



THE STATE BAR OF CALIFORNIA

– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

September 9, 2010

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 10-02

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 10-02), and appreciates the opportunity to submit these comments.

1. CACI No. 106. Evidence

Agree.

2. CACI No. 114. Bench Conference and Conferences in Chambers

Agree.

3. CACI No. 350. Introduction to Contract Damages

The committee agrees with the proposed revisions to the instruction, but notes that the word "foreseen" is misspelled in the second paragraph of the instruction.

The committee believes that the quotation from *Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697, in the Sources and Authority (p. 13 of the release) should be retained because no other cited authority in the Sources and Authority explains special or consequential damages.

4. CACI No. 359. Present Cash Value of Future Damages

Proposed new language in the Directions for Use cites *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613-614, for the proposition that the defendant bears the burden of proof on the discount rate. *Wilson* held that the trial court did not abuse its discretion by refusing the defendant's proposed jury instruction on present cash value because it was presented too late. (*Id.* at p. 613.) *Wilson* also held that the refusal of the instruction was proper because there was no evidence from which the jury could determine the present cash value. (*Id.* at pp. 613-614.) This appears to be only a specific application of the general rule that the court should not give an instruction absent evidence to support the instruction. Perhaps *Wilson* suggests that the defendant has the burden to present evidence as to present cash value, but the burden of producing evidence is not the same thing as the burden of proof. (See Evid. Code, §§ 110, 115, 550.) Moreover, if the defendant bears the burden of proof on the issue, the jury should be so instructed. (Evid. Code, § 502.) The committee believes that the second paragraph of the Directions for Use, citing *Wilson*, should be deleted.

5. CACI No. 450A. Good Samaritan—Nonemergency

The Directions for Use state that the instruction should be used for situations other than at the scene of an emergency and that CACI No. 450B should be used if there was an emergency. But whether an emergency existed is a question of fact for the jury under this instruction (and under CACI No. 450B). If there is a question of fact as to whether an emergency existed, the court cannot know the answer to that question before giving the instruction.

The committee believes that whether an emergency existed is relevant to the existence of an immunity under Health and Safety Code section 1799.102, which is the subject of CACI No. 450B, that the question whether an emergency existed belongs in CACI No. 450B rather than CACI No. 450A, and that item 1 of CACI No. 450A should be deleted. The committee believes that with this change, CACI Nos. 450A and 450B should both be given in appropriate cases, the former to establish liability and the latter to establish immunity as an affirmative defense.

6. CACI No. 450B. Good Samaritan—Scene of Emergency

This proposed new instruction is intended to set forth the statutory immunity for persons rendering emergency care at the scene of an emergency (Health & Saf. Code, § 1799.102). The committee believes that this is an affirmative defense and should be labeled as such.

The committee believes that the instruction could more clearly explain the effect of this affirmative defense. Rather than speak in terms of a "claim" that the defendant must "establish," this instruction could state that the defendant "cannot be held responsible" if the defendant proves the specified items. Alternatively, the instruction could refer to the defendant's "claim" but then state "To succeed on this defense" (e.g., CACI No. 1245) to make it clear that by establishing these elements the defendant avoids liability.

Health and Safety Code section 1799.102 establishes a broader immunity for medical, law enforcement, and emergency personnel (*id.*, subd. (a)) than for others (*id.*, subd. (b)(2)), but the proposed instruction seems to overlook this distinction, as do the Directions for Use.

The immunity applies to persons who “render[] emergency medical or nonmedical care [or assistance] assistance at the scene of an emergency.” (Health & Saf. Code, § 1799.102, subds. (a) & (b).) The harm need not occur at the scene of an emergency as long as the care or assistance was rendered there. The committee believes that the first enumerated requirement (“That the harm occurred at the scene of an emergency”) should be modified accordingly.

If the plaintiff proves that the defendant (other than medical, law enforcement, and emergency personnel) was grossly negligent or acted willfully or wantonly, the affirmative defense does not apply. In those circumstances, the defendant will be liable if the plaintiff has established liability under CACI No. 450A. The committee therefore believes that both instructions should be given where applicable, and there is no reason to incorporate in CACI No. 450B the requirements to establish liability under CACI No. 450A (i.e., concluding paragraphs 1 and 2 of CACI No. 450B).

The second paragraph of the Directions for Use states the Advisory Committee’s opinion that the defendant bears the burden of proof to establish the immunity. If the immunity is an affirmative defense, as we believe, it would be appropriate to cite Evidence Code section 500 regarding the defendant’s burden of proof.

7. CACI No. 1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control

Agree.

8. CACI No. 1009C. Liability to Employees of Independent Contractors for Unsafe Conditions—Nondelegable Duty

The first sentence of the proposed revisions to the Directions for Use states that the hirer’s nondelegable duty must have affirmatively contributed to the plaintiff’s injury. The committee believes that the reference should be to the hirer’s act or omission in breach of that duty, rather than to the duty itself. Accordingly, we would insert the words “breach of a” before “nondelegable duty.”

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.” But no new authority is cited to support this change, and the authorities cited in the Sources and Authority do not directly address this issue. The committee believes that the Sources and Authority should cite some authority for this proposed revision, or

the Directions for Use should acknowledge that the issue has not been definitively decided, if that is the case. This same comment applies to similar changes in CACI Nos. 1203 and 1204.

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

The committee suggests the following revisions to the second element in the instruction:

“That the [*product*] did not perform as safely as an ordinary consumer would have expected ~~while using or misusing the [*product*]~~ it to perform when used or misused in a reasonably intended or foreseeable way;”

Same comment as for CACI No. 1201 regarding the proposed revisions to the third element in the instruction.

The committee agrees with the revisions to the Sources and Authorities.

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 revisions to the second element in the instruction.

The committee agrees with the revisions to the Directions for Use and Sources and Authorities.

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

The committee suggests the following revisions to the third element in the instruction:

“That the potential [*risk/side effects/allergic reactions*] presented a substantial danger to ~~users of persons using or misusing the [*product*]~~ when used or misused in a reasonably foreseeable way;”

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

Agree.

14. CACI No. 1240. Affirmative Defense to Express Warranty—Not “Basis of Bargain”

Agree.

15. CACI No. 3904A. Present Cash Value

The committee agrees with the proposed revisions to the instruction. The committee agrees with the proposed revisions to the Directions for Use, with the exception of the paragraph citing *Wilson v. Gilbert, supra*, 25 Cal.App.3d at pp. 613-614. The committee believes that the paragraph citing *Wilson* should be deleted for the reasons stated above regarding CACI No. 359.

16. CACI No. 3904B. Use of Present-Value Tables

The committee believes that the instructions for Worksheet A and the worksheet itself are well-written and understandable. The same is true of the instructions for Worksheet B and the worksheet itself, except that the committee recommends the following changes to the instructions for Worksheet B for greater clarity and consistency (additions underscored, deletions shown by strike-through):

“1. Determine the future years in which a future loss will occur. Starting with the current year, enter each year through the last year that you determined a future loss will occur in Column A.

“2. Determine the amount of [name of plaintiff]’s future loss for [e.g., future surgeries] for each year that you determine ~~the~~ loss will occur. Enter these future losses into Column B on the worksheet. Enter \$0 if no future loss occurs in a given year.

“3. Select the interest rate that you decide [based on the expert testimony that you have heard] represents a reasonable rate of return on money invested today over the number of years determined in step 2. Enter this rate into Column C on the worksheet for each year with future loss amounts in Column B.

“4. Select the appropriate Present Value Factor from Table B for each year for which you determined ~~the~~ loss will occur. To locate this factor, use the Number of Years from Column A on the worksheet and the Interest Rate in Column C on the worksheet and find the number that is the intersection of the Interest Rate column and Number of Years row from the table. (For example, for year 15, if the interest rate is 10 percent, the corresponding Present Value Factor is 0.239.) Enter the appropriate Present Value Factors in Column D. For the current year, the Present Value Factor is 1.000. It is not necessary to select an interest rate for the current year in step 3.

“5. Multiply the amount in Column B by the factor in Column D for each year for which you determined ~~the~~ loss will ~~continue~~occur and enter these amounts in Column E.

“6. Add all of the entries in Column E and enter this sum into Total Present Value of Future Loss.”

The committee believes that the third sentence of the fourth paragraph of the Directions for Use, referring to the burden of proof on the issue of present cash value, should be deleted for the same reasons stated above with respect to CACI Nos. 359 and 3904A. The committee also

suggests revising the fifth paragraph of the Directions for Use as follows for greater clarity and consistency with the discussion of *Salgado v. County of L.A.* (1998) Cal.4th 629 in the Directions for Use for CACI No. 3904A:

~~“Tables should not be used for f~~Future noneconomic damages are not reduced to present cash value, so present value tables should not be used. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646-647 [80 Cal.Rptr.2d 46, 967 P.2d 585]; ~~CACI No. 3904A.~~)”

17. CACI No. 3920. Loss of Consortium (Noneconomic Damages)

The committee agrees with the proposed revisions to the instruction, but notes that because the series has been expanded from three to four items, the “; or” should follow the third item rather than the second.

The committee agrees with the proposed revisions to the Directions for Use and Sources and Authority.

18. CACI No. 3926. Settlement Deduction

Agree.

19. CACI No. 3933. Damages From Multiple Defendants

Agree.

20. CACI No. 4400. Misappropriation of Trade Secrets—Introduction

The committee agrees with the proposed revision to the instruction.

The committee agrees with the proposed revisions to the Directions for Use, but notes that the word “the” should be deleted from the end of the third line of the third paragraph.

The last item in the Sources and Authorities is a quotation from *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 997, in which the Court of Appeal rejected the defendants’ argument that CACI Nos. 4400 and 4401 were authority for a purported “ ‘current ownership rule.’ ” *Jasmine Networks* rejected the defendants’ reading of the instructions and stated, “Given only these instructions to go on, one would suppose that *past* ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element.” (*Ibid.*) *Jasmine Networks* also rejected other arguments in support of the purported “ ‘current ownership rule.’ ” (*id.* at pp. 993-1010) and held that “Jasmine’s sale of the trade secrets in question is not an impediment to its maintenance of this action.” (*Id.* at p. 1010; see also *id.* at p. 986.) The committee believes that the authority of this opinion is in its holding rather than in its discussion rejecting the defendants’ reading of CACI Nos. 4400 and 4401. The committee suggests citing and briefly describing the holding and deleting this quotation.

21. CACI No. 4401. Misappropriation of Trade Secrets—Essential Factual Elements

The committee agrees with the proposed revisions to the Directions for Use.

The first quotation from *Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 220, in the Sources and Authorities (p. 124 of the release) omits citations following the first sentence and fails to signal the omission.

The committee suggests that the quotation from *Jasmine Networks, Inc. v. Superior Court, supra*, 180 Cal.App.4th at page 997, in the Sources and Authorities be deleted and replaced with a brief description of its holding, for the reasons stated above in connection with CACI No. 4400.

The committee believes that the second quotation from *Silvaco Data Systems v. Intel Corp., supra*, 184 Cal.App.4th 210, in the Sources and Authorities, concerning the need to “ ‘identify the trade secret with reasonable particularity’ ” for purposes of discovery (*id.*, at p. 221, quoting Code Civ. Proc., § 2019.210), provides no information relevant to submitting these issues to the jury, and should be deleted.

22. CACI No. 4406. Misappropriation by Disclosure

Agree.

23. CACI No. 4407. Misappropriation by Use

The committee agrees with the proposed revisions to the Directions for Use.

The committee believes that the last of the four quotations from *Silvaco Data Systems v. Intel Corp., supra*, 184 Cal.App.4th 210, in the Sources and Authorities merely applies the rule stated in the first of those four quotations. The committee believes that this fourth quotation is excessive and unnecessary and should be deleted.

DISCLAIMER

This position is only that of the Jury Instructions Committee of the State Bar of California's Litigation Section. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Jury Instructions Committee and in the Litigation Section is voluntary, and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources.

Very truly yours,

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