POOLE SHAFFERY
ATTORNEYS AT LAW

Disclaimer: This Document is intended for general information purposes only. Nothing contained in this document is legal advice, nor should it be relied upon as such.

Name of Preparers:	John H. Shaffery and Jaion Chung
Firm:	Poole, Shaffery & Koegle, LLP
City and State of Firm:	Southern California – Los Angeles, Santa Clarita, Ventura County, Orange County, and San Diego

OVERVIEW OF CALIFORNIA COURT SYSTEM

Court levels: 3
Trial courts: 58 — one in each county
Court of Appeal districts: 6
Highest court: California Supreme Court

Trial Courts

1) **Superior Court**

a) General Jurisdiction: A court of California may exercise jurisdiction on any basis that is not inconsistent with the Constitution of California or the United States. (Code Civ. Proc., § 410.10.)

b) Many of California's larger Superior Courts have specialized divisions for different types of cases like civil, criminal, small claims, juvenile, probate, family, traffic and complex litigation.

c) Civil cases are separated into two categories:

i) *Limited Jurisdiction Civil Case* — The amount in controversy does not exceed $25,000. (Code Civ. Proc., §§ 85, subd. (a) & 86, subd.(a).)

ii) *Unlimited Jurisdiction Civil Case* — The amount in controversy exceeds $25,000. (Code Civ. Proc., §§ 85, subd. (a) & 86, subd. (a).)

d) Small claims has jurisdiction over the following types of actions:

i) Cases involving the recovery of money where the demand does not exceed $10,000. (Code Civ. Proc., §§ 116.220, subd., (a)(1) & 116.221, subd.(a).)

ii) Cases involving the recovery of damages resulting from an automobile accident if the amount of the demand does not exceed $7,500 and the defendant is covered by an automobile insurance policy that includes a duty to defend. (Code Civ. Proc., § 116.224.)

e) Juvenile Court has exclusive original jurisdiction over the following types of actions:

i) All delinquent minors (under 18 years old) wherein the minor is alleged to have committed an act that would be considered criminal if he or she was an adult (Welf. & Inst. Code, § 602.)

ii) All minors who are alleged to have been neglected or abused by their parent or guardian, by either commission or omission. (Welf. & Inst. Code, § 300.)

iii) All incorrigible minors (e.g. beyond the control of parent, chronic truants, runaways, disobedient to lawful parent rules). (Welf. & Inst. Code, § 601.)

f) Probate Court is a court of general jurisdiction which includes, but is not limited to, decedents' estate, trust of proceedings, guardianship proceedings, conservatorship proceedings and minor's compromise.

g) Family Court hears cases involving disputes over marriage or domestic partner relationships, disputes over property and children between parents and domestic partners, violence between family, friends and acquaintances.

h) Traffic Court deals with violations of traffic laws and other minor offenses.

i) Complex litigation cases are actions that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties and counsel. (Cal. Rules of Court, rule 3.400.)

Appellate Court

There are two types of Appellate Courts:

1) **California Court of Appeal**

a) Jurisdiction: Appellate jurisdiction when Superior Courts have original jurisdiction, and in certain other cases prescribed by statute. Like the Supreme Court, the appellate courts have original jurisdiction in habeas corpus, mandamus, certiorari, and prohibition proceedings. (Cal. Const., art. VI, § 10.)

b) Cases are decided by three judge panels. Decisions of the panels, known as opinions, are published in the California Appellate Reports if those opinions meet certain criteria for publication. In general, the opinion is published if it establishes a new rule of law, involves a legal issue of continuing public interest, criticizes existing law, or makes a significant contribution to legal literature (Cal. Const., art. VI, § 14; Cal. Rules of Court, rule 8.1105(c)).

c) The Court of Appeal is divided into six districts:

i) First District — located in San Francisco and has jurisdiction over the following counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, Solano, and Sonoma.

ii) Second District — split into two locations as follows:

(1) Divisions 1-5 and 7-8 are located in Los Angeles and have jurisdiction over Los Angeles County.

(2) Division 6 is located in Ventura and has jurisdiction over the following counties: San Luis Obispo, Santa Barbara, and Ventura.

iii) Third District — located in Sacramento and has jurisdiction over the following counties: Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Yolo, and Yuba.

iv) Fourth District — split into three locations as follows:

(1) Division 1 in San Diego and has jurisdiction over the following counties: Imperial and San Diego.

(2) Division 2 in Riverside and has jurisdiction over the following counties: Inyo,

Riverside, and San Bernardino Counties.

(3) Division 3 in Santa Ana and has jurisdiction over Orange County.

v) Fifth District — located in Fresno and has jurisdiction over the following counties: Fresno, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare and Tuolumne.

vi) Sixth District — located in San Jose and has jurisdiction over the following counties: Monterey, San Benito, Santa Clara, and Santa Cruz.

2) **Superior Court – Appellate Division**

a) Jurisdiction: Appeals in limited civil cases. (Code Civ. Proc., §§ 85 & 86.) Litigants in limited civil cases cannot appeal as a matter of right to the Court of Appeal, but the Court of Appeal has discretion to order an appeal transferred to it from the Superior Court – Appellate Division for review. (Code Civ. Proc., § 904.2.)

b) Cases are decided by three judge panels. Opinions are optional.

Supreme Court

1) Jurisdiction: Original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The Court also has original jurisdiction in habeas corpus proceedings. (Cal. Const., art. VI, § 10.)

a) The state Constitution gives the Supreme Court the authority to review decisions of the state Courts of Appeal. (Cal. Const., art. VI, § 12.) This reviewing power enables the Supreme Court to decide important legal questions and to maintain uniformity in the law. The court selects specific issues for review, or it may decide all the issues in a case. (Cal. Const., art. VI, § 12.)

b) The Constitution also directs the high court to review all cases in which a judgment of death has been pronounced by the trial court. (Cal. Const., art. VI, § 11.) Under state law, these cases are automatically appealed directly from the trial court to the Supreme Court. (Pen. Code, § 1239, subd. (b).)

c) In addition, the Supreme Court reviews the recommendations of the Commission on Judicial Performance and the State Bar of California concerning the discipline of judges and attorneys for misconduct.

d) The only other matters coming directly to the Supreme Court are appeals from decisions of the Public Utilities Commission.

2) Courthouse is located in San Francisco.

PROCEDURAL OVERVIEW

Venue

1) Venue rules depend on whether the action is "transitory" or "local."

a) **Classification**: To determine whether an action is local or transitory, the court looks to the "main relief sought." Where the main relief sought is personal, the action is transitory. Where the main relief relates to rights in real property, the action is local.

i) Transitory actions: Transitory actions are those in which the claim may have arisen anywhere. Such actions are subject to the "general rule" of venue, that the action be tried in the county of the defendant's residence.

ii) Local actions: Local actions are those dealing with land or certain other local

relationships that are deemed to require local adjudication, regardless where the defendant resides.

iii) Mixed actions: Some actions do not fit neatly into either category.

(1) Several causes joined — one local, another transitory: If the plaintiff's complaint joins several separate causes of action, one of which is local and another transitory, the *transitory action controls* as to venue.

(2) Single cause — seeking both forms of relief: If the plaintiff asserts only a single cause of action, but seeks different forms of relief, one local and the other transitory, venue is determined by the "main relief" sought.

2) **Venue Determined at Outset**: The classification of the action as "local" or "transitory" is determined at the outset of the action from the allegations of the plaintiff's *original* complaint. If venue is proper under the complaint as it stands at the time a motion for change is made, it remains proper notwithstanding any later amendment to the complaint.

3) **Transitory Actions**: Except as otherwise provided by law and subject to the power of the court to transfer and the *county where the defendants or some of them reside* at the commencement of the action is the proper court for the trial of the action. (Code Civ. Proc., § 395, subd. (a).)

a) Multiple Defendants: The Code provides that venue is proper in the county where the defendant or *some of them* reside. (Code Civ. Proc., § 395, subd. (a).) In an action against several properly joined defendants residing in different counties, the plaintiff may pick whichever of the counties he or she likes best. The other defendants have *no* right to compel transfer to their residence.

b) Corporate and Individual Defendant: If a corporation is joined as a codefendant, venue is proper *either* in the county where the individual defendant resides *or* at the corporation's headquarters (its "residence" for venue purposes).

c) Special Actions triable EITHER where the defendant resides or other counties:

i) **Personal Injury or Death**: Such actions are triable either in the county where the defendant resides OR in the county *where the injury occurred* (including the injury causing the death). (Code Civ. Proc., § 395, subd. (a)). Decision is the plaintiff's and the defendant has no right to have the action tried at his/her/its residence.

ii) **Injury to Personal Property**: The same venue rule applies here also. (Code Civ. Proc., § 395, subd. (a).)

iii) **Breach of Contract**: Such actions are triable in the county where the defendant resides OR where the contract was to be performed OR where the contract was entered into. (Code Civ. Proc., § 395, subd. (a).)

d) **Mixed Action Rule**: It sometimes happens that the plaintiff alleges two or more causes of action, each governed by a different venue provision; or joins two or more defendants who are subject to different venue standards. In such cases, venue must be proper as to *all* causes of action and the defendants joined. If not, any defendant is entitled to seek a change of venue (usually, of course, to the county where any defendant resides).

4) **Local Actions**: Local actions are triable in the county where the land is located — regardless of the defendant's residence. If the action involves land extending into several

counties, then venue is proper in any of those counties. (Code Civ. Proc., § 392, subd. (a)(1).)

a) Most common local actions: recovery of possession of land, injuries to real property, partition of land, foreclosure of lien or mortgage, determination of any other right or interest in land.

b) Not jurisdictional: In most cases, the local venue rule is not jurisdictional, so courts in other counties can adjudicate if the defendant fails to raise any objection to venue there. (Exception: condemnation actions)

c) Court may transfer: Although venue is proper only in the county where the land is located, the court has discretion to transfer the action to any other county for the convenience of witnesses and the ends of justice. (Code Civ. Proc., § 397, subd. (c).)

Statute of Limitations

Below is a summary of civil statutes of limitations in California

Injury to Person	Personal injury: 2 years. (Code Civ. Proc., § 335.1.)
	False imprisonment: 1 year. (Code Civ. Proc., §340, subd. (c).)
Injury to Personal Property	3 years. (Code Civ. Proc., § 338, subd. (b) & (c).)
Professional Malpractice	Legal: 1 year from discovery, maximum of 4 years from the wrong. (Code Civ. Proc., §340.6.)
	Medical: 1 year from discovery, 3 years if injury known. (Code Civ. Proc., § 340.5.)
	Veterinary: 1 year for injury or death of animal. (Code Civ. Proc., § 340, subd. (c).)
Contracts	Written: 4 years. (Code Civ. Proc., § 337.)
	Oral: 2 years (Code Civ. Proc., § 339.)
Libel/Slander	1 year. (Code Civ. Proc., § 340, subd. (c).)
Fraud	3 years. (Code Civ. Proc., § 338, subd. (d).)
Trespass	3 years. (Code Civ. Proc., § 338, subd. (b).)
Collection of Debt on Account	4 years (book and stated accounts). (Code Civ. Proc., § 337.)
Judgments	10 years. (Code Civ. Proc., § 337.5.)

1) **Tolling**: the statute of limitations can be extended by one of California's tolling provisions. Code of Civil Procedure section 352, subdivision (a) provides a tolling period for any time in which the plaintiff is a minor (under the age of 18) or insane at the time the cause of action accrued. Code of Civil Procedure section 352.1 provides a tolling period of no more

than two years if the plaintiff is imprisoned on a criminal charge or in execution under the sentence of a criminal court for a term less than for life.

2) **Delayed Discovery Rule**: Postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398; see also CACI no. 445.)

3) **Savings Statute:** If an action is commenced within the applicable statute of limitations period and a judgment for the plaintiff is reversed on appeal for any reason other than on the merits, a new action may be commenced within one year after the reversal. (Code Civ. Proc., § 355.)

4) **Borrowing Statute**: A person cannot bring a cause of action against a person in California if the cause of action accrued in another state and the applicable statute of limitations period for that action has expired according to that other state's law unless the cause of action is in favor of a citizen of California who has held the cause of action from the time it accrued. (Code Civ. Proc., § 355.)

Responsive Pleading

1) **Answer**: Unless extended by a stipulation or court order, a defendant's answer is due within 30 days after service of the complaint and summons. (Code Civ. Proc., § 412.20, subd. (a)(3).)
   a) The 30 day period is calculated by excluding the first day and including the last unless it is a weekend or holiday, then the date is excluded. (Code Civ. Proc., § 12.)
   b) The parties may stipulate without leave of the court to one 15 day extension beyond the 30 days. (Cal. Rules of Court, rule 3.110(d).) However, in practice, the parties can stipulate to longer extensions so long as there is not a pending hearing on an order to show cause regarding service of the complaint. The Court may extend the time for filing a responsive pleading. (Cal. Rules of Court, rule 3.110(e).)

2) **Pleading Challenges**: a demurrer is used to challenge the sufficiency of the complaint while a motion to strike is used to attack pleading defects not challengeable by demurrer. Both, or either, can be filed in conjunction with the answer or in lieu of an answer. (Code Civ. Proc., §§ 430.30, subd. (c); 430.40, subd. (a); 435, subd. (b)(3) & (d).)

Dismissals/Collateral Estoppel

1) **Dismissals**: A plaintiff has the absolute right to voluntarily dismiss the action "any time before the actual commencement of trial." (Code Civ. Proc., § 581, subd. (b)(1).) A plaintiff may dismiss the entire complaint or just some part of it (e.g., one of several causes of action), or, a plaintiff can dismiss as against some, but not all defendants named in the Complaint. (Code Civ. Proc., § 581, subd. (c).)
   a) Dismissal with prejudice: bars any later lawsuit on the same claim. Once trial commences, the dismissal must be with prejudice unless all parties consent to a dismissal without prejudice or the court so orders on a showing of good cause. (Code Civ. Proc., § 581, subd. (e).)

b) Dismissal without prejudice: allows the plaintiff to file a new lawsuit on the same claim any time before the statute of limitations runs.

2) **Collateral Estoppel**: Issues actually adjudicated in the earlier lawsuit may be entitled to collateral estoppel effect in later litigation between the same parties. "It is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action. If, on the other hand, new or additional facts are alleged that cure the defects in the original pleading, the (dismissal) is not a bar to the subsequent action." (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 789.)

LIABILITY

Negligence

1) **Elements**

a) The elements of a cause of action for negligence are: "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.)

b) Standard of care: Everyone has a duty to use ordinary care in conducting activities from which harm might reasonably be anticipated. (Civ. Code, § 1714, subd. (a).) "The formulation of the standard of care is a question of law for the court. Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether a party's conduct has conformed to the standard." (*Ramirez v. Plough, Inc*. (1993) 6 Cal.4th 539, 546.)

c) Breach: A defendant breaches its duty of care to the plaintiff when the defendant's conduct falls below the standard of ordinary care of skill in the management of person or property. (Civ. Code, § 1714, subd. (a).)

d) Causation: A defendant's negligent acts are the proximate cause of plaintiff's injury if they were the substantial factor in bringing about plaintiff's injury or damage. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041.)

2) **Defenses**

a) Comparative Negligence: Comparative negligence assigns responsibility and liability for damage in direct proportion to the fault of the person whose negligence is caused the resulting injury. (*Li v. Yellow Cab Co*. (1975) 13 Cal.3d 804.) "The comparative fault doctrine is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an equitable apportionment or allocation of loss." (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285, internal citations omitted.)

b) Workers' Compensation Exclusive Remedy: Workers' compensation provides a plaintiff's exclusive remedy, precluding claims against the plaintiff's employer or a co-worker, when the plaintiff was performing service growing out of and incidental to his or her employment and was acting within the course of his or her employment.

i) In some situations, an injured employee may maintain a civil action against his or her employer [see section entitled "Workers Compensation Exclusivity Rule" for

additional information]. These include physical assault by the employer, employer's fraudulent concealment of injury, product liability cases, and if the employer is uninsured.

c) Assumption of risk: Primary assumption of risk is a complete bar to the plaintiff's recovery. Applies in situations where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury. (*Knight v. Jewett* (1992) 3 Cal.4th 296.)

   i) Secondary assumption of risk merges doctrine with comparative fault scheme by requiring a trier of fact to consider relative responsibilities of parties in apportioning loss resulting from the injury. Applies in situations where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty. (*Knight v. Jewett* (1992) 3 Cal.4th 296.)

   ii) Express assumption of risk: By assuming a known, potential risk through a written contract or other writing, the plaintiff relieves the defendant of the duty of care, and the defendant cannot be charged with negligence. (*Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467.) However, certain contractual waivers are invalid as a matter of public policy (e.g., Civ. Code §§ 1668, 1953).

d) "Imminent Peril" or "Emergency Situation": A person who, without negligence on his or her part, is suddenly and unexpectedly confronted with peril arising from either the actual presence of, or the appearance of, imminent danger to himself or herself or to others, is neither expected nor required to use the same judgment and prudence that is required in the exercise of ordinary care in calmer and more deliberate moments. His or her duty is to exercise the care that an ordinarily prudent person would exercise in the same situation. If at that moment he or she does what appears to him or her to be the best thing to do, and if his or her choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he or she does all the law requires of him or her. This is true, even though in the light of later events, it should appear that a different course would have been better and safer. (CACI No. 452.)

e) "Fireman's Rule": Bars a firefighter or police officer from recovering for injuries resulting from a person's negligence or recklessness in causing the fire or other emergency that provides the reason for the firefighter's or police officer's presence. (*Lipson v. Superior Court* (1982) 31 Cal.3d 362.)

f) Unavoidable accident: While generally abolished as a defense in California, since it is encompassed within a defendant's general denial of negligence and proximate causation, there is an exception in the special situation where it may be necessary to explain the meaning of unavoidable accident as, for example, in a prosecution for violation of a section of the Vehicle Code (e.g., Veh. Code, § 21702).

g) Limitation on recovery by felon: A plaintiff may not recover damages based on negligence if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony. (Civ. Code § 3333.3.)

h) Limitation on recovery of noneconomic damages if not properly insured. Under Civil Code section 3333.4, a plaintiff cannot recover noneconomic damages arising out of the operation or use of a motor vehicle if:

i) The person was convicted of driving under the influence of alcohol or drugs at the time of the accident;

ii) The person owned a vehicle involved in the accident and that person's vehicle was not properly insured, unless the person was injured by a motorist operating a vehicle while under the influence of alcohol or drugs; or

iii) The person was the operator of a vehicle involved in the accident and the operator cannot establish requisite financial responsibility.

Gross Negligence, Willful/Wanton, and Reckless Conduct

1) **Gross negligence**: "the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others. A person can be grossly negligent by acting or failing to act." (CACI No. 425.)

2) **Willful/wanton conduct**: "Three essential elements must be present: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." (*Morgan v. Southern Pacific Trans. Co*. (1974) 37 Cal.App.3d 1006, 1012.)

3) **Recklessness**: a subjective state of culpability greater than simple negligence, which has been described as a deliberate disregard of the high degree of probability that an injury will occur. Recklessness involves more than inadvertence, incompetence, unskillfulness, or a failure to take precautions but rather rises to the level of a conscious choice of a course of action with knowledge of the serious danger to others involved in it. (*Delaney v. Baker* (1999) 20 Cal.4th 23; *Towns v. Davidson* (2007) 147 Cal.App.4th 461; *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72.)

4) "**Willful**," "**wanton**" or "**reckless**," are often interchangeable because the terms essentially mean the same thing – that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689).

5) Plaintiff's contributory negligence not a defense: In general, the plaintiff's total damages are not recoverable to the extent his or her own negligence contributed to the injuries. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 828-829.) However, the plaintiff's contributory negligence is no defense to an action for an intentional tort when a defendant's negligent conduct can be described as "willful negligence," "wanton and willful misconduct," "gross negligence," or "wanton and reckless misconduct," and invokes the legal consequences of an intentional tort. (*Mahoney v. Corralejo* (1974) 36 Cal.App.3d 966.)

Negligent Hiring, Supervision, Retention, and Entrustment

1) **Negligent hiring, supervision, and retention**: California recognizes the tort of negligent hiring or supervision, where a principal can be held liable for the acts of his agents when the principal is either negligent or reckless in the hiring or supervision of the agent, even without actual notice or specific warning. (*Deutsch v. Masonic Homes of California, Inc.*

(2008) 164 Cal.App.4th 748.) Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics that might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employee. (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333.)

a) Thus, an employer can be held liable for negligent hiring if the employer knows the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring the person. (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828.) A person conducting an activity through servants or other agents is subject to liability for harm resulting from his or her conduct if he or she is negligent or reckless in the employment of improper persons or instrumentalities in work involving a risk of harm to others. Negligence liability will also be imposed if the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes. (*Philips v. TLC Plumbing, Inc*. (2009) 172 Cal.App.4th 1133.)

b) The substantive requirements are the basic elements of a cause of action for negligence: (1) the existence of a legal duty to use due care; (2) breach of that duty; and (3) the breach as a proximate cause of the plaintiff's injury. (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1210-1211.)

2) **Negligent entrustment**: "No person shall employ or hire any person to drive a motor vehicle nor shall he knowingly permit or authorize the driving or a motor vehicle, owned by him or her under his or her control, upon the highways by any person unless the person is then licensed for the appropriate class of vehicle." (Veh. Code § 14606, subd. (a).)

a) Further, California law holds liable for injury and damages, any person who entrusts a motor vehicle to someone who they know, or from circumstances should know is incompetent or unfit to drive. (See *Flores v. Enterprise Rent-A-Car Co*. (2010) 188 Cal. App.4th 1055.) Similarly, even rental car companies may be held liable for negligently entrusting motor vehicles to customers but the measure is what a prudent person would have done under similar circumstances. (See *Osborn v. Hertz Corp.* (1988) 205 Cal. App.3d 703.) However, generally it has been held that the owner of an automobile is under no duty to third persons who may be injured to keep a motor vehicle out of the hands of a third party, unless they knew or should have known about the driver's incompetence. (See *Richards v. Stanley* (1954) 43 Cal.2d 60; but see *Ghezavat v. Harris* (2019) 40 Cal.App.5th 555 [suggesting that a duty exists for a joint owner of a vehicle in name only when the driver's incompetence is known.].)

3) Defenses:

a) **Vicarious liability admission**: an employer's admission of vicarious liability for an employee's negligent driving in the course of employment bars a plaintiff from pursuing a claim for negligent entrustment, hiring, or retention. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1160.)

b) However, upon a suitable demonstration of employer misconduct, a vicariously liable employer may be subject to an award of punitive damages when an employee was negligent. (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255.)

Dram Shop

1) Under California law, alcohol-related accidents are generally regarded as being caused by the consumption of alcohol, rather than the sale of alcohol. Civil Code section 1714, subdivision (c) codifies this law stating, "no social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages."
2) The one exception to this rule is for those who serve to a person they know or should know is under the age of 21.

Joint and Several Liability

1) For any actions involving personal injury, property damage, or wrongful death, each tortfeasor is jointly and severally liable to the plaintiff for economic damages, but is severally liable to the plaintiff for only its proportionate share of noneconomic damages. (Civ. Code, § 1431.2, subd. (a); see *DaFonte v. Up–Right, Inc*. (1992) 2 Cal.4th 593, 600.)
2) In a strict product liability action involving a single defective product where all defendants are in the same chain of distribution, all defendants remain jointly and severally liable for all damages. (*Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 93-95.)
3) In a strict product liability action where multiple products cause the plaintiff's injury and evidence shows a particular product responsible for only part of the injury, Proposition 51 requires noneconomic damages apportionment of the responsibility for the part to that product's chain of distribution. But as in the case of injury caused by a single product, the defendants who are in the chain of distribution of the specific defective product remain jointly and severally liable for all harm caused by that product. (*Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1193-1199.)

Wrongful Death and/or Survival Actions

1) **Wrongful death:** Code of Civil Procedure section 377.60 establishes a separate statutory cause of action in favor of specified heirs of a person who dies as a result of the "wrongful act or neglect" of another. Under a wrongful death cause of action, the specified heirs are entitled to recover damages on their own behalf for the loss they sustained by reason of bodily injury decedent's death. (See *Corder v. Corder* (2007) 41 Cal.4th 644, 651; *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 819.)
2) **Survival action**: A survival action is a wrongful death claim that is separate and distinct from the victim's action which survives to the estate of the decedent. (Code Civ. Proc., § 377.20.)
3) Death of the plaintiff during pending action: If an action has been commenced by the living victim who then dies, the personal representative or successor in interest may move to substitute parties. (Code Civ. Proc., §§ 368.5 & 377.31.) The substitute party must obtain an order either through noticed motion or ex parte motion. (Code Civ. Proc., § 377.31).)
4) Death of plaintiff prior to bringing action: If a person entitled to bring action passes away before the applicable limitations period and the cause of action "survives" the cause of action may be brought either 6 months after the person's death or the limitations period, whichever is later. (Code Civ. Proc., § 366.1.)

Vicarious Liability/Respondeat Superior

1) **Vicarious liability** is where a person actually acts through another to accomplish his or her ends, and where the law will or should impose such vicarious liability. (*King v. Ladyman* (1978) 81 Cal.App.3d 837.) The right of control over the person actively at fault is a test of the required relationship, but is not itself the justification for imposing liability. (*Ibid*.)

2) **Respondent superior**: The doctrine of respondent superior imposes vicarious liability on an employer for the torts of an employee acting within the scope of his or her employment, whether or not the employer is negligent or has control over the employee. (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151.) The common law theory that a principal is responsible to third parties for the negligence of an agent in the transaction of the business of the agency as reflected in Civil Code section 2338. However, the injured party first bears the burden of establishing that an employment relationship existed between the defendant employer and the wrongdoer, and that the employee's tortious act was committed within the scope of the employment relationship. (*Perez v. Van Groningen & Sons, Inc*. (1986) 41 Cal.3d 962.)

3) **Agency**: A principal-agent relationship exists where one person, the agent, is empowered to act on behalf of another, the principal, and to bind the principal to one or more transactions with one or more third persons, exercising a degree of discretion in effecting the purpose of the principal. (Civ. Code, § 2295; *Workman v. San Diego* (1968) 267 Cal.App.2d 36.) An agency is either actual or ostensible—an agency is actual when the agent is really employed by the principal; and an agency is ostensible when the principal intentionally, or by lack of ordinary care, causes a third person to believe another is the principal's agent who is not really employed by the principal. (Civ. Code, §§ 2299 & 2300.)

   a) Liability: Unless required by or under the authority of law to employ a particular agent, a principal is responsible to third persons for the negligence of the agent in the transaction of the business of the agency. This includes wrongful acts committed by the agent in and as a part of the transaction of the agency business, and for the agent's willful omission to fulfill the obligations of the principal. (Civ. Code, § 2338).

      i) However, a principal is not responsible for wrongs committed outside the transaction of the agency business unless he or she has authorized or ratified them, even though those wrongs are committed while the agent is engaged in the principal's service. (Civ. Code, § 2339.) Ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where oral authorization would suffice, by accepting or retaining the benefit of the act, with notice of it. (Civ. Code, § 2310.)

   b) Right of control: The principal's right of control over the agent determines if an agent's act was committed in the transaction of the business of the agency. Control of the agent by the principal is required before the principal may be found vicariously liable for the acts of the agent. (*Malloy v. Fong* (1951) 37 Cal.2d 356.) Without control by a principal, no agency will exist, the wrongdoer will be found to be an independent contractor, and the principal will not be vicariously liable. (*Flores v. Brown* (1952) 39 Cal.2d 622.)

i) However, where an agency relationship exists but the principal does not control the agent, there is authority limiting the principal's liability for the torts of the agent. Under this view, the court held in the context of ostensible agency and ostensible authority that a principal is not liable for physical harm caused by the negligent physical conduct of a nonemployee agent even during the performance of the principal's business. The rationale is that the principal does not have the right of control over the details of the nonemployee agent's conduct. (*Van Den Eikhof v. Hockey* (1978) 87 Cal.App.3d 900.)

4) **Independent Contractor**

a) An "independent contractor" is a person who renders service in the course of an independent employment or occupation, under the control of a principal as to the result of the work only and not as to the means by which the result is accomplished. (Lab. Code, § 3353.) It should be noted that California has specific tests for who is appropriately designated an independent contractor. (See *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903; Lab. Code, § 2750.3)

b) As a general rule, a hirer of an independent contractor is not liable for physical harm caused to others by the act or omission of the independent contractor. (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286; *Benson v. Superior Court* (2010) 185 Cal.App.4th 1179.) However, the non-liability of employers for the torts of independent contractors is now the exception and the so-called "general rule" will be followed only where no good reason is found for departing from it. (See *Widman v. Rossmoor Sanitation, Inc*. (1971) 19 Cal.App.3d 734 [stating that exceptions have almost emasculated general rule but citing examples where rule has been followed]; *American States Ins. Co. v. Progressive Cas. Ins. Co.* (2009) 180 Cal.App.4th 18 [holding that the exceptions to the general rule of non-liability are numerous].)

c) Although a person cannot be an independent contractor and an employee to the same principal at the same time, the law is somewhat unclear when it comes to distinguishing between agents and independent contractors. Some cases state that agent and independent contractor are not necessarily exclusive legal categories. Under this view, a person can simultaneously be both an agent and an independent contractor. (*Mottola v. R. L. Kautz & Co*. (1988) 199 Cal.App.3d 98; *Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d.900.) Cases that treat agents and employees as synonymous terms and apply the standard of "control" for purposes of establishing vicarious liability of principals as well as employers, treat agents and independent contractors as mutually exclusive legal categories. (*Rogers v. Whitson* (1964) 228 Cal.App.2d 662.)

d) **Exception — Peculiar Risk Doctrine**: One well recognized exception to the general rule that one who employs an independent contractor is not liable for injuries caused by the negligence of the contractor is found in the peculiar risk doctrine. Under this doctrine, one who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to others by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise. (*Privette v. Superior Court* (1993) 5 Cal.4th 689.)

e) **Exception — Non-Delegable Duty**: In addition, where the law imposes a definite, affirmative duty on a person by reason of a relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons cannot escape liability for a failure to perform the duty imposed by entrusting it to an independent contractor. It is immaterial whether the duty regarded as non-delegable is imposed by statute, charter, or common law. (*Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, overruled on another aground by *Privette v. Superior Court* (1993) 5 Cal.4th 689.)

Workers Compensation Exclusivity Rule

1) Subject to limited exceptions, workers' compensation is the only remedy available to injured employees and their dependents against the employer or against any fellow employee responsible for physical or mental injuries or death "arising out of and in the course of employment." (See Lab. Code, §§ 3600-3602, 5300; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 18.)

2) Standard: Workers' compensation exclusivity applies only to claims for work-related death or physical, mental, or emotional injuries. Claims for purely economic loss, property, or contract damages incurred independent of any workplace injury are exempt from workers' compensation exclusivity. Also, claims for emotional distress caused by the employer's conduct in employment actions involving termination, promotions, demotions, criticism of work practices, negotiations as to grievances, etc., are deemed "part of the normal risk of employment" and hence subject to the exclusive remedy provisions of the workers' compensation law. (*Charles J. Vacanti, MD., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 814-1815.)

   a) To be within the scope of employment, the incident giving rise to the injury must be an outgrowth of the employment, the risk of injury must be inherent in the workplace, or typical of or broadly incidental to the employer's enterprise. (*Torres v. Parkhouse Tire Service, Inc*. (2001) 26 Cal.4th 995, 1008.)

   b) The legal analysis must also examine whether the acts or motives giving rise to the injury constitute "a risk reasonably encompassed within the compensation bargain." (*Charles J. Vacanti, MD., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 819-820.) Further, the Workers' Compensation Act is liberally construed in the employee's favor. (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1290.)

3) Applied to Co-Employees: With respect to workplace injuries caused by coworkers, workers' compensation is generally the exclusive remedy as well. The exclusivity rule, however, does not protect coworkers who commit: (1) a "willful and unprovoked physical act of aggression" with intent to injure within; or (2) when the injury or death is proximately caused by the intoxication of the other employee. (Lab. Code, § 3601, subd. (a); see *Torres v. Parkhouse Tire Service, Inc*. (2001) 26 Cal.4th 995; *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1486-1487.) The employer will not be held liable for damages awarded against or for a liability incurred by such employee. (Lab. Code, §3601, subd. (b).) The employer may, however, be civilly liable for damages if it ratifies the coworker's tortious acts and thereby becomes a "joint participant" in the

assaultive conduct. (See *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1489-1490.)

4) Exceptions to the Workers Compensation Exclusivity Rule: In some situations, an injured employee may maintain a civil action against his or her employer such as the following:
   a) Physical assault by employer (Lab. Code, § 3602, subd. (b)(1); see *Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1430.)
   b) Employer's fraudulent concealment of injury aggravates employee's injury: A damages action lies where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection it the employment (e.g. asbestosis cases). The employer's liability is limited, to damages proximately caused by the aggravation. The employer bears the burden of proof respecting apportionment of damages between the injury and any subsequent aggravation. (Lab. Code, § 3602, subd. (b)(2); see *Foster v. Xerox Corp.* (1985) 40 Cal.3d 306, 312.)
   c) Product liability cases: A damages action lies against the employer where the employer's defective product is sold to a third person who thereafter provided the product for the employee's use. (Lab. Code, § 3602, subd. (b)(3); see *Behrens v. Fayette Manufacturing Co.* (1992) 4 Cal.App.4th 1567,1574-1575.)
   d) Employer is uninsured: If an employer lacks workers' compensation insurance, they will be exposed to possible actions for civil damages (Lab. Code, § 3706; *Hernandez v. Chavez Roofing, Inc.* (1991) 235 Cal.App.3d 1092, 1094-1095.)

DAMAGES

Statutory Caps on Damages

California does not have a general statutory cap on damages. The only exception to this general rule applies to actions for professional negligence against a medical care provider, for which noneconomic damages are capped at $250,000 – also commonly referred to as "MICRA." (Civ. Code, § 3333.2.)

Compensatory Damages for Bodily Injury

1) Every person who suffers loss or harm in person or property from the unlawful act or omission of another may recover monetary damages for that detriment from the person at fault. (Civ. Code, §§ 3281 & 3282.) Any party injured by the breach of an obligation not arising from contract is entitled to an amount in compensation for all the detriment proximately caused by the injury, whether it could have been anticipated or not. (Civ. Code, § 3333.)
2) A "plaintiff's remedy in tort is compensatory in nature and damages are generally intended not to punish a negligent defendant but to restore an injured person as nearly as possible to the position he or she would have been in had the wrong not been done." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 232.) Compensatory damages for bodily injury or death are for "injury caused by pain, suffering, inconvenience, loss of wages or other compensation and for expenditures by the insured for treatment of injuries received." (*California State Auto. Assn Inter-Ins. Bureau v. Carter* (1985) 164 Cal.App.3d 257, 261.)

3) Once a defendant;s liability for a tort has been established, the plaintiff is entitled to recover for any loss reasonably likely to occur in the future, as well as any loss incurred prior to the trial. (Civ. Code, § 3283.)

4) **Non-Economic Damages**: Non-economic damages means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation (Civ. Code, § 1431.2, subd. (b)(2).)

5) **Economic Damages:** Economic damages means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities. (Civ. Code, § 1431.2, subd. (b)(1).)

6) **Considerations for Personal Injury Cases**: In assessing general damages in a personal injury action, the jury should consider all relevant circumstances, including the age and sex of the injured person, his physical condition before and after the injury, the extent, severity and duration of bodily and mental suffering caused by the injury, and any impairment of earning capacity resulting therefrom. (*Roedder v. Rowley* (1946) 28 Cal.2d 820, 822.)

Collateral Source

1) Generally, under the "collateral source rule," the defendant's liability is not reduced by the plaintiff's medical expense recoveries from the plaintiff's own insurance carriers (but see section 3333.1 of the Civil Code regarding professional negligence actions against health care providers and section 985 of the Government Code regarding government entity defendant's right to "verdict adjustment" to reflect collateral source benefits). Therefore, the plaintiff's insurance policies should be reviewed for applicable medical pay coverage.

2) Collateral source rule does not bar the introduction of medical bills paid by the plaintiff's health care insurance carrier. A plaintiff's "reasonable" compensation for past medical expenses may not exceed the amount actually paid or incurred (whether by plaintiff directly or by private insurance, Medi-Cal, plaintiff's employer or any "collateral source"). Where the plaintiff's medical insurer negotiates an amount lower than the medical provider's ordinary rates, the plaintiff may not recover the "negotiated amount differential." This is so even if the full or ordinary rates arguable represent the "reasonable value" of the medical services. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Ca1.4th 541, 560-567.)

Pre-Judgment/Post-Judgment Interest

1) Pre-judgment interest

   a) Liquidated claims: persons entitled to recover "damages certain or capable of being made certain by calculation are entitled to interest from the time the right to recover arises." (Civ. Code, § 3287, subd. (a); see *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 174-175.)

   b) Unliquidated contract claims: persons entitled to damages based on a contract claim that was unliquidated (i.e. not certain) until the judgment was rendered may recover interest thereon from whatever date the court may fix, but not earlier than the filing of the action. (Civ. Code, § 3287, subd. (b); *Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist.* (2001) 90 Cal.App.4th 64, 72.)

c) Unliquidated tort claims: "In an action for breach of an obligation not arising from contract, and in every case of oppression, fraud or malice, interest may be given in the discretion of the jury." (Civ. Code, § 3288.)

2) Post-judgment interest

a) Generally, in civil actions, judgments bear interest at the legal rate of 10% from the date of entry until the judgment is satisfied or reviewed. (Cal. Const., art. XV, § 1(2); Code Civ. Proc., § 685.010.)

Damages for Emotional Distress

1) **Emotional distress**: Compensatory damages for personal injuries include reasonable compensation for pain and suffering, past and future. Emotional distress damages recoverable as an element of pain and suffering are distinguished from those damages recoverable in actions for the intentional or negligent infliction of emotional distress.

a) In order to recover damages for the intentional or negligent infliction of emotional distress, a plaintiff must plead and prove the specific elements of these torts. However, damages for emotional distress as an element of pain and suffering are generally available where a cause of action is otherwise established and distress naturally ensues from the acts complained of. (*State Rubbish Collectors Ass'n v. Siliznoff* (1952) 38 Cal.2d 330.)

b) Emotional distress as an element of pain and suffering is an accepted item of damage that may be recovered in actions for: (1) assault and battery; (2) abuse of process; (3) false arrest and false imprisonment; (4) libel; (5) invasion of privacy; (6) nuisance; (7) trespass; (8) sexual harassment, assault, or battery; (9) breach of insurer's duty of good faith and fair dealing; (10) bad faith contract action; (11) wrongful termination; (12) malicious prosecution of civil action; (13) real estate fraud and breach of fiduciary relationship; (14) willful violation of automatic stay.

c) In order to recover emotional distress damages, the injury suffered must be severe. In other words, the emotional injury must be substantial or enduring as opposed to trivial or transitory. (*Pintor v. Ong* (1989) 211 Cal.App.3d 837.)

d) Standard: The general rule of damages in tort is that for the breach of an obligation the injured party may recover for all detriment proximately caused, whether it could have been anticipated or not. (Civ. Code, § 3333). Accordingly, a plaintiff is entitled to recover damages for all mental suffering proximately caused for whatever length of time his or her mental suffering continues. (*Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425.)

e) There is some conflict in the courts as to whether emotional distress damages are available in the absence of other compensable damages. In two cases, the Supreme Court has allowed plaintiffs to go forward with negligence actions where the only harm alleged was serious emotional distress. (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916; *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583.) One Court of Appeal case, on the other hand, has held that in order to recover, a plaintiff must have substantial damages apart from emotional distress. (*Andersen v. Pacific Bell* (1988) 204 Cal.App.3d 277.) This case has been criticized for

its divergence from Supreme Court authority. (*Pintor v. Ong* (1989) 211 Cal.App.3d 837.)

2) **Negligent Infliction of Emotional Distress**

   a) The negligent causing of emotional distress is not an independent tort but the tort of negligence. The traditional elements of duty, breach of duty, causation, and damages apply. (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583.)

   b) Standard: as set forth in *Thing v. La Chusa* (1989) 48 Cal 3d 644, a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if the plaintiff:

      i) is closely related to the injury victim;

      ii) is 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 serious emotional distress, a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.

   c) Physical injury is no longer a prerequisite to recovery. (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916.)

3) **Initial Infliction of Emotional Distress**

   a) Standard: A cause of action for intentional infliction of emotional distress exists when there is

      i) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress;

      ii) the plaintiff's suffering severe or extreme emotional distress; and

      iii) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.'

4) The "outrageous act" element of the claim means the defendant's conduct was so extreme as to "exceed all bounds of decency usually tolerated in a civilized society." (*Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 1001; *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

5) And the defendant's conduct must be "intended to inflict injury or engaged in with the realization that injury will result." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051).

6) "Severe" emotional distress means emotional distress of such substantial quality or enduring quality that no reasonable person in civilized society should be expected to endure it. (so extreme as to "exceed all bounds of decency usually tolerated in a civilized society." (*Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 1004.)

Wrongful Death versus Survival Action Damages

1) Wrongful Death Damages: Under a wrongful death cause of action, the specified heirs are entitled to recover damages on their own behalf for the loss they have sustained by reason of decedent's death. Wrongful death damages include funeral and burial costs and loss of support. (See *Corder v. Corder* (2007) 41 Cal.4th 644, 651; *Fitch v. Select Products Co*. (2005) 36 Cal.4th 812, 819.)

2) Survival Action Damages: All decedent's pecuniary damages incurred prior to death (e.g. medical expenses and los earnings), as well as punitive damages are recoverable by decedent's estate. However, the estate is not entitled to an award for decedent's pain, suffering, or disfigurement. (Code Civ. Proc., § 377.34; see *County of Los Angeles v. Superior Court* (*Schonert*) (1999) 21 Cal.4th 292, 295-296; and *Gailing v. Rose, Klein & Marias* (1996) 43 Cal.App.4th 1570, 1577 [trial court has an obligation to instruct jury *sua sponte* that pain and suffering damages are not recoverable in a survival action].)

Punitive Damages

1) Punitive damages are governed by Civil Code section 3294, which states that in any "action for the breach of an obligation not arising from contract," punitive damages are available if "the defendant has been guilty of oppression, fraud, or malice provides" based upon "clear and convincing evidence." I
2) **Malice**: means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
3) **Oppression**: means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
4) **Fraud**: means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.
5) Any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence. (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644.)

Diminution of Value of Damaged Vehicle

1) The recovery for tort damages for a vehicle is limited to the difference between the fair market value of the vehicle before the loss and its value after the loss. It does not matter if this amount is enough to replace the vehicle. (See *Moran v. California Dept of Motor Vehicles* (2006) 139 Cal.App.4th 688; *Pacific Gas & Electric Co. v. Monteer* (1997) 66 Cal. App. 3d 809.)
2) However, there is no first-party right to diminution of value. Once a vehicle is repaired to pre-accident condition, the insurance carrier's duty is discharged. (See *Ray v. Farmers Ins. Exchange* (1998) 200 Cal.App.3d 1411.)

Loss of Use of Motor Vehicle

In California, a person whose car is damaged in an auto accident is entitled to recover damages for the loss of use of their vehicle. In order to recover these damages, a party must prove the reasonable cost to rent a similar vehicle for the amount of time reasonably necessary to repair or replace the vehicle. (See *Valencia v. Shell Oil Co*. (1944) 23 Cal.2d 840.)

EVIDENTIARY ISSUES

Exclusion of Traffic Collision Report and Traffic Citations

1) **Traffic Collision Report**: Vehicle Code section 20013 precludes the admissibility of the traffic collision report as evidence in any trial, civil or criminal, arising out of an accident.
2) **Traffic Citations Issued in Subject Incident**: It is a general rule that a judgment in a criminal prosecution (i.e., traffic citation) may not be received in a civil action to establish

the truth of the facts in which it was rendered. (See *Rendall v. Thompson* (1952) 108 Cal.App.2d 662.)

Testimony of Investigating Police Officer

A police officer's opinion is not admissible unless based on facts observed by the officer at the scene of the accident. (See *Hodges v. Severns* (1962) 201 Cal.App.2d 99.) However, an investigating police officer may be permitted to testify regarding causation if it can be demonstrated that they are competent to do so. "It is generally established that traffic officers whose duties include investigations of automobile accidents are qualified experts and may testify concerning their opinions as the various factors involved in such accidents, based on their own observations." (*Hart v. Wielt* (1970) 4 Cal.App.3d 224, 229.)

Failure of Motorcyclist to Wear a Helmet

1) Vehicle Code section 27803 requires that a driver and passenger must wear a safety helmet meeting requirements established pursuant to Vehicle Code section 27802 when riding a motorcycle, motor driven cycle, or motorized bicycle.
2) Similar to a plaintiff's failure to wear a seatbelt, defendants may present evidence that plaintiff failed to wear a motorcycle helmet and that had plaintiff worn a helmet, injury would have been avoided or less severe. (See *Housely v. Godinez* (1992) 4 Cal.App.4th 737.)

Evidence of Alcohol or Drug Intoxication

1) Intoxication is not negligence as a matter of law, but it is a circumstance for a jury to consider in determining whether such intoxication was contributing cause of an injury and is also a question of fact for the jury. (See *Pittman v. Boiven* (1967) 249 Cal.App.2d 207; *Barr v. Scott* (1955) 134 Cal.App.2d 823.)
2) However, in order to submit to a jury that a party was intoxicated, there must be a foundational showing that the driver was "under the influence" at the time of incident. Otherwise, the Court has the right to exclude the evidence of a party having consumed alcohol pursuant to its authority under Evidence Code section 352 (similar to Federal Rules of Evidence Rule 403). (See *Linde v. Emmick* (1936) 16 Cal.App.2d 676.)

Expert Testimony

1) Rule: If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
   a) Related to a subject that is sufficiently beyond common experience that such opinion& would assist the trier of fact; and
   b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion. (Evid. Code, § 801.)
2) Expert testimony is admissible only when required or permissible.
   a) **Required**: Expert testimony is required whenever proof of an element of the cause of action or defense calls for testimony that is outside an ordinary person's common

knowledge. (*People v. McDonald* (1984) 37 Cal.3d 351, 366, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896.)

i) Examples: professional standard of care/causation, specialists, emergency medical care, causation based on scientific knowledge, reliability of scientific evidence.

ii) Exception: Expert testimony is inadmissible where negligence is obvious to lay persons or where negligence has been admitted, issues of law, or matters of common experience.

b) **Permissible**: Expert testimony is helpful and therefore, permissible, where the subject matter is sufficiently beyond the scope of common experience to be of assistance to the trier of fact. (*People v. McDonald* (1984) 37 Cal.3d 351, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896.)

i) Examples: Reliability of eyewitness identifications, negligence, causation, future wage loss, present value of future payments, value of real or personal property, attorney fees, bad faith, etc.

3) Requirements for admissibility of expert opinion: Per Evidence Code section 801, there are three distinct requirements for admissibility of expert opinion testimony:

a) The subject matter must be "sufficiently beyond common experience" that the opinion would assist the jury;

b) The witness must have appropriate qualifications, i.e. some special knowledge, training or experience in that subject matter; and

c) The opinion must be based on reliable matter.

4) California does not follow *Daubert*: The California Supreme Court rejected *Daubert* and reconfirmed the more "conservative" approach enunciated in *People v. Kelley* known as the *Kelly* factors. (*People v. Leahy* (1994) 8 Ca1.4th 587, 604.)

a) **Kelly factors**: Under the Kelly rule, expert testimony deduced from novel scientific principles may be admissible if the proponent of the evidence makes a preliminary showing of general acceptance of the new technique in the relevant scientific community.

i) Must establish reliability of the method in general;

ii) Must establish that the evidence is furnished by a properly qualified expert; and

iii) Must establish the use of proper scientific procedures in the particular case.

5) Trial court acts as gatekeeper: Under California law, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. In determining the admissibility of an expert opinion, the court does not resolve scientific controversies or choosing between competing expert opinions. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747.)

Collateral Source

1) Collateral source payments such as those under medical or disability insurance may be excluded pursuant to the court's authority to exclude evidence that is irrelevant (Evid. Code § 350); or prejudicial (Evid. Code, § 352.)
2) Exception: Collateral source rule does not bar the introduction of medical bills paid by the plaintiff's health care insurance carrier. A plaintiff's "reasonable" compensation for past medical expenses may not exceed the amount actually paid or incurred (whether by plaintiff directly or by private insurance, Medi-Cal, plaintiff's employer or any "collateral source"). Where the plaintiff's medical insurer negotiates an amount lower than the medical provider's ordinary rates, the plaintiff may not recover the "negotiated amount differential." This is so even if the full or ordinary rates arguable represent the "reasonable value" of the medical services. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Ca1.4th 541, 560-567.)

Recorded Statements

1) A recorded statement may be admissible under Evidence Code sections 1250 and 1251, as either evidence of an existing state of mind, emotion, or physical sensation or as evidence of state of mind, emotion, or physical sensation at the time the statement was taken.
2) In order to have a recorded statement admitted under Evidence Code section 1250, a party must show (1) the declarant's state of mind, emotion, or physical sensation are at issue in the action; and (2) the statement is offered to prove or explain acts of conduct of the declarant.
3) In order to have a recorded statement admitted under Evidence Code section 1251, a party must show (1) the declarant is unavailable as a witness; and (2) the evidence is offered to prove prior state of mind, emotion, or physical sensation and not to prove any fact.
4) An insurance company may raise privilege to attempt to protect the statements. The counsel representing the insured may raise attorney-client privilege (see Evid. Code, § 954) as well as attorney work product if the recorded statement was gathered in anticipation of litigation. However, the California courts have employed the "dominant purpose" test in determining if something qualifies as either attorney client or attorney work product when communication can have more than one purpose. (See *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725; *2,002 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377, overruled on another ground in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110.) The " 'dominant purpose' test not only looks to the dominant purpose for the communication, but also to the dominant purpose of the attorney's work." (*2,002 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377, 1390-1391, overruled on another ground in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725.)

Prior Convictions

1) In allowing in a prior conviction, the Court must perform a weighing function pursuant to Evidence Code section 352, to determine that if the allowance of the prior conviction is more prejudicial than probative. (See *Robbins v. Wong* (1994) 27 Cal.App.4th 274; *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 879, overruled on another ground in *Ryan v. Rosenfield* (2017) 3 Cal.5th 124.)

2) Prior convictions may be used for purposes of impeachment. However, convictions, which are not crimes of moral turpitude, are not admissible as impeachment. (See *People v. Lopez* (2005) 129 Cal.App.4th 1508.)

Driving History

1) Generally, under California Evidence Code section 352, a person's prior driving history could be excluded as being more prejudicial than probative.
   a) An employee's driving record is inadmissible to prove that the employee was prone to driving negligently. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1161-1162.)
   b) Under Evidence Code section 1104, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specific conduct, i.e. evidence of several prior speeding citations cannot be admitted to show a party was likely speeding at the time of the accident. (See *Lowenthal v. Mortimer* (1954) 125 Cal.App.2d 636.)
2) If the party seeking to admit evidence of the person's prior driving history can show that the evidence of the persons driving history is necessary to prove an element of a cause of action, for example, negligent entrustment, the party may be able to submit the evidence to the trier of fact. However, if the employer admits to vicarious liability for the employee, then this will preclude any claim for negligent hiring and retention. (See *Diaz v. Carcamo* (2011) 51 Cal.4th 1148.)

Fatigue

1) Evidence Code section 669 allows the trier of fact to presume a person has failed to exercise due care if (1) he violated a statute; (2) the violation was the proximate cause of injury to another person; (3) the injury that resulted from the occurrence is of the nature the statute was meant to prevent; (4) the person injured was one of the persons meant to be protected by the statute.
2) Both the Federal Regulations and the California Vehicle Code (Veh. Code, § 34501.2) regulating hours of service for truck drivers were enacted to protect against driver fatigue and the resulting accidents. A plaintiff injured in a truck accident would need to prove that the driver violated the regulations regarding hours of service and that violation caused the subject accident.

Spoliation

1) **Intentional Spoliation**: The tort of intentional spoliation of evidence has been limited in cases where a party is aware of the misconduct at the time of trial. (See *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 18, fn. 4.) The California Supreme Court in *Cedars-Sinai* indicated that other remedies are available to an aggrieved party such as negative presumptions under Evidence Code section 412 and criminal penalties.
2) **Negligent Spoliation**: The court may exclude reference to evidence that is accidentally destroyed by another party. (See *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464 [no third party negligent spoliation claim]; *Puritan Ins. Co. v. Superior Court* (1985) 171 Cal.App.3d 877, 885-85 [exclusion of expert's testimony regarding testing of evidence that was inadvertently lost by expert before opposition could test it].)

SETTLEMENT

Offer of Judgment

1) Either party may serve on the other a written offer to allow judgment to be entered on specified terms at any time until 10 days prior to trial. (Code Civ. Proc., § 998.)
2) The written offer must:
   a) be in writing;
   b) state the terms and conditions of the proposed judgment or award; and
   c) contain a provision that allows the accepting party to accept the offer by signing a statement that the offer is accepted.
3) If the offer is accepted, then the offer with proof of acceptance must be filed with court for the judge to enter the judgment. (Code Civ. Proc., § 998, subd. (b)(1).)
4) If the offer is not accepted or made within 30 after it is made, whichever occurs first, it shall be deemed withdrawn (Code Civ. Proc., § 998, subd. (b)(2).)
5) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover his or her postoffer costs, including expert witness costs, and shall pay the defendant's cost from the time of the offer. The Court may further require the plaintiff pay a reasonable sum to cover the defendant's post offer expert fees that were reasonably necessary in preparation for trial and/or trial. (Code Civ. Proc., § 998, subd. (c)(1).)

Liens

1) **Priority**
   a) The Civil Code declares that, other things being equal, different liens on the same property have priority according to the time of their creation, except in cases involving certain maritime liens. (Civ. Code, § 2897.). Regardless of the time of transfer, the California real property recording system gives priority to the person whose instrument is first recorded, and any subsequent lien is inferior. (*Bratcher v. Buckner* (2001) 90 Cal.App.4th 1177.)
   b) An exception, however applies to attorney's liens for fees and costs which have priority over medical liens regardless of time of creation. (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606.) As a matter of equity and public policy, a patient's personal injury attorneys' lien for litigation costs, against the proceeds of a settlement with the tortfeasor who caused the patient's injuries, has priority over a medical lien against those proceeds, even if the medical lien came first in time, since the medical lien has value only if the patient obtains a judgment from which the liens can be paid, and the patient's chances of success in obtaining an adequate judgment are greatly diminished if the patient is not represented by a lawyer. (*Ibid.*)

2) Medical Liens

   a) Hospital Liens
      i) As set forth in Civil Code section 3045.1, a hospital which furnishes medical or other services to any person injured by reason of an accident, negligent, or wrongful act, shall have a lien upon the damages recovered by the injured person to the extent of the amount of the reasonable and necessary charges in which services

are provided for the treatment, care, and maintenance of the person resulting from that tortious act.

ii) Such liens are statutory, non-possessory, generally non-consensual, and enacted "to compensate a person who, pursuant to express or implied contract, furnishes services or materials in the improvement of a chattel, or stores it." The Hospital Lien Act "compensates a hospital for providing medical services to an injured person by giving the hospital a direct right to a certain percentage of specific property, i.e., a judgment, compromise or settlement, otherwise accruing to that person." (*Newton v. Clemons* (2003) 110 Cal.App.4th 1.)

b) **Actions or Liens by Department of Health Services**

i) California participates in the federal Medicaid program and in implementing Medi-Cal, statutory law authorizes a health care provider to assert on a lien for the full costs of its services against "any judgment, award, or settlement obtained by a Medicaid beneficiary." (Welf. & Inst. Code, § 14124.791; see also Welf. & Inst. Code, § 14124.74.)

ii) The Department of Health Care Services (Department) can obtain reimbursement by filing an action directly against a third-party tortfeasor, by intervening in a Medi-Cal beneficiary's action against a third party, or by filing a lien against a beneficiary's settlement, judgment or award. (Welf. & Inst. Code §§ 14124.71-14124.73.)

(1) Notice: When an action is brought by a beneficiary, the beneficiary must give notice to the Department of Health Services within 30 days of filing the action. (Welf. & Inst. Code, § 14124.73. Welfare and Institutions Code section 14124.79 sets forth the notice requirements. Notice is again required if a settlement or judgment is received. (Welf. & Inst. Code § 14124.76.)

(2) Limitations on Liens

(a) *Albhorn* Decision: Following a seminal U.S. Supreme Court case, *Arkansas Dept. of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268 (Ahlborn), amendments to the Welfare & Institutions Code sections 14124.76 and 14124.78 provides that recovery is limited to that portion of a settlement, judgment or award that represents payment for medical expenses, or medical care, provided on behalf of the beneficiary.

(b) *Proceed Limitations*: In addition, when an action is brought by the beneficiary, the Department is allowed a first lien, of not more than half, on the proceeds, after payment of reasonable litigation expenses and attorney's fees. (Welf. & Inst. Code, §§ 14124.74, 14124.78; *McMillian v. Stroud* (2008) 166 Cal.App.4th 692, 697-698).

(c) Medical Limitations: Federal Medical law also strictly limits provider liens against third party settlements or judgments to amounts paid by Medicaid to the extent that Welfare and Institutions Code sections 14124.791 and 14124.74 authorize a lien for an amount greater than amounts paid by Medicaid, such liens made pursuant to these California statutes are unenforceable because federal Medicaid statutes and regulations preempt

the California statutes. (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 814; Welf. & Inst. Code §§ 14124.791.)

(3) Third party action: If a beneficiary has filed a third-party action, the court in which the action is filed shall have jurisdiction over a dispute regarding the amount of the asserted lien. If no action has been filed, the reimbursement determination motion may be filed in any superior court where venue would have been proper if an action had been filed, and the motion shall be treated as a special proceeding pursuant to (Code. Civ. Proc., § 1063; Welf. & Inst. Code, § 14124.75, subd. (b); *Espericueta v. Shewry* (2008) 164 Cal.App.4th 615, 623 fn.5.)

(4) Statute of Limitations: The statute of limitations is three years for actions brought by the Department, as set forth in Code of Civil Procedure section 338, subdivision (a). The statute commences to run as to a deceased person when notice is furnished to the Department of the death of the decedent pursuant to Probate Code section 215, which requires that the director of Health Services be provided notice of the decedent's death not later than 90 days after the date of death. The notice must include a copy of the decedent's death certificate. The notice must be given as provided in Probate Code section 1215, addressed to the director at the Sacramento office of the director. (*Shewry v. Begil* (2005) 128 Cal.App.4th 639, 645.)

3) Workers' Compensation Liens

a) Statutory Liens: The Workers' Compensation Appeals Board (WCAB) may allow against an award of workers' compensation. Specifically, WCAB is authorized to determine liens for: reasonable attorneys' fees; specific reimbursements and medical expenses; reasonable value of living expenses of an injured employee or of his or her dependents, subsequent to the injury; reasonable burial expenses of the deceased employee; reasonable living expenses of the spouse or minor children of the injured employee, or both, subsequent to the date of injury; the amount of unemployment compensation disability benefits that have been unpaid or pursuant to the Unemployment Insurance Code; unemployment compensation benefits and extended duration benefits paid to an injured employee for the same day or days for which he or she receives or is entitled to receive temporary total disability indemnity payments under the workers' compensation law; family temporary disability insurance benefits; and the amount of indemnification granted by the California Victims of Crime Program; amount of compensation including expenses of medical treatment, and recoverable costs paid by the Asbestos Workers' Account, as set forth under Labor Code section 4903.

b) Non-statutory Liens: The WCAB may not allow a lien against an award of workers' compensation benefits in satisfaction of an obligation not specified in the Labor Code; if the appeals board does so, it acts in excess of its authority and without jurisdiction. (*Ogdon v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 192.) In order to assert a lien against a compensation award, there must be a valid debt within one of the classes enumerated by statute for which a lien may lawfully be declared, the creditor must possess a right of repayment, and a lien may not be asserted for money paid pursuant to a contract, voluntarily, or as a gift. (*Ibid.*)

c) Determining Priorities: If more than one lien is allowed, the WCAB may determine the priorities, if any, between the liens allowed. (Lab. Code, § 4903.) In addition, the WCAB may order the amount of any lien claim, as determined and allowed by it, to be paid directly to the person entitled, either in a lump sum or in installments. (*North Pac. S.S. Co. v. Industrial Acc. Commission of Cal*. (1917) 174 Cal. 500.)

d) Filing Requirements: When a compromise of claim or an award is submitted for approval, the parties must file with such entity or person any liens served on the parties. (Lab. Code, § 4903.1, subd. (b).) A lien claimant in one of the statutory classes set forth in Labor Code sections 4903 and 4903.1 must file its lien with the WCAB in writing on an approved WCAB form. The lien must be accompanied by a full statement or itemized voucher supporting the lien and justifying the right to reimbursement and proof of service on the injured worker, or if deceased, on the worker's dependents, the employer, the insurer, and the respective attorneys or agents of record. (Lab. Code, § 4903.1, subd. (c).)

e) Time Limits: No lien claim for medical expenses may be filed after six months from the date on which the appeals board or a workers' compensation administrative law judge issues a final decision, findings, order, including an order approving compromise and release, or award, on the merits of the claim, after five years from the date of the injury for which the services were provided, or after one year from the date the services were provided, whichever is later. (Lab. Code, § 4903.) At the same time, any health care provider, health care service plan, group disability insurer, employee benefit plan, or other entity providing medical benefits on a non-industrial basis, may file a lien claim for expenses within six months after the person or entity first has knowledge that an industrial injury is being claimed. (*North Pac. S.S. Co. v. Industrial Acc. Commission of Cal*. (1917) 174 Cal. 500.)

f) Notice Requirements: Notice in writing to the insurer, or to an uninsured employer, setting forth the nature and extent of any claim that is allowable as a lien, is necessary in order that the claim may constitute a lien against any amount subsequently payable as workers' compensation, subject to the determination of the amount and approval of the lien by the WCAB. (Lab. Code § 4904; Cal. Code Reg., tit. 8 § 10770.) No lien is created unless the notice is given. (*Pacific Coast Cas. Co. v. Pillsbury* (1915) 171 Cal. 319.) However, where it appears in any proceeding pending before the appeals board that a lien should be allowed if duly requested by the party entitled to it, the appeals board may, without any request for the lien having been made, order payment of the claim directly to the person entitled, in the same manner and with the same effect as though the lien had been regularly requested. The award to such person constitutes a lien against unpaid compensation due at the time of service of the award. (Lab. Code, § 4905.)

Settlement with a Minor

1) A "minor's compromise" is a procedure under California law by which settlements of accident and injury claims involving victims under the age of 18 may be approved by the court. The procedure involves a motion with the Court which sets forth the nature and extent of the injuries of the child, the current cost of all medical bills, anticipated future treatment costs (if applicable), information regarding payment of medical bills and liens to medical providers, information regarding other costs including attorney's fees, and a net

amount to be given to the minor. It will also ask for an order approving the settlement, which will require that the net proceeds for the minor be deposited into a FDIC insured bank account which is blocked from access by any other person except the minor and may only be withdrawn (absent exceptional circumstances) by the minor when they turn 18. (See Code Civ. Proc., § 372; Prob. Code § 3500.)

2) While a motion for court approval of a minor's compromise is pending, the settlement agreement is voidable only at the election of the minor or the minor's guardian or guardian ad litem. (See *Person v. Superior Court* (2012) 202 Cal.App.4th 1333, 1339.)

Negotiating Directly with Attorneys

Pursuant to California Rules of Professional Conduct, Rule 2-100 (A), attorneys may not communicate with a party who is represented without the consent of the party's counsel. Settlement negotiations are often initiated between a claimant's attorney and the adverse party or the party's insurance adjuster prior to retention of an attorney for the adverse party. However, once an attorney is retained for the adverse party, claimant's counsel should ask for the consent of the adverse attorney prior to continuing negotiating directly with the adjuster.

Confidentiality Agreements

1) Settling parties who enter into a confidentiality agreement regarding the case or the terms of settlement may seek a "good faith" determination only by way of noticed motion and hearing. (See Code Civ. Proc., § 877.6, subd. (a)(2).)

2) In addition, no evidentiary privilege arises from confidentiality provisions in a settlement agreement. Thus, of the settling parties do not wish to produce their agreement at a good faith determination hearing, they may withdraw their motion.

3) An agreement with a confidentiality clause may be subject to disclosure if the agreement is filed with the court. Unless confidentiality is required by law, a court record is presumed to be open. (See Cal. Rules of Court, rule 2.550.) However; in some situations, a confidentiality clause filed with the court may be required by law to remain confidential if it discloses privileged information.

Releases

1) General Releases: "A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party." (Civ. Code, § 1542; see *Winet v. Price* (1992) 4 Cal.App.4th 1159.)

2) Joint Tortfeasors:

   a) A release given to one or more joint tortfeasors that is determined to have been entered into in good faith:

      i) Does not discharge any other tortfeasor from liability unless the terms of the settlement provide for such release, but does operate to offset the claims against non-settling tortfeasors by the settlement amount; and

      ii) Discharges the settling party from all liability for contribution to any of the non-settling parties (except where the parties have contractually agreed to an apportionment of liability among themselves). (See Code Civ. Proc., § 877.)

b) When a release is not determined to have been entered into in good faith, the non-settling defendants remain jointly and severally liable to the plaintiff, but are entitled to seek contribution from the settling defendant for any damages in excess of the non-settling defendants' share of fault. The amount of the prior settlement is credited against the eventual damage award. (*Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291.)

Voidable Releases

In order to void release under California law, releasor must show that its entry into release was induced by fraud, undue influence, mistake or deceit.

TRANSPORTATION LAW

State DOT Regulatory Requirements

1) Information regarding California's DOT regulations may be found at: www.dot.ca.gov and specific information regarding motor carrier services may be found at: https://www.dmv.ca.gov/portal/dmv/detail/mcs/mcs.
2) California deviates from some of the regulations under the Federal Motor Carrier Safety Administration, such as hours of service and driver age.

State Speed Limits

1) California has a basic speed limit law which sets forth that no person shall drive at a speed greater than is reasonable or prudent having due regard for weather visibility, traffic, and the surface and width of the highway. (Veh. Code, § 22350.)
2) California Vehicle Code section 22349 sets forth maximum speed limits:
   a) No person may drive a vehicle upon a freeway at a speed greater than 65 miles per hour unless posted otherwise.
   b) No person may drive a vehicle upon a two-lane, undivided highway at a speed greater than 55 miles per hour unless the highway, or a portion thereof, has been posted for a higher speed limit by the DOT or appropriate local agency.
3) California Vehicle Code section 22352 sets forth prima facie speed limits unless authorized by another code and a sign is erected giving notice of a different speed limit. The prima facie speed limits are as follows:
   a) 15 mph: when traversing a railway grade crossing; traversing an intersection of a highway if during the last 100 feet the driver's approach is not clear and unobstructed; or any alley.
   b) 25 mph: on any highway other than a state highway; when approaching or passing a school building; or when passing a senior center or facility primarily used by senior citizens.

Overview of State CDL Requirements

1) To operate commercial vehicles, a driver must apply for a commercial driver's license (CDL). Only California residents may obtain a California CDL. Residence is established by one of the following:
   a) registering to vote in California;
   b) paying resident tuition at a public institution of higher education;

c) filing for a California homeowner's property tax exemption;

d) obtaining a license; or

e) any other privilege or benefit not ordinarily extended to nonresidents.

2) In California, a person may be a driver for hire if he or she is 18 years or older but may not engage in interstate commerce activities until 21 years or age. A person also must be 21 years of age to transport hazardous materials or wastes. (Veh. Code, § 12515.)

3) An applicant for a California CDL must provide the following documents in addition to providing their true full name and the applicable fee:

a) a Commercial Driver License Application (DL 44C);

b) an approved medical form completed by a doctor (Veh. Code, § 12517.2);

c) document evidencing birth date/ legal presence;

d) social security card; and

e) certificate of driving skill.

INSURANCE ISSUES

State Minimum Limits of Financial Responsibility

1) The minimum limits of financial responsibility required under California law are:

a) Bodily Injury: $15,000 for one person in any one accident, $30,000 for two or more people in any one accident;

b) Property damage: $5,000 for injury or destruction of property of others.

Uninsured Motorist Coverage

1) In California, the Uninsured Motorist Act is codified at Insurance Code section 11580.2 et seq. It is liberally construed in favor of coverage. (See *Mercury Ins. Co. v. Ayala* (2004) 116 Cal.App.4th 1198, 1203; *Mercury Ins. Co. v. Enterprise Rent-A-Car of Los Angeles* (2004) 116 Cal.App.4th 41, 48.)

2) The Uninsured Motorist Act mandates two types of coverage in auto liability insurance policies:

a) Uninsured Motorist Coverage: Insured must be covered, within limits as to damages for bodily injury or wrongful death from the owner or operator of an uninsured vehicle (Ins. Code, § 11580.2, subd. (a)(1).)

b) Underinsured Motorist Coverage: Auto insurance policies must also provide coverage for insureds where the other driver has liability insurance but with limits lower than the insured's own Underinsured Motorist Limits (Ins. Code, § 11580.2, subd. (p).)

3) The following conditions must be established for "uninsured motorist" coverage:

a) A covered person;

b) Suffers bodily injury or death;

c) As a result of physical contact;

d) From an uninsured motor vehicle; and

e) The uninsured motor vehicle was at fault.

4) Although the statute is expressed in terms of "uninsured motorist coverage," the conditions for coverage below general also apply to "underinsured motorist coverage." (See *Rudd v. California Cas. Gen. Ins.* (1990) 219 Cal.App.3d 948, 953.)

No Fault Insurance

California does not utilize no-fault insurance or personal injury protection. Some insurance policies have medical payments which are paid regardless of fault but are typically very limited.

Disclosure of Limits and Layers of Coverage

1) The Discovery Act expressly makes discoverable the existence and contents of a defendant's liability insurance coverage, as well as the carrier's identity, the nature of the coverage, and the policy limits. Pursuant to the Discovery Act, the entire policy must be produced upon request. (Code Civ. Proc., § 2017.210; *Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal.App.4th 733, 739-740.)
2) As for plaintiff's insurance, under the "collateral source rule," evidence of insurance benefits received by plaintiff irrelevant and therefore inadmissible on the issue of mitigation of damages. Collateral source payments and settlements may be relevant to prove other matters, such as the extent of the plaintiff's injury or plaintiff's credibility as a witness. (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1759-1762.)
3) The insurance status of a nonparty is generally irrelevant for discovery purposes. Traditionally at least, whether a nonparty is insured, has no bearing on liability between defendant and plaintiff or on settlement of the lawsuit and hence no relevance for discovery purposes. (See *Snell v. Superior Court* (1984) 158 Cal.App.3d 44, 50-51.)

Unfair Claims Practices

1) Fair Claims Act of California, requires that insurers attempt "in good faith to effectuate prompt, fair, and equitable settlements" after liability has become "reasonably clear." (Ins. Code, § 790.03, subd. (h)(5).)
2) The following practices are deemed unfair claims practices pursuant to the California Insurance Code:
   a) Misrepresenting to claimants any pertinent facts or insurance policy provisions.
   b) Failing to acknowledge or act reasonably promptly upon communications with respect to claims.
   c) Failing to affirm or deny coverage of claims in writing within a reasonable time after "Proof of Loss" requirements are completed.
   d) Failing to act in good faith to effectuate prompt, fair, equitable settlements.
   e) Forcing insured to instigate litigation to recover amounts due by offering less than the amounts ultimately recovered.
   f) Attempting to settle a claim by an insured for less than the amount to which he/she is reasonably entitled by referencing advertising material accompanying an application.
   g) Attempting to settle a claim on the basis of an application which was altered without notice to the insured.
   h) Failing, after payment of a claim, to inform insureds, upon request by them, of the coverage under which payment was made.

i) Telling insureds or claimants that the insurer typically appeals arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept a smaller settlement award or compromise.

j) Delaying the investigation or payment of claims by requiring a preliminary claim report and then requiring subsequent submission of formal Proof of Loss forms, both of which contain substantially the same information.

Bad Faith Claims

1) The law implies a covenant of good faith and fair dealing in ever y contract including insurance policies. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720.) An insurer's breach of its implied covenant of good faith and fair dealing with the insured may give rise to an action either in contract or tort, depending on the remedies sought. A contract claim limits the plaintiff to contract remedies only, which a tort claim permits recovery of extracontractual damages, including emotion distress, attorney fees, and if appropriate, punitive damages. (*Blue Shield of California Life & Health Ins. Co. v. Superior Court* (2001) 192 Cal.App. 4th 727, 731.)
2) An insured electing to proceeding in tort is limited to the stature of limitation for personal injury (2 years), whereas an insured that proceeds under contract has a longer statute of limitation (4 years). (See *Archdale v. American Internat. Specialty Lines Ins. Co*. (2007) 154 Cal.App.4th 449.)
3) However, there is no finding of bad faith, if it can be shown there was no coverage under the insurance policy, as there can be no breach of the implied covenant of good faith and fair dealing. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1.)

Coverage – Duty of Insured

1) Most liability policies contain a standard cooperation clause that provides that the insured will cooperate with the carrier in the investigation, settlement, or defendant of a claim or suit. (See *Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App 4th 615.) The purpose for these clauses is to allow the carrier to present a complete defense of its insured and to prevent collusion between the insured and a claimant. (*Rockwell Internat. Corp. v. Superior Court* (1994) 26 Cal.App.4th 1255.)
2) Examples of breach of the cooperation clause include:
   a) Willful failure of insured to attend trial. (*State Farm Fire & Cas. Co. v. Miller* (1970) 5 Cal.App.3d 837, 842.)
   b) Refusal to appear for deposition or consult defense attorney. (*Hall v. Travelers Ins. Companies* (1971) 15 Cal.App.3d 304.)
   c) Misrepresentation or concealment of material facts from insurer. (*Valladoo v. Fireman's Fund Indem. Co.* (1939) 13 Cal.2d 322.)

Fellow Employee Exclusions

California Insurance Code section 11580.1, subdivision (b)(4)(B) indicates that insurance afforded to any person other than the named insured need not apply to any employee with respect to bodily injury sustained by a fellow employee injured in the scope and course of his or her employment.