CALIFORNIA LAWYERS ASSOCIATION
– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

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March 1, 2018

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

Mr. Bruce Greenlee
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitation to Comment—CACI 18-01

Dear Mr. Greenlee:

The Jury Instructions Committee of the California Lawyers Association's Litigation Section has reviewed the proposed revisions to civil jury instructions and verdict forms (CACI 18-01) and appreciates the opportunity to submit these comments.

1. CACI No. 206. Evidence Admitted for Limited Purpose

We agree with the revisions to the Directions for Use, but we believe a fuller explanation would be helpful. In lieu of the proposed new second paragraph, we suggest:

"The jury must consider an expert's testimony concerning the basis for the expert's opinion for its truth in order to evaluate the expert's opinion. As such, hearsay problems with case-specific testimony given by an expert witness cannot be avoided by giving a limited-purpose instruction that such testimony should not be considered for its truth. (*People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320].)"

2. CACI No. 430. Causation: Substantial Factor

Agree.

3. CACI No. 435. Causation for Asbestos-Related Cancer Claims

Agree.

4. CACI No. 470. Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity

a. We agree with the revisions to element 1, adding a new alternative element 1 and making current element 1 an optional alternative. We believe the paragraph starting "Conduct is entirely outside the range . . ." should be made optional as well, by adding brackets, because this paragraph defines language in current element 1 ("entirely outside the range of ordinary activity") that will become optional.

b. We would modify the third paragraph in the Directions for Use to state that whether the defendant has unreasonably increased the risk "may be" (rather than "is") a question of fact for the jury, and would state that the issue can be resolved as a matter of law if the facts can support only one reasonable conclusion. We recommend this same change in CACI Nos. 471, 472, and 473.

c. We would add language to the Directions for Use stating to give the optional paragraph starting "Conduct is entirely outside the range . . ." if the first alternative element 1 is given.

5. CACI No. 1004. Obviously Unsafe Conditions

a. The existence of a duty of care is a question of law for the court to decide, and the jury only decides whether the defendant breached the duty. When the existence of scope of a duty of care depends on foreseeability, the court decides the issue of foreseeability as a question of law. "Foreseeability, when analyzed to determine the existence or scope of duty, is a question of law to be decided by the court." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678.) The instruction as revised would state that the defendant has a duty to protect against the risk of harm "if it is foreseeable that the condition my cause injury." This may suggest to the jury that the jury must decide the question of foreseeability. We believe the court should decide the foreseeability of injury and instruct the jury on the second paragraph, with no mention of foreseeability, only if the court decides such an injury was foreseeable. We would revise the second paragraph of the instruction as stated below.

b. *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 2 Cal.App.5th 438 and *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104 both involved necessity. Although *Jacobs* suggested that the duty of care may also extend to someone who encounters an obviously unsafe condition because of "other circumstances," *Jacobs* did not hold on this point, and the language "other circumstances" is too broad and would provide no guidance to the jury.

c. Accordingly, we would revise the second paragraph of the instruction as follows:

"[However, the [owner/lessor/occupier/one who controls the property] does still have to use reasonable care to protect against the risk of harm ~~if it is foreseeable~~ that the condition may cause injury to someone who, because of necessity ~~or other circumstances~~, encounters the condition.]"

d. We suggest adding language to the Directions for Use explaining that the court must decide the issue of foreseeability of injury and instruct on the second paragraph of the instruction only if the court finds that such an injury was foreseeable.

6. CACI 1005. Property Owner's Liability for the Criminal Conduct of Others

Agree.

7. CACI No. 1500. Former Criminal Proceeding—Essential Factual Elements

a. We agree with the proposed revisions to the instruction and the Sources and Authority.

b. We would modify the second paragraph in the Directions for Use for greater clarity:

"In elements 1 and 3 and in the next-to-last paragraph, include the bracketed references to prosecution if the arrest was without a warrant. In the absence of a warrant, false accusations that lead to an arrest, but do not culminate in formal charges and a prosecution, do not give rise to a cause of action for malicious prosecution because in such a case, there has been no adjudicative criminal proceeding resulting in a favorable termination. (See *Van Audernhove v. Perry* (2017) 11 Cal.App.5th 915, 919-925 [217 Cal.Rptr.3d 843].) In contrast, whether a claim of malicious prosecution can be based on an arrest obtained on a warrant that does not result in a ~~Whether~~ prosecution ~~is required in an arrest on a warrant~~ has not definitively been resolved because a warrant arguably involves court involvement and an adjudicatory criminal proceeding. ~~(See *Van Audernhove v. Perry* (2017) 11 Cal.App.5th 915, 919-925 [217 Cal.Rptr.3d 843].)~~"

8. CACI No. 1503. Affirmative Defense—Proceeding Initiated by Public Employee Within Scope of Employment

a. It is unclear whether this instruction as revised is intended to address immunity for the public entity or its employee. The instruction begins by stating that the public entity claims immunity, but the Directions for Use and Sources and Authority both refer to public employee immunity. We believe the instruction should cover immunity for both the public entity and public employee. We would modify the instruction:

"[*Name of public entity/public employee defendant*] claims that[he/she/it] cannot be held responsible for [*name of plaintiff*]'s harm, if any, because [*name of employee*] who initiated the [*specify proceeding, e.g., civil action*] ~~was initiated by its employee who~~ was acting within the scope of [his/her] employment. To establish this defense, [*name of defendant*] must prove that [*name of employee*] was acting within the scope of [his/her] employment."

b. We would cite Government Code section 815.2, subdivision (b) (public entity immunity) in the Directions for Use and Sources and Authority.

9. VF-1500. Malicious Prosecution—Former Criminal Proceeding

a. We agree with the revisions to the verdict form.

b. We would add to the Directions for Use: "In question 1, include the bracketed reference to prosecution if the arrest was without a warrant."

10. CACI No. 1730. Slander of Title—Essential Factual Elements.

Agree.

11. CACI No. 1731. Trade Libel—Essential Factual Elements

Agree. We note that the citation to Witkin on page 47 should be updated to the 11th edition.

12. CACI No. 1802. False Light

Agree.

13. CACI No. 2021. Private Nuisance—Essential Factual Elements

a. We believe proposed new element 3, based on dicta in *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100, does not accurately state the law. *Lussier*, quoting the Restatement, stated the invasion "may be" (1) intentional and unreasonable, (2) unintentional but negligent or reckless, or (3) the result of an abnormally dangerous activity for which there is strict liability. We regard this as a nonexclusive, rather than exclusive, list of types of conduct supporting nuisance liability. *Lussier* did not hold on this point. Instead, *Lussier* held that where nuisance liability is based on an omission, the defendant must have been negligent in failing to act. (*Id*. at pp. 102, 105; see *City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1237 [quoting *Lussier*, at p. 105].)

We believe the stated rule that nuisance must involve (1), (2), or (3) is potentially misleading, particularly if the word "unreasonable" is not defined. According to *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938, an interference with the plaintiff's use and enjoyment of land (not only an intentional interference, but any interference) must be "unreasonable" to create nuisance liability, and an interference is "unreasonable" if "the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account." This requirement is currently expressed in element 8 (renumbered element 9) and CACI No. 2022, *Private Nuisance—Balancing Test Factors—Seriousness and Public Benefit*, which must be given with this instruction. So it is unnecessary to add an "unreasonable" requirement in proposed new element 3, and troublesome to use this term without defining its meaning in this context.

As to "unintentional, but negligent or reckless," this may suggest that an *intentional* interference that is negligent or reckless does not give rise to nuisance liability, unless a

"negligent or reckless" interference is "unreasonable" (as seems to be the case). It would be simpler to say that any interference, whether intentional or unintentional, must be unreasonable to constitute a nuisance, but current element 8 and CACI No. 2022 already set forth this requirement.

We would limit element 3 to the holding in *Lussier* by modifying it as follows:

"[That [*name of defendant*]'s conduct in ~~acting or~~ failing to act was ~~[intentional and unreasonable/unintentional, but~~ negligent or reckless~~/the result of an abnormally dangerous activity]~~;]"

b. Accordingly, we would modify the final sentence in the proposed first new paragraph in the Directions for Use:

"If ~~there is an issue as to the nature of~~ the defendant's conduct involved the failure ~~in acting or failing~~ to act ~~that caused the interference~~, include Element 3."

c. The proposed second new paragraph in the Directions for Use derives from the same paragraph in *Lussier* as proposed new element 3. After stating three types of conduct constituting nuisance, *Lussier* stated (quoting the Restatement): "On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability." (*Lussier*, *supra*, 206 Cal.App.3d at p. 100.)"

We do not find the proposed second new paragraph helpful either as an explanation of how the instruction will work in practice or as a direction for use of the instruction. The term "reasonable" oversimplifies the required balancing under current element 8 and CACI No. 2022. And an accidental act would support liability if the defendant acted negligently or recklessly. The statement in *Lussier* was qualified by "and not fall within any of the categories mentioned above," but the proposed new second paragraph omits this qualification. We would strike the proposed second new paragraph.

d. The proposed new third paragraph in the Directions for Use explains the intent requirement. The only intent requirement in this instruction is in proposed new element 3, and we would strike that part of element 3, so we would strike the proposed new third paragraph too.

e. The proposed new fourth paragraph in the Directions for Use states, "If the conduct results from an abnormally dangerous activity, it must be one for which there is strict liability," citing *Lussier*, *supra*, 206 Cal.App.3d at page 100, and the Restatement 2d of Torts. But *Lussier* did not hold on this point. Absent a case holding on point, we would strike this paragraph.

f. The proposed new fifth paragraph in the Directions for Use refers to an exception, apparently meaning an exception to the purported rule that an abnormally dangerous activity supports nuisance liability only if strict liability applies. Since we would strike the fourth

paragraph and the reference in proposed new element 3 to abnormally dangerous activity, we would strike this fifth paragraph too absent a case holding on point.

g. We agree with the proposed new fifth paragraph in the Directions for Use citing *City of Pasadena*.

h. The quotes from *Lussier* added to the Sources and Authority (pp. 56-57) are dicta and are not particularly helpful, so we would strike them.

14. CACI No. 2521A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant

a. An employer is liable for harassment by a nonsupervisory employee only if the employer knew or should have known about the harassment and failed to take corrective action. (Gov. Code, § 12940, subd. (j)(1).) Element 6 reflects this, but the proposed new first sentence in the Directions for Use, "If there are both employer and individual defendants . . . both are liable for any damages," seems to suggest that the employer is automatically liable for harassment by an employee. And the reference to "vicarious liability" in the second sentence seems inappropriate. Under FEHA, employer liability for harassment by a nonsupervisory employee is direct rather than vicarious. Employer liability for harassment by a supervisor under FEHA is described as "strict" rather than "vicarious." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041 [under FEHA an employer is strictly liable for harassment by a supervisor, and liability is not based on agency principles]; see Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2017) ¶¶ 10:315.1-10:315.2 [employer liability under Title VII is vicarious, while under FEHA employer liability is strict and therefore is based on agency].) Accordingly, we would modify the final sentence in the Directions for Use:

"If there are both employer and individual defendants . . . , and both are found liable, the liability is joint and several ~~both are jointly and severally liable for any damages~~. Comparative fault and Proposition 51 do not apply to the defendants' liability ~~vicarious liability~~. . . ."[1]

b. We question the appropriateness of the new bullet point on page 61 of the Sources and Authority in light of the foregoing.

15. CACI No. 2620. CFRA Rights Retaliation—Essential Factual Elements (Gov. Code, § 12945.2(l))

a. We suggest modifying the title and providing specific alternative language in this instruction for use in a retaliation claim under the New Parent Leave Act, rather than simply stating that the instruction may be used for such a claim:

"CFRA or NPLA Rights Retaliation—Essential Factual Elements (Gov. Code, §§ 12945.2(l), 12945.6(h))

[1] We suggest the same changes in CACI Nos. 2521B, 2521C, 2522A, 2522B, and 2522C.

"[*Name of plaintiff*] claims that [*name of defendant*] retaliated against [him/her] for [[requesting/taking] [family care/medical/new parent] leave/[*other protected activity*]]. To establish this claim, [name of plaintiff] must prove all of the following:

"1. That [*name of plaintiff*] was eligible for [family care/medical/new parent] leave;

"2. That [name of plaintiff] [[requested/took] [family care/medical/new parent] leave/[*other protected activity*]];

"3. That [name of defendant] [discharged/[*other adverse employment action*]] [name of plaintiff];

"4. That [name of plaintiff]'s [[request for/taking of] [family care/medical/new parent] leave/[*other protected activity*]] was a substantial motivating reason for [discharging/[*other adverse employment action*]] [him/her];

"5. That [name of plaintiff] was harmed; and

"6. That [name of defendant]'s retaliatory conduct was a substantial factor in causing [name of plaintiff]'s harm."

b. We would modify the proposed new second paragraph in the Directions for Use for greater clarity:

"This instruction may also be given for a claim of retaliation under the New Parent Leave Act. The activity protected from retaliation under the New Parent Leave Act may be inserted as 'other protected activity' in the introductory paragraph and in ~~option of~~ elements 2 and 4 ~~may be used to assert what is protected from retaliation under this act~~. (See Gov. Code, § 12945.6(g), (h).)"

16. CACI No. 2630. Violation of New Parent Leave Act—Essential Factual Elements

a. This instruction states a cause of action under Government Code section 12945.6, so we would add the code citation to the title.

b. We believe the statutory threshold of 20 employees must be satisfied as of the calendar year when the employee requested leave or the preceding calendar year, rather than at the time of trial (see Cal. Code Regs., tit. 2 § 11087, subd. (d)), so we would modify element 1:

"1. That [*name of defendant*] employ~~s~~ed at least 20 employees within 75 miles of the site where [name of plaintiff] worked;"

c. The "previous 12-month period" under the statute refers to the 12 months prior to the commencement of leave (Cal. Code Regs. tit. 2, § 11087(e)), so we would modify element 2:

"2. That [*name of plaintiff*] worked for [*name of defendant*] for more than a year, and for at least 1,250 hours during the ~~previous~~ twelve months prior to the commencement of the leave;"

d. The NPLA requires employers, before or on the day the leave starts, to provide the employee a guarantee of reinstatement. (Gov. Code, § 12945.6, subd. (a)(1).) We believe the third sentence in the first paragraph in the Directions for Use should make this clear:

"The act also requires the employer to, on or before commencement of the leave, guarantee employment in the same or a comparable position on the termination of the leave."

e. Unlike the CFRA, which expressly requires an employee to provide prior notice of the foreseeable need for leave, the NPLA does not expressly require prior notice. Rather than construe this omission as unintentional and infer a requirement of prior notice, we believe the Directions for Use should simply identify the issue and acknowledge the uncertainty:

"~~Nevertheless, it is likely that a reasonable notice requirement would be implied. Lack of reasonable notice could possibly be viewed as an affirmative defense.~~ Whether an employee's failure to provide reasonable notice of the need for parental leave will provide employers with an affirmative defense is not yet known."

f. Government Code section 12945.6, subdivision (g) contains an antiretaliation provision. We believe the Directions for Use should reference the appropriate CACI instruction:

" For an instruction on a claim of retaliation under the New Parent Leave Act, see CACI No. 2620, CFRA or NPLA Rights Retaliation—Essential Factual Elements (Gov. Code, §§ 12945.2(l), 12945.6(h)."

17. CACI No. 2740. Violation of Equal Pay Act—Essential Factual Elements

a. The introductory sentence uses the present tense "is," while the elements use the past tense "was." We believe the past tense is appropriate for a claim that arose before trial, and would change "is" in the introductory sentence to "was." We would also insert the word "unlawfully" before "paid" for greater clarity:

"[*Name of plaintiff*] claims that [he/she] ~~is~~ was unlawfully paid at a wage rate that is less than the rate paid to employees . . . ."

b. We would modify element 2 for greater clarity:

"That [*name of plaintiff*] was performing substantially similar work as the other person[s] ~~with regard to~~ in terms of skill, effort, and responsibility; and"

c. The California Equal Pay Act prohibits certain pay discrepancies without the need to show that those discrepancies were "due to," "because of," or "based on" gender, race, or ethnicity. We would modify the first sentence in the Directions for Use for greater clarity:

"The California Equal Pay Act prohibits ~~discrepancies on pay due to gender, race, or ethnicity~~ paying employees at lower wage rates than rates paid to employees of the opposite sex or a different race or ethnicity for substantially similar work."

18. CACI No. 2741. Affirmative Defense—Different Pay Justified

a. In the second sentence in the introductory paragraph, consistent with other affirmative defenses, we would refer to this defense as a "defense" rather than a "claim."

b. A bona fide factor other than sex, race, or ethnicity may justify a pay differential, but does not necessarily justify a pay differential. Accordingly, we would modify the second paragraph in the Directions for Use:

"If the catchall factor d is selected . . . which establishes what bona fide factors other than sex, race, or ethnicity may justify a pay differential. . . ."

19. CACI No. 2742. Bona Fide Factor Other Than Sex, Race, or Ethnicity

We would modify the final sentence in the instruction for greater clarity. The stated facts only defeat the defense of a bona fide factor. They do not establish the elements required for liability, so it seems inappropriate to state the defendant "is in violation."

"[~~*Name of defendant*] is in violation~~ This defense does not apply, however, if [*name of plaintiff*] proves an alternative business practice exists that would serve the same business purpose without producing the pay differential."

20. CACI No. 2743. Equal Pay Act—Retaliation

a. We agree with this instruction.

b. The employee's pursuit of equal pay is not the only activity protected under the act, which also protects encouraging or assisting others to pursue equal pay or inquiring about others' wages, as stated in the first paragraph of the Directions for Use. We would modify the second paragraph in the Directions for Use accordingly:

"Note that there are two causation elements. First there must be a causal connection between the employee's pursuit of equal pay (or other activity protected by the act) and the adverse employment action (element 3). Second, the employee must have suffered harm because of the employer's retaliatory acts (element 5).

21. CACI No. 2800. Employer's Affirmative Defense—Injury Covered by Workers' Compensation

a. The proposed revisions to the introductory paragraph of the instruction and element 3 are helpful, and we agree with them.

b. We believe the language "a contributing cause" may not be self-explanatory to jurors. We would modify element 4 for clarification:

"4. That this [task/work] ~~was a contributing cause of~~ contributed to causing the injury."

c. We would add a citation to the Sources and Authority on the contributing cause requirement:

"'Substantial evidence supported the WC's finding that Elavil and Vicodin, prescribed for Clark's industrial injury, *contributed* to his death.' (*South Coast Framing, Inc. v. Workers' Compensation Appeals Bd.* (2015) 61 Cal.4 th 291, 303.)"

22. CACI No. 3244. Civil Penalty—Willful Violation

We would modify the second sentence in the third paragraph of the instruction for greater clarity:

"However, a violation is not willful if you find that [*name of defendant*] reasonably and in good faith believed that ~~the facts did not require~~ [he/she/it] was not required to [*describe statutory obligation, e.g., repurchasing or replacing the vehicle*]."

23. CACI No. 4010. Limiting Instruction—Expert Testimony

Agree.

24. CACI No. 4208. Affirmative Defense—Statute of Limitations—Actual and Constructive Fraud (Civ. Code, § 3439.09(a), (b))
Essential Factual Elements

a. We agree with the revisions to the instruction and the Sources and Authority.

b. We would modify the proposed new language in the Directions for Use for greater clarity:

"This instruction may not be modified ~~for use for~~ to state the seven-year period under Civil Code section 3439.09(c)."

25. CACI No. 4605. Whistleblower Protection—Health or Safety Complaint—Essential Factual Elements

Agree.

26. CACI No. 4800. False Claims Act—Essential Factual Elements

Agree.

27. CACI No. 4801. Implied Certification of Compliance With Contractual Provisions

Agree.

28. CACI No. 5022. Introduction to General Verdict

a. The third paragraph in this proposed new instruction refers to what the jury "should consider" with respect to the burden of proof. As set forth below, we believe stronger language is appropriate with respect to this foundational requirement: "must decide."

b. The plaintiff always has a burden of proof, but the defendant has a burden of proof only if the defendant asserts an affirmative defense. We would avoid referring generally to "the party with the burden of proof," because it may suggest that the defendant has the burden of proof, when in many cases the defendant has no burden of proof. We would modify the third paragraph as set forth below for greater clarity.

c. CACI No. 200, *Obligation to Prove—More Likely True Than Not True*, defines "burden of proof," but generally instructions on the elements of each claim and instructions on affirmative defenses avoid this term and instead refer to what the plaintiff or defendant "must prove." We believe this language is more comprehensible to lay jurors. As set forth below, we would refer to what the plaintiff and defendant (if applicable) must prove rather than to the parties' "burden of proof."

d. The instructions on the elements of each claim typically describe what the plaintiff must prove (these are facts) without referring to "elements." As set forth below, we would avoid use of the term "elements," which may be unfamiliar to lay jurors, and instead would refer to what the plaintiff must prove as "facts." We would not refer to "all of the necessary facts in support of each element" because the instructions only state what the plaintiff must prove, and those are facts, not "elements" or facts in support of elements.

e. We would delete the reference in the third paragraph to "other instructions." The jury hears most of the instructions all at once, and they are collectively "the instructions." (See CACI No. 5000, *Duties of the Judge and Jury*.) Attorneys see individual instructions, but the jury generally hears them all collectively. This concluding instruction is part of the instructions, and to the jury there are no "other instructions," except maybe pretrial instructions (see CACI No. 5000).

e. Accordingly, and for greater clarity in other ways, we would revise the third paragraph of the instruction:

"~~In reaching~~ To reach your verdict [and answer~~ing~~ the additional questions[s]], you ~~should consider~~ must decide whether ~~the party with the burden of proof~~ [*name of plaintiff*] has

proved all of the ~~necessary~~ facts ~~in support of each element of~~ that I have instructed you [*name of plaintiff*] must prove to establish [his/her/its] claim ~~or defense. You should review the elements addressed in the other instructions that I have given you and determine if at least nine of you agree that each element has been proven by the evidence received in the trial. The same nine do not have to agree on each element.~~ [I have also instructed you on [a defense/certain defenses] offered by [*name of defendant*]. You must decide whether [*name of defendant*] has proved all the facts that I have instructed you [*name of defendant*] must prove to establish [his/her/its] defense[s]]. At least nine of you must agree that a fact has been proved for the jury to decide that a fact has been proved, but the same nine do not have to agree on each fact."

Sincerely,

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