STATE OF CALIFORNIA
RETAIL COMPENDIUM OF LAW

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# Retail Liability Guide to California Premises Liability

## Introduction

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## Negligence

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## Specific Examples of Negligence Claims

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INTRODUCTION

Shopkeepers and restaurant owners are in the business of inviting customers onto their premises to shop, eat, drink or stay. They are tasked with hiring, supervising, and training numerous employees who, in turn, must interact with guests on a daily basis. Incidents involving personal injury and property damage are bound to arise, despite a business owner’s best efforts to exercise due care and maintain an environment that is hazard-free.

California’s body of law related to premises liability follows general negligence principles fairly closely. At this point in time, two of California’s most unique developments are the courts’ current budget crisis—which has resulted in delayed litigation, particularly for personal injury cases—and our developing body of law limiting a plaintiff’s ability to introduce gross medical bills at trial.

Below is a brief overview of the laws and principles most pertinent to navigating retail liability in California. We hope this serves as a quick reference guide and encourage you to contact Sean Burnett who leads Snyder Law’s Retail Practice Group for additional information and insight.

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A. **Structure of State Court System**

California’s court system serves nearly 34 million people and consists of the Supreme Court, the Courts of Appeal, and the Superior Courts. The state is geographically divided into six appellate districts, each containing a Court of Appeal. There are 58 Superior Courts, one in each county. Superior Courts have trial jurisdiction over criminal and civil cases. Civil cases are divided into Unlimited cases (more than $25,000 at issue) and Limited cases (up to $25,000 at issue).

B. **Budget Cuts and Delays**

Recent budget cuts have forced the closure of over 50 courthouses and 200 courtrooms, making it increasingly difficult to obtain timely hearing dates and trial dates.¹ Just one example is Los Angeles County, where all personal injury cases are directed to one courthouse and trial dates are set for 15-18 months after filing. Most courtrooms only supply court reporters for half of the week. For the other half of the week and for all civil trials, parties are required to retain their own court reporter if one is desired. These delays and associated costs lead to frequent consideration of alternative dispute resolution.

C. **Arbitration and Mediation**

Judicial arbitration is a statutory procedure by which certain civil cases are diverted before trial to nonbinding arbitration before a neutral third party. The California Judicial Arbitration Law and the California Rules of Court authorize the courts to adopt local rules affecting the arbitration process and adapting it to special local circumstances. Whether mediation is mandatory depends on the county. Due to recent budget cuts, many counties are reducing or eliminating court sponsored mediation programs.

**NEGLIGENCE**

A. **Elements of a Cause of Action of Negligence**

The elements of a cause of action for negligence are duty, breach of duty, proximate cause, and damages.² Duty is usually a question of law hinging largely on foreseeability, but as discussed further below, California recognizes several presumed duties arising out of “special

relationships,” such as a business owner’s duty to secure its premises for the safety of its potential or actual customers.

B. Statute of Limitations

1. Personal Injury
   An action for assault, battery, or injury to an individual, caused by the wrongful act or neglect of another, must be initiated within two years.3

2. Property Damage
   An action for taking, detaining, or injuring any goods, including actions for the specific recovery of personal property, must be commenced within three years after the cause of action accrued.4

C. General Negligence Principles

1. Comparative Negligence
   Under the doctrine of comparative negligence, the contributory negligence of a plaintiff is not a complete bar to his recovery. Instead, a plaintiff’s negligence diminishes his or her recovery in proportion to the amount of fault attributable to the plaintiff, even where a plaintiff is found to have a greater proportion of fault than a defendant.5 The doctrine of comparative negligence applies to all cases short of intentional misconduct by one of the parties.

2. “Eggshell Plaintiff” Rule
   Defendants must “take their victims as they find them.” It is no defense that a plaintiff was in a preexisting weakened condition or “unusually susceptible” to injury: defendants are liable for all damage legally caused by their tortious acts even though the injured plaintiff had a preexisting condition that made the consequences of the tortious acts more severe than they would have been for a “normal” victim.6 That being said, the existence of preexisting injuries

4 Id. at § 338.
5 See Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804.
often makes it more difficult for plaintiffs to prove that their alleged injuries were caused by an accident.

3. **Subsequent Remedial Measures**

If precautionary or remedial measures are made after an incident, and such measures would have made the incident less likely to occur, evidence of such conduct is inadmissible to prove negligence or culpable conduct. Nevertheless, this section does not prevent the use of such evidence to prove feasibility.

4. **Vicarious Liability and Negligent Hiring**

Employers are vicariously liable under the doctrine of respondent superior for their employees' negligent acts or omissions made in the course and scope of employment. This is not to be confused with negligent hiring, which is a form of direct liability. In the latter, the fault is the employer's own failure to act with due care in selecting and managing employees.

5. **Worker's Compensation As Exclusive Remedy**

The Workers' Compensation Act is a compulsory scheme of employer liability, irrespective of fault, for injuries that arise out of and in the course of employment, are not caused by intentional self-infliction or intoxication, and result in disability or death of an employee. Subject to the statutory exceptions below, the right to recover compensation for an industrial injury is the sole and exclusive remedy of an employee against the employer, or against any other employee of the employer who is acting within the scope of his employment.

There are several statutory exceptions to the “worker’s compensation as an exclusive remedy” rule. An injured employee may bring suit against a co-employee when the injury is proximately caused by the willful and unprovoked physical act of aggression of the co-employee or by the intoxication of the co-employee.

Similarly, an employee may bring an action for damages against the employer in the following instances: (1) when the employee’s injury or death is proximately caused by the employer’s willful physical assault; (2) when the employee’s injury or death is aggravated by the employer’s fraudulent concealment of the existence of the injury and its connection with the

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7 Evid. Code, § 1151.
10 Lab. Code, § 3601, subd. (a).
employment; (3) when the employee’s injury or death is proximately caused by a defective 
product manufactured by the employer that is later provided for the employee’s use by a third 
person; or (4) when the employer fails to secure payment of compensation.11

6. Joint and Several Liability

Joint tortfeasors are jointly and severally liable for economic damages, such as medical 
costs and lost wages. “Joint and several liability” means that in situations with multiple 
defendants, a plaintiff may pursue an obligation against any one defendant as if it was solely 
liable. It is the responsibility of the defendants to sort out their respective proportions of liability. 

In contrast, defendants are only severally liable for noneconomic damages, such as pain 
and suffering. A plaintiff may only seek to recover from each defendant the amount of 
noneconomic damages allocated to it in direct proportion to that defendant’s percentage of fault.12

7. Contribution

A right of contribution exists among two or more defendants to a tort action where a 
money judgment has been rendered jointly against them, so long as one tortfeasor judgment 
debtor is not entitled to indemnity from another.13 Typically the loss sharing claims of multiple 
defendants are resolved by a comparative indemnification cross-complaint in the underlying 
action, instead of by a post judgment claim for contribution via statute.14

8. Indemnity

a. Equitable Indemnity

The doctrine of equitable indemnity applies only among defendants who are jointly and 
severally liable to the plaintiff. Joint and several liability can apply to acts that are concurrent or 
successive or are joint and several, as long as they create a detriment caused by several actors. 
Generally, there must be some basis for tort liability against the proposed indemnitor.15 
However, implied contractual indemnity may also provide a basis for equitable indemnity.

Implied contractual indemnity is a type of equitable indemnity in which equitable 
considerations are brought into effect by contractual language not specifically dealing with

11 Lab. Code, §§ 3602, subds. (b)(1)-(3), and 3706. 
12 Civ. Code, § 1431.2, subd. (a). 
indemnification. Implied contractual indemnity is based on the premise that a contractual obligation to perform carries with it an implied agreement to indemnify against liability to a third party arising from failure to perform.

**b. Contractual Indemnity**

Prior to any lawsuit, retailers enter into insurance contracts containing indemnity provisions. Indemnity for the negligence of the indemnitee is often excluded. However, where such a provision does exist, case law is clear that the language of the indemnity provision must “clearly and explicitly” express the intent of the parties.

In the interpretation of a contract of indemnity, the following rules are applied, unless a contrary intention appears: (1) on an indemnity against liability, the indemnitee is entitled to recover on becoming liable; (2) on an indemnity against claims, demands, damages, or costs, the indemnitee is not entitled to recover without payment of them; (3) an indemnity against claims, demands, or liability, embraces costs of defense incurred; (4) the indemnitor is bound to defend actions against the indemnitee in respect to the matters embraced by the indemnity; (5) if the indemnitor neglects to defend the indemnitee, a recovery against the indemnitee is conclusive in the indemnitee’s favor against the indemnitor.

9. **Duty to Defend**

In California the duty to defend is broader than the duty to indemnify. Whereas the duty to indemnify runs only to claims that are actually covered, the duty to defend extends to claims that are potentially covered. In addition, the duty to defend continues from when there is a tender of defense through the conclusion of the underlying lawsuit or until it has been shown that there is no potential for coverage.

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17 Bay Dev., Ltd. v. Sup. Court (1990) 50 Cal. 3d 1012, 1032.
19 Civ. Code, § 2778.
22 Montrose Chemical Corp. v. Sup. Court, supra, 6 Cal. 4th at p. 295.
D. Negligence Per Se

The doctrine of negligence per se creates a presumption that a defendant was negligent or a plaintiff was comparatively negligent.\(^{23}\) A party wishing to establish the presumption must prove the following four elements: (1) plaintiff/defendant violated a statute, ordinance, or regulation; (2) the violation caused plaintiff’s harm; (3) the harm was the type the rule was meant to prevent; and (4) plaintiff was part of a group the rule was implemented to protect.\(^{24}\)

Either party may rebut the presumption of negligence by proof that a reasonable person under the same circumstances would have been justified in violating the rule.\(^{25}\)

E. Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress (“NIED”) is premised on mental distress proximately resulting from defendant's failure to exercise due care toward plaintiff. There are two primary theories of NIED. Under the “direct victim” theory, a plaintiff alleges emotional distress suffered as a proximate result of defendant's conduct directed at plaintiff.\(^{26}\) Under the “bystander” or “percipient witness” theory, a plaintiff alleges emotional distress as a proximate result of witnessing defendant's negligently-inflicted injury upon a person “closely related” to the plaintiff.\(^{27}\)

F. “Assumption of the Risk” Defense

Plaintiff’s “assumption of the risk” – his voluntary and knowing exposure of himself to obvious dangers arising from certain activities – may operate as a complete defense or simply reduce recoverable damages, depending on whether the assumption of the risk is “primary” or “secondary.”

Primary assumption of the risk is a complete defense to liability and exists where defendant’s conduct did not breach a legal duty of care to plaintiff. This includes express contractual assumption of the risk and occupational assumption of the risk. Secondary assumption of the risk exists where defendant owes a duty of care to plaintiff, but plaintiff encounters a known risk imposed by defendant’s breach of duty. Cases involving secondary

\(^{23}\) See Nevis v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 626, 633 (the presumption may be used to establish plaintiff’s contributory negligence).


\(^{26}\) CACI No. 1620.

\(^{27}\) Thing v. La Chusa (1989) 48 Cal. 3d 644; Dillon v. Legg (1968) 68 Cal. 2d 728.
assumption of the risk merge into the comparative fault system, and the trier of fact apportions the loss resulting from the injury among the parties based on their relative responsibility.

SPECIFIC EXAMPLES OF NEGLIGENCE CLAIMS

A. Duties of Landlords and Tenants to Third Parties

1. **The Nature of the Duty No Longer Turns on Third Person’s Status**

   Whereas a landlord or tenant’s liability to third persons previously turned on the third person’s status an “invitee,” “licensee,” or “trespasser,” that is no longer the case. Instead, a landlord or tenant is held to the general statutory standard of care of using “ordinary care or skill in the management” of their property. They are responsible for injuries proximately caused by their failure to exercise such due care, regardless of the third party’s status, except to the extent that injured persons “willfully or by want of ordinary care” bring the injury upon themselves.28

   Whether a duty exists is a question of law to be decided on a case-by-case basis, as discussed at length in *Rowland v. Christian*.29 As in all negligence cases, this depends largely on foreseeability of the harm to the plaintiff and the closeness of connection between the defendant’s conduct and the injury suffered. Although no longer determinative, the status of an injured party will still be relevant as part of the duty analysis under *Rowland*. For instance, any duty to render the premises safe for trespassers is likely to be far more attenuated than a duty to render the premises safe for those on the premises with the landlord's/tenant’s permission.


   A landlord or tenant has no duty to warn of a dangerous condition that is so obvious that others can reasonably be expected to see it.30 That being said, there may still be a duty to remedy the condition if it is foreseeable that the danger might cause injury despite its obvious nature, such as where people will necessarily encounter it.31 Similarly, if the danger is unavoidable, a landlord or tenant’s general duty of care may require him to prohibit use of the property.32

   As to latent, hidden conditions, landlords and tenants cannot be held liable for injuries caused by defective conditions unless they knew or had reason to know about the condition and

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had a reasonable opportunity to correct it.\textsuperscript{33} California courts have employed this “knew or should have known” standard to hold that an inference of constructive knowledge may exist where a plaintiff shows an inspection was not made within a particular period of time before an accident.\textsuperscript{34} Where such an inference does exist, it is a question of fact for the jury to decide whether the defective condition existed long enough for it to be discovered and remedied by a shopkeeper.\textsuperscript{35}

3. \textbf{Injuries Arising From Cluttered or Slippery Walkways}

Owners and possessors of property have a duty to use ordinary care to keep the floors of their premises reasonably safe for persons who must or may pass over them. This includes the application of cleaners, polishes, and waxes to floors as well as the use of aisle displays and advertisements.\textsuperscript{36} A plaintiff who wishes to recover damages for injuries arising out of such claims must prove that an aisle or walkway was maintained in a negligent fashion.

4. \textbf{Preparation of Food}

California’s law regarding a business owner’s liability for injury to a patron as a result of food consumption involves a multi-part inquiry. The first question is whether the injury-producing substance is natural or foreign to the food served.

If the substance is natural, such as a chicken bone in chicken soup, a plaintiff can only recover if they can prove a negligence theory based on the defendant’s failure to exercise reasonable care in the preparation and service of the food. Plaintiff is barred from a claim for implied warranty of merchantability or strict liability because the substance’s presence was reasonably expected by its very nature. It is not the product of defect or design.\textsuperscript{37}

By contrast, if the substance is foreign to food served, such as a piece of plastic in chicken soup, plaintiff may recover under theories of negligence for improper food preparation as well as implied warranty of merchantability or strict liability.\textsuperscript{38}

5. \textbf{Claims Arising From the Prevention of Theft}

Business owners have an obvious interest in preventing theft by customers as well as their own employees. Employers are permitted to detain and interrogate individuals to investigate

\textsuperscript{34} Ortega v. Kmart Corp. (2001) 26 Cal. 4th 1200, 1205, 1212.
\textsuperscript{35} Id.
\textsuperscript{37} Mexicali Rose v. Sup. Court (1992) 1 Cal. 4th 617, 633.
\textsuperscript{38} Id.
and prevent theft, but only if they can establish the following: (1) The employer had reasonable grounds to believe someone wrongfully took or damaged merchandise from the business; (2) the employer detained that person for a reasonable amount of time; and (3) the detention was performed in a reasonable manner.\textsuperscript{39}

The reasonableness of the employer’s actions is a question of fact.\textsuperscript{40} If the employer fails to show that its actions were reasonable, it exposes itself to the following claims arising from the wrongful prevention of theft.

a. **False Imprisonment**

Be it in tort or in criminal law, false imprisonment is the unlawful violation of the personal liberty of another person. It consists of the nonconsensual and intentional confinement of a person without lawful privilege for any time, however short.\textsuperscript{41} Therefore, an employer’s “unreasonable” confinement of an employee or customer may be considered false imprisonment under tort law and the California Penal Code.\textsuperscript{42}

b. **Malicious Prosecution**

Malicious prosecution requires the initiation and maintenance of legal proceedings against an individual in whose favor the proceedings are ultimately terminated. The proceedings must be brought with malice and without probable cause.\textsuperscript{43} “Legal proceedings” in a civil context includes initiating a lawsuit. In a criminal context, “legal proceedings” includes initiating an arrest.

If an individual is found liable in a civil suit or guilty of a crime for which he was arrested in a criminal case, he cannot recover for malicious prosecution. Where a law suit has been initiated, an employer’s good faith reliance on advice of counsel is a complete defense to a claim of malicious prosecution, assuming the employer has truthfully disclosed all relevant facts to counsel.\textsuperscript{44}

\textsuperscript{39} CACI No. 1409.
\textsuperscript{40} *Fermino v. Fedco, Inc.* (1994) 7 Cal 4th 701, 723.
\textsuperscript{42} Pen. Code, § 236; see also *Fermino v. Fedco, Inc.*, supra, 7 Cal. 4th at pp. 721–22.
c. **Defamation**

An individual who is wrongfully accused of criminal activity, such as shoplifting, may bring a cause of action for defamation. Defamation may take the form of libel, which is written defamation, or slander, which is spoken defamation.

To be successful on a claim for defamation, a plaintiff must prove that the defendant (i.e. business owner or employer) made a non-privileged “publication,” such as a verbal statement or written accusation that is false, defamatory, and has a tendency to injure or cause special damage.\(^{45}\) Wrongfully being accused of criminal activity is per se defamation.\(^{46}\)

If a statement is privileged it cannot be defamation. The litigation privilege, which is absolute, applies to any statement made in our outside of a courtroom in a judicial or quasi-judicial proceeding for the purpose of advancing the litigation.\(^{47}\) The litigation privilege applies to all tort claims except malicious prosecution.\(^{48}\)

Although not absolute, the common interest privilege protects statements made from one person to another where both parties have an interest in the matter and the statement is made without malice.\(^{49}\) This includes communications about direct and immediate concerns, such as a financial or organizational interest, as well as an employer who discusses a former employee's job performance and qualifications at the request of a prospective employer.\(^{50}\)

d. **Negligent Hiring, Retention, or Supervision of Employees**

An employer can be liable for the wrongful detention of an individual by an employee if the employer failed to act with reasonable care in hiring, retaining, and/or supervising the employee.\(^{51}\) Negligent hiring requires a plaintiff to establish that the employer knew or should have known that the employee created a risk of a particular harm and that harm actually materialized.\(^{52}\)

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\(^{46}\) Civ. Code, §§ 45a (libel) and 46, subd. (1) (slander).

\(^{47}\) See *Silberg v. Anderson* (1990) 50 Cal. 3d 205, 212.


\(^{49}\) Civ. Code, § 47, subd. (c); *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal. 3d 711, 723.


\(^{51}\) *Flores v. Autozone West, Inc.*, supra, 161 Cal. App. 4th at pp. 383–84; see *Diaz v. Carcamo*, supra, 51 Cal. 4th at pp. 1157–58.

B. Landlord/Tenant Liability for Conduct of Third Parties

Generally, one has no duty to control the conduct of a third person and no duty to warn or otherwise protect those who may be endangered by such conduct. However, a duty may arise where there is a “special relationship” between either (1) defendant and the third person that obligates defendant to control the third person’s conduct, or (2) defendant and plaintiff that obligates defendant to protect plaintiff.53

1. Criminal Conduct By Third Persons

Businesses, such as shopping centers, restaurants and bars, have an affirmative duty to take reasonable steps to secure their premises, as well as adjacent common areas within their control (e.g., parking lots), against reasonably foreseeable criminal acts of third parties.54 This “special relationship” duty is not limited to patrons and paying customers, but extends to invitees and all other “business visitors,” including persons who merely accompany a prospective customer and those who are just “killing time.”55

The nature of the “reasonable steps” required of the business depends on the circumstances. At the very least, it must undertake reasonable and minimally burdensome measures to assist customers and invitees who face danger from imminent or ongoing criminal conduct occurring on the premises or in the presence of the business owner/manager or its employees—e.g., to call police when witnessing an assault (unless doing so might increase the danger or lead to reprisals).56

The extent to which a business must take measures to prevent criminal conduct (e.g., hiring security guards) is determined largely under general negligence principles as discussed in Rowland v. Christian.57 The most important consideration is the foreseeability of third persons’ criminal conduct, determined primarily by incidents of prior similar conduct. Other factors include the extent of the burden to defendant and consequences to the community of imposing a duty of care and the availability, cost and prevalence of insurance for the risk involved.58

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56 See Kentucky Fried Chicken of Cal., Inc. v. Sup.Court (1997) 14 Cal. 4th 814, 823.
58 See Delgado v. Trax Bar & Grill, supra, 36 Cal. 4th at pp. 236–47.
2. **Security Contractors**

By contracting with a business to provide security services, a security guard company creates a special relationship between itself and the business' customers. This relationship imposes on the guards the obligation to act affirmatively to protect the customers while on the business' premises.\(^{59}\)

**STRICT PRODUCTS LIABILITY**

One engaged in the business of manufacturing, selling, or otherwise distributing products that are defective is subject to liability for personal injury and property damage caused by the defective product.\(^{60}\) Plaintiff's cause of action does not depend on the validity of any contract with the person from whom he acquired the product, nor is it affected by any disclaimer or other agreement.\(^{61}\)

A product is defective when any of the following circumstances exist at the time of sale or distribution: (1) the product contains a manufacturing defect, (2) the product is defective in design, or (3) the product is defective because of inadequate instructions or warnings.\(^{62}\)

**DAMAGES**

A. **Compensatory Damages**

The purpose of compensatory damages is to return the plaintiff to the position he would have been in had his injuries never occurred. The goal is neither to enrich the plaintiff nor punish the defendant.\(^{63}\) This includes compensation for harm that has already occurred, as well as harm which will occur in the future. Damages for future harm, including future medical expenses and lost wages, must be reasonably certain and not speculative.\(^{64}\)

1. **Non-economic Damages**

Noneconomic damages mean subjective, non-monetary losses including pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of

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60 See, e.g., Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 560.
61 Rest.2d Torts, § 402A.
64 See Civ. Code, § 3283.
consortium, injury to reputation and humiliation.\textsuperscript{65} Damages for past and future pain and suffering are available to plaintiffs as non-economic damages.\textsuperscript{66}

2. \textit{Economic Damages}

Economic damages are objectively verifiable past and future 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.\textsuperscript{67} Plaintiffs may recover for lost income, wages and earnings.\textsuperscript{68}

a. \textit{Medical Specials Under Howell v. Hamilton Meats}

In \textit{Howell v Hamilton Meats}, California’s Supreme Court examined the extent to which a plaintiff’s gross medical bills are admissible at trial.\textsuperscript{69} The Court framed the issue in Howell as: “when a tortiously injured person receives medical care for his or her injuries, the provider of that care often accepts as full payment . . . an amount less than that stated in the provider’s bill. In that circumstance, may the injured person recover from the tortfeasor, as economic damages for past medical expenses, the undiscounted sum stated in the provider’s bill but never paid by or on behalf of the injured person?”\textsuperscript{70} The California Supreme Court concluded, “we hold no such recovery is allowed, for the simple reason that the injured plaintiff did not suffer any economic loss in that amount.”\textsuperscript{71}

\textit{Howell} unequivocally prohibited plaintiffs from recovering amounts that were adjusted or written off by insurance companies. The Court left some ambiguity, however, as to whether gross, unadjusted medical specials could be admitted as evidence of a plaintiff’s pain and suffering or future medical expenses.\textsuperscript{72} An appellate court answered this question nearly two years later in \textit{Corenbaum v. Lampkin}.

\begin{enumerate}
\item[Civ. Code, § 1431.2, subd. (b)(2).]
\item[Civ. Code, § 1431.2, subd. (b)(1).]
\item[\textit{Chevron U.S.A., Inc. v. Workers’ Comp. Appeals Bd.} (1999) 19 Cal. 4th 1182.]
\item[\textit{Howell v Hamilton Meats & Provisions, Inc.} (2011) 52 Cal.4th 541.]
\item[\textit{Id.} at p. 548.]
\item[\textit{Id.} at p. 567.]
\end{enumerate}
b. **Medical Specials Under *Corenbaum v. Lampkin***

Based largely on *Howell’s* finding that "a medical care provider's billed price for particular services is not necessarily representative of either the cost of providing those services or their market value,"?73 *Corenbaum v. Lampkin* held that evidence of the gross, unadjusted amounts billed for plaintiffs' medical care is irrelevant to prove the amount of damages for past medical services, future medical care, or as an indicator of noneconomic damages.74 This strikes a significant blow to plaintiffs’ recovery and resolves several major evidentiary issues which had been subject to constant debate following the Supreme Court's *Howell* decision.

3. **Collateral Source Rule**

The collateral source rule is both a substantive rule of damages and a rule of evidence. The collateral source rule “provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.” 75 Ordinarily, evidence demonstrating plaintiff received some compensation from a collateral source is inadmissible for the purpose of mitigating damages.76

4. **Plaintiffs’ Duty to Mitigate Damages**

Plaintiffs are generally required to take reasonable steps to minimize the impact of damages to them. According to the doctrine of mitigation of damages, “[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.”77 While a plaintiff is not required to engage in unreasonable or impracticable steps to mitigate his damages, he must exercise ordinary care.78 The duty to mitigate usually comes into play when the incident producing injury or damage has already occurred, making it the responsibility of the injured party to make a reasonable effort to avoid continuing or enhanced damages.79

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73 Id. at p. 564.
75 *Hrnjak v. Graymar, Inc.* (1971) 4 Cal. 3d 725, 729.
78 See id. at pp. 1691-92.
79 Id.
B. Punitive Damages

Punitive damages are designed to both punish and make an example of a defendant for particularly bad conduct. Punitive damages are available for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.\(^{80}\)

The standard for punitive damages is higher where the defendant is an employer. Punitive damages are only available against an employer if the employer: (1) had “advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others;” (2) authorized or ratified the bad conduct; or (3) commits one or more acts of oppression, commits fraud, or engages in one or more malicious acts.\(^{81}\)

With respect to a corporate employer, the standard is even higher. The advanced knowledge and conscious disregard, authorization or act of oppression, fraud or malice must be on the part of an officer, director, or managing agent of the corporation.

C. Wrongful Death and Survival Actions

*Code of Civil Procedure* section 377.60 establishes a 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 enumerated heirs are entitled to recover damages on their own behalf for the loss they have sustained by reason of decedent's death.\(^{82}\)

By contrast, section 377.20 also provides for a “survival action” which arises from claims belonging to the deceased. If a person dies having a cause of action for injuries suffered during life, the claim “survives” to his or her estate and may be prosecuted by a duly appointed executor, administrator, or successor in interest.\(^{83}\) While all of decedent's special damages incurred prior to death (e.g., medical expenses and lost earnings) and punitive damages are recoverable by the estate, the decedent’s pain and suffering or disfigurement is not recoverable.\(^{84}\)

\(^{80}\) Civ. Code, § 3294, subd. (a).
\(^{81}\) Id. at subd. (b).
\(^{84}\) Id. at § 377.34.
SETTLEMENT

A. Offers to Compromise

The timing and amount of a settlement offer or demand made pursuant to *Civil Code* section 998 implicates serious financial consequences for the parties. “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post-offer costs and shall pay the defendant’s cost from the time of the offer.” 85 In addition, the plaintiff may be ordered to pay defendants’ expert witness fees from the beginning of the case. 86

Likewise, if a defendant rejects a plaintiff’s demand, and the defendant fails to obtain a more favorable result, the defendant bears the burden of paying plaintiff’s costs, interest on the judgment from the date of the demand, post-demand expert fees. 87 Due to these financial implications, statutory offers to compromise under this section must be “clear and specific,” including explicit directions to accept the offer. 88

B. Settlements Involving Minors

Minors require a guardian ad litem to approve their settlements. 89 California courts frequently require “minor’s compromise” hearings, where a court hears the facts of the underlying incident, speaks with the minor in the presence of his parent or guardian and counsel for the settling defendant, and determines whether the settlement is sufficient and in the best interest of the minor. Settlements pursuant to this procedure require settlement funds to be deposited into a blocked account, not to be accessed by anyone until the minor reaches adulthood. 90

C. Motion for Good Faith Settlement

A determination that a settlement between a plaintiff or other claimant and one or more defendants was made in “good faith” bars non-settling defendants from further claims against the settling defendant for equitable comparative contribution or partial or comparative indemnity. 91

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85 Civ. Code, § 998, subd. (c)(1).
86 Id.
87 Id. at subd. (d).
89 Civ. Code, § 372.
90 See Prob. Code, § 3500.
There is no precise measuring stick for determining the “good faith” of a settlement with one of several defendants. Generally, the settlement must harmonize the public policy favoring settlements with the competing public policy favoring equitable sharing of costs among defendants. To accomplish this, the settlement must be within the “reasonable range” or “ballpark” of the settling defendant’s expected share of liability for the plaintiff's injuries. In making its good faith determination, the court will consider the impact of the settling defendant’s removal from the case on the remaining defendants.

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93 *Id.*