supra*, 248 C.A.2d 666.)

(2) *Intentional Taking*. If the trespass is intentional, and the taking is with knowledge of the owner's rights, the plaintiff recovers for the value of the product after reduction, without deduction for the expense of milling and mining. This is in effect a recovery of punitive damages in a fixed amount. (*Lightner Mining Co. v. Lane* (1911) 161 C. 689, 704, 120 P. 771; *Union Oil Co. of Calif. v. Reconstruction Oil Co.* (1937) 20 C.A.2d 170, 185, 66 P.2d 1215 [oil and gas]; *Dolch v. Ramsey* (1943) 57 C.A.2d 99, 106, 134 P.2d 19 [gold ore]; see 54 Am.Jur.2d (1996 ed.), Mines and Minerals §422.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Innocent Taking*. See 53A Am.Jur.2d (2006 ed.), Mines and Minerals §396 et seq.



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G. Trespass and Injury to Real Property.
7. Continuing Injuries or Nuisance.

6 *Witkin Sum. Cal. Law Torts* § 1737

[§ 1737] Continuing Injuries or Nuisance.

If the defendant creates and maintains a nuisance, or commits a series of tortious acts that injure the plaintiff's property and seem likely to continue, the question arises whether the plaintiff may sue for future as well as past damage. Normally the plaintiff can sue at any time for past injuries, and bring successive actions from time to time to recover for the additional injuries. However, where the nuisance is "permanent," i.e., the injury appears likely to continue indefinitely, the plaintiff is often allowed to recover past and future damages in one action.

Rest.2d, Torts §930 recognizes this election in the plaintiff, and states the measure of damages as the depreciation in the value of the land; i.e., the diminution in value resulting from the prospect of the continuance of the injuries. The California cases likewise allow the election. (See *Williams v. Southern Pac. R. Co.* (1907) 150 C. 624, 626, 89 P. 599; *Kafka v. Bozio* (1923) 191 C. 746, 752, 218 P. 753; *Spaulding v. Cameron* (1952) 38 C.2d 265, 267, 239 P.2d 625; *Coats v. Atchison, Topeka & Santa Fe Ry. Co.* (1905) 1 C.A. 441, 444, 82 P. 640; 58 *Am.Jur.2d* (2002 ed.), *Nuisances* §269 et seq.; 26 *So. Cal. L. Rev.* 338; 10 *A.L.R.2d* 669 [damages for diminution of value of use of property as recoverable for permanent nuisance affecting real property]; 76 *A.L.R.4th* 629 [pollution of well or spring]; 3 *Cal. Proc.* (4th), *Actions*, §552; 4 *Cal. Proc.* (4th), *Pleading*, §47 et seq.)

In *Razzano v. Kent* (1947) 78 C.A.2d 254, 177 P.2d 612, plaintiff leased land and dredged for gold. Defendant caused the flooding and deposit of mud on the land, as a result of which plaintiff was forced to abandon operations on May 1. He sued, on June 25, for damages measured by the profits he would have made from gold dredging from May 1 to the time of suit and also from the time of suit until October 23, the expiration date of the lease. *Held*, it was proper to award both past and future damages in the one action, because it clearly appeared that the interference was permanent and would continue to prevent his operations throughout the period of the lease. The court quoted from McCormick on Damages as follows: "This practice of remitting the plaintiff to a later suit for the continuance of harmful conduct after the commencement of the action and before the trial, while a logical application of the theory of successive rights of action for successive wrongs, has the obviously inconvenient result of increasing litigation over what may broadly be regarded as a single controversy. In equity, when suits for injunction were brought to restrain the continuance of a nuisance or like continuing injury, this consideration of convenience prevailed. These courts, in order to terminate the entire controversy in one suit, will, in the injunction suit, give as an incident thereto compensation for the loss or injury already suffered, and, carrying out the same policy, will allow recovery for the harm or damage sustained through the continuance of the wrong down to the time of the final disposition of the case. The directness and practicality of this

result has led in several jurisdictions to the acceptance of this chancery rule allowing damages for a continuing wrong down to the time of trial, as a general rule for all actions, whether legal or equitable." (78 C.A.2d 263.)

In *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 C.3d 862, 218 C.R. 293, 705 P.2d 866, 8 Summary (10th), *Constitutional Law*, §1144, the California Supreme Court stated that the recovery in nuisance actions is limited to actual injury suffered "prior to commencement of each action." (39 C.3d 868.) This statement was rejected as nonbinding dicta in *Renz v. 33rd Dist. Agricultural Assn.* (1995) 39 C.A.4th 61, 64, 46 C.R.2d 67, holding that, in continuing nuisance cases, one may recover damages incurred from commencement of the action until judgment is rendered.

If the nuisance is not permanent but can be abated, the plaintiff must choose between elimination of the injury and depreciation in value; i.e., to have the cause of depreciation removed and at the same time receive damages for the depreciation would amount to double recovery. (See *Spaulding v. Cameron*, *supra*, 38 C.2d 269; *Rhodes v. San Mateo Inv. Co.* (1955) 130 C.A.2d 116, 118, 278 P.2d 447; *Alexander v. McKnight* (1992) 7 C.A.4th 973, 979, 9 C.R.2d 453 [recovery for future loss in resale value of plaintiffs' homes due to disclosure of "difficult" neighbors was improper where neighbors were ordered to cease offensive activities]; *Santa Fe Partnership v. ARCO Products Co.* (1996) 46 C.A.4th 967, 973, 54 C.R.2d 214 [where contamination of adjoining property was abatable by remediation, and where remediation process did no physical damage to the property, no damages could be recovered for stigma resulting from contamination; plaintiffs had good argument for these damages, but California Supreme Court decisions are to contrary]; see 26 So. Cal. L. Rev. 338.)

Another common element of damages is the annoyance, discomfort, and inconvenience caused by the nuisance. (See *Ingram v. Gridley* (1950) 100 C.A.2d 815, 821, 224 P.2d 798; *Sturges v. Charles L. Harney* (1958) 165 C.A.2d 306, 323, 331 P.2d 1072; cf. *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 C.2d 265, 273, 288 P.2d 507, *supra*, §1730 [same rule in recurrent trespass as in continuing trespass or nuisance]; 58 Am.Jur.2d (2002 ed.), *Nuisances* §284.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 C.A.4th 583, 598, 63 C.R.3d 165 [energy company's ponding of wastewater created from its oil production activities, which caused wastewater to contaminate adjacent cotton growers' subsurface aquifers, was continuing trespass of unknown duration for purposes of measuring damages, and thus damages to cotton growers were not limited to permanent measure of damages, but rather could include costs of cleaning up contamination if these costs were reasonable and restoration was possible].

Rest.2d:

Cross-References: 3 Cal. Proc. (5th), *Actions*, §601; 4 Cal. Proc. (5th), *Pleading*, §57 et seq.



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H. Excessive and Inadequate Damages.

1. In General.

a. Remedies in Trial Court.

6 *Witkin Sum. Cal. Law Torts* § 1738

[§ 1738] Remedies in Trial Court.

An award of damages by a jury's verdict or trial court's finding, which is either *excessive* (infra, §1741 et seq.) or *inadequate* (infra, §1750) is erroneous, and may be set aside or revised in several ways.

(1) *Excessive Damages*. The attack on excessive damages is by a motion for new trial. Formerly, the statutory ground was that the award was given under the influence of "passion or prejudice." A 1967 amendment eliminated the "passion or prejudice" terminology and substituted the simple ground of excessive damages. (*C.C.P.* 657(5); see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §36.) (On remittitur, i.e., remission by plaintiff of portion of the award that trial judge determines to be excessive, as condition to denial of defendant's motion for new trial, see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §125 et seq.)

(2) *Inadequate Damages*. A motion for new trial because of inadequate damages was formerly based on the statutory ground of insufficiency of the evidence to justify the verdict or other decision. The 1967 amendment made inadequate damages a specific ground for the motion, by including it in *C.C.P.* 657(5): "Excessive or inadequate damages." (See 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §36.) (On additur, i.e., addition to award to plaintiff, with defendant's consent, as condition to denial of plaintiff's motion for new trial, see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §129 et seq.; on order granting new trial on issue of damages alone, see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §114.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Excessive Damages*.

Amendment in 1967:

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack of Judgment in Trial Court*, §35.

Remittitur:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §116 et seq.(2) *Inadequate Damages*.

Amendment in 1967:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §35.

Additur:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §120 et seq.

Order granting new trial on damages:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §105.



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1. In General.
b. Remedies in Reviewing Court.

6 *Witkin Sum. Cal. Law Torts* § 1739

[§ 1739] Remedies in Reviewing Court.

(1) *Reversal*. The reviewing court, on appeal, may reverse the judgment, as unsupported by the evidence, either for excessive or inadequate damages. (See *Barrett v. Southern Pac. Co.* (1929) 207 C. 154, 166, 277 P. 481; *Taylor v. Pole* (1940) 16 C.2d 668, 673, 107 P.2d 614 [inadequate]; *Van DerHoof v. Chambon* (1932) 121 C.A. 118, 136, 8 P.2d 925.)

In *Zhadan v. Downtown L.A. Motors* (1976) 66 C.A.3d 481, 502, 136 C.R. 132, *supra*, §1622, the trial judge made a defective conditional new trial order reducing punitive damages. The appellate court agreed with his conclusion that the punitive damages were excessive, but reversed the judgment for a new trial on all of the issues. (a) Reversal for a new trial on the issue of damages alone would be improper, for nearly all of the evidence on liability was also relevant to the issue of punitive damages. (b) It was impracticable for the appellate court to exercise the function of the trial judge in reducing the award, for it did not have the benefit of his observation of the witnesses, and could not weigh the evidence. (See *Seeley v. Seymour* (1987) 190 C.A.3d 844, 868, 237 C.R. 282 [following *Zhadan*].)

(2) *Modification*. The reviewing court may also modify the judgment by reducing the amount of an excessive award. (See *Livesey v. Stock* (1929) 208 C. 315, 322, 281 P. 70; *Maede v. Oakland High School Dist. of Alameda* (1931) 212 C. 419, 298 P. 987; 61 *Harv. L. Rev.* 115; 9 *Cal. Proc.* (4th), *Appeal*, §754.)

(3) *Conditional Judgment*. The more common method is rendition of a conditional judgment, ordering a reversal unless the respondent (plaintiff) remits the excess, or an affirmance as modified if the excess is remitted. (See *Bellman v. San Francisco High School Dist.* (1938) 11 C.2d 576, 588, 81 P.2d 894; 9 *Cal. Proc.* (4th), *Appeal*, §754.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Modification*.

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §865.

(3) *Conditional Judgment*.

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §865.



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1. In General.
c. Discretion of Jury and Trial Court.

6 *Witkin Sum. Cal. Law Torts* § 1740

[§ 1740] Discretion of Jury and Trial Court.

It was formerly said that the trial court on motion for a new trial could interfere only where the verdict was so grossly disproportionate to any reasonable compensation as to raise a strong presumption that it was based on passion or prejudice. (See *Zibbell v. Southern Pac. Co.* (1911) 160 C. 237, 255, 116 P. 513; *Eldridge v. Clark & Henery Const. Co.* (1925) 75 C.A. 516, 535, 243 P. 43.) Under the statutory ground of "excessive or inadequate damages" the test is that of sufficiency of the evidence; i.e., a new trial should not be granted "unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (C.C.P. 657; see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §36.)

The primary duty to scrutinize the jury's verdict rests on the trial court, which is necessarily more familiar with the evidence than the appellate court. Hence, the grant or denial of a new trial for excessive or inadequate damages is usually upheld. (See *Koyer v. McComber* (1938) 12 C.2d 175, 182, 82 P.2d 941; *Seffert v. Los Angeles Transit Lines* (1961) 56 C.2d 498, 507, 15 C.R. 161, 364 P.2d 337; *Torres v. Los Angeles* (1962) 58 C.2d 35, 53, 22 C.R. 866, 372 P.2d 906; *Bertero v. National General Corp.* (1974) 13 C.3d 43, 64, 118 C.R. 184, 529 P.2d 608, citing the text; *Bonner v. Los Angeles Examiner* (1936) 17 C.A.2d 458, 461, 62 P.2d 427; *Sassano v. Roullard* (1938) 27 C.A.2d 372, 376, 81 P.2d 213; *Formosa v. Yellow Cab Co.* (1939) 31 C.A.2d 77, 88, 87 P.2d 716; *Cooksey v. Atchison, Topeka & Santa Fe Ry. Co.* (1947) 78 C.A.2d 504, 508, 178 P.2d 69; *Brown v. Boehm* (1947) 78 C.A.2d 595, 596, 178 P.2d 49; *Buswell v. San Francisco* (1948) 89 C.A.2d 123, 130, 200 P.2d 115; *Butler v. Peluso* (1957) 154 C.A.2d 624, 629, 317 P.2d 57; *Rudolph v. Gorman* (1959) 169 C.A.2d 666, 669, 338 P.2d 218; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 654, 151 C.R. 399; 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §140.)

SUPPLEMENT: [This section is current through the latest supplement]
C.C.P. 657:

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §35.

Duty of trial court:

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §130.



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2. Excessive Damages.
a. Matters Considered on Issue.
1. Evidence of Injury.

6 *Witkin Sum. Cal. Law Torts* § 1741

[§ 1741] Evidence of Injury.

The normal method of testing the verdict is to compare it with the evidence of injury. If, on this comparison, the trial judge or reviewing court decides that the evidence is insufficient (or, as the older cases put it, suggestive of passion or prejudice), it will be set aside on a motion for new trial or on appeal; otherwise it will be allowed to stand. (See *Zibbell v. Southern Pac. Co.* (1911) 160 C. 237, 254, 116 P. 513; *Bellman v. San Francisco High School Dist.* (1938) 11 C.2d 576, 586, 81 P.2d 894; *Cunningham v. Simpson* (1969) 1 C.3d 301, 308, 81 C.R. 855, 461 P.2d 39; *Bonner v. Los Angeles Examiner* (1936) 17 C.A.2d 458, 461, 62 P.2d 427; *Gladstone v. Fortier* (1937) 22 C.A.2d 1, 17, 70 P.2d 255; 22 *Am.Jur.2d* (2003 ed.), *Damages* §811 et seq.; 39 *Cal. L. Rev.* 1; 46 *A.L.R.4th* 220 [death of agricultural workers]; 47 *A.L.R.4th* 100 [death of homemaker]; 47 *A.L.R.4th* 134 [death of blue-collar workers]; 48 *A.L.R.4th* 229 [death of retired persons].)

The appellant should therefore set forth all of the material evidence on this point in order to overcome the presumption in favor of the judgment. (See *Leming v. Oilfields Trucking Co.* (1955) 44 C.2d 343, 356, 282 P.2d 23; 9 *Cal. Proc.* (4th), *Appeal*, §§349, 359.)

Annotations dealing with excessiveness or adequacy of damages for various types of injury are extensive. (See 11 *A.L.R.3d* 370 [injuries to head or neck]; 12 *A.L.R.3d* 117 [injuries to trunk or torso]; 12 *A.L.R.4th* 96 [injuries to arms and hands]; 13 *A.L.R.4th* 212 [injuries to legs and feet]; 14 *A.L.R.4th* 539 [injuries to, or conditions induced in, circulatory, digestive, and glandular systems]; 15 *A.L.R.4th* 294 [injuries to back, neck, or spine]; 15 *A.L.R.4th* 519 [injuries to, or conditions induced in, respiratory system]; 16 *A.L.R.4th* 238 [injuries to trunk or torso, or internal injuries]; 16 *A.L.R.4th* 736 [injuries causing particular diseases or conditions]; 16 *A.L.R.4th* 1127 [injuries to, or conditions induced in, sensory or speech organs and systems]; 48 *A.L.R.5th* 129 [injuries to trunk or torso, or internal injuries]; 50 *A.L.R.5th* 1 [injuries to head or brain]; 51 *A.L.R.5th* 467 [injuries to nerves or nervous system].)

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SUPPLEMENT: [This section is current through the latest supplement]
Overcoming presumption:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §§355, 365.



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2. Excessive Damages.
a. Matters Considered on Issue.
2. Inflation.

6 Witkin Sum. Cal. Law Torts § 1742

[§ 1742] Inflation.

The Supreme Court long ago declared that, in view of the rise in the cost of living, a comparison of verdicts held excessive in past years is no longer persuasive. It is necessary to bear in mind changes in the purchasing power of the dollar, in the cost of living and in living standards. (*O'Meara v. Haiden* (1928) 204 C. 354, 367, 268 P. 334 [court takes judicial notice of "a pronounced decrease in the purchasing power or value of the dollar"]; see *Behrendt v. Times-Mirror Co.* (1938) 30 C.A.2d 77, 91, 85 P.2d 949; *House v. Pacific Greyhound Lines* (1939) 35 C.A.2d 336, 341, 95 P.2d 465; *Kircher v. Atchison, Topeka & Santa Fe Ry. Co.* (1948) 32 C.2d 176, 187, 195 P.2d 427 [judicial notice taken of 50% decrease in purchasing power of dollar]; *Burke v. San Francisco* (1952) 111 C.A.2d 314, 320, 244 P.2d 708; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 662, 151 C.R. 399 ["California law has long approved consideration of the factor of inflation as a matter of economic reality"]; 22 *Am.Jur.2d* (2003 ed.), *Damages* §813; 12 *A.L.R.2d* 611; 21 *A.L.R.4th* 21 [effect of anticipated inflation on damages for future losses--modern cases].)

In *Fox v. Oakland Consol. Street Ry.* (1897) 118 C. 55, 67, 50 P. 25, a \$ 6,000 judgment for wrongful death of a boy of 41/2 years was reversed. In *Criss v. Angelus Hosp. Assn. of Los Angeles* (1936) 13 C.A.2d 412, 420, 56 P.2d 1274, a verdict in the same amount for death of a 12-day-old baby was upheld.

In *Foster v. Pestana* (1947) 77 C.A.2d 885, 177 P.2d 54, plaintiff, a truck driver, 27 years old and with a life expectancy of about 40 years, received a permanent injury to his left hand, involving considerable hospital and operative treatment, much pain, and substantially weakened grip that made it impossible to continue his heavy labor. *Held*, a verdict of \$ 16,769.58 was not excessive. The opinion, after referring to a Supreme Court decision where, for a similar injury, a \$ 15,000 verdict was reduced by the trial judge to \$ 8,500, states: "That was in 1941, before our entry into World War II, and we feel that a court passing on the same question now, would have thought twice before making such a reduction." (77 C.A.2d 893.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Excessive Damages.
a. Matters Considered on Issue.
3. Comparison of Judgments.

6 Witkin Sum. Cal. Law Torts § 1743

[§ 1743] Comparison of Judgments.

(1) *Older View*. For a time, reviewing courts followed the practice of comparing judgments in other cases. In *Maede v. Oakland High School Dist. of Alameda* (1931) 212 C. 419, 425, 298 P. 987, the court declared that the "average amount for particular injuries, as fixed by the verdicts rendered by juries and approved by courts," offers a standard, though not an invariable one, and that where the compensation for loss of a limb or eye, e.g., greatly exceeds the average award, it may be held excessive. (See 22 Am.Jur.2d (2003 ed.), *Damages* §820.)

In *Hallinan v. Prindle* (1936) 17 C.A.2d 656, 62 P.2d 1075, a verdict based primarily upon pain at the time of injury and in subsequent treatment, and involving no loss of earning capacity, was reduced from \$ 12,500 to \$ 5,000. The court reached its conclusion by comparison of a number of decided cases involving injuries of like character. (17 C.A.2d 673.) (See *Mudrick v. Market Street Ry. Co.* (1938) 11 C.2d 724, 735, 81 P.2d 950 [award upheld on basis of comparison].) And prior judgments in the same case have also been considered. (See *Hoffman v. Southern Pac. Co.* (1932) 215 C. 454, 460, 11 P.2d 387 [first trial, \$ 16,000; second, \$ 21,000; third, \$ 50,000, reduced to \$ 25,000]; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 654, 151 C.R. 399 ["The fact that an award may set a precedent by its size does not in and of itself render it suspect"]; *Bigboy v. San Diego* (1984) 154 C.A.3d 397, 406, 201 C.R. 226.)

(2) *Modern Approach*. Modern courts reject this mechanical treatment of the issue and place no limits on an award other than those that appear from the evidence of injury, suffering, disability, and other elements of damages. As a result, very large sums have been upheld. (See *Leming v. Oilfields Trucking Co.* (1955) 44 C.2d 343, 356, 282 P.2d 23; *Torres v. Los Angeles* (1962) 58 C.2d 35, 53, 22 C.R. 866, 372 P.2d 906; *Gluckstein v. Lipsett* (1949) 93 C.A.2d 391, 398, 209 P.2d 98; *McNulty v. Southern Pac. Co.* (1950) 96 C.A.2d 841, 848, 216 P.2d 534; *Butler v. Peluso* (1957) 154 C.A.2d 624, 630, 317 P.2d 57; *Henninger v. Southern Pac. Co.* (1967) 250 C.A.2d 872, 882, 59 C.R. 76; 39 Cal. L. Rev. 1.)

As the court said in *Sullivan v. San Francisco* (1950) 95 C.A.2d 745, 214 P.2d 82, "While \$ 125,000 is a large sum of money, and while it perhaps represents the largest verdict that has heretofore come before an appellate court in this state, those facts are not conclusive. The jury has fixed this amount as the damages suffered by plaintiff. The trial judge

has impliedly approved the award by denying the motion for a new trial. We may interfere only if it appears, as a matter of law, that the award was the result of passion or prejudice." (95 C.A.2d 758.)

The same view was expressed in *Bertero v. National General Corp.* (1974) 13 C.3d 43, 65, footnote 12, 118 C.R. 184, 529 P.2d 608: "For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of fact-finding. ... Thus, we adhere to the previously announced and historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice on the part of the jurors."

SUPPLEMENT: [This section is current through the latest supplement]



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1. Personal Injuries: In General.

6 *Witkin Sum. Cal. Law Torts* § 1744

[§ 1744] Personal Injuries: In General.

Bearing in mind that inflation has radically changed the thinking of the courts on excessive verdicts (see *supra*, §1715), the following cases are illustrative only of the method of review; the figures involved are often of little significance.

One group of cases includes those in which the injuries were minor or temporary, and a large award could not be justified for this reason. (See *O'Donnell v. Excelsior Amusement Co.* (1930) 110 C.A. 685, 690, 294 P. 737; *Van DerHoof v. Chambon* (1932) 121 C.A. 118, 132, 8 P.2d 925; *Hoover v. King* (1933) 134 C.A. 16, 24 P.2d 871; *Hallinan v. Prindle* (1936) 17 C.A.2d 656, 673, 62 P.2d 1075; *Thompson v. John Strona & Sons* (1970) 5 C.A.3d 705, 712, 85 C.R. 350.)

More difficult are the cases in which the injuries were serious, and a large recovery was clearly warranted, but the court concluded that it was too large, usually by comparison with the judgments upheld in other cases. (See *Maede v. Oakland High School Dist. of Alameda* (1931) 212 C. 419, 425, 298 P. 987 [\$ 35,000 held excessive for loss of eye, reduced to \$ 16,000]; *Loeb v. Kimmerle* (1932) 215 C. 143, 163, 9 P.2d 199; *Lindemann v. San Joaquin Cotton Oil Co.* (1936) 5 C.2d 480, 509, 55 P.2d 870; *Mondine v. Sarlin* (1938) 11 C.2d 593, 599, 81 P.2d 903 [extensive and severe burns, requiring numerous skin grafts, and resulting in impaired functioning of right arm and hand; \$ 20,000 held excessive, reduced to \$ 10,000]; 50 A.L.R.4th 787 [excessiveness of damages for death of white-collar workers]; 52 A.L.R.4th 1 [excessiveness of damages for injuries causing mental or psychological harm].) (For abandonment of the comparison approach, see *supra*, §1743.)

West's Key Number Digest, Damages k.130 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

Serious injury with large recovery: See *Buell-Wilson v. Ford Motor Co.* (2006) 141 C.A.4th 525, 548, 46 C.R.3d 147 [in vehicle accident case, jury's award of \$ 118 million in noneconomic damages, even reduced to \$ 70 million, was excessive; although motorist was vibrant 46-year-old wife and mother who was rendered paraplegic and lost control of bladder and bowel, award was about 13 times amount counsel requested, and jury may well have viewed as callous]

question of manufacturer's counsel to husband indicating that family should find "silver lining" in situation].



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b. Damages Held Excessive.

2. Injuries to or Death of Children.

6 *Witkin Sum. Cal. Law Torts* § 1745

[§ 1745] Injuries to or Death of Children.

Where children were injured or killed, the courts originally showed some reluctance to uphold large awards. (See *Babb v. Murray* (1938) 26 C.A.2d 153, 156, 79 P.2d 159 [serious injuries to child of 31/2 months, \$ 7,500 award reduced to \$ 4,000; overruled in *Capelouto v. Kaiser Foundation Hosp.* (1972) 7 C.3d 889, 103 C.R. 856, 500 P.2d 880, supra, §1674]; *Hunton v. California Portland Cement Co.* (1944) 64 C.A.2d 876, 882, 149 P.2d 471 [wrongful death, 17-year-old boy; verdict of \$ 40,000, reduced by trial court to \$ 18,000 and by appellate court to \$ 10,000]; *Gillett v. Gillett* (1959) 168 C.A.2d 102, 108, 335 P.2d 736 [brutal beating of 8-year-old child by stepmother, resulting in removal of spleen and one kidney; \$ 50,000 judgment reduced to \$ 30,000]; cf. *Criss v. Angelus Hosp. Assn. of Los Angeles* (1936) 13 C.A.2d 412, 420, 56 P.2d 1274 [wrongful death of 12-day-old baby, \$ 6,000 upheld]; *Junge v. Midland Counties Public Service Corp.* (1940) 38 C.A.2d 154, 160, 100 P.2d 1073 [13-year-old boy, severe burns, \$ 35,000 upheld]; see 25 *Cal. L. Rev.* 103; 49 *A.L.R.4th* 1076 [excessiveness of damages for death of minor].)

A more liberal view on the loss suffered by the death of a young child was expressed in *Tyson v. Romey* (1948) 88 C.A.2d 752, 199 P.2d 721. The child was 5 years old, the jury awarded \$ 25,000, the trial judge reduced this to \$ 18,500, and the latter amount was upheld. The court said that "\$ 18,500 might have indicated an excessive figure some years ago, but in view of subsequent verdicts the amount is not disproportionate, though this may be the highest award assessed in this state for the death of a 5-year-old child." (88 C.A.2d 757.)

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3. Intentional Torts.

6 *Witkin Sum. Cal. Law Torts* § 1746

[§ 1746] Intentional Torts.

Although large awards of punitive damages are regularly upheld (see *supra*, §1611 et seq.), awards of compensatory damages for intentional torts are subject to the same test as those applied in negligence cases, and are occasionally found excessive. (See *BMW of North America v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589, 1595, 134 L.Ed.2d 809, 822, *supra*, §1590 [\$ 2 million damages award for fraudulent failure to disclose that car sold as new had suffered predelivery damage was unconstitutionally excessive]; *Gill v. Epstein* (1965) 62 C.2d 611, 616, 44 C.R. 45, 401 P.2d 397 [false arrest of plaintiff and unreasonable delay in taking him before magistrate; \$ 16,390 general and special damages for few days of detention justified granting of new trial]; *Cunningham v. Simpson* (1969) 1 C.3d 301, 308, 81 C.R. 855, 461 P.2d 39 [slander; actual damages demanded were \$ 300, verdict was for \$ 25,000]; *Notrica v. State Comp. Ins. Fund* (1999) 70 C.A.4th 911, 951, 83 C.R.2d 89 [because defendant State Compensation Insurance Fund was required to return excessive reserves to its insureds, awarding one insured \$ 20 million was excessive; award reduced to \$ 5 million].) (On excessive awards of punitive damages, see *supra*, §§1612, 1621, 1622.)

In *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 C.A.3d 5, 130 C.R. 416, plaintiff received an award of \$ 267,294.52 against defendant insurer, which unjustifiably failed to make payments under a home mortgage insurance policy (see *supra*, §459). The only substantial economic loss suffered by plaintiff was loss of the equity in his home (\$ 7,470); the rest of the damages, over \$ 250,000, were obviously given for emotional distress. The court declared that the evidence of plaintiff's suffering (see *supra*, §1622) could not support so large an award. (59 C.A.3d 16.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Horsford v. Board of Trustees of Calif. State University* (2005) 132 C.A.4th 359, 386, 33 C.R.3d 644 [employment discrimination case in which substantial evidence supported trial court's reduction of both economic and noneconomic damages]; *Grassilli v. Barr* (2006) 142 C.A.4th 1260, 1291, 48 C.R.3d 715 [in motorist's civil rights action against CHP officers predicated on repeated stops after motorist made complaint about officers, punitive damages awards of \$ 3 million against officer with net worth of \$ 50,000 to \$ 55,000 and annual salary of \$ 60,000, and \$ 1 million against other officer with net worth of \$ 415,000 and retirement income of \$ 60,000 per year, were financially ruinous and thus unreasonable].



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1. Negligent Personal Injuries.

6 Witkin Sum. Cal. Law Torts § 1747

[§ 1747] Negligent Personal Injuries.

"A reviewing court does not ordinarily substitute its judgment for that of the jury and trial court, which have evaluated in terms of damages the pain, humiliation, disfigurement, and loss of earning capacity suffered by a plaintiff." (*Johnston v. Long* (1947) 30 C.2d 54, 76, 181 P.2d 645 [plaintiff's nose cut off, requiring painful plastic surgery for over 4 years; future operations faced and permanent disfigurement likely; \$ 87,575 verdict was not excessive].) (See 22 Am.Jur.2d (2003 ed.), *Damages* §811 et seq.; 39 Cal. L. Rev. 14; 12 A.L.R.4th 96 [injuries to arms and hands]; 13 A.L.R.4th 212 [injuries to legs and feet]; 48 A.L.R.5th 129 [injuries to trunk or torso, or internal injuries]; 50 A.L.R.4th 787 [death of white-collar workers]; 52 A.L.R.4th 1 [injuries causing mental or psychological harm].)

The following decisions are illustrative:

Kircher v. Atchison, Topeka & Santa Fe Ry. Co. (1948) 32 C.2d 176, 186, 195 P.2d 427 [air cadet, 23, good education and future, left hand nearly severed; \$ 60,000].

Leming v. Oilfields Trucking Co. (1955) 44 C.2d 343, 356, 282 P.2d 23 [plaintiff, 47, life expectancy 23.08 years, monthly earnings after taxes \$ 410.41; right leg amputated, left shortened, long hospitalization and serious pain, future permanent medical care and movement in wheelchair or on crutches; \$ 213,460.22].

Cooksey v. Atchison, Topeka & Santa Fe Ry. Co. (1947) 78 C.A.2d 504, 508, 178 P.2d 69 [freight car conductor, 54, salary \$ 500 per month, life expectancy 17.40 years, permanent back injuries with probable deformity, continual pain, and greatly weakened physical condition; \$ 42,000].

Huggans v. Southern Pac. Co. (1949) 92 C.A.2d 599, 615, 207 P.2d 864 [12-year-old boy, loss of left leg and part of right foot; \$ 91,000].

Gluckstein v. Lipsett (1949) 93 C.A.2d 391, 398, 209 P.2d 98 [plastic surgeon engaged by 50-year-old woman to raise her pendulous breasts and remove scar and excessive skin from abdomen; faulty technique left her body seriously disfigured and uncomfortable, with some possibility of malignant growths on her breasts; \$ 115,000].

Sullivan v. San Francisco (1950) 95 C.A.2d 745, 758, 214 P.2d 82 [plaintiff, 21, life expectancy 44 years, earning \$ 260 per month, married; serious injuries causing great pain, many operations, impotency, inability to do hard work; \$ 125,000].

McNulty v. Southern Pac. Co. (1950) 96 C.A.2d 841, 848, 216 P.2d 534 [assistant bank cashier, 42 years old with 26 years' life expectancy, previous good health; both legs amputated, curtailed activity and business advancement lessened; \$ 100,000].

Flynn v. Grand Cen. Public Market (1959) 176 C.A.2d 243, 249, 1 C.R. 237 [woman, injury to pelvis muscles, tissues, and nerves, with permanent serious effects, medical expense of \$ 2,000; \$ 20,000].

Henninger v. Southern Pac. Co. (1967) 250 C.A.2d 872, 882, 59 C.R. 76 [29-year-old railroad conductor-brakeman who lost both legs high above the knee and will be confined to wheelchair for life; \$ 650,000].

Rodriguez v. McDonnell Douglas Corp. (1978) 87 C.A.3d 626, 636, 655, 151 C.R. 399 [catastrophic injuries to young man; \$ 4,113,122.25 upheld].

Westphal v. Wal-Mart Stores (1998) 68 C.A.4th 1071, 1078, 81 C.R.2d 46 [where slip and fall resulted in permanent and persistent pain, there was no requirement of objective medical evidence to substantiate plaintiff's pain and suffering; \$ 150,000].

SUPPLEMENT: [This section is current through the latest supplement]



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2. Other Cases.

6 *Witkin Sum. Cal. Law Torts* § 1748

[§ 1748] Other Cases.

Decisions dealing with various torts have affirmed substantial awards of compensatory and punitive damages.

(1) *Battery*. (See *Estrada v. Orwitz* (1946) 75 C.A.2d 54, 60, 170 P.2d 43 [verdict of \$ 4,000 against dentist for extraction of five teeth without consent, on testimony of plaintiff, age 31, that they were all good teeth]; *McChristian v. Popkin* (1946) 75 C.A.2d 249, 263, 171 P.2d 85 [verdict of \$ 10,000 for compensatory and exemplary damages, on evidence that plaintiff was severely beaten and ejected from theatre, suffering permanent injuries]; *Sandoval v. Southern Calif. Enterprises* (1950) 98 C.A.2d 240, 254, 219 P.2d 928, *supra*, §476 [plaintiff beaten and kicked; \$ 25,000 compensatory, and punitive damages against 3 defendants--\$ 4,500, \$ 1,000, \$ 2,500]; *Helms v. Thomas* (1953) 120 C.A.2d 265, 269, 260 P.2d 1016 [verdict of \$ 30,000 to 29-year-old plaintiff permanently deprived of hearing in right ear and lost sense of equilibrium in middle ear].)

(2) *False Imprisonment*. (See *Gibson v. J.C. Penney Co.* (1958) 165 C.A.2d 640, 647, 331 P.2d 1057 [detention of woman for 40 minutes, with search of parcels by detective and of partially disrobed person by sales girl, resulting in headaches, emotional distress; \$ 5,000]; *Washington v. Farlice* (1991) 1 C.A.4th 766, 774, 2 C.R.2d 607 [plaintiff arrested at gunpoint, thrown to ground, accused of stealing car, and detained for 4 hours; \$ 10,000].)

(3) *Malicious Prosecution*. (See *Sandoval v. Southern Calif. Enterprises*, *supra*, 98 C.A.2d 256 [\$ 10,350 compensatory, \$ 2,500 punitive]; *Sierra Club Foundation v. Graham* (1999) 72 C.A.4th 1135, 1158, 85 C.R.2d 726 [compensatory--\$ 672,638, punitive--\$ 2,017,914 (slightly in excess of 2% of defendant's net worth); defendant's reprehensibility shown by his disbelief in underlying charges and his strategy of extracting settlement on his terms while bringing negative attention to plaintiff during its centennial fund-raising campaign]; 50 A.L.R.4th 843 [excessiveness and inadequacy of damages for malicious prosecution].)

(4) *Defamation*. (See *Stoneking v. Briggs* (1967) 254 C.A.2d 563, 580, 62 C.R. 249, *supra*, §553 [plaintiff had been union officer and served in various public offices; after slander he was subject of unfriendly comment and was unable to obtain employment in his trade; \$ 22,000]; 49 A.L.R.4th 1158 [inadequacy and excessiveness of damages for defamation].)

(5) *Wrongful Death*. (See *Brown v. Boehm* (1947) 78 C.A.2d 595, 602, 178 P.2d 49 [painter, 61, doing odd jobs and earning \$ 2,000-\$ 3,000 per year, life expectancy 13.47 years, left widow, 54, and five adult children; \$ 25,000]; *Martin v. Mansfeldt* (1950) 100 C.A.2d 327, 328, 223 P.2d 501 [wife, 38, expectancy of 28 years, earning \$ 75 to \$ 80 per week, affectionate and devoted, good housekeeper; \$ 36,566.17 to husband with expectancy of 27 years]; *Gall v. Union Ice Co.* (1951) 108 C.A.2d 303, 320, 239 P.2d 48 [army sergeant with \$ 330 total monthly pay, life expectancy 34 years; \$ 100,000 to widow (35) and daughter (71/2 years)]; *Burke v. San Francisco* (1952) 111 C.A.2d 314, 324, 244 P.2d 708 [wife, expectancy of 23 years, small income from outside work, devoted to family; \$ 50,000 to husband, adult son, and adult daughter]; *DiRosario v. Havens* (1987) 196 C.A.3d 1224, 1241, 242 C.R. 423 [minor daughter as part of close-knit family unit; \$ 2 million to parents]; *Wright v. Los Angeles* (1990) 219 C.A.3d 318, 356, 268 C.R. 309 [20-year-old son; \$ 2 million to parents and brother and sister]; 46 A.L.R.4th 220 [farmer]; 47 A.L.R.4th 100 [housewife]; 47 A.L.R.4th 134 [blue-collar worker]; 48 A.L.R.4th 229 [retired person]; 49 A.L.R.4th 1076 [minor]; 50 A.L.R.4th 787 [white-collar worker]; 61 A.L.R.4th 309 [adequacy of damages awarded for noneconomic loss resulting from injury or death of spouse].)

(6) *Violation of Statutory Duty*. (See *Pintor v. Ong* (1989) 211 C.A.3d 837, 846, 259 C.R. 577, 3 Cal. Proc. (4th), *Actions*, §141 [award of \$ 15,000 for plaintiff's emotional distress resulting from defendants' refusal to execute certificate of discharge or deed of reconveyance pursuant to C.C. 2941].)

(7) *Sexual Harassment*. (See *Bihun v. AT&T Information Systems* (1993) 13 C.A.4th 976, 995, 16 C.R.2d 787 [award of \$ 686,000 for loss of future earnings and \$ 662,000 for emotional distress].)

(8) *Child Molestation*. (See *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 C.A.4th 1023, 1059, 75 C.R.2d 777, 3 Cal. Proc. (4th), *Actions*, Supp., §293 [victim awarded \$ 50,000 in economic damages and \$ 1.5 million in noneconomic damages; her father's award in these categories was \$ 12,500 and \$ 100,000, respectively].)

(9) *Emotional Distress*. (See *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 C.A.4th 1211, 1230, 88 C.R.2d 732 [relentless harassment of other party to failed law office romance, resulting in substantial psychological distress, physical effects, and loss of partnership and family home; compensatory damages of \$ 450,000 were not excessive].)

(10) *Retaliation for Filing Claim Under FEHA*. (See *Iwekaogwu v. Los Angeles* (1999) 75 C.A.4th 803, 820, 89 C.R.2d 505 [damage award of \$ 500,000, only about \$ 10,000 of which could have been for economic damages, was proper where jury could have found that plaintiff needed psychiatric help and was suffering from such emotional distress that his capacity to enjoy life and engage in ordinary activities was significantly altered].)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Violation of Statutory Duty*.

Pintor case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §146.(7) *Sexual Harassment*. See *Hope v. California Youth Authority* (2005) 134 C.A.4th 577, 594, 36 C.R.3d 154 [gay employee brought action for sexual orientation harassment; award of \$ 917,104 in economic damages and \$ 1 million in noneconomic damages upheld].

(8) *Child Molestation*.

Ortega case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §310.



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6 *Witkin Sum. Cal. Law Torts* § 1749

[§ 1749] Judgment by Default.

In *Uva v. Evans* (1978) 83 C.A.3d 356, 147 C.R. 795, plaintiffs, a minor child and her father, sued for damages suffered when the child was bitten by defendant's dog. Her medical expenses were \$ 182, and an estimated \$ 2,100 would cover brief hospitalization and plastic surgery to remove a scar. The trial judge gave judgment for \$ 30,000, an amount obviously excessive in the light of the evidence, and the judgment was reversed for a new trial on the issue of damages. (83 C.A.3d 365.) The difficulty with the case was its procedural aspect, and the court decided one significant point and left another undecided. Defendant, served with a summons and complaint praying for \$ 30,000 damages, ignored the process; he likewise ignored the service of a request to enter a default and a request to enter a default judgment. At the ex parte hearing on the default, plaintiffs testified to the facts, and judgment was entered in the amount of the demand. Defendant's subsequent motion to set aside the default judgment under C.C.P. 473 was denied for lack of an adequate showing of excusable neglect, and this appeal followed.

(a) *Effect of improper prayer for amount of damages.* C.C.P. 425.10 prohibits a specific statement of the amount of damages demanded in personal injury or wrongful death actions, and C.C.P. 425.11 allows the defendant to request a statement as to the nature and amount of damages being sought and then requires notice by the plaintiff of that amount before a default may be taken. (See 4 Cal. Proc. (4th), *Pleading*, §472.) Defendant could have moved to strike the improper prayer (83 C.A.3d 360, footnote 2), but failed to do so. Instead he contended on appeal that (1) because C.C.P. 425.10 precludes a demand for a specific sum, and (2) C.C.P. 580 limits damages recoverable on a default to the amount demanded (see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §124), a default judgment in a personal injury or wrongful death case can only be a determination of liability and not of damages. (83 C.A.3d 360.) In refusing to decide this issue the court said: "Right or wrong, the complaint filed and served herein did contain a recitation of the damages sought and the judgment did not exceed the amount requested. In this case, section 580 was fully complied with. Moreover, the amount of damages sought was contained in every piece of paper which plaintiff served on defendant; thus defendant suffered no conceivable prejudice from the procedure followed here." (83 C.A.3d 360.)

(b) *Appellate court's power to review issue of excessive damages awarded in default judgment.* Sufficiency of the evidence is not reviewable on an appeal from a default judgment (see 9 Cal. Proc. (4th), *Appeal*, §355), and plaintiff argued that excessiveness of damages--in essence a question of sufficiency of evidence (see *supra*, §1741)--cannot be considered by the appellate court on such an appeal. Although the court found no explicit authority in point, it found a

persuasive analogy in *Buck v. Morrossis* (1952) 114 C.A.2d 461, 467, 250 P.2d 270, a case involving a treble damage award. (83 C.A.3d 363.) And two strong reasons of policy were declared in support of the power of review:

(1) The review of a trier of fact's determination of damages "is severely circumscribed"; i.e., only where it is so out of proportion to the evidence that "it shocks the conscience" of the court will it be overturned. "A rule precluding review of damages on appeal from a default judgment would consequently protect the award precisely in those cases in which review is most necessary--that is, where the damages awarded are totally unconscionable and without evidentiary justification." (83 C.A.3d 363, 364.)

(2) The right to appellate review of the issue flows logically from the fact that damages must be proved in the trial court before the default judgment may be entered (C.C.P. 585(b); see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §146). "The requirement of proof of damages is meaningless if it can be fulfilled by *any* evidence, even evidence which results in a judgment prompted by 'passion, prejudice or corruption.' ... While the role of the appellate court in reviewing damages is much more limited than that of the trial court reviewing a jury verdict, the policies which sanction such review are not dissimilar: just as the trial court need not sit idly by and watch injustice be done through an improper award by the jury, we know of no statutory or constitutional barrier which requires an appellate court to ignore gross injustice in the award of damages simply because the judgment was procured by way of default." (83 C.A.3d 364.) (See *Cummings Med. Corp. v. Occupational Med. Corp.* (1992) 10 C.A.4th 1291, 1297, 13 C.R.2d 585 [following *Uva v. Evans*]; Judicial Council Form No. 982(a)(24) [form for statement of damages in personal injury and wrongful death cases].)

C.C.P. 425.10 also prohibits a statement of the *punitive damages* sought. (See 11 *Pacific L. J.* 352.) However, the plaintiff may preserve the right to seek punitive damages on a default judgment by serving on the defendant a statement as to the amount of these damages. Thus, where the motion for default judgment includes a request for punitive damages, the plaintiff must serve the statement on the defendant before a default may be taken. This statement may be served as part of the statement required by C.C.P. 425.11. (C.C.P. 425.115; see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §135.)

SUPPLEMENT: [This section is current through the latest supplement]
Statement of damages:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §511.

Limit on recoverable damages:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §149.

Sufficiency of evidence is not reviewable:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §361.

Damages must be proved in trial court:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §169. Judicial Council Form No. 982(a)(24) [form for statement of damages in personal injury and death cases] was redesignated Judicial Council Form No. CIV-050 in 2006.

Statement of damages:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §159.



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CHAPTER IX - Torts

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XVIII. DAMAGES: KINDS OF INJURY
H. Excessive and Inadequate Damages.
3. Inadequate Damages.
a. Damages Held Inadequate.

6 Witkin Sum. Cal. Law Torts § 1750

[§ 1750] Damages Held Inadequate.

Occasionally, a judgment will be reversed because the award disregards specific items of pecuniary loss established by the evidence. (See *Price v. McComish* (1937) 22 C.A.2d 92, 99, 70 P.2d 978 [\$ 200 given for personal injuries, but medical expenses were over three times this amount, and other elements of damage were shown].)

The majority of the cases, however, are those in which the award is found to be inadequate on a fair consideration of the evidence. In *Bencich v. Market Street Ry. Co.* (1937) 20 C.A.2d 518, 67 P.2d 398, a fireman received bruises, a fracture, and a crushed foot, spent 6 months in the hospital and suffered amputation of part of the foot, which required the use of a special brace, and spent \$ 2,423.37 for medical services. An award of \$ 5,000 was held grossly inadequate, and the judgment was reversed despite the trial court's refusal to grant a new trial. (20 C.A.2d 529.) (See *Frantz v. McLaughlin* (1966) 64 C.2d 622, 624, 51 C.R. 282, 414 P.2d 410 [serious and permanent injury to foot, only \$ 1,900 for general damages]; *Peri v. Culley* (1931) 119 C.A. 117, 120, 6 P.2d 86 [extensive injuries, long hospitalization, \$ 2,500]; *Amore v. Di Resta* (1932) 125 C.A. 410, 413, 13 P.2d 986 [wrongful death of 30-year-old man in perfect health, leaving wife and two young children, \$ 1,000]; *Bauman v. San Francisco* (1940) 42 C.A.2d 144, 159, 108 P.2d 989 [child, fractured skull and serious subsequent disabilities, \$ 1,500]; *Weiskopf v. Smith* (1941) 44 C.A.2d 438, 440, 112 P.2d 665 [18-year-old girl, cheek wound, and disfigurement, \$ 100]; *Wilson v. San Francisco* (1951) 106 C.A.2d 440, 443, 235 P.2d 81, supra, §1697; *Reznick v. Hillman-Sidney Auto Sales* (1963) 216 C.A.2d 569, 574, 30 C.R. 889 [plaintiff sustained back injury, liability conceded; verdict of \$ 200 was inadequate where special damages aggregated \$ 2,674.50]; *Doyle v. Hamren* (1966) 246 C.A.2d 733, 735, 739, 55 C.R. 84 [wrongful death, verdict for \$ 51,427.75; decedent with substantial earning power and life expectancy of 44 years; order granting new trial on damages alone affirmed]; *Gallentine v. Richardson* (1967) 248 C.A.2d 152, 154, 155, 56 C.R. 237, quoting the text [verdict for exact amount of special damages, where substantial general damages suffered]; *Haskins v. Holmes* (1967) 252 C.A.2d 580, 587, 60 C.R. 659 [assault and battery, severe injuries and pain; medical expense \$ 911.37, verdict for \$ 1,000; i.e., only \$ 88.63 general damages]; *Smith v. Moffat* (1977) 73 C.A.3d 86, 94, 140 C.R. 566 [wrongful death of mother of 11/2-year-old child; \$ 4,030.66 general damages awarded despite uncontradicted testimony that present value of economic loss until age 18 was \$ 168,000]; 22 Am.Jur.2d (2003 ed.), *Damages* §§824, 825.)

A number of annotations deal with the adequacy of damages. (See 11 A.L.R.3d 370 [injuries to head or neck]; 12 A.L.R.3d 475 [injuries to organic systems and processes]; 12 A.L.R.4th 96 [injuries to arms and hands]; 13 A.L.R.4th

212 [injuries to legs and feet]; 14 A.L.R.4th 539 [injuries to, or conditions induced in, circulatory, digestive, and glandular systems]; 15 A.L.R.4th 294 [injuries to back, neck, or spine]; 15 A.L.R.4th 519 [injuries to, or conditions induced in, respiratory system]; 16 A.L.R.4th 1127 [injuries to, or conditions induced in, sensory or speech organs and systems]; 52 A.L.R.4th 1 [injuries causing mental or psychological harm]; 48 A.L.R.5th 129 [injuries to trunk or torso, or internal injuries]; 50 A.L.R.5th 1 [injuries to head or brain]; 51 A.L.R.5th 467 [injuries to nerves or nervous system]; and see A.L.R. Notes, *supra*, §§1741, 1747.)

If the liability is undisputed or clear, the reversal may be for a limited new trial on the issue of damages. But where the evidence of liability is so doubtful or sharply conflicting as to indicate a compromise verdict, the reversal will be general. (See *Clifford v. Ruocco* (1952) 39 C.2d 327, 329, 246 P.2d 651 [\$ 1,500 award where special damages alone were over \$ 2,000]; 9 Cal. Proc. (4th), *Appeal*, §779.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Dodson v. J. Pacific* (2007) 154 C.A.4th 931, 935, 64 C.R.3d 920 [plaintiff was injured in fall caused by defendant's negligence; damages award that included nothing for pain and suffering was inadequate where plaintiff had surgery in which herniated disc was removed and metallic plate inserted]. *Annotations:* See 14 A.L.R.6th 263 [inadequacy or excessiveness of damage awards against drunk drivers].

Limited or general reversal:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §§890, 891.



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3. Inadequate Damages.
b. Small Awards Upheld.

6 *Witkin Sum. Cal. Law Torts* § 1751

[§ 1751] Small Awards Upheld.

Most of the decisions in which awards that seem inadequate are upheld involve insufficient or conflicting evidence on the elements of damage. Following the usual practice, the appellate court accepts the determination of the jury or trial judge. (See, e.g., *Knight v. Fitch* (1937) 22 C.A.2d 252, 255, 70 P.2d 976 [15-year-old girl received cuts on eye and lip, lost six teeth, suffered fractured jaw, and incurred medical expense of \$ 150; trial court's judgment of \$ 950 affirmed]; *Sassano v. Roullard* (1938) 27 C.A.2d 372, 376, 81 P.2d 213 [7-year-old boy cut on forehead and nose by flying glass, permanent scar; verdict of \$ 250 upheld after judge denied new trial]; *Gersick v. Shilling* (1950) 97 C.A.2d 641, 645, 218 P.2d 583 [conflicting evidence about severity and permanency of injuries]; *Lemere v. Safeway Stores* (1951) 102 C.A.2d 712, 715, 228 P.2d 296 [\$ 7,500 to woman who suffered leg, hand, and head injuries, with long hospitalization and wheel chair; jury could believe she grossly exaggerated both injuries and present condition]; *Frampton v. Stoloff* (1956) 142 C.A.2d 175, 176, 298 P.2d 10 [suit for \$ 35,000, verdict for \$ 250; no evidence of plaintiff's past or possible future earnings, and medical testimony of old mental trouble as cause of most of hospitalization]; *Abbott v. Taz Express* (1998) 67 C.A.4th 853, 856, 79 C.R.2d 360 [award of \$ 17,000 economic damages was adequate even though expert testified that cost to retrain plaintiff was \$ 115,000; jury, asked to award single amount for economic damages, may have decided to award no retraining costs]; 22 *Am.Jur.2d* (2003 ed.), *Damages* §811.)

In *Miller v. San Diego Gas & Elec. Co.* (1963) 212 C.A.2d 555, 28 C.R. 126, an action for personal injuries resulting from electric shock, the verdict was in the exact amount of the claimed medical expenses, \$ 1,133.18. *Held*, it was not inadequate as a matter of law, for there was substantial conflict whether the medical treatment was necessary as well as whether plaintiff received any substantial injury or suffered any substantial pain. (212 C.A.2d 558.)

West's Key Number Digest, Damages k.127, 128

SUPPLEMENT: [This section is current through the latest supplement]