

# 2011

# The Law Offices of BORTON PETRINI, LLP California Law Quick Reference Guide

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## STATUTE OF LIMITATIONS

	YEARS
Negligence/Personal Injury/PD	2/ 2/ 3
Contract: Written/Oral:	4/ 2
Construction Defect:	10
UM/ UIM:	2
Medical Malpractice:	3*
Assault/Battery/Wrongful Death:	2/ 2/ 2
Discrimination/Harassment:	1**
Minority:	Begins to run at age of majority.

\* Three years after date of injury or 1 year after plaintiff knew, or should have known, of the injury, whichever occurs first.

\*\* One year after last act of discrimination or harassment, a complaint with DFEH/ EEOC to obtain a "Right to Sue" letter from the DFEH/EEOC must be filed.

## COMPARATIVE NEGLIGENCE

California is a pure comparative fault state. Plaintiff's damages are reduced by his/her percentage of fault. For example, if plaintiff is found to be 90% responsible, defendant can still be found liable for 10% of the total damages if it is determined that defendant was 10% responsible.

## JOINT AND SEVERAL LIABILITY/CCP § 1431 (Prop. 51)

- Each defendant pays his/her percentage of total non-economic damages only (except in cases involving strict products liability, non-delegable duties and vicarious liability based upon respondent superior or permissive user statutes, where 1% liability can result in 100% responsibility for non-economic damages).
- Each defendant, if at least 1% liable, can be responsible for all economic damages less plaintiff's comparative negligence.
- Settlement by other defendant(s) can reduce amount owed by non-settling defendant.

## PARENTAL LIABILITY

Parents will be held jointly and severally liable for any act of willful misconduct by their minor child, which results in injury or death to another person, or any property damage, subject to financial limitations imposed by statute.

Parents are also liable for the driving fault of their child if the child was acting as an actual or ostensible agent of the parent at the time of the accident. An example would be where the child was employed by the parent, or carrying out a task for the benefit of the parents' business.

## WRONGFUL DEATH

In California, a cause of action for wrongful death may be brought by decedent's surviving spouse, domestic partner, children, and issue of deceased children. If there are no surviving issue, recovery is allowable for those who would be entitled to recover under intestate succession.

The wrongful death statute provides for damages to be awarded that, under all the circumstances of the case, may be just.

## FAMILY CLAIMS

An insurance policy may contain a provision, and indeed most do, to exclude liability coverage to an insured for bodily injury to another insured under the same policy. (Family exclusion policy.)

## NEGLIGENCE PER SE

If the driver is (i) found to be in violation of a driving statute, (ii) the violation is considered a proximate cause of the injury, and (iii) the injured person or property is within the class the statute intended to protect, failure to exercise due care is presumed.

## DAMAGES

### Personal Injury

Special damages (medical bills and economic losses), general damages (pain and suffering) and punitive damages (clear and convincing evidence of evil mind or recklessness, intended to punish wrongdoer) are recoverable.

### Property Damage

Regarding harm to personal property, plaintiff can claim; (i) the reduction in the value of the property, or the reasonable cost of repair, and; (ii) the reasonable value of the loss of use while repairs are being made. When there is evidence of both reduction in value and the cost of repair, the plaintiff is generally entitled to the lesser of the two amounts.

### Seat Belts and Helmets

California law considers failure to wear an available seat belt or failure to wear a helmet if riding a motorcycle to be negligence. Defendant must prove that (i) in the exercise of ordinary care, plaintiff should have used a seat belt available to him or her, and (ii) defendant must show what the consequence to plaintiff would have been had seat belts been used.

## Successive Accidents

Where same claimant is involved in successive accidents which contribute to his/her injuries, both defendants are jointly and severally liable for all damages that cannot be separately apportioned to the individual accidents, subject to their percentage of fault for the accident each caused in whole or in part.

## CLAIMS OF MINORS

### Special Damages

Medical expenses are a claim of the parents of the minor. Parents have the primary right to recover medical expenses paid for and incurred in the treatment of the minor. However, in an action on behalf of the child, if the parents waive the medical expenses, the child may seek recovery. Thus, a cause of action can exist for either the parent or the child, but not both.

## CONSERVATORSHIP

Under the conservatorship statute, compromise or settlement under \$25,000 need not be court approved, unless court approval is otherwise required as in matters relating to real property, a claim by the conservatee against the conservator, a claim for support, wrongful death, personal injury, or compromises of a tax matter.

## FUTURE MEDICAL EXPENSES

A parent may recover future medical expenses on behalf of the child. Additionally, a parent may also recover on behalf of a child after the child reaches the age of majority upon proof that the child will be unable to support and maintain himself or herself on reaching adulthood.

## OTHER ISSUES

### Zone of Danger Claims (Dillon v. Legg)

A plaintiff may recover if he/she is (i) closely related to the injury victim (relatives in the same household, parents, siblings, children and grandchildren of the victim), (ii) present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim, and (iii) as a result, suffers severe emotional distress.

### Loss of Consortium By A Child of the Injured Parent

In California, a child may not make a claim for loss of consortium as to the injured parent.

### Loss of Consortium by The Non-Injured Spouse

In a cause of action by the non-physically injured spouse for loss of consortium where the spouse is seriously injured, four elements must be proven: (i) a valid and lawful marriage between the plaintiff and the person injured at the time of the injury; (ii) a tortious injury to plaintiff's spouse; (iii) loss of consortium (sexual relations, care, comfort, society and companionship) suffered by the plaintiff; and (iv) that the loss of consortium was proximately caused by defendant's wrongful act.

As of this writing, a cause of action for loss of consortium is limited to a spouse in a valid and lawful marriage, and, therefore, does not extend to couples who live together, unmarried couples or domestic partnerships.

When damages are proven by the spouse seeking a claim for loss of consortium, in the absence of a provision in the insurance policy limiting such a claim to the "per person" limit of coverage, the loss of consortium claim will be seen as a separate injury, and covered under the "per occurrence" higher limit of coverage.

## EMPLOYMENT LAW

Under California law, 50 or more part-time or full-time employees are required in order for the California Family Rights Act to apply to an employer. Five or more employees are required for the purpose of establishing a claim of discrimination. Only 1 employee is required for the purpose of establishing a claim of unlawful harassment.

Complaints for discrimination and harassment must be filed within 1 year of the last act of discrimination/harassment. It is a requirement that such complaints be filed with the DFEH/EEOC to obtain a Right to Sue letter, which entitles the complainant to file a civil suit.

The Department of Industrial Relations, through the Division of Labor Standards Enforcement (DLSE), enforces wage claim violations including, among other things, unpaid wages, final paychecks not being received timely, unused vacation hours that were not paid upon termination, unauthorized deductions, failure to provide meal/rest periods, failure to pay overtime or misclassification of an employee.

The DLSE requires that a claim based on an oral agreement must be filed within 2 years of the date the claim arose. A claim based upon a written agreement must be filed within 4 years of the date the claim arose. A claim for minimum wage, unpaid overtime and other statutory claims must be filed within 3 years of the date the claim arose.

## CALIFORNIA PROCEDURE

### Service of Process

The summons and complaint must be served upon the defendant within three years after the complaint is filed. However, the court may entertain a motion for dismissal if the summons and complaint are not served within two years after filing (discretionary).

Personal service may be made on the defendant by a registered process server, or by any person who is at least 18 years of age and is not a party to the action.

Service may also be made by mail or publication in a newspaper.

Service upon a corporation, by any of the above-mentioned methods, must be made upon the agent for service of process.

Answer must be filed within 30 days of service of the summons and complaint or plaintiff may apply for a default judgment.

### Default Procedure

When a defendant fails to file an Answer to the complaint within the time stipulated on the summons, the plaintiff may submit an application for entry of default judgment.

The application for entry of default judgment must be mailed to the defendant's attorney of record, or if none, to the defendant at his or her last known address, which would usually be the address where the defendant was originally served with the summons and complaint.

### Settlement Conferences

Mandatory settlement conferences may be heard on the court's own motion or at the request of any party. If a mandatory settlement conference is scheduled, trial counsel, parties, and persons with full authority to settle the case must personally attend the conference, unless excused by the court for good cause.

### Mandatory Judicial Arbitration Hearings

- In each superior court with 18 or more judges, all non-exempt unlimited civil cases shall be submitted to arbitration if the amount in controversy, in the opinion of the court, shall not exceed \$50,000 for each plaintiff.
- In each superior court with fewer than 18 judges, the court may provide by local rule, when it determines that it is in the interests of justice, that all non-exempt, limited civil cases shall be submitted to arbitration if the amount in controversy, in the opinion of the court, will not exceed \$50,000 for each plaintiff.
- Each superior court may provide by local rule, when it is determined to be in the interests of justice, that all non-exempt, limited civil cases shall be submitted to arbitration.

### Offers to Compromise

Either party may submit an offer which is hand-served upon the opposing party not less than 10 calendar days from the date of trial or arbitration.

If an offer made by defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post-offer costs and shall pay the defendant's costs from the time of the offer.

If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover post-offer costs of the services of expert witnesses, in addition to plaintiff's post-offer costs.

## CALIFORNIA INSURANCE POINTS

- Mandatory minimum liability limits for passenger vehicles: 15/30/5
- Common carrier mandatory minimum liability limit: \$750,000
- Insurance coverage available to the vehicle is primary; additional coverage available to driver is excess coverage. Where coverage is available under two policies and one policy insures a car business (selling, repairing, servicing, delivering, testing, road testing, parking, or storing motor vehicles, but not renting) and, at the time of the loss, the motor vehicle is being operated by any person engaged in the car business, or his employee or agent, the policy issued by the car business shall be primary, and any other policy shall be excess coverage. If the same vehicle is operated by any other person, the policy issued to any person engaged in the car business (other than rental cars) shall be excess coverage.
- Rental cars must provide primary coverage, and the renter's insurance should bear only excess responsibility. However, if an agency provides a cash deposit with neither rates or describes the vehicle as an owned vehicle, and the rental agreement does not provide, or specifically declines primary coverage, the driver's policy is primary and rental company's financial responsibility is excess coverage. Rental agency must also cover driver who has permission of the renter, even if not authorized by the rental contract.
- UM and UIM coverage must be offered in writing in same amounts as liability coverage, but the insurer and insured can enter into an agreement to delete UM and UIM coverage entirely, delete the coverage to a named driver, or offer in a lesser amount, but in no case less than the mandatory minimum liability limits.

- The named driver exclusion is valid as to both liability, UM and UIM coverage.
- In UM or UIM for a bodily injury or death claim when the owner of the vehicle is unknown, (hit and run) physical contact between the two vehicles is required. Additionally, the accident must be reported to the police within 24 hours and a claim must be filed with the insurer within 30 days. For a property damage claim, physical contact with the vehicle is required as well as the identification of the owner or operator of the vehicle, or the license plate number of the uninsured vehicle.
- "Owned but uninsured" exclusion is valid for both liability and UM/UIM coverage. If the insured is driving another vehicle he/she owns and not insured under the policy, neither liability nor UM/UIM coverage would apply, UM/UIM coverage is not considered to be "portable."
- An insurance policy does not cover punitive damages, which must be paid by the party against whom they are assessed.
- In California, the insured cannot "stack" the limits of more than one of his/her uninsured policies, or any policy, but may pick the highest limit of all available coverage.
- UM/UIM and liability coverage may be reduced by medical payments previously paid if policy so provides. UM/UIM may also be reduced by worker's compensation paid to claimant if policy so provides. The reduction is from the actual claim value, and not from the policy limits.
- A car owner injured in a car accident may not recover non-economic damages if, at the time of the accident, the vehicle was not insured as required by the financial responsibility laws of the state.
- The insurer may subrogate UM/UIM payments.
- The driver of an insured vehicle with the express or implied permission of the named insured must be afforded coverage in the event of an accident so long as the use of the vehicle by the driver was within the scope of the permission granted by the named insurer.
- The insurer may issue a notice of cancellation for only; (i) non-payment of premium, (ii) fraud or material misrepresentation affecting the policy or the insured, and (iii) a substantial increase in the hazard insured against.

## PRE-TRIAL PROCEDURES

### Discovery

*Interrogatories:* 30 days to answer.

(Thirty-five question limit unless party seeking additional interrogatories attaches a declaration justifying the additional interrogatories that is not challenged by the responding party. If the responding party disputes the additional interrogatories, the propounding party has the burden of justifying the additional interrogatories).

*Request to Produce Documents:* 30 days to answer.

*Requests for Admission:* 30 days to answer.

(No party shall request that any other party admit more than 35 matters that do not relate to the genuineness of the documents). Party may move for an Order to deem matters admitted if any answer, or answers, are deemed evasive or incomplete.

### Evidence

#### Depositions:

Depositions may be used against any party, at trial or any other hearing, who was present or represented at the taking of the deposition. Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness. Deponent does not have to be unavailable and can still testify at trial.

#### Expert Reports:

Inadmissible at trial as hearsay.

#### Medical Records:

Medical records are admissible under the hearsay exception for business records. However, proper foundation must be established to show that the records were properly kept in the regular course of business.

#### Settlement Discussions:

Documents or testimony regarding negotiations with insurance company, party, or attorneys regarding compromise, possible settlement, or any admissions of liability in the pursuit of compromise or settlement are inadmissible at trial.

**DISCLAIMER: THE INFORMATION PROVIDED IN THIS REFERENCE GUIDE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF CALIFORNIA LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT**

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