THE STATE BAR OF CALIFORNIA

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– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

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Via E-mail: civiljuryinstructions@jud.ca.gov.

Ms. Geraldine Dungo
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitations to Comment—CACI 11-01

Dear Ms. Dungo:

The Jury Instructions Committee of the State Bar of California's Litigation Section (the committee) has reviewed the proposed new and revised civil jury instructions (CACI 11-01), and appreciates the opportunity to submit these comments.

1. CACI No. 108. Duty to Abide by Translation Provided in Court

Agree.

2. CACI No. 112. Questions from Jurors

Agree.

3. CACI No. 115. "Class Action" Defined (Plaintiff Class)

The committee agrees that an instruction explaining what a "class action" means would be useful and agrees with the language of the instruction, with the exception of the sentence "You may assume that the evidence at this trial applies to all class members." We believe that that this statement is overbroad. Particular evidence may or may not apply to all class members, and it very likely will not be true that all of the evidence will apply to all class members. "Most class actions involve individual issues as well as the required common questions. Individual issues may arise in connection with any phase of a class controversy, including proofs of legal violation or breach of legal duty, causation or fact of damage, relief entitlement, nature, and amount, unique defenses, and other issues." (3 Newberg on Class Actions (4th ed. 2010) § 9.58.)

4. CACI No. 116. Why Electronic Communications and Research Are Prohibited

Disagree. The preliminary admonitions in CACI No. 100 are quite extensive, particularly when considered together with the other pretrial instructions. We believe that further explanation of the reasons for the rule prohibiting electronic communications is unnecessary and that the marginal benefit of this proposed instruction would likely be outweighed by the diminished juror attention resulting from so many lengthy pretrial instructions.

5. CACI No. 302. Example of Proposed Change to 19 Different Instructions

The committee agrees with the proposed revisions. Omitting uncontested elements from the instructions shortens the instructions, which is beneficial, but may mislead or confuse the jury by creating the impression that the plaintiff's burden is too light. We believe that if a particular instruction includes several elements, however, it would useful to state in the Directions for Use that the court may instruct the jury that particular elements are uncontested.

6. CACI No. 333. Affirmative Defense—Economic Duress

The four elements set forth in *Perez v. Uline, Inc.* (2007) 157 Cal.App.4th 953 seem to be only a specific application of the same three elements stated in the instruction. We suggest that the Directions for Use state that the court may modify the instruction to describe particular ways that the defendant's conduct would be wrongful in the circumstances, citing "see" *Perez*, in lieu of the proposed language.

The second bullet point in the Sources and Authorities contains the same quoted language as the sixth, except that the sixth includes an additional sentence. We suggest striking the second bullet point and retaining the sixth. The fifth and seventh bullet points regarding policy considerations and the courts' reluctance to apply the economic duress doctrine do not seem relevant to this jury instruction, so we would strike both bullet points. We believe that the quoted language in the final bullet point does not merit inclusion in the Sources and Authorities, and would strike it.

7. CACI No. 417. Special Doctrines: Res Ipsa Loquitur

This instruction is appropriate only if the defendant presents evidence to rebut the presumption that the defendant's negligence caused the plaintiff's harm, i.e., evidence that could support a finding that the defendant was not negligent or that the defendant's negligence was not a proximate cause of the occurrence. The Directions for Use suggest that the instruction is appropriate only in those circumstances, but this could be stated more clearly.

The committee suggests that either this instruction or a separate instruction should provide for the situation where the defendant presents no rebuttal evidence and the jury must be instructed that if it finds that the three conditions exist (i.e., that the presumption is established), it must find that the presumed fact is established (i.e., that the defendant's negligence caused the plaintiff's harm). The California Law Revision Commission has explained what is required in this situation, known as conditional res ipsa loquitur:

"Basic facts contested; no rebuttal evidence. The defendant may attack only the elements of the doctrine. His purpose in doing so would be to prevent the application of the doctrine. In this situation, the court cannot determine whether the doctrine is applicable or not because the basic facts that give rise to the doctrine must be determined by the jury. Therefore, the court must give an instruction on what has become known as conditional res ipsa loquitur. [¶] Where the basic facts contested by evidence, but there is no rebuttal evidence, the court should instruct the jury that, if it finds that the basic facts have been established by a preponderance of the evidence, then it must also find that the accident was caused by some negligent conduct on the part of the defendant." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 646, pp. 200-201.)

If the defendant presents evidence rebutting the presumption, the court, upon request, must instruct the jury on two points. (Evid. Code, § 646, subd. (c).) The revised instruction includes the first point: if the jury finds that the three conditions exist, it may infer that a proximate cause of the occurrence was negligent conduct by the defendant. But the revised instruction omits the second point: the jury can find that the defendant's negligence was a proximate cause of the occurrence only if the jury believes, after weighing all of the evidence and drawing any inferences that are warranted, that it is more probable than not that this fact is true. It appears that the second point is intended to counterbalance the first point and dispel any impression that the inference could be made based solely on the facts giving rise to the presumption without considering all of the evidence, including rebuttal evidence. (See Cal. Law Revision Com. com., 29B West's Ann. Evid. Code, *supra*, p. 201.) The last paragraph of the existing instruction includes this second point, and it should not be deleted.

Finally, we believe that the prefatory language in the instruction "In this case" is superfluous and should be omitted.

8. CACI No. 427. Furnishing Alcoholic Beverages to Minors

The committee believes that rather than assume in the instruction that knowledge that the person was a minor is not a required element while acknowledging the uncertainty on this point in the Directions for Use, the instruction instead should include knowledge of minority as an optional required element in brackets. The omission of this element from the instruction may be perceived as a suggestion that it probably is not a required element.

The fourth element in the instruction is the fact of harm and should include optional language where the plaintiff is the minor rather than a third party. We suggest the following (additions underscored):

"4. [That [*name of alleged minor*] harmed [*name of plaintiff*]] <u>[or] [That [*name of plaintiff*] was harmed]</u>; and"

This seems preferable to substituting a personal pronoun for "[*name of alleged minor*]," as suggested in the Directions for Use.

9. CACI No. 1201. Strict Liability—Manufacturing Defect—Essential Factual Elements

The proposed revision to the instruction would delete that portion of the essential elements stating that the plaintiff must have been harmed "while using the [*product*] in a reasonably foreseeable way." The only authority cited to support this change is *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658. We believe that *Perez* is not on point and that the language in the instruction should be retained.

Perez discusses the burden of proof with respect to the affirmative defense of product misuse as a superseding cause. According to *Perez*, the plaintiff has the burden of producing evidence that he or she was injured while using the product in a reasonably foreseeable way. If the plaintiff satisfies this burden, the burden of proof shifts to the defendant to show that the plaintiff's injury "resulted from a misuse of the product." (*Perez*, *supra*, 188 Cal.App.4th at p. 678; see also *id.* at p. 679.) This quoted language in *Perez* refers to proof that the defect was a superseding cause of the injury, which is an affirmative defense. (See *id.* at p. 663 ["the burden of proof shifted to VAS to prove that Perez's use of the machine was so unforeseeable as to constitute a superseding cause of the injury"], pp. 679-682 [discussing the law of superseding cause].)

Product misuse may be a substantial factor resulting in the plaintiff's injury without being a superseding cause. The Directions for Use for CACI Nos. 1207A and 1207B recognize this distinction. That the defendant has the burden to prove misuse as a superseding cause does not compel the conclusion that the plaintiff has no burden to prove that his or her use was reasonably foreseeable.

We believe that the existing instruction is consistent with caselaw suggesting, if not definitively holding, that the plaintiff has the burden to prove a reasonably foreseeable use. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560;[1] *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 64.[2]) Perhaps the Directions for Use should acknowledge that the issue has not been definitively decided, if that is the case. (See Madden & Owen on Products Liability (2010) § 14:4; American Law of Products Liability 3d (2011), § 42:6; Annotation, Products Liability: Product Misuse Defense (1988) 65 A.L.R.4th 263, §§ 5, 6.) This same comment applies to similar changes in CACI Nos. 1203, 1204, and 1205.

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[1] "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way. [Citations.]" (*Soule*, *supra*, 8 Cal.4th at p. 560.)

[2] "To establish the manfacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in the design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use." (*Greenman*, *supra*, 59 Cal.2d at p. 64.)

10. CACI No. 1203. Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements

Same comment as for CACI No. 1201 regarding the proposed deletion from the third element in this instruction.

The consumer expectations test applies only if "the minimum safety of a product is within the common knowledge of lay jurors." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567.) The committee believes that this is a question of law for the court to decide (*id.* at p. 568) and suggests that the second paragraph of the Directions for Use, including the citation to *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, be replaced with language to this effect.

We believe that the quotation at the end of the Sources and Authorities that "the use of asbestos insulation is a product that is within the understanding of ordinary lay jurors" is out of place and that no effort should be made either to catalog products for which the consumer expectation test may be appropriate or to single out only one such product. Moreover, "[t]he critical question, in assessing the applicability of the consumer expectation test, is not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, in the context of the facts and circumstances of its failure, is one about which the ordinary consumers can form minimum safety expectations." (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1124.)

11. CACI No. 1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof

Same comment as for CACI No. 1201 regarding the proposed deletion from the second element in this instruction.

12. CACI No. 1205. Strict Liability—Failure to Warn—Essential Factual Elements

Same comment as for CACI No. 1201 regarding the proposed deletion from the sixth element in this instruction.

13. CACI No. 1222. Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements

The committee believes that references to the Restatement Second of Torts in the Sources and Authority should not be replaced with references to the Restatement Third of Torts, Products Liability. Section 2 of the Restatement Third has not been adopted by the California courts, and the Restatement Third generally has not supplanted the Restatement Second as an authoritative source.

Also, we suggest that "make" in the second line of the instruction be changed to the past tense "made" consistent with other instructions.

14. CACI No. 1245. Affirmative Defense—Product Misuse or Modification

Agree.

15. CACI No. 2570. Age Discrimination—Disparate Treatment—Essential Factual Elements

Disagree. The committee believes that there is no need for a separate instruction on age discrimination. CACI No. 2500 can be used for age discrimination just as it can be used for discrimination on any other protected status. The plaintiff's membership in a protected group ordinarily is not disputed, but if it is disputed an element can be added to CACI No. 2500 without the need for a separate instruction.

16. CACI No. 2924. Status as Defendants' Employee—Subservant Company.

The committee agrees that elements 2 and 3 should be added and that the list of factors (a) through (f) should be deleted. We would modify the language of factors 2 and 3, however.

The plaintiff may be suing for his or her own injury or for the wrongful death of another. This is clear from the language "[he/she/[*name of decedent*]]" in the first line of the instruction. (See also CACI No. 2923.) The references to [*name of plaintiff*] in elements 2 and 3 therefore should be changed to [*name of plaintiff/decedent*], the language "was injured" in element 2 should be changed to "was [injured/killed]," and "time of injury" in element 3 should be changed to "time of [injury/death]."

Schmidt v. Burlington Northern & Santa Fe Ry. (9th Cir. 2010) 605 F.3d 686, 689-690, states that the plaintiff must prove that the defendant "controlled or had the right to control his physical conduct on the job." Yet the second element in the instruction refers more generally to the right to control the primary employer's "employees." We believe that the second element should be specific to the plaintiff or decedent:

"2. That [*name of defendant*] controlled or had the right to control ~~the~~ [*name of plaintiff/decedent*]'s physical conduct ~~of [name of primary employer]'s employees~~ in the course of the work during which [*name of plaintiff/decedent*] was [injured/killed]; and"

The committee also suggests stating in the Directions for Use that the court should instruct on the appropriate factors to determine the existence of the right to control, and citing section 220 of the Restatement Second of Agency.

17. CACI No. 3011. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—General Conditions of Confinement Claim

Disagree. Use of the word "deprivation" suggests that the instruction applies only to those cases where the prisoner was deprived of some necessity. But a deprivation of rights, privileges, or immunities under section 1983 may involve affirmative conduct (such as excessive force) that most jurors would not describe as a deprivation.

The committee believes that the existing instruction more accurately describes the essential elements.

We believe that the fact that a substantial risk of harm was obvious may be circumstantial evidence of the defendant's knowledge, but does not merit specific mention in this instruction. The defendant's knowledge of the risk of harm must be actual and subjective. (*Farmer v. Brennan* (1970) 511 U.S. 825, 847.) Instructing on the obviousness of the risk may weaken this requirement.

The authorities cited in the Sources and Authorities do not indicate whether absence of reasonable justification is an essential element for the plaintiff to prove or reasonable justification is an affirmative defense for the defendant to prove.

18. CACI No. 3301. Below Cost Sales—Essential Factual Elements

The committee believes that an instruction on the presumption is appropriate, but believes that a separate instruction would be clearer.

Bay Guardian Co. v. New Times Media, LLC (2010) 187 Cal.App.4th 438 holds that the presumption under Business and Professions Code section 17071 is a presumption affecting the burden of proof, but offers no clear guidance on how to instruct the jury on such a presumption. We believe that other authorities better explain the operation of such a presumption (*Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1492-1495; Assembly Com. on Judiciary com. on Evid. Code § 606, 29B West's Ann. Evid. Code (1995 ed.) foll. § 606, pp. 64-65; Jefferson's California Evidence Benchbook (Cont.Ed.Bar 4th ed. 2010) §§ 48.29-48.33) and should be cited in lieu of relying on *Bay Guardian*.

The proposed new language provides for a rebuttable presumption upon the plaintiff's proof of only one factor: sales below cost or giving away product or services. But section 17071 also requires "proof of the injurious effects of such acts" to establish the presumption. This second factor should be included in the instruction.

19. CACI No. 3712. Vicarious Responsibility

Agree.

20. CACI No. 3921. Wrongful Death (Death of an Adult)

Agree.

21. CACI No. 3922. Wrongful Death (Parents' Recovery for Death of a Minor Child)

Agree.

22. CACI No. 4302. Termination for Failure to Pay Rent—Essential Factual Elements

Valov v. Tank (1985) 168 Cal.App.3d 867, 876, held that the residential tenant's admission that he actually received the written notice waived any defect in the manner of service. The committee believes that the Directions for Use should be modified to clarify that a waiver occurs only upon actual receipt of the written notice:

"If service of notice may have been defective, but there is evidence that the defendant ~~did~~ received the written notice ~~it~~, include the bracketed language at the end of element 4. Defective service may be waived if defendant admits receipt of the written notice."

This same comment applies to the Directions for Use for CACI Nos. 4303, 4304, 4305, 4306, 4307, 4308, and 4309.

23. CACI No. 5000. Duties of the Judge and Jury

The committee suggests the following revisions to the third paragraph of the instruction to make it more understandable:

"These prohibitions on communications and research extend to all forms of electronic communications. Do not use any electronic devices or media~~, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or Web site, including social networking websites or online diaries,~~ to send or receive any information to or from anyone about this case or your experience as a juror until after I tell you that you are ~~have been~~ discharged from your jury duty. This means that you cannot use any cell phone, smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or Web site, including social networking websites or online diaries, or any other electronic device to send or receive anything dealing with your experience as a juror or any subject matter of this case.

The citation to the 4th edition of Witkin, California Procedure under Secondary Sources probably should be 7 Witkin, California Procedure (5th ed. 2008) Trial, § 256. We suggest that you consider citing section 330 as well.

24. CACI No. 5009. Predeliberation Instructions

Agree.

25. CACI No. 5019. Questions from Jurors

Agree.

DISCLAIMER

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Very truly yours,

Reuben A. Ginsburg
Chair, Jury Instructions Committee of the
State Bar of California's Litigation Section